UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D.C. 20001

CLARENCE THOMAS
UNITED STATES CIRCUIT JUDGE

September 24, 1991

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Chairman Biden:

I have enclosed responses to your written questions that accompanied your letter of September 20, 1991. Pursuant to the agreement between Jeff Peck of your staff, and John Mackey at the Department of Justice, I will provide answers to Senator Levin's written questions as soon as possible.

Sincerely,

Clarence Thomas

Attachments

cc: Honorable Strom Thurmond
Ranking Minority Member
Senate Judiciary Committee

1. As I sought to make clear in my testimony, I believe that Eisenstadt was correct on both the privacy and equal protection rationales.

2. (a) The court's holding in Community for Creative Non-Violence ("CCNV") v. Lujan, 908 F.2d 992 (D.C. Cir. 1990) (R.B. Ginsburg, Sentelle, Thomas, JJ.), did not involve the First Amendment, because CCNV did not raise a constitutional challenge to the Park Service's decision. Rather, CCNV's challenge was based on, and the case decided under, the Administrative Procedure Act. The Park Service had issued a Policy Statement describing its administration of the Christmas Pageant of Peace; it followed that statement when deciding on the inclusion of proposed displays in the pageant. CCNV claimed that its proposed display was within the category of displays described by the Policy Statement and therefore was eligible for inclusion. It did not claim that the statement violated the First Amendment. In the Policy Statement the Park Service said that the pageant was designed to present traditional American symbols of Christmas. CCNV contended that its proposed display both communicated a traditional Christmas message and constituted a traditional Christmas symbol (i.e., a particular way of communicating the message). Because of the stated purpose of the pageant, the Park Service considered only the question whether the display was a traditional symbol, and concluded that it was not. Reviewing this determination under the deferential standard set forth in the Administrative Procedure Act, the court held that the Park Service's decision was not arbitrary or capricious.

In explaining that the Park Service's decision was not based on the display's message, the court was referring to the distinction between specific symbols and more general messages that underlay the Park Service's Policy Statement. The question whether the Park Service's decision was "content based" in the constitutional sense did not arise because CCNV did not raise it. Although First Amendment issues had been considered in earlier litigation, see CCNV v. Hodel, 623 F.Supp. 528 (D.D.C. 1985), in this case CCNV did not challenge the Policy Statement on constitutional grounds.

(b) A set of facts much like the one described in this question could easily come before the Court, so I must be circumspect in my answer. I will assume that the sit-in would constitute expressive conduct of the kind protected by the First Amendment, see, e.g., Brown v. Louisiana, 383 U.S. 131 (1966), and that the ordinance and its application would be found to be content-neutral. I will also assume that the sidewalk at issue, although public property, constitutes a "traditional public forum," see, e.g., Frisby v. Schultz, 487 U.S. 474, 480-81 (1988). All of these conclusions depend on the facts of a particular case, and therefore could be otherwise. Under these circumstances, the Court has held that the government may enforce

reasonable time, place, and manner restrictions if they are "narrowly tailored to serve a significant government interest" and "leave open ample alternative channels of communication." Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1990). See also United States v. O'Brien, 391 U.S. 367 (1968).

This balancing is fact-based and thus its application would require more information than is presented in the question. It is likely that the government's interest in maintaining the sidewalk for its primary purpose -- pedestrian traffic -- would be found to be significant. Whether the restriction is narrowly tailored would depend on facts such as the width of the sidewalk and the usual level of traffic. Moreover, it would be necessary to inquire into the availability of alternative channels of expression.

3. The First Amendment clearly protects communications between doctor and patient. The Constitution limits the extent to which the federal government may directly regulate such communication.

UNITED STATES COURT OF APPEALS
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CLARENCE THOMAS
UNITED STATES CIRCUIT JUDGE

September 30, 1991

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Chairman Biden:

I have enclosed responses to the written questions of Senator Levin that accompanied your letter of September 20, 1991. By copy of this letter to Senator Levin, I am also providing copies of my responses directly to him.

Sincerely,

Clarence Thomas

Attachments

cc: Honorable Strom Thurmond
Ranking Minority Member
Senate Judiciary Committee

Honorable Carl Levin
United States Senate