Cases



by Erich R. Eiselt, Assistant General Counsel

Ordinance Limiting All Signs Except "Holiday Decorations" and "Public Art" Is Content Neutral

William Bowden, a resident of Cary, North Carolina wanted to express his unhappiness with water damage allegedly caused to his home by the Town. He scrawled the words "Screwed by the Town of Cary" in bright fluorescent orange paint across a 15-foot swathe of his home, in letters more than a foot tall. The Town notified him that his message violated the Town's sign ordinance, which prohibits fluorescent colors and limits signs to five square feet, with the exception of holiday displays and public works of art. He refused to remove the sign and sued on First Amendment grounds because the ordinance was not content-neutral.

The district court ruled for Bowen, finding that, because the ordinance made an exception for holiday decorations and public art, it necessarily required content-specific analysis to determine whether a given sign was exempt, triggering strict scrutiny review. The court enjoined enforcement of the ordinance and awarded Bowen more than $36,000 in attorney's fees. The Town appealed.

The Fourth Circuit reversed, finding the carry sign ordinance to be content-neutral.

The mere fact that a determination must be made as to whether a sign falls within the holiday decoration or public art exception does not invalidate the ordinance's content neutrality. The Court of Appeals reviewed its recent opinion in *Wag More Dogs, LLC v. Cozart*, 630 F.3d 359 (4th Cir. 2012), where it upheld a rule limiting the size of commercial signs while not so limiting other types of signs. That opinion had relied on the Supreme Court's treatment of content neutrality in *Hill v. Colorado* 530 U.S. 703 (2000), which eschewed a "formalistic approach" to assessing content neutrality and instead adopted a "more practical inquiry."

The Fourth Circuit stated that "content neutrality bars only one particular form of distinction—those made with a censorial intent..." In so holding, it aligned with the posture of the Seventh, Third, Sixth and Ninth Circuits--and departed from the absolutist approach taken by the Fifth, Eighth and Eleventh Circuits, which hold that content neutrality is absent if the ordinance requires any inquiry whatsoever as to content.

Under intermediate scrutiny, the Town's ordinance successfully met the requirement that it bear a reasonable relationship to its asserted purpose: traffic safety and aesthetics. The Cary ordinance placed reasonable time, manner and place restrictions "only on the physical characteristics of messages." It furthered a substantial governmental interest, was narrowly tailored, and left open ample alternate means of communication.

Reversed and remanded (including reversal of attorney's fee award). *Brown v. Town of Cary*, No. 11-1480 (4th Cir. Jan. 22, 2013).

NOTE: *John Baker of Greene Espel PLLP, Minneapolis, Minnesota, and other lawyers were part of team that filed an amicus brief on behalf of IMLA, Scenic America, the North Carolina League of Municipalities, the Virginia Municipal League, the South Carolina League, and the Maryland League, in support of the successful effort by the Town of Cary to overturn the judgment against it arising out of enforcement of its sign ordinance.*

Male Traveler's Bare Chest Protest of Airport Screening Is Protected Speech

In December 2010, Aaron Tobey passed through TSA passenger screening at the Richmond Virginia airport. Tobey showed his displeasure by disrobing to socks and running shorts, revealing the text of the Fourth Amendment written on his chest. Although he peacefully entered the scanning equipment and allowed himself to be imaged, he was arrested by airport officers for creating a public disturbance. After being detained for an hour, he was allowed to board a flight. The public disturbance charges were subsequently dropped.

Tobey sued various TSA and Richmond police officers, claiming violation of his First, Fourth and Fourteenth amendment rights. The District Court for the Eastern District of Virginia dismissed his Fourth Amendment claim because Tobey's behavior justified police action; his Fourteenth Amendment Equal Protection claim failed because he could point to no other disrobing or protesting passengers. However, the lower court refused to dismiss his First Amendment cause of action, questioning whether the officers' actions were motivated by a desire to squelch Tobey's political expression or were part of a TSA policy to prohibit such speech. The TSA defendants appealed on qualified immunity grounds, arguing that they had not violated a "clearly established" constitutional right.

The Fourth Circuit Court of Appeals affirmed, in a split decision. Mr. Tobey had plausibly set forth a claim that the TSA officers caused his arrest, violating his clearly established First Amendment rights.

In order to state a plausible First Amendment claim, Tobey had to demonstrate (1) that he was engaging in protected speech; (2) that he was seized as a result of his expression; and (3) the "temporal proximity" between his peaceful protest and arrest, unsupported by probable cause. Tobey alleged that his silent, nonviolent expression of disagreement with the TSA's screening policies was immediately followed by his arrest, a retaliatory response to his message. Defendants countered that the arrest was justified due to Tobey's "bizarre" and "disruptive" behavior.

The Fourth Circuit disagreed. "For us to hold today that it is reasonable to cause an arrest due to bizarre behavior would undermine the most basic tenets of our Constitution." The TSA's own