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Abstention: Even Split by State Supreme Court Indicates Uncertainty About State Preemption; Federal Abstention is Appropriate

Caldara v. City of Boulder, no. 18-1421 (Apr. 10, 2020).

The Colorado Supreme Court's even split in assessing whether a local gun ordinance was preempted by state law revealed fundamental uncertainty about the preemption issue, requiring abstention by the federal courts—and deferral of US Constitutional claims--pending resolution of that state law question.

In May 2018, the Boulder, Colorado (Boulder) City Council (Council) unanimously passed Ordinance 8245 (Ordinance), amending the Boulder Revised Code to prohibit the sale or possession of "assault weapons" and large-capacity ammunition magazines in Boulder, and raising the legal age for firearm possession from 18 to 21. As a home-rule municipality, Boulder has the authority under the Colorado Constitution to pass ordinances in "local and municipal matters" that supersede "any law of the state in conflict therewith."

Plaintiffs sued in federal court, contending the Ordinance is preempted by Colorado statutes providing that "[a] local government may not enact an ordinance, regulation, or other law that prohibits the sale, purchase, or possession of a firearm that a person may lawfully sell, purchase, or possess under state or federal law." They also challenge the Ordinance under the First, Second, Fifth, and Fourteen Amendments and under provisions of the Colorado Constitution.

Other entities challenged the Ordinance in state court. Because of uncertainty about the state law preemption issue, the federal district court abstained (*Caldara v. City of*

Boulder, 341 F. Supp. 3d 1241 (D. Colo. 2018)), citing Supreme Court precedent in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

Plaintiffs appealed, requiring the Tenth Circuit to review whether the lower court properly applied *Pullman*. Abstention is justified where:

> (1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law by the district court would hinder important state law policies. (citation omitted).

The operative question was whether the Ordinance regulated a matter of purely local concern. Where "a home rule ordinance . . . and a state statute conflict with respect to a local matter, the home rule provision supersedes the conflicting state provision." On the other hand, municipal ordinances dealing with matters of statewide concern and conflicting with state law are preempted, unless otherwise authorized by the constitution or state statute. Finally, in "matters of mixed local and state concern, a charter or ordinance provision of a home rule municipality may coexist with a state statute as long as there is no conflict, but in the event of a conflict the state statute supersedes the conflicting [ordinance] provision." (citation omitted).

The state district court had concluded that the Ordinance related to matters of purely local concern. The Colorado Supreme Court, sitting en banc, split evenly on the preemption issue, which, under Colorado appellate rules, results in affirmance of the lower court decision.

Plaintiffs argued that the determination upholding the Ordinance meant that, at the state level, there was no uncertainty about its validity and it was therefore ripe for consideration by the federal courts, meaning abstention was improper. The Tenth Circuit disagreed: “In these circumstances, we agree with the district court that ‘it is hard to conceive of a more potent way of demonstrating’ uncertainty under *Pullman* than ‘the state's highest court split[ting] evenly on a question of law.’”

Having found the first *Pullman* factor—uncertainty—satisfied, the Circuit reviewed the second: would the state court determination “render unnecessary or substantially modify the federal constitutional question." (citation omitted). Here, the answer was “clearly yes.” If the state court found that the Ordinance was preempted under Colorado statutes, there would be no need to resolve federal constitutional questions.

The third *Pullman* factor was also satisfied. The case “implicates state rights and a decision by this court would risk intrusion into important state functions.” The real debate was in-state: on one hand, the Colorado legislature had expressed a strong interest in uniform firearm regulation, seeking to avoid “[i]nconsistency among local governments of laws regulating the possession and ownership of firearms results in persons being treated differently under the law solely on the basis of where they reside."

On the other hand, the Colorado Constitution grants regulatory power to municipalities under the home rule provision.

