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Speech: Mobile Billboard Exemption for Emergency and Construction Vehicles Assumes Safety-Related Messaging and is Content-Based

Boyer v. City of Simi Valley, no. 19-55723 (9th Cir. Oct. 14, 2020).

Reversing the lower court, the Ninth Circuit finds that an ordinance exempting certain emergency and construction vehicles from a ban on mobile billboards, while ostensibly content-neutral, is based on an assumption that the messages on such vehicles will be safety-oriented and is therefore content-based.

In 2016, Simi Valley, California (City) adopted various ordinances (Ordinances) that prohibit the parking or standing of "mobile billboard advertising display[s] on any public street, alley or public lands in the City" and authorize the impounding of mobile billboard advertising displays (mobile billboards) parked illegally; however, certain authorized vehicles—emergency vehicles and vehicles used "for construction, repair or maintenance of public or private property" --were exempt from the ban (Authorized Vehicle Exemption).

Bruce Boyer (Boyer) utilizes various "vehicles, including trailers attached to and detached from motor vehicles, and other non-motorized vehicles that may qualify as 'mobile billboard advertising displays' in the City. Boyer parks his mobile displays "in locations where parking of most any other vehicle is permitted." The City has impounded or threatened to impound his vehicles and displays on various occasions. In 2018, Boyer sued in state court, arguing that the Ordinances violated his First Amendment rights and were preempted by California law. The case was removed to federal court, where the City moved to dismiss under FRCP 12(b)(6).

The district court granted the City's motion, concluding the Ordinances were content-neutral and reasonable time, place, and manner restrictions.

On appeal, Boyer asserted that the Authorized Vehicle Exemption "is inescapably a content-based distinction." The Ninth Circuit agreed, conducting a more rigorous evaluation than the lower court. Although the Authorized Vehicle Exemption did not expressly restrict the topic, idea, or message that an authorized vehicle could display via a mobile billboard, and an officer determining whether the Ordinances were violated would not have to consider the content of the speech, the officer would need to evaluate the manner of speech (whether it is part of a mobile billboard); the place of speech (whether it is located on public property); and the speaker (whether the display is an authorized vehicle). This second phase of inquiry was problematic:

> Because the Exemption does not facially distinguish between speakers based on the message they convey, we consider whether the speaker preference is justifiable "without reference to the content" of the speech. We struggle to identify a justification for allowing speech only from authorized emergency and construction, repair, or maintenance vehicles that does not rely on content, and the City offers none.

The City had justified the Ordinances as "reasonable and necessary to protect the health, safety, and welfare of the citizens of the City." But the Circuit found that logic lacking—the justification only made sense if authorized vehicles were more likely to display messages promoting public health, safety, and welfare than nonauthorized vehicles:

> In other words, how else could allowing authorized vehicles to display messages via mobile billboards protect the health, safety, and welfare of City residents if not because those authorized vehicles are likely to display public-safety related messages? **Thus, to execute its purpose, the City enacted an ordinance that prefers speakers likely to spread messages consistent with its purpose. This is a prudent preference, a reasonable rationale, and a content-based choice that triggers strict scrutiny.**

Although neither party had raised the issue, the Circuit considered whether the government speech doctrine saved the Authorized Vehicle Exemption. **In his *Reed* concurrence, Justice Alito noted that "government entities may also erect their own signs consistent with the principles that allow governmental speech" and that "[t]hey may put up all manner of signs to promote safety." As the court phrased it, "Under Justice Alito's view, a content preference for government speech is not a content-based restriction at all." Here, however, it did not appear that the Authorized Vehicle Exemption was a mere codification of the government speech doctrine.** (See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). While some of the speech on vehicles covered in the Authorized Vehicle Exemption would qualify as government speech, the exemption did

not limit authorized vehicles to displaying City-approved messages nor did it provide that a vehicle would lose its authorization when it speaking beyond the scope of its authority. This breadth was impermissible:

> But where the Exemption allows authorized vehicles to display messages that are not subject to government control, we do not see how the Authorized Vehicle Exemption can avoid strict scrutiny based on the government speech doctrine. **In sum, we conclude that exempting certain authorized vehicles from the ban on mobile billboard advertising displays can be justified only based on content. And, as indicated, the City does not advance any other justification. Because the district court concluded the ordinances were content neutral, it evaluated the sufficiency of Boyer's complaint against the wrong standard.**

The Circuit vacated the order granting the City's motion to dismiss regarding Boyer's First Amendment claims, remanding with instructions that the lower court "consider Boyer's claims consistent with this opinion." It affirmed the dismissal of Boyer's state law claims and held that the district court did not err in declining Boyer's request for remand to state court; because the lower court had subject matter jurisdiction over Boyer's state claims under 28 U.S.C. § 1367, it could evaluate them on the merits and dismiss them with prejudice at the same time it dismissed his federal claims.

