

Case No. 04-4113

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

UTAH GOSPEL MISSION, FIRST UNITARIAN CHURCH OF SALT LAKE CITY, SHUNDAHAI NETWORK, UTAH NATIONAL ORGANIZATION FOR WOMEN, and LEE J. SIEGEL,

Plaintiffs/Appellants,

vs.

SALT LAKE CITY CORPORATION, a municipal corporation; ROSS C. ANDERSON, Mayor of Salt Lake City, in his official capacity; and CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Defendants/Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH, CENTRAL DIVISION
The Honorable Dale A. Kimball, Judge Presiding
Trial Court Case No. 2:03CV-0068**

**BRIEF OF THE SUTHERLAND INSTITUTE, THE UTAH TAXPAYERS
ASSOCIATION, AND THE UTAH ASSOCIATION OF REALTORS AS
AMICI CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE OF
THE DISTRICT COURT**

Maxwell A. Miller
Parsons Behle & Latimer
201 South Main St., Suite 1800
Salt Lake City, Utah 84111
Attorneys of Amici Curiae

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE.....	1
CONSENT OF THE PARTIES.....	2
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	5
I. THE CHURCH’S PROPERTY RIGHTS ARE NOT A “TECHNICALITY.”	5
A. Respect for Property Rights is Deeply Rooted in American Constitutional Law and Tradition.....	5
B. Plaintiffs’ arguments would eviscerate property rights.....	6
II. THE ASSERTED INTERESTS OF PLAINTIFFS DO NOT JUSTIFY VIOLATING CONSTITUTIONAL RIGHTS	16
CONCLUSION.....	19

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Board of Education v. Mergens</i> , 496 U.S. 226 (1990)	17
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000).....	18
<i>Central Hardware Company v. National Labor Relations Board</i> , 407 U.S. 539 (1972).....	14, 16
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994).....	17
<i>Evans v. Newton</i> , 382 U.S. 296 (1966).....	13
<i>First Unitarian Church v. Salt Lake City Corp.</i> , 308 F.3d 1114 (10th Cir. 2002).....	<i>passim</i>
<i>Flagg Brothers, Inc. v. Brooks</i> , 436 U.S. 149 (1978).....	12
<i>Freedom from Religion Foundation v. City of Marshfield</i> , 203 F.3d 487 (7th Cir. 2000)	11
<i>Hale v. Department of Energy</i> , 806 F.2d 910 (9th Cir. 1986).....	18
<i>Hawkins v. City, County of Denver</i> , 170 F.3d 1281 (10th Cir. 1999)	11
<i>Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston</i> , 515 U.S. 557 (1995)	18
<i>International Society for Krishna Consciousness v. Reber</i> , 454 F. Supp. 1385 (C.D. Cal. 1978)	12
<i>Lloyd Corporation v. Tanner</i> , 407 U.S. 551 (1972).....	14
<i>Marsh v. Alabama</i> , 326 U.S. 501 (1946).....	12
<i>United Church of Christ v. Gateway Economic Development Corporation of Greater Cleveland, Inc.</i> , 383 F.3d 449 (6th Cir. 2004).....	15
<i>United States v. Craft</i> , 535 U.S. 274 (2002).....	6
<i>United States v. Grace</i> , 461 U.S. 171 (1983)	15

TABLE OF AUTHORITIES

<i>Utah Gospel Mission v. Salt Lake City Corp.</i> , 316 F. Supp. 2d 1201 (D. Utah 2004)	<i>passim</i>
<i>West Virginia Board Of Education v. Barnette</i> , 319 U.S. 624 (1943)	17
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	17