Having determined that all *Pullman* factors were present, the Circuit reviewed whether the federal district court had abused its discretion. Plaintiffs argued that, irrespective of the *Pullman* factors, abstention was improper in this instance because it chilled the exercise of their fundamental constitutional right to keep and bear arms. The Circuit disagreed:

> [T]he Supreme Court has not recognized a categorical rule against abstention in cases involving constitutional rights. See *Moore v. Sims*, 442 U.S. 415, 434-35, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979) (ordering abstention in a child-welfare case involving due process rights); see also *Reetz v. Bozanich,* 397 U.S. 82, 90 S. Ct. 788, 25 L. Ed. 2d 68 (1970) (requiring abstention despite Fourteenth Amendment challenge). Moreover, consideration of the nature of the right and the chilling effect of abstention is a secondary assessment to determining whether the *Pullman* requirements are met.

Plaintiffs also argued that abstention would cause delay, depriving them of their Second Amendment rights for an extended period. But the Supreme Court has "regularly ordered abstention" when a case is "pending in state court that will likely resolve the state-law questions underlying the federal claim."

The Circuit affirmed. The district court had properly abstained, evidencing "appropriate regard for the rightful independence of state governments. . . in absence of an authoritative and controlling determination by the state tribunals."

LINK

Mandamus: Extraordinary Relief Where no Alternate Means of Redress, Lower Court Plainly Incorrect as Matter of Law and Disregards Federal Rules

In re: National Prescription Opiate Litigation, no. 20-3075 (6th Cir. Apr. 15, 2020).

In decidedly unvarnished terms, the Sixth Circuit has rebuked the national opiate MDL court in Ohio's Northern District for allowing plaintiffs to amend their complaints long after the CMO deadline had passed, and has stricken the belatedly-added claims.

Under the Case Management Order for the "Track One" bellwether case in the national Opiate MDL, two Ohio county plaintiffs (Counties) had a deadline of April 25, 2018 to

amend their complaints. They did so, amending their existing claims against the manufacturers and pharmaceutical distributors to include numerous pharmacy chains (Pharmacies)—but only in their capacity as "distributors" of pharmaceuticals to their own retail pharmacies. The Counties expressly declined to bring claims against the Pharmacies as "dispensers" of prescription opioids.

The Counties settled their Track 1A cases against the manufacturers and distributors in October 2019, but severed the Pharmacies. The MDL court then established Track 1B, whereby the Counties' cases against the Pharmacies would continue, now scheduled for trial late in 2020. In November 2019, the MDL district court allowed the Counties to amend their complaints against the Pharmacies in the Track 1B cases, adding "dispensing claims"—which would assess liability for filling suspicious opioid prescriptions (unusually large amounts, repeated refills, combinations of opioids/benzodiazepines/muscle relaxers, and so on).

The district court refused to rule on the Pharmacies' subsequent motions to dismiss, and ordered the Pharmacies to produce data on every prescription they had filled anywhere in the United States, for a period of more than 20 years—a period that was later shortened to 13 years.

This Pharmacies moved for stay of discovery and for mandamus. The district court denied the stay. The Sixth Circuit granted it, and then granted the writ of mandamus, striking the dispensing claims from the Counties' complaint.

Circuits grant a writ of mandamus only in "exceptional circumstances" involving a "judicial usurpation of power" or a "clear abuse of discretion." They consider, among other things, whether "the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired"; whether "the petitioner will be damaged or prejudiced in a way not correctable on appeal"; whether the district court's order is plainly incorrect as a matter of law; whether the district court's order "manifests a persistent disregard of the federal rules"; and whether "the district court's order raises new and important problems.

Here, the Pharmacies challenged (1) the district court's allowance of amended complaints 19 months after the deadline for doing so, and more than 10 months after the close of discovery; (2) the court's refusal to adjudicate the Pharmacies' Rule 12(b)(6) motions to dismiss; and (3) the court's order requiring the Pharmacies—in a case brought by two Ohio counties—to produce nationwide opioid prescription data for 13 years.

