No. 86-104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, *et al.*,
Petitioners,
v.
JEWS FOR JESUS, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

I. **Does a Major Airport's Ban on "First Amendment Activities" Go Far Beyond Permissible Regulation of a Forum, under the Free Speech and Free Exercise Clauses of the First and Fourteenth Amendments?**

   A. Is LAX a Traditional Public Forum, Where Such a Ban Is Unconstitutional, in View of Its Similarity to Streets and Sidewalks and the Airport's Openness to the General Public, as Four Circuits Unanimously Have Held and as Other Airports Have Acknowledged?

   B. If Not a Traditional Public Forum, Is LAX Still an Open Forum, Where Such a Ban Is Unconstitutional, in View of the Inapplicability of the Perry Test and the Airport's Openness to the General Public and Other Expressive Activities?

II. **Does a Major Airport's Ban on "First Amendment Activities" Involve Impermissible Discretion Amounting to a Prior Restraint, under the Free Speech and the Free Exercise Clauses of the First and Fourteenth Amendments?**

   A. Does the Airport Ban Involve Impermissible Discretion for LAX Officials, Amounting to a Prior Restraint, in Determining Whether Activities Are "First Amendment Activities" and Whether They Are "Travel Related," as Exercised Arbitrarily in This Case?

   B. Does the Airport Ban Involve Vagueness of Terms, Chilling Preferred Freedoms, in Referring to "First Amendment Activities" and "Airport Relatedness"?

III. **Does a Major Airport's Ban on "First Amendment Activities" Embody Impermissible Content Discrimination and Religious Discrimination, under the Free Speech, Free Exercise,**

Establishment, and Equal Protection Provisions of the First and Fourteenth Amendments?

A. Does the LAX Ban Constitute Content Discrimination against "First Amendment Activities" in Favor of Non-Expressive Activities, and Against Most Traditional First Amendment Expression in Favor of Allegedly Airport-Related Expression and Commercial Speech, without a Sufficient Justification for Such Content Discrimination?

B. Does the Airport Ban Constitute Religious Discrimination against Other Religions in Favor of the Christian Science Religion?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. Court Decisions

B. Statutes and Ordinances

C. Other Authorities

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STATEMENT OF THE CASE

Airport Ban. On July 13, 1983, the Board of Airport Commissioners ("Board") enacted Resolution No. 13787 ("Resolution"), which banned all "First Amendment activities" from the interior of the Central Terminal Area ("CTA") at Los Angeles International Airport ("LAX"). (J.A. 18a, para. 64.) (*See* Appendix A for the enabling provisions of the city charter, and Appendix B for the Resolution.) In adopting the resolution, the Board directed the city attorney of the City of Los Angeles to institute "appropriate litigation" against individuals or entities that engage in First Amendment activities within the CTA at LAX. (J.A. 5a.) The CTA at LAX is open to members of the general public without restriction, regardless of their intent or desire to utilize the transportation related facilities. (J.A. 13a, para. 31.)

First Amendment Activities. During at least the past ten years, a variety of religious and political groups, including Jews for Jesus,* have utilized the interior area of the terminals at LAX, including the "pedestrian walkways"[1] located

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* Jews for Jesus, Inc. is a California non-profit religious corporation, with no parent companies and no subsidiaries. Jewish Christian Ministry of Reconciliation and A Messianic Jewish Perspective are affiliates of Jews for Jesus, Inc.

1. "Pedestrian walkways" at LAX, unlike some airports, refers to broad corridors within airport buildings, rather than moving sidewalks or similar narrower areas.

within it, to distribute literature and communicate ideas. (J.A. 11a, para. 22.) Neither the Board nor Jews for Jesus is aware of any occasion in which a member of Jews for Jesus, while engaged in the free distribution of religious literature in the pedestrian walkways of LAX, has intentionally harassed, interfered with, blocked, obstructed, physically touched in an offensive manner, or otherwise intentionally annoyed any other person. (J.A. 18a, para. 63.)

Jews for Jesus is an evangelical organization whose purpose is to present the gospel of Jesus particularly to Jews although to Gentiles as well. In contrast to cults, Jews for Jesus works with various evangelical missions and evangelical churches, and presents the historic gospel in much the same way as the early church (which in its first decades consisted mostly of Jews) did in Jewish synagogues and to Jewish individuals. Distribution of free religious literature in public places is an integral part of its religious mission, just as it was for early Jewish believers in Jesus.

On July 6, 1984, Alan Snyder ("Snyder"), a minister with Jews for Jesus, was stopped while distributing free religious literature prepared by Jews for Jesus, on a pedestrian walkway in the CTA at LAX. (J.A. 19a, para. 67.) A uniformed peace officer approached Snyder, handed him a copy of the resolution, and warned him that if he did not cease his distribution of religious literature within the terminal, the city would take legal action against him. (J.A. 19a, para. 69.)

While he was distributing the religious literature, Snyder was courteous, and he was not blocking any entrances, exits, stairways, escalators, elevators, doors, or otherwise inhibiting the free flow of pedestrian traffic on the pedestrian walkway located inside the terminal. (J.A. 19a, para. 67.) In keeping with the express policy of Jews for Jesus, Snyder did not solicit or accept any contributions. (J.A. 18a, para. 61.) Nevertheless, as the peace officer had demanded, Snyder stopped his distribution of literature and left the terminal. (J.A. 19a-20a, para. 69.)

LAX and CTA Structure. LAX is the third busiest airport in the world. It was anticipated that in 1984 LAX would handle more than 34 million passengers. It is estimated that at least an equal number of greeters enter the terminal area to pick up or drop off airline passengers. (J.A. 9a, para. 10.)

The CTA at LAX contains the terminal facilities, parking structures, and a series of private streets and roadways which provide vehicular access. (J.A. 7a, para. 4.)

Each of the terminal facilities contains large areas open to the public including the pedestrian walkways, ticketing and baggage claim areas, baggage lockers, check in gates, loading gates, restaurants, newsstands, gift shops, barber shops, art displays, information displays, flight insurance counters, rent-a-car counters, hotel, motel, restaurant and ground transportation advertising displays, rest areas, including chairs and benches, restrooms, automatic traveler's check and banking machines, general waiting areas (J.A. 7a, para. 4), and a Christian Science Reading Room in one of the terminals. (J.A. 20a-21a, para. 74.) The public is permitted unrestricted access to these portions of the CTA. (J.A. 8a, para. 5.)

Airport Discrimination toward Non-Commercial Speech. The total ban on First Amendment activities in the CTA does not extend to the Christian Science Reading Room (J.A. 20a, para. 74), and newsstands (J.A. 11a, para. 18), or to sales counters, hotel and transportation displays, and so forth. (J.A. 7a, para. 4.) The Christian Science Reading Room is open to the public and displays religious literature pertaining to the Christian Science faith. (J.A. 20a-21a, para. 74.) The monthly rental paid for the leased space occupied by the Christian Science Reading Room is $510.00. It has been in operation inside the terminal building for twenty years. (J.A. 21a, para. 74.)

Similarly, the total ban on First Amendment activities does not extend to anyone wishing to exercise First Amendment rights on the sidewalks outside the front of the terminal buildings. However, approximately 25% of the passengers do

not use the sidewalk area in front of the terminal facilities because at least this number of passengers neither commence nor terminate their flight travels at LAX. (J.A. 9a, para. 15.) Thus, a substantial number, nearly 8,500,000 passengers, cannot be reached by First Amendment activities restricted to the sidewalks.

The Board has allowed the interior of the terminal areas, including the wide pedestrian walkways, to be utilized by print, television and radio media for purposes of filming, photographing, and interviewing public figures. (J.A. 12a, para. 25.) The Board has expressly permitted the display of art work created by children in the terminal facilities. (J.A. 12a, para. 28). The Board does permit First Amendment activity in the form of slogans and statements imprinted on T-shirts or other articles of clothing. (J.A. 13a, para. 32.)

Airport Discrimination in Favor of Commercial Speech. Under the Los Angeles City Charter[2] (*see* Appendix A), the Board has the power to enter into leases for purposes *other than* for the promotion and accommodation of air commerce and air navigation covering any portion of the airport property, whenever the Board determines that the use of a portion of the airport property is not necessary for the promotion and accommodation of air commerce and air navigation or uses incidental thereto. (J.A. 10a, para. 16.)

The general manager has the power[3] to issue revocable permits to use limited portions of the airport facilities *for any and all purposes* that do not interfere with air commerce or air navigation and that are not inconsistent with any trust upon which such land may be held by the City of Los Angeles. (J.A. 10a, para. 17.) The Board has expressly allowed the exercise of commercial speech in the interior terminal areas of LAX in the form of advertising displays in connection with hotel, motel, restaurant, and ground transportation and other services offered by commercial vendors. (J.A. 14a, para. 33.) Immediately prior to and during the 1984 Summer Olympic

2. Art. XXIV, § 238.8.
3. *Id.* art. XXIV, § 239.5.

Games in Los Angeles, "Olympic Family" booths, providing information to athletes and Olympic officials, were set up with the express consent of the Board within the terminal areas at LAX. (J.A. 14a, para. 36.)

The Los Angeles Department of Airports ("Department"), which operates LAX under the direction and control of the Board, has entered into permits, license agreements, leases, and concession agreements to provide newspapers and books, food and beverage service, gift facilities, ground transportation, waiting areas, ticket counters, lockers, and baggage facilities. (J.A. 11a, para. 18.) A picture of the Mayor of the City of Los Angeles is displayed in each of the terminals on a sign that states "Mayor Tom Bradley Salutes the New LAX—Gateway to the Olympics." (J.A. 12a, para. 27.) A display entitled "Think Before You Buy" containing specimens, pictures, and information pertaining to protected species is also expressly permitted by the Board. (J.A. 12a, para. 29.) A display depicting photographs of various athletes and containing the message, "Photographs of American Olympic Hopefuls Sponsored by the Reach for the Gold Foundation with a grant from Fuji Film U.S.A., Inc.," was constructed and maintained inside the terminal at LAX for approximately two or three weeks in 1984. (J.A. 13a, para. 30.)

