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FEATURED CASE:

Takings: Rational Basis Review Applies to Deprivation of Work, but Concurrence Suggests that Work is a Fundamental Right

***Golden Glow Tanning Salon, Inc. v. City of Columbus*, no. 21-60898 (5th Cir. Nov. 8, 2022).**

A tanning salon unsuccessfully challenges a COVID shutdown mandate on Equal Protection and Takings grounds—but the concurrence argues that work is a fundamental unenumerated right and implies that the Supreme Court should apply strict scrutiny to governmental acts which deprive one of the right to earn a livelihood.

Background
In March 2020, after the Governor of Mississippi declared a state of emergency in response to the Covid-19 pandemic, Columbus, Mississippi (City) passed an ordinance (Ordinance) including a number of measures to counter the spread of the virus. The Ordinance's stated purpose was to reduce excessive person-to-person contact so as to slow the pandemic. It subjected to closure bars, nightclubs, gyms, spas, barbershops, beauty parlors and other businesses; places of worship were limited to gatherings of no more than 10 people.

Section 2 of the Ordinance subjected Golden Glow Tanning Salon (Golden Glow) to mandatory closure from March 21 through May 9, 2020. An owner of Golden Glow told the mayor and two city council members that his tanning business could operate without person-to-person contact, but the City made no exception.

In May 2020, Golden Glow brought a Section 1983 action against the City, alleging that the Ordinance violated the Equal Protection Clause by treating tanning salons differently from churches, Wal-Marts, and liquor stores and constituted a taking under the Fifth Amendment entitling Golden Glow to just compensation. The district court granted the City's summary judgment motion and Golden Glow appealed to the Fifth Circuit.

A. Equal Protection
To establish its equal protection claim, Golden Glow had to show it had been treated differently from another similarly situated business. To determine what businesses are similarly situated to tanning salons, the court considered "the full variety of factors that an objectively reasonable . . . decisionmaker would have found relevant" when making the classification.

It noted similarities between tanning salons and the other businesses shut down by the Ordinance--each provided recreational, social, "or as some would say, 'nonessential' services" where the clientele typically spent more than a few minutes at the location, with the likelihood of close person-to-person contact.

The district court had found that Golden Glow could rationally be differentiated from churches, large retailers, and liquor stores, which "provide different services," "are in different positions," "and do not present the same health and safety concerns" as tanning salons. The Fifth Circuit agreed as to churches and large retailers like Walmart, but "In an abundance of caution," assumed that liquor stores and tanning salons were similar.

B. Rational Basis Review
The Circuit's next task was to determine the appropriate level of scrutiny for Its review. Golden Glow argued that strict scrutiny applied because the Ordinance deprived certain business owners of a fundamental right—namely, the right to work. That argument failed:

> The Supreme Court does not now recognize a fundamental right to work and has consistently applied rational basis review "to state legislation restricting the availability of employment opportunities." . . . As the Court put it in *Conn v. Gabbert*, "the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation." 526 U.S. 286, 291–92, 119 S. Ct. 1292, 1295–96 (1999).

Accordingly, rational basis review applied. Under that standard, a governmental classification "will be upheld 'if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" Golden Glow contended that the Ordinance created an arbitrary distinction between tanning salons and liquor stores that bore no rational relationship to public health given the salon's ability to operate safely and without customer contact. The City responded that the length of time spent in a tanning bed as compared to a liquor store raised the probability that the virus was more likely to spread in a tanning salon. "This proffered reason is not arbitrary."

While the Ordinance may have been overinclusive in the absence of exceptions for safe and sterile tanning salons, and underinclusive for failing to shut down every similarly situated business, "such imperfections do not make a law supported by at least one
'conceivable basis' an irrational one."

C. Taking
Golden Glow argued that the closure of the salon was a per se taking because it amounted to both a physical invasion (under *Cedar Point Nursery*) and a total deprivation of productive use. Neither rationale applied: the Ordinance did not authorize physical entrance, and while closure constitutes a deprivation of *some* economically productive uses nothing in the record supported the conclusion that the Ordinance rendered the entire property "valueless."
Affirmed.

Concurrence:
Judge James Ho concurred in the result but argued that there is substantial rationale for the proposition that the right to work is fundamental and should be protected accordingly.

> The Supreme Court has recognized a number of fundamental rights that do not appear in the text of the Constitution. But the right to earn a living is not one of them—despite its deep roots in our Nation's history and tradition. Governing precedent thus requires us to rule

> against the countless small businesses, like Plaintiff here, crippled by shutdown mandates imposed by public officials in response to the COVID-19 pandemic. Cases like this nevertheless raise the question: If we're going to recognize various unenumerated rights as fundamental, why not the right to earn a living?

As he saw it, under COVID shutdowns, "Millions of wage earners and small business owners watched helplessly as public officials claimed the 'extraordinary power to force people from their chosen occupations, destroy vast investment and reliance interests, and make millions dependent on government assistance. . . .'" The Supreme Court has long said that it will recognize "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty . . . " Under the Court's current approach to unenumerated rights, "we privilege a broad swath of non-economic human activities, while leaving economic activities out in the cold." But, Judge Ho says, scholars have suggested that this may get things backwards. There is ample history evidencing the protection of a right to pursue one's occupation against arbitrary government restraint in the courts of England—a philosophy brought to the Colonies. George Mason authored the Virginia Declaration of Rights and included an express provision securing "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety., a sentiment with which Jefferson agreed.

