

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

HIGHER SOCIETY OF INDIANA, INC.,)
)
Plaintiff,)
)
v.) Cause No. 4:16-cv-43
)
TIPPECANOE COUNTY, INDIANA,)
)
Defendant.)

OPINION & ORDER

The Higher Society of Indiana wants to hold a rally advocating the legalization of marijuana on the steps of the Tippecanoe County Courthouse. It seems like a reasonable place to get the message out since that is the very place where prosecutions for marijuana possession and sale occur. But the County’s policy requires events on the courthouse grounds to be “sponsored and prepared by a department or office of county government” and scheduled through the Board of Commissioners. And despite a request, the County has refused to sponsor an event by the Higher Society. The group filed this case and has moved for a preliminary injunction on grounds that the County has used its events policy to discriminate against speakers on the basis of viewpoint in violation of the First Amendment of the U.S. Constitution.

A hearing was held on the motion for preliminary injunction. Although no evidence was offered at the hearing other than the documentary evidence already attached to the briefing, oral argument was held. During its argument, the County candidly admitted that the reason it did not sponsor the Higher Society’s rally was

because it didn't agree with the group's message. The County argues that it may engage in viewpoint discrimination because activities and speeches that take place on the courthouse steps are "government speech" that is not entitled to constitutional protection. As a result, the County's position is that it can pick and choose what messages are conveyed from the grounds of the courthouse. For the reasons outlined below, I think that the County's argument stretches the concept of "government speech" to its breaking point, and so the motion for a preliminary injunction will be granted.

Background

The Tippecanoe County Courthouse occupies one square city block in downtown Lafayette, Indiana and houses the county's state courts and county offices. (DE 15 at 2, 9; DE 18 at 1-2.) To fully understand this case, one needs to understand the physical layout of the courthouse and the surrounding grounds which are landscaped and include plush greenery, paved paths, several monuments, a fountain, and benches, and all of which are open to and used by the public. (DE 15 at 2-3; DE 18 at 1-2.) The northern entrance is on Main Street and is permanently closed. The southern entrance to the Courthouse is on Columbia Street and is the only entrance for visitors. The eastern entrance is on Fourth Street and is reserved for the transport of prisoners by the Sheriff. The western entrance is on Third Street and is reserved for county employees. The Main Street and Third Street entrances are separated from the sidewalk by a short flight of stairs and are flanked by two larger staircases that rise to balconies overlooking the

street. (See DE 15 at 2–3, 16; *see also* DE 18-1 at 13 (showing Third Street entrance).) The Columbia Street entrance is separated from the public sidewalk by three stairs and is similarly flanked by two staircases that rise to a balcony and colonnade. (See DE 18-1 at 18; DE 15 at 2–3, 16.)

In 1999, the Tippecanoe County Board of Commissioners voted to change the County’s policy on displays and events on government property to ensure that private activities did not disrupt official business and that County property was available for County uses. (DE 15 at 3; DE 18 at 2–3.) Although there’s nothing in the record about the extent to which the courthouse grounds were available to the public for protests, rallies, and other events before the policy was changed, it’s clear that the County intended the courthouse grounds to be a “nonpublic forum” moving forward, which is to say an area where the government may impose restrictions on speech or even ban expressive activities, so long as it doesn’t discriminate on the basis of viewpoint. (See DE 2-2.) Here’s what the revised policy, which remains in effect today, says:

**POLICY ON DISPLAYS AND EVENTS ON
GOVERNMENT PROPERTY
(CLOSED FORUM)**

Only displays and events sponsored and prepared by a department or office of county government will be allowed in the windows of the Tippecanoe County Office Building or on the grounds of the Tippecanoe County Courthouse. Said displays and events shall be scheduled through the Board of Commissioners of the County of Tippecanoe.

(DE 15 at 3; DE 18-1 at 19.)

Under this policy, any group that wishes to hold an event on the courthouse grounds must solicit the support of a commissioner, who then must request sponsorship by the full County board. (See DE 18 at 4; DE 15 at 8.) The County's professed aim is to restrict the use of courthouse property to "private groups that are in essence echoing the views of the government agency that is sponsoring them." (See DE 18 at 4 (internal quotation marks and citations omitted).) This is a rather curious claim in light of the fact that the County does not inquire into the content of the messages the group would convey before deciding whether to sponsor an event, and there's nothing to suggest that the County in any way controls what a group says once an event is sponsored.

County-Sponsored Events

Since the policy change, the County has continued to allow ostensibly private events to take place on courthouse grounds. For example, soon after changing the policy, the County passed a resolution permitting the Round the Fountain Art Fair to be held annually on the courthouse grounds. (DE 15-1 at 6; DE 15 at 5.) Although the fair's name suggests it is confined to an area surrounding a fountain in the northeast corner of the block, it actually takes place across the courthouse grounds and on the surrounding sidewalks and streets. (See DE 15 at 5.) Consistent with the County's sponsorship of the fair, County commissioners and maintenance department help with preparations and handle logistics for the fair. (*Id.*; DE 15-1 at 6.)

The County also has sponsored other events by private groups on the courthouse

grounds. For example, in 2015, the County board authorized the League of Women Voters to hold a rally celebrating its 95th anniversary on one staircase, the balcony, and the plaza outside the Fourth Street entrance. (DE 18 at 3; DE 18-1 at 42–45.) That rally, which attracted approximately 100 people, was held on a weekday, just after the close of business. (*Id.*) Similarly, the County sponsored a rally by the Fraternal Order of Police in 2014. (DE 18-1 at 46–48.) The FOP rally took place at lunchtime on a weekday on the Main Street entrance stairs. (*See id.*) Neither the League of Women Voters nor the FOP’s sponsorship agreement with the County board included any specifics about the messages that would be conveyed at those events. (*See generally* DE 18-1 at 42–48.)

Private Events Held Without Permission

In addition to County-sponsored events, other private groups have held events on the courthouse steps without County permission. For example, in 2015, a group called Eyes on Lafayette requested authorization to hold a candlelight vigil against bullying on the courthouse steps. (DE 15-2 at 14–15.) A County employee responded that, while it was too late to get County sponsorship and approval, the event could be held on the sidewalk surrounding the courthouse without permission. (*Id.* at 14.) The vigil was held a few days later in the evening, and the group made use of the courthouse steps in addition to the sidewalk. (DE 15-4 at 2–5 (reproducing pictures from D. Peers McCoy, *Lafayette Crowd Remembers Bullying Victims*, Lafayette J. & Courier, June 5, 2015, www.jconline.com/story/news/education/2015/06/04/lafayette-crowd-remembers-bullying-victims/28517089/.) It was reported that more than 50 people

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