Purported Justification for Resolution. The Board's proposed justification is "to limit use of the terminal facilities to those uses which *it believes directly aid* the traveling public." (J.A. 11a, para. 20, emphasis added.) Based on the foregoing facts, the Board has failed to demonstrate a significant danger of substantially greater congestion than already exists, or of any interference with air commerce and incidental uses, or of danger to passengers, from "First Amendment activities" such as those of Jews for Jesus and Snyder. This is particularly true of those First Amendment activities that do not involve solicitation or acceptance of contributions, as is the express policy of Jews for Jesus. On the contrary, the Board has experienced no problems arising from the First Amendment activities of the Christian Science Reading Room, the news-

stands, or commercial speech activities that the airport permits, and the First Amendment activities that the airport tolerates on its sidewalks.

History of Litigation. On July 17, 1984, Jews for Jesus and Snyder filed a complaint in the United States District Court for the Central District of California seeking declaratory relief that the resolution was unconstitutional and enjoining its enforcement. Jews for Jesus also sought attorney's fees and costs incurred in connection with the suit.

On March 25, 1985, the district court ruled in favor of Jews for Jesus. The basis for the ruling was that LAX was a public forum and that the resolution was unconstitutional. (*See* Appendix D for full text of the opinion.)

On March 25, 1986, the United States Court of Appeals for the Ninth Circuit affirmed. The panel unanimously held that the Board's resolution was unconstitutional and that the CTA at LAX was a traditional public forum, and awarded reasonable attorneys' fees. (*See* Appendix C for full text of the opinion.)

SUMMARY OF THE ARGUMENT

1. *Major Airports Are Public Forums That Are Open for First Amendment Activities.* The extent to which the government must permit access by the public for expressive activity to a publicly owned place depends upon the nature of the particular place. Streets, parks, sidewalks, and other public thoroughfares lie at one end of the spectrum. In these places, the government's power to limit expression is sharply circumscribed. *United States v. Grace*, 461 U.S. 171, 177 (1983).

Major airport terminals are thoroughfares opened at all times to unrestricted public access, and as such are traditional public forums. They are close indeed to the "quintessential public forums" of streets, sidewalks, and parks—distinguishable primarily by being covered. Airport terminals bear little relevant resemblance to military bases or mailboxes, which by necessity are enclaves set apart from general access. *Greer v. Spock*, 424 U.S. 328 (1976); *United States Postal Service v. Council of Greensburgh Civic Associations*,

453 U.S. 114 (1981). There are, no doubt, areas in an airport where there is a special interest in limiting or prohibiting access. It does not follow, however, that access may be entirely excluded as the Board's resolution purports to do. There is no compelling interest in banning all "First Amendment activities" everywhere in a major airport. Moreover, the ban of all First Amendment activities from the interior of the CTA at LAX is not the least restrictive means by which the Board could achieve its desired purpose. To the contrary, the resolution is the most restrictive means imaginable to accomplish any conceivable state interest.

The Board's own practice and policy has unequivocally opened the CTA at LAX for indiscriminate use by the general public, even if it is not a traditional public forum. Public property which the government opens, for use by the public for expressive activity, becomes a designated or open public forum from which the state may not limit activity absent a compelling state interest. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). Not only is the general public allowed unrestricted access to the CTA at LAX, but wide ranges of commercial First Amendment activities, as well as many pure First Amendment activities, take place within the CTA. During the past ten years, a variety of religious and political groups, including Jews for Jesus, have utilized the interior area of the terminals at LAX, to distribute literature and communicate ideas. (J.A. 11a, para. 22.) The CTA is lined with newsstands, as well as a Christian Science Reading Room, and is the site of political speeches and press interviews, as well as informative signs and commercial speech, all of which show the Board's intent in unequivocally opening the CTA to expressive First Amendment activities.

The resolution's sweeping ban on First Amendment activities inside the CTA at LAX is so unreasonable that it cannot pass constitutional scrutiny. Its justification is purportedly to preserve the airport for airport-related uses. Yet, the record is devoid of any evidence showing that the "First Amendment

activities" of Jews for Jesus or similar groups interfered with the airport-related uses the Board seeks to preserve. To the contrary, the Board concedes that the very activities that prompted this action did not interfere with the airport's operation. (J.A. 19a, para. 67.)

II. *LAX's Ban on "First Amendment Activities" Involves Impermissible Discretion and Is Vague.* In many decisions, "this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid." *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951). *Accord, e.g., Kunz v. New York*, 340 U.S. 290, 293, 294 (1951). The Board retains precisely that sort of discretion, without narrowly drawn or definite standards, in permitting or excluding certain First Amendment activities. It may use the "airport-related" tag to justify any permission, and the "non-airport-related" tag to justify any denial, with no governing standard at all. Thus, the Board arbitrarily allows the Christian Science Reading Room, numerous newsstands, an endangered species display, press interviews and political speeches, and general public access, while disallowing Jews for Jesus from the CTA. Incredibly, the Board sees no problem with "non-First Amendment activities" or commercial speech, and subordinates pure "First Amendment activities" to them. As such broad discretion implies, the Board's resolution is impermissibly vague.

III. *LAX's Ban on "First Amendment Activities" Embodies Impermissible Content Discrimination and Religious Discrimination.* "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone . . .." *Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972). The Board has done ex-

actly that sort of content discrimination, not only between nonexpressive activities and "First Amendment activities," but between allegedly airport-related and other "First Amendment activities," and between commercial speech and "First Amendment activities." Literature distribution by Jews for Jesus and other First Amendment activities do not threaten any compelling interest, and the Board has not attempted to serve its interests by the least burdensome means or by narrowly drawn means.

Moreover, the Board has brought about religious discrimination between the Christian Science Reading Room and other religions.

ARGUMENT

I. A MAJOR AIRPORT'S BAN ON "FIRST AMENDMENT ACTIVITIES" GOES FAR BEYOND PERMISSIBLE REGULATION OF A FORUM, UNDER THE FREE SPEECH AND FREE EXERCISE CLAUSES OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. LAX Is a Traditional Public Forum, Where Such a Ban Is Unconstitutional.

1. *Traditional Public Forums Are Not Limited to Streets and Parks.*

Certainly streets and parks are traditional public forums where First Amendment exercises may not be banned. *E.g.*, *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Jamison v. Texas*, 318 U.S. 413 (1943); *Niemotko v. Maryland*, 340 U.S. 268 (1951). That list is not exhaustive, however, because state capital grounds and sidewalks are similarly traditional forums. *E.g.*, *Edwards v. South Carolina*, 372 U.S. 131 (1966); *United States v. Grace*, 461 U.S. 171 (1983). This Court has also recognized limited public forums including state fairs, *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), school grounds, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and public libraries, *Brown v. Louisiana*, 393 U.S. 131 (1966). The "concept of the public forum," to use Professor Kalven's

phrase, by its nature can be neither monolithic nor static.[4] Over a period of time, the places that will constitute public forums must change.

The presence of a roof does not necessarily transform a traditional public forum into something else.[5] A public street or park would not lose its character as a forum because of physical incidents such as being covered, just as access to a downtown street may, for example, not be prohibited because of the legal incident that title to the entire downtown has been transferred to a private entity. *Marsh v. Alabama*, 326 U.S. 501 (1946). Places such as a middle eastern market, or a street like the arcades of Paris and London, or the Galleria Vittorio Emanuele II of Milan, would, were they to be transplanted into an American city, doubtless be "quintessentially public forums." Indeed, the historical places from which the modern metaphor of "forum" derives were often enclosed spaces. The Roman basilicas traditionally adjacent to the forum itself were large, usually roofed, public structures containing markets, courthouses, covered promenades, and meeting halls.[6] In the Greek agora, the roofed stoas housed small shops and stores and provided the citizens with an ideal place to meet and exchange views.[7]

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4. Kalven, *The Concept of Public Forum*: Cox v. Louisiana, 1965 S.Ct. Rev. 1.

5. The "mere presence of a roof plainly does not render a place inappropriate for expression." Wolin v. Port Authority of New York, 392 F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968):

> The privacy and solitude of residents may require that apartment house hallways be insulated from the excitement of volatile exhortations, or the quiet dignity of judicial administration may dictate that court house passages be kept free of demonstration. But that is a result based on wisdom and experience because the abrasions caused by any protected speech would too greatly interfere with other interests . . . and not simply because there is a covering on the building.

See also Hudgens v. NLRB, 424 U.S. 507 (1976), wherein this Court held that a shopping mall is not a forum only because it is privately owned.

6. *See* W. Anderson & R. Spiers, The Architecture of Greece and Rome 192-93, 226-30 (1907).

7. *See id.* at 136-39; W. Rinsmoon, The Architecture of Ancient Greece 240-241, 262-64 (3d ed. 1950).

2. *A Major Airport Is a Traditional Public Forum, Because It Is Very Similar to Streets and Sidewalks, and Very Different from Limited Forums.*

a. *General Public Access and Commerce.* The Los Angeles International Airport (LAX) is the third busiest airport in the world. In 1984 it handled about 34 million passengers and at least another 34 million "meeters and greeters." (J.A. 9a, para. 10.)

It has eight terminal buildings (J.A. 7a, para. 4), to all of which the public has unrestricted access. (J.A. 8a, para. 5.) Thus, access is not limited to the 68 million yearly (more than 180,000 daily) travelers and "meeters and greeters." The remainder of the public enjoys plenary use of the terminal buildings for such ordinary pursuits as walking, reading, shopping, eating, drinking, and conversing. (J.A. 13a, para. 31.) Furthermore, no charge is imposed for any such entry or use. (J.A. 16a, para. 46.)

At least 8.5 million passengers each year, more than the entire population of New York City, do *not* use the sidewalk area in front of the terminal at all (J.A. 9a, para. 15), and thus spend their time at LAX literally within the confines of the buildings themselves. The public forum at LAX must include the terminal buildings where 68 million people congregate annually.

b. *Other First Amendment Activities.* The terminal buildings, lined with wide pedestrian walkways, encompass such First Amendment activities as a Christian Science Reading Room (J.A. 20a-21a, para. 74), art displays, information displays, and newsstands (J.A. 7a-8a, para. 4), as well as slogans and statements on T-shirts and other clothing. (J.A. 13a, para. 32.) The CTA also provides for commercial speech in the form of numerous shops, locations for insurance, car rental, banking, and rest areas. (J.A. 7a-8a, para. 4.) A picture and endorsement of LAX from the Mayor of Los Angeles adorns each of the terminal buildings, and reads "Mayor Tom Bradley Salutes the New LAX—Gateway to the Olympics,"

thereby making clear its public nature and its governmental sponsorship. (J.A. 12a, para. 27.)

