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A UNIVERSITY'S SLIGHT INCONSISTENCY IN WRITTEN POLICIES AND THE RESULTING COLOSSAL EFFECT ON FIRST AND FOURTEENTH AMENDMENT RIGHTS

Yerin Cho

McGlone v. Cheek, 534 F. App'x 293 (6th Cir. 2013)

I. INTRODUCTION

The case of *McGlone v. Cheek* concerned the potential impairment of a citizen's constitutional rights to free speech and due process as a result of a public university's inconsistent and vague written policies.[1] Plaintiff John McGlone (McGlone) brought action under 42 U.S.C. §§ 1983 and 1988 against several officials employed by the University of Tennessee (the University) in the United States District Court for the Eastern District of Tennessee concerning the University's written policies on its sponsorship requirement.[2] The Sixth Circuit ultimately held that the University's sponsorship requirement policy was vague and unclear to a person of ordinary intelligence, invited arbitrary and discriminatory enforcement, and threatened to chill free speech.[3]

II. FACTUAL BACKGROUND

Plaintiff McGlone was a devout Christian who traveled to public universities and their campuses to help spread the teachings of Christianity to college students.[4] McGlone was not compensated for his faith-related speeches, nor was he represented by a religious affiliation; he acted on his own volition.[5]

On August 25, 2010, McGlone alerted the University—located in Knoxville, Tennessee—of his intention to speak on campus the following day, as he had similarly done for his past visits.[6] In

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[1] McGlone v. Cheek (*McGlone I*), 534 F. App'x 293, 294 (6th Cir. 2013).
[2] McGlone v. Cheek (*McGlone II*), No. 3:11-CV-405, 2012 U.S. Dist. LEXIS 18820, at *11 (E.D. Tenn. Feb. 15, 2012).
[3] *McGlone I*, 534 F. App'x at 298-99.
[4] *Id.* at 294.
[5] *McGlone II*, 2012 U.S. Dist. LEXIS 18820, at *3.
[6] *McGlone I*, 534 F. App'x at 295. Between 2008 and 2010, McGlone visited the University of Tennessee's campus a total of five times. *Id.* Apart from his first visit, McGlone always notified the University of his intention to speak on campus beforehand. *Id.* He never encountered any difficulties with the University during his prior visits. *Id.*

response, the University's Dean of Student Affairs[7] (Dean of Student Affairs) and the Associate Dean of Students[8] (Associate Dean) informed McGlone that he must acquire a University sponsor before utilizing any open area of the campus.[9] The Associate Dean further explained that sponsorship must be provided "by a registered student organization, staff, or faculty."[10]

Conversely, in a separate communication, the University's legal counsel informed McGlone that those who were not affiliated with the school must receive sponsorship from "students, faculty, or staff."[11] The University's legal counsel further provided to McGlone the University's two written policies: (1) the "Access to University Property" policy[12] and (2) the University student handbook.[13] The "Access to University Property" policy read as follows: "The University's campuses and facilities shall be restricted to students, faculty, staff, guests, and invitees except on such occasions when all or part of the campuses, buildings, stadia, and other facilities are open to the general public."[14] Additionally, the student handbook defined "guest" as "[a] person invited by *a university student or employee* to visit the campus at a specific time, place, and occasion."[15]

Conversely, the student handbook specifically addressed the University's sponsorship requirement, which required persons unaffiliated with the University to obtain sponsorship in order to speak on campus.[16] In a section entitled "Freedom of Expression and Speech," the student handbook read as follows:

> *[R]egistered student organizations* on campus may freely select, without prior restraints, persons they wish to invite as guest speakers.

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[7] The Dean of Student Affairs is responsible for the interpretation and administration of University "regulations that pertain to expressive activities" on campus. *McGlone II*, 2012 U.S. Dist. LEXIS 18820, at *4.

[8] The Associate Dean is responsible for the administration of University regulations that pertain to campus activities. *Id.*

[9] *McGlone I*, 534 F. App'x at 295.

[10] *Id.*

[11] *Id.*

[12] The "Access to University Property" policy, or policy # 1720-1-2, was promulgated by the University Board of Trustees in 1970 under the provisions of the Tennessee Uniform Administrative Procedures Act, TENN. CODE ANN. § 4-5-101. *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* (emphasis added).

[16] *Id.*

> There are no restrictions to control the point of view expressed by speakers other than those imposed by local, state, and federal laws. Any person sponsored by a registered campus organization is free to speak . . . . The criterion for a negative decision will be a demonstrable inability to make such physical arrangements.[17]

McGlone was led to understand that in order to comply with the University's sponsorship requirement, he needed to obtain sponsorship from a registered student organization or a University employee.[18] McGlone failed in his attempts to ascertain proper sponsorship from numerous Christian-based student organizations, the Dean of Student Affairs, and the Associate Dean.[19] Feeling "deterred by the process," and fearful of arrest, McGlone did not return to the campus again.[20]

In 2011, McGlone filed a lawsuit claiming that the University's sponsorship requirement was unconstitutionally vague, and thus violated his First and Fourteenth Amendment rights to free speech and due process.[21] The lawsuit named individually, and in their official capacities, the Dean of Student Affairs, the Associate Dean, and the University Chancellor.[22]

