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Excessive Force: Deploying "Less-lethal" Weapons to Quell Protests Violates First and Fourth Amendments

Black Lives Matter Seattle-King County v. City of Seattle, no. 2:20-cv-00887 (W.D. Wa. June 12, 2020).

Seattle is temporarily enjoined from using tear gas, pepper spray, flash grenades or rubber bullets to suppress protests.

Protests in Seattle began days after the death of George Floyd at the hands of Minneapolis police. While largely peaceful, on occasion protestors and the Seattle Police Department (SPD) exchanged bottles, rocks, and fireworks for tear gas, pepper spray, and blast balls. On June 5, 2020, SPD banned the use of tear gas, subject to some limitations, but days later, deployed it again.

Plaintiffs sued the City of Seattle (City) and SPD, asserting violation of their First and Fourth Amendment rights. They alleged that during the protests the SPD deployed "less-lethal" weapons including "chemical irritants, batons, kinetic impact projectiles, and weapons intended to stun with light and sound." "Chemical irritants" include tear gas (CS gas) and oleoresin capsicum spray (OC or pepper spray). The use of these weapons, plaintiffs say, deprived them of their right to protest and to be free from excessive force.

Hours after filing their complaint, plaintiffs moved for a temporary restraining order (TRO), seeking to enjoin the City from "deploying chemical weapons or projectiles of any kind for the purpose of crowd control at protests or demonstrations . . . includ[ing] prohibitions on[] (1) any chemical irritant such as CS Gas ('tear gas') or OC Spray

('pepper spray') and (2) any projectile such as flash-bang grenades, 'pepper balls,' 'blast balls,' and rubber bullets."

The court applied traditional TRO analysis, assessing the likelihood of success on the merits, risk of irreparable injury, and balancing of the hardships.

Merits - First Amendment Claim: To succeed on their First Amendment claim, plaintiffs had to demonstrate that (1) they were engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity, and (3) the protected activity was a substantial or motivating factor in the defendant's conduct. All were present.

Constitutionally protected activity: The right to protest is clearly protected by the First Amendment, and "since 'time immemorial,' city streets and sidewalks have been deemed public fora." Protected protest includes "yelling obscenities and threats at a police officer;" and the law is clear that the government may not prohibit angry or inflammatory speech in a public forum, unless it is both "directed to inciting of producing imminent lawless action" and "likely to incite or produce such action."

Both parties agreed that some protesters did launch objects at the police, ranging from rocks, bottles, fireworks, traffic cones, traffic flares, and more, and the SPD confronted "significant arson events, assaults on civilians and officers, as well as wide-spread looting and property destruction." But even though this posed a serious threat to officer life and safety, "the proper response to potential and actual violence is for the government to ensure an adequate police presence, and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure."

Chilling effect: The court found that SPD's actions would "chill a person of ordinary firmness" from continuing to protest. "Ordinary firmness" is an objective standard that will not allow a defendant to escape liability for a First Amendment violation "merely because an unusually determined plaintiff persists in his protected activity." The mere threat of harm, without further action, can have a chilling effect; fear of the imminent use of less-lethal, crowd control measures including pepper spray and rubber bullets. "Though 'less lethal,' these devices have been sufficiently lethal to deter some protestors from protesting again."

Motivating factor: The court also found that silencing of protected speech was a motivating factor in the SPD's activity. The use of less lethal measures "against all protesters—not just the violent ones" supported the inference that SPD's actions were substantially motivated by plaintiffs' protected First Amendment activity. Even though the SPD could show diminishing use of such measures over time, while the ferocity of the protestors' behavior continued, "it is not clear to the Court that, under the third prong of the retaliation analysis, Plaintiffs must show that they were retaliated against *every* time they exercised their First Amendment rights."

