The Top and Bottom of the Ninth

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The Ninth Circuit Court of Appeals encompasses over one-third of the United State's geographical area and nearly one-fifth of its population. For better or worse, its legal influence reflects its geographical and population dominance. In the past two months, the Ninth Circuit has churned out a number of decisions with noteworthy religious liberty implications that may spread to other circuits in the next few years.

First, a favorable decision came from the Ninth Circuit in *Intermountain Fair Housing Council v. Boise Rescue Mission Ministries,* 2011 WL 4347029 (9th Cir., Sept. 19, 2011). The Boise Rescue Mission Ministries, a non-profit Christian organization, ran a residential drug treatment program that did not charge for its services but required its participants to be, or want to be, Christians. During the intense year-long program, participants were required to attend a broad range of Christian activities, including worship services, prayer groups, and Bible study, a requirement made known to all applicants for the program. Separately, the ministry's two homeless shelters gave people a free place to sleep and eat. Open to persons of all faiths, the shelters encouraged but did not require their guests to attend chapel services and morning devotions.

The ministry was sued under the federal Fair Housing Act (FHA) for discrimination on the basis of religion by a woman who had avoided a jail sentence by agreeing to participate in the residential drug treatment program and by a man who had stayed at the homeless shelters. Both filed complaints with the federal Department of Housing and Urban Development, which dismissed the complaints for lack of evidence. They then filed suit but lost in the district court.

On appeal, the Ninth Circuit held that the residential drug treatment program and the shelters all fell within the FHA's exemption under which religious organizations that own or operate dwellings for a noncommercial purpose may give preference to, or limit use by, "persons of the same religion … unless membership in such religion is restricted on account of race, color, or national origin." 42 U.S.C. § 3607(a). Saying that the exemption must be construed narrowly, the court nonetheless ruled that the ministry could limit its drug treatment program to persons who shared its faith and could require its participants to become Christians in order to "graduate" from the program. Similarly, under the exemption, the homeless shelters could "prefer" guests who attended religious services. The alleged preference had been the practice of letting guests who attended services go first in the food line.

The Ninth Circuit hit a home run in *Boise Recue Mission* but then went 0-for-3 in cases involving religion at public schools and universities. In *Alpha Delta Chi-Delta Chapter v. Reed,* 648 F.3d 790 (9th Cir. 2011), the Ninth Circuit acknowledged that in *Christian Legal Society v. Martinez,* 130 S. Ct. 2971 (2010), the Supreme Court refused to decide whether a public university could apply a nondiscrimination policy to prohibit a religious group's requirement that its leaders and members affirm its religious beliefs. Four justices would have decided the issue in favor of the religious groups and found that application of a nondiscrimination policy to restrict religious groups' ability to choose their leaders violated the First Amendment. Only one justice, now retired Justice Stevens, stated that such a troubling application of a nondiscrimination policy was permissible. The remaining four justices explicitly stated they were not addressing that question.

Despite acknowledging that the *Martinez* decision did not mandate its result, the Ninth Circuit determined that a public university could exclude religious groups from campus by deeming their requirement that their officers and members agree with their religious beliefs to be "religious discrimination" in violation of the university's nondiscrimination policy. The case was then remanded to determine whether the policy had been applied to other student groups and not just religious groups.

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Of course, the Ninth Circuit overlooks the critical fact that nondiscrimination policies are supposed to *protect religious students from harassment* on the basis of their religious beliefs not be used as an instrument to exclude religious groups from campus. It is hard to think of anything more harassing than campus officials tossing religious groups off campus because they want to be religious. But the Ninth Circuit typically treads where other jurists fear to go.

Indeed, Judge Ripple, sitting by designation from the Seventh Circuit, brilliantly elucidated the error of the majority's reasoning when he wrote:

> Most groups dedicated to forwarding the rights of a "protected" group are able to couch their membership requirements in terms of shared beliefs, as opposed to shared status. . . .
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> Religious students, however, do not have this luxury—their shared beliefs coincide with their shared status. They cannot otherwise define themselves and not run afoul of the nondiscrimination policy. . . . The Catholic Newman Center cannot restrict its leadership—those who organize and lead weekly worship services—to members in good standing of the Catholic Church without violating the policy. Groups whose main purpose is to engage in the exercise of religious freedoms do not possess the same means of accommodating the heavy hand of the State.
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> The net result of this selective policy is therefore to marginalize in the life of the institution those activities, practices and discourses that are religiously based. While those who espouse other causes may control their membership and come together for mutual support, others, including those exercising one of our most fundamental liberties—the right to free exercise of one's religion—cannot, at least on equal terms.[1]

The student group likely will appeal to the United States Supreme Court this fall. In the meantime, Judge Ripple's opinion is a welcome supplement to Justice Alito's brilliant dissent in *Martinez*, 130 S. Ct. at 3009, joined by the Chief Justice and Justices Scalia and Thomas, which explained why a wooden application of nondiscrimination policies to prevent religious groups from choosing their leaders according to their religious beliefs is viewpoint discrimination that violates religious groups' freedom of speech.