The Sixth Circuit granted mandamus. The lower court could allow amended complaints long after its deadline only if there was a showing by Plaintiffs of "good cause" under FRCP 16(b); here, there was no such justification for the Counties' late amendments:

> Quite the contrary: as the district court recognized then, and as the Counties concede now, the Counties did not bring their dispensing claims earlier because

> they expressly chose not to bring them. Indeed, the Counties' knowing and voluntary relinquishment of those claims arguably amounts to an outright waiver of them. Not a circuit court in the country, so far as we can tell, would allow a district court to amend its scheduling order under these circumstances.

Judicial economy—a laudable goal in MDL management—could not justify the lower court's actions: "[T]he district court's stated basis for finding "good cause"—namely, that "the trial would be most efficient if it included not only existing 'distribution claims' but also claims against those same pharmacies as dispensers"—is simply no substitute for the showing of diligence required by the Rule."

This overreach required that the added claims could not proceed:

> [T]the district court's decision to grant leave to amend was plainly incorrect as a matter of law; the Pharmacies have "no other adequate means" to obtain relief from that decision; the Pharmacies will be prejudiced by that decision "in a way not correctable on appeal"; and the decision "manifests a persistent disregard of the federal rules," which—in the MDL context especially—presents "important problems" that often evade appellate review. We will therefore grant the writ and order that the Counties' November 2019 amendments to their complaints be stricken.

That decision also relieved the Pharmacies of their discovery burden as to prescriptions filled.

(Note that the "New York MDL" currently proceeding in Suffolk County where two New York counties and the State of New York are suing opioid manufacturers, distributors and pharmacies held last week that pharmacy parent corporations cannot be liable under public nuisance for dispensing activities of their individual subsidiary pharmacies).

LINK

Qualified Immunity: No Requirement that Plaintiffs Show Subjective Intent that Harm Occur

Dyer v. Houston, no. 19-10280 (5th Cir. Apr. 9. 2020).

Rejecting the district court's application of a third element in evaluating qualified immunity—whether the defendant intended that harm occur—the Fifth Circuit applies the traditional two-prong test (constitutional wrong and clearly established law) to find police officers liable for deliberate indifference where a detainee smashed his head more than 40 times in a police cruiser.

Responding to an emergency call in August 2013, Mesquite, Texas (Mesquite) police officers (Officers) and paramedics (Paramedics) found Graham Dyer (Graham) exhibiting erratic behavior. After learning that Graham had consumed LSD, the Paramedics examined him, finding a serious head injury. Graham was incoherent and "in a drug induced psychosis." The Paramedics walked Graham to the Officers' vehicle for transport to jail.

Graham began to thrash violently, whereupon the Officers placed him in leg restraints, but did not secure his seatbelt. During transport, he slammed his head multiple times against metal portions of the car's interior. At one point, after approximately 19 such slams, the vehicle stopped so Officers could restrain Graham, tasing him in an effort to regain control. They were unsuccessful and continued driving. He slammed his head another 27 times, as captured in the car's video cam.

The Officers delivered Graham to jail, where he was placed in a restraint chair in a padded room. The Officers "each said they had no recollection of reporting to the jail sergeant the fact that Graham had slammed his head repeatedly against the interior of the patrol car en route to jail." The investigation report states only that the Officers related that Graham "had been medically cleared at the scene."

Two hours later, the sergeant noticed Graham's breathing was labored and summoned paramedics, who arrived at 1:40 a.m. Graham died at a local hospital that evening. The reported cause of death was craniocerebral trauma.

Graham's parents (Dyers) brought a section 1983 action, claiming the Paramedics and Officers violated Graham's Fourteenth Amendment rights by exhibiting deliberate indifference to his serious medical needs. They asserted that the Paramedics, being aware of the likelihood that a person with LSD-induced psychosis would injure himself, should have recommended a sedative which would have calmed Graham, and should have required that he be transported to the emergency room, and that the Officers should have notified the jail of Graham's significant head injuries. The district court dismissed all counts based on qualified immunity.

