Public Forums - Is the Airspace above a Public Forum also a Public Forum - The Ninth Circuit's Narrow Interpretation of the Public Forum Doctrine Results in Another Barrier for Freedom of Expression: *Center for Bio-ethical Reform, Inc. v. City and County of Honolulu*

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PUBLIC FORUMS—IS THE AIRSPACE ABOVE A PUBLIC FORUM ALSO A PUBLIC FORUM?—THE NINTH CIRCUIT’S NARROW INTERPRETATION OF THE PUBLIC FORUM DOCTRINE RESULTS IN ANOTHER BARRIER FOR FREEDOM OF EXPRESSION: CENTER FOR BIO-ETHICAL REFORM, INC. V. CITY & COUNTY OF HONOLULU

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THE NINTH CIRCUIT recently upheld a municipal ordinance that prohibited aerial tow-banners against an advocacy organization’s charges of First Amendment free speech violations.1 A principal issue of first impression was whether the airspace directly above the public beaches of Honolulu was a public forum for purposes of free expression.2 The court chose to narrowly interpret the public forum doctrine in a way that conflicts with the First Amendment’s rationale, policies, and goals. The Ninth Circuit’s holding further restricts speakers from exercising a fundamental guarantee of the Constitution—the right to free speech.

The Center for Bio-Ethical Reform (the Center), challenged a municipal ordinance that prevented it from utilizing aerial advertising as part of an advocacy campaign.3 The Center is a pro-life advocacy organization that uses airplanes to tow large graphic banners of aborted fetuses over densely populated areas.4 The Center received permission for its aerial advertising from the Federal Aviation Administration (FAA) in the form of a Certificate of Authorization (Certificate).5 The Certificate

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1 Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 455 F.3d 910, 915 (9th Cir. 2006).
2 Id. at 919.
3 Id. at 916.
4 Id.
5 Id.
permits the Center to tow its banners in "the contiguous United States of America, Alaska, Hawaii & Puerto Rico" but the Certificate does state it "does not constitute a waiver of any state law or local ordinance." 6

The State of Hawaii has a long history of attempting to regulate expression for the sake of its aesthetic interests. 7 The ordinance at issue in this case, ordinance § 40-6.1, (the Ordinance) prohibits aerial advertising, but makes exceptions for certain limited commercial uses. 8 The Ordinance effectively restricted the Center's aerial advocacy campaign over the beaches of Honolulu and the surrounding coastal waters.

Consequently, the Center filed suit seeking declaratory and injunctive relief, asserting that the Ordinance violated its right to free speech under the First Amendment. 9 The United States Court for the District of Hawaii denied the injunction, and the Ninth Circuit affirmed that ruling. 10 Both the Center and the city of Honolulu filed cross-motions for summary judgment, and the district court granted summary judgment for Honolulu. 11

The Ninth Circuit upheld the district court's decision and found that: 1) the airspace above the municipality and county was a non-public forum; 2) the Ordinance was viewpoint neutral; 3) the Ordinance was reasonable; and 4) the Ordinance did not foreclose a unique and traditionally important mode of expression for which there was not a practical substitute. 12

The Ninth Circuit considered the three classifications of public property used in First Amendment analysis: 1) public forums, 2) government designated public forums, and 3) non-public forums, and determined that in light of its history, purpose, and physical characteristics, the airspace at issue was a non-public forum. 13 A non-public classification of property is important as it subjects the government to a more lenient stan-

6 Id.
8 Ctr. for Bio-Ethical Reform, Inc., 455 F.3d at 915–16.
9 Id. at 916.
10 Id.
11 Id.
12 Id. at 919–23.
13 Id. at 919.
standard of constitutional scrutiny.\textsuperscript{14} The court cited \textit{Preminger v. Principi}\textsuperscript{15} in defining a public forum as "a place traditionally devoted to expressive activity."\textsuperscript{16} In concluding that the airspace's history and purpose did not constitute a public forum, the court considered the FAA's strict regulations of airspace, the ordinance itself, and the notion that the use of airspace to tow banners is a modern creation.\textsuperscript{17}