Although the Board purports to have "attempted to limit the use of the terminal facilities to those uses which it believes directly aid the traveling public" (J.A. 11a, para. 2a), this effort has been neither consistent nor truly serious. For at least ten years, a variety of religious and political groups have used the terminal buildings to distribute literature, solicit funds, and communicate ideas. (J.A. 4a, para. 21.) During this period, Jews for Jesus and Snyder distributed free religious literature within the terminal. (J.A. 15a, para. 41.) Indeed, the print, television, and radio media have utilized the CTA at LAX for the purpose of interviewing public figures, such as political candidates, the Mayor of Los Angeles, and the Chairman of the Olympic Organizing Committee. (J.A. 12a, para. 25.)

Thus, the CTA at LAX, like the Port Authority Bus Terminal in New York, constitutes a "thoroughfare used by thousands of people each day," and is "so vast" and complex that it has "become something of a small city—but built indoors." *Wolin v. Port of New York Authority*, 392 F.2d 83, 89 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968). In both their purpose (transportation) and their physical attributes (open pedestrian passageways and spaces filled with all manner of newsstands, stores, amusement, and places of repose), the LAX terminals closely resemble the city streets and parks long since determined to be impressed with a public trust. Indeed, certain portions of the interior CTA at LAX are even referred to as "streets" and "sidewalks." (J.A. 24a-25a.) A person who uses the terminal, just as one who uses a street, as a forum for the dissemination of religious or political views, is not "making an anomalous use of it," and is neither "out of place" nor "out of order."[8] This does not suggest that all parts of all airports are traditional public forums. Some parts of airport facilities are not forums for security reasons, and so are

8. Kalven, *supra* note 4.

not open to the non-traveling or even traveling public by reason of the same compelling interests.

This case is remarkably similar to another Los Angeles ordinance involving another public forum almost fifty years ago. That ordinance provided that "[n]o person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park . . .." *Schneider v. State*, 308 U.S. 147, 154 (1939). Los Angeles argued that the ordinance "leaves persons free to distribute printed matter in other public places," *id.* at 163, just as it now contends that Jews for Jesus is free to distribute tracts on the sidewalk outside the LAX terminals. This Court in *Schneider* invalidated the ordinance. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 163.

c. *Contrast to Limited Forums and Non-Forums.* Non-forums to which access for expressive purposes may generally be denied are, for the most part, places that are constructed and used for particular narrow purposes and are not open to the public. Markedly different from open-to-the-public airport terminals are government workplaces and fund drives, *Cornelius v. NAACP Legal Defense & Education Fund*, 105 S.Ct. 3439, 3450 (1985); utility poles, *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984); meetings between public employers and their employees' exclusive collective bargaining representatives, *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 280-82 (1984); interschool mail systems, *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37, 47 (1983); letterboxes where mail must be secure, *United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 129-30 (1981); paid advertising cards on buses, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974); and the curtilage of jail houses, *Adderley v. Florida*, 385 U.S. 39, 41 (1966).

Contrasting the nature of the place in *Adderley* with that in *Edwards v. South Carolina*, 372 U.S. 229 (1963), Justice

Black emphasized that "[t]raditionally, state capital grounds are open to the public. Jails, built for security purposes, are not." *Id.* at 41. The state was thus entitled to ban expressive activity "on that part of the jail grounds reserved for jail uses." *Id.* at 47. Because in this closed, secured physical context the state could take this action, it followed that "people who want to propagandize protests or views [do not] have a constitutional right to do so whenever and however and wherever they please." *Id.* at 48.

On the other hand, "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943). Although "whether the property has been generally opened to the public . . . is not determinative of whether the property should be at all available for "the use of the people for communicative purposes," it is at the very least "a factor to consider," *United States v. Grace*, 461 U.S. 171, 177 (1983), and, as a practical matter, has proved to be of considerable weight.[9]

The Board mistakenly relies on *Greer v. Spock*, 424 U.S. 828 (1976). In *Greer*, Army authorities had a "special interest" in regulating all activities "within the confines of the military reservation." *Id.* at 837.[10] The peculiar exigencies of the military constitute an overriding governmental interest re-

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9. This Court in *Perry* recognized in determining that the interschool mail system was not a public forum, that "as the case comes before us, there is no indication in the record that school mailboxes and interschool delivery systems are open for use by the general public." 460 U.S. at 47. In *Cornelius*, this Court recognized that a policy of "general access" was an important factor in determining whether a public forum has been created. The Board of Airport Commissioners has acknowledged that the CTA at LAX is open to members of the general public without restriction, regardless of their intent or desire to utilize the transportation related facilities (J.A. 13a, para. 31.)

10. This Court in *Greer* emphasized the "special constitutional function of the military in our national life, a function both explicit and indispensable." In the case now before the Court, a wide range of activity flourishes within the confines of the CTA at LAX. Clearly there does not exist a "special constitutional function" as was found in *Greer*.

quiring judicial deference to the commander's decision to restrict speech within the base. *See also, e.g., Goldman v. Weinberger*, 106 S.Ct. 1310, 1313 (1986) (free exercise of religion); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (equal protection).

3. *A Major Airport Is One of the Primary City Gates, Which by Tradition and by Function Are Traditional Public Forums.*

a. *Classical City Gates.* City gates as places where ideas were examined are concepts as ancient as scripture. In the scriptures, a refugee at a city of refuge "shall stand at the entrance of the gate of the city and explain his case to the elders.[11] The locus of the city gates as places of judgment and ideas is also reflected in the proverb that proclaims, "Wisdom cries aloud in the street; in the markets she raises her voice; on the top of the walls she cries out; at the entrance of the city gates she speaks . . .."[12] The role of the city gate as a place for teaching of the law and faith is also found in Nehemiah where "both men and women and all who could hear with understanding" gathered "into the square before the Water Gate to hear the law."[13] It was a beggar seeking alms at the Beautiful Gate of the Temple in Jerusalem, a man lame from birth, who saw Peter and John and solicited money.[14] The city gates, streets, and squares were places at which scriptures teach wisdom, truth, and healing were spread.

b. *National Transportation Gateways.* In modern times, as new transportation routes were created and new means for transporting goods and people were discovered, public spaces were increasingly located at transportation "crossroads." Town squares, waterfronts,[15] and later railroad terminals became three of the important forums.

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11. *Joshua* 20:14.
12. *Proverbs* 1:20-21.
13. *Nehemiah* 8:1-2.
14. *Acts* 3:2.
15. Waterfronts of the nineteenth century were accompanied by agoric activities that are widely illustrated. *See generally* I J. FORLONG, ENCYCLOPEDIA OF REGIONS 49 (1964); *e.g.*, H. MELVILLE, MOBY DICK, OR THE WHALE 795-77 (Library of America ed. [1st ed. 1851]) "[T]he waterfront was the

Railroad stations, like waterfronts, were often the central public spaces around which entire towns were built.[16] The great metropolitan railroad stations, built at the turn of the century, clearly manifest the tradition of agora type activity. Grand Central Station in New York is such a forum: it is a gateway, a transportation hub, a center of commerce, and a meeting place. Grand Central has such "First Amendment activities" as newsstands, a stock exchange information booth, and political activists and religious evangelists.

c. *Major Airports.* Today, major airports are the primary gateways to the cities, if not cities in themselves, and they have supplanted waterfronts and railroad terminals as primary public forums. In fact, at LAX a picture of the mayor of the City of Los Angeles is displayed in each of the terminal buildings on a sign that states, "Mayor Tom Bradley Salutes the New LAX—Gateway to the Olympics."

Built with and maintained by public funds, large municipal airports are regional, national, and international urban transportation centers. K. LYNCH, THE IMAGE OF THE CITY 74-75 (1960). They draw more people than the population of any American city, and attract nearby development,[17] reflecting their function as agora. In fact, having most of the characteristics of "cities,"[18] such major airports are effectively "cities in themselves" with "a daily population greater than most of

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scene of all sorts of public events . . . . Market Street Wharf and other wharves to the north of it were not only landing places, but also served as business streets." J. KEMBLE, SAN FRANCISCO BAY: A PICTORIAL MARITIME HISTORY 16 (1957).

16. Atlanta, Dallas and Denver are examples of cities that were formed around new railheads and also at the intersections of major rail lines. H. CONWAY, THE AIRPORT CITY (1977).

17. "There is an abundance of experience now available which demonstrates that development clusters quickly around big, busy airports even if they are built at some distance from the central business district in relatively undeveloped areas. In short, it is impossible for the big airport to escape the city." H. CONWAY, *supra* note 16, at 239.

18. It is apparent that the airport is a complex place, where multifaceted activities include boutiques, *Airport Shopping Spree*, FLYING TIMES, Nov.-Dec. 1986, at 3-6; health spas, sleeping quarters, S.F. Sunday Examiner & Chronicle, July 13, 1986 at T10; N.Y. Times, March 13, 1986, at F6; and meeting spaces, Project for Public Spaces, Inc., An Analysis of User Needs

the cities of the nation."[19] In 1985, the Port Authority of New York and New Jersey sparked a controversy when it called for the demolition of Kennedy Airport's Protestant, Roman Catholic, and Jewish chapels. *See* New York Times, August 25, 1985, at 47. The very presence of the chapels in the airport, *see Brashick v. Port Authority*, 484 F.Supp. 697 (S.D. N.Y. 1979), *aff'd mem.*, 628 F.2d 1344 (2d Cir. 1980), is proof of an airport's essentially agora-like nature.

The critic Paul Goldberger has written that "[a]n airport is an entrance to a city, so it should reflect the city's best aspects."[20] Access is one of those aspects which should be safeguarded. As noted planner Kevin Lynch has observed, "[U]ser control must not deny others the basic opportunities [for access] that the owners themselves enjoy. Regulations by present users often entail the exclusion of others who may have a legitimate interest in the use of the place or of some similar place."[21]

4. *Major Airports Have Been Treated by Lower Court Decisions as Public Forums.*

a. *Four Circuits' Unanimous Decisions on Major Airports.* Every federal court of appeals and district court that has confronted the question has held that an airport terminal is a public forum. The first appellate decision concerning the availability of public airport terminals for expressive activity

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and Patterns . . . International Arrival Terminals [of] John F. Kennedy International Airport 15-16, 20-24 (Sept. 1985).

