

]DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 93 CV 6056, Courtroom 2

ORDER RE: PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THE FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin nonprofit corporation; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; ROBERT H. FENN; and LEE WHITFIELD

Plaintiffs,

v.

CITY AND COUNTY OF DENVER, COLORADO; WELLINGTON WEBB, Mayor of the City and County of Denver, Colorado,

Defendants.

THE COURT, having considered Plaintiffs' Motion for Preliminary Injunction, the briefs of the parties, the evidence presented at the hearing, the court file and relevant authorities, and being sufficiently advised in the premises, finds, concludes and orders as follows:

1. Plaintiffs move for a preliminary injunction to enjoin the defendants from promoting, endorsing, or sponsoring, in their official capacities as public servants, a Day of Prayer against Violence (also referred to as the "event") set for Sunday, December 5, 1993 at the Colorado Convention Center. The Court grants the injunction in part and denies it in part.

FINDINGS OF FACT

2. Plaintiff, the Freedom from Religion Foundation, Inc. ("Foundation"), is a non-profit corporation existing under the laws of the State of Wisconsin and is qualified to do business in the State of Colorado. One of the Foundation's primary objectives is to promote constitutional principle of separation of church and state and to guard against infractions of that principle.

3. The individual plaintiffs are residents and taxpayers of the State of Colorado, and the City and County of Denver, and are members of the Colorado chapter of the Foundation. Plaintiff Whitfield testified that he felt insulted, outraged, and belittled by their City's participation in the Day of Prayer

because he, as a non-religious person, feels left out and feels that the City's participation violates the Establishment Clause of the First Amendment.

4. Defendant, Wellington Webb, is the mayor of the City and County of Denver and its chief executive officer.

5. In the past year the problem of gang and youth violence in the City and County of Denver has escalated substantially and has become a matter of great public concern. This concern was heightened dramatically by the shooting death of 18-year old Carl Banks this past Halloween evening in the 1900 block of Cherry Street in Denver, Colorado.

6. On Sunday, November 7, 1993 a vigil was held in the 1900 block of Cherry Street in response to the Banks' shooting. The vigil was organized by several ministers and citizens in that area of the City and was attended by approximately 300 people including Mayor Webb. The people at the vigil, including Mayor Webb, engaged in prayer and expressed remorse at the death of Carl Banks as well as concern for the increasing problem of youth violence.

7. In a five-minute, impromptu meeting after the vigil Reverends Boyd and Peters, both of whom are Christian ministers as well as community leaders and acquaintances of Mayor Webb, discussed with him the possibility of a city-wide day of prayer as another step that might be taken to deal with the problem of youth violence. The Mayor was receptive to the idea, but no specific plans were made at that time.

8. The day after the vigil Reverends Boyd and Peters contacted several ministers to set up a Day of Prayer against Violence for December 5, 1993. Reverend Boyd chaired an ad hoc committee of ministers that actually organized the event and selected the day. The purpose of the Day of Prayer was to mobilize concern for, and seek solutions to youth violence problems and to do so in a prayerful setting. There is no evidence that Mayor Webb or other city officials participated in organizing the event.

9. On November 9, 1993 during normal business hours Mayor Webb held a press conference with several of the ministers who organized the Day of Prayer. At that time he issued a press release, Exhibit 1, which stated in part that: "MAYOR WELLINGTON WEBB AND MEMBERS OF DENVER'S CLERGY DESIGNATES SUNDAY, DECEMBER 5 AS A CITY WIDE DAY OF PRAYER AGAINST VIOLENCE." The press release, which was issued on the Mayor's official stationery, announced the date, time and place of the event and included a statement by the Mayor to the effect that guns, drugs and violence were tearing at the community's spiritual fabric. The release also contained the clergy's acknowledgement that prayer

was just one component of the overall strategy to solve violence. The release listed, as a contact person, Charlotte Stephens, a city employee.

10. In addition to issuing a press release, Mayor Webb said at the press conference that he wanted everyone to get the event on their calendar and that he had formed an Inter-faith Religious Coordinating Committee to work on the event. The Mayor further said that he was working on getting non-Christian faiths involved on the Committee.

11. The press release and press conference were reported in the Denver Post. See Appendix A to plaintiffs' Brief.

12. The day after the press conference Charlotte Stephen ceased to be the contact person for the event. That function was taken over by non-governmental persons who were promoting the event. There is no evidence of any involvement in the planning, organizing or promoting of the event by the Mayor or other City or governmental employees other than at the November 9, 1993 press conference.

