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Federalism: "Anarchist Cities" Challenge President's Defunding Policy

City of Seattle v. Trump, no. 2:20-cv-01560 (W.D. Wa. filed Oct. 22, 2020).

On September 2, 2020 President Trump issued his Presidential Memorandum titled "Reviewing Funding to State and Local Government Recipients of Federal Funds That Are Permitting Anarchy, Violence, and Destruction in American Cities" (Memo), announcing an official policy to stem the flow of federal tax dollars to any "anarchist jurisdiction," characterized as one which:

i. forbids the police force from intervening to restore order amid widespread or sustained violence or destruction;
ii. has withdrawn law enforcement protection from a geographical area or structure that law enforcement officers are lawfully entitled to access but have been officially prevented from accessing or permitted to access only in exceptional circumstances, except when law enforcement officers are briefly withheld as a tactical decision intended to resolve safely and expeditiously a specific and ongoing unlawful incident posing an imminent threat to the safety of individuals or law enforcement officers;
iii. disempowers or defunds police departments; or
iv. unreasonably refuses to accept offers of law enforcement assistance from the Federal Government; or
v. any other factors the Attorney General deems appropriate.

The Memo cited no constitutional or statutory authority for the president's policy.

On September 21, 2020, Attorney General Barr announced that Seattle, Portland and New York City were “anarchist jurisdictions” (Cities). Federal agencies began following the Memo’s directive to punish the Cities by restricting or withholding federal funds. On October 8, 2020, the Federal Transit Administration announced that it will consider applications for COVID-19 public transportation research grants “in accordance” with the Anarchist Memo; other such steps are imminent via the OMB and other entities.

The consequence of the policy is reminiscent of the president’s Sanctuary Cities defunding mandate. With billions of federal dollars at stake, the Cities face uncertainty in formulating their 2021 budgets, particularly for cost categories where the locality advances its own funds and then seeks reimbursement from Washington.

On October 22, 2020, led by Pete Holmes’ Seattle Law Department, the Cities filed in the Western District of Washington, seeking a declaratory judgment that the policy violates the Administrative Procedure Act because it lacks any rational foundation, and contradicts basic limitations on the power of the executive in the Constitution:

The Anarchist Memo and Designation blatantly violate this fundamental limitation on the Executive’s power. Without pointing to a single source of statutory authority, Defendants have created a new federal funding condition to be applied to a potentially unlimited number of federal grant programs. Cities now must avoid being designated “anarchist jurisdictions”—pursuant to a set of shifting, ambiguous, and subjective criteria to be determined by the Attorney General at the time of designation—or risk losing federal funding critical to the Cities’ daily operations.

No act of Congress authorizes agencies to consider the Anarchist Memo’s newly invented “anarchist jurisdiction” concept in disbursing federal grants, nor does any statute give the President or the Attorney General the right to determine which jurisdictions are eligible to receive federal funds, as the Anarchist Memo purports to do.

The complaint requests the court to:

A. Declare that the Designation violates the Administrative Procedure Act
B. Declare that the Anarchist Memo and Designation violate Separation of Powers;
C. Declare that the Anarchist Memo and Designation violate the Spending Clause;
D. Declare that the Anarchist Memo and Designation violate the Tenth Amendment;
E. Declare that the Anarchist Memo and Designation violate the Due Process Clause of the Fifth Amendment;
F. Enjoin DOJ, Barr, OMB, and Vought from taking any further steps to carry out the Anarchist Memo.

LINK

Remand: First Circuit Declines Expansive Reading of Remand Statute, Joining Majority View in Case Headed to Supreme Court

Rhode Island v. Shell Oil Products Co. L.L.C., no. 19-1818 (1st Cir. Oct. 29, 2020).

In a decision which highlights the circuit split IMLA and many others have asked the Supreme Court to resolve, the First Circuit upholds a lower court's decision to remand a climate change case against oil companies to Rhode Island state court, choosing to review only the federal officer grounds cited by the lower court for remand rather than revisit the entire ambit of arguments raised by the defendants for removal.

The case is framed in highly readable argot by Judge Thompson, who is quoted frequently in the summary which follows:

> Rhode Island is salty about losing its already limited square footage to rising sea levels caused by climate change. Facing property damage from extreme weather events and otherwise losing money to the effects of climate change, Rhode Island sued a slew of oil and gas companies for the damage caused by fossil fuels while those companies misled the public about their products' true risks.
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> Because those claims were state law claims, Rhode Island filed suit in state court. The oil companies, seeing many grounds for federal jurisdiction, removed the case to federal district court. Rhode Island opposed removal and asked that the district court kindly return the lawsuit to state court. The district court obliged and allowed Rhode Island's motion for remand.
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> The oil companies appealed the district court's order to us and a heated debate ensued over the scope of our review. After careful consideration, we conclude that 28 U.S.C. § 1447(d) permits our review of remand orders only to the extent that the defendant's grounds for removal are federal-officer jurisdiction, pursuant to 28 U.S.C. § 1442 or civil rights jurisdiction, pursuant to 28 U.S.C. § 1443. The oil companies make no argument that this is a civil rights case and we conclude the allegations in Rhode Island's state court complaint do not give rise to federal-officer jurisdiction. Having jurisdiction to review no more than that question, we affirm the district court's remand order.