The Fourteenth Amendment guarantees pretrial detainees a right "not to have their serious medical needs met with deliberate indifference on the part of the confining officials." (citation omitted). The deliberate indifference bar is high: plaintiffs must show that (1) the official was aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and (2) the official actually drew that inference. The district court had also applied a third element—since discarded because it conflicts with Supreme Court precedent--that the official "subjectively intended that harm occur." The Fifth Circuit agreed that the Dyers' complaint failed to allege facts showing the Paramedics' deliberate indifference. At most, they alleged negligence, and "deliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm." As the Circuit has long held, the decision whether to provide additional treatment "is a classic example of a matter for medical judgment," which fails to support a deliberate-indifference claim.

The Dyers had also claimed the Officers acted with deliberate indifference, and the lower court had dismissed that claim based on qualified immunity. While it found disputed issues of fact as to whether one of the Officers acted with deliberate indifference, that finding was subordinated to the court's more significant determination that "there is no clearly established right in the Fifth Circuit to be free from medical inattention by officers who do not actually intend to cause harm."

The Circuit held otherwise. The district court's prong two analysis had been legally erroneous, pointing to "confusion" in the Fifth Circuit over whether deliberate indifference requires proof of an officer's "actual intent to cause harm in medical-inattention claims." While acknowledging that "our deliberate-indifference cases are not a paradigm of consistency" due to occasional reliance on the now-discredited subjective intent requirement, the lower court was still obligated to evaluate the qualified immunity question based on the traditional Supreme Court standard—clearly established law.

The Circuit found such a clear precedent. In *Thompson v. Upshur County, Texas*, a detainee who was hallucinating and was striking his head against the wall had been placed in a straitjacket but no helmet. When her shift ended, the jailer did not inform her replacement of the particulars and told the replacement not to summon medical help without first calling her. There, the Circuit found that any reasonable jailer "would have recognized the constitutional obligation to summon medical assistance well before Thompson died." *Thompson* defined clearly established law in sufficient detail to have notified the Officers that their actions regarding Graham were unconstitutional. Reversed as to the Officers' qualified immunity.

LINK

Search: Community Caretaker Exception Allows Search for Firearm by Officers Responding to Domestic Violence Call

United States v. Sanders, no. 19-1497 (8th Cir. Apr. 14, 2020).

Officers were justified in searching for a firearm on community caretaker grounds after being called to a domestic disturbance, being met at the door by a woman with injuries, hearing crying inside the home and being told that a child inside overheard a demand to put the weapon down.

In February 2018, Dubuque Iowa (Dubuque) officers responded to a 911 call regarding potential domestic abuse; a child in the house had called her grandmother to report that her parents were fighting violently. Seeing a child in the upstairs window gesturing excitedly as they approached, the officers knocked, whereupon a woman emerged, upset and unstable and bearing visible red marks on her face and neck. She asserted

that everything was under control, but officers required that they speak with the male in the house, Kenneth Sanders (Sanders). She offered to go inside and summon Sanders, but when she opened the door and the officers heard crying, they entered.

Sanders became noncompliant, uncooperative, and argumentative. The child who had made the call informed the officers that Sanders "had a gun out." On further questioning, it was determined that the child had not personally seen a gun but had heard her mother downstairs yelling "Put the gun down!" -3

When questioned, the woman told officers that a gun might be located in the sofa. Officers eventually located a Smith & Wesson .380 caliber pistol in the couch cushions beneath where Sanders was sitting. He was arrested on state domestic assault charges and a no-contact order was issued. That order was violated pending trial, and Sanders was again arrested, for violating the no-contact order.

Sanders entered a conditional guilty plea to being a prohibited person in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 922(g)(9), and 924(a)(2). Based on Sanders' violent criminal history and risk to the public, he was sentenced to the statutory maximum term of 120 months.