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Statutes of Limitations: In § 1983 Cases, Federal Law Controls Accrual; Later Discovery of Unavailable Evidence Tolls Statutes of Limitations

Ouellette v. Beaupre, No. 19-2069 (1st Cir. Oct. 7, 2020).

A district court incorrectly dismissed a claim for deliberate indifference brought against a police department more than 25 years after an officer molested a minor, on the erroneous holding that recently-discovered evidence of a cover-up did not toll the statute of limitations and that the victim should have conducted a more extensive investigation at the time.

Lawrence Ouellette (Ouellette) alleged that he was sexually abused as a teenager in the late 1980s by a Biddeford, Maine Police Department (BPD) officer, Captain Norman Gaudette (Gaudette). Ouellette reported the abuse to the BPD at the time and an internal investigation ensued with no action being taken. Years later, in 2015, Ouellette learned through a series of social media posts that the BPD, and specifically BPD Chief Roger Beaupre (Beaupre) allegedly knew of at least one other report of Gaudette sexually abusing a minor that pre-dated Ouellette's experience. The posts also described a pattern of alleged sexual misconduct by BPD officers over the prior 30 years.

Armed with this newly discovered information, Ouellette brought a § 1983 action in October 2015 , alleging that the City of Biddeford (City) and Beaupre were deliberately indifferent to the violation of his constitutional rights. The defendants moved for summary judgment, arguing, inter alia, that Ouellette's suit was barred by the statute of limitations. The district court agreed, finding that Ouellette's claims were nearly 20 years late under the applicable statute of limitations. The court held that Ouellette's awareness of Gaudette's affiliation with the BPD provided Ouellette with enough information for his claims against the City and Beaupre to accrue at the time of his injury, in the late 1980s. Alternatively, the court concluded that even if Ouellette's awareness of Gaudette's affiliation with the BPD at the time of his injury was not sufficient for purposes of accrual, it still provided him with enough information to lead a reasonable person in his position to investigate whether the City and Beaupre had a role in causing his injury; if Ouellette had diligently undertaken such an investigation, he would have uncovered enough information for his claims to accrue at some unspecified point prior to the time Maine's statute of limitations expired in 1995 (six years after he reached 18 years of age).

The Circuit reversed.

Accrual of § 1983 Claims: Although federal courts look to state law for the statute of limitations and tolling principles, "the accrual date of a § 1983 cause of action is a question of federal law; a § 1983 claim accrues when the putative plaintiff has a "complete and present cause of action" when all of the acts comprising the specific constitutional violation have been completed. And under the federal discovery rule, accrual is delayed until the plaintiff knows, or should know, of those acts. A § 1983 claim will accrue once a plaintiff is armed with the necessary factual predicate to file suit, including knowledge of both an injury and the injury's likely causal connection with the putative defendant. While this information is sometimes apparent at the time of an injury, in other cases, this information will only come to light through the release of subsequent factual information or through additional investigation.

Here, the district court had reasoned that Ouellette's "awareness of his abuser's affiliation with the BPD supplied [him] with enough information to lead a reasonable person in his position to seek advice about a possible claim against Defendants Beaupre and the City." In other words, if Ouellette had consulted a competent attorney shortly after he was injured, that attorney would have advised him that he was in a position to immediately file suit against Gaudette's employer and supervisor.

The panel disagreed. A constitutional tortfeasor's employment with a municipality does not, on its own, give rise to a "complete and present" § 1983 cause of action--the doctrine of respondeat superior, which imposes vicarious liability on an employer for the torts of an employee undertaken in the course of his or her employment, does not apply to § 1983. And a *Monell* action will only proceed where the plaintiff pleads sufficient facts to indicate the existence of an official municipal policy or custom condoning the alleged constitutional violation. Therefore, "any knowledgeable attorney that Ouellette

consulted around the time of his alleged abuse would have told him of these standards and would not have advised him to file a lawsuit" in the absence of this fundamental additional information.