Merits - Fourth Amendment Claim-Plaintiffs' Fourth Amendment claim was analyzed under *Graham v. Connor's* objective reasonableness standard, balancing the "nature and quality of the intrusion on a person's liberty with the countervailing governmental interests at stake to determine whether the force used was objectively reasonable under the circumstances." The Ninth Circuit has held that it is unreasonable to use pepper spray, projectile bean bags, and pepper ball projectiles against individuals "who were suspected of only minor criminal activity, offered only passive resistance, and posed little to no threat of harm to others." Here, a video of a June 1, 2020 protest suggested the use of excessive force without provocation: while the protesters were largely peaceful, "SPD changed its posture by replacing frontline officers on bicycles with officers donning gas masks, and then SPD deployed a battery of pepper spray, flash-bang grenades, and tear gas." The court found this response to be an overreaction even though "plaintiffs, and many protesters alike, were engaging in minor property crime. . . "

Irreparable harm: The court also found a likelihood of irreparable harm to plaintiffs: it is well settled that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." The protests were ongoing and the possibility of continued use of less-lethal weapons would stifle that activity.

Weighing of the hardships: A balancing of the hardships also favored plaintiffs; their potential loss of constitutional rights outweighed the burden on the City. The court acknowledged the interest in "the life and safety of the public and officers or the need to protect public and private property." Nonetheless, while "this Court appreciates that officers sometimes, especially in the circumstances we find ourselves in, carry on a thankless job," the balance remained in favor of plaintiffs.

Order: The court temporarily enjoined Seattle as follows:

> (1) The City of Seattle, including the Seattle Police Department and any other officers, departments, agencies, or organizations under the Seattle Police Department's control (collectively, "the City"), is hereby enjoined from employing chemical irritants or projectiles of any kind against persons peacefully engaging in protests or demonstrations. This injunction includes: (1) any chemical irritant such as and including CS Gas ("tear gas") and OC spray ("pepper spray") and (2) any projectile such as and including flash-bang grenades, "pepper balls," "blast balls," rubber bullets, and foam-tip projectiles. **This Order does not preclude individual officers from taking necessary, reasonable, proportional, and targeted action to protect against a specific imminent threat of physical harm to themselves or identifiable others or to respond to specific acts of violence or destruction of property.** Further, tear gas may be used only if (a) efforts to subdue a threat by using alternative crowd measures, including pepper spray, as permitted by this paragraph, have been exhausted and ineffective and (b) SPD's Chief of Police has determined that use of tear gas is the only reasonable alternative available. The Chief of Police may only authorize limited and targeted use of tear gas and must direct it to those

causing violent or potentially life-threatening activity. **To the extent that chemical irritants or projectiles are used in accordance with this paragraph, they shall not be deployed indiscriminately into a crowd and to the extent reasonably possible, they should be targeted at the specific imminent threat of physical harm to themselves or identifiable others or to respond to specific acts of violence or destruction of property.**

The Order will expire on June 26, 2020 unless extended for good cause.

LINK

Excessive Force: Tasing/Pepper Spraying Without Probable Cause and Use of Offensive Training Materials Result in Section 1983 Reversal

Wright v. City of Euclid, no. 19-3452 (6th Cir. June 18, 2020).

Reversing the district court which had granted officers qualified immunity and denied *Monell* liability, the Sixth Circuit finds ample grounds to identify clearly established law and requires the city to face a jury based on a custom and official ratification of excessive force.

On a November evening in 2016, Lamar Wright (Wright) pulled an SUV onto a residential driveway in Euclid, Ohio (City), and spoke briefly from his window to a friend standing outside the house. Plain-clothed Officers Kyle Flagg (Flaff) and Vashon Williams (Williams) were surveilling the home based on reports of illegal drug activity and suspected Wright may have been involved.