Sanders' motion to suppress was denied. On appeal, he argued that law enforcement officers' initial warrantless entry into the house was not supported by the community caretaker exception and, once inside, their search for a firearm was not supported by exigent circumstances. He also challenged the court's application of an obstruction of justice enhancement and denial of acceptance of responsibility at sentencing.

The Eighth Circuit affirmed. Although at the very core of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable government intrusion," an exception applies to law enforcement officers engaging in a community caretaking function. That exception allows a police officer to "enter a residence without a warrant as a community caretaker where the officer has a reasonable belief that an emergency exists requiring his or her attention." Such a search is reasonable "if the government interest in law enforcement's exercise of that function, based on specific and articulable facts, outweighs the individual's interest in freedom from government intrusion."

Here, the specific, articulable facts known to the officers at the time they entered the residence included the information received from dispatch, their own observations, and information obtained from the woman answering the door, including her imploring them not to reveal to Sanders that her 11-year old daughter had made the initial call. These added up to sufficient justification to enter. "We conclude that the officers reasonably believed an emergency situation existed that required their immediate attention in the form of entering [the] home to ensure that no one inside was injured or in danger."

Once inside, the officers had further grounds for locating a firearm after they were told of the mother's demand that Sanders put his weapon down. "A warrant is not needed to

search areas that may conceal a threat if officers have an objectively reasonable basis to believe an immediate act is required to preserve the safety of others or themselves." The search was not widespread; the gun was located in the place where the woman had predicted it would be found.

The obstruction of justice count was not lessened. During a recorded call from jail, Sanders had argued with the complainant that the domestic violence statements "need to go away." This threat was actionable, and justified the increased sentencing:

> [W]e conclude the district court did not clearly err in its factual finding that Sanders' statement was, at a minimum, an attempt to influence a witness. . . The firearm in question was alleged to have been used during a domestic assault, which was the event that brought law enforcement officers to the residence. We affirm the district court's decision to increase Sanders' offense level . . .

An obstruction of justice enhancement typically indicates that the defendant has not accepted responsibility for criminal wrongdoing. An obstructive defendant must "do more than merely cease obstructive conduct and plead guilty to the underlying offense to earn a downward adjustment for acceptance of responsibility." Here, the district court did not err in refusing to reduce Sanders' sentencing to account for acceptance of responsibility.

LINK

Speech: Where Government Controls Content, Speech is not Private and is Immune from First Amendment Compelled Speech Challenge

O'Brien v. Village of Lincolnshire, no. 19-1349 (7th Cir. Apr. 7, 2020).

Affirming the court below, the Seventh Circuit holds that, regardless of an Illinois statute describing the Illinois Municipal League as "nonpolitical" and the League's promotion of a governor's right to work platform, voluntary member municipalities ultimately control the content of their speech "by or through" the League; whether the League is "private" or "governmental" is a subordinate question.

Illinois law allows state municipalities to join and pay dues to the Illinois Municipal League (League), a nonprofit association with more than 1,000 members. Lincolnshire, a village of 8,000 north of Chicago (Lincolnshire) is one such member, and used funds from its utility, sales and property taxes to pay more than $5,000 in League dues between 2013 and 2018.

In March 2015, the League emailed its members to promote the so-called "Turnaround Agenda" of then-Governor Bruce Rauner. One such communication stated:

> The Governor's office has asked that we follow-up with mayors and managers on the Turnaround Agenda information and provide a resolution … that is supportive of his administration's effort to address collective bargaining, unfunded mandates, prevailing wage requirements, workers' compensation costs and legal empowerment zones . .

Lincolnshire taxpayers and union members Dixon O'Brien and John Cook (plaintiffs) brought suit, asserting that, contrary to its statutory description as nonpolitical, the League engages in political activity including lobbying and contributing to candidates. They specifically cited the League's urging members to adopt local ordinances creating "right to work" zones as part of the Turnaround Agenda; Lincolnshire was the only municipality to adopt "right to work."

