



LEGAL MEMORANDUM

To: Fr. Frank Pavone
National Director, Priests for Life

From: Robert J. Muise, Esq.
American Freedom Law Center

Re: Voter Education Project

PROJECT BACKGROUND

Once again, Priests for Life is calling on pro-lifers around the country to participate in a monumentally important election which will in large measure determine the direction our nation takes on fundamental matters of public policy and the direction of our courts.

As Americans, we are blessed to have the opportunity to elect our leaders, and we are called by our Christian discipleship to exercise that responsibility in an active and informed way.

Part of that exercise of citizenship involves being informed about the positions that the candidates and their parties take, and to reach out to our fellow citizens, our fellow believers, and equip them with the information that will help them make an informed voting decision.

To that end, Priests for Life is inviting pro-lifers to take part in a voter education project (“Project”). The Project involves distributing literature that will provide information about the candidates and the parties and, when appropriate, discussing the issues with willing listeners. The literature will contain important voting information, and the Project participants will peacefully distribute this information and engage willing passersby on *public property* adjacent to and surrounding churches throughout the country. No one involved in the Project will obstruct or otherwise hinder anyone from using the public rights of way nor will they engage in any harassing, threatening, boisterous, or otherwise disruptive conduct while engaging in Project activities.

This Legal Memorandum sets forth the constitutional rights of pro-lifers to engage in the Project.

LEGAL ANALYSIS

I. Distributing Literature on Voting Issues Is Fully Protected by the First Amendment.

“Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.” *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997). Indeed, “speech on public issues,” such as voter information,

“occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted); *see also Citizens United v. FEC*, 558 U.S. 310, 329 (2010) (“[Political speech] is central to the meaning and purpose of the First Amendment.”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (“[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.”) (citations omitted); *Stromberg v. Cal.*, 283 U.S. 359, 369 (1931) (observing that “free political discussion” is “essential to the security of the Republic” and “a fundamental principle of our constitutional system”).

The activities of the Project, which include handing out literature and informing fellow believers of important electoral issues from a Christian perspective, are undertaken as a form of Christian discipleship. Consequently, these activities are protected by the Free Speech *and* Free Exercise Clauses of the First Amendment. *See, e.g., Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O’Connor, J.) (observing that “private speech endorsing religion” is protected by “the Free Speech and Free Exercise Clauses”).

For example, in *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015), the Sixth Circuit, sitting *en banc*, stated:

The right to free exercise of religion includes the right to engage in conduct that is motivated by the religious beliefs held by the individual asserting the claim. . . . The government cannot prohibit an individual from engaging in religious conduct that is protected by the First Amendment. . . .

The Bible Believers’ proselytizing at the 2012 Arab International Festival *constituted religious conduct, as well as expressive speech-related activity, that was likewise protected by the Free Exercise Clause of the First Amendment. . . .*

Free exercise claims are often considered in tandem with free speech claims and may rely entirely on the same set of facts.

Id. at 255-56 (emphasis added).

In sum, the Project’s activities are fully protected by the First Amendment.

II. The First Amendment Right to Distribute Literature Is at Its Zenith when Exercised in Traditional Public Fora.

The public streets and sidewalks adjacent to churches throughout the United States are traditional public fora. As stated by the U.S. Supreme Court:

[O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a ‘cliché,’ but recognition that “[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.” No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.

Frisby v. Schultz, 487 U.S. 474, 480-81 (1988) (internal citation omitted). Traditional public fora “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. CIO*, 307 U.S. 496, 515 (1939).

There is no exception to this long-standing rule for public streets and sidewalks adjacent to church property. Per the U.S. Supreme Court, “[T]he streets are natural and proper places for the dissemination of information and opinion, and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schneider v. N.J.*, 308 U.S. 147, 163 (1939); *see also Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (“Constitutional concerns are heightened further where, as here, the [challenged ordinance] restricts the public’s use of streets and sidewalks for political speech.”); *Perry Educ. Ass’n v. Perry Local Educators*, 460 U.S. 37, 55 (1983) (stating that “[i]n a public forum . . . all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers”).

CONCLUSION

In the final analysis, the Project’s activities on the public streets and sidewalks adjacent to churches are fully protected by the Free Speech and Free Exercise Clauses of the First Amendment. There is no basis to argue otherwise. Moreover, if police officers or other government officials interfere with the Project, they could be liable for violating the participants’ civil rights under 42 U.S.C. § 1983. And any private party that conspires with government officials to interfere with the Project could also face potential civil liability. *See Dennis v. Sparks*, 449 U.S. 24 (1980) (holding that private parties conspiring with a government official were acting under color of state law for purposes of a civil conspiracy claim brought pursuant to 42 U.S.C. § 1983).