



Distribution of “180” DVDs on Public Sidewalks Near High Schools

The Alliance Defense Fund (ADF) is a legal alliance defending the right to hear and speak the Truth through strategy, training, funding, and litigation. We write this memorandum to provide you with guidance on the constitutional right to distribute informational materials such as the “180” DVD to students and community members in public places. The fact that the “180” DVDs contain Holocaust images that some people may perceive as offensive does not deprive them of First Amendment protection.

The Distribution of “180” DVDs on Public Streets and Sidewalks, Even Those Abutting High Schools, is Constitutionally Protected.

Private citizens have the constitutional right to distribute DVDs, books, literature, and other materials that communicate a message in public places. The Supreme Court has held that “[t]he liberty of the press is not confined to newspapers and periodicals.... The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.” *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 452 (1938) (emphasis added) (holding that a city ordinance requiring prior approval to distribute literature was facially unconstitutional). Recently, the Supreme Court reiterated that “[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas.... That suffices to confer First Amendment protection.” *Brown v. Entertainment Merchants Ass’n*, 131 S.Ct. 2729, 2733 (2011) (emphasis added). This right includes the distribution of materials that communicate a religious message, which have “the same claim as the others to the guarantees of freedom of speech and freedom of the press.” *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 109 (1943) (striking down a law that required payment of license fees to distribute religious pamphlets).

The right to distribute informational materials extends to all “‘public places’ historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks.” *United States v. Grace*, 461 U.S. 171, 177 (1983). In particular, “[s]idewalks...are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.” *Id.* at 179.

Even sidewalks located adjacent to a public high school are available for use by citizens as long as the speech or activity does not materially disrupt the operation of the school. The Supreme Court has held that “the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public.” *Grayned v. City of*

Rockford, 408 U.S. 104, 118 (1972). So long as the distribution does not “interfere[e] with normal school activities,” literature distribution on sidewalks near a school “can effectively publicize [the informational message] to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students.” *Id.* at 118-19.

The “180” DVDs Cannot be Restricted Based Upon Their Content or the Holocaust and Abortion Images Contained in the Video.

Neither school officials nor city enforcement officers can prohibit the distribution of the “180” DVDs based upon the pro-life message or Holocaust images contained in the video. The Supreme Court has held that “[r]egulations that permit the government to discriminate on the basis of content cannot be tolerated under the First Amendment.” *Simon & Schuster, Inc. v. Members of NY State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). A restriction is content-based if it is premised on the likes or dislikes of the audience. As a result, the “[l]isteners’ reaction to speech is not a content-neutral basis for regulation.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (emphasis added). Indeed, “it is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations.” *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (internal citation omitted).

Pursuant to this well-settled principle, the Supreme Court has routinely struck down regulations that operate as heckler's vetoes. In *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971), for instance, the Supreme Court held that a Cincinnati ordinance that made it a criminal offense for three or more people to assemble on the sidewalk and conduct themselves in such a manner as to annoy passers-by, was unconstitutional. The Court stated that “[o]ur decisions establish that mere public intolerance or animosity cannot be the basis for abridgement of these constitutional freedoms.” *Id.* at 615. The same holds true for speech on or near school grounds, where “the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.” *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001).

Furthermore, the fact that the informational materials contain images or information that some may consider disturbing or offensive does not provide a basis to prohibit its distribution to minors. Recently, the Supreme Court struck down a California law that prohibited the sale of violent video games to minors. *Brown v. Entertainment Merchants Ass’n*, 131 S.Ct. 2729 (2011). “As a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Id.* at 2733. Speech cannot be deprived of First Amendment protection “by a legislature that concludes certain speech is too harmful to be tolerated.” In *Brown*, some of the video games subject to the ban were extremely violent: “[v]ictims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown.” *Id.* at 2749 (Alito, J., concurring). But despite the disturbing images contained in the games, “disgust is not a valid basis for restricting expression.” *Id.* at 2738. This is because “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined

circumstances may government bar public dissemination of protected materials to them.” *Id.* at 2735. “Speech that is neither obscene as to youths [which the Court earlier stated applies only to “depictions of sexual conduct,” *id.* at 2734] nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Id.* at 2736. If such restrictions were allowed, “[i]t could be made criminal to admit a person under 18 to church, or to give a person under 18 a religious tract, without his parents’ prior consent.” *Id.* at 2736, n.3. Such restrictions are “obviously an infringement upon the religious freedom of young people and those who wish to proselytize young people.” *Id.*

In sum, there is no basis for school or city officials to prohibit the distribution of the “180” DVDs by claiming that the video is offensive to minors. The Supreme Court’s holding in *Brown* clearly limits the authority of government officials to restrict speech simply because it contains Holocaust or abortion images or content. If such protection applies to video games that have limited social value, it applies even more so to the “180” DVD and its discussion of the horrors of the Holocaust and abortion. Any attempt by a school or city official to restrict the distribution of the “180” DVD would subject said official to legal liability, including damages and attorney’s fees under 42 U.S.C. § 1983, for violating the First Amendment rights of the distributors of the DVD.

Conclusion

We hope this information has been helpful in understanding the First Amendment rights of community members to distribute the “180” DVDs to students, teachers, and other members of the community on public sidewalks and streets near high schools. If you would like more information or assistance about a particular situation, please feel free to contact us at the Alliance Defense Fund at 1-800-TELL-ADF.

Sincerely,



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