The court also ruled that the physical characteristics of the airspace did not support its categorization as a public forum and rejected the Center's argument that the airspace above the beaches was merely an extension of the beaches below.\textsuperscript{18} The court based this reasoning on \textit{United States v. Grace},\textsuperscript{19} which held that spatial proximity to a public forum is determinative only if the two areas are indistinguishable.\textsuperscript{20} Here, the Ninth Circuit decided the airspace above the beach was distinguishable from the beach because of physical separation, the requirement of special equipment to access the air, and the authorization required for access.\textsuperscript{21} Because the court concluded the airspace was not a public forum, it evaluated the Ordinance's constitutionality under the less restrictive standard of reasonableness and viewpoint neutrality.\textsuperscript{22} The court determined the Ordinance was viewpoint neutral because it restricted all types of speech except certain identifying trademark symbols on the exterior of aircraft.\textsuperscript{23} When evaluating reasonability, the court determined that reasonable meant "consistent with preserving the property for its dedicated purpose."\textsuperscript{24} In applying this definition, the court relied on \textit{Metromedia, Inc. v. City of San Diego},\textsuperscript{25} and found that preserving aesthetics and promoting safety are well established in the law as legitimate goals.\textsuperscript{26} The court then

\begin{itemize}
\item \textsuperscript{14} \textit{Id.}; See also \textit{Int'l Soc'y for Krishna Consciousness, Inc. v. Lee}, 505 U.S. 672, 678–79 (1992).
\item \textsuperscript{15} 422 F.3d 815, 823 (9th Cir. 2005).
\item \textsuperscript{16} \textit{Ctr. for Bio-Ethical Reform, Inc.}, 455 F.3d at 919.
\item \textsuperscript{17} \textit{Id.} at 919–20.
\item \textsuperscript{18} \textit{Id.} at 920.
\item \textsuperscript{19} 461 U.S. 171 (1983).
\item \textsuperscript{20} \textit{Id.} at 179.
\item \textsuperscript{21} \textit{Ctr. for Bio-Ethical Reform, Inc.}, 455 F.3d at 920.
\item \textsuperscript{22} \textit{Id.} at 921 (citing \textit{Brown v. Cal. Dep't of Transp.}, 321 F.3d 1217, 1222 (9th Cir. 2003)).
\item \textsuperscript{23} \textit{Id.} at 922.
\item \textsuperscript{24} \textit{Brown}, 321 F.3d at 1222.
\item \textsuperscript{25} 453 U.S. 490, 507–08 (1981).
\item \textsuperscript{26} \textit{Ctr. for Bio-Ethical Reform, Inc.}, 455 F.3d at 922.
\end{itemize}
noted the district court's findings of the particular importance of preserving Hawaii's aesthetics and tourism industry.27

Finally, the court ruled that the Ordinance did not “foreclose a traditionally important medium of communication or leave the Center without a practical substitute.”28 The court cited Kovacs v. Cooper29 to support its statement that no constitutional right exists to engage in the cheapest, easiest, or most far-reaching mode of communication.30

The Ninth Circuit chose to further suppress freedom of speech when it narrowly construed the airspace as a non-public forum. The United States Supreme Court has ruled that public property constitutes a public forum if it has been “opened for public use as a place for expressive activity.”31 In determining whether the government has opened a forum to the public, a court must evaluate the policy and practice of the government, the nature of the property, and its compatibility with expressive activity.32 The Ninth Circuit erroneously considered only Honolulu's airspace, and not the character of airspace in general, when finding there was no intentional opening of the airspace by the government.33 In contrast, when evaluating whether an airport had been opened by the government as a public forum, the United States Supreme Court considered the nature of airports generally and referred to airports as a class.34 Here, airspace generally qualifies as a federally designated public forum because the FAA, through its certificates of authorization, has intentionally opened United States airspace for commercial and political aerial speech.35 The Ninth Circuit also immediately dismissed the question of whether airspace is naturally compatible with expressive activity, without an explanation as to its reasoning. Here, the very fact that the FAA had made certificates available demonstrates that at least some organizations have found airspace to be compatible with expressive activity. Further, the