Specifically, McGlone alleged that the University's vague sponsorship requirement restrained and chilled his First Amendment right to religious speech.[23] McGlone further alleged that the lack of objective guidelines or standards to guide the discretion of officials who were charged with enforcing the policy violated his Fourteenth Amendment right to due process.[24] Defendants, on the other hand, contended that the University's sponsorship requirement was clearly established under the official "Access to University Property" policy, allowing any student, faculty, or staff to have the authority to grant sponsorship to visiting speakers.[25]

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[17] McGlone v. Cheek (*McGlone II*), No. 3:11-CV-405, 2012 U.S. Dist. LEXIS 18820, at *6-7 (E.D. Tenn. Feb. 15, 2012) (emphasis added).
[18] *McGlone I*, 534 F. App'x at 296.
[19] *Id.* at 295-96.
[20] *Id.* at 296; *McGlone II*, 2012 U.S. Dist. LEXIS 18820, at *10.
[21] *McGlone I*, 534 F. App'x at 296.
[22] *McGlone II*, 2012 U.S. Dist. LEXIS 18820, at *11.
[23] *Id.* at *12.
[24] *Id*. at *13.
[25] *McGlone I*, 534 F. App'x at 296.

McGlone moved for preliminary injunctive relief, hoping to enjoin all appropriate University affiliates from further enforcing the sponsorship requirement.[26] Defendants moved to dismiss all claims.[27]

The United States District Court for the Eastern District of Tennessee held that the University's sponsorship requirement was not vague, but rather "well delineated," and did not give University officials unbridled discretion to restrict speech.[28] The district court denied McGlone's motion for preliminary injunctive relief and granted Defendants' motion to dismiss.[29]

III. RATIONALE

On appeal, the Sixth Circuit reversed.[30] The Sixth Circuit examined the issue of whether the inconsistency between the two written University policies created a vagueness problem.[31] The vagueness doctrine has two goals: (1) to ensure a policy's fair notice to a man of ordinary intelligence and (2) to provide a policy's explicit standards for enforcement by officials.[32]

Indeed, inconsistency existed between the University's two written policies when one policy required, at a minimum, that a guest acquire sponsorship from a registered student organization, while the other only required sponsorship from an individual student or University employee.[33] Here, McGlone believed he had to acquire sponsorship from a registered student organization in order to comply with the University's sponsorship requirement.[34] At the time, the University had 395 registered student organizations.[35] Had McGlone acted under the provisions of the student handbook, he could have requested sponsorship from any of the more than 27,000 enrolled students or more than 8,000 University employees.[36] Thus, although

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[26] *McGlone II*, 2012 U.S. Dist. LEXIS 18820, at *13.
[27] *Id.* at *14.
[28] *Id*. at *31, *42.
[29] *McGlone I*, 534 F. App'x at 296.
[30] *Id.* at 294.
[31] *Id.* at 297. The inconsistency issue was only first presented during the appellate oral arguments. *Id.* at 296. Because the Sixth Circuit found the potential injustice to free speech to be adequately exceptional, it found *sua sponte* review of the issue to be appropriate. *Id.* at 297.
[32] Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 551 (6th Cir. 2007).
[33] *See McGlone I*, 534 F. App'x at 295.
[34] *Id.* at 296.
[35] *Id.* at 298.
[36] *Id.* at 294-95.

the written policies for the sponsorship requirement varied little in wording, the implications were far more substantial.

The Sixth Circuit concluded that the lower court erred in finding that the University's sponsorship requirement was well delineated.[37] The Sixth Circuit held that the sponsorship requirement was unconstitutionally vague and unclear, quickly noting that the mere fact that the Dean of Student Affairs, the Associate Dean, and the University's legal counsel all gave McGlone conflicting information was sufficient proof of the policy's failure to ensure the first goal of the vagueness doctrine: fair notice to people of ordinary intelligence.[38] Furthermore, McGlone's experiences with the University prior to August 25, 2010—successfully speaking on campus without University interference—also exemplified the University's inconsistent enforcement of the sponsorship requirement.[39]

The Sixth Circuit further held that the ambiguous language of the inconsistent policies invited a practice of discriminatory enforcement of the sponsorship requirement.[40] Defendants contended at trial that the "Access to University Property" policy was the official guest speaker policy for the University.[41] The "Access to University Property" policy, however, was silent as to who had the authoritative discretion for the delegation of the sponsorship requirement.[42] On the other hand, the student handbook made clear that a guest speaker would be denied only if there was an inability to make appropriate physical arrangements.[43]

Although the University contended that it held no power to revoke a guest's sponsorship once successfully acquired, it did not deny that only a University-affiliated individual held the initial power to invoke sponsorship upon chosen guests.[44] The mere possibility of a University official taking advantage of inconsistencies in policies to foreclose the option of sponsorship for undesirable individuals was sufficient for the Sixth Circuit to make a finding of plausible vagueness.[45] The Sixth Circuit further found the University's

