

THE RUTHERFORD INSTITUTE

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January 5, 2012

Via E-mail and U.S. Mail

Harrison County Commission
c/o Mr. Bernie Fazzini, President
301 W. Main Street
Clarksburg, WV 26301

Re: *Equal Access to Community Festival Funding*

Dear Mr. Fazzini and Harrison County Commissioners:

The Rutherford Institute¹ has learned that the American Civil Liberties Union of West Virginia (ACLU) is threatening to institute a lawsuit against Harrison County unless the County ceases providing funding for “Jesus Fest.” We are writing to inform you that there is ample legal support for a funding program whereby money is appropriated on the basis of neutral criteria to organizations that provide community events with a variety of viewpoints. In fact, the First Amendment strictly forbids government agencies to engage in any type of viewpoint-based discrimination in providing access to this type of public forum.

As the ACLU recognized in its letter, the central demand of the Establishment Clause, as currently interpreted, is neutrality between religious sects and between religion and non-religion.² Because Harrison County regularly supports a number of community festivals and other public events and determines its support based on neutral, even-handed criteria, its funding policy appears to properly achieve this balance. The United States Supreme Court has consistently recognized:

[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients

¹ The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights have been threatened or infringed.

² *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005)(quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

whose ideologies and viewpoints, including religious ones, are broad and diverse.³

In a landmark 1995 decision, *Rosenberger v. Rector and Visitors of the University of Virginia*, the United States Supreme Court considered a First Amendment challenge to a funding program at the University of Virginia that denied access to certain groups because of their religious viewpoint.⁴ The University's policy was to provide funds to student organizations for publication of newsletters, but the University denied funding for the printing of a Christian student organization's newsletter, citing the Establishment Clause as its justification. The High Court held that the denial of funds for the religious group's publication violated the First Amendment. The Court reminded the parties that:

More than once we have rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.⁵

The Court went on to note that the program's neutrality toward religion would distinguish it from a tax being levied for the direct support of a church or group of churches.⁶ For the same reasons, a religiously neutral system of funding community festivals and events does not offend the First Amendment, but rather is required by it.

It is also important to note that, according to the documents obtained by the ACLU, the funds provided by the County Commission for Jesus Fest do not directly benefit any religious group, but rather cover general expenses such as "children's movies" and "second stage cost."⁷ As the Supreme Court noted with regard to the reimbursement for printing costs in *Rosenberger*, "This is a far cry from a general public assessment designed and effected to provide financial support for a church."⁸

Harrison County's support of a diverse array of community festivals is laudable. When support is made available to the organizers of Jesus Fest just as it is made available to the West Virginia Blackberry Festival, the Scottish Festival & Celtic Gathering, and other public events on a religion-blind basis, the County Commission is respecting, rather than offending, the principle of religious neutrality.

³ *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 839 (1995)(citing *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994).

⁴ *Rosenberger*, *supra*.

⁵ *Id.* at 839.

⁶ *Id.* at 840.

⁷ "Harrison County Commission Special Funding Request," attached to ACLU letter, December 20, 2011, as Exhibit 3.

⁸ *Rosenberger*, at 841.

On the other hand, if the County Commission were to deny access to the funding forum for community festivals that it has created, organizers of Jesus Fest might well have a viable cause of action against the Commission for violation of their First Amendment rights. This is because where a government agency opens such a forum, it is absolutely prohibited from denying individuals or groups access to the forum based upon their religious viewpoint.⁹

Thus, it is clear that the constitutionally sound approach is for the Commission to continue to provide funding for a variety of diverse community festivals on a religion-blind basis rather than to risk violating the First Amendment's guarantees of free speech and religious neutrality by engaging in viewpoint-based discrimination.

The Rutherford Institute commends you for your demonstrated commitment to religious neutrality. The course you have taken with regard to community festival funding is one that respects the civil liberties of all citizens—religious and non-religious alike.

If we can provide any assistance to you in this matter, please do not hesitate to contact us.

Sincerely yours,

/s/

Rita Dunaway, Esq.

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⁹See, e.g., *Rosenberger, supra*; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1983); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983).