In *C.F. v. Capistrano Unified School District,* 2011 WL 3634159 (9th Cir., Aug. 19, 2011), a sophomore high school student in an Advanced Placement European History class was offended by the teacher's classroom comments about religion. For example, the teacher stated that peasants had been persuaded to oppose reforms that were in their best interest because of religion. As the teacher opined, "You have to have something that is irrational to counter that rational approach. … [W]hen you put on your Jesus glasses, you can't see the truth." The teacher criticized evidence for belief that God created the universe as the invocation of magic rather than science: "I mean, all I'm saying is that, you know, the people who want to make the argument that God did it, there is as much evidence that God did it as there is that there is a giant spaghetti monster living behind the moon who did it…."

The Ninth Circuit rejected the student's Establishment Clause challenge to the teacher's remarks finding the teacher had qualified immunity because the law was not clearly established. Usually eager to go where no other court has previously gone (see the *Alpha Delta Chi* case), the Ninth Circuit modestly concluded that "there has never been any reported case holding that a teacher violated the Establishment Clause by making statements in the classroom that were allegedly hostile to religion." Somewhat self-contradictory, the court nonetheless offered its belief that "[e]ven statements exhibiting some hostility to religion do not violate the Establishment Clause" if the teacher's conduct has a secular purpose, does not have the principal effect of inhibiting religion, and does not create excessive entanglement between government and religion. The court reluctantly conceded that "[a]t some point a teacher's comments on religion might cross the line and rise to the level of unconstitutional hostility." One wonders what level of hostility would be needed for the Ninth Circuit to find a teacher's gratuitous anti-religious comments unconstitutional. Despite the loss, the student's challenge, which has received some public atten-

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[1] Judge Ripple concurred in the panel's result because he believed that a prior Ninth Circuit opinion required the panel's ruling. In reality, the panel's claim that there was controlling intra-circuit authority was erroneous. Regardless of that error, Judge Ripple's opinion is a lucid and succinct explanation of why nondiscrimination policies should not be interpreted to justify excluding religious groups from campus.

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tion, may have served as a useful wake-up call to many teachers to curb their classroom disdain for religion.

Compare the Ninth Circuit's handling of a teacher's remarks that are critical of religion with its handling of a teacher's pro-religious words in *Johnson v. Poway Unified School District,* 2011 WL 4071974 (9th Cir., Sept. 13, 2011). Twenty-five days after its *Capistrano* decision, the Ninth Circuit had no trouble finding that the law was "clear" that a school district does not violate a teacher's first amendment rights "when it orders him not to use his public position as a pulpit from which to preach his own views on the role of God in our Nation's history to the captive students in his mathematics classroom." The Ninth Circuit then reversed the district court's grant of summary judgment in favor of the teacher.

Since 1982, a high school algebra and calculus teacher had displayed two large banners on his classroom walls. One banner was emblazoned in large letters with "In God we trust," "One nation under God," "God bless America," and "God shed His grace on thee." The other banner stated that: "All men are created equal, they are endowed by their CREATOR." Despite the obvious origin of these phrases in our laws, patriotic songs, and the Declaration of Independence itself, the school principal ordered the banners removed because they "might make students who didn't share that viewpoint uncomfortable."

While the teacher complied with the order to remove his banners, he noted that other teachers at other high schools in the district had signs that displayed a sectarian viewpoint. For example, one teacher displayed Tibetan prayer flags, one of which incorporated a small picture of Buddha, in her classroom; another exhibited a John Lennon poster with the lyrics to "Imagine"; another teacher presented a poster that listed Mahatma Gandhi's "7 Social Sins"; one poster pictured the Dalai Lama; and one teacher's poster opined that "The hottest places in hell are reserved for those who in times of great moral crisis, maintain their neutrality."

The Ninth Circuit held that the school district had not violated the teacher's First Amendment rights because the teacher's speech in this context was actually the school's speech, and therefore, could be restricted by school officials if they thought students might be offended. In a neat pivot, however, the Ninth Circuit then found that school officials did not violate the Establishment Clause by allowing the other posters with religious connotations to remain on display because nothing in the record suggested that those posters were used to endorse or inhibit religion despite their religious content. For example, the science teacher who displayed the Tibetan flags claimed such flags were like flags purchased by Mount Everest climbers and therefore were relevant to her classroom discussion of fossils found near Mount Everest. Unblinkingly, the Ninth Circuit accepted that "the flags are intended to stimulate scientific interest, not religious pressure (or even permissible religious discussion)."

Quoting from the Declaration of Independence does not protect speech, but fossils near Mount Everest do. Perhaps if John Lennon had penned the Declaration, it would have been sufficiently politically correct to survive in the Ninth Circuit. Yet again, the Ninth Circuit leaves those who care about religious liberty speechless.

Kim Colby has worked for the Center for Law and Religious Freedom since graduating from Harvard Law School in 1981. She has represented religious groups in numerous appellate cases, including two cases heard by the United States Supreme Court, as well as on dozens of amicus briefs in federal and state courts. She was involved in congressional passage of the Equal Access Act in 1984.