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 O'CONNOR, concurring in 91–155 and concurring in the judgment in 91–339.

In the decision below, the Court of Appeals upheld a ban on solicitation of funds within the airport terminals operated by the Port Authority of New York and New Jersey, but struck down a ban on the repetitive distribution of printed or written material within the terminals. 925 F. 2d 576 (CA2 1991). I would affirm both parts of that judgment.

I concur in the Court's opinion in No. 91–155 and agree that publicly owned airports are not public fora. Unlike public streets and parks, both of which our First Amendment jurisprudence has identified as "traditional public fora," airports do not count among their purposes the "free exchange of ideas," *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 800 (1985); they

have not "by long tradition or by government fiat . . . been devoted to assembly and debate;" *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983); nor have they "time out of mind, . . . been used for purposes of . . . communicating thoughts between citizens, and discussing public questions," *Hague* v. *CIO*, 307 U. S. 496, 515 (1939). Although most airports do not ordinarily restrict public access, "[p]ublicly owned or operated property does not become a `public forum' simply because members of the public are permitted to come and go at will." *United States* v. *Grace*, 461 U. S. 171, 177 (1983); see also *Greer* v. *Spock*, 424 U. S. 828, 836 (1976). "[W]hen government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's official business." *Perry*, *supra*, at 53. There is little doubt that airports are among those publicly owned facilities that could be closed to all except those who have legitimate business there. See *Grace*, *supra*, at 178. Public access to airports is thus not "inherent in the open nature of the locations," as it is for most streets and parks, but is rather a "matter of grace by government officials." *United States* v. *Kokinda*, 497 U. S. 720, 743 (1990) (Brennan, J., dissenting). I also agree with the Court that the Port Authority has not expressly opened its airports to the types of expression at issue here, see *ante*, at 7, and therefore has not created a "limited" or "designated" public forum relevant to this case.

For these reasons, the Port Authority's restrictions on solicitation and leafletting within the airport terminals do not qualify for the strict scrutiny that applies to restriction of speech in public fora. That airports are not public fora, however, does not mean that the government can restrict speech in whatever way it likes. "The Government, even when acting in its proprietary capacity, does not enjoy absolute

freedom from First Amendment constraints." *Kokinda, supra*, at 725 (plurality opinion). For example, in *Board of Airport Commrs. of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569 (1987), we unanimously struck down a regulation that prohibited "all First Amendment activities" in the Los Angeles International Airport (LAX) without even reaching the question whether airports were public fora. *Id.*, at 574–575. We found it "obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech." *Id.*, at 575. Moreover, we have consistently stated that restrictions on speech in nonpublic fora are valid only if they are "reasonable" and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U. S., at 46; see also *Kokinda*, *supra*, at 731; *Cornelius, supra*, at 800; *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 303 (1974). The determination that airports are not public fora thus only begins our inquiry.

"The reasonableness of the Government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances." *Cornelius, supra*, at 809. "`[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.'" *Kokinda*, *supra*, at 732, quoting *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 650–651 (1981). In this case, the "special attributes" and "surrounding circumstances" of the airports operated by the Port Authority are determinative. Not only has the Port Authority chosen *not* to limit access to the airports under its control, it has created a huge complex open to travelers and nontravelers alike. The airports house

restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, commercial advertising displays, bookstores, newsstands, dental offices and private clubs. See 1 App. 183–185 (Newark); *id.*, at 185–186 (JFK); *id.*, at 190–192 (LaGuardia). The International Arrivals Building at JFK Airport even has two branches of Bloomingdale's. *Id.*, at 185–186.

We have said that a restriction on speech in a nonpublic forum is "reasonable" when it is "consistent with the [government's] legitimate interest in `preserv[ing] the property . . . for the use to which it is lawfully dedicated.'" *Perry*, *supra*, at 50–51, quoting *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 129–130 (1981) (internal quotation marks omitted). Ordinarily, this inquiry is relatively straightforward, because we have almost always been confronted with cases where the fora at issue were discrete, single-purpose facilities. See, *e.g.*, *Kokinda*, *supra* (dedicated sidewalk between parking lot and post office); *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.,* 473 U. S. 788 (1985) (literature for charity drive); *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984) (utility poles); *Perry*, *supra* (interschool mail system); *United States Postal Service* v. *Council of Greenburgh Civic Assns., supra*, (household mail boxes); *Adderley* v. *Florida*, 385 U. S. 39 (1966) (curtilage of jailhouse). The Port Authority urges that this case is no different and contends that it, too, has dedicated its airports to a single purpose—facilitating air travel—and that the speech it seeks to prohibit is not consistent with that purpose. But the wide range of activities promoted by the Port Authority is no more directly related to facilitating air travel than are the types of activities in which ISKCON wishes to engage. See *Jews for Jesus, supra*, at 576

("The line between airport-related speech and nonairport-related speech is, at best, murky"). In my view, the Port Authority is operating a shopping mall as well as an airport. The reasonableness inquiry, therefore, is not whether the restrictions on speech are "consistent with . . . preserving the property" for air travel, *Perry*, *supra*, at 50–51 (internal quotation marks and citation omitted), but whether they are reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately created.

