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## Bankruptcy: "Equitable Mootness" Prevents Pensioners' Challenge to Detroit Bankruptcy Plan

## *Ochadleus v. City of Detroit,* Nos. 15-2194, 15-2337, 15-2353, 15-2371, 15-2379 (6th Cir. Oct. 3, 2016)

**The doctrine of equitable mootness, sometimes used to protect complex bankruptcy plans from being unwound by other courts, has not been invalidated by the Supreme Court and is still good law in the Sixth Circuit.**

The City of Detroit (City) filed for municipal bankruptcy in July 2013 under Chapter 9 of the Bankruptcy Code. The City had over $18 billion in escalating debt, over 100,000 creditors, hundreds of millions of dollars in negative cash flow, some 78,000 abandoned structures, another 66,000 blighted vacant lots, and a crumbling infrastructure.

The City's Pension Plan was underfunded by nearly $1.9 billion, with no feasible means to achieve solvency. The City was therefore faced with having to reduce each pension by 27%. Instead, it orchestrated a "Grand Bargain" in which it obtained "outside funding" of more than $800 million to bolster the Pension Plan in exchange for a settlement of General Retirement System (GRS) claims at less than the full promised pension amount. The result was a reduction of GRS pensions by 4.5%, elimination of cost-of living increases, reduced retiree healthcare coverage and elimination of dental, vision, and life insurance. The GRS settlement—and many others--were memorialized in the Eighth Amended Plan for the Adjustment of Debts of the City of Detroit (Plan), which was confirmed by the bankruptcy court in November 2014.

Participants in the City's General Retirement System (GRS)—City employees, retirees, or beneficiaries thereof—opposed the provisions of the Plan that reduced their pension benefits; they sued to obtain the full benefits the City had promised them prior to bankruptcy. They

urged the court to strike the challenged provisions from the Confirmation Order and remand to the bankruptcy court with instructions to exempt pensions from adjustment.

In response, the City moved to dismiss the appeals as "equitably moot." The district court agreed. As it noted in its opinion dated September 29, 2015, by that date the City had already issued $287.5 million in bonds and $720 million in new notes; irrevocably transferred all Detroit Institute of Art assets to a perpetual charitable trust; settled with numerous classes of claimholders; returned day-to-day management of the City from the emergency manager to the City Council and Mayor; and undertaken innumerable other steps towards establishing stability.

On appeal, the Sixth Circuit affirmed, based on equitable mootness.

Equitable mootness is not technically "mootness"—constitutional or otherwise—but is instead "a prudential doctrine that protects the need for finality in bankruptcy proceedings and allows third parties to rely on that finality" by "prevent[ing] a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract." Unlike conventional mootness, equitable mootness is not concerned with the court's ability or inability to grant relief; it is concerned with protecting the good faith reliance on a bankruptcy plan.

Equitable mootness is established under a three-part test: (1) whether a stay has been obtained; (2) whether the plan has been "substantially consummated"; and (3) whether the relief requested would significantly and irrevocably disrupt the implementation of the plan or disproportionately harm the reliance interests of other parties not before the court. Here, the GRS plaintiffs had not obtained a stay of the Confirmation Order, the Plan had been substantially consummated, and the requested relief of omitting the pension reduction would rescind the "Grand Bargain," thereby unravelling the entire Plan and adversely affecting countless third parties, including entire City population.

> This is not a close call. In fact, the doctrine of equitable mootness was created and intended for exactly this type of scenario, to "prevent[] a court from unscrambling complex bankruptcy reorganizations" after "the plan [has become] extremely difficult to retract."

The appellants raised two challenges. First, they argued that equitable mootness is no longer a viable doctrine under the Supreme Court's evolving case law.