The Rhode Island Lawsuit: In 2018, faced with rising sea levels, higher temperatures and extreme heat days, more frequent floods, storms, hurricanes, and droughts, Rhode Island sued, in state court "nearly every oil and gas company under the sun." Rhode Island alleged that the companies knew that their fossil fuel products were hazardous to the planet but concealed those risks, working actively to dilute scientific consensus, collecting extensive research into the global impact of fossil fuels but hiding the results.

“All of this left the state up the creek without a paddle once the effects of fossil fuels became more clear. . . “

Among other damage, the storm surges and rise in sea levels is causing the state to lose ground to the ocean at a rate three to four times faster than the global average “(and Rhode Island is hardly big enough to sacrifice so much of its land).” Rhode Island’s state court complaint listed state causes of action: public nuisance, various products liability claims, trespass, impairment of public trust resources, and violation of the state's Environmental Rights Act.

The oil companies removed the action to federal turf, arguing that the district court could have had jurisdiction over the case from the start per 28 U.S.C. § 1331 because the complaint presents a federal question. They further cited the federal-officer removal statute, the Outer Continental Shelf Lands Act, federal-enclave jurisdiction, the bankruptcy-removal statute, and admiralty jurisdiction.

Rhode Island disagreed, seeking remand. The district court evaluated each of the oil companies’ arguments, saw no federal jurisdiction, and remanded.

The Analysis on Appeal: The oil companies appealed, and Rhode Island argued that the First Circuit’s appellate jurisdiction was limited by 28 U.S.C. § 1447(d) to considering only whether the district court was wrong about federal-officer removal. The oil companies asserted that § 1447(d) authorized appellate review of the entire remand order, and that, were the Circuit to do so, it would find that the district court improperly remanded the case.

Section 1447(d) of Title 28 United States Code provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

Section 1442, in turn, authorizes defendants to remove from state court cases involving "[f]ederal officers or agencies" and § 1443 permits removal of civil rights cases.

While Rhode Island argued that § 1447(d) only allowed review of the district court's order insofar as it applied to the federal-officer jurisdiction argument, this was a question of first impression for the Circuit. It remarked “Though this is not a popularity contest, Rhode Island counts among its friends nearly all of the circuits that have weighed in on the topic and have limited appellate review to federal officer or civil rights removal,” citing cases in the Second, Fourth (the *City of Baltimore* case headed to the High Court), Eighth, Ninth, Tenth, and Eleventh Circuits. The oil companies countered that the word "order" in the statute meant the district court's entire remand order was subject to appellate review; they relied on the Seventh Circuit's decision in *Lu Junhong v. Boeing Co*., which adopted this interpretation. 792 F.3d 805, 811 (7th Cir. 2015).

In *Lu Junhong*, the Seventh Circuit concluded that "to say that a district court's 'order' is reviewable is to allow appellate review of the whole order, not just of particular issues or reasons." It arrived at that conclusion by relying on the Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996) where the Supreme Court examined appellate jurisdiction over a district court order during an interlocutory appeal under 28 U.S.C. § 1292(b).

That provision stated:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order[.]

The *Yamaha* Court held that the language of § 1292(b) permitted an appellate court to review the entire order, rather than being bound by the district court's framing of the "controlling question," and the Seventh Circuit reasoned that *Yamaha's* understanding of "order" should also apply to § 1447(d).

The First Circuit did not concur with what the Seventh Circuit described as an "entirely textual" analysis of § 1447(d), finding latent ambiguity in the statute's uses of the word "order." It was "unwilling, when faced with an ambiguous provision, to force an interpretation in the name of simplicity." Instead, it conducted a "more holistic" analysis: "the point of § 1447(d), by its text, is to limit appellate review. The provision begins with a complete ban on our review of the remand order and then pivots to two precise exceptions." The ban was codified because, "despite our best efforts, appeals can move at a glacial pace" which would frustrate the purpose of § 1447(d). The First Circuit was persuaded that to allow review of every alleged ground for removal rejected in the district court's order "would be to allow § 1447(d)'s exception clause to swallow the general rule prohibiting review."

