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Board of Educ. of Kiryas Joel Village v. Grumet:

STATUTE CREATING SCHOOL DISTRICT DESIGNED TO BENEFIT A RELIGIOUS GROUP VIOLATES THE ESTABLISHMENT CLAUSE.

In a six to three decision, the United States Supreme Court in *Board of Educ. of Kiryas Joel Village v. Grumet,* 114 S.Ct. 2481 (1994), held that a New York statute creating a school district for the benefit of a religious enclave violated the Establishment Clause of the First Amendment. Although the Court's decision upheld the ideal of governmental neutrality toward religion, it failed to devise a workable standard for analyzing statutes under the Establishment Clause.

The Village of Kiryas Joel is a village designed specifically to include only the practitioners of a strict form of Judaism. In 1989, a state statute, 1989 N.Y.Laws, ch. 748, ("Chapter 748") removed the village from the Monroe-Woodbury Central School District and established a separate school district, drawn according to the Kiryas Joel village lines. Because almost all children in the newly-created district attended parochial schools, the district's primary purpose was to provide a public special-education program for handicapped children.

Just a few months prior to the district's commencement of operations, Respondents Grumet and Hawk and the New York State School Boards Association challenged Chapter 748 as violative of the Establishment Clause of the First Amendment. Applying the three factors established in *Lemon v. Kurtzman,* known as the *Lemon* test, the trial court granted summary judgment for the respondents, finding that the statute violated the Establishment Clause because it promoted no secular purpose, had the effect of advancing religion, and fostered excessive governmental entanglement with religion. The Appellate Division and the Court of Appeals of New York both affirmed and, after staying the mandate of the United States Court of Appeals for the Fourth Circuit, the United States Supreme Court granted certiorari.

In an opinion written by Justice Souter, the Supreme Court began its analysis by noting that the Free Exercise and Establishment Clauses of the United States Constitution require government neutrality toward religion. *Grumet,* 114 S.Ct. at 2487. The majority maintained that because Chapter 748 delegated civic authority to a religious group, it violated the "constitutional command" of neutrality toward religion. *Id.* The Court compared Chapter 748 to the statute which was invalidated in *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116 (1982). In *Larkin,* the Court found that a statute violated the Establishment Clause by granting a veto power to churches, synagogues, and schools over liquor license applications for premises located within 500 feet of the church, synagogue, or school. The statute violated the neutrality requirement by conveying governmental powers to religious bodies, while not insuring that such power would

be used solely for secular purposes. *Grumet,* 114 S.Ct. at 2488 (citing *Larkin,* 459 U.S. 116).

Because an unusual Act of the legislature created the school district, the majority found there was "reason for concern . . . that the legislature [would] provide equally to other religious (and nonreligious) groups." *Id.* at 2491. Observing that the authority bestowed upon the Village of Kiryas Joel was unique, the Court determined that future communities would have no guarantee of judicial review of similar state actions, providing no way for the Court to determine if the government was favoring one group over another. *Id.* Next, the Court carefully emphasized that what invalidated the statute as an unconstitutional establishment of religion was not "[t]he fact that Chapter 748 facilitate[d] the practice of religion." *Id.* at 2492. Thus, the Court recognized and rejected the argument that Chapter 748 was merely an accommodation of religion.

Finally, the Court determined that Chapter 748 delegated civic power to a religious group, raising questions as to whether religious favoritism had been used to establish the school district. *Id.* at 2494. The majority concluded that the statute failed the neutrality test, went beyond the permissible accomodation of religion, and therefore violated the Establishment Clause of the First Amendment. *Id.*

A plurality of the court, including Justices Souter, Blackmun, Stevens, and Ginsburg found the *Larkin* reasoning persuasive, notwithstanding the factual distinction: Chapter 748 specifically delegated power to the voters in the school district, whereas in *Larkin* the power was given to the religious group leaders. "In light of the circumstances of this case, this distinction turns out to lack constitutional significance . . . [and it] is one of form, not substance." *Id.* at 2488. The plurality explained that because the State of New York drew the lines of the district knowing the religious enclave would have "exclusive control of the political subdivision" it was essentially equivalent to the *Larkin* case. *Id.*

