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Contracts: Arbitration Clause in Uber Contracts is Not Vague or Unconscionable and Precludes Class Action by Uber Drivers

Mohamed v. Uber Technologies, Inc., no's. 15-16178/15-16181/15-16250 (9th Cir. Sept. 7, 2016)

Reversing the District Court, the Ninth Circuit had found that the arbitration clauses in Uber's contracts with drivers is neither vague nor unconscionable and is enforceable, undermining a potential class action against the company by as many as 385,000 Uber drivers.

(While the case did not specifically address the issue of whether Uber drivers should be treated as employees, entitling them to various benefits, the decision effectively kills that potential class action. It also presumably abrogates the $100 million settlement offer that plaintiffs had previously obtained from Uber—an offer that District Court Judge Chen had rejected as being less than 10% of what would have been appropriate).

Plaintiffs Abdul Mohamed and Ronald Gillette began driving for Uber in 2012 and 2013, respectively. In 2013 and 2014 Uber required them to agree to updated contract provisions before they could continue using Uber's passenger software (App). The updates stated that they were governed by California law and required arbitration: all disputes were "to be resolved only by an arbitrator through final and binding arbitration on an individual basis only, and not by way of court or jury trial, or by way of class, collective, or representative action." However, the 2013 update also stated that "Notwithstanding any other clause contained in this Agreement, any claim that all or part of the Class Action Waiver, Collective Action Waiver or Private Attorney General Waiver

is invalid, unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator."

Drivers were allowed to opt-out if they declined to be governed by the arbitration provision. Mohamed and Gillette accepted these agreements and did not opt out.

In 2014 Mohamed's and Gillette's access to the App was cut off due to negative information on their consumer credit reports, effectively terminating their ability to drive for Uber. Mohamed filed a class action in November 2014 in the Northern District of California against Uber and other defendants, including the company that conducted background checks and obtained drivers' credit scores. He alleged that use of his consumer credit report violated the Fair Credit Reporting Act (FCRA) and various state laws. Gillette filed a separate lawsuit, also alleging improper use of credit reports, but included a count alleging that Uber had misclassified him and other employees as independent contractors in violation of California's Private Attorney General Act (PAGA) statute.

Uber moved to compel arbitration in both lawsuits. The District Court denied both motions. It concluded that the delegation clauses in both updates were ineffective because they were not clear and unmistakable, and even if clear, they were unenforceable because they were unconscionable. The 2013 arbitration provision was procedurally unconscionable because it was "hidden in a prolix printed form" and the 2014 provision was procedurally unconscionable because it "utterly failed to notify drivers of a specific drawback of the delegation clause-namely, that drivers may be required to pay considerable forum fees to arbitrate arbitrability."

The Ninth Circuit disagreed. It found that the updated arbitration provisions clearly applied and were not unconscionable. It cited California Supreme Court opinions stating that "unconscionability requires a substantial degree of unfairness beyond 'a simple old-fashioned bad bargain,'" and that to be unconscionable, contracts must be "so one-sided as to 'shock the conscience.'" Those elements were not present here: although the Uber opt-out provisions had originally required drivers to opt-out in person at Uber's San Francisco office or by overnight delivery, the 2014 update allowed online opt-outs.

Plaintiffs did achieve a modest "win"—the Circuit Court determined that the PAGA waiver should be severed from the arbitration agreement and Gillette's PAGA claim could proceed in court on a representative basis.

Affirmed in part, reversed in part and remanded.

LINK

Employment: Employer Liable for Retaliatory Firing under Cat's Paw Theory, Even Where Low-Level Employee Manipulates Employer

Vasquez v. Empress Ambulance Service, Inc., No. 15-3239-cv (2d Cir. Aug. 29, 2016)

Adopting the "cat's paw' theory of liability, the Second Circuit has found that a terminated female employee could sue her employer on a retaliation claim under Title VII where the employer was negligent in relying on fabricated evidence provided by the low-level co-worker who allegedly sexually harassed the plaintiff.

