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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 5, 1998

The Honorable Molly M. Spearman
Member, House of Representatives
Route 1, Box 490
Saluda, South Carolina 29138

RE: Informal Opinion

Dear Representative Spearman:

Your opinion request has been forwarded to me for reply. You have informed this Office that the Saluda County Ministerial Association requested approval from the Saluda County Council to use the Saluda County Courthouse Square for a public religious ceremony. The County Council denied this request citing concern that such use would violate the Establishment Clause. It is my understanding that the Courthouse Square is a public area which has been used by numerous groups for a variety of purposes, including celebrations, concerts, and festivals. I further understand that use of the Courthouse Square has been granted to both public and private groups. You have asked whether use of public grounds, such as the Courthouse Square, by a religious group for a religious ceremony would violate the Establishment Clause.

LAW/ANALYSIS

The United States Supreme Court has unequivocally stated that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995). It is undeniable that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State. Id. The right to use government property for one's private expression depends upon whether the property by law or tradition been given the status of a public forum, or rather had been reserved for specific official uses. Id. The Supreme

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Court has recognized three distinct categories of government property: (1) traditional public fora; (2) designated public fora; and (3) nonpublic fora. Summun v. Callaghan, 130 F.3d 906 (1997).

The first category is the "traditional public forum," such as the town square, which is a forum "which by long tradition or by government fiat has been devoted to assembly and debate." Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983). Examples of traditional public fora include streets, parks and public sidewalks which have "immemorially been held in trust for the use of the public and, time out of mind, 'have been used for purposes assembly, communicating thoughts between citizens, and discussing public questions.'" Id.

The second category of government property is the "designated public forum." Id. This is public property that the state has opened for expressive activity, treating the property as if it were a traditional public forum. Id. A designated public forum may be created for a "limited purpose" for use "by certain speakers, or for the discussion of certain subjects." Id. For example, "university facilities opened for meetings of registered student organizations qualify as a designated public forum." Widmar v. Vincent, 454 U.S. 263 (1981).

The third category is the "non-public forum" which is public property which is not by tradition or designation a forum for public communication. Perry, 460 U.S. 37. The government may limit speech in a non-public forum to reserve the forum for the specific official uses to which it is lawfully dedicated. Summun, 130 F.3d 906. When the government allows selective access to some speakers or some types of speech in a non-public forum, but does not open the property sufficiently to become a designated public forum, it creates a "limited public forum." Id.

In the case of a traditional or designated public forum, a State's right to limit protected expressive activity is sharply circumscribed: it may impose reasonable, content-neutral time, place and manner restrictions, but it may regulate expressive content only if such restriction is necessary, and narrowly drawn, to serve a compelling state interest. Capitol Square, 515 U.S. 753. There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. Id. However, the United States Supreme Court has previously addressed the combination of private religious expression, a forum available for public use, content-based regulation, and a State's interest in complying with the Establishment Clause. In those cases, the Court struck down the restrictions on religious content. Id. The key in making such determinations was that the government property was open to a wide variety of uses, the government was not directly sponsoring the religious group's activity, and any

benefit to religion would have been no more than incidental. Id. Further, an open forum does not confer any imprimatur of state approval on religious sects or practices. Widmar, 454 U.S. 263.

In sum, the United States Supreme Court has concluded that Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms. Capitol Square, 515 U.S. 753.

In regards to a non-public forum, regulations of speech are subject to a reasonableness standard. This does not mean that the government has unbridled control over speech, however, for it is axiomatic that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993). Thus, "control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Summon, 130 F.3d 906. In other words, although content-based discrimination is permissible in a non-public forum if it preserves the purpose of the forum, when the government moves beyond restricting the subject matter of speech and targets particular viewpoints taken by speakers on a subject, such viewpoint discrimination is presumed impermissible. Id.

In sum, while the government does have wide discretion to regulate a non-public forum consistent with the specific purpose for which it was intended, including banning all speech, problems arise when the government allows some private speech on the property. Id. If, for example, the government permits secular displays on a non-public forum, it cannot ban displays discussing otherwise permissible topics from a religious perspective. id.

In the context of non-public fora, courts have consistently rejected the government's assertions that the Establishment Clause raises concerns outweighing free speech rights. Id. In order to avoid an Establishment Clause violation, the government need only remain neutral, preferring neither religious speech nor secular expression over the other. Id. Indeed, if the government denies access to private speech because of the religious viewpoint of the speaker, the denial itself risks fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. Id.

Based on the facts presented, it appears that the Courthouse Square is a traditional or designated public forum and the Ministerial Association is a private religious

organization. Therefore, consistent with the United States Supreme Court's decision in Capitol Square, the religious expression of the Ministerial Association cannot violate the Establishment Clause where the expression is (1) purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms. As I understand the facts to be, these two factors exist here and, therefore, the Establishment Clause would not be violated by allowing the Ministerial Association to hold a public religious ceremony in the Saluda County Courthouse Square.

Even if the Courthouse Square was classified as a non-public forum, while the County Council may regulate the forum consistent with the purpose of the forum, it may not ban permissible topics because of their religious nature. In order to avoid an Establishment Clause violation in such a case, the government need only remain neutral. In fact, if the government denies access solely because of the religious viewpoint of the speaker, the very neutrality of the Establishment Clause may be violated.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

Paul M. Koch

Paul M. Koch
Assistant Attorney General