They followed Wright's vehicle for several blocks, and maintain that he made two turns without signaling. When Wright pulled into a second driveway to answer a text message, the officers exited their vehicle, drawing their guns, and approached Wright's SUV. Believing that he was about to be robbed, Wright initially threw the vehicle into reverse until seeing the officers' badges. Flagg then attempted to handcuff Wright and remove him from the vehicle. Wright, who had recently undergone surgery for diverticulitis, requiring staples in his stomach and use of a colostomy bag, placed his right hand on the console to assist exiting, whereupon officer Williams pepper-sprayed Wright at point-blank range and Flagg deployed his taser into Wright's abdomen. Wright was placed face-down on the ground and handcuffed; because his abdominal staples were bleeding an ambulance was summoned.

After being treated at a hospital, he was taken to the City jail and charged with two misdemeanors for which he was arrested (obstructing official business and resisting arrest), along with two other offenses (criminal trespass and failure to use a turn signal).

Despite the fact that Wright had no drugs when arrested and was not charged with drug-related offenses, the officers designated Wright's arrest as stemming from a drug investigation. This triggered further investigation. He was transported to the county jail and held for another four hours while authorities conducted a full body scan for drugs, which revealed none. Wright was released from custody around 4:00 am.

All charges were dropped seven months later. Neither officer was investigated or disciplined for the encounter with Wright, and their use of force was approved by their supervisors.

The City's Practices and Customs. Wright argued that his injury was directly attributable to the City's policy or custom of indifference to use of force. City police officers undergo "defensive tactics training" that purportedly trains them in methods to defend themselves or defuse a situation, and Flagg maintained he had used "defensive tactics" in subduing Wright.

Wright sued the City, Flagg and Williams, alleging § 1983 counts of excessive force, false arrest, malicious prosecution, failure to intervene, extended detention, along with claims under Ohio law for malicious prosecution and intentional infliction of emotional distress. He also alleged that his injuries were directly attributable to the City's policy or custom of indifference to use of force, pointing to the City's "defensive tactics training" for officers that contains a link to a YouTube video of a Chris Rock comedy skit entitled "How not to get your ass kicked by the police!" That video shows numerous clips of multiple police officers beating African-American suspects. During the video, Rock says things such as:

> "People in the black community . . . often wonder that we might be a victim of police brutality, so as a public service the Chris Rock Show proudly presents: this educational video." "Have you ever been face-to-face with a police officer and wondered: is he about to kick my ass? Well wonder no more. If you follow these easy tips, you'll be fine." "We all know what happened to Rodney King, but Rodney wouldn't have got his ass kicked if he had just followed this simple tip. When you see flashing police lights in your mirror, stop immediately. Everybody knows, if the police have to come and get you, they're bringing an ass kicking with 'em." "If you have to give a friend a ride, get a white friend. A white friend can be the difference between a ticket and a bullet in the ass."

Also revealed was a City use-of-force PowerPoint presentation, which displays a stick figure portraying a police officer in riot gear beating a prone and unarmed civilian with a club. The caption above reads "protecting and serving the poop out of you."

Wright also introduced evidence that the sergeant who reviewed the incident and approved the use of force against Wright had approved many other such interactions and had testified that he had never heard of a use-of-force incident by a City officer that he deemed inappropriate. Similarly, the City's police chief testified that he had never

found merit to any civilian complaint concerning use of force, false arrest, or illegal searches.

Despite this evidence, the district court granted summary judgment to the officers and the City.

The Sixth Circuit reversed on appeal.

Excessive Force. When making an arrest or investigatory stop, police must act in an "objectively reasonable" manner. *Graham v. Connor*, 490 U.S. 386 (1989). Three factors guide *Graham's* analysis: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." The district court had found that "[T]the officers in this case, having an objective reason to believe that Mr. Wright may have been involved in drug activity, also had a reasonable belief that he may be in possession of a weapon." The Circuit saw the facts otherwise: unlike the precedent relied on by the lower court, which involved a known large-scale drug dealer who might well be armed, the officers here had little basis for that assumption. "Flagg and Williams at most had a suspicion that Wright had briefly visited with a suspected drug dealer, but given that the officers had not identified Wright himself as a drug dealer or sought any corroboration of their suspicions of criminal activity, there is a genuine dispute as to whether the officers were justified in brandishing their firearms upon approach. Thus, a jury must determine whether their decision to do so was unconstitutionally excessive."

