SUPREME COURT OF THE UNITED STATES

Nos. 91–155 AND 91–339

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH, PETITIONERS

91–155 *v.*

WALTER LEE

WALTER LEE, SUPERINTENDENT OF PORT AUTHORITY POLICE

91–339 *v.*

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 1992]

JUSTICE SOUTER, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in the judgment in No. 91–339 and dissenting in No. 91–155.

I join in Part I of JUSTICE KENNEDY's opinion and the judgment of affirmance in No. 91–339. I agree with JUSTICE KENNEDY's view of the rule that should determine what is a public forum and with his conclusion that the public areas of the airports at issue here qualify as such. The designation of a given piece of public property as a traditional public forum must not merely state a conclusion that the property falls within a static category including streets, parks, sidewalks and perhaps not much more, but must represent a conclusion that the property is no different in principle from such examples, which we have previously described as "archetypes" of property from which the government was and is powerless to exclude speech. See *Frisby* v. *Schultz*, 487 U. S. 474, 480 (1988). To treat the class of such forums as closed by their description as "traditional," taking that word merely as a charter for examining the

history of the particular public property claimed as a forum, has no warrant in a Constitution whose values are not to be left behind in the city streets that are no longer the only focus of our community life. If that were the line of our direction, we might as well abandon the public forum doctrine altogether.

Nor is that a Scylla without Charybdis. Public forum analysis is stultified not only by treating its archetypes as closed categories, but by treating its candidates so categorically as to defeat their identification with the archetypes. We need not say that all "transportation nodes" or all airports are public forums in order to find that certain metropolitan airports are. Thus, the enquiry may and must relate to the particular property at issue and not necessarily to the "precise classification of the property." See *ante*, at 6 (KENNEDY, J., concurring in judgment). It is true that property of some types will invariably be public forums. "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby*, *supra*, at 481. But to find one example of a certain property type (*e.g.,* airports, post offices, etc.) that is not a public forum is not to rule out all properties of that sort. Cf. *United States* v. *Kokinda*, 497 U. S. 720, 727 (1990) (plurality opinion of O'CONNOR, J.), (implicitly rejecting the categorical approach by examining whether "[t]he postal sidewalk at issue . . . [has] the characteristics of public sidewalks traditionally open to expressive activity"). One can imagine a public airport of a size or design or need for extraordinary security that would render expressive activity incompatible with its normal use. But that would be no reason to conclude that one of the more usual variety of metropolitan airports is not a public forum.

I also agree with JUSTICE KENNEDY's statement of the public forum principle: we should classify as a public forum any piece of public property that is "suitable for discourse" in its physical character, where expressive activity is "compatible" with the use to which it has actually been put. See *ante*, at 7, 6 (KENNEDY, J., concurring in judgment); see also *Grayned* v. *City of Rockford*, 408 U. S. 104, 116

(1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"); *ante*, at 8 (O'CONNOR, J., concurring in No. 91–155 and concurring in judgment in No. 91–339) (finding that the ban on the sale or distribution of leaflets here must be struck down "[b]ecause I cannot see how peaceful pamphleteering is incompatible with the multipurpose environment of the Port Authority airports," and concluding that regulations of leafletting may thus only be upheld if they pass scrutiny under our test for restrictions on time, place or manner of speech). Applying this test, I have no difficulty concluding that the unleased public areas at airports like the metropolitan New York airports at issue in this case are public forums.

From the Court's conclusion in No. 91–155, however, sustaining the total ban on solicitation of money for immediate payment, I respectfully dissent. "We have held the solicitation of money by charities to be fully protected as the dissemination of ideas. See [*Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781,] 787–789 [(1988)]; *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 959–961 (1984); *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 628–632 (1980). It is axiomatic that, although fraudulent misrepresentation of facts can be regulated, the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 803 (1988) (SCALIA, J., concurring in part and concurring in judgment) (some citations omitted).

Even if I assume arguendo that the ban on the petitioners' activity at issue here is both content neutral and merely a restriction on the manner of communication, the regulation must be struck down for its failure to satisfy the requirements of narrow

tailoring to further a significant state interest, see, *e.g.*, *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984), and availability of "ample alternative channels for communication." *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976).