STATE STATUTES

Utah Code Ann. § 31A-27-321(1).....	6
-------------------------------------	---

MISCELLANEOUS

A.J. Casner, 2 American Law of Property § 8.43 (1952 ed.)	8
Federalist No. 10 at 78 (C. Rossiter ed. 1961)	6
Federalist No. 54 at 339 (C. Rossiter ed. 1961)	6
James L. Huffman, <i>The Public Interest in Property Rights</i> , 50 Okla. L. Rev. 377, 383 (1997)	5
Michael W. McConnell, <i>Contract Rights and Property Rights</i> , 76 Cal. L. Rev. 267, 270 (1988)	5
J. Nedelsky, <i>Private Property and the Limits of American Constitutionalism</i> 9 (1990)	6
Restatement (Second) of Contracts § 129 (1981).....	7
William Michael Treanor, <i>The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment</i> , 94 Yale L.J. 694 (1985).....	5

INTEREST OF AMICI CURIAE

Amici Curiae, the Sutherland Institute (“Sutherland”), the Utah Taxpayers Association (“Taxpayers Association”), and Utah Association of Realtors (“Realtors Association”) hereby submit the following brief in support of Defendants/Appellees, Salt Lake City (the “City”) and the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints (the “Church”).

Amicus Curiae, Sutherland, is a non-profit, non-partisan, Utah-based public policy research institute whose goal is to encourage public policy solutions that allow private initiative to flourish, and that support private property rights and personal responsibility. In this case, Sutherland is primarily concerned that a reversal of the District Court’s decision would undermine private property rights, and thereby well-established common law and constitutional law protecting those rights, and from which many other constitutional rights and time-honored liberties emanate.

Amicus Curiae, the Taxpayer’s Association, is a statewide association of approximately 2,500 Utah taxpayers, both individuals and businesses. For over 75 years, the Taxpayers Association has been instrumental in promoting sound tax policy and preventing waste of taxpayer dollars in Utah. The Taxpayers Association has a strong interest in promoting and preserving property rights. These include, as in this case, local government decisions taken in the best interests of their taxpayer-constituents to bring cloture to divisive litigation, stop the unnecessary

hemorrhaging of taxpayer dollars, and promote stability in the administration and sale of public property to private entities.

Amicus Curiae, the Realtors Association, is a statewide association of Utah realtors. The purpose of the Realtors Association is to serve its members by representing all facets of the real estate industry, by providing and promoting programs and services to enhance members' freedom and ability to conduct their business successfully, with integrity and competency, and through collective action, to promote the preservation and extension of the right to own, transfer and use real property.

Were Plaintiffs' arguments in this case to prevail, the rights of all property owners, not only churches, would be severely and negatively impacted. Amici therefore submit this brief in support of Defendants/Appellees urging affirmance of the District Court.

CONSENT OF THE PARTIES

The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

I.

The importance of property ownership has always been an undergirding principle of the United States Constitution because its framers, as well as the philosophers of liberty upon which they relied, recognized that protection of property rights is fundamental to any free society. Following this Court's Decision in *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114 (10th

Cir. 2002), it is now possible that a public access and passage easement over private property includes a public forum in certain narrow circumstances, even when the parties that created the easement had an expressly contrary intent. However, this Court in *First Unitarian* did not even hint, much less hold, that lesser government property interests having nothing to do with public access, and which the parties intended as exclusive of First Amendment rights, might nevertheless create a public forum. Here, the City and the Church followed this Court's admonition in *First Unitarian* that the public forum easement could be extinguished by sale of the City's interest to the Church, thereby making the property entirely private. Consummation of the sale option, which thereby extinguished the public forum on the Plaza, was for a price roughly ten times the property's fair market value. From any reasonable perspective, the City "got a good deal." Plaintiffs nonetheless claim the City's insignificant interests in the former Main Street property for emergency access and aesthetic easements creates a public forum, despite the sale, the plain terms of the property documents, and the parties' expressly contrary intent. Plaintiffs advance a radical theory that calls into question the private status of innumerable private lands, inclusive of similar interests, and eviscerates private property rights, and reliance upon well-established property law.

II.