Flagg's use of his taser also required submission to a jury to evaluate excessive force. At no point before Flagg began to seize Wright was there probable cause for an arrest. Construing the record in the light most favorable to Wright, the second *Graham* factor—the immediate safety threat posed by the suspect to police and others—weighed in Wright's favor as well.

So did the third *Graham* factor, which hinged on whether Wright was "actively" or "passively" resisting arrest. A reasonable juror could accept Wright's account that he was not resisting arrest, but rather was simply having difficulty maneuvering while seated in the vehicle and reacting to Flagg's twisting of his left arm. The impropriety of Flagg's taser use was further evidenced by expert testimony to the effect that it would not comport with the Model Policy on Electronic Control Weapons of the International Association of Chiefs of Police (of which the City's police chief is a member), the TASER training manual, and the City's own use-of-force continuum.

A similar analysis applied to the use of pepper spray at close quarters, an act which can cause serious injury. The *Graham* factors and the City's use-of-force continuum did not countenance such use against an individual who constituted no apparent risk to the officers.

Clearly Established Right. The district court had held that it was "unaware of any controlling cases that have established a constitutional violation occurred when non-lethal force was used to obtain control over the suspect who reasonably appeared to pose a safety risk to officers." The Circuit examined its own precedents and found ample basis "to give a reasonable officer fair warning that the conduct at issue was unconstitutional." It had held in various settings that pointing a weapon at an individual and making a demand could constitute excessive force. Based on that authority, "it was clearly established as of the time of Wright's encounter with the officers that brandishing a firearm without a justifiable fear that Wright was fleeing or dangerous was unreasonable and constituted excessive force."

There was also a line of authority finding a clearly established right not to be tased when the suspect is not actively resisting arrest: "as of December 31, 2010, it was clearly established that tasering a non-threatening suspect who was not actively resisting arrest constituted excessive force." The officers' summary judgment on the issue of excessive force was reversed.

Failure to Intervene. To succeed in his failure to intervene claim against each officer, Wright had to prove that "the officer observed or had reason to know that the excessive force would be or was being used and that the officer had both the opportunity and the means to prevent the harm from occurring." Wright's circumstances did not present such a scenario. The entire process of removing Wright from his vehicle took approximately ten seconds, not enough time to enable either officer to note the other's actions and intervene. The district court's grant of summary judgment with respect to the failure-to-intervene claims was affirmed.

False Arrest. Wright also maintained that the district court erred in granting summary judgment to the officers on his Fourth Amendment false-arrest claim. For purposes of summary judgment, the officers had maintained that their grounds for probable cause were Wright's obstruction of official business and resisting arrest. Neither of these was valid, requiring reversal:

Obstructing Official Business: Under Ohio law, one is guilty of obstructing official business if he, "without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties." An affirmative act that interrupts police business is required; a person may not be convicted of the offense simply by doing nothing. Based on this standard, a reasonable juror could find that Wright's actions did not involve any affirmative act that obstructed police business.

Resisting Arrest: In his deposition, Flagg had conceded that he did not have probable cause to arrest Wright until he started "resisting." As the Circuit construed the argument, "This puts the cart before the horse . . . the officers could not, as a matter of law, have probable cause to arrest [Wright] where the underlying arrest was not lawful."

Extended Detention. Wright claimed a violation of the Fourth Amendment based on his continued detention after he posted bond. Nothing had happened, from the time that Wright was detained in his SUV to the time he posted bond, to give officers probable cause to believe that he was hiding drugs in his body. Despite the officers' having no information that would give them probable cause, Wright was seized for another four hours after he should have been free to go. A jury could find that this detention violated Wright's right to be free from unreasonable seizures. Reversed.