Federal Officer Removal: Private actors sued in state court can remove the case to federal court where the private actor is "acting under [any federal officer], for any act under color of such office." 28 U.S.C. § 1442(a)(1); "Acting under" connotes "subjection, guidance, or control" and involves "an effort to assist, or to help carry out, the duties or tasks of the federal superior."

To succeed in their argument that federal-officer removal is proper in this case, the oil companies had to show that they were acting under a federal officer's authority, that they would assert a colorable federal defense to the suit, and that there existed "a nexus" between the allegations in the complaint and conduct undertaken at the behest

of a federal officer. If the oil companies could not demonstrate all three of these elements, they could not remove the case to federal court under § 1442.

To support their argument, the oil companies pointed to three contracts with the federal government related to the production of oil and argued that they were "acting under" a federal officer because they "help[ed] the Government to produce an item that it needs." "At first glance," said the Circuit, "these agreements may have the flavor of federal officer involvement in the oil companies' business," but that mirage only lasted until one examined the state's allegations. Rhode Island was alleging that defendants' products were damaging the environment, and engaged in a misinformation campaign about the harmful effects of those products. There was simply no nexus between anything for which Rhode Island sought damages and anything the oil companies allegedly did at the behest of a federal officer.

The sole ground upon which the First Circuit could review the remand was federal officer removal, but there were no grounds for such action. The lower court was affirmed.

LINK

Speech: Exemption in Electronic Sign Ban for Governmental Messages is not Content-Based and Does not Violate *Reed*

Signs for Jesus v. Town of Pembroke, no. 17-1192 (1st Cir. Oct. 7, 2020).

The First Circuit affirms a lower court holding that an exemption in a zoning-based ban on electronic signs for governmental messages is not content-based; the required-by-law message exemption is merely a reflection of the limits imposed on the municipality's authority.

The Sign Law: The Pembroke, New Hampshire (Town) Sign Ordinance (PSO) is intended to "[p]romote" street safety, "[r]educe distractions and obstructions," "[d]iscourage excessive visual competition," and "[p]reserve or enhance town character." Individuals and businesses desiring to install signs must apply for permits, which are issued only on a determination by the Town that "the sign complies with, or will comply with all applicable provisions of [the PSO]."

Certain types of signs, such as political and "for sale" signs, are exempt from the permit requirement. But even signs exempt from permitting are subject to a "Dimensional Table of Signs" provision which establishes which types of signs are allowed in each zone of the Town. Pursuant to a March 2012 change to the table, "Electronic Changing Signs"

were banned from all zones, except in C1 and certain lots "directly abutting Pembroke Street." The only signage not subject to the zoning-based prohibition on electronic signs are "[s]igns which are required by federal, state or municipal laws" or "non-conforming sign[s] lawfully existing at the time of adoption" of the PSO, which may "continue," unless they pose safety problems.

The Church: Hillside Baptist Church (Church) displayed a sign on its property that conveyed religious messages and could be changed manually. In April 2015, it applied to install an electronic sign that could be remotely programmed to display different religious messages each day, with messages provided by Signs for Jesus.

The application was denied, on the ground that the Church is located in a zone where electronic signs are prohibited. At the time, there were three electronic signs on the same road as the Church. The first was a gas station sign which predated the PSO. The second, on the property of a public school, posted messages advertising school events. The third sign was temporary, erected during the summer of 2015 by the state to inform motorists of possible construction delays.

The Church filed an administrative appeal which was denied after a public hearing. The Town emphasized that allowing the electronic sign would "detract from the rural character of the Route 3 corridor," and noted that the municipality's interest in maintaining the area's rural character was "compelling." The Church then filed the district court, which granted the Town summary judgment on the Church's constitutional and RLUIPA claims.

The First Amendment Analysis on Appeal: The First Circuit began with *Reed's* pronouncement that "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Those restrictions are subject to strict scrutiny and require the government to demonstrate a compelling interest and narrowly tailoring.

Content-neutral regulations, by contrast, "serve[] purposes unrelated to the content of expression," and are subject to intermediate scrutiny, requiring that the restrictions be "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)).

The zoning-based PSO allowed the First Circuit to sidestep the "if you have to read the sign to know whether the regulation applies" standard that has proliferated after *Reed*. It instead cited *Turner Broadcasting v. F.C.C.,* 512 U.S. 622 (1994): "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." The Circuit concluded that, where the evidence indicates that the challenged regulation was enacted to advance a purpose unrelated to content preference, it is subject only to intermediate scrutiny.

Irrespective of the PSO's ostensibly legitimate zoning-based distinctions, the Church claimed that the PSO's allegedly content-based exemptions created constitutional violations. But the Town successfully argued that the exemptions did not override the electronic sign prohibition: "If a sign falls under one of these allegedly content-based categories and is also an electronic changing sign, moreover, there is no indication in the ordinance that the sign is exempt from satisfying the requirements of the electronic sign provision. In accordance with this reading of the PSO, the Town represents that if a sign meets the definition of an electronic changing sign, "it is an Electronic Sign, irrespective of the content of its message."