Plaintiffs asserted that the League was violating the First Amendment by compelling them to support private speech with which they disagreed and compelling them and fellow union members residing in Lincolnshire to associate with the League. A third count asserted an Equal Protection violation because the plaintiffs were required to support political activities with which they disagreed while others did not have to. They sought injunctive and declaratory relief and a refund of their taxes which went to the League.

The district court found that the plaintiffs had standing as municipal taxpayers but concluded that the plaintiffs' First Amendment claims failed as a matter of law because the challenged communications constituted government speech; the Equal Protection claim failed as a matter of law because it depended on the validity of the First Amendment claims.

The plaintiffs relied heavily on *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). There, the Supreme Court struck an Illinois law that forced public employees to subsidize a union, even if they chose not to join and strongly objected to the union's collective bargaining posture. The Court found the arrangement compelled plaintiffs to subsidize private speech on matters of substantial public concern and violated their rights of free association. But *Janus* was inapposite. It clearly involved a *private speaker*, namely, the union.

Plaintiffs also cited *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), which actually weakened their case. In *Johanns,* the Secretary of Agriculture implemented the "Beef Promotion and Research Act" by appointing a Beef Board which charged all cattle ranchers a fee of $1 per head. More than $1 billion was raised to support the "Beef. It's what's for Dinner" campaign. Some ranchers objected to such compelled speech, arguing that because the content of the speech was controlled by a nongovernmental Board, the advertisements were not governmental speech. The Court disagreed--the message of the promotional campaigns was reviewed by the Secretary of Agriculture and effectively controlled by the government itself. That determination defeated plaintiffs' challenge:

> Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object.

The Court has subsequently reiterated that the First Amendment does not regulate government speech in such foundational decisions in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135S. Ct. 2239 (2015).

Against this background, the Seventh Circuit analyzed the League's composition and management. It is composed entirely of local governments who join voluntarily and is run by a Board of Directors consisting only of the highest elected officials of member governments. Under Illinois law, local governments may join the League and pay dues, and "member cities, villages and incorporated towns *acting by, through and in the name of such instrumentality* may provide and disseminate information and research services, and may do all other acts for the purpose of improving local government."

This structure was pivotal. Whether or not the League is a "private" or "governmental" entity was not dispositive; as in *Johanns,* the issue was the degree of control the government exercised over the speech in question:

> Lincolnshire itself, which the plaintiffs agree (as they must) has the right to speak for itself and also a right to associate, voluntarily joined the League as it is authorized to do by statute. As a member, Lincolnshire could adopt the speech of the League if it wished or could denounce the speech or leave the League at any time if it disagreed with the message issued. But as the plaintiffs pled, Lincolnshire was unique in Illinois in its whole-hearted adoption of the League's promotion of the Governor's Turnaround Agenda. It was the only unit of local government to adopt an ordinance legalizing local "right to work zones," as promoted in the Turnaround Agenda. Although the plaintiffs vehemently disagree with the Turnaround Agenda, they cannot plausibly claim that Lincolnshire—by itself or through an association of local governments—lacked the right to speak and to take a position on that Agenda.

While the Illinois statute describes the League as "nonpolitical," the Circuit acknowledged that the entire purpose of the League is to act as an instrumentality of its governmental members in order to improve local government "all of which can be described as political acts in the sense that they are related to government and governing":

> It is difficult to see how the League could accomplish its purpose as described by statute unless it could lobby its own members and the state legislature on issues related to improving local government. To adopt the plaintiffs' definition of the

word “nonpolitical” would render the remainder of the Illinois statute nonsensical and inert.

Here, the plaintiffs “pled themselves out of court” because they failed to allege private *control* of the speech; “they instead pled facts that conclusively demonstrated that the conduct and messages at issue were governmental speech and association not subject to First Amendment scrutiny.” Affirmed.

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