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

price. The provisions were content-based: they targeted labor-solicitation speech while leaving unaffected other types of street solicitation, thereby undermining an argument that their primary purpose was to promote the broader goal of traffic safety. This purpose was evident in the omnibus immigration bill, S.B. 1070, in which the day labor provisions appeared. It expressly states that the "provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."

Arizona's impermissibly disproportionate concern with this type of speech was also evident in its punishment: Whereas conduct that *recklessly* impeded traffic was punishable by 30 days' imprisonment, day labor solicitation that was not reckless carried a penalty of up to six months in prison.

The Ninth Circuit concluded that the day labor provisions were likely unconstitutional restrictions on First Amendment free speech rights by using the four-part test from *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). The Court found that: (1) day labor solicitation was neither misleading nor related to unlawful activity and therefore deserved First Amendment protection; (2) Arizona had shown the requisite substantial governmental interest (in traffic safety); and (3) Arizona had also shown that the day labor provisions did directly advance the State's interest in traffic safety by reducing pedestrians and slow-moving traffic in the streets.

However, Arizona failed the fourth prong of the *Central Hudson* test, because the day labor provisions imposed a greater restriction on a particular species of speech than was necessary to serve the State's general interest in traffic safety. Ironically, the Circuit Court found that the day labor provisions, by targeting only employment-related speech, were actually *underinclusive* if their true intent was to promote traffic safety.
The Ninth Circuit pointed out that Arizona could have advanced its interest in traffic safety directly, without reference to speech. The availability of such obvious and less restrictive alternatives made the day labor provisions constitutionally suspect.

Valle Del Sol Inc. v. Whiting, No. 12-15688 (9th Cir. Mar. 04, 2013).

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In other words, it is not enough to tell defendant what you are challenging generally, and thereby inform defendant how to correct the violation, e.g., obtain a new permit. You must specifically tell defendant what it is doing wrong, e.g., DEQ lacks authority to renew permit and you failed to renew your renewal application.

Concurrent Enforcement Actions by Citizens and Regulators

One of the more frustrating aspects of our hypothetical is the prospect of facing two lawsuits enforcing the same violations. While the CWA bars a citizen suit if the EPA or state is diligently prosecuting a comparable civil or criminal action,[43] a citizen suit may proceed in tandem with an administrative enforcement action in the following circumstances:

- If the EPA or state is not proceeding diligently. 33 U.S.C. § 1365(b)(1)(B); *Friends of the Earth Inc. v Laidlaw Environmental Services (TOC),* Inc., 890 F.Supp. 470 (D.S.C. 1995*), vacated*, 149 F.3d 303 (4th Cir. 1998); *rev'd*, 528 U.S. 167, 120 S.Ct 693 (2000).
- If the EPA or state files a civil or criminal action after the citizen timely files his or her lawsuit. 33 U.S.C. § 1319(g)(6)(B)(i); *Chesapeake Bay Foundation v. American Recovery Co.*, 769 F.2d 207 (4th Cir. 1985); *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017 (2d Cir. 1993).
- If the EPA or state files an administrative action after the citizen serves the notice of violation, and the citizen timely files his or her lawsuit within 120-days of the notice. 33 U.S.C. § 1319(g)(6)(B)(ii); *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC*, 548 F.3d 986, 989, 992 (11th Cir. 2008).

With respect to the first exception noted above, the CWA bar in Section 1367(b)(B) explicitly prohibits citizen suits "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action. . . ."[44] The District Court in *Laidlaw* considered whether the South Carolina designated agency diligently prosecuted in filing a judicial action against Laidlaw. The complaint was filed on the 60th day of the notice period for FOE and CLEAN, and the consent order resolving Laidlaw's NPDES violations was also lodged on the 60th day and signed and entered by the court the next day.[45]

At the outset, the court noted that citizen-plaintiffs bear a heavy burden to prove the state agency's prosecution was not diligent because courts give great deference to government enforcement agencies. This deference is grounded in the delegation by the CWA of primary enforcement responsibility to designated state and federal agencies.[46] Despite this burden, the court found that the South Carolina was not diligent because procedurally the one day between lodging and entering the consent decree did not provide plaintiffs a chance to exercise their statutory right to intervene. Substantively, the consent order lacked strong enforcement provisions. Most importantly, the DHEC agreed to a penalty of only $100,000 when it could have sought an amount as high as $2,270,000.[47]

Under the second exception, the CWA only bars a citizen's suit when the EPA or state files litigation before the citizen's lawsuit, not after. Section 1365(b)(1)(B) bars a citizen suit "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action. . . ."[48] The Fourth Circuit followed the language of CWA and refused to bar a citizen suit because an EPA lawsuit was filed after the citizen suit. In *Chesapeake*, the Chesapeake Bay Foundation (Foundation) gave the required 60 day notice to the EPA and State of Maryland. After the 60 days expired, the Foundation filed suit at 12:34 p.m., and the EPA filed suit at 3:52 p.m.[49] The court held that "jurisdiction is normally determined