Cases



Civil Rights
Pat-Down Inspections – Stadium

In 2005, a football team, the San Francisco 49ers, Ltd., implemented a policy of the National Football League (NFL) that required all patrons at their football games to submit to a pat-down search as a condition of entering the stadium at San Francisco's Candlestick Park. This consisted of non-police screeners running their hands around the patrons' backs and down the sides of their bodies and their legs. Members of the San Francisco Police Department stood nearby, observing the searches. The Sheehans, two long-time season ticket holders, sued the team seeking declaratory and injunctive relief, claiming that the pat-down policy violated their state constitutional right to privacy. (The California State Constitution, article I, section 1, specifically refers to an inalienable right of "privacy"). The team demurred, arguing that the suit did not state a cause of action, without giving any explanation or justification for the alleged search policy, or asserting any defenses. The trial court sustained the demurrer without leave to amend and dismissed the action with prejudice. The plaintiffs appealed and the California Court of Appeal affirmed, finding that the plaintiffs had validly consented to the search and failed to show that they had a reasonable expectation of privacy, because "rather than submit to the pat-down[,] the Sheehans had the choice of walking away, no questions asked."

On further appeal, the Supreme Court of California reversed and remanded, ruling that the plaintiffs had adequately alleged a reasonable expectation of privacy not to be subjected to a pat-down inspection when entering the stadium. Referring to the analytical framework of *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633 (Cal. 1994), the court held that the plaintiffs had established a legally protected privacy interest ("a right not to have others pat them down") and a reasonable expectation of privacy under the circumstances. While consent was a factor in the latter determination, the court held that a person who chose to attend an entertainment event could not, in doing so, be taken to consent to any security measure the promoters decided to impose, "no matter how intrusive or unnecessary." Other factors were the team's identity as a private, not public, entity, and the availability of less invasive alternatives. "Private entities that present entertainment events, like the 49ers', necessarily retain primary responsibility for determining what security measures are appropriate to ensure the safety of their patrons, subject, when those security measures substantially infringe on a privacy interest, to judicial review for reasonableness." In this case, given the absence of an adequate factual record, further inquiry was necessary to determine whether the challenged policy was reasonable, and the matter was remanded for the trial court to consider the circumstances. However, three of the judges signed onto a concurring opinion that rejected the "extreme deference to the judgment of private interests" in the majority opinion, finding that the intrusion, "far from being trivial or insignificant, involve[d] a substantial invasion of citizens' interests and expectations of physical autonomy," and suggesting that the policy should be subjected to a greater level of scrutiny. *Sheehan v. San Francisco 49ers, Ltd.*, 201 P.3d 472, 45 Cal. 4th 992 (Cal. 2009).

First Amendment
Soliciting Ban Valid

As part of his campaigning for public office, Del Gallo attempted to solicit signatures in support of his election campaign in the lobby of the Pittsfield Post Office. The staff started receiving complaints, and Del Gallo was told that, although he could not solicit signatures in the post office, he could do so on the post office sidewalk, which separated the post office parking lot from the post office itself. Later that month, Del Gallo returned to solicit signatures on the post office sidewalk. This time, Del Gallo was instructed by a post office supervisor that he could not continue campaigning on the post office sidewalk. This supervisor was aware of a postal service regulation, 39 C.F.R. § 232.1, which banned "campaigning for election to any public office" on post office property. Del Gallo refused to comply and was arrested. He sued the Post Office and its staff on First Amendment grounds, alleging a violation of his rights. The district court granted summary judgment in favor of the defendants.

The U.S. Court of Appeals for the First Circuit agreed with the district court. Reviewing the purpose behind 39 C.F.R. § 232.1, the court found that, until the 1970's, the Post Office was closely tied to partisan politics. It was a Cabinet-level department within the executive branch and Congress was extensively involved in the management of the post office (including selecting local postmasters). In 1970, Congress "recognized that partisan political entanglement was one of the most foremost problems facing the post office." As part of the reorganization of the Post Office, the regulation which banned campaigning on post office property was passed to "prevent abuses and to preclude any appearance of partisan endorsement or preference." With this historical angle in mind, the First Circuit analyzed the First Amendment implications of the regulation. The first inquiry was whether the post office sidewalk constituted a traditional public forum. In this case, it was held not to "have the characteristics of public sidewalks traditionally open to expressive activity." The sidewalk was clearly distinguishable from the municipal sidewalk and was not used as a public thoroughfare or a gathering place. It was constructed for the sole purpose of providing passage into the post office for individuals "engaged in post office business ... [and] not to facilitate the daily commerce and life of the neigh-

borhood or city." Accordingly, the sidewalk was a non-public forum. The regulation was content-neutral, and its rationale, to prevent "abuses and to preclude any appearance of partisan endorsement of preference," was held to be reasonable. *Del Gallo v. Parent*, 557 F.3d 58 (1st Cir. 2009).