Malicious Prosecution. Wright next argued that the district court erred in granting summary judgment on his claim of malicious prosecution in violation of the Fourth Amendment. He had to prove four things: (1) that a criminal prosecution was initiated against him and that the defendant "made, influenced, or participated in the decision to prosecute;" (2) that there was a lack of probable cause for the criminal prosecution; (3) that, as a consequence of a legal proceeding, he suffered a deprivation of liberty apart from the initial seizure; and (4) that the criminal proceeding was resolved in his favor. These factors were met. The officers' own false statements that Wright's arrest was drug-related satisfied the first variable, and there was no probable cause. While an "initial arrest alone is an insufficient deprivation of liberty" to support a claim for malicious prosecution, the failure of authorities to release him until 3:55 am would allow a reasonable jury to find that Wright suffered a deprivation of liberty beyond the initial seizure. Finally, the proceedings were resolved in Wright's favor when the prosecutor dropped all charges against him. Reversed.

State-Law Claims. The Circuit reversed summary judgment for the defendants on two state-law causes of action: malicious prosecution and intentional infliction of emotional distress. The district court held that the officers were entitled to immunity from the malicious prosecution under Ohio law granting immunity to municipal employees acting within the scope of their employment. But the officers' state-law statutory-immunity defense "stands or falls with their federal qualified immunity defense." Reversed.

Monell Claim. Wright argued that the City was liable under various *Monell* indicia: (1) a custom of tolerance or acquiescence of federal rights violations; (2) inadequate training and supervision; and (3) ratification of illegal actions by an official with final decision-making authority.

Custom: Here, the fully inappropriate Chris Rock video and stick figure cartoon described above supported the assertion that the City had a custom of allowing excessive force:

> Wright has produced enough evidence such that a reasonable jury could find that the City's custom surrounding use of force is so settled so as to have the force of law and that it was the moving force behind violations of Wright's constitutional rights. We therefore REVERSE the district court's grant of summary judgment on the issue of municipal liability under § 1983.

Failure to Train or Supervise: A failure-to-supervise claim requires a showing of "prior instances of unconstitutional conduct demonstrating that the municipality had ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." The City's training met this description; while officers were required to read the use of force policy, this was followed up with "a one-or-two-page quiz that may or may not be given to officers." Reversed-a reasonable jury could find that the City's excessive-force training regimen and practices gave rise to a culture that encouraged, permitted, or acquiesced to the use of unconstitutional excessive force.

Ratification by Decision-Maker: A reasonable jury could likewise find that the City's apparent failure to ever meaningfully investigate excessive force complaints rose to the level of a ratification of use of force by a policymaker. Reversed.

The Circuit concluded:

> It is very troubling that the City of Euclid's law-enforcement training included jokes about Rodney King—who was tased and beaten in one of the most infamous police encounters in history—and a cartoon with a message that twists the mission of police. The offensive statements and depictions in the training contradict the ethical duty of law enforcement officer "to serve the community; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation and the peaceful against violence or disorder; and to respect the constitutional rights of all to liberty, equality, and justice."

LINK

Public Health: No Injunctive Relief for Adult Establishment Shuttered by COVID-19 Regulations

McCarthy v. Cuomo, no. 20-cv-2124 (E.D.N.Y. June 18, 2020).

In a case illustrative of the flood of legal action arising from misguided litigants who detect constitutional violations as the nation battles COVID-19, a federal court denies injunctive and declaratory relief to a New York exotic dancing establishment.

Governor Cuomo's Executive Orders: Beginning in March 2020, as the COVID-19 pandemic hit New York, Governor Cuomo issued a series of executive orders (Executive Orders) placing restrictions on New Yorkers in an effort to reduce the spread of the virus. These included a declaration of disaster emergency, a prohibition on gatherings of more than 50 people and serving food or drink on-premises, and the reduction of all in-person workforces by 50% except for enumerated "essential businesses." The in-person restriction on non-essential businesses was subsequently

increased to 100% and masks were required when people were in in public and unable to maintain social distancing.

