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February 23, 1977

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ARIZONA ATTORNEY GENERAL

Honorable Donna J. Carlson
Arizona State Representative
Arizona House of Representatives
State Capitol - House Wing
Phoenix, Arizona 85007

Re: 77-45 (R77-32)

Dear Representative Carlson:

By letter dated January 19, you requested our opinion on substantially the following question:

Does Hamilton Test Systems have the legal authority under A.R.S. § 13-712(11) to exclude citizens from its privately owned free standing vehicular emissions test stations when such citizens engage in picketing, distributing handbills, or other forms of political speech during normal business hours in such a way so as not to interfere with the operations of the testing program?

We conclude that Hamilton Test Systems lacks the legal authority to exclude citizens from its property when such persons attempt to exercise their First Amendment rights in a way that doesn't interfere with the normal business operations of the test stations during business hours for the following reasons:

1) Although the vehicular emissions test stations are privately owned, they are so imbued with a governmental function and dedicated to the public use that the stations are treated, for all intents and purposes, as if they were publicly held state property. The United States Supreme Court had held that under some circumstances privately owned property may, at least for First Amendment purposes, be treated as if it were publicly owned. Marsh v. State of Alabama, 326 U.S. 501 (1946), involved a so-called company town that was wholly owned by the Gulf Shipbuilding Corporation. In addition, the town and its shopping district were accessible to and freely used by the non-resident public in general. The corporation also provided all municipal services for the town.



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In its opinion, the Court held that persons exercising their First Amendment rights in the town could not be arrested for trespassing on private property.

In a subsequent case involving the picketing of a store in a shopping center, where the private property was not colored with a governmental function as it was in Marsh, the Court held that the picketers could not be barred from exercising their First Amendment rights under a trespassing statute. Amalgamated Food Employee's Union, Local 590 v. Local Valley Plaza, 391 U.S. 308 (1968). However, the ruling in Logan Valley was questioned in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The Lloyd case involved the exclusion of persons who were distributing handbills in a privately owned shopping center under a trespassing statute. The Court indicated that:

The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner or private property used non-discriminatorily for private purposes only. (Emphasis added.)

at 565.

The central issue in Lloyd was whether the private property had been sufficiently dedicated to the public use to be treated as public property for First Amendment purposes. The Court held:

. . . that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.

at 570.

The Logan Valley decision was later distinguished in Hudgens v. National Labor Relations Board, ___ U.S. ___, 96 S.Ct. 1029 (1976).

In Hudgens the Court indicated that the rationale of Logan Valley did not survive the Court's decision in Lloyd Corp. v. Tanner, supra, and that Lloyd amounted to a rejection of the holding in Logan Valley. However, Marsh v. State of Alabama, supra, was not so distinguished and remains a valid precedent. In the Court's words:

. . . Marsh v. Alabama, supra, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power. (Emphasis added)

at 1036.

We maintain that in this question Hamilton Test Systems stands "in the shoes of the State", because it administers the State's emission test program as the contractual agent of the State. Further, each inspection station is required to display a sign identifying it as a "State of Arizona Vehicular Emissions Inspection Station" and required to employ vehicle inspectors who shall dress in uniforms which identify them as "official Arizona emissions inspectors". [Contract between the State of Arizona and Hamilton Test Systems, Paragraphs 2.4.1 and 2.5.] The emissions stations exercise a delegated governmental function and are sufficiently dedicated to the public use so as to be considered public property for First Amendment purposes.

2) Although private property may be considered as publicly owned for First Amendment purposes, the access to such property for those purposes may be denied or regulated under certain circumstances. In New Times, Inc. v. Arizona Board of Regents, 110 Ariz. 367 (1974), the Arizona Supreme Court held that:

The exercise of first amendment rights may be regulated where such exercise will unduly interfere with the normal use of public property by other members of the public with an equal right to access to it.

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Thus, access to property for the purpose of exercising first amendment rights may be denied altogether where such property is not ordinarily open to the public, and even where state property is open to the public generally the exercise may be regulated as to prevent interference with the use to which the property is ordinarily put by the state. Food Employees v. Logan Valley Plaza, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968). We must begin with the proposition that the state has already opened the campus to the public generally and may not arbitrarily restrict the freedom of individuals, lawfully on the property to exercise their first amendment rights. (Emphasis added.)

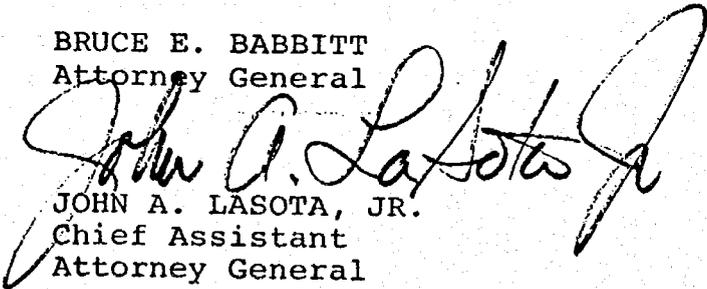
at 173-74.

We maintain that in the present question Hamilton Test Systems could not legally exclude citizens who were exercising their First Amendment rights, because (a) the emissions test stations are opened to the public generally, and (b) the picketing, hand-billing, and other forms of political speech were done in such a way as to not interfere with the use to which the property is ordinarily put by Hamilton Test Systems and the State.

If we can be of any further assistance in this matter, please contact us.

Sincerely,

BRUCE E. BABBITT
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JAL:b