As the Circuit pointed out, roughly half of the 63 paragraphs in the operative complaint in this case contained information about the conduct and inaction of Beaupre and the City—data that Ouellette did not have at the time of his injury in the late 1980s. For example:

> Chief Beaupre engaged in a pattern of altering BPD internal affairs policies and establishing BPD policies that provided him with the opportunity to control and manipulate BPD policies to allow Officer Gaudette to remain in his position during and after sexual abuse allegations were made against Officer Gaudette prior to the time that he sexually assaulted Ouellette.

The Circuit opined "In light of these considerations, we hold that the district court erred in concluding that Ouellette's § 1983 claims against appellees accrued at the time of his injury in the late 1980s because of his undisputed knowledge of Gaudette's affiliation with the BPD."

Duty to Investigate: The Circuit also had to assess the district court's alternative holding -- that Gaudette's employment relationship with the BPD, even if insufficient for accrual at the time of his injury, was still sufficient as a matter of law to trigger Ouellette's duty to investigate whether the City and/or Beaupre were at least partially responsible for causing his alleged injury. It found no such duty. Ouellette had no basis to think that there might be other victims or that the BPD had failed to conduct a responsible review of his abuse allegations. "[B]ased on the information available to Ouellette in the early 1990s regarding the BPD's investigation, a jury could reasonably find that a reasonable person in Ouellette's shoes would have no reason to suspect that the BPD was not doing its job, or worse, that it was covering up Gaudette's conduct. . . . We thus hold that the district court erred in concluding that information available to Ouellette prior to 2015 necessarily triggered a duty to inquire into claims against appellees.

Effect of Time-Barred Underlying Claim: As an alternative argument, the defendants argued that because Ouellette's state-law claims against Gaudette individually were time-barred (Ouellette was clearly aware of those specifics in 1989 when he named Gaudette as his abuser), leading Ouellette to voluntarily dismiss those claims against Gaudette in the early stages of the litigation, the constitutional predicate for his § 1983 action had evaporated. But contrary to that assertion, "we have never held that the dismissal of a § 1983 claim against an individual officer on the basis of the statute of limitations compels dismissal of timely supervisory and municipal liability claims premised on that officer's alleged constitutional violations."

Therefore, while Ouellette could no longer litigate his case against Gaudette, he could still litigate the issue of whether Gaudette violated his constitutional rights as part of the

larger case: “[S}uch a finding will merely establish the possibility that appellees may be held responsible for Gaudette's allegedly unconstitutional conduct under Ouellette's theory of deliberate indifference.”

Reversed and remanded.

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Tolling: Although Tolling Statute is “Based Upon” an Individual Officer’s Conduct, the Statute May Also Toll a Municipal *Monell* Claim

Lockett v. County of Los Angeles, no. 19-55898 (9th Cir. Oct. 2, 2020).

In an interlocutory appeal, the County of Los Angeles challenges the district court’s denial of its motion to dismiss a *Monell* claim based on language in the tolling statute referencing an individual officer’s actions.

In January 2016, two Los Angeles County (County) Sheriff’s Department deputies confronted Sheldon Lockett (Lockett) at his godmother’s house in Compton, California after a shooting nearby. According to Lockett’s complaint, he ran in fear from the deputies—who had guns drawn and shouted commands at him—and hid in a nearby home. In response, the deputies radioed in a false report that Lockett had a gun and was fleeing. After being found, Lockett attempted to surrender to the deputies, but he alleges that they severely beat him while using racial slurs. After they finally subdued Lockett, one of the deputies allegedly rammed a baton into Lockett’s eye socket, causing permanent damage. Lockett was charged with attempted murder and held in custody for eight months; in August 2016, the charge was dropped and Lockett was released.

In July 2018, more than two years and five months after his arrest, he filed a federal civil rights suit against the County, the two deputies, and others under 42 U.S.C. § 1983, alleging that the County’s failure to hire, train, and supervise its officers resulted in two deputies severely beating him. He contended that the County tolerated and ignored the proliferation of racially motivated “cliques” or “gangs” within the Sherriff’s Department which led to the excessive force. used. He further argued that his claims had been tolled while he was held on the attempted murder charge by operation of California Government Code § 945.3 (Tolling Provision), which reads:

> No person charged … [with] a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the

> offense or arresting or detaining the accused, while the charges against the accused are pending before a superior court.

At trial, the County moved to dismiss the *Monell* claim, arguing that Government Code § 945.3 was inapplicable to Lockett's action since the Tolling Provision is directed solely at claims "based upon conduct of the peace officer," while Lockett's *Monell* claim was based on "the conduct of the department," not "the officer."