The Circuit Court conceded that the Supreme Court has expressed disfavor for prudential doctrines that abdicate jurisdiction; it has emphasized the duty federal courts have to exercise jurisdiction. But, the Circuit noted, the high court's precedents were not bankruptcy cases and their holdings neither expressly nor necessarily extended to equitable mootness. Furthermore, the Supreme Court had not abolished equitable mootness, which continues as good law in the Sixth Circuit.

Second, appellants argued that even if equitable mootness survived, it did not apply in Chapter 9 cases. The Sixth Circuit had never before applied equitable mootness in a Chapter 9 case, only in Chapter 11 cases. Only three opinions nationwide had ever applied equitable mootness in a Chapter 9 setting. The Sixth Circuit saw no reason that Chapter 9 could not sustain equitable mootness. "The fact that the debtor is a municipality, with state sovereignty, rather than a business enterprise does not reduce the municipal debtor's rights in bankruptcy."

Judge Karen Nelson Moore dissented. She characterized the doctrine as based on "shaky ground" and an abdication of the court's duties. She also disagreed with the majority that the doctrine could be extended from its Chapter 11 commercial enterprise origins to the Chapter 9 municipal bankruptcy context.

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## Due Process: Adoption of a Comprehensive Zoning Plan is a Legislative Act Which Does Not Violate Due Process When Undertaken Without Public Proceedings

## *Onyx Properties, LLC v. Board of County Commissioners*, No. 15-1141 (10th Cir. Oct. 3, 2016)

### The Tenth Circuit has found no federal substantive or procedural due process violations where a board of commissioners replaced a lost zoning plan document via a legislative act without public proceedings.

In 1983, the Board of Commissioners of Elbert County, Colorado (Board) enacted comprehensive zoning regulations referring to an official county map; however, in 1997, the Board discovered that its files only contained six pages of regulations and no zoning map. Consequently, it authorized its planning director to research historical zoning information to reconstruct the map. No public proceedings were conducted to approve the planning director's report and it was ultimately adopted as a part of the county's comprehensive zoning regulations.

Between 1997 and 2008 plaintiffs sought to subdivide their agricultural land and were informed by the County Commissioners that pursuant to the county's zoning regulations, including the reconstituted planning director's reconstituted map, that they would first have to seek approval for rezoning. Plaintiffs obtained approval for re-zoning and paid the requisite fees, learning of the director's report and its informal adoption only after they had incurred rezoning expenses.

In two consolidated cases, plaintiffs claim that under 42 U.S.C. § 1983, the Board's actions denied their right to substantive and procedural due process. In both cases, the district court granted summary judgment for the Board and the plaintiffs appealed.

While the Tenth Circuit observes that plaintiffs may have a valid state procedural due process claim, they clarify that to succeed in federal court, the alleged violation must result in a procedure which falls short of federal due process standards. Under federal law, the adoption of general zoning law is a legislative act and the Supreme Court has established that the federal Constitution does not require a hearing on the adoption of legislation. The Circuit Court characterized the Board's adoption of the planning director's report as a legislative rather than administrative act because it found that the document was based on community-wide development goals and involved the discretionary implementation of prospective policies rather than the application of an existing policy to a specific landowner. Had the document been focused on only a few specific properties and affected only a few individual landowners, the result may have been different.

Regarding the plaintiffs' substantive due process claim, the court addressed the allegations that the Board's misrepresentations and cover-ups regarding the lost map pages amounted to substantive due process violations related to executive actions. The court observed that to qualify as a substantive due process violation the alleged misconduct must be conscience-shocking—a very high bar to meet. The Tenth Circuit pointed out that in some circuits, allegations of corruption are insufficient in the context of zoning disputes. Because this case did not even come close to that level, the substantive due process claim was also dismissed.

