First Amendment, RLUIPA: Fortune Teller's Prognosticating Is Subject To Regulation

The Chesterfield Virginia County Code of Ordinances (Code) defines a "fortune teller" as:

> any person or organization engaged in the occupation of occult sciences, including fortune-teller, palmist, astrologist, numerologist, clairvoyant, craniologist, phrenologist, card reader, spiritual reader, tea leaf reader, prophet, psychic or advisor or who in any other manner claims or pretends to tell fortunes or claims or pretends to disclose mental faculties of individuals for any form of compensation. Code §6.1.

The Code requires that any "fortune teller" operating in the County must (1) obtain a business license; (2) receive a permit from the chief of police based on a background check confirming the absence, for the prior ten years, of a conviction for any felony or crime of moral turpitude or the denial or revocation of a fortune-telling permit; and (3) pay an annual license fee of $300.00 and annual taxes based upon gross receipts. In addition, fortune tellers must comply with zoning ordinances and may only operate in select zoning districts based upon conditional use applications to the County's Board of Supervisors.

Plaintiff Patricia Moore-King sought to operate a spiritual and psychic counseling business in the County under the name 'Psychic Sophie.' Her website stated that she drew her inspiration from a wide range of spiritual influences, including new-age philosophy, Kabbalah and "mind-body-soul-spirit-chakra study." She included references to the Bible but specifically stated that "I do not follow particular religions or practices, and 'organized' anything's are not for me."

She refused to pay the license fee, challenging the County's regulatory scheme as violating the First Amendment's free expression and establishment clauses and violating her Equal Protection rights under the Fourteenth Amendment. She also claimed violations of RLUIPA.

The district court granted summary judgment to the County. It found that Moore-King's speech, which purported to predict future events for clients, was "quintessentially deceptive" and only constituted "commercial speech." Even if her services were not commercial speech, the County's regulations contained reasonable time, manner and place restrictions needed to protect the public. Because she disavowed any religious affiliation, her RLUIPA claim could not stand. Finally, given that she had not identified any similarly-situated entity, Moore-King's Equal Protection claim failed.

On appeal, the Fourth Circuit affirmed, although diverging from the lower court on the issue of whether Moore-King's speech was deceptive. The Appeals Court found that fortune telling is not inherently deceptive; rather it is akin to a wide range of religious, medical, financial and other prognostication, all of which deserve constitutional protection—therefore that issue could not be disposed of on summary judgment. Furthermore, given the recent decision in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), (involving an intentional misrepresentation that the speaker had served in the military) even knowing falsehoods may be entitled to First Amendment protection.

On the issue of commercial speech, the Circuit Court upheld the lower court's analysis. Moore-King was dispensing compensated professional services in a private setting, justifying time-manner-place limitations. Even if that regulatory scheme treated various specialties, including fortune telling, in different ways, it did not overly contravene the requirement of content-neutrality.

The RLUIPA issue required analysis of whether Moore-King's beliefs were "sincerely held" and whether they were "religious" and occupied a place in her life "parallel to that filled by the orthodox belief in God." Although those beliefs need not be "acceptable, logical, consistent or comprehensible to others," they must nevertheless amount to a religious faith as opposed to a "way of life." Based on Moore-King's own description of her far-ranging, non-religious philosophical belief system, RLUIPA's protections for religious practice did not extend to her.

Finally, plaintiff's Equal Protection claims could not survive. Under a rational basis test, the County's regulatory mechanism was accorded wide deference, and Moore-King was required to negate "every conceivable basis" which might support the Code provisions. This she could not do. *Moore-King v. County of Chesterfield*, No. 11-2183 (4th Cir. Feb. 26, 2013).

First Amendment: Law Prohibiting Motor Vehicle Occupants From Hiring Day Laborers While Impeding Traffic Is Likely Unconstitutional

Two sections of Arizona's recent immigration reform legislation are known as the "day labor provisions." They make it unlawful for a motor vehicle occupant to hire or attempt to hire a person for work at another location from a stopped car that impedes traffic, or for a person to be hired in such a manner.

In 2011 Plaintiffs brought suit in federal district court, moving for a preliminary injunction against the day labor provisions on the grounds that they violated the First Amendment. Arizona argued that the day labor provisions serve the government's substantial interest in promoting the safe and orderly flow of traffic. In February 2012 the district court issued a preliminary injunction, prohibiting enforcement of the day labor provisions. The court held that plaintiffs were likely to succeed on the merits of their First Amendment claim because the day labor provisions were insufficiently tailored to the direct advancement of the State's interest in traffic safety.

On appeal, the Ninth Circuit affirmed, finding that, although Arizona has a significant governmental interest in promoting traffic safety, the day labor provisions fail the requirement that restrictions on commercial speech be no more extensive than necessary to serve that interest. The Circuit Court reasoned that more than the mere invocation of a significant government interest is needed before First Amendment rights can be restricted. The benefits imparted by the restrictions must be balanced against the burden imposed on the protected speech.

The court held that the day labor provisions were content-based restrictions on commercial speech (rather than "core" First Amendment speech as plaintiffs had argued). The provisions impacted commercial speech because the primary purpose of soliciting work as a day laborer was to advertise the laborer's availability and negotiate a