Over a four-month period, Andrea Vasquez, an emergency medical technician working for Empress Ambulance Service, Inc. (Empress), received unwanted sexual overtures from a co-worker, who ultimately texted her an explicit photograph of himself. Vasquez complained and was assured by supervisors that her complaint would be investigated. However, the co-worker became aware of Vasquez's complaint and manufactured ersatz text messages which purported to document a fully consensual relationship. Empress relied on the phony evidence, refused to accept Vasquez's proffer of her own phone to show the true communication trail, and instead fired Vasquez for sexual harassment of the amorous co-worker.

Vasquez filed suit in the Southern District of New York, alleging that Empress had wrongfully terminated her in retaliation for complaining of sexual harassment, in violation of Title VII and New York State Human Rights Law.

The District Court dismissed the case, holding that the retaliatory intent of Vasquez's co-worker, a low-level employee with no decision-making authority, could not be imputed to Empress and that Empress consequently could not have engaged in retaliation.

The Second Circuit disagreed, vacating the lower court decision and remanding for further proceedings.

The Circuit found that agency principles permitted the retaliatory intent of plaintiff's co-worker--even a low-level employee--to be imputed to the employer, as a result of the employer's alleged negligence. The so-called "cat's paw" theory could be used to support recovery for Title VII claims of retaliation: assuming that the employer knew or should have known of the co-worker's retaliatory animus, the fact that the co-worker was nothing more than a low-level employee could not shield the employer from answering for the co-worker's conduct, because the employer's own negligence provided an independent basis to treat the co-worker as the employer's agent and hold the employer accountable. The Circuit further found that plaintiff's complaint should not have been dismissed under Fed. R. Civ. P. 12(b)(6), because she had sufficiently pled that her employer acted negligently.

So-called "cat's paw" liability derives from an Aesop fable, in which a wily monkey

flatters a naïve cat into pulling roasting chestnuts out of a roaring fire for their mutual satisfaction; the monkey, however, "devour[s]. . . them fast," leaving the cat "with a burnt paw and no chestnuts" for its trouble. Injected into United States employment discrimination law by Judge Posner in 1990, the “cat’s paw” metaphor now refers to a situation in which an employee is fired or subjected to some other adverse employment action by a supervisor who himself has no discriminatory motive, but who has been manipulated by a subordinate who does have such a motive and intends to bring about the adverse employment action.

Although the Second Circuit had not yet accepted or rejected the cat's paw analysis, it noted that the Supreme Court has approved its application under the Uniformed Services Employment and Reemployment Rights Act, a statute very similar to Title VII, and numerous Circuits have adopted cat’s paw. The question here was whether cat’s paw analysis applied where the employee manipulating the employer was not a supervisor but only a low-level worker. The Second Circuit opined that the level of the employee should not be material, and found one Circuit--the First--which has already held that cat’s paw applies even where very junior-level workers manipulate an unsuspecting employer.

The Second Circuit found ample evidence that Empress was negligent in accepting the co-worker’s accusations and rejecting Vasquez’s account. First, the co-worker had just learned of Vasquez’s complaint and had an obvious reason to concoct his story. Second, the timing was suspicious—it seemed unlikely that Vasquez should go from eagerly trading explicit messages to reporting such conduct as unwelcome harassment within the space of only six hours. These factors required reversal on a cat’s paw theory, regardless of the co-worker’s status within Empress:

> In sum, we hold that an employer may be held liable for an employee's animus under a "cat's paw" theory, regardless of the employee's role within the organization, if the employer's own negligence gives effect to the employee's animus and causes the victim to suffer an adverse employment action.

