



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

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900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Richard L. Morris
Member, House of Delegates
Post Office Box 406
Carrollton, Virginia 23218

Dear Delegate Morris:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire whether Isle of Wight County constitutionally may prohibit political organizations and candidates from reserving booth space at the Isle of Wight County Fair or may impose on political booths a fee greater than that charged other participating individuals or organizations.

Response

It is my opinion that, under the facts presented, an absolute prohibition on political booths is not constitutionally permissible and that charging a higher fee for such booths than others is presumptively unconstitutional unless justified by a compelling governmental interest, and unless it is narrowly drawn to meet that interest.

Background

Based upon the information you provided, I understand that the Isle of Wight County Fair (the "Fair") is sponsored and financed, at least in part, by Isle of Wight County (the "County"), and held on County property. The Board of Supervisors delegated authority to conduct the Fair to the Fair Committee (the "Committee"), which is assisted by County employees. Between 25,000 and 50,000 people attend the Fair each year, and it is the largest event held in the County.

You further explain that in the past nonprofit and governmental organizations have applied to operate booths at the Fair, which are designated spaces from which to "discuss and disseminate . . . information to the public." These booths are grouped together in an area on the fairgrounds and have included the Virginia Department of Transportation, the Red Cross, various religious organizations, the NAACP, elected officials, candidates for elected office, and political organizations. Any organization could obtain a booth for a fee of \$25. You state that in 2013 the Committee increased the fee for only the political booths to \$750. In 2014, the Committee prohibited any political booths.

Attached to your request is a letter you received from the Chairman of the County's Board of Supervisors, in which the County explains the decision to prohibit political booths. According to this correspondence, the County's decision was based on complaints from commercial vendors who had booths near political booths. These vendors complained that they lost revenue because Fair patrons appeared to avoid, not only the political booths, but also other booths in the same area. In addition, Fair volunteers reported that some political booth attendants set up signs beyond their allotted space, and Fair patrons complained that they felt harassed, annoyed, or intimidated by political booth attendants. The letter does not discuss the 2013 decision to increase the fees applicable to political booths.

Applicable Law and Discussion

Freedom of speech is protected by the First Amendment to the United States Constitution,¹ and political speech is at the core of the protections offered by the First Amendment.² While the First Amendment limits the restrictions governments may impose on the freedom of speech, it "does not guarantee access to property simply because it is owned or controlled by the government."³ Rather, the constitutionality of a particular restriction on speech depends, in the first instance, on the nature of the property at issue.⁴ The Supreme Court of the United States recognizes two main categories of property for purposes of public access for expressive activities: an area may be either a public forum or a nonpublic forum.⁵

A public forum may be one traditionally open to the public for the expression of ideas, such as a park or streets,⁶ or a facility that, while not historically deemed a public forum, has been made a public forum by the government's opening the area for use by the public for assembly and communication and discussion of ideas, even if on a limited basis.⁷ The government's ability to deny access to a public forum is limited by the First Amendment,⁸ and the government generally may not restrict access to a public forum based on the content of the speech.⁹ A nonpublic forum, on the other hand, is "[p]ublic property which is not by tradition or designation a forum for public communication [and] is governed by different [First Amendment] standards."¹⁰

¹ U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom of speech."). The First Amendment applies to the States through the Fourteenth Amendment. *Burstyn v. Wilson*, 343 U.S. 495. (1952). Freedom of speech also is protected by Article I, § 12 of the Constitution of Virginia. However, the Virginia Supreme Court generally has treated this provision of the Virginia Bill of Rights as coextensive with the First Amendment to the United States Constitution. *See* 2000 Op. Va. Att'y Gen. 177, 180.

² *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'") (further citation omitted).

³ *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981).

⁴ *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

⁵ *See U.S. Postal Serv.*, 453 U.S. at 128-31. Case law also identifies two distinct categories of public fora: traditional and designated, *see, e.g., note 7 infra*.

⁶ *Perry Educ. Ass'n*, 460 U.S. at 45 (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

⁷ *Id.* at 45-46 (describing traditional and designated public fora).

⁸ *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990).

⁹ "To safeguard free speech, the Supreme Court requires that a regulatory measure be content neutral." *Adams Outdoor Adver. v. City of Newport News*, 236 Va. 370, 381, 373 S.E.2d 917, 922 (1988) (citing *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). *See also Carey v. Brown*, 447 U.S. 455, 462-63 (1980).

¹⁰ *Perry Educ. Ass'n*, 460 U.S. at 46.

A threshold issue, therefore, is whether the fairgrounds constitutes a public or nonpublic forum. Such a determination is a highly fact-specific inquiry, based on factors such as the location, purpose, and nature of the facility.¹¹ Based on the facts you provide, I conclude that, in hosting the Fair, the County is operating the fairgrounds as a public forum. Large numbers of citizens visit the Fair to gather as a community, to celebrate local achievements and happenings, to engage in commerce, and to enjoy various recreational and entertainment offerings. Vendors reserve booths to sell products and to distribute informational materials. Although the County has an understandable and reasonable interest in the orderly movement of the large crowds the Fair generates,¹² the County's efforts to maintain order must comply with the Constitution. Specifically, in a public forum, restrictions on the time, place, and manner of speech are valid only so long as they "are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication."¹³

You further advise that the County refuses to allow any politically affiliated group or individual, or any individual in office or running for office, to pay a fee and obtain a space to present information and discuss political views with patrons of the Fair. A regulation that bans public discourse on a specific classification of issues is a content-based restriction on speech, even where the regulation treats equally all viewpoints on those issues.¹⁴ The restriction prohibits political speakers from having the same access to the forum as nonpolitical speakers. Accordingly, the described prohibition on political booths is a content-based regulation.