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[37] *Id.* at 294.
[38] *Id.* at 298.
[39] *Id.* at 295.
[40] *Id.* at 298.
[41] *Id.* at 296.
[42] *Id.* at 298.
[43] *See* McGlone v. Cheek (*McGlone II*), No. 3:11-CV-405, 2012 U.S. Dist. LEXIS 18820, at *6-7 (E.D. Tenn. Feb. 15, 2012) (discussing the student handbook's Freedom-of-Expression policy, which delineates that denial of sponsorship may only be based on the inability to provide adequate physical arrangements).
[44] *McGlone I*, 534 F. App'x at 298.
[45] *Id.*

sponsorship requirement vulnerable to arbitrary and discriminatory enforcement due to inconsistency and ambiguity of the policies, failing the second goal of the vagueness doctrine.[46]

Lastly, the Sixth Circuit feared that the inconsistency in the University's policies ultimately threatened to chill an individual's First Amendment right to free speech.[47]

Here, McGlone attempted to defend specifically his First Amendment right to religious speech.[48] Endeavoring to narrow the legal issue of this case to only that of free religious speech, however, would leave the analysis incomplete. Although McGlone's constitutional rights of free speech and due process were at stake, the main legal issue focused on the vagueness of the University's written policies regarding the sponsorship requirement.[49]

It is important to note that the Sixth Circuit did not challenge, or even address, the lower court's finding that the open areas of the University's campus were limited public fora.[50] "In a limited public forum, the government need not allow persons to engage in every type of speech, and may exclude a speaker who is not a member of the class for whose special benefit the forum was created."[51] The single objection the Sixth Circuit made over the University's sponsorship requirement was the lack of consistency between the two written policies.[52] As such, both the lower court and the Sixth Circuit did not deny the University's capacity to preclude sponsorship from certain types of guest speakers, as long as the policies were rewritten in a

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[46] *Id.*
[47] *Id.* at 299.
[48] *Id.* at 294.
[49] *Id.* at 297.
[50] *See* McGlone v. Cheek (*McGlone II*), No. 3:11-CV-405, 2012 U.S. Dist. LEXIS 18820, at *25 (E.D. Tenn. Feb. 15, 2012). During its analysis, the district court noted a limited public forum is government-owned property that is "limited to use by certain groups or dedicated solely to the discussion of certain subjects," usually under some type of sponsorship requirement. *Id*. at *19-20 (quoting Miller v. City of Cincinnati, 622 F.3d 524, 534-35 (6th Cir. 2010)). The three other types of fora are: (a) traditional public forum, (b) designated public forum, and (c) nonpublic forum. *McGlone II*, 2012 U.S. Dist. LEXIS 18820, at *18. A traditional public forum is a public area, such as a street, sidewalk, or park, which the government devotes to open assembly and debate. *Id.* at *18-19. A designated public forum is public property that is traditionally not a place for public debate or assembly, but the government allows it to be treated as a traditional public forum. *Id.* at *19. A nonpublic forum is a publicly-owned property that is not designated as a forum for public communication. *Id.* at *21.
[51] *Id.* at *20 (citing Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).
[52] *McGlone I*, 534 F. App'x at 297-98.

more concise, coherent manner and did not discriminate based on viewpoint.[53] In essence, both of the University's written policies were facially constitutional when considered separately.

Overall, the ramifications of *McGlone* are slight. The University will likely review and rewrite its written policies regarding sponsorship requirement in a more consistent manner, as well as any other applicable policies that might include any other inconsistencies. Other private and public institutions should take note of this case because of its implications. Indeed, the same plaintiff, McGlone, filed a nearly identical lawsuit against Tennessee Technological University ("TTU") in the United States District Court for the Middle District of Tennessee a year before the instant case, indicating the prevalence of such claims.[54] That case also made it to the Sixth Circuit, where a similar result ensued.[55]

Although painstaking, institutions must take meticulous measures to promote consistent and straightforward written policies. Institutions should not regard this as a radical alteration but rather an overdue requisite.

IV. CONCLUSION

In conclusion, the outcome of *McGlone*, while not revolutionary, reemphasized the fundamental understanding that a policy, rule, statute, or law, which intends to enforce any requirement upon an individual, must be sufficiently consistent and plainly coherent in its language so that an ordinary person of common intelligence will be able to easily understand it and protect his or her own constitutional rights.

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[53] *See id.* at 299; *McGlone II*, 2012 U.S. Dist. LEXIS 18820, at *23-24.

[54] *See* McGlone v. Bell (*McGlone III*), 681 F.3d 718 (6th Cir. 2012). *See generally* Gilles v. Garland, 281 F. App'x 501 (6th Cir. 2008) (dismissing plaintiff's free speech and due process claims against Miami University and its unwritten sponsorship requirement policy); Gilles v. Miller, 501 F. Supp. 2d 939 (W.D. Ky. 2007) (denying a motion for preliminary injunctive relief brought by the same plaintiff from *Gilles v. Garland* regarding a similar sponsorship requirement policy at Murray State University).

[55] *McGlone III*, 681 F.3d at 722.