19. Major airports, such as those in Chicago, New York and *Los Angeles*, possess many unmistakably urban characteristics. These airports employ thousands of people who engage directly and indirectly in the commerce of goods, services, ideas and information. Today's airport manager has been likened to a metropolitan "mayor" who is the chief administrator of a "large and diverse constituency" who must now "operate such lawful city services as fire protection, emergency medical police and security services, and in many cases, a water system, sewage treatment system and communication system. At the same time, the administration must deal with concessions, ground transport and maintenance of building and grounds—all for a 'city' having a daily population greater than most of the cities of the nation." H. CONWAY, *supra* note 16, at 242 (emphasis added).

20. P. Goldberger, *Design Notebook*, New York Times, March 23, 1978, at C10.

21. K. LYNCH, GOOD CITY FORM 208 (1981).

came in 1973, *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973), and was followed by decisions from opposite ends of the country holding that speech could not be barred from other similar transportation facilities. *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (bus terminals); *In re Hoffman*, 67 Cal. 2d 845, 434 P. 2d 353, 64 Cal. Rptr. 97 (1967) (railroad station).[22] From then until now, as evidenced by the decisions below in this case (*see* Appendices C and D for full text), lower courts have uniformly recognized that the exclusion of speech from airport terminals could not be reconciled with the First Amendment. *See, e.g., Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. 1981) (noting that the result "is now generally well established"), *cert. dismissed*, 458 U.S. 1124 (1982). The District of Columbia Circuit noted the "unusual consensus of judicial, legislative, and administrative opinion [that] would classify the public areas of [airports] squarely within the public forum family." *United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983).[23] This recognition has proceeded from judicial acknowledgment of the essential similarity, for forum analysis purposes, of metropolitan airport terminals and "traditional public forums such as streets." Thus the Seventh Circuit observed that O'Hare Airport's "spacious, city owned common areas . . . resemble those public thoroughfares which have long been recognized to be particularly appropriate

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22. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 313 n.4 (1974) (Brennan, J., joined by Stewart, Marshall and Powell, JJ., dissenting) (noting that *Wolin* and *Hoffman* extended "[p]ublic forum status . . . to municipal bus terminals and railroad stations").

23. This consensus has, indeed, recently spread across international borders. In Committee for Canada v. Canada, 1 F.T.R. 71 (Fed. Ct. 1986), a ban on expression at the Montreal International Airport was held to violate § 2 of the Canadian Charter of Rights and Freedoms. To the court, which found it "preposterous . . . to disregard the thoughtful considerations of American jurists," it "seem[ed] plain and obvious . . . that the public terminal concourses in our Canadian airports, as well as in American airports, have become contemporary extensions of the streets and public places of yesterday. They are indeed 'modern crossroads' for the intercourse of the travelling public." *Id.* at 75-76.

places for the exercise of constitutionally protected rights to communicate ideas and information." *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975). The Fifth Circuit, writing of the Dallas-Fort Worth Regional Airport, found "clear and powerful" the parallel between public streets and the crescent-shaped central concourses of the airports' terminal buildings where air travelers as well as the general public may shop, dine, and sightsee. *Fernandes v. Limmer*, 663 F.2d at 627.

An intense flurry of litigation involving the appropriateness of airport terminals for expression occurred during the period from 1974 to 1978, with a few cases thereafter.[24] These cases confirmed the appropriateness of airport terminals as places for expressive conduct by way of either final judgments,[25] temporary injunctions,[26] agreed judgments,[27] stipulated dismissal upon enactment of regulations by the local au-

24. Litigation involving the Los Angeles airport is described separately. *See infra* Part II(B)(2).

25. ISKCON v. City of St. Louis, No. 70509-F (St. Louis, Mo. Cir. Ct. Apr. 2, 1979) (Lambert International Airport, St. Louis); ISKCON v. Lentini, 461 F. Supp. 49 (E.D. La. 1978) (New Orleans International Airport); ISKCON v. Wolke, 453 F. Supp. 869 (E.D. Wis. 1978) (General Mitchell Field, Milwaukee); ISKCON v. Adlum, No. C-75-4015 (W.D. Wash. Feb. 7, 1978) (Seattle-Tacoma International Airport); ISKCON v. Collins, 452 F. Supp. 1007 (S.D. Tex. 1977) (Houston Intercontinental Airport); ISKCON v. Engelhardt, 425 F. Supp. 176 (W.D. Mo. 1977) (Kansas City International Airport); Mahoney v. Cook, Civ. No. C-4778 (D. Colo. Aug. 25, 1975) (Stapleton International Airport).

26. ACLU v. Ginty, No. C-2-77-251 (S.D. Ohio Apr. 19, 1977) (Port Columbus International Airport); ISKCON v. Cunningham, Civ. No. 76-563 (D. Or. July 9, 1976) (Portland International Airport); ISKCON v. Lamb, No. CIV-LV-75-88-RDF (D. Nev. Oct. 17, 1975) (McCarran International Airport, Las Vegas); ISKCON v. Wetzel, No. Civ. 75-450 PHX WAC (D. Ariz. Sept. 2, 1975) (Skyharbor Municipal Airport, Phoenix); ISKCON v. Garey, No. C-75-705 (N.D. Ohio Aug. 29, 1975) (Cleveland Hopkins International Airport); ISKCON v. Sorenson, No. 190090 (San Mateo County, Cal. Super. Ct. Mar. 13, 1975) (San Francisco International Airport).

27. ISKCON v. Stover, CIV-76-486M (D.N.M. Oct. 3, 1976) (Albuquerque International Airport); ISKCON v. Fillis, No. C-75-443 (D. Utah Mar. 22, 1976) (Salt Lake City Municipal Airport); ISKCON v. Hynes, No. 75-9421 (Alaska Super. Ct. 3d Dist. Mar. 11, 1976) (Anchorage International Airport).

thorities,[28] or reversal of criminal convictions.[29] Other "second generation" cases involved challenges to particular rules short of exclusions.[30]

b. *California Court Decisions on LAX.* The Los Angeles airport terminals have long been places available to members of the public in which to engage in expressive activity. During at least the past ten years, a variety of religious and political groups, including Jews for Jesus and Snyder, have utilized the CTA at LAX to distribute literature and communicate ideas. (J.A. 11a, para. 22.)

In 1974, an injunction securing the right to distribute literature in the LAX terminals was issued by Judge (now Justice) Campbell Lucas. *International Society for Krishna Consciousness v. Davis*, No. C 104943 (Los Angeles Super. Ct. Nov. 27, 1974). That is precisely what Jews for Jesus seeks to do in this case. That relief was broadened by a unanimous decision of the California Supreme Court forbidding arrest for the "sale of religious literature or solicitation of donations in any portion inside or outside at the Los Angeles International Airport generally open to the public." *Id.*, Civ. No. 45347 (Cal. Jan. 8, 1975). While in form temporary, the order in fact endured for a considerable period.[31]

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28. ISKCON v. Waser, No. C-77-107 (E.D. Wash. Sept. 7, 1979) (Spokane International Airport); ISKCON v. Flesch, No. 76-69 (E.D. Ky. July 12, 1978) (Greater Cincinnati Airport); ISKCON v. Andersen, No. Civ. 76-0-388 (D. Neb. Apr. 19, 1977) (Eppley Airfield, Omaha), attorney's fees awarded, 569 F.2d 1027 (8th Cir. 1978); ISKCON v. Mercado, No. 76-8 (D.P.R. Sept. 23, 1976) (San Juan International Airport); ISKCON v. Bosquez, Civ. No. SA-76-CA-189 (W.D. Tex. Aug. 20, 1976) (San Antonio International Airport); ISKCON v. Pixley, No. CIV 4-75-631 (D. Minn. July 2, 1976) (Wold-Chamberlain Field, Minneapolis-St. Paul); ISKCON v. Massachusetts Port Auth., No. 75-3468-T (D. Mass. Nov. 10, 1975) (Logan International Airport).

29. Arsenalt v. State, No. 75-18473 (Fla. Cir. Ct. Oct. 24, 1975) (Miami International Airport).

30. *See, e.g.*, U.S. S.W. Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 764 (D.C. Cir. 1983); Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981); ISKCON v. Eaves, 601 F.2d 809 (5th Cir. 1979); ISKCON v. Rochford, 585 F.2d 263 (7th Cir. 1978).

31. Later attempts by city officials to deter solicitation and distribution at the airport by the attempted enforcement of a parcel of miscellaneous

The overall guidelines were, or should have been, finally established by a 1978 plenary opinion of the California Supreme Court. *People v. Fogelson*, 21 Cal. 3d 158, 577 P.2d 677, 145 Cal. Rptr. 542 (1978). In *Fogelson*, an adherent of the Hare Krishna faith was convicted of violating a local ordinance by soliciting contributions on public property, specifically the main lobby of the Trans World Airlines terminal at the Los Angeles airport, without a permit. *Id.* at 161-62, 577 P.2d at 678-79, 145 Cal. Rptr. at 543-44. The conviction, challenged on both federal and state constitutional grounds, *id.* at 161, 577 P.2d at 678, 145 Cal. Rptr. at 543, was unanimously reversed on the basis that the ordinance vested overly broad discretion in licensing officials to grant or deny permission to solicit, *id.* at 167, 577 P.2d at 682, 145 Cal. Rptr. at 547. In the course of its decision, however, the court pointed out that the ordinance covered not only "city streets and parks, clearly First Amendment forums," but also—plainly referring to the airport terminal in which the arrest occurred—"to 'public' areas in municipal buildings, which are also appropriate areas for exercise of protected activity." 21 Cal. 3d at 167 n.9, 577 P.2d at 682 n.9, 145 P.2d at 547 n.9.[32] The state supreme court

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criminal ordinances failed when charges were dismissed on the ground that the activities of the defendants, members of the Krishna Consciousness Society, were constitutionally protected. *People v. Hawk*, No. 823596 (Los Angeles, Cal. Mun. Ct. Dec. 27, 1976); *People v. Mendoza*, No. 752864 (Los Angeles, Cal. Mun. Ct. Dec. 7, 1976), *appeal dismissed by abandonment*, No. CR A 15373 (Cal. Super. Ct. App. Dep't May 25, 1978).

