No.

IN THE

Supreme Court of the United States

MEMORIAL DAY WEEKEND SALUTE
TO VETERANS CORPORATION, PETITIONER

v.

BILL WICKERSHAM; MAUREEN DOYLE

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DALE C. DOERHOFF
Counsel of Record

Cook, Vetter, Doerhoff & Landwehr, P.C.
231 Madison Street
Jefferson City, MO 65101
(573) 635-7977

Attorneys for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

Blank Page

QUESTIONS PRESENTED

1. Whether the Eighth Circuit departed from established principles that previously protected non-governmental organizers of public events and festivals like the Memorial Day air show from "state actor" status under 42 U.S.C. § 1983 and created a conflict with decisions from the Fourth and Sixth Circuits.

2. Whether the First Amendment allows the non-governmental organizers of public events and festivals such as the Memorial Day air show to choose their message without being compelled to include extraneous messages.

RULE 29.6

Petitioner has no parent corporations, and there are no publicly held companies that hold 10% or more of petitioner's stock

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

Blank Page

INTRODUCTION

In a case that has drawn the attention of organizers of Memorial Day events, air shows, and other public events and festivals, the Eighth Circuit has broadened the scope of "state actor" liability under 42 U.S.C. § 1983 beyond accepted understandings. As a result of the Eight Circuit decision, non-governmental organizers of public events and festivals like Memorial Day air shows are faced with an all but impossible dilemma and an enormous financial risk. If they continue to rely on public services, especially police protection, will they become "state actors" under §1983 and lose their existence to back-breaking fee awards as they try to protect themselves from unwanted messages?

When confronted with substantially identical facts, the Fourth and Sixth Circuit came down on the side of non-governmental organizers and held that they do not become "state actors" under §1983. This Court needs to resolve this conflict and eliminate the uncertainty now hanging over public events and festivals all over the country.

In addition to the opportunity to resolve the "state actor" issue and settle the conflict between the circuits, this case also presents a unique opportunity for the Court to clarify the scope of First Amendment rights of organizers of public events and festivals to their own message and their freedom from unwanted messages. The Eighth Circuit unduly restricted the First Amendment principles set out in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), by adding "disruption" and

"dilution" tests that are not found in *Hurley* and are inconsistent with *Hurley's* principles. Further, the Eighth Circuit deprived persons of *Hurley's* protections by treating the nonpublic forum for a Memorial Day event as if it were a commercial shopping center. The Court's review is badly needed to protect commemorative festivals from losing their identity.

OPINIONS BELOW

The order of the United States District Court for the Western District of Missouri granting a preliminary injunction is reprinted at App. 48a-115a and is published at 371 F.Supp.2nd 1061. The order and judgment of the United States District Court for the Western District of Missouri granting a permanent injunction is reprinted at App. 21a-47a and is not otherwise published. The Eighth Circuit decision is reprinted at App. 1a-20a and is published at 481 F.3d 591. The court of appeals' order denying rehearing and rehearing en banc is reprinted at App. 116a and is not otherwise published.

JURISDICTION

The Eighth Circuit rendered its decision on March 22, 2007, and denied rehearing and rehearing en banc on May 8, 2007. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech....

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,....

STATEMENT

A. Factual Background

Petitioner Memorial Day Weekend Salute to Veterans Corporation ("Salute") is a non profit organization whose purpose is to honor and remember veterans on Memorial Day weekend. Since 1993 Salute has staged its annual Memorial Day Weekend Salute to Veterans Air Show at the Columbia Regional Airport. The airport is owned by the city, but lies outside the city limits. The city gives Salute control over the secured tarmac[1] for the show. App. 2a-3a.

---

[1] The "secured tarmac" where the static displays, exhibits and ceremonies are held during the air show is the paved area inside the airport security fence, next to the runway, which is used to park and taxi airplanes on days other than the air show. There are three gates for ingress and egress between the motor vehicle

The two day event is free and open to the public, and tens of thousands of people attend each year. In addition to feats of aerial acrobatics performed by military planes, the event features static airplane displays, exhibits by military recruiters, and food on the airport's secured tarmac. During the noontime hour each day there is a ceremony to honor fallen veterans at which the national anthem is played, the names of fallen Boone County service members are read aloud, and the air show's honored guests are introduced to the crowd. The stated purpose of the air show is "to honor and remember" service members, past and present. App. 2a-3a.