Federal Paycheck Protection Program: On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act, was signed into law. Section 1102 of the CARES Act established the Paycheck Protection Program (PPP). The PPP expanded a pre-existing federal program which provided and guaranteed loans for small businesses, and followed the same eligibility requirements as those under the pre-existing Small Business Act loan program. One such requirement, unaltered by the CARES Act, is that loans are not provided to "[b]usinesses which (1) [p]resent live performances of a prurient sexual nature; or (2) [d]erive . . . more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature." 13 C.F.R. § 120.110(p).

Sean McCarthy (McCarthy) owns and operates Blush Gentleman's Club (Blush), a restaurant, bar and “gentleman's club” located in Commack, New York. McCarthy closed Blush on March 16, 2020 in response to the Executive Orders. He claims that he has since suffered "catastrophic financial losses," and intended to apply for a loan under the PPP to mitigate those losses, but did not do so because he knew his business would not pass the PPP eligibility requirements.

McCarthy and others sued, alleging eleven causes of action. A variety were brought against Governor Cuomo under § 1983: unreasonable seizure under the Fourth Amendment, violation of First Amendment free speech and assembly rights, Fifth Amendment takings, Fourteenth Amendment due process and equal protection violations, and denial of the right to a republican form of government under the guarantee clause of Article IV § 4. Others sought declaratory judgments stating that the Executive Orders violated the New York Constitution. The final two causes of action were brought against federal defendants under § 1983 and alleged that the PPP violates the due process and equal provisions of the Fifth Amendment.

Plaintiffs moved for a temporary restraining order or a preliminary injunction, seeking to enjoin enforcement of the Executive Orders; allowing Blush to open immediately, enjoining federal defendants from enforcing the PPP eligibility requirements and restoring plaintiffs to an appropriate place in the PPP application queue.

The court easily dispensed with the case. Each of plaintiffs' nine causes of action against Governor Cuomo were based on fundamental misunderstandings of the law. "[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905).” The Circuit cited the breadth of recent decisions across the nation which have upheld similar public health-based restrictions against commercial and religious entities. *Geller v. de Blasio*, No. 20CV3566 (DLC), 2020 WL 2520711, (S.D.N.Y. May 18, 2020); *Open Our Oregon v. Brown*, 2020 WL 2542861 (D. Or. May 19, 2020); *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 2517093 (7th Cir. May 16, 2020); *Spell v. Edwards*, No. 20 Civ. 282, 2020 WL 2509078

(M.D. La. May 15, 2020); *In re Abbott*, 954 F.3d 772 (5th Cir. Apr. 7, 2020); *Lighthouse Fellowship Church v. Northam*, No. 20 Civ. 204, 2020 WL 2110416 (E.D. Va. May 1, 2020); *Henry v. DeSantis*, No. 20 Civ. 80729, 2020 WL 2479447 (S.D. Fla. May 14, 2020); *Calvary Chapel of Bangor v. Mills*, No. 20 Civ. 156, 2020 WL 2310913 (D.Me. May 9, 2020); *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020); *Legacy Church, Inc. v. Kunkel*, No. 20 Civ. 327, 2020 WL 1905586 (D.N.M. Apr. 17, 2020); *Cross Culture Christian Ctr. v. Newsom*, No. 20 Civ. 832, 2020 WL 2121111 (E.D. Cal. May 5, 2020); *Gish v. Newsom*, No. 20 Civ. 755, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020); *McGhee v. City of Flagstaff*, No. 20 Civ. 8081, 2020 WL 2308479 (D. Az. May 8, 2020).

Fourth Amendment: The Fourth Amendment is only implicated if "the challenged conduct occurred either during an investigation conducted by the government as an employer or during a law enforcement official's performance of a traditional government function." No such employment relationship existed and no law enforcement investigation had occurred.