LINK

Fourth Amendment: Requirement that Plaintiff Appear for Pre-Trial Hearings under Threat of Arrest is Sufficient to Constitute "Seizure"

Black v. Montgomery County, No. 15-3399 (3d Cir. Aug. 30, 2016)

Reversing a lower court, the Third Circuit has found that a "seizure" occurred where a woman was charged with arson and threatened with arrest if she did not appear for numerous court proceedings. The Circuit also allowed her to proceed with a due process fabrication of evidence claim even though she was not convicted on the arson charges.

In 2012, Michelle Black was assisting her mother at their family home. Electricians upgrading wiring in the house accidentally caused a fire to break out but soon extinguished it; nevertheless, the fire department was called. Despite seeing the electrical outlet where the fire had started, the fire marshal stated that the fire had been deliberately set and misrepresented that had there been no power to the outlet. Other fire officers came to the same conclusion without checking the circuit panel or interrogating the electricians. When a box of matches was found on a window sill, officials posited that they were used to start the fire. Defendants never tested the matches for DNA or fingerprints.

Black "was advised that she was not free to leave the premises until she was questioned by police, and was escorted by police to and from the bathroom." Officers accused her of setting the fire. She alleges she was told that if she did not surrender to them at a later date, defendants would have her hometown District Attorney's Office in California send a police officer to arrest her and she would remain in custody until extradited.

Black returned to California. In December 2012, Pennsylvania authorities issued an arrest warrant for arson endangering persons, risking catastrophe, criminal mischief, and recklessly endangering another person. She flew to back to Pennsylvania, was arraigned, fingerprinted, photographed and released on $50,000 unsecured bail. She subsequently flew from California to Pennsylvania twelve times to attend her preliminary hearing and pre-trial conferences because court notices said that if she did not appear a bench warrant would be issued for her arrest.

Black retained a fire expert who concluded that the fire was unequivocally an electrical one, not arson. The expert reached out to the fire chief to discuss his findings but received no response. Her counsel emailed the assistant district attorney to advise him about the expert's findings and offered to meet the prosecutor, to no avail.

At trial, Black presented evidence that the defendants had fabricated their story and had suppressed exculpatory information. The jury deliberated for less than forty minutes in clearing her of all charges.

In November 2014 Black filed suit under 42 U.S.C. § 1983, naming the fire chief, various detectives and state troopers, and the county and township as defendants. The complaint alleged, inter alia, malicious prosecution in violation of the Fourth Amendment, violation of her Fourteenth Amendment due process rights due to fabrication, suppression, and destruction of evidence, and conspiracy claims under *Monell*.

The District Court dismissed on defendants' 12(b)(6) motion, finding that Black's malicious prosecution claim failed because she never experienced the types of liberty restrictions that constitute a Fourth Amendment seizure. The District Court also determined that the Fourteenth Amendment due process claim for fabricated evidence could not succeed because precedent in the Circuit requires a conviction for such a claim, and Black had been acquitted. Finally, the District Court dismissed the conspiracy and *Monell* claims because Black could not succeed on the underlying malicious prosecution or due process claims.

Black appealed, raising two issues: whether she had been "seized" as required for a Fourth Amendment malicious prosecution claim; and whether her Fourteenth Amendment due process claim for fabricated evidence required that she be convicted at trial.

The Third Circuit reversed on both counts.

The scope of "unreasonable searches and seizures" is broad. Under *Terry*, a seizure occurs when law enforcement, "by means of physical force or show of authority" restrains the liberty of a citizen—even where no trip to the station house or prosecution ultimately occurs. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). No physical touching is required; the relevant question is "whether a reasonable person would have believed he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

Justice Ginsburg has discussed the concept of "continuing seizure" in *Albright v. Oliver*, 510 U.S. 266 (1994):

> A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.

The Third Circuit found that, although Black was not prohibited from traveling outside of Pennsylvania, the fact that she was charged with serious crimes, required to post a significant bond and faced arrest if she did not reappear in the state—compounded by the requirement that she return a dozen times—did create a "seizure" for Fourth

Amendment purposes: "Considering the totality of the circumstances alleged, Black has sufficiently alleged that her liberty was intentionally restrained by the defendants." It reversed the District Court.