Violent Video Games Law

In 2005, California Governor Schwarzenegger signed into law Assembly Bill 1179. The law, among other things, stated that "[a] person may not sell or rent a video game that has been labeled as a violent video game to a minor." The plaintiff, the Video Software Dealers Association, filed suit, claiming that the law unconstitutionally restricted freedom of expression, being an impermissible content-based regulation. The State argued that, as the law dealt with minors, the court should analyze the law under the "variable obscenity" standard, rather than the strict scrutiny standard that applied to the majority of content-based regulations. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the U.S. Supreme Court held that New York State could prohibit the sale of sexually-explicit material to minors, despite the fact that the material was not considered obscene with respect to adults. Here, however, the U.S. Court of Appeals for the Ninth Circuit rejected this approach. "*Ginsberg* is specifically rooted in the Court's First Amendment obscenity jurisprudence, which relates to non-protected sex-based expression – not violent content, which is presumably protected by the First Amendment." Instead, the court reviewed the law using strict scrutiny analysis, finding that the State did not demonstrate the necessary compelling interest, nor did it show that less restrictive means for addressing the perceived harm were unavailable. The State relied on numerous studies on the effects of video games on adolescents but, unfortunately, the studies did not show a causal connection between violent video games and increased adolescent hostility. In fact, many of the studies explicitly stated that "causality was not studied." The court found, further, that less restrictive means of forwarding the State's purported interests were available, "including...enhanced education campaigns, and parental controls." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009).

Prison Mail Policy

As part of its mail policy, the Pennsylvania Department of Corrections, or PDOC, classified mail to inmates as regular mail or a "Privileged Correspondence." Until 2002, a Privileged Correspondence was any mail identified by its return address as being from an attorney or a court of law. This would be separated from regular mail, send to the corrections facility, and opened and inspected by on-site housing unit officers in the addressee-inmate's presence. In 2002, the PDOC instituted a new policy that classified mail as Privileged Correspondence only if the attorney hand-delivered the sealed communications to a specific PDOC location, or the attorney obtained a unique "control number" from the PDOC and placed it on each item sent to the inmate. A control number could be obtained by a faxed letter request that included the attorney's name, address, telephone number, and state attorney identification. Further, the number could be used only for mail that was "essential confidential, attorney-client communication," containing no contraband. Several inmates filed a pro se complaint against PDOC officials, claiming that the new mail policy unconstitutionally burdened their First Amendment rights because their attorneys and the courts had not be given control numbers, despite repeated requests and, as a result, PDOC inspectors were opening and inspecting legitimate legal-related mail. The district court agreed with the inmates, finding there was no rational relationship between the mail policy and the legitimate penological interest in prison safety and security.

On appeal, the U.S. Court of Appeals for the Third Circuit reversed. In *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court outlined a two-step test for determining whether a prison regulation was reasonably related to legitimate penological interests. A court was to first determine "whether there [was] a valid, rational connection between the prison regulation and the legitimate interest put forth to justify it." Second, three factors were to be considered – alternative means of exercising the rights available to inmates; the burden on the prison resources that would be imposed by accommodating the rights; and any alternatives to the regulation that fully accommodated the inmates' rights at *de minimis* cost to valid penological objectives. The PDOC easily met the first step by showing that the old mail policy was being abused by outsiders, who were sending contraband through mail by simply labeling it as a Privileged Communication. In addition, PDOC provided evidence that, by inspecting the mail in an off-site location, contraband was prevented from entering the corrections facility. Addressing the second part of the *Turner* analysis, the court held that control numbers were easily obtained, and, therefore, were a valid alternative means of receiving legal mail. Further, reverting back to the old policy would mean that corrections officers would have less time to deal with prison safety, causing a significant burden to corrections facilities – one that was not associated with a *de minimis* cost. *Fontroy v. Beard*, 559 F.3d 173 (3d Cir. 2009).

Employment and Personnel

Employer Health-Care Spending

Last year, the U.S. Court of Appeals for the Ninth Circuit upheld a San Francisco ordinance, the San Francisco Health Care Security Ordinance, against claims that the ordinance was preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA). *See Golden Gate Restaurant Ass'n v. City and County of San Francisco,* 546 F.3d 639 (9th Cir. 2008). The ordinance required San Francisco employers to pay, to the City, either $1.17 or $1.76 per hour per employee, depending on the profit or non-profit status of the employer and the number of employees. These payments were used to help support a City-administered program (HAP) that provided health care to low- and moderate-income residents of San Francisco. The

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