

# FREEDOM FROM RELIGION *foundation*

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SENT VIA MAIL AND EMAIL to [broppe@cityofprineville.com](mailto:broppe@cityofprineville.com); [maureen@ccprd.org](mailto:maureen@ccprd.org)

The Honorable Betty Roppe  
Mayor, City of Prineville  
387 NE Third St  
Prineville OR 97754

Maureen Booher  
Director, Crook County Parks and Recreation District  
398 NE Fairview St  
Prineville OR 97754

RE: Unconstitutional delegation of government power over citizen speech

Dear Mayor Roppe and Ms. Booher:

I am writing on behalf of the Freedom From Religion Foundation ("FFRF") to object to the government delegating power over free speech activities on government property to a private individual. FFRF is a national nonprofit organization with 19,000 members across the country including members in Prineville and almost 500 members in Oregon. Our purpose is to protect the fundamental constitutional principle of separation between state and church.

In 2010, Prineville residents and taxpayers contacted us about the crèche that was located next to City Hall. FFRF successfully opposed this unconstitutional display and the Prineville council voted not to sponsor any further nativities. We understand that, in response, the local resident spearheading the effort to keep the nativity on public property, Mr. Orlando, has been allowed to "lease" the entirety of City Plaza and that he has erected a nativity. We further understand that he now has full power to allow or prohibit displays in City Plaza. FFRF objected to this practice last year. This delegation of power raises serious constitutional concerns.

## **An unconstitutional delegation of government power to a private citizen**

Prineville has granted Mr. Orlando, the private citizen it knew was spearheading the effort to keep a religious display on public property, the sole power to include or exclude displays on government property. This violates the Constitution.

In *Larkin v. Grendel's Den*, the Supreme Court held that delegating an important discretionary governmental power to a religious institution was excessive entanglement because it "substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards ..." 459 U.S. 116, 127 (1982). In

that case, Massachusetts delegated to churches the power to veto liquor licenses within a five hundred foot radius of the church. *Id.* at 117.

Prineville's abrogation of duty is unconstitutional and irresponsible. The government-licensing agency in *Larkin* had no "effective means of guaranteeing" that the delegated power "will be used exclusively for secular, neutral, and nonideological purposes." *Larkin* at 125, citing *Committee for Public Education v. Nyquist*, 413 U.S. 756, 780 (1973). Similarly, Prineville has no guarantee that Mr. Orlando is using the property for "secular, neutral, and nonideological purposes." In fact, Mr. Orlando's stated purpose is to erect a display portraying the mythical birth of a particular religious sect's savior.

Although Mr. Orlando has stated that he will open up *his* space to all comers, he is free to change his mind without forfeiting his permit. The government has delegated its power without a guarantee that disagreeable speech will not be censored. The government cannot allow potential censorship in a public forum: the "Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); see also *Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

Whether or not Mr. Orlando exercises his veto power is irrelevant. He cannot constitutionally possess such a power. This government has abrogated its constitutional responsibilities by giving him veto power over the speech of other citizens.

**Holiday displays are significantly different than the Prineville Farmer's Market and courts will not ignore the history of this display**

The city cannot hide in analogies about leasing the public space to the Farmer's Market. The market is a commercial venture benefitting citizens, farmers, and the ecosystem. More vendors attract more customers and there is virtually no danger of excluding unpopular viewpoints.

Holiday displays are not commercial activities; they are speech activities. Forcing citizens to seek approval for their free speech activities from a single, private individual is outrageous. There is no *valid* reason for the government to turn regulation of free speech over to a single person espousing a religious mission. The only possible reasons are indolence or, more likely, a desire to host religious displays on public property.

There is no practical reason for giving one person such power. Leasing the entire plaza to the Farmer's Market may be necessary because diverse vendors need space for their tents, displays, and trucks. A nativity takes up comparatively little space, perhaps the equivalent of one farmer's tent. Mr. Orlando cannot use the whole plaza, nor can he be given power over the whole plaza.

This attempt to circumvent the Constitution would not be ignored by any court examining this issue. The constitutionality of current displays depends on the history of those displays. "One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545



U.S. 844, n. 14 (2005). In other words, if a display is unconstitutional, and policies are amended slightly to keep the religious display up, the display remains unconstitutional. In the past, the nativity stood as a city display that violated the First Amendment. *See County of Allegheny v. ACLU of Pittsburgh*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1983). Only after receiving our letter of complaint was the new scheme created to keep the nativity on public land.

### **The Solution**

The jurisdictional issues on your end are not our responsibility. It is enough that we have shown that this delegation is unconstitutional. The responsible body should immediately act to rescind the unconstitutional power it has bestowed on Mr. Orlando.

If you permit Mr. Orlando to erect the nativity on City Plaza, you are either violating the First Amendment or creating an open forum. If the latter, the city is responsible for managing that forum. It cannot discriminate against particular speech. If you wish to allow religious displays, you must allow nonreligious displays.

Other governments have divided the public space into several allotments that are then awarded via lottery. Santa Monica, Calif., tried this in 2011. Eleven of the fourteen available display spaces were awarded to atheist or agnostic groups. Fences were erected to protect the displays from vandalism. This year, the city decided that the park should remain a park free from the clutter and sectarian strife religious displays cause and closed the forum. No displays are permitted, a decision recently upheld in court.

The best policy is for Prineville to prohibit all displays. If the City desires to open a public forum, it must manage the forum. FFRF requests permission to erect our own display in any public forum the city decides to open. May we hear from you, in writing, as soon as possible about the steps you are taking to rectify this constitutional problem?

Sincerely,

A handwritten signature in blue ink, appearing to read "Andrew Seidel".

Andrew L. Seidel  
Staff Attorney