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FEATURED CASE:

HOUSING: Seattle Prohibition on Landlord Inquiries into Criminal Record Not Narrowly Tailored

***Yim v. City of Seattle*, no 21-35567 (9th Cir. Mar. 21, 2023).**

An ordinance that totally prohibits landlords from inquiring about the criminal history of potential tenants is not narrowly tailored considering significantly less burdensome provisions adopted in other jurisdictions. The right to exclude is not a fundamental right in the context of Due Process.

Background: The City of Seattle (City) enacted the Fair Chance Housing Ordinance (Ordinance) in 2017, which prohibited landlords from requiring disclosure or inquiring about any arrest record, conviction record, or criminal history of current or prospective tenants, and from taking adverse action against them based on that information. The Ordinance contained four exceptions to this provision, including the ability to inquire about a prospective tenant's sex offender status and federal regulations that require denial of tenancy. Additionally, the provision does not apply to renting a single-family dwelling unit in which the owner or subleasing tenant occupies part of the unit or to the renting of an accessory dwelling unit or detached accessory dwelling unit in which the owner maintains a permanent residence on the same lot. Other cities, including Berkeley, Oakland, and Ann Arbor, have adopted similar ordinances, but most jurisdictions allow landlords to consider at least some of a potential tenant's criminal history with additional protections.

Several landlords and a trade organization (Landlords) sued the City, initially filing in state court before the case was removed to federal court. The district court granted summary judgment in favor of the City, upholding the Ordinance. The landlords appealed, arguing that the Ordinance violated their First Amendment and Substantive Due Process rights their corollary rights under the Washington State Constitution. The district court held that the inquiry provision regulated commercial speech, which subjected it to intermediate scrutiny, and that the adverse action provision was subject to rational basis review, which it survived.

On appeal, the Landlords present two legal questions: first, whether the inquiry provision of the Ordinance violates the First Amendment, as applied to prospective tenants, and second, whether the adverse action provision impermissibly interferes with their fundamental property right to exclude prospective tenants based on their criminal history.

Appeal: The Ninth Circuit Court reversed in part and affirmed in part

First Amendment Question

To determine constitutionality, the court first determined the scope of speech the Ordinance regulates. The parties disagree about who the provision applies to, specifically whether or not it only applies to landlords inquiring about their own prospective tenants, or whether it applies more broadly to anyone inquiring about the criminal history of any person seeking to rent any apartment for any reason. The court determined that the City's interpretation of the Ordinance was correct, and that the provision only applies to landlords.

The court then continued with their First Amendment analysis (assuming without deciding) that the Ordinance regulates commercial speech and applying the intermediate scrutiny standard codified in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), which involves analyzing: 1) whether the speech at issue concerns lawful activity, 2) whether the government's interest in regulating the speech is substantial, 3) whether the regulation directly advances that interest, and 4) whether it is not more extensive than necessary to serve that interest. The court notes that the activity of reviewing criminal records is generally legal, and therefore subject to First Amendment scrutiny. The court finds that the City's stated interests in reducing barriers to housing for persons with criminal records and combating discrimination on the basis of race are substantial, and that the ordinance does not prohibit misleading speech.

Again, relying on *Central Hudson,* the court then evaluates whether the Ordinance directly and materially advances the government's substantial interests, and whether it is narrowly tailored to achieve them. The court notes that a regulation must directly advance a substantial state interest and that an exception that undermines and counteracts those goals can render the regulation ineffective. However, the court finds that the adverse action exemption for federally assisted housing is well-justified by the City's interest in preventing federal law from preempting the Ordinance.

The court found that the Ordinance is not narrowly drawn to achieve the City's stated goals related to housing access and reducing racial discrimination. The court looked at other cities that have enacted similar ordinances to achieve the same goals and found that none of them forecloses all inquiry into criminal history by landlords, as does Seattle's blanket ban. The court argued that the inquiry provision of the Ordinance imposes a significantly higher burden on landlords' speech, and the city failed to consider alternative ordinances that would have been less burdensome on landlords while still achieving its goals. Finally, the court was critical of the Council's justification for the ordinance, which was based on a tenuous explanation that landlords did not insist on background checks a decade ago.