Black's claim based on defendants' fabrication of evidence was also successful. The Circuit first clarified that a fabrication of evidence claim need not be brought under the rubric of malicious prosecution, and could stand alone as a Due Process action. "[I]f a defendant has been convicted at a trial at which the prosecution has used fabricated evidence, the defendant has a stand-alone claim under section 1983 based on the Fourteenth Amendment if there is a reasonable likelihood that, without the use of that evidence, the defendant would not have been convicted."

Turning to the issue of whether an acquitted plaintiff could bring a fabrication of evidence claim, the Circuit held that its own precedent, while being based on a conviction, did not foreclose an acquitted plaintiff from also bringing such an action:

> We see no reason to require a conviction as a prerequisite to a stand-alone due process claim against a state actor for fabrication of evidence. The harm we were concerned with in Halsey — corruption of the trial process — occurs whether or not one is convicted. It would be indeed anomalous if an attentive jury correctly saw through fabricated evidence, and its acquittal categorically barred later relief to the criminal defendant. Such a result would insulate the ineffective fabricator of evidence while holding accountable only the skillful fabricator.

Furthermore, the Second, Fifth and Eleventh Circuits had already reached the same conclusion in their own precedents, allowing acquitted plaintiffs to bring fabricated evidence Due Process claims.

LINK

Immunity: Arresting Officer has Probable Cause despite Contradictory Account of Incident by Attorney

Rogers v. City of Orlando, No. 15-13198 (11th Cir. Sept. 1, 2016)

Affirming the lower court, the Eleventh Circuit has found that an officer had qualified immunity for an arrest based on a victim's statement that he had been assaulted; the fact that the arrestee was a lawyer did not entitle her statement to greater credibility or eliminate probable cause. Although the officer had not been adequately trained in the impermissibility of in-home warrantless arrests, that deficiency was not a policy or custom of Orlando.

Orlando officers responded to a 911 call made by the passenger of a vehicle which had allegedly been bumped and blocked in place by Jessica Arnold-Rogers (Rogers), an Orlando attorney. The caller also claimed that when her husband exited their vehicle to check for damage, Rogers confronted and pushed him several times and then followed him back to the vehicle, reaching in and pushing him again. Officers questioned Rogers at her apartment, where she was belligerent, appeared to be intoxicated and denied the incident. After the other driver pressed charges in a sworn statement, an officer returned to Rogers's apartment without a warrant and arrested her for burglary (she had "entered" the complainant's vehicle without authorization) and battery. Rogers claimed that he pulled her from her apartment to effect the arrest; the officer stated that she voluntarily complied with his request to come outside.

After Rogers spent the night in jail, the state dismissed the burglary charge for lack of evidence and declined to prosecute the battery charge.

Rogers sued the officer under §1983 for violating her Fourth Amendment rights, because she was arrested (1) without probable cause and (2) inside her home without a warrant. She also contended Orlando was liable for the unconstitutional arrest because the officer acted pursuant to Orlando's policy or custom.

Due to conflicting evidence about where the arrest occurred, the District Court denied the officer's qualified immunity defense on the warrantless arrest claim; it was clearly established that an individual has a right to be free from a warrantless arrest in her home absent consent or exigent circumstances. It granted the officer qualified immunity on the probable cause theory and granted Orlando summary judgment because, even if there was a constitutional violation, Rogers had failed to show that the constitutional violation occurred pursuant to Orlando's policy or custom.

At trial, a jury found that the officer had not entered Rogers's apartment, meaning her warrantless arrest claim failed.