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27 Id. at 922-23 (noting the district court's findings in Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 345 F. Supp. 2d 1123, 1134 (D. Haw. 2004)).
28 Id. at 923.
30 Ctr. for Bio-Ethical Reform, Inc., 455 F.3d at 924-25.
33 Ctr. for Bio-Ethical Reform, Inc., 455 F.3d at 920.
35 Ctr. for Bio-Ethical Reform, Inc., 455 F.3d at 916.
Center’s brief specifically indicated how utilizing aerial advertising was conducive to expression and speech.\textsuperscript{36}

Even if the court was correct in finding the FAA had not intentionally opened up the air space as a public forum, the airspace above the public beaches should be considered a public forum for the purposes of expression directed at persons on the beach. Here, the airspace directly above the beaches is not completely distinguishable from the beaches below. The United States Supreme Court held that the steps on the United States Supreme Court building were indistinguishable in location and purpose from the adjacent public sidewalks and noted the lack of a fence or other physical separation.\textsuperscript{37} The United States Supreme Court distinguished this from a previous case where it had found that the sidewalks and streets within an enclosed military base were completely separate from the public sidewalks and streets.\textsuperscript{38} Here, unlike the military base, no tangible physical separation exists between the beaches and the air directly above the beaches. Additionally, airspace above land has been viewed under property law’s \textit{ad coeleum} doctrine as an extension of the land below.\textsuperscript{39} Furthermore, in defining a forum, the focus should be on the access sought by the speaker.\textsuperscript{40} Thus, what should be evaluated is not just the airspace, but the airspace directly above the beaches. Here, the Center’s advocacy efforts were specifically directed to and intended to reach persons on the public beaches. The Center merely used technology in the form of aircraft to reach persons on public property—the beaches. In \textit{International Society for Krishna Consciousness}, Justice Kennedy noted that the Supreme Court has allowed flexibility to meet changing technologies in areas of constitutional interpretation and argued that such flexibility should be applied to the public forum doctrine.\textsuperscript{41} The Ninth Circuit should have applied

\textsuperscript{36} Brief of Appellant at 9, Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 455 F.3d 910 (9th Cir. 2006) (No. 04-17496).


\textsuperscript{38} \textit{Id.} (distinguishing \textit{Greer v. Spock}, 424 U.S. 828, 836–38 (1976)).

\textsuperscript{39} \textsc{William Blackstone}, \textsc{Commentaries on the Laws of England} 18 (photo. reprint 1979) (1766); \textsc{Jesse Dukeminier & James E. Krier}, \textsc{Property} 141 (5th ed. 2002) ("to whomsoever the soil belongs, he owns also to the sky and to the depths").

\textsuperscript{40} Cornelius v. \\textsc{NAACP Legal Def. & Educ. Fund, Inc.}, 473 U.S. 788, 801 (1985).

such flexibility and ruled that the airspace was a public forum based on the access sought by the Center.

Next, in evaluating reasonableness, authority exists for the proposition that aesthetic interests do not overcome a speaker’s constitutional right to free speech. For instance, the United States Supreme Court noted that aesthetic interests in preventing litter were not compelling reasons to prevent the expression of one’s views. The United States Supreme Court also invalidated an ordinance that placed significant prohibitions on outdoor advertising despite the city’s argument that it was justified on the basis of traffic safety and aesthetics. Furthermore, when determining whether a government restriction on speech is reasonable, the speech at issue itself should also be evaluated. For example, the United States Supreme Court, when finding that a restriction against solicitation in an airport was reasonable, considered the interaction required, the opportunities for fraud, congestion, security problems, and the effects of delaying passengers. Based on the facts, the Center’s speech was not inherently disruptive. The Center’s banners were not as intrusive as solicitations and did not require any interaction from its audience. Moreover, the leisurely activities of people on the beaches were unlikely disrupted in the way that the activities of travelers in a busy airport would be. Because the aesthetics were the main reason offered in support of the Ordinance, and because the speech at issue was silent and non-intrusive, the Ninth Circuit should not have ruled that the Ordinance was unreasonable.