32. As authority for the latter proposition, the court cited In re Hoffman, 67 Cal. 2d 845, 850-51, 434 P.2d 353, 356-57, 64 Cal. Rptr. 97, 100-01 (1967). *Hoffman*, the seminal California public-forum decision, has been authoritatively read as an interpretation of the California Constitution's free speech provision, Cal. Const. art. I, § 2. *See* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 854, 909, 592 P.2d 341, 346-47, 153 Cal. Rptr. 854, 859-60 (1979), *aff'd sub nom.* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). It is "a protective provision more definitive and inclusive than the First Amendment." Wilson v. Superior Court (Watson), 13 Cal. 3d 552, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975).

The *Hoffman* line of cases, and *Engleson* in particular, would have provided a substantial basis in state law for the decision of the court below in this case. A state constitutional violation was alleged in the complaint, Complaint for Declaratory, Preliminary and Permanent Injunctive Relief at 9-11, paras. 22-24, 26, and was extensively argued in the courts below, *see*

thus effectively recognized that the terminals of the Los Angeles airport constitute a public forum.[33]

The most recent litigation prior to the present case began with a state court action filed by the Krishna Consciousness Society after adoption of the same resolution at issue here. The city removed the action to federal court and later filed its own federal lawsuit against the Krishna Society and four other organizations, seeking a declaration that the resolution was valid and an injunction against its violation. The cases were consolidated. *International Soc'y for Krishna Consciousness v. City of Los Angeles*, No. CV-83-5229-ER (June 29, 1984) [hereinafter *ISKCON v. Los Angeles*].

The city's suit was dismissed for want of subject matter jurisdiction because the claim for a declaration that the resolution was constitutional did not constitute a federal question. *ISKCON v. Los Angeles*, slip op. at 3-6. In the Krishna Society's action, the court held that "whether the resolution violates the First Amendment is not an actual case or contro-

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Trial Br. of Plaintiffs and Counterdefendants at 39-45; Appellees' Br. at 6-18. It is, of course, settled practice that when a case in the federal courts may be resolved upon a pendent state claim rather than a federal constitutional claim "that course is usually pursued and is not departed from without important reasons." Siler v. Louisville & N.R.R., 213 U.S. 175, 193 (1909). The corollary to the general principle that decision of federal constitutional questions should be avoided when possible, Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring), applies equally when the pendent ground is the state constitution rather than a statute. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 294-95 (1982). Indeed the Ninth Circuit itself, shortly before its opinion in this case, had pretermitted a federal constitutional ground for deciding a challenge to a California city's ban on expressive activity at a stadium and convention center in favor of basing its decision on the state constitution's free-speech clause. Carreras v. City of Anaheim, 768 F.2d 1039, 1042-43 (9th Cir. 1985). The courts below in this case, however, inexplicably ignored the state constitution.

33. After *Engelson*, the state superior court issued, at the city's request, certain time, place, and manner rules. City of Los Angeles v. ISKCON , No. C 270320 (Los Angeles, Cal. Super. Ct. Sept. 4, 1979). This action was resolved by settlement along with four affirmative state-court cases that have been brought by the Krishna Consciousness Society or its members. ISKCON v. Davis (above); Baktapriva v. Trusel, No. C177985 (Los Angeles, Cal. Super. Ct. filed Oct. 22, 1976); Bonaccurso v. City of Los Angeles, No. C274022 (Los Angeles, Cal. Super. Ct. filed Mar. 25, 1979); Holtzman v. Davis, No. C187786 (Los Angeles, Cal. Super. Ct. filed Jan. 25, 1977).

versy," and that "[t]here is not sufficient adversity between the parties to make determination of the federal constitutional question appropriate." *Id.* at 9.

c. *FAA Regulations.* The Federal Aviation Administration recognized the traditional public forum nature of National and Dulles International Airports. Pursuant to legislative mandate,[34] it promulgated regulations regarding "certain non-commercial activities" at those airports—the distribution of literature and the solicitation of contributions. 14 C.F.R. §§ 159.91, 159.93-94 (1986). The FAA noted that "large portions of the airport buildings were designed for and are open to the general public," and that "[t]here is a considerable amount of social and commercial interchange in the terminals."[35] The agency concluded that, "in many respects, the terminals are like any other public thoroughfare where there is no question" that expressive activity is appropriate.[36]

5. *No Justification Has Been Shown by LAX, Either by Compelling Interest or Least Restrictive Means, for the Airport Ban on "First Amendment Activities."*

a. *No Compelling Interest.* Essentially conceding that it has no justification for its policy (Br. of Petitioners 26), the Board engages in the ritual incantation of its desire to "limit the uses of the facilities to their intended and dedicated airport-related facilities," *id.* at 7; *see id.* at 8, 10, 11, 12, 13, 15, 16, 18, 19, 23, 24, 27; and the bare assertion of a "right" to do so, *e.g.*, *id.* at 19. Almost as an afterthought, the Board finally seeks, with no record support, "the recognition that the Airport's functions would be seriously disrupted by the activities of all the groups who wish to use the terminal buildings to expound their views on a myriad of subjects." *Id.* at 26-27. There is not even a scintilla of evidence of "disruption" put forth by the Board in support of its position.

The record shows, however, that over a period of at least ten years, "a variety of religious and/or political groups have

34. 49 U.S.C. app. 1359 (1982).
35. 45 Fed. Reg. 35,314 (1980).
36. *Id.*

utilized the interior area of the terminal at LAX, including the pedestrian walkways located therein, to distribute literature, solicit funds, and communicate ideas." (J.A. 11a, para. 22.) Despite this long history, there is nothing in the record to show the existence of any problem whatsoever, much less any "serious[] disrupt[ion]," in connection with the functioning of the airport that arose as a result of these communicative activities, and the Board does not assert any. The only references in the record in any way related to pedestrian congestion or the like are (1) that the airport's recent "expansion and construction project" resulted in "reducing the levels of pedestrian and vehicular congestion both inside and outside of the terminal complexes" (J.A. 8a, para. 8), (2) that the airport is "not aware of any occasion" on which respondents intentionally engaged in any untoward behavior (J.A. 18a, para. 63), and (3) that, at the time an officer warned Mr. Snyder to cease his "First Amendment activities," those activities in fact were having not the slightest detrimental or even any noticeable effect on the normal functioning of the airport (J.A. 19a, para. 67-68).

Not only is the record devoid of any evidence that the LAX terminals are so congested as to be inconsistent with "First Amendment activities," but such a conclusion is belied by experience. As has been noted, the terminals have in fact been "open" for expression on a virtually unregulated basis for at least ten years, yet the Board has made not the slightest effort to demonstrate any resulting deleterious effects. Moreover, many of the "First Amendment activities" to which the airport is purportedly closed are functionally indistinguishable from the uses already explicitly allowed to the public as a matter of course. (J.A. 13a, para. 31.) The issue is not whether LAX is congested—airports have crowds with or without "First Amendment activities"—but whether LAX's congestion is so increased by such activities that the Board has a compelling interest in quashing First Amendment rights. The Board has failed to establish any "compelling state interest"

that could in any way justify the resolution. *Carey v. Brown*, 447 U.S. 455 (1980).[37]

The fact that many varieties of expression are presently engaged in without a detrimental impact upon any legitimate governmental interest further indicates that free speech is fully compatible with the business of the airport. While the leaflets distributed by Jews for Jesus can be read at one's leisure or simply discarded, many expressive activities already permitted by the city government cannot be so easily avoided. For example, the endangered species display, "Think Before You Buy" (J.A. 12a-13a, para. 24), as a large stationary object, poses much greater potential for congestion since observers may be attracted to congregate around it. By contrast, the distribution of pamphlets by an individual does not require a pedestrian so much as to break stride in order to receive or refuse the message offered.

Over the last decade it has been repeatedly shown that expressive activities can and do easily coexist with the "transportation functions" of airports. Regulations have been enacted establishing simple ground rules successfully dealing with any actual or potential difficulties. Among these are the regulations promulgated by the FAA in 1980 to allow First Amendment activities in National and Dulles Airports, as described at *supra* p. 23.

The successful coexistence of First Amendment activities and most major airports, and the lack of any demonstration

37. *See, e.g.*, Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976). Although a state may conduct business in private session, "[w]here the state has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification. In Carey v. Brown, 447 U.S. 455 (1980), not only did this Court require the state to carry the burden of showing that the regulation at issue was necessary to serve a compelling state interest, but also required that the regulation be drawn narrowly to achieve the compelling state interest *id.* at 461-65. LAX has failed to establish any compelling state interest in passing the resolution. Even assuming *arguendo* that the resolution served some compelling state interest, LAX certainly cannot carry its burden that the resolution was narrowly drawn to achieve a compelling state interest, when the resolution on its face purports to ban all "First Amendment activity" from the CTA at LAX. (J.A. 18a, para. 64.)

or even serious assertion of untoward consequences from Jews for Jesus' literature distribution, make plain that the drastic ban which the Board proposes here does not further and is not necessary to protect any compelling interest.

b. *No Least Restrictive Means.* The LAX resolution boldly states that the "[a]irport is not open for First Amendment activities by any individual and/or entity . . .." Los Angeles Bd. of Airport Comm'rs Resolution 13787 (July 13, 1983). (J.A. 5a.) (*See* Appendix B for relevant portions of the resolution.) This language is hardly precise (*see infra* Part II), but it cannot be intelligibly interpreted except to ban any airport communication to members of the public of religious or political views. Even in the closed forum in *Perry*, the public schools did not seek to ban all expression, but instead left bulletin boards for non-official messages such as union information. 460 U.S. at 53. The Board's resolution is the *most* restrictive means imaginable to accomplish any conceivable state interests. It achieves the Board's goals only by reducing the overall quantity of expression and by eliminating pure speech to preserve commercial speech and non-expressive activities.