First Amendment: Rights to freedom of speech and assembly are not absolute. Content-neutral laws which regulate speech or assembly are subject to intermediate scrutiny, and "[a] regulation is content-neutral if it 'serves purposes unrelated to the content of expression ... even if it has an incidental effect on some speakers or messages but not others." The Executive Orders were content neutral. While plaintiffs argued that the Executive Orders intentionally targeted businesses that involve an "alternative lifestyle" or "adult dancing," that allegation had no basis in reality. The Executive Orders broadly prohibit large gatherings, without any regard for the content of the expression occurring at those gatherings. Under intermediate scrutiny, that restriction on speech had to be narrowly tailored to serve a significant governmental interest. “I can think of few governmental interests more pressing than protecting the public from transmission of highly-contagious and often deadly disease.”

Fifth Amendment: A regulatory taking can arise based on an interference with property rights that "arises from a public program adjusting the benefits and burdens of economic life to promote the public good." Where the regulation does not deny all economically beneficial use of the land, courts are instructed to weigh factors including "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." The Executive Orders did not deny McCarthy all economically beneficial use of his property. He could, for example, offer food and drinks from the Blush Club for take-out or delivery.

Fourteenth Amendment: Plaintiffs identified no violation of a fundamental right nor reliance on a suspect classification that would support an equal protection claim; there was a rational relationship between the disparity of treatment alleged and a legitimate governmental purpose.

Guarantee Clause: Plaintiffs argued that the Executive Orders constituted a violation of

the separation of powers principles embodied in the Constitution. But "the Guarantee Clause does not provide the basis of a justiciable claim." *Rucho v. Common Cause,* 139 S.Ct. 2484, 2506 (2019).

State Law Claims: Plaintiffs' claims against the state were barred by the Eleventh Amendment.

Claims Against Federal Defendants: Plaintiffs' misapprehension of law was clearly evidenced here; § 1983 actions are not cognizable against federal actors, meaning that the court had no jurisdiction over those claims.

The court closed with this admonition: "Plaintiffs' request for preliminary relief is denied. While I will consider any arguments the plaintiffs put forward in response to the motions to dismiss, plaintiffs may be well-advised to voluntarily withdraw their complaint given the many problems identified in this opinion."

LINK

Speech: Requiring Educational Competence Before Enrolling in Certain Private Postsecondary Schools Violates First Amendment

Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer, no. 18-15840 (9th Cir. June 10, 2020).

Reversing and remanding, the Ninth Circuit finds untenable California's content-based distinctions in a law intended to combat private postsecondary schools that enroll underqualified students.

California's Private Postsecondary Education Act of 2009 (Act) prohibits students from enrolling in private postsecondary schools unless they first pass an examination prescribed by the U.S. Department of Education. The Act was passed by the California legislature in an effort to combat a significant number of private vocational postsecondary schools in the state which were issuing diplomas of dubious value: while it found that such schools "can complement the public education system and help develop a trained workforce to meet the demands of California businesses and the economy," the possibility of "fraudulent or substandard educational programs and degrees" demonstrated "the need for strong state-level oversight of private postsecondary schools."

The Act defines a category of students, known as "[a]bility-to-benefit student[s]," as those "who do[] not have a certificate of graduation from a school providing secondary education, or a recognized equivalent of that certificate." No such student can enroll in a private postsecondary school unless "the institution shall have the student take an

independently administered examination from the list of examinations prescribed by the United States Department of Education." Unless the student achieves a score “demonstrating that the student may benefit from the education and training being offered," that student may not enroll.

But the Act exempts a wide range of programs from such restrictions. Educational programs "sponsored by a bona fide trade, business, professional, or fraternal organization" are exempt, so long as the program is provided "solely for that organization's membership." Also exempt are courses offering "avocational or recreational education programs"; "[t]est preparation for examinations required for admission to a postsecondary education institution" such as the SAT or ACT; "[c]ontinuing education or license examination preparation"; and "[f]light instruction." And institutions that do not award degrees and solely provide educational programs for total charges of $2500 or less are exempt.