A resolution passed by the Columbia city council authorizes the city manager to execute a contract with Salute for exclusive control of the airport during the event, subject to the city's right to retake control in the event of an emergency. Salute does not pay for this use. During the remainder of the year the airport is controlled by the city, and the tarmac is not open to general public access. App. 3a.

Salute is responsible for deciding on the content of the air show, including the schedule of events, the list of honored guests, and the exhibits that will be displayed. Salute pays for liability insurance, the sound system, and the fees and incidental costs associated with the use of the military aircraft and does not receive any city funds. In order to produce the Memorial Day air show, Salute has 3,000 volunteers, 65 committee chairpersons, and raises about $100,000.00 in

---

parking lots at the airport and the secured tarmac. App. 54a; Pl. Ex. 22.

donations every year for the event. City personnel retain responsibility for operating the airport during the air show. In addition, the city's airport manager has borne primary responsibility for developing the Ground Operations Plan for the air show and has coordinated with the Federal Aviation Administration to facilitate the air show's compliance with federal regulations. App. 3a-4a & 23a.

Salute includes a disclaimer in its media releases, stating that the air show is presented solely by Salute and should not be referred to as the Columbia Air Show or "any other designation that would imply it is hosted, organized, or in any way sponsored by the City of Columbia." The city's contract with Salute also states: "In no event shall the City and the Corporation be deemed or construed to be joint venturers or partners." App. 4a.

Salute imposes a number of restrictions on the behavior of the invitees on the secured tarmac during the air show. Some of the rules are for safety and others are limits on expressive activities, without regard to content. There are rules against soliciting, petitioning, leafleting, political campaigning, and unauthorized signs. These rules are widely publicized and often appear on Salute's media releases about the air show, on its website, and on signs at the entry gates. Salute's rules apply only within the secured tarmac area which is accessed through several gates. App. 4a-5a. Outside the gates, there are no rules limiting expressive activities – anything goes. App. 58a-59a. Wickersham and others protested on airport property outside the gates for a number of years, without incident. Wickersham depo. 53.

Columbia police officers provide security at the air show. Salute provides no reimbursement to the city for the officers' time. The local police captain has developed a security plan for the event each year which incorporates Salute's restrictions on expressive activity. In 2004, the police wrote an interoffice memo that officers were to advise persons that the tarmac area was private property subject to protesting and petitioning restrictions and to give trespass warnings prior to arrest. App. 5a.

In 2004, Maureen Doyle attempted to distribute antiwar fliers inside the secured tarmac. A Columbia police officer confronted her and stated that she would be arrested if she continued to hand out leaflets. Soon more officers arrived, and one grabbed leaflets out of her hands. Doyle then left the air show. App. 6a.

At that same air show, Bill Wickersham attempted to collect signatures inside the secured tarmac area on an initiative petition advocating renewable energy.[2] He knew there was a rule against petitioning on the secured tarmac. He wanted to be arrested. He was approached by a police officer who warned him that if he did not cease petitioning, he

---

[2] Wickersham admitted in his testimony that his intention on entering the secured tarmac with a petition was to be arrested in order to make a point. Wickersham depo. 33-35. He further testified that he believes the air show is a psychological operation by the government to modify the behavior of the local audience, especially the youth, and what he really wants to do is "have a petition that petitioned against the military recruiting at the Memorial Day air show." Wickersham depo. 12-13.

would be arrested.[3] After Wickersham refused to obey the warning, the officer told him he was under arrest and took him to the police command post where he was issued a ticket for trespassing. Wickersham then left the secured tarmac. The ticket was never prosecuted. Pltf. Ex. 32a; Wickersham depo. 30-34.

The Columbia Regional Airport is the only facility in the county capable of hosting the Memorial Day air show. Boston depo. 107. Respondents and others have numerous public fora in and around Columbia for the expression of their ideas, including the city parks, the area in front of the post office, an amphitheater at the county courthouse, a speaker's circle next to the library at the University of Missouri, and all the public streets and sidewalks. Wickersham depo. 56-63. Salute has done nothing to restrict anyone's opportunities to express their ideas anywhere else at any time.