Plaintiffs' arguments further pit constitutional values against one another in an attempt to denigrate rights of others, which Plaintiffs deem less important, and by implication, not worthy of protection. Initially, Plaintiffs pit constitutionally protected property rights against selective free speech principles they claim should override all other concerns, including property rights and freedom of speech others possess. These arguments are unavailing because there are only two narrow exceptions to the general rule honoring private property rights, neither of which apply here. As supported in numerous United States Supreme Court decisions, the City's conveyance of whatever remaining interest it had in the Plaza to the Church did not convert the Church's private property to a public forum merely because the public has access to the Plaza courtesy of the Church. Neither under United States Supreme Court precedent can Plaintiffs compel the Church to be the courier of unwanted protests on its own property. The First Amendment is a two-way street. Not only does it protect speakers, but also those who, like the Church, do not wish to provide Plaintiffs a forum for protest at Church members' expense. Plaintiffs' arguments, if successful, would seriously undermine the First Amendment rights of those with whom they disagree.

ARGUMENT

I. THE CHURCH'S PROPERTY RIGHTS ARE NOT A "TECHNICALITY."

A. Respect for Property Rights is Deeply Rooted in American Constitutional Law and Tradition.

At numerous points in their brief before this Court, Plaintiffs characterize the Church's property ownership in dismissive terms. The brief charges that the agreement between the Church and City "elevates form over substance" and that the District Court mistakenly focused on the "formalities of ownership." Brf. Appls., at 25. By these statements, Plaintiffs seem to regard the Church's ownership of the area in question as a mere "technicalit[y] of property law," which is entitled to little or no respect. *Id.* at 27.

This approach ignores the reality that "secure and enforced property rights are important to the public interest." James L. Huffman, *The Public Interest in Property Rights* 50 OKLA. L. REV. 377, 383 (1997). The importance of property ownership has always been an undergirding principle of the United States Constitution, because its framers, as well as the philosophers of liberty upon which they relied, recognized that protection of property rights is fundamental to any free society. *See, e.g.*, Michael W. McConnell, *Contract Rights and Property Rights*, 76 CAL. L. REV. 267, 270 (1988) ("Protection of private property was a nearly unanimous intention among the founding generation."). The framers' conviction was that private property constitutes "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government."

J. Nedelsky, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 9 (1990). So important was this to the framers that they viewed protection of private property as “the first object of government[,]” FEDERALIST NO. 10, at 78 (Madison) (C. Rossiter ed. 1961), and inseparably linked with individual liberties. The United States Constitution was thus “instituted no less for protection of the property than of the persons or individuals.” FEDERALIST NO. 54, *supra*, at 339 (Madison). Thus, one commentator observes that James Madison “believed it necessary to erect strong safeguards for rights in general and for property rights in particular.” William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment* 94 YALE L. J. 694 (1985).

Far from being a mere technicality, property ownership is an essential part of our legal tradition worthy of great deference and respect.

B. Plaintiffs’ Arguments Would Eviscerate Property Rights.

Property rights are often conceived as a bundle of sticks. *See, e.g., United States v. Craft*, 535 U.S. 274, 279 (2002). One of the most important “sticks” in the bundle is the right to buy and sell property on mutually advantageous terms. Obviously, the value of property is highly influenced by one’s ability to sell it. The predictability and finality of property transactions is therefore of tremendous importance, both in the law, and, as a practical matter, for individuals. Indeed, such concerns are so significant that the law even protects bona fide purchasers of illegally sold property. *See, e.g., Utah Code Ann. § 31A-27-321(1)(c)*(liquidator

may not recover against a bona fide purchaser despite the seller's voidable preference).

To the greatest extent possible, people must be able to rely on the express terms of property transactions consummated in good faith. Accordingly, the law provides that the terms of a deed and other property instruments are strictly enforced to effectuate the parties' intent, ensuring that a willing buyer obtains, and a willing seller gives up, exactly what was agreed. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS, § 129 (1981)(contracts for the transfer of an interest in land may be enforced by specific performance to avoid injustice).

In *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002), these amici argued that a mere access and passage easement is insufficient to create a public forum when that result would be contrary to the parties' intent and the express terms of the deed. Although this Court did not completely agree with our position under the unique facts of that case, the Court was nevertheless careful to clarify that its holding did not imply that every public access easement over private property creates a public forum. *Id.* at 1124.

