
**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Appeal No. 03-3547

THOMAS ROBB, KNIGHTS OF THE KU KLUX KLAN, RALPH GRIFFITH,
and KNIGHTS OF THE KU KLUX KLAN REALM OF MISSOURI, UNIT 188,

Appellees,

v.

HENRY HUNGERBEELER, S. LEE KLING, EDWARD D. DOUGLAS, OLLIE
W. GATES, W.L. ORSCHELN, WILLIAM E. GLADDEN, MARJORI B.
SCHRAMM, and DON HILLIS, in their official capacities,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
Case No. 4:01CV1133-CDP
The Honorable Catherine D. Perry

BRIEF OF APPELLANTS

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1. The State possesses the right to control its own speech and to deny participation in the Adopt-A-Highway program based on the violent, criminal conduct of an organization.

This case involves the State of Missouri's proper consideration of the violent, criminal history of the Klan in denying its application to participate in the Adopt-A-Highway program. The MHTC's decision does not affect any speech by the Klan. The only speech at issue in this case is the placement of a sign on the side of the roadway by the State of Missouri.

- a. *The placement of a sign on the side of a highway is speech by the State of Missouri -- not the Klan.*

When an organization participates in the Adopt-A-Highway program, the MHTC erects two signs on the adopted section of highway containing the State's Adopt-A-Highway logo and the name of the participating organization. The State chooses the message to be expressed, selects the format in which it will be expressed, and implements the expression by paying for, manufacturing, and erecting a sign. This Court has recognized that acknowledgements by a

³ The fact that numerous courts have taken judicial notice of the Klan's history of violence is itself important because this signifies that the court considers the fact to be generally known within the jurisdiction or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. See FED. R. EVID. 201.

government entity of a group's participation in an activity constitute speech by that governmental entity. See Curators, 203 F.3d at 1094. In Curators, this Court held that a public radio station could not be compelled to accept program underwriting from the Klan because the acceptance of such funding would require the radio station to air an acknowledgement of such underwriting. Id. at 1093. The Court held that the airing of such an acknowledgement constituted speech by the government, and the First Amendment did not give the Klan the right to compel the public radio station to speak. Id.

Commentators have agreed with the Curators analysis, noting that when the government speaks, it has the right to control the message, and the First Amendment does not require the government to bestow recognition upon criminally violent organizations like the Klan. By recognizing the efforts or participation of outlaw groups, like the Klan, in such government programs the State runs the very real risk of being viewed as implicitly endorsing the group or bestowing recognition upon that group. See Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1475-86 (Aug. 2001); *Recent Cases: Eighth Circuit Holds That Missouri May Not Exclude Knights of the Ku Klux Klan from Public Program*, 114 HARV. L. REV. 660, 660-65 (Dec. 2000). Under the First Amendment, "[w]hen the government appropriates public funds to promote a particular policy of its own it is entitled to

say what it wishes.” Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995); see also Rust v. Sullivan, 500 U.S. 173, 193-94 (1991); Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 139 n.7 (1973). Private parties cannot require the government to speak. See Muir v. Alabama Educ. Television Comm’n, 688 F.2d 1033, 1044 (5th Cir. 1982) (“[T]he First Amendment does not prohibit the government, itself, from speaking, nor require the government to speak”); Wooley v. Maynard, 430 U.S. 705 (1977) (refusing to require state to remove motto “Live Free or Die” from all license plates).

This Court in Cuffley did not address the argument that only the State is speaking through the Adopt-A-Highway program.⁴ The Court’s decision instead was premised upon its conclusion that “[t]he State’s purported reasons for denying the Klan’s application are so obviously unreasonable and pretextual that, in the end, we are left only with the admitted reason the State was motivated to so carefully scrutinize the Klan’s application as an explanation for the denial: that the State disagrees with the Klan’s beliefs and advocacy.” Cuffley, 208 F.3d at 711. No such “viewpoint discrimination,” id., is present in this case. Rather, here, in response to Cuffley, the State has established objective, viewpoint-neutral standards by which all applicants are judged. The Klan’s failure to satisfy these

⁴ In fact, the Court did not address “whether the Klan is speaking for purposes of the First Amendment or whether the Adopt-A-Highway program is a public forum.” Cuffley, 208 F.3d at 706, n.3.

standards has nothing to do with its “viewpoints or advocacy,” *id.*, and everything to do with its violent criminal behavior, which is not protected by the First Amendment. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence”).

