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Speech: Limiting Protestors to Specified Areas of Arena Concourse is Constitutional; Prohibiting Profanity and Amplification is Not

Pomicter v. Luzerne County Convention Center Authority, no. 18-2380 (3d Cir. Sept. 23, 2019).

A municipal arena used for commercial activities is a nonpublic forum, allowing for reasonable restrictions on otherwise protected speech; while the restrictions may include limiting protestors to specific areas so as to allow passage by patrons, restrictions on protestors' use of profanity or devices to amplify their message cannot stand.

Luzerne County Convention Center Authority ("Authority") owns the Mohegan Sun Arena ("Arena"), a large event space in Wilkes-Barre, Pennsylvania. The Arena holds up to 10,000 people and hosts athletic and other commercial entertainment events. Patrons attending events at the Arena drive from the public road onto an access road, park in one of the lots, and then walk to the Arena's entrances via a large concrete concourse.

Under the Arena's protest policy, "[a]ll persons are welcome to express their views" at the Arena. The Arena's policy imposes several limits on protest activity. First, protesters must stand within "designated area[s]" on the concourse and "[h]andouts can only be distributed from within" those areas (the "location condition"). Second, the policy bans protesters from using profanity and "promotional verbiage suggesting vulgarity or profanity" (the "profanity ban"). Finally, the protest policy prohibits any artificial voice amplification (the "amplification ban").

In 2016, Silvie Pomicter (“Pomicter”) and Last Chance for Animals (“LCA”), sought to protest the use of animals in circuses at the Arena. They sued the Authority, contending the Arena's protest policy is a facial violation of their free speech rights under the First Amendment and Article I of the Pennsylvania Constitution. They alleged that confinement to the designated areas limited their ability to communicate with patrons, and sought declaratory and injunctive relief prohibiting the Authority from enforcing the location condition, the profanity ban, and the amplification ban.

The district court, after holding an evidentiary hearing on the location condition, granted plaintiffs’ motion for injunction, finding it "unreasonable 'in light of the characteristic nature and function' of the Arena." It crafted a less restrictive policy in its injunction, allowing up to 20 protesters to distribute literature and talk to patrons within a circumscribed section of the concourse -- but protesters could not approach anyone in line or otherwise "block the ingress or egress of patrons."

Plaintiffs protested under the terms of the preliminary injunction at circus performances at the Arena in 2016 and in 2017. The district court later held a bench trial where plaintiffs showed video footage of nonconfrontational interactions between patrons and protesters, with no abnormal congestion created on the concourse. The Arena argued that, while plaintiffs’ interactions were peaceful, the Arena’s policies were designed to deal with other, potentially more unruly protest groups.

The district court ruled in favor of plaintiffs and found all three restrictions violated the First Amendment. As to the location condition and amplification ban, the court discounted the Arena’s proffered explanations for the policies, finding them speculative and unreasonable. As to the profanity ban, the court held it "unreasonably singles out First Amendment activity by imposing" the ban "on protesters alone. “It entered judgment for plaintiffs and enjoined defendants from enforcing the three restrictions, though it noted more carefully crafted restrictions may be permissible.

The Third Circuit affirmed in part. Its opinion began by affirming that plaintiffs’ message was assuredly protected speech—but that the forum in which the speech takes place governs what regulation is permissible; in a nonpublic forum like the Arena concourse, protected speech is subject to reasonable regulations.

In a public forum, property that "has been traditionally open to the public for expressive activity, such as public streets and parks, "time, place, and manner restrictions must be content neutral and narrowly tailored, while content-based restrictions must meet the even higher bar of being the least restrictive means of achieving a compelling government interest.

In nonpublic forums—government property that is not dedicated to First Amendment activity—the government has more flexibility to limit speech. "Nothing in the Constitution requires the government to grant open access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the

property or to the disruption that might be caused by the speaker's activities. Rather, the government may reserve a nonpublic forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

Here, the concourse was used for ingress and egress to the Arena—there was no evidence that it was routinely used for public assembly and advocacy. There was no claim that the Arena's protest policy discriminated based on viewpoint or that it was enforced in a discriminatory way. Accordingly, the inquiry was "reasonable in light of the purpose served by the forum." The record confirmed that the concourse was dedicated to a single purpose: providing for the passage of patrons into and out of the Arena. Customers required access through the concourse from the parking areas, and it was important that areas immediately abutting the parking lots remained clear to prevent "backing people up into the traffic area." Given this usage, the Arena's location condition, which required protesters to stand within designated areas on the concourse next to the Arena's two entrance gates, was reasonably related to the goal of minimizing congestion. Plaintiffs' arguments for other less restrictive strategies were unavailing in the context of a nonpublic forum—even though the location condition clearly burdened plaintiffs' speech, narrow tailoring was not required here.

The profanity condition did not survive, however. While the Authority justified the ban because "customers of the Arena should not be subjected to profane or vulgar language when attending a sports or entertainment event at the Arena," the court found that the ban was inconsistent with "the atmosphere" of the Arena—which imposed no such restriction on spectators, athletes or other attendees.

The voice amplification ban was likewise unjustifiable. The Authority argued that protestors' messages would drown out Arena announcements or commercial vendors' solicitations, and would annoy attendees, but the court was unconvinced: "Here, faced with a lack of record support demonstrating the justification for the ban or connection to the forum, we will not make inferences to fill the gaps and accordingly conclude the amplification ban is unreasonable."

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