When government regulation of speech is based on the content of speech, the regulation will be strictly scrutinized.¹⁵ "the Government bears the burden of proving the constitutionality of its actions"¹⁶ and it must demonstrate that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."¹⁷ Such content-based restrictions on speech have been permitted to stand in very few, and only in rather extreme, situations.¹⁸ In its letter, the Committee asserts that the

¹¹ See, e.g., 1996 Op. Va. Att'y Gen. 28, 29; 1994 Op. Va. Att'y Gen. 40, 43-44.

¹² See *Heffron v. Int'l. Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649-50 (1981).

¹³ *Perry Educ. Ass'n*, 460 U.S. at 45. See 1986-87 Op. Va. Att'y Gen. 246 (summarizing instances when the Supreme Court has allowed certain types of restrictions).

¹⁴ *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."). See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (finding state statute establishing speaker disclosure requirement for only those publications that contained speech designed to influence voters in an election to be content-based speech regulation: "even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of the speech").

¹⁵ *Id.*, at 536. "[A] content-based restriction on political speech in a public forum [] must be subjected to the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321 (1988).

¹⁶ *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 814 (2000) (citing *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 183 (1999)).

¹⁷ *Boos*, 485 U.S. at 321 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45).

¹⁸ *United States v. Alvarez*, 132 S.Ct. 2537, 2539 (2012) ("Content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar . . . Among these categories are . . . obscenity, defamation, so-called fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent.") (internal quotation and citations omitted). Indeed, the Supreme Court has found that even the "objective of shielding children [from indecent speech] does not suffice to support a blanket ban, if the protection can be accomplished by a less restrictive alternative." *Playboy Entm't Grp.*, 529 U.S. at 814.

purpose of its ban was to ensure fair attendees were not annoyed by political booths and that they continued to frequent the commercial booths at the fair. A speculative fear of disruption or mere desire to avoid discomfort generally is not a compelling state interest.¹⁹

The blanket prohibition, in addition, does not appear to be a regulation narrowly drawn to achieve the desired effect of protecting patrons at the Fair from interference with their commercial interests or their enjoyment of the Fair. The distinction made by the Committee between booths with a political message and those that are nonpolitical does not appear to be related to the County's stated interest. Whether a booth operator annoys a fairgoer depends on what that fairgoer finds objectionable. Rather than selectively excluding political booths, the County could employ neutral and uniform enforcement of Fair rules relating to literature distribution, booth boundaries, and actual disruption, for example, to serve as a less restrictive measure to address the expressed concerns.²⁰ I therefore conclude that the County constitutionally may not exclude political booths from Fair participation.

With respect to your inquiry regarding fees, I note that the law permits a governmental entity to require a permit, license, or fee related to the use of public property in order to "regulate competing uses of public forums."²¹ Nevertheless, the Court has explained that these requirements "must not be based on the content of the message."²² Indeed, "[c]ontent-based burdens must satisfy the same rigorous scrutiny as its content-based bans."²³ Further, the requirement or restraint must be based upon "narrow, objective and definite standards"²⁴ and may not vest "unbridled discretion in a government official."²⁵ Moreover, "[t]he Equal Protection Clause requires that [regulations] affecting First Amendment interests be narrowly tailored to their legitimate objectives."²⁶

You state that in 2013, the Committee charged politically affiliated organizations or individuals \$750 to reserve a booth at the Fair, although other organizations or individuals paid only \$25 to reserve a booth. Your inquiry does not include an explanation regarding the basis upon which the Committee imposed the higher fee for political booths. If the content of the communication offered at the political booth was the sole basis for the higher fee, that higher fee "is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of the speech."²⁷ The County could overcome the presumption of unconstitutionality only by identifying a compelling state interest to justify higher fees for political booths and showing that the higher fees are narrowly tailored to meet that interest.

¹⁹ See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *Consol. Edison Co.*, 447 U.S. at 541.

²⁰ See *Heffron*, 452 U.S. at 640 (upholding certain content-neutral place and manner restrictions applicable to all participants at the Minnesota State Fair).

²¹ *Forsyth Cnty. v. Nat'list Movement*, 505 U.S. 123, 130 (1992).

²² *Id.*

²³ *Playboy Entm't Grp.*, 529 U.S. at 812.

²⁴ *Forsyth Cnty.*, 505 U.S. at 131.

²⁵ *Id.* at 133.

²⁶ *Mosley*, 408 U.S. at 101.

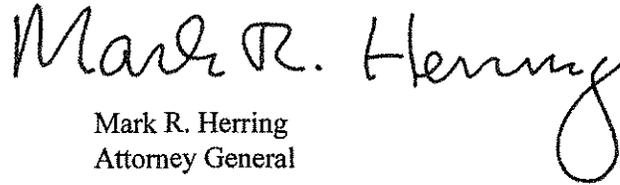
²⁷ See *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)).

Conclusion

Accordingly, for the reasons stated above, it is my opinion that, under the facts presented, an absolute prohibition on political booths is not constitutionally permissible and that charging a higher fee for such booths than others is presumptively unconstitutional unless justified by a compelling governmental interest, and unless it is narrowly drawn to meet that interest.²⁸

With kindest regards, I am

Very truly yours,


Mark R. Herring
Attorney General

²⁸ This Opinion does not apply to the ability of the county to enact and enforce uniform regulations for conduct at the Fair, such as placing signs at locations other than booths, distributing written materials away from booths, or disruptive conduct, so long as the regulations are content-neutral and are enforced equally, without regard to content.