13. The City has leased the Colorado Convention Center to the organizers of the event. The lease was handled in the same manner the City would handle any other lease of the Convention Center. The Colorado Council of Churches has paid the full rent of \$4,400.00. The City does not discriminate against religious organizations or events in leasing its facilities, including the Convention Center.

14. There is no evidence that any tax money has been spent on the event other than that involved in holding the November 9, 1993 press conference and issuing the press release.

15. Mayor Webb's intent in holding the press conference and issuing the press release was to bring people together for prayer and the discussion of solutions to youth violence.

16. Mayor Webb testified at the hearing that he believes that the event is worthwhile and he approves of it and endorses it as another solution to youth violence. However, he candidly acknowledged that the press release and press conference may have been a mistake. He testified that he intends to participate in the event but does not now what form his participation may take.

17. Reverend Boyd testified that he believes that he could have achieved, and can achieve the attendance goal of 5,000 people for the event even if the Mayor had not held the press conference. Given the level of community concern for the problem of youth violence, and the fact that the event was organized and is being promoted by ministers who are also community leaders and has the support of the Colorado Council of Churches, the Court

finds this testimony persuasive. Thus, the Court finds that the event could have, and can take place on substantially the same scale even without the Mayor's press release and press conference.

18. The Day of Prayer is open to persons of all faiths as well as persons who have no religious beliefs.

19. Mayor Webb, the ministers organizing the event and their congregations believe that their right to the free exercise of religion would be violated if they were not permitted to participate in the Day of Prayer on December 5, 1993.

CONCLUSIONS OF LAW

20. The Court first addresses the issue of standing. Defendants have made a general challenge to plaintiffs' standing to bring this action. The Court concludes that the individual plaintiff, Lee Whitfield, and the Association plaintiff, The Freedom from Religion Foundation, Inc., do have standing. Mr. Whitfield's testimony that he felt insulted, outraged, and belittled by the City's participation in the Day of Prayer because he believes it violates the Establishment Clause is sufficient injury-in-fact to assure that an actual controversy, appropriate for judicial resolution, exists. See Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1983). Therefore, plaintiff Whitfield has standing. See id. Since Whitfield is a member of The Freedom from Religion Foundation, Inc., and that association is dedicated to promoting the constitutional principle of separation of church and state, the Court concludes that the Foundation also has standing. See Murray v. City of Austin, Texas, 947 F.2d 147 (5th Cir. 1991).

21. Before addressing the merits of this motion the Court addresses two preliminary matters. First, although this motion was filed as a motion for preliminary injunction it has been presented by the parties more in the form of a motion for permanent or final injunction. This appears to be appropriate because the evidence suggests that the Day of Prayer as presently structured and scheduled is more likely than not a one-time event. Thus, if the Court should order that the event itself be enjoined that order would have the same effect as a final injunction. Under these circumstances this motion is, in substance, a motion for a final injunction and the Court treats it as such. The foregoing is intended merely to advise the parties of the framework within which the Court resolves the motion. The result reached below does not differ because the Court is treating the motion as one for final injunctive relief. The second preliminary matter is that since the same values underlie both the federal and state constitutional provisions involved here, the Court does not treat plaintiffs'

constitutional claims separately. Rather, it resolves the merits of both state and federal claims within the context of the United States Constitution. See Conrad, 656 P.2d at 670. The Court now turns to the merits of plaintiffs' claims.

22. Plaintiffs contend that the City's participation in the Day of Prayer, specifically Mayor Webb's November 9, 1993 press release and press conference, violates the Establishment Clause of the First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, as well as Article II, Section 4, of the Colorado Constitution. Plaintiff seeks to enjoin any further conduct on the part of Mayor Webb in his official capacity as well as the conduct of other City officials which tends to promote, endorse, support or sponsor the Day of Prayer. Plaintiffs also seek to enjoin the event itself. The Court grants the injunction to the extent of enjoining Mayor Webb and other City officials, acting in an official capacity, from promoting, endorsing or supporting the Day of Prayer, but denies plaintiffs' motion to the extent that it seeks to enjoin the event itself.

23. The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion. . . ." As relevant here, the test applied to determine whether governmental conduct violates the Establishment Clause is whether the governmental action would be interpreted by a reasonable person as endorsement of religion. Freedom from Religion Foundation, Inc., et al. v. State of Colorado, et al., ___ P.2d ___ (Colo. App. June 17, 1993). The challenged conduct here is Mayor Webb's press release and press conference endorsing the Day of Prayer. Since prayer is exclusively a religious act, the endorsement of a Day of Prayer would logically be interpreted by a reasonable person as an endorsement of religion. Because from all appearances Mayor Webb was acting in his official capacity in issuing the press release and conducting the press conference endorsing the Day of Prayer, the Court concludes that a reasonable person would interpret his conduct as a governmental endorsement of religion. As such, it violates the Establishment Clause. See id.