B. Procedural History

Wickersham and Doyle brought this action against Salute and the City of Columbia under 42 U.S.C. § 1983, seeking injunctive relief permitting them to distribute leaflets, circulate petitions, and engage in other expressive activities on the secured tarmac at future air shows. They alleged violations of their First Amendment rights to free expression, characterizing the air show as a public forum. They argued that although Salute was a private corporation, it was a

---

[3] The officer noted in his report that the coordinator for Salute, Mary Posner, authorized the trespass warning. Pltf. Ex. 32a. She also signed a complaint.

state actor in its imposition of restrictions on free speech given the degree of joint participation between Salute and the city in staging the air show and enforcing the restrictions. They also claimed that by granting Salute discretion to determine who was arrested at the air show, the city has ceded a public function to Salute. App. 6a-7a.

On May 18, 2005 the district court granted a temporary injunction permitting plaintiffs to distribute leaflets and wear expressive clothing at the 2005 air show, but not allowing them to circulate petitions or engage in other forms of solicitation. App. 7a.

At the 2005 air show, leafleting and expressive clothing were permitted as required by the preliminary injunction; sign carrying was also allowed even though it had not been specifically addressed in the order. At the 2005 event, several persons handed out leaflets and carried signs inside the secured tarmac. One protestor ignored the district court's order to refrain from expressive activities during the solemn noon event. Several members of the public submitted written complaints to Salute about the presence of "protestors" on the secured tarmac.[4] App. 7a-8a.

On March 3, 2006, after additional depositions and hearings, the district court issued a permanent injunction which incorporated its earlier order by reference. App. 21a-47a. The district court ordered Salute and the city to permit leafleting, sign carrying, and the wearing of expressive clothing at future air

---

[4] There were nine cards with critical comments about anti-war protestors at the air show. App. 26a-27a.

shows subject to reasonable restrictions on time, place, and manner, except during Salute's noontime ceremony, during which unauthorized expressive activities were not allowed. App. 8a-9a.

Salute appealed to the Eighth Circuit on both the "state actor" finding and the district court's failure to protect Salute's First Amendment right to its own message. The court of appeals affirmed. It found that Salute was a "state actor" for two reasons: 1) the role of the Columbia police in enforcing Salute's rules on the tarmac; and 2) the assistance provided by the city in planning and operating the air show. The court attempted to distinguish contrary decisions from the Sixth and Fourth Circuits — *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000); *UAW, Local 5285 v. Gaston Festivals*, 43 F.3d 902 (4th Cir. 1995). App. 13a-14a.

The court of appeals further concluded that Salute did not have a First Amendment right to control the expressive content of its own event under *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), because of the court's conclusion that Salute's message was not diluted by the presence of a small number of protestors and that such protests were not likely to be identified with Salute. App. 17a-18a. The court of appeals avoided the contention that Salute forfeited some of its right to deliver its own message unimpeded by others when it assumed the role of "state actor," a position that the plaintiff had advocated and to which the district court agreed, without citation of any authority. App. 16a-17a.

The Eighth Circuit also said that *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), was more relevant than *Hurley* on grounds that the Memorial Day air show is somehow akin to a commercial shopping mall. App. 18a.

The Eighth Circuit denied rehearing en banc. App. 116a.

REASONS FOR GRANTING THE PETITION

The petition should be granted for two reasons.

First, the opinion of the Eighth Circuit conflicts with *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000), and *UAW, Local 5285 v. Gaston Festivals*, 43 F.3d 902 (4th Cir. 1995), on the issue of whether the non-governmental organizer of a public event or festival becomes a "state actor" under 42 U.S.C. § 1983 if it avails itself of municipal services on public property and relies on the police to maintain order and enforce the rules. The *Lansing* and *Gaston* opinions are practically indistinguishable from this case on the relevant facts. This case presents the Court with a much-needed opportunity to eliminate conflicting circuit rules regarding state actor status on the part of non-governmental organizers of public events and festivals such as air shows, art and music festivals, book fairs, and the like.

Second, the Eighth Circuit's opinion is a radical departure from well-established First Amendment protections against compelled speech. The opinion unduly restricts *Hurley v. Irish-American Gay,*

Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995). This case presents a unique opportunity for the Court to extend the First Amendment protections articulated in *Hurley* to commemorative festivals in general and Memorial Day events in particular, where people choose to assemble for a shared purpose and do not want to be compelled to include unwanted messages.