On appeal, Rogers argued that the officer did not have probable cause because the victim had not shown any evidence of damage to his vehicle and he lacked veracity—he

had been arrested for battery 10 years earlier. These were not sufficient to undermine a probable cause determination: Eleventh Circuit precedent advises that, in deciding whether probable cause exists, arresting officers "are not required to sift through conflicting evidence or resolve issues of credibility, so long as the totality of the circumstances present a sufficient basis for believing that an offense has been committed."

Rogers also claimed that because she is a lawyer, the officer should not have relied on the victim's conflicting statement. "Underpinning this argument is the assumption that an attorney's account of an incident that contradicts the victim's sworn statement always renders the victim's statement insufficiently trustworthy, even if another witness corroborates the victim's report. . . [T]here is no basis to conclude otherwise simply because Arnold-Rogers is an attorney."

The Circuit Court held that a jury could easily have found that probable cause existed. Although the officer admitted that he had not been adequately trained regarding the impermissibility of warrantless arrests inside the home, absent exigent circumstances or consent, Rogers was unable to show that Orlando had adopted a policy of such inadequate training or acted with deliberate indifference to solving such a known deficiency.

Finally, Rogers argued that evidence she was intoxicated was prejudicial and should not have been admitted. The Eleventh Circuit agreed with the District Court's determination that evidence of intoxication was relevant to ascertaining Rogers's memory of whether she was inside or outside her apartment when arrested.

LINK

Immunity: Failure to Use Pepper Spray in lieu of Shooting does not Constitute Excessive Force

Collar v. Austin, No. 15-14482 (11th Cir. Sept. 2, 2016)

Affirming the District Court, the Eleventh Circuit has held that an officer's failure to use pepper spray and failure to rely on the fact that a fellow officer was nearby did not subject him to excessive force liability.

Trevis Austin (Austin), a campus police officer at the University of South Alabama, shot and killed Gil Collar (Collar) after a very brief encounter. His parents brought a §1983 action, alleging excessive force. The District Court entered summary judgment in favor of Austin, finding his actions under the circumstances to be reasonable.

The Eleventh Circuit affirmed. Although it found that the lower court had incorrectly determined that Austin was at the scene alone, when in fact Austin was aware of another officer nearby, Austin could reasonably have feared imminent death as he backed up during the 30-second encounter with Collar. Furthermore, Austin could be excused for not using his pepper spray: both the spray and his service revolver were on his right side, and he would have had insufficient time to replace his pistol and remove the pepper spray as a drugged and irrational Collar moved towards him.

Under Eleventh Circuit precedent "[T]he question is whether [the plaintiff] has convinced us that at the time [the officer] shot him no officer reasonably could have believed that [the plaintiff] . . . posed a risk of serious physical injury . . . .").

The circumstances here compelled the opposite conclusion—that officer Austin was justified in perceiving Collar as a potentially deadly threat. Citing *Graham v. Connor* ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation"), the Circuit Court affirmed.

LINK

Immunity: No Immunity for Teacher Who Cuased State-Created Danger

L.R. v. School District of Philadelphia, No. 14-4640 (3d Cir. Sept. 6, 2016)

Affirming the District Court and citing the state-created danger doctrine, the Third Circuit has refused to grant qualified immunity to a teacher who allowed a five-year old to be accompanied away from school by an adult without appropriate documentation.

In January 2013, a teacher in the Philadelphia School District allowed a kindergarten student to leave his classroom with an adult who failed to identify herself. The adult sexually assaulted the child later that day. In the early hours of the next morning, a sanitation worker found the child in a playground after hearing her cries. The child's parent sued the teacher, who claims he is immune from suit.

Jane's parent, L.R., filed suit under 42 U.S.C. § 1983 against Littlejohn, the School District of Philadelphia and others (Defendants), alleging that Littlejohn deprived Jane of her Fourteenth Amendment rights under a state-created danger theory. Specifically, L.R. alleged that by releasing her daughter to an unidentified adult, Littlejohn created the danger that resulted in Jane's physical and emotional harm. Defendants moved to

dismiss, arguing that the complaint did not allege a constitutional violation and, even if it did, Littlejohn was entitled to qualified immunity. The District Court denied defendants' motion, also holding that L.R. sufficiently stated a claim for municipal liability against the School District under a failure to train and supervise theory.