Fourteenth Amendment Due Process Question

Citing a lack of precedence, the court quickly drew the conclusion that the right to exclude is not a fundamental right in the context of the Due Process Clause. Therefore, rational basis review is applied to the challenge since the law infringes on a non-fundamental property right. The City offers two legitimate rationales for its policy: reducing barriers to housing faced by persons with criminal

records and lessening the use of criminal history as a proxy to discriminate on the basis of race. Therefore, the court finds that the adverse action provision easily survives rational basis review.

Yim v. City of Seattle

SHORT SUMMARIES:

4th Circuit – Wrongful Conviction – Attorney's fees, etc.

In a case that makes me question our criminal justice system, Plaintiffs showed that they were wrongfully convicted in 1983 and served sentences of 31 years before being released and subsequently pardoned. The case resulted in a substantial verdict and attorney's fees. The gist was that these two young men – one nineteen, functioning at the level of an 8 year old and the other 15 years old with an IQ of around 50 – were badgered into confessing to a crime they did not commit. To make matters worse, a very similar crime was committed while they were in jail and the suspect was arrested and convicted of that second crime without being matched to the first despite evidence linking him to it until DNA testing was done some 30 years later which affirmatively proved that person had committed the first crime. Those handling wrongful conviction cases will want to read this sad story and those representing the police may want to use it as a training tool or work with the police to review older cases to determine if mistakes were made. BTW, I was reading a Grisham book called the Guardians about efforts to fee an innocent prisoner. If you like legal thrillers, it's a pretty good read.

Back to the case – the town settled as did its officers early on for $500K each. The county and its officers continued litigating as did the state agents. During trial, the county and its officers settled and agreed to pay $4.6 million to each Plaintiff. The agents continued litigation and the jury awarded $31 million to each Plaintiff and awarded $8 million in punitives to one and $5 million to the other. Attorney fees awarded were $6.5 million. The court also awarded prejudgment interest among other decisions. While the 4th Circuit reversed some decisions the bulk of the verdict stands. All I can think is the town was pretty smart to settle early.

Gilliam v. Allen

7th Circuit – First Amendment – Billboards – Variances

First, tip of the hat to Dirk Stahl in Evansville, Indiana for passing this case along and best wishes to him as he litigates similar issues. A billboard company GEFT sought to build a digital billboard that violated various size regulations of Monroe County. GEFT then sought relief from the BZA and was denied. It sued asserting a host of constitutional rights associated with speech denial in the county's regulations. The lower court issued an injunction against enforcement of portions of the county's zoning ordinance because some of the ordinance differentiated between commercial and non-commercial speech. It also enjoined the county's variance procedure that applied despite having little direct application to speech. In a great win, the county was able to reverse the lower court's decision that affected its variance procedure while losing on the commercial/non-commercial speech ruling. You'll need to read the opinion if you have an interest in this area to capture all the details and analysis. Long story short, the panel concluded that the variance procedure did not give so much discretion to the board as would make it violative of the constitution. For those handling these cases,

my recollection is that the history of the variance was that it was included in the Standard State Zoning Enabling Act to prevent unconstitutional takings or applications of the law to individual properties.

GEFT v. Monroe County

10th Circuit – Excessive Force – Wrongful Death

The legal team in Salt Lake City clearly does a great job. This case, like so many others, involves tragic events. The police responded to a 9-1-1 call about a man threatening the caller with a gun. The police responded and various body cameras and video surveillance cameras recorded the events. The lower court concluded based on that evidence that no constitutional violation occurred, thus no liability. The 10th Circuit panel agreed. The Plaintiffs' decedent, while still alive and active, fled when the police responded to the 9-1-1 call. The police chased him and ultimately, despite claims to the contrary the video footage reflected that he had a gun and that the police officer's belief that he did was correct. Several times the officers attempted to get him into custody, but he continued his somewhat ungainly flight, falling several times and dropping and picking up what was likely the gun. As the conclusion to the story approaches, the soon to be decedent ignores shouted orders to stop and show hands and ultimately, the police shoot him. There's a bit of a kerfuffle about how many times they needed to shoot him and if while he was lying on the ground whether he was surrendering or pointing the gun at the officers, but the court sorted these questions by viewing the recordings and found in favor of the officers. Both lower court and the panel found no constitutional violations: "An officer's belief need not be correct, so long as it is reasonable. Taylor, 16 F.4th at 765. And, officers are not required to "await the glint of steel" before taking protective action. Valverde, 967 F.3d at 1063 (quoting Larsen, 511 F.3d at 1260).