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## Immunity: No Qualified Immunity where Handcuffs Aggravate Pre-Exisiting Injury and Arrest is Based on Uncorroborated Phone Tip *Courtright v. City of Battle Creek,* No. 15-1722 (6th Cir. Oct. 14, 2016)

**Michigan police officers could not rely on qualified immunity where they forced a detainee's arms behind his back for handcuffing even after he advised them of his rotator cuff surgery.**

In response to a phone tip that Jeff Courtright, a guest of Battle Creek, Michigan hotel had come out of his room with a gun and threatened to shoot the dog of another hotel resident, two officers were dispatched to the scene. Courtright alleges that he attempted to tell the officers that he had not been on site when the alleged incident occurred, and did not threaten anyone with a gun. The officers nevertheless arrested him for felonious assault. While handcuffing him, they forcefully grabbed his arms and pulled them behind his back, even though he had told the officers that prior rotator cuff injuries and shoulder surgeries precluded him from placing his hands behind his back. He repeatedly complained of pain to the officers

after he was handcuffed, but neither officer relented. Courtright was jailed overnight, but the prosecutor declined to issue a warrant, and he was released the next day.

Courtright sued the officers and the City of Battle Creek, alleging excessive force, false arrest, false imprisonment under state, and municipal liability on the part of the City of Battle Creek under *Monell.*

The defendants moved to dismiss all counts under F. R. Civ. P. 12(b)(6), based on qualified immunity. The district court declined to exercise supplemental jurisdiction over the state-law claims and denied the motion with respect to the plaintiff's three federal-law claims. The defendants filed an interlocutory appeal.

The Sixth Circuit affirmed as to excessive force and false arrest. The excessive force claim was based on an alleged violation of clearly established Fourth Amendment rights, of which the officers would have been aware: the Sixth Circuit has previously held "excessively forceful or unduly tight handcuffing is a constitutional violation under the Fourth Amendment" provided that the plaintiff sufficiently alleges physical injury. Here, although Courtright's allegations of physical injury from handcuffing were "admittedly sparse," and did not specifically include a statement as to continued pain after removal of the handcuffs, they satisfied minimal pleading criteria:

> Courtright pleaded in his complaint that he suffered from prior rotator-cuff injuries and shoulder surgeries, that he could not put his hands behind his back because of his medical condition, and that he suffered from pain after he was handcuffed behind his back. Viewing the allegations in the complaint in the light most favorable to Courtright, we reasonably may infer that he was handcuffed in a manner that aggravated his prior medical injuries, that he suffered pain from that handcuffing, and that he thus was physically injured by the handcuffing. That Courtright did not allege that he continued to suffer injury after his handcuffs were removed does not preclude the survival of his excessive-force claim.

The Circuit Court also agreed with the lower court's findings as to false arrest. Probable cause exists only when the police officer "discovers reasonably reliable information that the suspect has committed a crime."

The crux of the case was whether the phone call to the police had been sufficient to establish probable cause for Courtright's arrest. Probable cause is created only by eyewitness allegations that are reasonably trustworthy; it does not exist where there is an apparent reason to believe that the eyewitness is lying, is not accurately describing what he sees, or is mistaken. The phone call had been made to police by an unidentified resident at the hotel; without more, it lacked sufficient indicia of trustworthiness and reliability: "We have not found any precedential case in which we concluded that a phone call, without any corroborating information, provided probable cause for arrest."

Defendants had also appealed the district court's denial of their motion to dismiss Courtright's municipal-liability claim. This argument was premature. While the Circuit Court could have exercised pendent appellate jurisdiction over the municipal-liability claim because "the finding of nonexistence of a constitutional claim for immunity purposes necessarily decide[s] the whole case not only in favor of the officer, but also in favor of the [municipality] as well," Courtright had alleged a constitutional violation sufficient to survive the motion to dismiss, foreclosing the defendants' argument.