To be sure, after *First Unitarian*, it is now possible for a public access and passage easement to create a public forum on private property in certain narrow circumstances, even when the parties that created the easement had an expressly contrary intent. *First Unitarian* itself involved a public access and passage easement that served as a downtown pedestrian thoroughfare dedicated to public use – a significant government property interest this Court deemed closely

analogous to the public sidewalk rights of way that are generally considered public fora. But nowhere did this Court even hint, much less hold, that lesser government property interests having nothing to do with public access, and which the parties intended as exclusive of First Amendment rights, might nevertheless create a public forum.

The City in this case retained utility and emergency access easements, as well as the right to ensure that the property will remain a landscaped space and that the view corridor will be preserved. Plaintiffs' contention that these limited government property interests might somehow create or preserve a public forum is utterly untenable. As in many states, in Utah municipal utility, emergency access and aesthetic easements, or analogous regulations, are virtually ubiquitous – nearly every private property is burdened by some type of government property interest. Moreover, in an effort to reduce urban sprawl, while at the same time respecting private property rights, states and municipalities increasingly seek to purchase or condemn easements that preserve private open spaces and farmland. The law has long held that these government property interests do not burden private land any more than reasonably contemplated by the legal documents that create them. *See, e.g., A. J. Casner, 2 AMERICAN LAW OF PROPERTY § 8.43 (1952 ed.)*(the extent of an easement is determined by reasonable necessity rather than in terms of unqualified necessity). And no one has ever supposed that such interests – which have nothing to do with public access – might create free speech rights on private property.

The theory Plaintiffs advance is, therefore, radical and extreme. By claiming that Salt Lake City's insignificant interests in the former Main Street property create a public forum, despite the plain terms of the property documents and the expressly contrary intent of the parties, Plaintiffs call into question the private status of innumerable private lands burdened by similar interests. To take an easy example, private properties that resemble parks and are burdened by open space easements – say, privately owned fields with groomed grassy areas – would be extremely vulnerable to Plaintiffs' sweeping public forum theory. Even private residences – with their ever-present utility easements and increasingly common aesthetic, green space and trails easements – would be susceptible. If adopted, Plaintiffs' public forum arguments would disrupt settled property rights throughout the Tenth Circuit.

Furthermore, Plaintiffs' expansive public forum theory would immediately chill the willingness of private owners to grant easements to government, or at least cause them to demand a large premium for doing so. As a matter of common sense, it strains credulity to believe that any sane owner would actually want a noisy protest zone on his private land. The ability of governments to acquire property interests for the public good would thus be greatly weakened as private owners resist and acquisition costs rise. Political support for government acquiring beneficial easements and other property interests would rapidly diminish.

Given what Amici perceive as the general public anxiety after *First Unitarian*, private property owners in Utah have voiced reluctance to grant public access easements over their property. Their justifiable fear is that, even with express terms limiting public use to bare access and passage, such easements might nevertheless result in the types of unruly protests and disruptions that arose in connection with the easement over the Church Plaza. If this Court adopts Plaintiffs' argument that the City's extremely minor property interests give rise to a public forum on the Plaza, then that anxiety and reluctance will only intensify and spread to the common government property interests routinely reserved or requested by municipalities.

Plaintiffs' dismissive approach to the Church's ownership originates in their frustration with the District Court's clearly correct holding that the Church owns the Main Street Plaza outright. An overriding, but in Plaintiff's brief overlooked, fact of this case is that the transaction resulting in the extinguishment of the pedestrian easement stems from the Tenth Circuit's decision in *First Unitarian*, which gave the parties that option. In that case, the Court made it indisputably clear that litigation over protests on the Church's Plaza could easily be resolved: "If [the City] wants an easement, the City must permit speech on the easement. Otherwise, it must relinquish the easement *so the parcel becomes entirely private.*" *Id.* at 1132 (emphasis added). The City adopted this second option and extinguished the easement, so the property is now "entirely private."