The State of Missouri has a right to refuse to endorse (even tacitly) or to avoid being placed in a position of having to show gratitude to any organization with a judicially recognized history of violence. As in the Curators case, if the State of Missouri is required to allow the Klan to participate in the Adopt-A-Highway program and to erect and pay for a sign with state funds to publicly acknowledge the Klan, the State is being compelled to speak and to send a message that will be viewed by highway users as an implicit endorsement of the Klan and its violent criminal history. Missouri is not required by the First Amendment to publicly recognize and acknowledge a group that has a judicially recognized history of violence and criminal activity. The District Court’s holding to the contrary completely disregards the State’s interest in controlling its own speech.⁵

⁵ In Cuffley, the Court distinguished Curators on the ground that the claim arose in the public broadcasting context, where editorial discretion “looms large.” And, the Court noted, “the radio station had legitimate reasons for its refusal to accept the Klan’s sponsorship, and there was absolutely no showing of viewpoint discrimination.” Cuffley, 208 F.3d at 706 n.3. The Court did not suggest in Cuffley that erection of a sign recognizing the Klan would not be viewed as speech by the State of Missouri.

As the District Court correctly recognized, a court is only required to conduct a forum analysis when considering "restrictions on private speech on government property." App. 318. Here, there is no private speech involved; only the State is speaking through the Adopt-A-Highway program. A forum analysis is appropriate only when a government entity has made a location available for speech activities by private groups. See Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983) (discussing whether school mailboxes used for leafleting constitute a public forum); Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997) (determining whether history department display case is public forum). The District Court erred in applying any forum analysis because this case involves government speech, not a private group's right to speak.

b. *The Klan's conduct -- picking up litter -- does not constitute speech.*

The only activity that private groups are allowed to participate in as part of the Adopt-A-Highway program is picking up litter. Litter collection is not speech protected by the First Amendment. As the Supreme Court has recognized, "We cannot accept the view than an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaged in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968). Elevating trash pick-up to the level of constitutionally protected speech is practically unworkable because

[i]t is possible to find some kernel of expression in almost every activity a person undertakes -- for example, walking down the street or meeting one's friends at a shopping mall -- but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

Courts apply a two-pronged test to determine whether non-speech related conduct is protected as symbolic speech: (1) whether an intent to convey a particularized message was present and (2) whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Neinast v. Board of Trustees of the Columbus Met. Library, 190 F. Supp. 2d 1040, 1045 (S.D. Ohio 2002) (citing Spence v. Washington, 418 U.S. 405, 409 (1974)). To meet the first prong of the Spence test it is not enough to intend to convey any idea. See Searcy v. Simmons, 97 F. Supp. 2d 1055, 1059 (Kan. 2000). Rather, the speaker must intend to convey a specific political, ideological, or religious message. See Neinast, 190 F. Supp. 2d at 1045. Participating in community service is not an expressive act, and is therefore, not protected under the symbolic speech doctrine. See, e.g., Steirer v. Bethlehem Area School Dist., 987 F.2d 989, 997 (3d Cir. 1993). In Steirer, students contested the constitutionality of a school's requirement that a student must perform a certain number of hours of community service to be eligible to graduate. Id. The students argued that the performance of community service was speech because it expressed

a belief in altruistic behavior. Id. The Third Circuit rejected this argument, holding that performing community service is conduct, not speech, for purposes of the First Amendment. Id.

Regarding the second prong of the test, courts have been reluctant to recognize common, everyday activities, like collecting garbage, as symbolic speech protected by the First Amendment. See Cabrol v. Town of Youngsville, 106 F.3d 101, 110 (5th Cir. 1997) (refusing to relocate chicken coop is not symbolic speech); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 208 (S.D. Tex. 1982) (refusing to recognize military activities conducted by Klan as speech); Neinast, 190 F. Supp. 2d at 1045 (going barefoot is not symbolic speech); see also Searcy, 97 F. Supp. 2d at 1059 (refusing to participate in a prison program is not symbolic speech). Rather, courts have required the conduct in question to be of a type that has historically been understood as having a communicative element. See Spence, 418 U.S. at 410 (explaining that the Court had "for decades . . . recognized the communicative connotations of the use of flags").

Picking up garbage is not the type of conduct that qualifies for protection as symbolic speech under the Constitution. Even if the Court believes that the Klan intends to convey the message that it is a civic organization by cleaning up litter, this is not the type of expressive idea that has been found to rise to the level of

symbolic speech. See, e.g., Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969) (wearing black arm bands to protest the Vietnam War was symbolic speech); Texas v. Johnson, 491 U.S. 397 (1989) (burning an American flag while chanting, "red, white, and blue, we spit on you," at the Republican National Convention to protest the policies of the Reagan administration was expressive conduct). There is no evidence that a person traveling on the highway would view the Klan's picking up trash on the side of the road as expressive conduct. The District Court's conclusion to the contrary is clearly wrong.⁶ This Court should correct that error and reverse the District Court's ruling.

⁶ The District Court's statement that "the Klan's desired participation in the Adopt-A-Highway program is 'speech' protected by the First Amendment" is even further removed from established First Amendment jurisprudence. See App. 318. Appellants have been unable to find a single case in which a mere "desire" to participate in an activity has been found to be protected speech.