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## Speech: Requirement that Anti-Abortion Pregnancy Clinics Notify Patients about Free, State-Provided Services is Acceptable Restriction on Professional Speech

## *National Institute of Family & Life Advocates v. Harris,* No. 16-55249 (9th Cir. Oct. 14, 2016)

**Affirming the lower court, the Ninth Circuit has denied the efforts by anti-abortion pregnancy clinics to enjoin a state requirement that all such clinics provide notice to patients about California's free, state-provided pregnancy services including abortions, finding that the law affected professional speech and was therefore only subject to intermediate scrutiny. Although the law was content-based, *Reed* did not require strict scrutiny here; the Supreme Court has already indicated that abortion-related speech is subject to a different analytical regime.**

The California legislature became aware that many California women were unaware of state-funded reproductive health programs. It passed the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (Act) which requires that all pregnancy clinics in the state provide clients with this notice (Notice):

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all Food and Drug Administration-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

Plaintiffs, a group of pregnancy clinics opposing abortion, attempted to enjoin the requirement that all clinics provide the Notice, alleging that it was an unconstitutional content-based restriction on their free speech rights.

The Ninth Circuit, affirming the district court, found that the plaintiffs showed no likely success on their free speech claims. The court acknowledged that the Notice was content-based—it required clinics to engage in speech when they might not otherwise do so. But the Notice

requirement did not discriminate based on viewpoint; instead, it applied to all licensed and unlicensed facilities, regardless of what, if any, objections they might have to various family-planning services.

The Ninth Circuit squarely addressed plaintiffs' *Reed*-based arguments, finding a line of Supreme Court precedent that specifically allowed for regulations on physicians speech:

> In arguing that content-based regulations are always subject to strict scrutiny, Appellants cite the Supreme Court's recent decision in *Reed*. . . . [There] the Court expressly stated that "[c]ontent-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226.
>
> *Reed*, however, does not require us to apply strict scrutiny in this case. Since *Reed*, we have recognized that not all content-based regulations merit strict scrutiny. *See United States v. Swisher*, 811 F.3d 299, 311-13 (9th Cir. 2016) (en banc) (discussing *Reed* and noting examples that illustrate that "[e]ven if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny").
>
> Further, the Supreme Court has recognized a state's right to regulate physicians' speech concerning abortion. In *Casey*, the Supreme Court considered Pennsylvania's requirement that a physician provide abortion-related information to his or her patient, writing:
>
> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated . . . but only as part of the practice of medicine, *subject to reasonable licensing and regulation by the State* . . . We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

The court also cited the Fourth Circuit's holding that the Supreme Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), had not announced a rule regarding the level of scrutiny to apply in abortion-related disclosure cases.

The Ninth Circuit ruled that the Notice regulated professional speech—the conversation between a caregiver and its patient--subjecting it only to intermediate scrutiny. Therefore, the requirement that clinics tell patients of cost-free state services met intermediate scrutiny because it was closely drawn to safeguard public health. A related requirement in the Act--that unlicensed pregnancy clinics must notify their clients of being unlicensed--was narrowly tailored to further a compelling interest.

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## Speech: City Zoning Regulation Prohibiting Illuminated Signs More than 40 Feet Above Ground Allows for Alternative Communication *Vosse v. City of New York*, No. 15-4052-cv (2d Cir. Oct. 14, 2016)

**The Second Circuit has again upheld a New York City Zoning Regulation which prohibits illuminated signs in residential areas more than 40 feet above ground, finding it is a reasonable time, manner and place restriction in support of a legitimate government objective and allows for alternative forms of communication—specifically, non-illuminated signs.**

Brigitte Vosse brought suit against the City of New York and the Commissioner of the New York City Department of Buildings, alleging that her right to free speech was violated when she was fined, pursuant to the City's Zoning Resolution, for affixing an illuminated peace symbol to the exterior frame of a seventeenth-floor window in her condominium unit on the Upper West Side of Manhattan.

In a prior proceeding, the Second Circuit had remanded her case to the district court to determine whether the zoning regulations "constituted an unduly restrictive time, place, [or] manner restriction on speech." On remand, the district court rejected Vosse's argument that, even if the regulations are considered content-neutral, they still do not pass constitutional muster based on the manner of restriction. She again appealed.