In *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), the "booth rule" of the Minnesota State Fair, a place which the Court described as but a "limited public forum," *id.* at 655, was upheld only because it allowed oral propagation of views anywhere on the fairgrounds, *id.* at n. 16. The instant resolution, however, prohibits all access to the interior of the CTA for communicative purposes even though, as the Fifth Circuit has noted, a municipal airport "is not 'limited' in the same ways" as a state fair. *Fernandes v. Limmer*, 663 F.2d 619, 634 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982). Because an airport "is a permanent, on-going concern," its managers "are not subject to the same pressures" as are those of a state fair "in formulating short-lived, expedient regulations to ensure order." *Id.* While in Los Angeles, as in Dallas, "[c]ertain areas of the terminals may be as crowded as the fairground in *Heffron*," the

Board here, like the officials in *Fernandes*, "have not shown which, if any, areas are so congested." *Id.*

Many less restrictive alternatives exist in order to accomplish the Board's goals. These include limiting the current unrestricted public access to the terminals by excluding non-travel-related visitors, limiting reasonably the number of First Amendment expressants (as the FAA regulations do), restricting the place of expression away from peak congested areas and high security areas, or regulating the manner of expression as necessary to prevent torts or public disturbances.

The FAA regulations provide an example of less restrictive means, as promulgated in 1980 for National and Dulles Airports. The agency concluded, after a careful study, that a ban on expression was by no means necessary to preserve fully the smooth functioning of the airports under its charge, and that appropriate regulations could do the job. 45 Fed. Reg. 34,314, 35,315-17 (1980). The rules allow people *within the terminals* to distribute written matter or solicit contributions, and require anyone wishing to do so to apply for and obtain one of a fixed but reasonable number of permits, 14 C.F.R. § 159.93(b)-(d). The permits are granted "on a 'first come, first serve' basis," *id.* § 159.93(e). The FAA thus assures that the "solicitors or distributors of literature not exceed a number which would aggravate existing congestion." 45 Fed. Reg. at 35,315. In addition, solicitation or distribution may not be conducted within ten feet of any one of a number of specified places that are sensitive for any reason, such as serious congestion or security risk. 14 C.F.R. § 159.94(d). In this way the agency believes it "provides the maximum freedom of movement to leafleteers and solicitors" while at the same time preserving "the rights of others using the airports." 45 Fed. Reg. at 35,315. There is no reason to think this less restrictive alternative would not work at LAX, particularly in view of the higher need for security precautions at the Washington airports.

B. If Not a Traditional Public Forum, LAX Is Still an Open Forum, Where a Ban on "First Amendment Activities" Is Unconstitutional.

1. *The* Perry *Test Is Neither an Exclusive Test Nor Applicable to LAX.*

The Board has premised much of its argument on the supposition that all public places fit into one of three categories for the purpose of public forum analysis. The Board relies on this Court's decision in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). In *Perry*, three categories of forums were addressed by the Court. The first category, the so-called *traditional public forums*, are those places "which by long tradition or government fiat have been devoted to assembly and debate," and where "the rights of the State to limit expressive activity are sharply circumscribed." *Id.* at 45.

The second category, the *opened public forum*, "consists of public property which the State has opened for use by the public, even if it were not required to create the forum in the first place. *Id.* at 46. As is the case with traditional public forums, the state's right to limit expressive activity is sharply circumscribed. In order to pass constitutional scrutiny, the state, in order to enforce a regulation in a traditional or open public forum, must establish both a compelling state interest and a narrowly drawn means to achieve that end. *Id.* at 45; *Carey v. Brown*, 447 U.S. 455, 461 (1980)

The final category discussed in *Perry* involves those public properties which are not by tradition or by designation a forum for public communication. In these *non-public forums*, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46.

a. *Nonexclusive Test.* While it is the position of Jews for Jesus that the CTA at LAX is both a traditional public forum and an opened public forum, Jews for Jesus submits that the

Perry test is not an exclusive one. The *Perry* opinion does not set forth an immutable set of universally applicable "tests," and instead recognizes that public forum questions lie along a "spectrum." *Id.* at 45. Indeed no other view comports with the infinitely variable span of places and facilities that are controlled by government. The factors that may come into play when a citizen seeks access to one of these places or facilities are too complex, too interdependent, and too subtle to be catalogued in advance for all purposes.

The *Perry* test does not cover the "limited public forum" recognized in *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981) (state fair). Indeed, this Court, in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), a case decided after *Perry*, recognized that the determination of whether a particular piece of government owned property is a public forum, may "blur at the edges," quoting from *United States Postal Service v. Greensburgh Civic Association*, 453 U.S. 114 (1981).[38] The *Perry* test is not exclusive.

b. *Inapplicable.* In any event, the *Perry* test is inapplicable to the sorts of pure "First Amendment activities"—religious literature distribution and oral evangelism— present here, particularly where there is not a shred of evidence of disturbance of the peace, physical interference with passengers and the public, or monetary solicitation. Unlike the internal school mail system in *Perry*, the CTA at LAX is open to the general public without restriction (J.A. 8a, para. 5) and permits many "First Amendment activities." Unlike the intragovernmental charitable drive that neutrally excluded all legal defense and advocacy organizations in *Cornelius*, LAX is not a site for only governmental employees, and does not

38. In *Taxpayers for Vincent*, 466 U.S. at 815, Justice Stevens writing for a majority of the Court stated, "... 'the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a 'public forum' may blur at the edges,' and this is particularly true in cases falling between the paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust, either by tradition or recent convention, for use of citizens at large." (Citations omitted.)

neutrally exclude all expression. Unlike mailboxes with important security considerations in *Greensburgh*, LAX has unquestioned authority to exclude the general public and "First Amendment activities" from properly secured areas. However, LAX has massive pedestrian walkways within the CTA that are accessible to the general public without even having to go through metal detectors, as well as other massive pedestrian walkways that can be reached by any member of the general public after going through metal detector devices.

2. *Even If Applicable, the* Perry *Test Invalidates the Ban on "First Amendment Activities."*

a. *The CTA at LAX Has Been "Opened" for Expressive "First Amendment Activities."* Public property, which the government opens for use by the public for expressive activity, becomes a designated or open public forum, from which the state may not limit expressive activity absent a compelling state interest. *See, e.g., Perry Education Association v. Perry Local Educators' Association*, 460 U.S. at 43, 45; *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). The Board has by practice and policy unequivocally opened the CTA at LAX for indiscriminate use by the general public.[39] As the Board admits, members of the general public are permitted unrestricted access to the CTA at LAX regardless of whether their purpose or activity is airport-related. (J.A. 8a, para. 5.)

In *Widmar v. Vincent*, 454 U.S. 263 (1981), a registered student group sought access to a state university's facilities for religious worship and discussion. This Court held that the state university could not close its facilities to the group because the university had created an open forum. "Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups." *Id.* at 267. The university's plea that it had created only a "secular" forum failed. Likewise, the Board, through its policy of accommodating other First Amendment activities in the CTA

39. It is the indiscriminate use by the general public, which if present in the *Perry* factual scenario, would have allowed PLEA to "justifiably argue that a public forum has been created." *Id.* at 47.

at LAX, has created an open forum for expressive First Amendment activities.

The Board has made a silly effort to justify what in many cases are non-existent relationships between the various "First Amendment activities" conducted at LAX and what it deems "airport-related activities." (Br. of Petitioners 7.) If an endangered species display is "as clear an aid to the traveling public" as emergency exit signs (*id.* at 20), then nearly any message imaginable might be construed to offer some assistance to the traveling public and thereby be airport-related. Although the Board argues that the endangered species display is "nothing more than a warning to the international traveler that the importation of certain goods made from endangered species is illegal" (*id.* at 20), it is nothing of the sort, and simply is an ideological message relating to wildlife conservation. If it were in fact an admonition relating to illegal activity, it would certainly include the warning in its text. However, the text of the message simply states "Think Before You Buy," with no reference to illegal importation or any other illegal activity. (J.A. 12a-13a, para. 29.)

The relationship which the Board seeks to establish between the Christian Science Reading Room and "airport-related activities" is even more tenuous. The Board argues that the operation of a Christian Science Reading Room is airport related as a waiting area, which is adjunct to the terminal facilities. (Br. of Petitioners 20.) Yet there are other more numerous waiting areas in the interior terminals, which do not display religious literature pertaining to the Christian Science faith, and nothing in the record even implies that people may wait in the Reading Room without reading Christian Science literature. The Christian Science Church has promulgated its faith in the CTA at LAX with the Board's express consent since 1966. (J.A. 21a, para. 74.) Therefore, the Board opening the CTA to the Christian Science Reading Room, newsstands, political speeches, ideological displays, etc., constrains LAX to allow the use of its facilities to similar activities and pursuits by organizations such as Jews for Jesus.

Jews for Jesus, in its ministry of the Gospel, is for First Amendment purposes indistinguishable from the pursuits of the Christian Science Church and from newspapers.

The Board's assertion that the city charter mandates that the airport be operated only for airport-related purposes mischaracterizes its authority. That ignores those portions of the charter that not only authorize the Board to enter into leases for *other than airport-related purposes* (J.A. 10a, para. 16), but also authorize the general manager to issue revocable permits to use portions of the airport for *any and all purposes* that would not interfere with air navigation or air commerce. (J.A. 10a, para. 17.) (*See* Appendix A for full text of relevant sections of the Charter.)

In addition to opening the CTA at LAX to expressive "First Amendment activities," the Board has also consented to and in fact entered into leases with newsstands, restaurants, gift facilities, flight insurance counters, and money exchange facilities. (J.A. 11a, para. 18.)

These commercial activities, the activities of Snyder and Jews for Jesus, and those other expressive First Amendment activities which the Board has expressly consented to, have proved to be totally compatible with each other and with the efficient operation of the airport. (J.A. 18a, para. 63.) This Court has in the past "examined the nature of the property and its compatibility with expressive activity to discern the government's intent" in opening or designating a particular place as a public forum. *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 105 S. Ct. 3439, 3449 (1985).[40] The Board's intent at LAX cannot be more explicit. It has permitted expressive First Amendment activities and commercial activities in the CTA at LAX without having any detrimental

40. "In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that that Government intended to designate a public forum." Cornelius, 105 S. Ct. 3439, 3450. The record in this case is totally devoid of any evidence that the expressive First Amendment activities have disrupted the operation of the airport. To the contrary, the record clearly shows the compatibility of the expressive First Amendment activities with the operation of the airport at LAX.

effect on the operation of the airport. Clearly, the Board has opened the CTA at LAX as a public forum by its own intent and action. Finally, the Board does not even attempt to put forth a compelling interest, which is required in order to justify the total ban on "First Amendment activities." *Perry*, 460 U.S. at 45.

b. *The Resolution Banning First Amendment Activities Is Impermissible.* Even if LAX is an opened public forum instead of a traditional public forum, the compelling interest test applies. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. at 43, 45; *Widmar v. Vincent*, 454 U.S. at 267. That test is not met, as discussed in Part I(A)(5) *supra*.