The question is only whether it is objectively reasonable for an officer under the totality of the circumstances to use deadly force."

Palacios v. Fortuna

3rd Circuit – 1983 Individual Capacity Claim – Takings – Just Compensation

I'm probably not sufficiently competent to offer a full and complete analysis of this decision, so read it at your leisure. The gist is this: PennDOT sought easements for a project and began condemnation proceeding under what I gather was a 'quick take' process whereby the state acquired the easements and compensation was to follow. Apparently, in Pennsylvania the process allowed the property owner to object to the State's acquisition of the property, which the owner did, and to also file in separate proceedings objections to the compensation offered. After pursuing the objections to the title transfer process, the owner sued in federal court asserting a host of complaints about the whole process and included claims against various PennDOT official individually for damages. The lower court dismissed the action based on Burford and Rooker-Feldman. The 3rd Circuit panel affirmed on all but the individual capacity claims because it concluded that those claims were for damages and were never a part of the underlying state proceedings. Take heart ye of little faith, in a footnote the panel recognized that the Plaintiff might not ultimately prevail, but noted that the issue of individual liability for government officials in a condemnation proceeding has not been settled in the Circuit. In doing so, the panel cited to conflicting results from elsewhere. Personally, I find it hard to believe that absent some personal gain associated with the action a government official could have individual liability for a condemnation action.

Merritts v. Richards

6th Circuit- Drug Free Zone – Land Use -Medical Marijuana Dispensary

A hopeful purveyor of medical marijuana sought a permit to operate in Detroit, but the city denied the permit because the location was within a "drug free zone". Imagine the horror of such a result to those investors especially when they saw some of their competitors receive licenses to operate in similar zones. Well, said the city, you need to understand that one of the competitors was not in a drug free zone when the permit was granted and the other was mistakenly thought to be outside the zone due to a rather inconspicuous strip of land. The 6th Circuit reviewed the dismissal of the suit and affirmed in an opinion that those not knowing Detroit might find illuminating for its description of the history of the city and its allure – including: "Among other recognitions, the City has been named one of world's greatest places to explore. See Sarah Bence, Detroit: Newfound Glory, Time (July 12, 2022, 7:10 AM), https://time.com/collection /worlds-greatest-places-2022/6194455/detroit/". The City added evidence that other comparators were similarly treated and any disparities had idiosyncratic facts to support the different treatment. Thus, substantive due process claims failed as did the equal protection claims. From afar, I have to say it seems as though the Detroit legal team did a remarkable job handling this case. Congratulations!

Green Genie v. Detroit

6th Circuit – Probable Cause – Wrongful Arrest – Qualified Immunity

So a guy walks into a liquor store and gets into an argument with the clerk. The guy walks next door through an alley and while doing so claims the clerk came out and pointed a gun at him and called him racial epithets. A friend, next door, hearing the story tells him to call 9-1-1. He does. The police respond, interview him, and immediately believe he's lying about the incident. They go to the store and the clerk denies that he did any such thing as alleged and the police view videotape from the store supporting the clerk's story, but do not review other videotape available or walk outside the back door (because when they opened the door, they felt that it was such a mess the clerk wouldn't have gone out that way). The officers arrest the guy for making a false report. He spends a couple weeks in jail. Charges dismissed, so begins the 1983 lottery. The lower court denied qualified immunity to the officers (but dismissed the claim against the city and a detective who reviewed the reports and forwarded the complaint to the prosecutor). 6th Circuit panel affirms in what I frankly believe proves once again that law schools fail to teach analytical thinking. Here's the court's analysis – officers don't believe the guy as soon as they arrive at the scene. Therefore, there couldn't have been probable cause because the follow up investigation only sought to prove their initial conclusion that the guy was lying. To me that might make sense if the clerk's story wasn't borne out by the video or if they ignored evidence to the contrary. Pretty scary to think that someone can claim a lack of probable cause simply because initial assumptions are supported by investigation before an arrest is made. Because this case involves Saginaw, I'm wondering if the 6th Circuit after its ludicrous tire chalking decision has something against the city.