Applying that standard, I agree with the Court in No. 91–155 that the ban on solicitation is reasonable. Face-to-face solicitation is incompatible with the airport's functioning in a way that the other, permitted activities are not. We have previously observed that "[s]olicitation impedes the normal flow of traffic [because it] requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. . . . As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information." *Kokinda*, 497 U. S., at 733–734 (plurality opinion) (citations omitted); *id.*, at 739 (KENNEDY, J., concurring in judgment) (accepting Postal Service's judgment that, given its past experience, "in-person solicitation deserves different treatment from alternative forms of solicitation and expression"); *Heffron, supra*, at 657 (Brennan, J., concurring in part and dissenting in part) (upholding partial restriction on solicitation at fair grounds because of state interest "in protecting its fairgoers from fraudulent, deceptive, and misleading solicitation practices"); *id.*, at 665 (BLACKMUN, J.,

concurring in part and dissenting in part) (upholding partial restriction on solicitation because of the "crowd control problems" it creates). The record in this case confirms that the problems of congestion and fraud that we have identified with solicitation in other contexts have also proved true in the airports' experience. See App. 67–111 (affidavits). Because airports users are frequently facing time constraints, and are traveling with luggage or children, the ban on solicitation is a reasonable means of avoiding disruption of an airport's operation.

In my view, however, the regulation banning leafletting—or, in the Port Authority's words, the "continuous or repetitive . . . distribution of . . . printed or written material"—cannot be upheld as reasonable on this record. I therefore concur in the judgment in No. 91–339 striking down that prohibition. While the difficulties posed by solicitation in a nonpublic forum are sufficiently obvious that its regulation may "rin[g] of common-sense,'' *Kokinda*, *supra*, at 734 (internal quotation marks and citation omitted), the same is not necessarily true of leafletting. To the contrary, we have expressly noted that leafletting does not entail the same kinds of problems presented by face-to-face solicitation. Specifically, "[o]ne need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand . . . . `The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead the recipient is free to read the message at a later time.'" *Ibid.* (plurality opinion), quoting *Heffron*, 452 U. S., at 665 (BLACKMUN, J., concurring in part and dissenting in part). With the possible exception of avoiding litter, see *Schneider* v. *State*, 308 U. S. 147, 162 (1939), it is difficult to point to any problems intrinsic to the act of leafletting that would make it naturally incompatible with a large, multipurpose forum such as those at issue here.

We have only once before considered restrictions on speech in a nonpublic forum that sustained the kind of extensive, nonforum-related activity found in the Port Authority airports, and I believe that case is instructive. In *Greer* v. *Spock*, 424 U. S. 828 (1976), the Court held that even though certain parts of a military base were open to the public, they still did not constitute a public forum in light of "`the historically unquestioned power of [a] commanding officer summarily to exclude civilians from the area of his command.'" *Id.,* at 838, quoting *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 893 (1961). The Court then proceeded to uphold a regulation banning the distribution of literature without the prior approval of the base commander. In so doing, the Court "emphasized" that the regulation on leafletting did "not authorize the Fort Dix authorities to prohibit the distribution of conventional political campaign literature." Rather, the Court explained, "[t]he only publications that a military commander may disapprove are those that he finds constitute `a clear danger to [military] loyalty, discipline, or morale'" and that "[t]here is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." 424 U. S., at 840 (citation omitted). In contrast, the regulation at issue in this case effects an absolute prohibition and is not supported by any independent justification outside of the problems caused by the accompanying solicitation.

Moreover, the Port Authority has not offered any justifications or record evidence to support its ban on the distribution of pamphlets alone. Its argument is focused instead on the problems created when literature is distributed in conjunction with a solicitation plea. Although we do not "requir[e] that . . . proof be present to justify the denial of

access to a nonpublic forum on grounds that the proposed use may disrupt the property's intended function," *Perry*, 460 U. S., at 52, n. 12, we have required some explanation as to why certain speech is inconsistent with the intended use of the forum. In *Kokinda*, for example, we upheld a regulation banning solicitation on postal property in part because the Postal Service's 30-year history of regulation of solicitation in post offices demonstrated that permitting solicitation interfered with its postal mission. 497 U. S., at 731–732 (plurality opinion). Similarly, in *Cornelius*, we held that it was reasonable to exclude political advocacy groups from a fundraising campaign targeted at federal employees in part because "the record amply support[ed] an inference" that the participation of those groups would have jeopardized the success of the campaign. 473 U. S., at 810. Here, the Port Authority has provided no independent reason for prohibiting leafletting, and the record contains no information from which we can draw an inference that would support its ban. Because I cannot see how peaceful pamphleteering is incompatible with the multipurpose environment of the Port Authority airports, I cannot accept that a total ban on that activity is reasonable without an explanation as to why such a restriction "preserv[es] the property" for the several uses to which it has been put. *Perry*, *supra*, at 50–51 (internal quotation marks and citation omitted).

Of course, it is still open for the Port Authority to promulgate regulations of the time, place, and manner of leafletting which are "content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, *supra*, at 45; *United States Postal Service*, 453 U. S., at 132. For example, during the many years that this litigation has been in progress, the Port Authority has not banned *sankirtan* completely from JFK International Airport, but has

restricted it to a relatively uncongested part of the airport terminals, the same part that houses the airport chapel. Tr. of Oral Arg. 5–6, 46–47. In my view, that regulation meets the standards we have applied to time, place, and manner restrictions of protected expression. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984).

I would affirm the judgment of the Court of Appeals in both No. 91–155 and No. 91–339.