Vosse made two principal arguments regarding the first prong of the time, place, or manner analysis. First, she contended that the City's interests in "maintaining an aesthetically pleasing cityscape and preserving neighborhood character" were insufficient and unsupported by the record. As the Second Circuit found, it is well settled that these interests are legitimate government objectives.

Second, Vosse argued that the district court's narrow tailoring analysis was flawed because it misinterpreted the regulations as categorically prohibiting illuminated signs more than 40 feet above curb level. Vosse contended that the exemption for flags, banners, or pennants located on community-facility lots had the effect of allowing certain illuminated signs above the 40-feet cut-off. The Second Circuit was unpersuaded. As the Supreme Court has stated, a statute or ordinance "need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668, 191 L. Ed. 2d 570 (2015).

As for the requirement that the regulations leave open ample alternative channels for communication, Vosse argued that the regulation failed under the reasoning of *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994). However, *City of Ladue* dealt with an ordinance that prohibited all signs not falling within a narrow list of exemptions, and "almost completely foreclosed a venerable means of communication." *Id.* at 46-47, 54.

Vosse's reliance on *Ladue* was misplaced. The New York ordinance did not prohibit non-illuminated, non-commercial signs with a total surface area of less than 12 square feet, even above 40 feet. She was free to display the same sign in her window, as long as it was not illuminated.

Although she argue that an unilluminated sign would be harder for passers-by to see at night, the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. Thus, the district court had correctly concluded that restrictions on illuminated signs in the Zoning Resolution left open ample alternative channels for Vosse to communicate her message.

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## Taxis: Less Restrictive Regulatory Scheme for Uber *et al* Is Justified Due to Differences in Relationships with Passengers

## *Illinois Transportation Trade Ass'n v. City of Chicago*, Nos. 16-2009, 2980 (7th Cir. Oct. 7, 2016).

**Under a recent Seventh Circuit decision, taxi drivers' equal protection claims fail due to differences between Uber and taxis and their relationships with their customers, warranting different regulatory approaches.**

Local taxicab owners and livery services brought suit against the City of Chicago to challenge an ordinance impacting their services but not those of Uber, Lyft, and other Transportation Network Providers ("TNPs"). The plaintiffs presented several arguments, all of which the court characterized as weak.

First, the plaintiffs made a takings argument, claiming that allowing TNPs like Uber had taken the plaintiff's property for public use. The Seventh Circuit pointed out that if the argument had been that the City confiscated the licenses required to operate a car as a taxi, the plaintiffs would have a stronger case, since this would have amounted to a confiscation of the taxi. Since the challenged ordinances merely exposed the taxi services to competition rather than entirely preventing them from operating, however, the court found no takings issue. While the City created a property right in taxi licenses, it did not create a property right in all commercial automobile transportation and it did not create a right to exclude competition. Next, the plaintiffs argued that by subjecting TNPs to a separate, less restrictive ordinance, the City has discriminated against taxi cabs, which the court dismissed as an anticompetitive argument.

Finally, the plaintiffs brought an equal protection argument, claiming that the City denied taxicabs equal protection by failing to place as many regulatory burdens on TNPs. Again, the court focused on the importance of fostering competition, questioning whether the regulatory

differences between Chicago taxicabs and Chicago TNPs are arbitrary or defensible. According to the court, the nature of the relationship between the passenger and the service justifies the differences in regulations between the two transportation options, making the differences in ordinances defensible rather than arbitrary.

Unlike TNPs, taxis are permitted to take on passengers who hail them from the street. According to the Seventh Circuit, passengers rarely have a prior relationship with the driver or the taxi company; therefore, it makes sense for the City to enact regulations that promote public safety by screening drivers and imposing a uniform set of rates for taxis. The City's TNP regulations reflects the differences in the nature of the ride service. According to the court, the process of signing up for Uber or other TNP services creates a contractual relationship between the rider and the company, with the company assuming primary responsibility for the screening of drivers rather than the City. Additionally, the company, in its contract with the passenger, specifies the fares, driver qualifications, insurance, and identifies any special needs of the rider, leaving little need for the City to interfere. Further, because the majority of TNP drivers are part-time, the court reasoned that there is not as much wear-and-tear on vehicles as there would be on a taxi, thus further reducing the City's need to regulate.