Harris v. City of Saginaw

WA SCT – Transit Police – Fares – Search and Seizure – Arrest

Proving once again that the law makes no sense, the Supreme Court of Washington concluded that its state constitution protects the stupid. OK, maybe it didn't actually say that, but here you go. Like many transit systems in Europe, several transit systems in Washington do not require turnstiles and rely on something of an honor system for paying fares. A person pays to ride but does not swipe a

card or otherwise provide evidence of fare unless the transit police request that evidence. Those requests are random and designed to provide at least some modicum of honesty among the ridership. So, a guy gets on the transit, doesn't pay and when sheriffs' deputies who are enforcing the fare system that day accost him, he cannot prove entitlement to the transit. (BTW, apparently, the way the deputy asked the rider for evidence of payment was too harsh in the court's analysis of the facts.) The normal process is to then determine if the person has frequently abused the system for which an arrest is allowed or if only a civil violation for the first time is warranted. The rider is apparently a frequent traveler with law enforcement as he gives a false name and DOB. At that point he's held and the officer then uses a biometric fingerprint tool and upon a quick fingerprint check the rider is found to have some outstanding warrants and he's arrested. So, under Washington's Constitution was the rider "disturbed in his private affairs by the particular method of fare enforcement used here"? In something of a split decision – of course! The officers had weapons on them, and the Court has previously recognized the effect of armed police on minority populations and it shouldn't matter that this guy was not a minority. Well, what about implied consent to being asked if he'd paid the fare – the court recognized that this could be an argument, but here's where we get to the protection of the stupid: "Without evidence that Meredith was informed that fare enforcement on the bus may involve questioning by law enforcement officers, the State cannot meet its burden of proving that Meredith voluntarily consented to such an interaction merely by boarding." All I can say is that Washington is a beautiful state.

State v. Meredith

Mississippi Supreme Court – City Council – Executive Power

This case involves a dispute between the Mayor and City Council of Jackson Mississippi over the authority to contract for garbage collection. The mayor declared a state of emergency due to the impending end of the waste collection contract and entered contract negotiations with a new provider. The City Council voted not to ratify the new provider's contract presented by the mayor. The mayor filed a lawsuit against the Council seeking a determination of their respective legal authorities, and the court ruled that the Mayor has the authority to find independent contractors and present contracts to the Council for approval. The mayor vetoed the City Council's denial of the emergency contract ratification, and the City Council filed a complaint seeking a declaratory judgment that the Mayor cannot veto a negative vote of the Council and an injunction prohibiting the Mayor from attempting any action on a veto of a negative vote. The trial court granted declaratory judgment in favor of the City Council, ruling that Mississippi law does not permit the mayor to veto a matter not adopted by the City Council. Not satisfied with that answer, the mayor appealed to the Supreme Court of Mississippi on various grounds, contending that any decision from the City Council is subject to an executive veto pursuant to Mississippi law. But the court found that the plain meaning of the statute outlines the authority of a mayor to veto adopted affirmative actions by the council and non-actions by the City Council are not subject to a veto by the mayor.

Lumumba v. The City Council of Jackson

MA – Public Meetings – Requirements to be Courteous

At a town council meeting during public comment an activist had the temerity to question some of the actions of the town council including their meetings seemingly in violation of the open meetings law. Taking offense the chair challenged the activist and eventually told her that she must leave or escorted out. OUCH! In a decision that reminds us of our revolutionary history and its well germinated seeds which grew in Massachusetts the court noted that public meetings are where free

ranging debate formed the foundations of our liberty. I'm linking an article by Eugene Volokh who reported on the case.

Town Public Comment Policy Requiring Remarks to Be "Respectful and Courteous" Violates Massachusetts Constitution (reason.com)