The suppression of speech in this case was also unconstitutional because the Center lacked a practical substitute to express its message to the Honolulu public. The expression was unique in that graphic photographic images were the topic of the communication. Because of the existence of Honolulu’s other restrictive ordinances that prohibit traditional billboards and other expressive signs, the prohibition against tow-banners greatly limits the methods in which the Center can communicate. Further, although not determinative, cost-effectiveness and convenience are factors to be considered when determining

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42 Schneider v. New Jersey, 308 U.S. 147, 162 (1939).
45 Brief of Appellant at 9, Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 455 F.3d 910 (9th Cir. 2006) (No. 04-17496).
whether there is a practical substitute.\textsuperscript{46} Here, because of the controversial subject matter of the expression, leafleting or more personal forms of communication would likely pose a safety problem for the Center's volunteers. In addition, because the Center is a non-profit organization, it would be unlikely that expensive outlets such as television and radio would be practical substitutes. Thus, based on the facts, the use of tow-banners was a method of communication for which there was no practical substitute.

In determining whether the Ordinance violated the First Amendment, the Ninth Circuit addressed a case of first impression: whether the airspace above a public area constituted a public forum. The United States Supreme Court explained that forum analysis was developed as a means of determining whether "the [g]overnment's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."\textsuperscript{47} Allowing interests in tourism and aesthetics to prevail at the expense of a constitutional right is contrary to the goals of the First Amendment. A right to free speech and self-expression, especially political speech, should not be restricted to areas where it can be comfortably accommodated. In relying on confined technical definitions, the court ignored the grave consequences for the future exercise of free speech. Justice Kennedy's remarks pertaining to a discussion on public forum analysis are particularly relevant to the current facts. He wrote:

> Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat . . . the purpose of the public forum doctrine is to give effect to the broad command of the First Amendment to protect speech from governmental interference. The jurisprudence is rooted in historic practice, but it is not tied to a narrow textual command limiting the recognition of new forums.\textsuperscript{48}

Additionally, Justice Souter's concurrence in the same case stressed that the most important considerations are whether the property shares physical similarities with traditional public fo-

\textsuperscript{46} City of Ladue v. Gilleo, 512 U.S. 43, 57 (1994).
\textsuperscript{48} Int'l Soc'y for Krishna Consciousness, Inc., 505 U.S. at 693–94, 697 (Kennedy, J., concurring).
rums, and whether the government has permitted or acquiesced in broad public access.\textsuperscript{49} The property at issue shares physical similarities with traditional public forums because it consists of air above a public area and because the speech is directed at persons in that public area—the beaches. Furthermore, the FAA’s certificates permitting the use of aerial tow-banners in all fifty states certainly demonstrates acquiescence.

A consequence of such a narrow interpretation of the public forum doctrine will be to stifle free political expression and debate, a fundamental value upon which our nation was founded. Unless our courts conduct forum analysis in light of the goals of the First Amendment, a multitude of mediums available through new technologies will be excluded and will consequently be unavailable to political speakers. We have entered a new millennium where technology continues to increase efficiency and affect every aspect of our lives; freedom of expression must not be suppressed and narrowly confined to parks, sidewalks, and streets. The Ninth Circuit’s decision is inconsistent with the fundamental goals, policies, and spirit of the First Amendment.

\textsuperscript{49} Id. at 710 (Souter, J., concurring).
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