Even if the interior terminal facilities at LAX were nonpublic forums, the resolution banning all First Amendment activity constitutes an unreasonable and therefore unconstitutional suppression of free speech. *Perry*, 460 U.S. at 46. When protected speech takes place in the context of a nonpublic forum, the government's reason for restricting expressive activity must satisfy a reasonableness standard. *Id.*; *Cornelius*, 105 S. Ct. 3349, 3447 (1985). Reasonableness, for purposes of a ban on First Amendment activities in a nonpublic forum, must at least be measured by whether it "furthers some substantial goal of the state." *Cf. Plyler v. Doe*, 457 U.S. 202, 224 (1982) (equal protection rationality standard); *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3258-60 (1985).

In attempting to justify its position that the Resolution is reasonable, the Board again relies on this Court's opinion in *Perry*. (Br. of Petitioners 22-24.) However, one of the bases on which this Court found the regulation in *Perry* reasonable was the existence of "substantial alternative channels that remain open . . . for communication to take place." *Perry*, 460 U.S. at 53. In this case the "alternative channel" for communicating, the sidewalks outside of the terminal area, prohibits Jews for Jesus from reaching over eight million people each year, a number more than the population of the City of New

York. (J.A. 9a, para. 15.) Certainly, this "accommodation" by the Board does not provide Jews for Jesus with *real* or *substantial* alternative channels.

Interestingly, the Board, by authorizing First Amendment activities on the sidewalks in front of the terminal area so long as they do not interfere with other persons (*see* Appendix B), has implicitly recognized that First Amendment activities can be conducted in an unobstructive manner. The Board offers no reason, nor does the record reflect any justification, why expressive activity can be conducted immediately outside the terminal but not inside the terminal facilities. In fact, the sidewalks are much narrower than the pedestrian walkways.

As discussed above, the resolution's ban on "First Amendment activities" is riddled with exceptions. Wide ranges of First Amendment activity are conducted in the CTA at LAX, all of which are compatible with the efficient operation of the LAX airport. The Board has failed to establish any reasonable basis for the resolution. In this context, the Board's claims to the contrary amount to little more than *ipse dixit*.

II. A MAJOR AIRPORT'S BAN ON "FIRST AMENDMENT ACTIVITIES" INVOLVES IMPERMISSIBLE DISCRETION, AMOUNTING TO A PRIOR RESTRAINT, UNDER THE FREE SPEECH AND THE FREE EXERCISE CLAUSES OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. The Airport Ban Involves Impermissible Discretion for LAX Officials, Amounting to a Prior Restraint, in Determining Whether Activities Are "First Amendment Activities" and Whether They Are "Travel Related."

1. *Official Discretion Whether To Permit or Ban First Amendment Activities Is an Impermissible Prior Restraint.*

This Court has many times held arbitrary official discretion to permit or forbid First Amendment activities to constitute an impermissible prior restraint. In *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951), the Court stated the rule as follows:

> This Court has many times examined the licensing systems by which local bodies regulate the use of their parks and public places. See *Kunz v. New York*, decided this day, *post*, p. 290. See also *Saia v. New York*, 334 U.S. 558 (1948); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Lovell v. Griffin*, 303 U. S. 444 (1938). In those cases this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a *prior restraint* on freedom of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid.

Id. at 271. On the same day as *Niemotko*, in *Kunz v. New York*, 340 U.S. 290 (1951), this Court similarly concluded under "the right . . . to speak on religious matters" that "we have consistently condemned licensing systems which rest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Id.* at 293, 294. *Accord, Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976).

The Court has applied this principle to invalidate a number of regulations of "First Amendment activities" that, like the LAX ban and airport-related exception, involved impermissible discretion because of unclear standards: the requirement of a license for group use of the streets in *Kunz v. New York*, 340 U.S. 290 (1951);[41] denial of a park permit under a licens-

41. 340 U.S. at 294:

> [We] have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court held invalid an ordinance which required a license for soliciting money for religious causes. Speaking for a unanimous Court, Mr. Justice Roberts said: "But to condition the solicitation of aid for the perpetuation of

ing practice in *Niemotko v. Maryland*, 340 U.S. 268 (1951);[42] requirement of a permit for use of a loud speaker in *Saia v. New York*, 334 U.S. 558 (1948);[43] restriction of door-to-door witnessing in *Tucker v. Texas*, 326 U.S. 517 (1946);[44] denial of a permit for distributing religious literature in *Marsh v. Alabama*, 326 U.S. 501 (1946);[45] forbidding of door-to-door distribution of handbills or circulars in *Martin v. City of Struthers*, 319 U.S. 141 (1943);[46] forbidding of distribution or

religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." 310 U.S. at 307. To the same effect are *Lovell v. Griffin*, 303 U.S. 444 (1938); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Largent v. Texas*, 318 U.S. 418 (1943). . . .

42. 340 U.S. at 273 (emphasis added):
It thus becomes apparent that the lack of standards in the license-issuing "practice" renders that "practice" a *prior restraint* in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection. . . .

43. 334 U.S. at 559-60 (emphasis added):
We hold that § 3 of this ordinance is unconstitutional on its face, for it establishes a *previous restraint* on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loudspeaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. . . .

44. 326 U.S. at 520:
It follows from what we have said that to the extent that the Texas statute was held to authorize appellant's punishment for refusing to refrain from religious activities in Hondo Village it is an invalid abridgment of the freedom of press and religion.

45. 326 U.S. at 504-05:
Under our decision in *Lovell v. Griffin*, 303 U.S. 444 and others which have followed that case, neither a State nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will. We have also held that an ordinance completely prohibiting the dissemination of ideas on the city streets cannot be justified on the ground that the municipality holds legal title to them. *Jamison v. Texas*, 318 U.S. 413. . . .

46. 319 U.S. at 146-47:
Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of

sale of religious publications without a permit in *Largent v. Texas*, 318 U.S. 418 (1943);[47] a prohibition against solicitation for a religious cause without a certificate from an official who determined whether the cause was actually religious in *Cantwell v. Connecticut*, 310 U.S. 296, 305-06 (1940);[48] a ban on literature distribution and solicitation from house to house without a license in *Schneider v. New Jersey*, 308 U.S. 147 (1939),[49] prohibition against public assembly in streets or

time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

47. 318 U.S. at 422 (emphasis added):
Upon the merits, this appeal is governed by recent decisions of this Court involving ordinances which leave the granting or withholding of permits for the distribution of religious publications in the discretion of municipal officers. It is unnecessary to determine whether the distributions of the publications in question are sales or contributions. The mayor issues a permit only if after thorough investigation he "deems it proper or advisable." Dissemination of ideas depends upon the approval of the distributor by the official. This is administrative *censorship* in an extreme form. It abridges the freedom of religion, of the press and of speech guaranteed by the Fourteenth Amendment.

48. 310 U.S. at 305-06 (emphasis added):
[The official] is empowered to determine whether the cause is a religious one, and . . . the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a *censorship* of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and . . . the Fourteenth. The state asserts that if the licensing officer acts arbitrarily, capriciously, or corruptly, his action is subject to judicial correction . . ..
. . . A statute authorizing *previous restraint* upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.

49. 308 U.S. at 164 (emphasis added):
In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion.

parks without a license in *Hague v. C.I.O.*, 307 U.S. 496 (1939);[50] and proscription of literature distribution without a city manager's permission in *Lovell v. City of Griffin*, 303 U.S. 444 (1938).[51] In each case, the official discretion, without precise standards to apply in approving or disapproving First

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. . . On this method of communication the ordinance imposes *censorship*, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.

Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house.

50. Saia v. New York, 334 U.S. at 560:

In *Hague v. C.I.O.*, [307 U.S. 496 (1939)], we struck down a city ordinance which required a license from a local official for a public assembly on the streets or highways or in the public parks or public buildings. The official was empowered to refuse the permit if in his opinion the refusal would prevent "riots, disturbances or disorderly assemblage." We held that the ordinance was void on its face because it could be made "the instrument of arbitrary suppression of free expression of views on national affairs." 307 U.S. p. 516.

51. 303 U.S. at 451-52 (emphasis added):

We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and *censorship*. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish "*without* a license what formerly could be published only *with* one." While this *freedom from previous restraint* upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. See *Patterson v. Colorado*, 205 U.S. 454, 462; *Near v. Minnesota*, 283 U.S. 697, 713-716; *Grosjean v. American Press Co.*, 297 U.S. 233, 245, 246. Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.

Amendment activities,[52] constituted a prior restraint in violation of the First Amendment.[53] Now that this Court has adopted the compelling interest test, the unconstitutional nature of prior restraints, such as LAX's ban on some First Amendment activities, is all the more clear.

2. *LAX Officials Hold and Have Exercised Such Impermissible Discretion.*

The Board holds and has exercised precisely the sort of official discretion that this Court has uniformly struck down as a prior restraint. The resolution does not define or give governing standards for applying the terms "First Amendment activities" or "promotion . . . of . . . air navigation or uses incidental thereto." In fact, the Board has conceded that its "practice has been to permit only those activities *they believe* directly aid the traveling public . . . and to deny all other cases." (Br. of Petitioners at 18, emphasis added.) That standardless discretion falls in three categories: (a) distinguishing non-First Amendment activities from First Amendment activities and banning the latter; (b) distinguishing airport-related First Amendment activities from other First Amendment activities and banning the latter; and (c) distinguishing commercial First Amendment activities from pure First Amendment activities and banning the latter. These are further discussed in Part III(A) *infra*.

There are abundant examples of the Board's unchecked official discretion. (a) It seems rather incredible, in a forum with unrestricted public access, to prefer non-expressive activities over First Amendment activities. No ban exists on various non-expressive activities by the general public in the

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52. *Accord*, Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Poulos v. New Hampshire, 345 U.S. 395, 407-08 (1953); Jamison v. Texas, 318 U.S. 413, 416 (1943); Cox v. New Hampshire, 312 U.S. 569, 577-78 (1941).