By divesting political power to a religious sect, the statute resulted in a "forbidden 'fusion of governmental and religious functions.'" *Id.* at 2490 (quoting *Larkin,* 459 U.S. at 126). The plurality enunciated that Chapter 748 impermissibly delegated civic authority based on religious beliefs, evinced by three factors. First, the legislature was aware of the village's exclusive control of the school district. *Id.* at 2489. Second, the creation of a smaller school district ran contrary to the customary practices of the State of New York. *Id.* at 2490. Third, the district was created deliberately in a special and unusual legislative Act. *Id.*

In a separate concurrence, Justice Blackmun emphasized that the Court should adhere to the principles enunciated in *Lemon.* Justice Stevens also wrote a separate concurrence joined by Justices Blackmun and Ginsburg. Justice Stevens insisted that Chapter 748 established, rather than just accommodated, religion because the school district lines were drawn to provide "official support" to the faith. *Id.* at 2495. Concurring in part and in the judgment, Justice O'Connor expressed the difficulty in reducing the Establishment Clause to a single test. Justice O'Connor stressed that a case by case approach is necessary to free the Court from the unitary approach of *Lemon. Id.* at 2499-2500. The final concurrence, written by Justice Kennedy, expressed the view that Chapter 748 should be invalidated because the legislature drew political boundaries solely on the basis of religion.

In a vigorous dissent, Justice Scalia, with whom Chief Justice Rehnquist and Justice Thomas joined, criticized the majority for concluding a facially neutral statute had been religiously motivated. The dissent argued that the statute was based not on religion, but rather on the "cultural distinctiveness" of the group. *Id.* at 2510. Further, the dissent reasoned that even if Chapter 748 was based on religion, this would merely constitute "permissible accommodation" of religion, not establishment. *Id.* at 2511.

In *Grumet,* the Supreme Court stressed the importance

of neutrality in governmental action toward religion by invalidating a statute designed to aid a religious enclave. The decision signaled the Court's recognition of the need to evolve from the frequently criticized *Lemon* test. By not developing a workable standard, the Court left little guidance to legislatures and lower courts in determining whether a statute passes constitutional muster under the Establishment Clause.

- David A. Prichard

Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy:

STATE BEARS BURDEN OF DEMONSTRATING THAT TRUTHFUL DISCLOSURE OF CERTIFIED FINANCIAL PLANNER AND CERTIFIED PUBLIC ACCOUNTANT DESIGNATIONS IN COMMERCIAL SPEECH IS ACTUALLY, INHERENTLY, OR POTENTIALLY MISLEADING, OR ADVANCES A SUBSTANTIAL STATE INTEREST BY THE LEAST INTRUSIVE MEANS IF IT DESIRES TO RESTRICT SUCH SPEECH.

In *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 114 S. Ct. 2084 (1994), the United States Supreme Court reiterated the heavy burden incumbent upon state governments attempting to censure or limit constitutionally protected commercial speech when it considered the disclosure of validly held designations of "Certified Public Accountant" (CPA) and "Certified Financial Planner" (CFP), by a person holding herself out as an attorney, in advertising and other communications with the public. The Court held that the State must demonstrate with sufficient specificity, not mere speculation or conjecture, that the public would actually be misled or harmed by the Petitioner's commercial speech, if the State desires to restrict truthful commercial speech. The State must also show that the manner of restriction is no more extensive than that which is necessary to serve the State's interest. In so holding, the Court addressed whether the CFP designation is commonly recognized and, consequently, whether it would mislead a consumer into thinking that a CFP is certified by the State.

The Petitioner, Silvia Safille Ibanez, is a practicing attorney in Winter Haven, Florida. In addition to being a member of the Florida Bar, Ibanez is licensed by the Respondent, Florida Board of Accountancy (Board), as a CPA, and is authorized to use the designation "Certified Financial Planner" or "CFP" by a private organization known as the Certified Financial Planner Board of Standards (CFPBS).

The gravamen of the Board's complaint is that Ibanez engaged in "false, deceptive, and misleading" advertising when she included her credentials as a CPA and a CFP in her yellow pages listing, under the "Attorneys" section, as well as in her other communications with the public. The Board instituted an investigation, and eventually a complaint against Ibanez, after receiving an anonymous copy of her yellow pages listing. Pursuant to various sections of the Public Accountancy Act, Board Rules, and the Florida Administrative Code, the