I. THE COURT SHOULD CLARIFY WHETHER THE NON-GOVERNMENTAL ORGANIZER OF AN EVENT LIKE A MEMORIAL DAY AIR SHOW OR OTHER PUBLIC FESTIVAL BECOMES A "STATE ACTOR" UNDER 42 U.S.C.§ 1983 IF IT AVAILS ITSELF OF MUNICIPAL SERVICES AND RELIES ON THE POLICE TO MAINTAIN ORDER AND COMPLIANCE WITH THE RULES.

People like to assemble for a shared purpose. Sometimes they gather in small groups with family and friends to celebrate a birthday, observe a wedding anniversary, or mark the years since graduation. Other times they gather in large crowds with people they hardly know but with whom they share a common interest or purpose. Most of the larger gatherings are held on public property, such as parks, streets, plazas, harbors or airports. All of them have one thing in common – somebody has to be in charge, to plan, schedule, finance, organize, support, carry out, and clean up. With large festivals, the organizer is typically a nonprofit corporation, staffed by volunteers and funded by contributors.

Even though a non-governmental organizer and its volunteers and contributors shoulder most of the

responsibilities for a public festival, there are certain functions that traditionally remain in government hands. Policing is one of those. Local and state police typically provide traffic and crowd control outside the venue. Inside, the police provide security and law enforcement. These responsibilities include enforcing laws against disturbing the peace, unlawful assembly, and trespass. A trespass violation occurs when an invitee fails to stay within the terms of the invitation by breaking one of the rules.

One of the issues before the Court is whether a non-governmental organizer loses its private status and becomes a "state actor" if it turns to the police to deal with a trespasser. A second issue is whether a non-governmental organizer becomes a "state actor" by working with the local government on the planning and staging of a festival.

Lansing v. City of Memphis, 202 F.3d 821 (6th Cir. 2000), and *UAW, Local 5285 v. Gaston* Festivals, 43 F.3d 902 (4th Cir. 1995), previously dealt with these issues and held that the non-governmental organizer did not become a "state actor" on either ground. The Eighth Circuit reached a contrary result. The decisions cannot be reconciled, and the circuits are clearly in conflict, as a reading of the cases will show.

Lansing was a §1983 action by a "street preacher" against the not-for-profit corporation that sponsored the "Memphis in May" festival. The preacher was asked to leave the event by a city policeman, just as Doyle and Wickersham were asked to leave the air show by a city policeman in this case. The reason in both cases was the same – failure to comply with the organizer's rules. The district court issued a permanent injunction barring "Memphis in May" from prohibiting plaintiff's preaching within the

festival area. The organizer appealed. The Sixth Circuit reversed, holding that the organizer was not a "state actor". Thus, the organizer could not be held liable for violating the plaintiff's First Amendment rights. In the course of its opinion, the Sixth Circuit reviewed the controlling authorities. On the "nexus test" to determine when there is a sufficiently close nexus between the state and the challenged action of the entity so that the action of the latter may be fairly treated as that of the state itself, the court of appeals found that "it is now well-established that state regulation, even when extensive, is not sufficient to justify a finding of a close nexus between the state and the entity." *Id.* at 830. The court further stated there is the equally well-established rule that "neither public funding nor private use of public property is enough to establish a close nexus between state and private actors." *Id.* The court also recognized the rule that "utilization of public services by private actors does not convert private actions to a state action," citing, among other cases, *Edmondson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 612 (1991). Even though there was evidence that there were two public officials on the Memphis in May board, city and state funding, coordination with city agencies regarding the regulation of traffic and security at the festival, use of city property, use of city employees, and numerous other entanglements, the Sixth Circuit held that this did not establish a nexus between the organizer and the city. The division of labor actually demonstrated the independence of their operations. *Id.* at 832.