Bob Smith (Smith) operates the Pacific Coast Horseshoeing School (PCHS), the only such full-time entity in the state. He charges $6000 for an eight-week course. Academic prowess is not needed to be a good farrier, and Smith is willing to teach less-educated students. If he determines at the end of the first week that a student will not benefit from the course, he refunds all but $250 of their tuition. As a private postsecondary-educational institution teaching a vocational skill, PCHS is subject to the Act, and declines admission to prospective students who do not have a high-school diploma or a GED or who have not passed an examination prescribed by the Act.

Esteban Narez (Narez) sought to enroll in Smith's classes. He does not have a high-school diploma or a GED and is considered an ability-to-benefit student under the Act who cannot enroll unless he takes an academic examination. Narez asserts that no such examination will test a prospective student’s skills, and absent the requirement he would be able to enroll in PCHS.

Smith, Narez, and PCHS challenged the ability-to-benefit requirement on First Amendment grounds. California argued that the requirement was a consumer-protection provision regulating only non-expressive conduct—namely, the execution of the enrollment agreement between a private postsecondary school and a prospective student.

The district court granted the motion to dismiss by two California officials (“California”), concluding that the ability-to-benefit requirement did not prohibit the imparting or disseminating of information. Instead, it determined that the law regulated only conduct—the forming of an enrollment agreement—and any burdens on speech were "incidental," resulting from the government's regulation of commercial transactions.

The Ninth Circuit reversed. It analyzed whether the Act regulated speech, and if so, whether such regulation was content-based. Legislation regulating commercial transactions will generally be assessed under a rational-basis standard, but if it burdens speech or another fundamental right, a more stringent standard applies: intermediate

scrutiny for legislation that regulates conduct and only incidentally burdens expression or which imposes content-neutral restrictions on speech, such as time, place, and manner limitations, and, strict scrutiny for laws that regulate the content of the speech, requiring a compelling state interest and narrow tailoring.

The Circuit discerned a clear violation of the First Amendment. “There can be little question that vocational training is speech protected by the First Amendment. Smith's speech to [students] imparts a 'specific skill' or communicates advice derived from 'specialized knowledge.'" The question was whether the Act drew content-based distinctions, differentiating among speech or speakers. “It does. [The Act] is riddled with exceptions to the ability-to-benefit rule, and the exceptions turn on one of two things: (1) the content of what is being taught, or (2) the identity of the speaker. Together these exceptions demonstrate that the Act does more than merely impose an incidental burden on speech: it "target[s] speech based on its communicative content."

First, the Act distinguished among programs: “Communication of factual information about horseshoeing surely qualifies as protected free speech the same as communication about golf.” Second, the Act differentiated among speakers: “It picks winners and losers when it comes to which institutions must ensure that its listeners have satisfied the ability-to-benefit requirement. For example, the Act exempts "educational programs sponsored by a bona fide trade, business, professional, or fraternal organization, solely for that organization's membership.’"

The Circuit found *Sorrell v. IMS Health Inc*., 564 U.S. 552 (2011) instructive. There the Supreme Court struck down a Vermont law that prohibited pharmacies from selling doctors' prescribing records to pharmaceutical companies, which would use the data to market prescription drugs to specific doctors --but exempted entities that did not use the information for marketing purposes. Vermont had argued that its law affected only conduct, but the Court saw the regulation as restricting marketing speech while other communication was not so limited. The Ninth Circuit saw parallels:

> In *Sorrell*, the listener was the doctor and the forbidden topic was the marketing of prescription drugs. Id. at 564-65. Here, the listener is a student without a high-school education and the topic is vocational education. See Cal. Educ. Code §§ 94811; 94857; 94904. Thus, the [Act’s] overall statutory scheme precludes certain would-be students from taking a course when the institution would otherwise admit such students "because of the topic discussed." *Reed*, 135 S. Ct. at 2227.

Having found that plaintiffs stated a First Amendment claim, the Circuit left it to the lower court “on remand to determine whether this case involves commercial or non-commercial speech, whether California must satisfy strict or intermediate scrutiny . . . and whether it can carry its burden under either standard.”

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