24. Accordingly, the Court orders that Mayor Webb and other City officials, while acting in an official capacity, be enjoined from any further endorsement, promotion, sponsorship or support of the Day of Prayer scheduled for December 5, 1993 at the Colorado Convention Center. This Order does not enjoin Mayor Webb, acting as a private citizen, from exercising his First Amendment rights to free speech and religion by discussing or participating in the Day of Prayer as long as his conduct would not be interpreted by a reasonable person as an official, government endorsement of religion. Depending upon the circumstances, this may require some type of disclaimer to dispel the impression of governmental support which his position as

mayor may create. However, the Court does not believe it is necessary to enter any specific order in that regard.

25. Before addressing plaintiffs' request to enjoin the event itself, the Court briefly discusses the joinder of other parties who would likely be affected by such an order. Those parties include the Colorado Council of Churches, the organizers of the event, and possibly persons who intend to attend the event. Rule 19 of the Colorado Rules of Civil Procedure requires the joinder, if feasible, of persons who claim an interest in the subject of the action where nonjoinder may impair their ability to protect their interest. Defendants have raised this issue in passing but have not presented it in a manner (by motion to dismiss under Rule 12) which would properly bring it before the Court. In addition, Reverend Boyd, one of the organizers of the event testified at the hearing but has not sought joinder in this action as a party. Under these circumstances the Court does not believe it is necessary at this time to order joinder of such parties on its own motion.

26. Plaintiffs' motion to enjoin the event involves issues of both the appropriateness of such an injunction under the law and the proper scope of injunctive relief. The Day of Prayer involves the use of a public forum, the Convention Center, for a religious event. As a general rule, a state may limit protected speech, including religious speech, in a public forum only upon the showing of a compelling state interest. See Lamb's Chapel v. Center Moriches, 508 U.S. ___, 124 L.Ed.2d 352 (1993). A state's interest in avoiding an Establishment Clause violation may constitute such a compelling interest. See generally Widmar v. Vincent, 454 U.S. 263 (1981). It follows then that the need to avoid an Establishment Clause violation may also be a sufficient basis for enjoining the use of a public forum for a religious event. Here, since the only evidence presented regarding any promotional publicity for the event was the Mayor's press conference and press release, which the Court found violative of the Establishment Clause, there is a sufficient basis to warrant enjoining the Day of Prayer absent some corrective action by the defendants. This leads to consideration of the proper scope of injunctive relief.

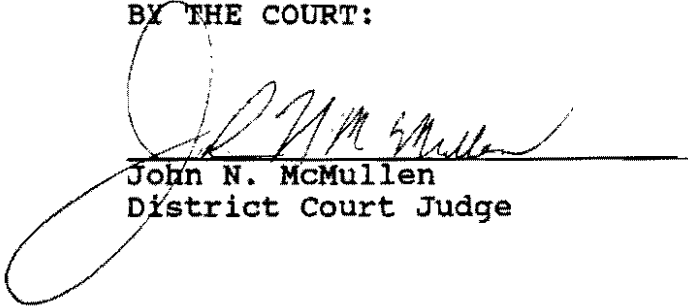
27. While a court has considerable latitude in fashioning appropriate injunctive relief, see Brennan v. Monson, 50 P.2d 534 (Colo. 1935), it should generally do so in terms no broader than is necessary to remedy the situation giving rise to the need for such relief in the first place. See Doe v. Small, 964 F.2d 611, 620-622 (7th Cir. 1992). This principle is particularly applicable where, as here, an unnecessarily broad injunction may infringe upon the constitutional rights of others. See id.

28. With the above principles in mind, the Court orders that plaintiffs' motion to enjoin the Day of Prayer scheduled for

December 5, 1993 is denied upon the express condition that prior to December 2, 1993 Mayor Webb issue a press release containing a sufficient disclaimer of his or the City's official sponsorship, endorsement or support of the Day of Prayer to substantially offset the impression created by is November 9, 1993 press release and press conference. The Court is not ordering any personal disclaimer of the event itself or disassociation from the event by Mayor Webb as a private citizen, but merely that it be made clear that this is a privately planned, organized and supported event, and not a City event.

Dated this 24 day of November, 1993.

BY THE COURT:



John N. McMullen
District Court Judge

cc: All counsel.