The Sixth Circuit specifically rejected the plaintiff's argument – which was a key element in the Eighth Circuit's reasoning as well – that the festival

organizer was a "state actor" because it called on the city police to enforce its rules by removing the plaintiff from the festival grounds:

> "Finally, neither the supply of police officers to help enforce Memphis in May's decision to remove Lansing, nor the city's instruction to its officers not to interfere with expressive speech activity outside the lease space, indicates a nexus sufficient to attribute Memphis in May's actions to the state." 202 F.3d at 833.

The court went on to say that if asking the police for assistance in this manner were all that was required to find state action, "then every private citizen who solicited the aid of the police in resolving disputes or in ejecting unwanted persons would be transformed into a state actor." *Id.*

UAW, Local 5285 v. Gaston Festivals, Inc., 43 F.3d 902 (4th Cir. 1995), was a §1983 action against the non-governmental organizer because it denied the union access to the festival grounds to distribute literature. The district court dismissed the suit upon a finding that the organizer was not a "state actor." The union appealed. In affirming the dismissal, the court of appeals observed that functions considered to fall traditionally within the exclusive prerogative of the State "compromise a very narrow category, subject to 'carefully confined bounds,'" citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 163 (1978).

After reviewing Supreme Court "state action" cases,[5] the court of appeals found that "only those undertakings that are uniquely sovereign in character qualify as traditional and exclusive state functions." 43 F.3d at 907. While many functions have been traditionally performed by governments, very few have been "exclusively reserved to the State." *Id*; quoting *Flagg Bros.*, 436 U.S. at 158. Accordingly, the court of appeals held that the organization, management and promotion of events such as festivals "do not fall within the domain of functions exercised traditionally and exclusively by the government. The government has not traditionally been the sole provider of community entertainment. Nor has it traditionally been the exclusive organizer of festivals, parades or fairs." 43 F.3d at 907-908.[6]

The plaintiffs in the *Gaston Festivals* case argued that the festival organizer was a "state actor" because the City of Gastonia had ceded control of its town center to the organizer and by showing that the city provided essential services to support the festival such as police support, fire support, and the like. The

---

[5] This Court has identified as functions "traditionally exclusively reserved to the State," activities such as the administration of elections, *Nixon v. Condon*, 286 U.S. 73 (1932); *Terry v. Adams*, 345 U.S. 461 (1953); the operation of a company town, *Marsh v. Alabama*, 326 U.S. 501 (1946); eminent domain, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974); and peremptory challenges in jury selection, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

[6] See also *Gay Veterans Association, Inc. v. American Legion*, 621 F.Supp. 1510, 1518 (S.D.N.Y. 1985), holding that the non-governmental organizer of a Veterans Day parade on public streets was not a "state actor" under 42 U.S.C. §1983 because Veterans Day parades are not exclusively governmental functions.

court of appeals held that the involvement by the city did not change the result. "The principle is that private organizations who wish to use public property to organize festivals, fairs, rallies, parades, or meetings, are not chilled from doing so by the possibility that they will be subject to liability as if they were agents of the government." 43 F.3d at 910.

The court looked at the practical effect of holding otherwise. "The consequences of finding state action in this case would be difficult to overstate." 43 F.3d at 911. The court rightly observed that if it were to hold that the incidental power to exclude others from public property during the course of a limited, permitted use transformed the permit holder into a state actor, softball teams on the National Mall in Washington, D.C. would be constitutionally obliged to afford due process to those not allowed to play on the particular field at the same time, every family that barbecues at a public park would theoretically be barred from excluding uninvited guests on constitutionally suspect grounds, local churches could no longer use public facilities to hold events for fear of violating the Establishment Clause, and every picnic, wedding, company outing, meeting, rally, and fair held on public grounds would be subject to constitutional scrutiny merely because the organizer had been granted exclusive use of city facilities as well as authority to determine who may use those facilities and what they may say while on the public fora. 43 F.3d at 911. Because the festival organizer was found to not be subject to liability as a state actor under §1983 when it held its annual festival in the City of Gaston, the proper course was to dismiss the complaint against the festival organizer, because it was not acting "under color of law." *Id.*

The *Lansing* and *Gaston Festivals* cases illustrate an important point that was overlooked by the Eighth Circuit. Festivals are in a class by themselves when it comes to deciding whether a non-governmental organizer is a "state actor." For one thing, they are limited in time to a day or two. They do not "hog" a venue. Others are free to stage their own expressive activities on other days. A second distinguishing feature is that a large, public festival requires a considerable amount of prior planning and coordination with public entities.

