

Kicking Christmas off the Bus, Paying Less for More Work, and Muting Endorsements in Judicial Elections

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Barring Religious Ads on Public Buses
Archdiocese of Washington v. Washington Metropolitan Area Transit Authority, **No. 17-2554 (D. D.C. Dec. 8, 2017).**

The District Court in Washington DC has upheld the City bus company's policy against religious ads on its buses, finding that, as a limited public forum, the bus exteriors are subject to governmental restrictions on categories of speech so long as the policies are reasonable and do not discriminate among religious views. An allowed Salvation Army ad was not "religious."

The Archdiocese of Washington and Donald Cardinal Wuerl, Roman Catholic Archbishop of Washington (collectively Archdiocese) sought to place an advertisement on the exterior of buses operated by the Washington Metropolitan Area Transit Authority (WMATA) as part of the Archdiocese's "Find the Perfect Gift" Christmas campaign.

As the Archdiocese explained:

> The Find the Perfect Gift campaign is an important part of the Archdiocese's evangelization efforts. . . . The campaign seeks to invite the public to consider the spiritual meaning of Christmas, to consider celebrating Advent/Christmas by going to Mass at one of our parishes and/or joining in one of our many outreach programs that care for the most vulnerable and poor during Advent and beyond.

WMATA rejected the ads as inconsistent with its advertising guidelines (Guidelines), in particular, the Guideline prohibiting "[a]dvertisements that promote or oppose any religion, religious practice or belief."

The Archdiocese filed a five-count complaint that asking that the Guideline be declared unconstitutional; because the advertising campaign was specifically tied to the liturgical season of Advent, which had already begun, it moved for a temporary restraining order and preliminary injunction that would direct WMATA to immediately accept the advertisements.

The district court declined. Noting that emergency injunctive relief is an extraordinary remedy that may only be awarded based on a substantial showing that the plaintiff is likely to succeed on the merits, it found the applicable constitutional principles to be "quite clear."

While private religious speech is protected under the Free Speech Clause to the same degree as secular speech, that rule does not necessarily apply when government property has not been designated or made available for broad public use for communicative purposes. "Control over access to a nonpublic or limited forum may be based on the subject to be discussed as long as: the lines drawn are reasonable given the purpose of the forum involved, they do not favor one viewpoint over another, and they are consistently applied."

It is settled as a matter of law that the exterior of a bus is not a public forum open to anyone who wishes to address any topic. WMATA had determined not to accept advertisements related to potentially divisive topics such as politics or religion out of well-founded concerns for the safety of the public and WMATA employees--and a desire to reduce vandalism and the administrative burden of reviewing proposed ads.

The Archdiocese tried unsuccessfully to characterize WMATA's action as depriving it of the right to express a sincerely-held religious belief under RFRA. The court was unpersuaded:

> Neither the Guideline nor its application in this case interferes with plaintiff's right to practice its religion in any way, and it does not compel the Archdiocese to take any action that burdens its sincere religious convictions. The Guideline does not establish any preference for or against one religion over another, and it is neutral and generally applicable, and therefore, WMATA's decision in this case does not violate either the Constitution or RFRA.

The Archdiocese also argued that it was deprived of the opportunity to express its view of Christmas, while allowing other entities to express Christmas messages. The court found that the other complained-of advertisements were hardly comparable:

> [T]he ads heralding the opening of another CorePower Yoga fitness studio in Clarendon, Virginia ("Muscle + Mantra"), nor the ads soliciting contributions to the Salvation Army's Red Kettle effort ("Give Hope. Change Lives") "promote or oppose any religion." While the Salvation Army is a Christian organization, and its charitable efforts, like those of the Archdiocese and other religious organizations, may be motivated in some measure by religious beliefs, the ads it chose to display on the buses do not promote or advance religion.

The Archdiocese's motion for restraining order was denied.

https://www.courthousenews.com/wp-content/uploads/2017/12/ARCHDIOCESE-RULING.pdf

Note:
On December 20, 2017, the D.C. Circuit denied the Archdiocese's motion for TRO, requiring the parties to file briefs on the merits in January 2018.

A Woman Steps into a Retiring Male's Role, but is Paid Less
***Lauderdale v. Illinois Department of Human Services,* No. 16-3830 (7th Cir. Nov. 30, 2017).**

Acknowledging that a state female superintendent who assumed additional responsibilities upon the retirement of a male executive was paid less that the retiring male, the Seventh Circuit has upheld the disparity based on a showing that the state's precarious fiscal condition required drastic belt-tightening.