The district court disagreed, concluding that Lockett was entitled to tolling for the eight-month period that the attempted murder charge was pending against him; therefore, his civil action was not barred by California's two-year statute of limitations. While the Tolling Provision tolls only claims based upon the conduct of the officer, a *Monell* claim is "derivative" of a claim against the officer and requires an "underlying civil rights claim against an officer." The district court certified the issue for interlocutory appeal and the Circuit granted the County permission to appeal.

The Circuit referenced its own precedent confirming that "Federal courts borrow from state law to determine any applicable statute of limitations for § 1983 claims, including tolling provisions." While California has a two-year statute of limitations for actions involving "assault, battery, or injury" caused by the wrongful act or neglect of another (Cal. Code Civ. Proc. § 335.1) , the Tolling Provision overrode that timeframe. Here, while Lockett filed his *Monell* claim against the County two years and five months after his arrest and outside of the two-year statute of limitations, his attempted murder charge had been pending for eight months. Consequently, his claim against the County could proceed if the Tolling Provision applied to his facts.

To answer whether the Tolling Provision governed, the panel looked to whether Lockett's *Monell* claim was "based upon conduct of the peace officer relating to the offense for which the accused is charged." In another context, the Circuit had interpreted the "**based upon**" language to mean "because of." In turn, the ordinary meaning of "because of" was "by reason of" or "on account of." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013). "Thus, in 'common talk,' we understand the phrase 'based on' to indicate a 'but-for causal relationship and thus a necessary logical condition.'" Accordingly, the Tolling Provision tolls a civil action when the "but for" cause of the claim is the "conduct of the peace officer."

While the County had correctly argued that ***Monell*** liability was limited to the "acts of the municipality," the peace officer's conduct still constituted an element of the *Monell* claim. Under this understanding of the law, it was clear that the officers' conduct was the "but for" cause of Lockett's *Monell* claim. The panel held that because there can be no *Monell* claim based on excessive force without an underlying constitutional violation by the officers, the peace officer's conduct in violation of the Constitution became the necessary logical condition to formulate the Monell claim. Lockett's claim was therefore tolled during the time his attempted murder charge had been pending.

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THIS JUST IN—The Need for Nationwide Broadband Access Has Never Been Greater, but the Industry Is Stifling Local Initiatives

As a recent Route Fifty update relates, reporter Nicolas Rivero of Quartz.com reveals in an October 6, 2020 article that the broadband industry is in no rush to see underserved localities take action. Here are excerpts:

Millions of Americans don't have access to high-speed internet. But under lobbying pressure from the broadband industry, nearly half of US state legislatures have outlawed a model that might help ease the country's digital divide.

In 22 states, it is illegal—or laws make it very cumbersome—for cities to build their own broadband networks for residents. Industry lobbyists have argued that those laws are necessary to protect companies like Comcast, Charter, and AT&T against unfair competition from local governments. But local broadband activists say they stifle municipal networks that could bring more small town and rural residents online.

* * *

BroadbandNow, a company that collects data on US broadband coverage, has cataloged many of the restrictions that make local broadband networks practically impossible to operate. Some bar cities from issuing bonds or using tax revenue to build networks; others ban cities from building networks if there is already a private provider in the area. Many impose costs on local networks that don't apply to private providers, or require cities to set artificially high broadband prices to match private providers.

But in Springfield, Missouri, city leaders have come to a detente with one carrier—offering a vision of what local governments could do if they were freed from statewide restrictions.

Last year, the city announced a public-private partnership with internet service provider CenturyLink to expand broadband access. Springfield is building its own fiber-optic network, which uses light signals to provide faster internet speeds than standard copper wire networks—a significant step up in the broadband quality available to many residents. CenturyLink will lease bandwidth on the network, and take over the day-to-day business of selling high-speed internet to residents. . . . Now, Springfield doesn't have to wait for a private company to decide it would be profitable to install a fiber optic network for every resident—the city built the network as a public service, and then induced an internet service provider to come run it.

In an emailed statement, CenturyLink expressed enthusiasm for more municipal partnerships. "We will continue to work closely with communities, government officials, and policymakers on creative public-private partnerships that bring high-speed internet services to more American homes and businesses," wrote a company spokesperson.

* * *

But that will be much harder if the country's largest internet internet service providers, including CenturyLink, continue their multi-million-dollar state house lobbying campaign against municipal broadband networks.

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