Cases decided after *Lansing* and *Gaston Festivals* have noted these same distinctive features and the difference they make in the result.[7]

A commemorative air show at a city-owned airport requires a great deal of prior planning and coordination with public entities. Of course, the airport manager has to be involved in the plan. Yes, the city retains the right to suspend the air show and reopen the airport to other traffic if the need arises. Certainly, the police have to provide security considering the size of the crowd and the protection required for the

---

[7] *Villegas v. City of Gilroy*, 363 F.Supp.2d 1207 (N.D. Cal. 2005), applied *Lansing* and the *Gaston Festivals* cases to shield the Gilroy Garlic Festival Committee from a § 1983 lawsuit by motorcycle club members who were expelled by the city police from the Gilroy Garlic Festival at the request of the Committee for refusing to remove their club vests. See *Diener v. Reed*, 232 F.Supp.2d 362, 383 (M.D. Penn. 2002), which applied *Lansing* and *Gaston Festivals* to a claim involving a one-day permit for an event in the park rather than a *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002), where there was a long-term lease of a public forum.

military aircraft furnished by the Department of Defense. Much more is required than merely asking people and airplanes to show up on a certain day in the hope that an air show might break out. But to say that close cooperation with the city under these circumstances constitutes "entwinement" for "state actor" purposes punishes Salute for its diligence.

While the Eighth Circuit decision stands, organizers of public events like Memorial Day air shows and other public festivals are faced with enormous financial risks if they continue to rely on public services and become "state actors" under § 1983, exposed to liability and back-breaking fee awards if they or their volunteers guess wrong as they try to maintain control over their message. Ostensibly, an organizer is supposed to be able to ensure that its message is not submerged by others, according to the Eighth Circuit. App. 19a. But how is this supposed to work? At the 2005 air show a protestor ignored Salute's right to have other messages suspended during the solemn ceremony at noon when the names of Boone County men killed in action were read. Trying to stop the protestor during this solemn time would have magnified the disruption, according to the officer in charge, so nothing was done. This would never have happened if the competing messages had been kept outside the gates, as in former years.

As a practical matter, the only way a festival organizer can enforce any rules is to be able to ask the police for assistance in removing persons who have lost their status as invitees after they have broken the rules upon which their invitation was conditioned. Unless something is done about the Eighth Circuit decision,

non-governmental organizers will lose control of their message and eventually the support of their volunteers and contributors, who will not want to feed the cowbird in the nest.

II. THE DECISION BELOW IS A RADICAL DEPARTURE FROM WELL-ESTABLISHED FIRST AMENDMENT PROTECTIONS AGAINST COMPELLED SPEECH, AND THE COURT SHOULD CLARIFY THE RIGHTS OF NON-GOVERNMENTAL ORGANIZERS OF PUBLIC EVENTS TO THEIR OWN MESSAGE AND FREEDOM FROM UNWANTED MESSAGES.

In the court below, Salute's rights were ultimately determined by the choice of an analogy, which in turn led to a choice of law. Is the Memorial Day air show more akin to a shopping mall or a festival parade? The Eighth Circuit chose the shopping mall and applied *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), to hold that Salute does not have a First Amendment right to keep unwanted messages off the tarmac. App. 18a. The court refused to apply the festival parade case, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and it added additional tests not found in that decision.

The first test that the Eighth Circuit added to *Hurley* was the requirement of disruption.

> "The presence of nondisruptive expressive conduct during the remainder

> of the air show was not shown to threaten to alter Salute's message." App. 17a.

Nowhere in *Hurley* did this Court say that alternate messages could be injected into the St. Patrick's Day Parade of South Boston if they were "nondisruptive." *Hurley* was all about protecting a speaker's "autonomy to choose his own message." 515 U.S. at 573. Disruption or lack of disruption from the unwanted messages has nothing to do with it. The Court noted that the plaintiffs in *Hurley* marched "uneventfully" the one year they were allowed to do so under a state-court order. 515 U.S. at 561. But the fact they were nondisruptive was of no help to them in the final analysis.

A second test added to *Hurley* by the Eighth Circuit was a dilution test.