Marybeth Lauderdale (Lauderdale) worked as superintendent for the Illinois School for the Deaf, during which she was paid a total of $88,048. Reggie Clinton (Clinton) was superintendent for the School for the Visually Impaired and was paid $121,116 per year. When Clinton retired and the state sought to combine the roles, paying just one superintendent, Lauderdale was offered the job and, after negotiations, was paid $106,500 for the job. Lauderdale filed a lawsuit alleging a violation of the Equal Pay Act based on the difference between what she was paid and what Clinton had been paid. The district court ruled against her, finding the difference was the result of budget concerns and from applying the Illinois Pay Plan. Lauderdale appealed.

The Seventh Circuit began by setting out that the Equal Pay Act prohibits employers from discriminating between employees on the basis of sex and that establishing a prima facie case requires an employee demonstrate "a difference in pay for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." If the employee clears this hurdle, the burden shifts to the employer to evidence a neutral factor which actually accounts for the pay disparity. Given that Lauderdale took over Clinton's job and took on additional work to supervise a second school, the state conceded she had made out a prima facie case.

Like the lower court, however, the Circuit found the state's evidence compelling. First was the fact that in making its decision the state did look to the Illinois Pay Plan (Plan) for guidance about how much the new position commanded in terms of salary and showed that it had produced a decision memorandum, as required by the Plan. Second, the Circuit found that, even if the state had not strictly adhered to every provision of the Plan, emails and documents showed that Lauderdale's previous salary was a determining factor in setting her new salary and, the court noted, it has repeatedly held this is a "legitimate factor other than sex." Finally, the Circuit found that emails also showed that budgetary concerns went above and beyond the normal status the factor plays in salary decisions – pointing out that Lauderdale herself, as well as other staff, had been required to take furlough days and were warned that schools might have to close entirely due to funding concerns.

Ultimately it held that if "presented with this evidence, no reasonable juror could find that Lauderdale was paid less because of her sex." It affirmed the lower court.

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D11-30/C:16-3830:J:Kanne:aut:T:fnOp:N:2070074:S:0

Montana Judicial Candidates Can't Use Endorsements
***French v. Jones,* no. 15-35990 (9th Cir. Dec. 7, 2017).**

Efforts by a judicial candidate in Montana to strike the state's law prohibiting his use of political endorsements have failed; based on Supreme Court guidance, the Ninth Circuit upholds the lower court decision finding that such a law is narrowly tailored and is neither over-inclusive nor under-inclusive.

Montanans select their judges through nonpartisan popular elections. In an effort to keep those elections nonpartisan, Montana prohibits candidates from using political endorsements in their campaigns: "[A] judge or judicial candidate shall not . . . seek, accept, or use endorsements from a political organization, or partisan or independent non-judicial office-holder or candidate . . . ." In 2014, Mark French (French) ran as a candidate for justice of the peace in Sanders County. The Sanders County Republican Central Committee endorsed his candidacy, and two prominent Republican officeholders were also willing to consider doing so personally, if French had asked. Afraid of violating the rule, French refrained from seeking or using these endorsements in his campaign. He ultimately lost the election, but intends to run again in 2018. Seeking to use endorsements, he sued to invalidate the Montana rule on First Amendment grounds.

The district court rejected French's argument and entered summary judgment for the state.

The Ninth Circuit affirmed. It recited that content-based restrictions on judicial-campaign speech are subject to strict scrutiny, requiring the government to show that "the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. FEC*, 558 U.S. 310, 340, (2010) (citation omitted). The Circuit reviewed the Supreme Court's treatment of similar campaign speech restrictions in *White I* and *Williams-Yulee*, discerning "a clear shift in favor of state regulation." While *White I* had struck a restriction because the compelling state interest – judicial impartiality—was not adequately articulated in the regulation, *Williams-Yulee* moderated that posture significantly.

In contrast to *White I*, the *Williams-Yulee* Court did not attempt to define precisely what judicial integrity or impartiality means. Instead, it emphasized that "[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling." "Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse . . . .' The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions." (quoting *The Federalist No. 78*, at 465). The *Williams-Yulee* Court found the Florida statute being challenged was neither over-inclusive nor under-inclusive and allowed the prohibition to stand.

On that basis, the Ninth Circuit upheld the Montana restriction: "We hold that Montana has compelling interests in an impartial and independent judiciary. Rule 4.1(A)(7) is narrowly tailored to those interests because it strikes an appropriate balance between a candidate's speech and Montana's interest in an independent and impartial judiciary. French's arguments to the contrary are foreclosed by the Supreme Court's decision in *Williams-Yulee* . . . "

http://cdn.ca9.uscourts.gov/datastore/opinions/2017/12/07/15-35990.pdf