The Third Circuit agreed. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), was instructive. There, the Supreme Court explained that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." Rather, the purpose of the Clause is "to protect the people from the State, not to ensure that the State protect[s] [the people] from each other."

Under that principle, the Court held that state social workers did not deprive four-year-old Joshua DeShaney of substantive due process when they failed to remove him from a physically abusive household, despite their ongoing knowledge of suspected abuse by his father. But the Court suggested that the result may have been different had the State played a role in creating or enhancing the danger to which Joshua was exposed, giving rise to the concept of a "state-created danger."

In the Third Circuit, the elements necessary to successfully plead a state-created danger claim are:

1. the harm ultimately caused was foreseeable and fairly direct;
2. a state actor acted with a degree of culpability that shocks the conscience;
3. a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential [9] harm brought about by the state's actions, as opposed to a member of the public in general; and
4. a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Unlike the *DeShaney* scenario, all of these elements were present when teacher Littlejohn affirmatively released five-year old Jane into the custody of a stranger with dubious bond fides. Although defendants attempted to reframe Littlejohn's alleged actions as inactions or failures (failure to follow School District policy, failure to obtain proper identification and so on) the Circuit was unpersuaded—the teacher’s decision to release Jane was an affirmative act exposing her to danger:

> We can therefore easily distinguish Littlejohn's conduct from the state actors' conduct in *DeShaney*. The Supreme Court's focus in *DeShaney* was on the State's failure to remove Joshua a second time from a situation it had reason to believe was dangerous, meaning the State's decision to leave Joshua with his father was a maintenance of the status quo. . . . When Littlejohn allowed Jane to leave the classroom with an adult who failed to produce proper identification or

verification, he exposed Jane to a danger she would not have otherwise encountered.

The Circuit found that Littlejohn's behavior shocked the conscience and violated what should have been clearly known as a five-year old student's right to be protected against being released to a predator.

LINK

Search and Seizure: Warrantless "Pinging" of Cellphone to Determine Location is Allowed due to Exigent Circumstances

United States v. Caraballo, No. 12-3839 (2d Cir. Aug. 1, 2016)

Where a known drug kingpin executed an associate who had contacted police, law enforcement was justified in requiring Sprint to "ping" the location of the dealer's cellphone without a warrant to protect undercover officers and prevent the destruction of evidence.

In early 2011, Brattleboro, Vermont police made a series of undercover cocaine purchases from Frank Caraballo. Several months later, the body of Melissa Barratt, an associate of Caraballo's who had confided to police, was discovered after an execution-style slaying. Authorities were concerned that Caraballo had extracted information from Barratt about the identities of the undercover officers who had infiltrated his network and would soon kill them. They also wanted to prevent the dissipation of evidence.

Although they considered obtaining a search warrant, officers decided that the safety of their colleagues and the value of preserving evidence required immediate action which overrode warrant considerations. They approached Sprint about locating Caraballo's cellphone. This could be accomplished in two ways. One, based on a phone's calls to nearby cell towers (giving a historical log of a phone's movements and a margin for error of about 5,000 meters), did not require a command from Sprint. The other, which involves triangulating the cell phone's position by reference to three or more network satellites upon specific command of a Sprint operator ("pinging") is quite precise--within a range of 8 to 46 meters.

Foregoing a warrant, the officers requested GPS data from Sprint. Pinging soon located Caraballo's phone and he was apprehended within 90 minutes.

Caraballo contended that the pinging of his cell phone was a warrantless search in violation of the Fourth Amendment. The District Court applied three parameters in denying Caraballo's suppression motion: (1) the pinging was not a cognizable Fourth Amendment search because Caraballo lacked both a subjective and reasonable

expectation of privacy in his phone's location; (2) no warrant was necessary for any such search because the officers' actions were justified by exigent circumstances; and (3) exclusion would be inappropriate, in any event, because the officers had acted in good faith in reliance on applicable law. Caraballo was convicted on drug charges.