That posture was strengthened by the Town's assertion that, even if a governmental public service sign would otherwise be entitled to an exemption from the electronic sign ban, it could not be placed where the Church wanted to place its signs: "As the Town represented to the district court, this provision thus does not "create an 'exemption' from the restriction on electronic signs." If a qualifying public service announcement were "displayed as an electronic sign," according to the Town, it "would still be banned at the Church's location."

The Church also contended that the required-by-law exception to the PSO reflected an impermissible preference for government speech. The district court had concluded that the required-by-law exception did not reflect a content preference, applied intermediate scrutiny. The Circuit agreed, citing its own precedent in *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 8-9 & n.4 (1st Cir. 1980) (holding that a sign ordinance was content neutral despite excepting "[s]igns of a duly constituted governmental body"). In *Campbell*, the Circuit had reasoned that the government signage exception reflected an "appropriate governmental interest" and was "justified by sheer public necessity," and it did not alter that stance in this case. As it summarized, "The underlying purpose of the state law exemption is to allow New Hampshire to carry out "legitimate state functions," unimpeded by the cost of complying with the variable signage restrictions across different municipalities and zones within those municipalities."

The Circuit acknowledged that *Campbell* predated *Reed*, "which held that facially content-discriminatory laws cannot be content-neutral." But it saw a distinction: "[W]hile the law at issue in *Campbell* was speaker-based, it was content-neutral on its face, and *Reed* recognized that such laws are only subject to strict scrutiny when the speaker-based discrimination "reflects a content preference." Thus, the Circuit found, "*Campbell's* holding on this point remains good law."

On this analysis, the exemption for legally-required signs was not a content-based regulation:

> Accordingly, because the exception for legally required signs only reflects the existence of external limits on the Town's power to regulate the signs displayed or required by other governments, it is neither speaker-based nor content-based. The Town has applied the electronic sign provision equally to all signs that are

within its power to regulate; the required-by-law exception merely acknowledges a legal limit to the scope of that power.

The Church further argued that restricting electronic signs to the C1 district -- and requiring churches to apply for variances in order to locate in that district -- reflected a preference for commercial speech and was therefore content-based in that respect. The Circuit disagreed, finding the zoning-based prohibition on electronic signs to be neither content-based or speaker-based; it applied equally to all property owners. Those within the C1 district, including two churches that had received variances to locate in C1, could display electronic signs; those outside C1 could not. This was a content-neutral time, place, and manner restriction on speech, and withstood intermediate scrutiny because it was "narrowly tailored to serve a significant governmental interest." That interest--"preserv[ing] the existing neighborhood characteristics and aesthetics, including the rural and natural look of [Pembroke]" sufficed for intermediate scrutiny purposes: “It is well established that, in the realm of content-neutral regulations, aesthetic concerns are significant governmental interests.”

The court accepted the Town’s argument that the PSO was material toward achieving its aesthetic goals. “Here, we can identify no basis to doubt that the Town's interest in maintaining its’ ‘quaint little New England village’ aesthetic would be achieved less effectively without the electronic sign provision.

The Circuit further found that the PSO was not underinclusive even though it allowed for many less aesthetically pleasing signs such as sandwich boards. As *Metromedia* held, the First Amendment does not require that a municipality, in advancing its aesthetic interests through a content-neutral regulation, eliminate all possible sources of visual blight. Nor was the PSO overinclusive. Although the Town could not "burden substantially more speech than is necessary to further [its] legitimate interests," it need not choose the least restrictive means possible; as *Ward* stated, a regulation will not be invalid “simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."

The RLUIPA Claims: The Church brought two claims under RLUIPA, an "equal terms" claim and a "substantial burden" claim. The equal terms argument failed; neither of the two entities with electronic signs in the Church’s district were valid comparators. Unlike the public school and the state Department of Transportation which had been allowed to erect electronic signs in the Church’s district and were beyond the Town’s regulatory authority, the Church was not such a public entity. (This absence of a valid comparator also doomed the Church’s Equal Protection challenge).

The Church’s substantial burden tack was also unsuccessful. The Circuit had previously outlined factors helpful in determining whether a particular regulation imposes a substantial burden: 1) "whether the regulation at issue appears to target a religion . . . because of hostility to that religion itself"; 2) whether the regulation was "imposed on the religious institution arbitrarily, capriciously, or unlawfully"; and 3) "whether local regulators have subjected the religious organization to a process that

may appear neutral on its face but in practice is designed to reach a predetermined outcome contrary to the group's requests." The Church could not meet this burden; although an electronic sign might be more convenient, the Church was hardly prevented from conveying its desired messages.

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