> "There is no evidence that Salute's message was diluted by the presence of a small number of sign carriers and leafleters at the 2005 air show, which was attended by over 25,000 people." App. 17a.

There is no "dilution" exception in *Hurley*. If this Court had meant to add one it had ample evidence upon which to do so. The annual St. Patrick's Day Parade of South Boston includes as many as 20,000 marchers and draws up to 1 million watchers. 515 U.S. at 560-61. The plaintiffs were only one group – a few fish in a sea of many. Nevertheless, the Court ruled that the parade sponsor had a First Amendment right to keep them out of the parade.

How many antiwar leaflets does it take at a Memorial Day air show to turn people's attention away from honoring and remembering veterans to debating the political dimensions of the war? Disruption happens one leaflet and one person at a time. The transformation is immediate and substantial for each person affected. For each of them, the Memorial Day message that Salute and its many volunteers and sponsors work so hard and pay so much to create is submerged.

As this Court said in *Hurley*, one's right to choose one's content under the First Amendment "boils down to the choice of a speaker not to propound a particular point of view. . . ." 515 U.S. at 575. Salute does not want the air show to be a political forum. It does not want pro-war leafleting or anti-war leafleting or any other leafleting to promote messages that are not about honoring and remembering veterans. Over the years, it has consistently maintained neutrality by keeping all extraneous messages off the secured tarmac. It wants to keep it that way. Its interests in this regard are consistent with hundreds if not thousands of other sponsors of events on public property across the country. The court of appeals' decision diminishes their First Amendment rights under *Hurley*, and the Court should grant this petition in order to redress the diminution.

Hurley recognized that inclusion of unwanted messages in the St. Patrick's Day Parade would run the risk that the public would perceive such messages were "worthy of presentation and quite possibly of support as well." *Hurley*, 515 U.S. at 574. For the lower court to say in this case that there is no reasonable likelihood

that the public will conclude that the plaintiffs' message reflects the beliefs of Salute flies in the face of a contrary conclusion by this Court based on accepted standards of human perceptions. Activities on the secured tarmac at the air show are an integral part of the expressive message, conveyed through static displays and ceremonies. Under the *Hurley* decision, Salute should not be compelled to accept other messages at that same place and time.

> "Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley*, 515 U.S. at 573.

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 340 U.S. 705, 714 (1977). Requiring an individual to present a viewpoint not its own is the equivalent of forbidding the speaker to say what it wishes to say. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). The government cannot force a speaker to tailor its speech to an opponent's agenda or respond to an opponent's arguments when it prefers to be silent. See *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 10 (1986). The choice of a speaker not to propound a particular point of view is presumed to lie beyond the government's power to control, and "when dissemination of a view contrary to one's own is forced upon a speaker . . . the speaker's right to autonomy over the message is compromised." *Hurley v. Irish-*

American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 575-76 (1995).

What Respondents are attempting to do, and what the Eighth Circuit decision is allowing them to do, is force Salute to provide a forum on the secured tarmac during the air show for other messages, including anti-military and anti-war advocacy. Respondents and others similarly situated are not offering to contribute anything toward the event, so the effect of their request is to have Salute and its volunteers and contributors play host for speech with which they do not agree. The First Amendment does not permit their rights to be disregarded in this manner. They, too, have rights to free speech, which include the right to not be compelled to support speech with which they disagree.[8]

Hawkins v. City and County of Denver, 170 F.3d 1281 (10th Cir. 1999), shows how *Hurley* has been applied by another circuit. Plaintiffs were a group of union musicians who wanted to picket and distribute leaflets expressing their grievances against the Colorado Ballet in the "Galleria" area of the Denver Performing Arts Complex. There was evidence that Denver allowed leaseholders to promote their businesses within the Galleria through the use of signs. There was also evidence that Denver made brochures listing events at other venues it owned and distributed

[8] Government compulsion over what Salute must include in the air show is a given. Under its annual lease with the city, Salute is required to allow on the secured tarmac such other expressive activities as this case determines. As the case currently stands, Salute is being compelled to host messages that it does not want to host.