As a result of the differences between taxi service and TNP service, the Seventh Circuit found that the City was justified in creating different regulatory schemes, therefore defeating the plaintiffs' equal protection claim.

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## Travel: Right to Intrastate Travel is Violated by Repeated Sweep of Downtown Area, Even Under Intermediate Scrutiny
## *Cole v. City of Memphis*, Nos. 15-5725/5999 (6th Cir. Oct. 17, 2016).

**The practice of "sweeping" a two-block area of downtown Memphis at specific, arbitrary times to prevent pedestrian traffic for reasons not related to public safety is unconstitutional under intermediate scrutiny.**

An off duty police officer, Lakendus Cole, was arrested after leaving a night club in downtown Memphis as a result of the City's routine practice of sweeping Beale Street at 3 am on weekend nights. Beale Street is a two block stretch of night clubs and businesses that is barricaded to encourage pedestrian traffic. Pedestrians are permitted by ordinance to buy and carry alcoholic beverages when the street is closed to motor traffic.

Officer Cole was charged with disorderly conduct, resisting arrest and vandalism over $500 (though these charges were all later dropped). Shortly thereafter, Officer Cole brought claims both individually and as a class action, alleging that the City's routine practice of sweeping Beale Street at 3:00 am on weekends violated the right to intrastate travel. Officer Cole and the

class won at trial, with the jury finding that the sweep practice was the cause of Officer Cole's arrest and that on the night of Cole's arrest, conditions on Beale Street did not pose an existing, imminent, or immediate threat to public safety. Cole was awarded $35,000 in compensatory damages for his arrest pursuant to the policy.

The district court, applying strict scrutiny, held the practice unconstitutionally limited an individual's fundamental right to intrastate travel, emphasizing that the practice was not narrowly tailored to address a specific public safety threat (which would otherwise be considered a compelling government interest). As a result, the court issued an injunction on the practice of the "Beale Street Sweep" and granted equitable relief in the form of revised officer training and the distribution of bulletins to officers explaining that the practice is unconstitutional. The City appealed.

While the Sixth Circuit agreed with the district court's outcome, they instead applied intermediate scrutiny, holding that because the sweep was limited in scope to a two-block section of downtown and to a two-hour period during weekend mornings and special events, that it did not warrant the strict scrutiny that had been applied in a previous Sixth Circuit case, *Johnson v. City of Cincinnati*. The distinction between the two cases, according to the court, was the *scope* of the travel ban. Relying both on their own circuit's precedent as well as the Third Circuit's *Lutz v. New York* (which utilized intermediate scrutiny), the court expressed a reluctance to universally apply strict scrutiny and instead indicated that such regulations are more properly analyzed on a sliding scale, with strict scrutiny being applied to ordinances that are broader in scope and intermediate scrutiny being applied to ordinances and practices that are more narrowly tailored. Intermediate scrutiny notwithstanding, however, the court agreed the "Beale Street Sweep" still did not pass constitutional muster because the City was unable to demonstrate that the practice furthered a significant public interest, since it was performed each weekend night regardless of whether there was an immediate public safety concern.

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## THIS JUST IN – Search Warrant Allows Law Enforcement to Require Phone Owners to Use Fingerprints to Unlock Phones

According to a recent Washington Post article, investigators in Lancaster, Calif., obtained a search warrant last May that allowed them to force anyone inside the premises at the time of search to open up their phones via fingerprint recognition. The government argued that this did not violate the citizens' Fifth Amendment protection against self-incrimination because no actual passcode was handed over to authorities.