United States Court of Appeals for the Fourth Circuit

PAGE

v.

LEXINGTON COUNTY SCHOOL DISTRICT ONE

Decided June 23, 2008

NIEMEYER, Circuit Judge

Lexington County School District One, a "body politic and corporate" under South Carolina law, used its website, e-mail, and other forms of communication to urge opposition to the Put Parents In Charge Act, a bill pending in the South Carolina legislature that proposed tax credits for private and home schooling. . . . Randall Page, who favored the bill, requested "equal access" to the School District's "informational distribution system" to present his own message in support of the bill. When the School District refused his request, he commenced this action, claiming that the School District's refusal violated his First Amendment rights by discriminating against his point of view.

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II.

As an overarching position, Page asserts that Lexington County School District One engaged in impermissible viewpoint discrimination, in violation of the First Amendment, when it denied his request for equal access to the "informational distribution system" that the School District used to disseminate its opposition to the Put Parents in Charge Act so that he could express his support of the bill. The School District agrees that it denied Page access to the channels of communication that it used to disseminate its opposition to the bill, but it asserts that those channels were dedicated to the School District's own speech and were not public forums to which private speakers were invited.

The School District's success in this case-based on the contentions of the parties-thus depends on whether its communications about its opposition to the Put Parents in Charge Act were government speech or whether the School District used its channels of communication to disseminate the viewpoints of *private speakers against* the Put Parents in Charge Act to the exclusion of *private speakers in favor of* the bill, thus discriminating in a limited public forum based on the speaker's viewpoint. Accordingly, we begin by addressing two connected questions: (1) whether the Lexington School District's campaign against the Put Parents in Charge Act was "government speech," and (2) whether the School District created a limited public forum, by inviting private speech to be expressed through its communications channels, to which Page was entitled access.

At the outset, we restate what is well established-that "the Government's own speech . . . is exempt from First Amendment scrutiny." This observation arises from the well-understood role of government and the scope of the First Amendment. . . .

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. . . That, however, does not suggest that government can suppress opposing views. Its speech expressed for itself is one thing, but its regulation of other persons' speech is another. It is the regulation of private speech and discrimination with respect to private speech that are the appropriate subjects of First Amendment challenges.

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Whether speech is government speech depends on the government's ownership and control of the message, and the government's ownership and control of the message may be determined from consideration of various factors. We have identified factors such as (1) the purpose of the program in which the speech occurs; (2) the "editorial control exercised by the government" over the message; (3) the identity of the person actually delivering the message; and (4) the person "bear[ing] the ultimate responsibility for the content of the speech." After we identified these nonexclusive factors, the Supreme Court issued its decision in *Johanns,* which distilled them, particularly in cases involving the government's use of third-party messages, focusing on (1) the government's *establishment* of the message, and (2) its *effective control* over the content and dissemination of the message.

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In this case, the Lexington School District Board of Trustees *established* its message to oppose the Put Parents in Charge Act, adopting the view in its December 2004 Board meeting that the proposal for tax credits to private educators would divert public funds from public education, undermining the State's commitment to a free, quality public education for all South Carolina children. And the Board instructed its Director of School/Community Relations to communicate its position through its various communications channels to government employees, legislators, students, and the public at large, urging that the bill be voted down.

In carrying out her charge, the Director of School/Community Relations employed the School District's website, its e-mail facility, and its distribution channels to constituent schools-all channels of communications controlled by the School District. While the School District did not create the full content of every communication-for instance, it circulated an article written by Dr. Jim Ray, "Who Will Speak Up for Public Schools?"-it adopted and approved all speech, even that of third parties, as representative of its own position for inclusion in its messages opposing the bill. Thus, it also *controlled* the message.

In short, the nature of the School District's speech in opposing the Put Parents in Charge Act was strikingly analogous to the Secretary of Agriculture's speech in *Johanns* promoting the consumption of beef. In both situations, the government established the message; maintained control of its content; and controlled its dissemination to the public. Moreover, in both situations, the form of the message was, in part, adopted by the government from private sources.

III.

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It is true that if the School District invited private speakers to use the platform of its channels of communication to speak in opposition, it could not then exclude private speakers who would speak in favor of the bill. Allowing such access to some would create a limited public forum in which the School District could not exclude speech based on its viewpoint.

In *Perry Education Association v. Perry Local Educators' Association,* the Supreme Court held that a school district appropriately excluded persons from its internal mail system because the school district's internal mail system was a "nonpublic forum." The school board policy did not grant general access but instead required those desiring access to the system to obtain the school principal's permission prior to distributing materials. "[I]n a nonpublic forum the government may employ a selective access policy in which individual non-ministerial judgments govern forum participation ... subject to ... two limitations: the policy must be reasonable and viewpoint neutral."

Distinct from a nonpublic forum is a limited public forum, which is a place or channel of communication created "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."

Page contends that the School District maintained inadequate control over each of the channels of communication it employed to disseminate its opposition to the Put Parents in Charge Act, and thus the School District created a limited public forum from which he could not be excluded based on his viewpoint. We address each channel that the School District employed to disseminate its message.

With respect to the School District's website, Page argues that the School District's inclusion of links to other websites caused the School District to lose control over content and therefore to fail the government-speech requirement of control. . . .

. . . This argument, however, assumes too much.

First, it must be noted that the links to other websites were selected by the School District alone as ones that supported *its own message*. . . .

Second, the School District wholly controlled its own website, retaining the right and ability to exclude any link at any time.

Third, the School District never incorporated on its own website any material from a website to which it had provided a link; it merely provided information that other websites supporting its position existed, and it facilitated viewing those websites with links.

Fourth, the School District continuously and unambiguously communicated a consistent message-its opposition to the Put Parents in Charge Act-and its providing references to others who shared that position was consistent with and supported the message, much as would a bibliography, a citation, or a footnote.

Finally, the School District "disclaimed" the contents of any linked website, making it clear that only that which was stated on its own website should be taken as the School District's speech.

* * *

In sum, we conclude that the School District sufficiently controlled this channel of communication so that its speech remained government speech and it did not create a limited public forum by including links to other websites. The School District included every link to other websites *on its own initiative,* and it did so only insofar as the link would *buttress its own*

*message.*It thus retained *sole control* over its message.

The same is true for the School District's e-mail facility. . . .

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IV.

Page contends additionally that newsletters distributed by individual schools within the School District were public forums to which he was entitled access, pointing particularly to the White Knoll Middle School PTSA newsletter which communicated opposition to the Put Parents in Charge Act.

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It may be true that by editorially controlling the newsletter, the individual school may have created a limited public or nonpublic forum because the speech in the PTSA newsletter was not the government's own speech, but speech of the Association. But that conclusion does not advance Page's request in this case to have access to the newsletter, because he has not demonstrated that he was within the class of persons who was, by design, accorded access to that forum.

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VI.

Finally, Page argues as a general matter that the government speech doctrine should, in any event, never apply when the government attempts to influence legislation. In essence, he urges that we adopt a content-based limitation on the government speech doctrine. His argument is grounded on the proposition that when the School District attempts to influence legislation, its position is not checked by the "ballot box," which is the traditional justification for accepting the government speech doctrine.

In this case, Page assumes erroneously that the ballot box is not available to check the government speech. . . .

Moreover, recognizing that government speech almost always supports a given policy objective and "[t]he government is entitled to promote particular messages." It is therefore appropriate for the School District to defend public education in the face of pending legislation that it views as potentially threatening of public education.

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