a publication that promoted events at the complex available in the Galleria. Occasionally, Denver also leased promotional space within the Galleria. Plaintiffs argued that these activities converted the area into a public forum and that they should be allowed to leaflet and picket in the forum. The trial court disagreed. On appeal, the Tenth Circuit affirmed the dismissal of the complaint. After reviewing the applicable Supreme Court decisions, the court of appeals found that in a nonpublic forum "the government has much greater latitude to restrict protected speech. The law draws no distinction between content-neutral and content-based restrictions in a nonpublic forum." *Id.* at 1287. Just because the City of Denver allowed some speech in the Galleria did not create a designated public forum, in the opinion of the court. *Id.* at 1288. The ban against leafleting was held not to be discrimination based on viewpoint. Because the ban was on all leafleting, there was no unlawful viewpoint discrimination. *Id.* at 1288-1289. The court distinguished the leafleting allowed the Krishna sect in Justice O'Conner's concurring opinion in *International Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672 (1992) on the grounds that Justice O'Conner's analysis was based upon a finding that the airports at issue were huge complexes open to travelers and non-travelers alike containing a multitude of commercial establishments, like a shopping mall as well as an airport. Clearly, the secured tarmac at the Columbia Regional Airport, which does not include the airport terminal or any commercial establishments, is not equivalent to a shopping mall, either, when it comes to applying the First Amendment.

Memorial Day is a civic holiday with deep roots in American history and culture. Three years after the

Civil War ended, General John A. Logan, the head of an organization of Union veterans—the Grand Army of the Republic (GAR)—established May 30th as "Decoration Day," to honor and remember the soldiers "who died in defense of their country during the late rebellion, and whose bodies now lie in almost every city, village and hamlet churchyard in the land." *General Orders No. 11*, Headquarters of the Grand Army of the Republic, May 5, 1868. Although Gen. Logan urged the people to garland the graves with flowers, he made it clear that "in this observance no form of ceremony is prescribed," leaving it to local posts and comrades to "arrange such fitting services and testimonials of respect as circumstances may permit." Ibid.

The first Decoration Day in 1868 was at Arlington National Cemetery. Approximately 5,000 people attended. Various federal officials, including General and Mrs. Ulysses S. Grant, participated in the ceremonies. After speeches, children from the Soldiers' and Sailors' Orphan Home and members of the GAR made their way through the cemetery, strewing flowers on both Union and Confederate graves, reciting prayers and singing hymns. *Memorial DayBackground,(www1.va.gov/opa/speceven/memday/history. asp)*, U.S. Department of Veterans Affairs.

By the end of the 19th century, Memorial Day ceremonies were being held throughout the nation. After World War I, the purpose was extended to honor and remember those who died in the all the nation's wars. In 1971, Memorial Day was declared a national holiday by an act of Congress. 5 U.S.C. §6103. In December 2000 the observance was further enhanced by "The National Moment of Remembrance Act," P.L.

106-579, which created the White House Commission on the National Moment of Remembrance.

Beyond question, Memorial Day has a message, and a commemorative event like a Memorial Day air show should not have been likened to a commercial shopping mall for purposes of First Amendment analysis, as the Eighth Circuit did in this case. People do not gather at shopping malls to assemble for a common purpose. They go to shopping malls to satisfy individual desires for goods and services. As with the "state actor" analysis under Point I, the court of appeals fell into error when it failed to take into account the fundamental differences between festivals and permanent fora and what those differences mean when it comes to the application of First Amendment rights.[9]

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted,

---

[9]Salute has First Amendment rights, even if it is found to be a "state actor." See *Griffin v. Department of Veterans Affairs*, 274 F. 3d 818 (4th Cir. 2001)(recognizing the right of the VA to not to fly the Confederate flag over a national cemetery). Government entities make decisions every day about what expressive materials to include and what to exclude as they decide what to exhibit or not exhibit in a museum, what books to buy for a library, what art to exhibit in a park, etc. A "state actor" does not check its First Amendment rights at the door, and the Eighth Circuit should not have avoided this issue as if it does not make any difference. It does to Salute to Veterans, who has the right to decide what does or does not happen on the secured tarmac during the air show.

Dale C. Doerhoff
COOK, VETTER,
DOERHOFF &
LANDWEHR, P.C.
231 Madison Street
Jefferson City, MO 65101
(573) 635-7977
(573) 635-7414 – facsimile

Attorneys for Petitioner

August 6, 2007

Blank Page