53. Explicit prior restraint language was used in Kunz v. New York, 340 U.S. at 293, 294; Niemotko v. Maryland, 340 U.S. at 271, 273; Saia v. New York, 334 U.S. at 559-60, 561; Largent v. Texas, 318 U.S. at 422 (censorship); Cantwell v. Connecticut, 310 U.S. at 306; Schneider v. New Jersey, 308 U.S. at 164 (censorship); Lovell v. City of Griffin, 303 U.S. at 451-52 (censorship).

terminals, whether or not they are airport-related, but a total ban has been promulgated against "First Amendment activities" unless they are airport-related in an unspecified sense. (b) The airport-related category is a standardless weapon for airport officials to use in excluding disfavored expression, and it has been so used to discriminate against Jews for Jesus. The Christian Science Reading Room is defended as airport-related (Br. of Petitioners 20), although there is no evidence in the record that the general public may use it as a waiting area if they do not read its literature. The endangered species display is also arbitrarily categorized as airport-related (*id.*), although it in fact does not contain any warning about sanctions for violating rights of endangered species in the United States, and instead is simply a permitted political statement. Newsstands are permitted throughout public areas in the terminal, and presumably would be allowed to give Jews for Jesus tracts or sell Jews for Jesus books, although there is nothing more airport-related about newspapers than tracts since airline passengers read both. The ban's exception for airport-related expression is itself the arbitrary creation of unchecked official discretion. (c) It also is incredible, in a forum offering unrestricted public access, to prefer commercial speech over traditional speech, but that too is where unchecked discretion has led. Commercial speech occurs in many stores, while the pure speech of Jews for Jesus is excluded. This all reflects arbitrary discretion vested in the Board.

B. The Airport Ban Involves Vagueness of Its Terms, Chilling Preferred Freedoms, in Referring to "First Amendment Activities" and "Travel Relatedness."

Vague ordinances violate the Due Process Clause, and the Board's resolution embodies both offensive aspects under the vagueness doctrine:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the

> person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Such vagueness produces a chilling effect in violation of the First Amendment.[54] This Court has recognized that "a sweeping statute or one incapable of limitation has the potential to repeatedly chill the exercise of expressive activity by many individuals . . .." *New York v. Ferber*, 458 U.S. 747, 772 (1985).

The Board's ban on "First Amendment activities" contains no definition. This allows and in fact has enabled LAX officials arbitrarily to suffer some First Amendment activities while excluding others. Its exception for "airport-related" expression also contains no definition. This permits and in fact has led to capricious official approval of some First Amendment activities and exclusion of other ones. That indeed "has the potential repeatedly to chill the exercise of expressive activity."

III. A MAJOR AIRPORT'S BAN ON "FIRST AMENDMENT ACTIVITIES" EMBODIES IMPERMISSIBLE CONTENT DISCRIMINATION AND RELIGIOUS DISCRIMINATION, UNDER THE FREE SPEECH, FREE EXERCISE, ESTABLISHMENT, AND EQUAL PROTECTION PROVISIONS OF THE FIRST AND FOURTEENTH AMENDMENTS.

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54. *E.g.*, Buckley v. Valeo, 424 U.S. 1, 76-82 (1976); Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

A. The LAX Ban Constitutes Content Discrimination against "First Amendment Activities" in Favor of Non-Expressive Activities, and Against Most Traditional First Amendment Expression in Favor of Allegedly Airport-Related Expression and Commercial Speech.

This Court has stressed that government may not grant use of a forum to persons whose views it finds acceptable while denying use to those whose views it opposes:

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted.] . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan*, *supra*, at 270.
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Department v. Mosley, 408 U.S. 92, 95-96 (1972).[55]

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55. *See also* First National Bank of Boston v. Bellotti, 435 U.S. 765, 784-85 (1978); Madison Joint School Dist. No. 8 v. Wisconsin Emp. Rel. Comm'n, 429 U.S. 167, 175-76 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209, 215 (1975); Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854 (1983).

Content discrimination exists in its most egregious form in this case, and is entirely unjustified.

1. *The Ban Constitutes Content Discrimination.*

The Board's ban on "First Amendment activities" amounts to content discrimination in three senses: (a) it prefers airport-related First Amendment activities (if an official arbitrarily characterizes them as such) while banning other First Amendment activities; (b) it prefers commercial First Amendment activities while banning many pure First Amendment activities; and (c) it prefers nonexpressive activities, by not subjecting them to an airport-related requirement, while allowing First Amendment activities only subject to such a requirement.

a. *Preferring Airport-Related First Amendment Activities While Banning Other First Amendment Activities.* The very category of airport-related First Amendment activities is itself content discrimination with no governing standards. The arbitrariness and impropriety of the airport-related distinction is evident in its application only to "First Amendment activities" and not to non-expressive activities: non-First Amendment activities come with the general public into LAX without any requirement for airport-relatedness.

That category of airport-related expression appears to have been created with no legal authority, because the city charter authorizes the Board to enter into leases for non-airport-related purposes whenever the Board determines that the use of a portion of the airport property is not necessary for the promotion of air commerce and air navigation. (J.A. 10a, para. 16.) The city charter also empowers the general manager to issue revocable permits to use limited portions of the airport facility "for any and all purposes which shall not interfere with air commerce or air navigation and not be inconsistent with any trust on which such land may be held . . .." (J.A. 10a, para. 16.) Thus, except for arbitrary official action, the exclusion should only be of activities *inconsistent with* air travel, not activities *nonessential to* air travel.

"Airport-related" seems to be simply a tag for what the Board wishes to approve in its discretion, as indicated by its approval of the Christian Science Reading Room, the endangered species display, newsstands, and the mayor's message in each terminal building. Yet this content discrimination easily could be circumvented, by an organization simply printing an airport map on the back of its evangelistic literature, or giving oral directions to travelers along with an evangelistic presentation. Rather than consider such subterfuge, Jews for Jesus brought this challenge to suggest that something so easily circumvented must be wrong in principle as well as in practice.

The Board seems to find no problem with political and religious conversations between travelers or between travelers and greeters, or with fans meeting returning sports teams and newscasters filming various events including political speeches; yet the Board disapproves of the most traditional First Amendment activities by Jews for Jesus. The Board also seems to have no problem with the sale of newspapers or the offering of Christian Science literature, while seeking to ban free distribution of religious literature by Jews for Jesus.

b. *Preferring Commercial First Amendment Activities While Banning Many Pure First Amendment Activities.* The Board permits a wide variety of stores, with various commercial displays of price and product information, and each terminal building has various newsstands. Thus, the Board actually prefers commercial speech and non-expressive activities over the "preferred freedoms" of the First Amendment.

c. *Preferring Non-First Amendment Activities While Banning First Amendment Activities.* The resolution facially discriminates against "First Amendment activities" while permitting unrestricted public access for virtually any nonexpressive purpose. The only thing the Board has banned on the record is First Amendment activities, hijacking, and terrorism, certainly a bizarre combination.

2. *Such Content Discrimination Is Unjustified.*

The standard for justifying governmental content discrimination was described in *Widmar v. Vincent*, 454 U.S. 268 (1981), as the compelling interest test:

> Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. . . . In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. See *Carey v. Brown*, 447 U.S. 455, 461, 464-465 (1980).

Id. at 269-70.

a. *No Compelling Interest Threatened.* The Board has not shown, and cannot show, that its amorphous ban is narrowly drawn to serve a compelling interest. Jews for Jesus does not question the compelling nature of the governmental interest in preventing hijacking and terrorism; but the danger comes from public access rather than expressive activities. The actual threat to the airport's interest in controlling crowds that arises from these First Amendment activities is insubstantial; otherwise the Board would restrict public access or would restrict airport-related First Amendment activities and unrelated commercial activities. The absence of any real threat from First Amendment activities is evident in the practice of other airports in allowing such activities.

b. *No Narrowly Drawn Means Used.* Every perceived danger raised by the Board results from activities other than such "First Amendment activities" as Jews for Jesus practices—and yet the Board does not use the less burdensome means of restricting the real cause of the threat. That real cause is unrestricted public access, and one narrowly drawn means of countering the perceived danger is restricting public access—particularly non-airport-related public access. Other narrowly drawn means include reasonable time, place, and

manner restrictions, such as the FAA regulations described *supra*. However, LAX has yet to demonstrate a problem that requires correction.

B. The Airport Ban Constitutes Religious Discrimination against Other Religions in Favor of the Christian Science Religion.

1. *The Ban Constitutes Religious Discrimination.*

The Board's ban on "First Amendment activities" has been applied to permit continuation of the Christian Science Reading Room, continuation of religious conversations between passengers and greeters, and continuation of religious activities such as silent prayer. However, it forbids other religious activities such as evangelism by Jews for Jesus.

This constitutes religious discrimination in violation of the First Amendment. This Court resolved a similar issue, involving a registration and reporting requirement that restricted some religions but not others, in *Larson v. Valente*, 456 U.S. 228, 255 (1982). The decision there struck down religious discrimination under the Establishment Clause:

> The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.

Id. at 244.

> It is plain that the principal effect of the fifty per cent rule in 309.515, subd. 1(b), is to impose the registration and reporting requirements of the Act on some religious organizations but not on others. . . . But this statute does not operate evenhandedly, nor was it designed to do so: The fifty per cent rule . . . effects the *selective* legislative imposition of burdens and advantages upon particular denominations.

Id. at 253-54. A decision striking down discrimination between religious and secular organizations, in their access to public university facilities, was *Widmar v. Vincent*, 454 U.S. at 269. Earlier decisions struck down similar discrimination between various religions, in *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (under First Amendment), and *Niemotko v.*

Maryland, 340 U.S. 268, 272 (1951) (under equal protection for First Amendment rights).

2. *Such Religious Discrimination Is Unjustified.*

This Court in *Larson* and *Widmar* applied the compelling interest test to religious discrimination. 456 U.S. at 246-51;[56] 454 U.S. at 270. As discussed in Parts I(A)(5) and III(A)(2), the Board does not face any nonspeculative threat to a compelling interest, and has not employed the least restrictive means. Thus, the Board by religious discrimination has violated the Establishment Clause and the Equal Protection Clause.

CONCLUSION

For these reasons, the Court should affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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56. The test in *Larson* was as follows:

> Consequently, that rule must be invalidated unless it is justified by a compelling governmental interest, cf. Widmar v. Vincent, 454 U.S. 263, 269-270 (1981), and unless it is closely fitted to further that interest, Murdock v. Pennsylvania, 319 U.S. 105, 116-117 (1943).

Id. at 247.