National Review Online

Town of Greece Decision Brings Needed Common Sense to Establishment Clause . . . and to New York City

By Jordan Lorence

May 9, 2014 10:53 AM

The U.S. Supreme Court's decision in the *Town of Greece v. Galloway* prayer case brings a common-sense balance to the understanding of the Establishment Clause, an area of law fraught with fevered and excessive applications.

This week, Alliance Defending Freedom, which litigated the *Town of Greece* case, asked the en banc U.S. Court of Appeals for the Second Circuit to use that decision to reverse a recent 2–1 panel decision in another important case that ADF is litigating. That decision upheld New York City's exclusion of religious worship services from a policy allowing local groups to rent vacant public schools for any activity "pertaining to the welfare of the community."

ADF represents a small evangelical church, Bronx Household of Faith, which has been challenging this policy that has kept the congregation's worship services out of nearby schools since 1995. In early April, the Second Circuit ruled that the New York City Department of Education's concern about a possible violation of the Establishment Clause allows it to violate the First Amendment rights of religious groups by excluding their worship services. The *Town of Greece* decision rejects that overly Establishment Clause-centric view of religious liberty and freedom of speech.

ADF submitted a letter Tuesday to the Second Circuit pointing out three ways the *Town of Greece* decision rejects the panel's extreme view of the Establishment Clause in its *Bronx Household of Faith* decision. The Supreme Court said that, "so long as the town maintains a policy of nondiscrimination" among religions, it does not violate the Establishment Clause. Certainly, New York City does not violate the Establishment Clause when it opens the doors of its empty school buildings to community groups to use on a first-come, first-served basis. This is government accommodation of religion, which is not government endorsement of religion.

Second, the Supreme Court said that "the Establishment Clause must be interpreted by reference to historical practices and understandings" and then referred to the fact that the House of

Representatives created an office of the chaplain to lead prayers for that body within days of approving the text of the Establishment Clause. Similarly, history informs the Bronx Household of Faith situation. Congress allowed churches to conduct worship services in the U.S. Capitol for about 70 years, from about 1800 until after the Civil War. While president, Thomas Jefferson attended weekly worship services at the House of Representatives.

In *Town of Greece*, the Supreme Court wrote that the Establishment Clause prohibits the government from excessively entangling itself with religion when it "seek[s] to define permissible categories of religious speech" by dissecting prayers in order to determine which are too "sectarian" and which are acceptable. Similarly in *Bronx Household of Faith*, New York City school district officials were deciding whether a religious meeting was a forbidden "worship service" or an acceptable religious meeting. Such determinations are not the business of the government.

Right now, churches and other religious congregations are still meeting in the schools because the Second Circuit has not yet allowed the panel decision to go into effect, which means the lower-court order finding the policy unconstitutional remains in effect for now. If the Second Circuit votes to reject our petition for re-hearing, ADF will likely appeal the case to the U.S. Supreme Court.

The Supreme Court's decision in *Town of Greece* brings a more balanced approach to the Establishment Clause doctrine. It refutes the extreme notion pushed by separationist groups that, in essence, the Establishment Clause requires the government to go on a "search and destroy" mission to obliterate religious expression from public life, no matter what the context, and no matter whether the religious expression is state-sponsored or initiated by private speakers.

Town of Greece shows that New York City is wrong to think that Establishment Clause "concerns" require this policy banning worship services. The government does not show "neutrality" towards religion by treating religious groups and their expression worse than everyone else.

— Jordan Lorence is senior counsel with Alliance Defending Freedom, which represents Bronx Household of Faith in its lawsuit at the U.S. Court of Appeals for the 2nd Circuit. ADF also represented the town of Greece in its case at the U.S. Supreme Court.

http://www.nationalreview.com/bench-memos/377631/town-greece-decision-brings-needed-common-sense-establishment-clause-and-new-york