The Second Circuit declined to consider the first and third of the District Court's parameters. (The Sixth Circuit has expressly found no expectation of privacy in a cellphone pinging case and numerous jurisdictions have found no expectation of privacy in historical cell-phone data collection, but the Second Circuit did not address the expectation of privacy. Nor did it rely on Supreme Court precedent that evidence is not excluded where officers act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, even where the statute is ultimately found to violate the Fourth Amendment).

Instead, the Second Circuit based its affirmance solely on an exigent circumstances analysis. Exigent-circumstances determinations typically consider the *Dorman* factors:

1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause . . . to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry.

Here, the Second Circuit held, exigent circumstances justified the officers' pinging of Caraballo's phone following the discovery of Barratt's body. Based on the brutal execution of Barratt, the officers reasonably believed that Caraballo posed an imminent threat, particularly to those undercover agents and confidential informants involved in his investigation. Furthermore, delay in securing a warrant could result in the imminent destruction or dissipation of evidence.

Also important was the fact that pinging the cellphone did not involve any violent or forceful entry. The pinging was "strictly circumscribed" to finding Caraballo as quickly as possible. It took place over a very short period of time (less than two hours) and ceased immediately upon the officers confirming that the identified vehicle was Caraballo's. Officers used the GPS coordinates only to trace Caraballo's path.

LINK

Speech: District Court Declines to Dismiss Abortion Buffer Zone Case Where City Has Not Demonstrated Narrow Tailoring

Reilly v. City of Harrisburg, No. 1:16-CV-0510 (M.D. Pa. Aug. 31, 2016)

Picking up where *McCullen* left off, a Pennsylvania District Court has refused to dismiss a challenge to Harrisburg's abortion clinic buffer ordinance. Although it disagreed with plaintiff's argument that under *Reed*, a law disproportionately curtailing anti-abortion communication was not content-neutral, it found that the City had not shown adequate efforts to accomplish its public safety objectives in a less restrictive manner than a 20-foot barrier.

Plaintiffs regularly provide what they euphemistically refer to as "sidewalk counseling" outside of two health care facilities in Harrisburg, Pennsylvania (City) that perform abortions. In November 2012, the City adopted Ordinance No. 12-2012 entitled "Interference With Access To Health Care Facilities (Ordinance). Intended "to promote the health and welfare of [Harrisburg] residents and visitors to [Harrisburg]'s health care facilities, as well as the health and welfare of those who may wish to voice their constitutionally protected speech outside of such health care facilities," the Ordinance makes it illegal for individuals, other than police, emergency personnel or employees assisting patients to enter or exit the facilities, to "knowingly congregate, patrol, picket or demonstrate in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility."

In March 2016, Plaintiffs filed a complaint alleging, inter alia, that the Ordinance's "buffer zones" make it impossible for them to effectively counsel or distribute literature in opposition to abortions, violating their First Amendment rights to freely speak, exercise their religion, and assemble, as well as their Fourteenth Amendment due process and equal protection rights. Citing *Reed*, plaintiffs argued that the Ordinance is a content-based restriction on protected speech because it only prohibits anti-abortion speech, and that it does not pass strict scrutiny because it is not narrowly tailored to serve a compelling state interest.

Plaintiffs moved for preliminary injunction; the City moved to dismiss for failure to state a claim.

The District Court cited *McCullen,* in which the Supreme Court had found that a very similar Massachusetts law was content-neutral because it did not require law enforcement to examine the content of speech to determine if individuals were violating the law, but simply where individuals were located. It found that the Supreme Court's reasoning in *McCullen's* buffer zone scenario (involving a 35-foot buffer ordinance) remained unaffected by *Reed*.

