Speech: Ordinance Limiting Size of "Signs" but Exempting Artworks and National, State or Organizational Flags is Content-Neutral and Furthers Legitimate Legislative Purpose

Central Radio Company, Inc. v. City of Norfolk, No. 13-1996 (4th Cir. Jan. 13, 2015).

The Fourth Circuit has affirmed a lower court decision upholding Norfolk's signs ordinance which limits the size of signs but does not restrict most flags or artwork.

Norfolk, Virginia, like many cities, has a code section regulating the placement and display of signs. And, like many cities, it was enacted to "enhance and protect the physical appearance of all areas of the city" and to "reduce the distractions, obstructions, and hazards to pedestrian and auto traffic caused by the excessive number, size or height, inappropriate types of illumination, indiscriminate placement or unsafe construction of signs." The term "sign," however, does not include any "flag or emblem of any nation, organization of nations, state, city, or any religious organization," or any "works of art which in no way identify or specifically relate to a product or service."

Central Radio Company, Inc. wanted to place a sign on its building to protest action by the Norfolk Redevelopment and Housing Authority. In 2010 the agency initiated condemnation proceedings against Central Radio and other nearby property owners in an effort to gain control of certain properties to turn them over to Old Dominion University. Central Radio and others successfully challenged the action, after which Central Radio placed a 375-square foot banner on the side of its building facing a major thoroughfare. The sign said "50 YEARS ON THIS STREET / 78 YEARS IN NORFOLK / 100 WORKERS / THREATENED BY / EMINENT DOMAIN!" After being made aware of the sign by a member of the public the city's zoning enforcement staff confirmed that the sign did not meet applicable size restrictions for the industrial zone where Central Radio was located. The city thus directed the company to bring it into compliance with the sign code, which required reducing it to 60 square feet. Central Radio, instead, filed suit to enjoin the city from enforcing the sign code, alleging it was unconstitutional because it subjected their sign to restrictions, but excepted flags, emblems, and art.

The District Court denied the plaintiff's motion and granted summary judgment to the city. The lower court held the sign code was content-neutral and subject only to intermediate scrutiny, that the city was using its regulatory authority appropriately under such a standard, and that the exemptions were reasonably related to the city's interests. Central Radio appealed.

HELD: The Fourth Circuit affirmed the lower court's ruling that the sign ordinance is a content-neutral restriction on speech that satisfies intermediate scrutiny.

DISCUSSION: Under Fourth Circuit precedent "[a] regulation is not a content-based regulation of speech if (1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message the speech conveys; or (3) the government's interests in the regulation are unrelated to the content of the affected speech." Under this standard, just because a law differentiates between types of speech does not necessarily mean it is content-based, rather the law is only content-based if it "distinguishes content with a censorial intent to value some forms of speech over others to distort public debate, to restrict expression because of its message, its ideas, its subject matter, or to prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

The plaintiff argued that the exemption for flags, emblems, and art in the code were facially unrelated to the legislatures' stated interest in aesthetics and traffic safety. Central Radio also attacked, simultaneously, the exemption as too narrow, since it only exempted flags and emblems of governmental or religious organizations, and as too broad in that it exempts art, but does not define "art." Since, in Central Radio's estimation, private flags and many works of art have the same distracting impact on traffic and detrimental aesthetic effects on the community, the regulation lacks a reasonable relationship to the legislature's stated purpose for its enactment.

The Fourth Circuit affirmed the lower court's ruling that intermediate scrutiny applied. The exemptions bore a "reasonable relationship to legitimate legislative purposes" because the city generally allows all signs, regardless of messages, and only restricts their time, place, and manner. The exemptions simply had an incidental effect on some speakers or messages, but did not convert the whole code section into a content-based restriction demanding strict scrutiny. Moreover, exempting government and religious organizations from size limits did not demonstrate a preference for particular governments or religious groups, and exempting works of art did not demonstrate a preference for some artistic messages over others.

Being a content-neutral regulation subject to intermediate scrutiny, the law is valid so long as it "furthers a substantial government interest, is narrowly tailored to further that interest, and leaves open ample alternative channels of communication." The court noted that the record included evidence of how the banner disturbed traffic, including by causing passing drivers to honk, yell things in support of Central Radio, and wave at the building. This potentially dangerous behavior evidenced that the sign code furthered the government's interest in safety. The court also found the sign code to be narrowly tailored since it does not burden more speech than necessary to accomplish its purpose. The law limits size and location which the court found "calculated" to its safety and aesthetic reasons. Lastly, the Fourth Circuit found the law left open alternative channels of communication. Particularly important was the fact that Central Radio could still have its sign, since the city only required it meet size and location regulations for its zoning district. While the plaintiffs argued that there are "no reasonable alternatives" to convey its message such that its message could be seen by the very busy highway

below, the Circuit held that “the plaintiffs do not have a constitutional right to place their sign in the location and manner that they deem most desirable.”

http://www.ca4.uscourts.gov/Opinions/Published/131996.P.pdf (last accessed Jan. 29, 2015).