FIRE
Foundation for Individual Rights and Expression

October 11, 2023

BJ King
City Administrator
655 Blacklick Street
Groveport, Ohio 43125

URGENT

Sent via Electronic Mail (bking@groveport.org)

Dear Mr. King:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by the City of Groveport's ban on vendors selling "faith based items" or items containing "socially offensive language" at the upcoming Apple Butter Day festival.[2] These restrictions violate the First Amendment by targeting speech based on viewpoint and must be rescinded.

The First Amendment "forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[3] Such viewpoint discrimination is "censorship in its purest form," and government action "that discriminates among viewpoints threatens the continued vitality of free speech."[4] The categorical bar on viewpoint discrimination applies no matter what type of property or forum the speaker is using.[5]

In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Supreme Court held that a public university violated the First Amendment by denying a religious student magazine access to the same funding resources it made available to secular student-run publications.[6] The university's actions constituted viewpoint discrimination because they "select[ed] for

[1] You can learn more about FIRE's mission and activities at thefire.org.

[2] City of Groveport, Apple Butter Day Application for Craft or Food Booth (on file with author).

[3] *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

[4] *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 248 (6th Cir. 2015) (*en banc*) (cleaned up).

[5] *Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, 978 F.3d 481, 490–91 (6th Cir. 2020). Even in nonpublic forums—public property that is "not by tradition or designation a forum for public communication"—viewpoint discrimination is impermissible. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

[6] 515 U.S. 819 (1995).

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disfavored treatment those student journalistic efforts with religious editorial viewpoints."[7] The Court emphasized that viewpoint discrimination is an "egregious" form of censorship, and reinforced that the "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[8]

The *Rosenberger* Court also rejected the university's argument that its actions were necessary to avoid violating the Establishment Clause. The Court cited a long line of precedent "reject[ing] the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."[9] The university's funding program "respect[ed] the critical difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[10]

The Supreme Court recently reaffirmed this principle in *Shurtleff v. City of Boston*, holding that Boston violated the First Amendment when it denied the plaintiff permission to fly a Christian flag on a city plaza because the city mistakenly believed doing so would violate the Establishment Clause.[11] The city regularly allowed outside groups to hold ceremonies and events at the plaza where they could fly flags of their choosing on city flagpoles. The Court concluded the flags were speech not of the city but of the people who chose to raise them, and the city violated the First Amendment's bar on viewpoint discrimination by refusing a request to fly a religious flag.[12]

Like the policies at issue in *Rosenberger* and *Shurtleff*, Groveport's prohibition on "faith based items" at Apple Butter Day unconstitutionally targets speech solely because it expresses a religious viewpoint. Because of these restrictions, some residents, including Jake and Jan Seabaugh, declined to participate in this year's festival. The Seabaughs make wood carvings and stained glass, which are not exclusively faith-based but include items like crosses, angels, doves, the Star of David, and signs with the words, "Peace, Believe, Love." While the Seabaughs

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[7] *Id.* at 831.

[8] *Id.* at 829.

[9] *Id.* at 839.

[10] *Id.* at 841 (cleaned up).

[11] 142 S. Ct. 1583 (2022).

[12] *Id.* at 1593; *see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (school district violated First Amendment when it allowed after-hours use of school property for social, civic, and recreational uses but denied church and pastor use of school facilities to show films on family values and child rearing because it was for religious purposes; district's actions discriminated against religious viewpoints and allowing film series would not have violated Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (public university, having made its facilities generally available for activities of registered student groups, violated First Amendment when it denied that benefit to student group simply because it sought to use facilities for religious purposes; in rejecting university's Establishment Clause argument, Court noted that opening a forum "does not confer any imprimatur of state approval on religious sects or practices" and emphasized that the forum was "available to a broad class of nonreligious as well as religious speakers").

may not sell faith-based stained glass of a dove, no rule prevents a vendor from selling bird carvings with no religious message. That is viewpoint discrimination.

Supreme Court precedent makes clear that Groveport would not violate the Establishment Clause by allowing vendors to sell crafts, baked goods, or antiques that promote a religious viewpoint. In fact, merely permitting vendors to reserve a booth and sell items at Apple Butter Day entails even less government involvement than the university program in *Rosenberger*, which provided *funds* to private speakers. Any message associated with a vendor's item is private speech, not that of the city. Even the risk that a "reasonable observer would consider the government's challenged action an endorsement of religion" is insufficient to give rise to an Establishment Clause violation.[13] In sum, the Establishment Clause does not bar Groveport from maintaining a vendor program that uses "neutral criteria and evenhanded policies to extend benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[14]

The ban on items containing "socially offensive language" also fails First Amendment scrutiny for two independent reasons. First, like the ban on "faith based items," it singles out speech based on viewpoint. As the Supreme Court has made clear, "[g]iving offense is a viewpoint."[15] Just like a restriction on "immoral or scandalous" speech, a prohibition on "socially offensive language" is viewpoint-based because it "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation."[16]

Second, "socially offensive language" is an unconstitutionally vague criterion, lacking the requisite specificity. This undefined term can capture a wide range of protected speech depending on the subjective judgment and biases of city officials enforcing them.[17] As such, it fails to provide persons of ordinary intelligence reasonable notice what speech is prohibited and gives city officials undue discretion to decide what may be expressed.[18]

FIRE urges the City of Groveport to rescind its bans on the sale of "faith based items" and items containing "socially offensive language" at the Apple Butter Day festival. Given the urgent nature of this matter, we respectfully request a substantive response no later than Friday, October 13, 2023.

Sincerely,

Aaron Terr
Director of Public Advocacy
Cc: Kevin Shannon, Law Director

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[13] *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2414 (2022); *see also id.* at 2427 (Establishment Clause does not "compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious").

[14] *Rosenberger*, 515 U.S. at 822.

[15] *Matal v. Tam*, 582 U.S. 218, 243 (2017).

[16] *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019).

[17] *See Cohen v. California*, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another's lyric.").

[18] *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).