As JUSTICE KENNEDY's opinion indicates, the respondent comes closest to justifying the restriction as one furthering the government's interest in preventing coercion and fraud.[1] The claim to be preventing coercion is weak to start with. While a solicitor can be insistent, a pedestrian on the street or

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[1]Respondent also attempts to justify its regulation on the alternative basis of "interference with air travelers," referring in particular to problems of "annoyance," and "congestion." Brief for Respondent 24–25, 42–44, 47. The First Amendment inevitably requires people to put up with annoyance and uninvited persuasion. Indeed, in such cases we need to scrutinize restrictions on speech with special care. In their degree of congestion, most of the public spaces of these airports are probably more comparable to public streets than to the fairground as we described it in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 651 (1981). Consequently, the congestion argument, which was held there to justify a regulation confining solicitation to a fixed location, should have less force here. See *id.*, at 650–651. Be that as it may, the conclusion of a majority of the Court today that the Constitution forbids the ban on the sale, as well as the distribution, of leaflets puts to rest respondent's argument that congestion justifies a total ban on solicitation. While there may, of course, be congested locations where solicitation could severely compromise the efficient flow of pedestrians, the proper response would be to tailor the restrictions to those choke points.

airport concourse can simply walk away or walk on. In any event, we have held in a far more coercive context than this one, that of a black boycott of white stores in Claiborne County, Mississippi, that "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 910 (1982). See also *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971) ("The claim that . . . expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper"). Since there is here no evidence of any type of coercive conduct, over and above the merely importunate character of the open and public solicitation, that might justify a ban, see *United States* v. *O'Brien*, 391 U. S. 367 (1968); *Claiborne Hardware Co.*, *supra*, at 912, the regulation cannot be sustained to avoid coercion.

As for fraud, our cases do not provide government with plenary authority to ban solicitation just because it could be fraudulent. "Broad prophylactic rules in the area of free expression are suspect," *NAACP* v. *Button*, 371 U. S. 415, 438 (1963), and more than a laudable intent to prevent fraud is required to sustain the present ban. See, e.g., *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 636–638 (1980) ("The Village, consistently with the First Amendment, may not label such groups `fraudulent' and bar them from canvassing on the streets and house to house"); *Riley*, *supra*, at 800. The evidence of fraudulent conduct here is virtually nonexistent. It consists of one affidavit describing eight complaints, none of them substantiated, "involving some form of fraud, deception, or larceny" over an entire 11–year period between 1975 and 1986, during which the regulation at issue here was, by agreement, not

enforced. See Brief for Respondent 44; Brief for Petitioners 46. Petitioners claim, and respondent does not dispute, that by the Port Authority's own calculation, there has not been a single claim of fraud or misrepresentation since 1981. *Ibid.* As against these facts, respondent's brief is ominous in adding that "[t]he Port Authority is also aware that members of [International Society for Krishna Consciousness] have engaged in misconduct elsewhere." Brief for Respondent 44. This is precisely the type of vague and unsubstantiated allegation that could never support a restriction on speech. Finally, the fact that other governmental bodies have also enacted restrictions on solicitation in other places, see, *e.g.*, 36 CFR §7.96(h) (1991), is not evidence of fraudulent conduct.

Even assuming a governmental interest adequate to justify some regulation, the present ban would fall when subjected to the requirement of narrow tailoring. See *Riley*, *supra*, at 800; *Schaumburg*, *supra,* at 637 ("The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms"). "Precision of regulation must be the touchstone . . . ." *Button*, *supra*, at 438. Thus, in *Schaumburg* we said:

> "The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether

> to contribute . . . .” 444 U. S., at 637–638 (citations and footnotes omitted).

Similarly, in *Riley* we required the state to cure its perceived fraud problem by more narrowly tailored means than compelling disclosure by professional fundraisers of the amount of collected funds that were actually turned over to charity during the previous year:

> “In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available. For example, as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation. Alternatively, the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements.” 487 U. S., at 800.

Finally, I do not think the Port Authority's solicitation ban leaves open the “ample” channels of communication required of a valid content-neutral time, place and manner restriction. A distribution of preaddressed envelopes is unlikely to be much of an alternative. The practical reality of the regulation, which this Court can never ignore, is that it shuts off a uniquely powerful avenue of communication for organizations like the International Society for Krishna Consciousness, and may, in effect, completely prohibit unpopular and poorly funded groups from receiving funds in response to protected solicitation. Compare *Linmark Associates, Inc.* v. *Willingboro*, 431

U. S. 85, 93 (1977) ("Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like").

Accordingly, I would reverse the judgment of the Court
of Appeals in No. 91–155, and strike down the ban on solicitation.