Ho argues that many of our fundamental rights hinge on the right to work:

> The First Amendment guarantees the freedom of speech and religion. But the meaningful exercise of those freedoms often requires the expenditure of resources. The Fourth Amendment secures the people in their houses, papers, and effects, and the Fifth Amendment protects property from taking without just compensation. But it's virtually impossible for most citizens to obtain property without an income. In short, the right to engage in productive labors is essential to ensuring the ability of the average American citizen to exercise most of their other rights.

In conclusion, he says, various scholars have determined that the right to earn a living is deeply rooted in our Nation's history and tradition—and should be protected under our jurisprudence of unenumerated rights. "But that is for the Supreme Court to determine."

21-60898-CV0.pdf (uscourts.gov)

SHORT SUMMARIES:

4th Circuit – First Amendment – Consent Decree – Attorney's fees

Folks wonder at why we've seen a society explode in violence towards people of differing viewpoints with resulting injury and death. One might want to take a look at the way in which the courts elevate the First Amendment over public safety. In an effort to thwart violence at an abortion provider, the City of Charlotte enforced a law prohibiting people from interfering with traffic and pedestrians on the public way. The police began enforcing the law after some fights broke out in an effort to protect public safety. A right-to-life group, feeling its First Amendment rights were being trampled upon, sued. Ultimately, and before trial, the city agreed to a consent decree with the group that allowed pamphleteering if doing so did not directly interfere with traffic and a driver indicated interest in receiving the information being distributed. The cases were dismissed upon entry of the decree and the group sought attorneys fees against the city as a "prevailing party". The lower court awarded fees and on appeal the 4th Circuit agreed concluding that the plaintiffs had met the test to be

considered a prevailing party – “It is enough that the consent decree, as a practical matter, provide a party with some of the relief sought in the complaint. Maher, 448 U.S. at 127–130. And that is what we have here.” In an effort to find something good to write about, I note that the plaintiffs did not cross appeal, so their argument that the award was inadequate was tossed.

Cities4Life v. City of Charlotte
211322.P.pdf (uscourts.gov)

4th Circuit – Deliberate Indifference to Medical Needs – Sheriffs - EMS

The facts in this case are quite bad and likely explain why Qualified Immunity was not granted. A man with schizophrenic background gets run off the road along Rte 95 and undergoes a schizophrenic episode by disrobing completely and running down the highway to an interchange, where, while naked, jumps aboard a tractor trailer. The driver of the truck, not noticing the stowaway, drives off only a mile or so later learning of the stowaway’s existence. The naked traveler alerts the driver by banging on the windows and jumping on the catwalk between tractor and trailer and pulling out the brake hoses and jumping on the roof of the truck. The driver calls the police and pulls over. The police arrive to find a completely incoherent naked man on top of the truck and ask for medical assistance. The EMS arrive and attempt to interview the man, but without little success and despite putting ammonia up his nose to get him to respond. Ultimately, a deputy advises that he’ll take the naked man for a ride to let him go once he determines where to do so and that the man would not be under arrest and not delivered to a hospital. Apparently, the deputy let the man go at a service station still not knowing anything about his identity and shortly thereafter, the man’s body was discovered along the highway after having been run over. The suit was against the officers and EMS for failure to provide for the medical needs of the deceased. No Qualified immunity as the duty to provide for a pretrial detainee was Affirmed.

Tarashuk v. Givens
211930.P.pdf (uscourts.gov)

6th Circuit – First Amendment- Police Misconduct - Investigations

Cincinnati, like many cities, has created a civilian review board to inquire into police misconduct. The police took umbrage at the manner in which the investigations were being conducted, believing that the investigator for the board selectively recorded portions of interviews with officers. To rectify what the police officers believed might be a due process issue, the officers’ representative sought also to record the interviews, but the investigator refused and suit followed. By way of settlement, the City agreed that the investigator must record the full interview, but continued to refuse to allow the union also to record the interview. The lower court concluded that the settlement resolved most of the issues and that the First Amendment did not provide support for the union to record the interviews absent consent of the City. This panel of the 6th Circuit agreed with the lower court finding that the right to record does not extend to non-public fora (among other reasons). Great work by the City of Cincinnati, Scott M. Heenan and Lauren Creditt Mai on the brief for the City.

Hils v. Davis
22a0235p-06.pdf (uscourts.gov)

11th Circuit – Sheriffs – Negligent Retention

A woman travelling to Chicago through Harris County, Georgia was pulled over by Deputy Pierson. He issued her a warning and she pulled away, but he again turned on the lights and sirens to which she responded by pulling over and stopping. Deputy Pierson then forced her to have oral sex. Distraught, she stopped at the Pike County Sheriff's Office and reported the crime. The Deputy confessed during an interview with his employer and was fired. The Sheriff sensing that Pierson was no gift but one that might have more strings attached, reached out to other women he had stopped and found that Pierson had assaulted others. The woman sued and asserted that the Sheriff was liable as was the county for retaining their belief in Pierson. The court dismissed the county and found the sheriff was not liable based on a lack of knowledge of regarding Pierson's propensity for sexually assaulting women. The intriguing part of this case rests on Pierson's employment record: Previously, he had been sued for excessive force for kneeling on a subject's neck resulting in the subject's death but the Sheriff had not taken any disciplinary action against him and following a complaint by Pierson's ex-wife that he was following her in a police vehicle, the department concluded he was off duty at the time and took no further action. The court concluded that neither of these past lapses sufficiently alerted the Sheriff to the likelihood that Pierson would commit sexual assaults on women he stopped, so there would be no recovery. As an aside, one reason the court concludes that the Plaintiff loses rests upon her failure to argue that the Sheriff violated clearly established law. Hmmm.

Christmas v. Harris County
202111187.pdf (uscourts.gov)