> Plaintiffs argue, nonetheless, that the Ordinance's prohibition on patrolling, picketing, or demonstrating makes it content-based under Reed's analytical

> framework because the Ordinance frustrates the purpose of Plaintiffs' speech. The court disagrees. . . Plaintiffs argue that the Ordinance, even if not content-based on its face, nonetheless restricts speech based on its content because it cannot be justified "without reference to the content of the regulated speech." Reed, 135 S. Ct. at 2227. Once again, the court disagrees. Members of law enforcement can identify patrolling, picketing, or demonstrating without knowing or needing to ascertain the content of the speech.

The District Court found the Ordinance to be a content-neutral time, place, or manner restriction upon speech, resulting in intermediate scrutiny analysis. The law therefore had to be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication. Although Plaintiffs did not dispute that public safety was a significant governmental interest, they argued that the City had not explored less-restrictive alternatives. As in *McCullen*, the District Court found this argument persuasive: "[T]he government must do more than 'simply say that other approaches have not worked. . . Rather, the government has 'to show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason.'"

Accordingly, the District Court held that, at this early stage of the litigation, Plaintiffs had sufficiently alleged that the Ordinance was not narrowly tailored. It also found that it would be premature to dismiss Plaintiffs' overbreadth argument.

However, plaintiffs' prior restraint, void-for-vagueness, due process, equal protection and religious expression claims were all dismissed, as were their attempts to include the City Council and Mayor as defendants. Similarly, their motion for preliminary injunction failed because they could not demonstrate the requisite likelihood of success on the merits.

Trials: Failure to Appeal Zoning Board Decision Regarding Ham Radio Tower to State Court Requires Dismissal by Federal Court

Depolo v. Bd. of Supervisors Tredyffrin Twp., No. 15-2495 (3d Cir. Aug. 30, 2016)

A ham radio enthusiast who failed to appeal a local zoning board's denial of his request to erect a 180-foot radio tower to state court was unable to have his case heard at federal court.

Jeffrey DePolo, a federally licensed ham radio enthusiast, sought permission to erect a 180-foot radio tower on his property, which was surrounded by mountainous terrain. The Zoning Hearing Board of Appeals ("ZBHA") of the Township of Tredyffrin ("Township") denied permission for a 180-foot tower, but agreed to a tower that was 65-

feet tall, viewing the intermediate height as a reasonable accommodation under the applicable zoning ordinance.

DePolo did not appeal that decision to the Chester Court of Common Pleas as allowed under state law but filed suit in the U.S. District Court for the Eastern District of Pennsylvania. He claimed that the Township's zoning ordinance, which prohibited any building taller than 35 feet, is preempted by a federal regulation (47 C.F.R. § 97.15(b)) ("FCC Reg") and by a closely related FCC declaratory ruling, known as PRB-1. The federal district court granted the Township's motions to dismiss, finding that the 65-foot variance was a reasonable accommodation and that the Township's zoning ordinance was not preempted by PRB-1.

The Court of Appeals upheld the district court's decision, although on different grounds. The Third Circuit noted that the FCC Reg. reflects a national interest in promoting ham radios as an important source of communications should other networks fail, whether due to natural disaster or other reason. The applicable portion of the FCC Reg. reflects that interest:

> Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. (State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See PRB-1, 101 FCC 2d 952 (1985) for details.)

The cited FCC ruling, PRB-1, states expressly that "a zoning ordinance is preempted when a local municipality fails to apply the land use regulation in a manner that reasonably accommodates amateur communications."

Unfortunately for Dipolo, the Circuit Court could not consider the impact of the federal authorities. It concluded that his failure to timely appeal the ZHBA's determination to state court rendered that decision final. "[G]iven the unique procedural history of this case, we must afford the ZHBA's final judgment the same preclusive effect that it would have had in state court. It is therefore not reviewable in this suit."

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