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Adult Entertainment: Zoning Ordinance Which Addresses Secondary Effects and Provides Other Locations Does Not Violate First Amendment

HH-Indianapolis, LLC v. Consolidated City of Indianapolis and County of Marion, No. 17-3023 (7th Cir. May 7, 2018).

A zoning ordinance which prohibits adult businesses in three city districts but allows such enterprises in three other areas and is directed at secondary effects of such businesses, survives First Amendment challenge.

HH-Indianapolis, LLC (HH) sought to open "Hustler Hollywood" in Indianapolis and entered a ten-year lease to do so. Unfortunately, the property was located in a district that prohibited adult entertainment businesses. Although HH submitted statistics claiming to show that only a small portion of the store's inventory and floor space would be dedicated to overtly sexual products and literature, authorities determined that the planned facility would constitute an adult business under the applicable zoning ordinance. After not being able to open its business, HH filed suit against the Consolidated City of Indianapolis and County of Marion (City), alleging the zoning ordinance at issue violated the First Amendment, facially and as-applied. The district court denied HH's request for preliminary injunction, leading it to appeal.

Given that speech was involved, HH's hurdle to sustain a "likelihood of success on the merits" was very low-it merely had to demonstrate a probability "greater than negligible." However, it could not do so. The City's prohibition was not content-based, but based on the secondary effects of such a business-particularly because there was a restaurant catering to children in the vicinity. HH unsuccessfully argued that the City's zoning ordinance effectively "silenced" it and that the City had classified it as an adult entertainment business (in prior administrative hearings) in order to "suppress" unwanted speech. The Seventh Circuit noted that HH had not contested that the ordinance was content-neutral - meaning it was only required to involve reasonable time, place, and manner restrictions under intermediate scrutiny. From there, the court easily concluded that HH was not "silenced" or "suppressed," but that rather had been told it could not operate in the specific zone at issue but could do so in a variety of other districts within the City. The Circuit concluded that HH's likelihood of success on its First Amendment claim was negligible because 1) the ordinance is content-neutral, 2) serves a substantial interest, and 3) allows HH to operate in numerous districts (albeit not the one in which it leased property).

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Elections: Challenge to New Jersey Requirement that those Circulating National Campaign Petitions Must be Registered New Jersey Voters

Wilmoth v. Secretary of the State of New Jersey, No. 17-1925 (3d Cir. Apr. 19, 2018).

The Third Circuit has remanded for further evidentiary exposition a case brought by two out-of-state "petition circulators" barred from gathering presidential signatures in New Jersey due to an in-state residency requirement, requiring the state to demonstrate the compelling interest underlying the law.

N.J. Stat. Ann. §§ 19:23-11 requires those circulating petitions in the state on behalf of candidates seeking to be listed on ballots for national office be " registered voter[s] in [New Jersey] whose party affiliation is of the same political party named in the petition." In practical effect, this means that only New Jersey residents can conduct such petitioning activity in the state. Shawn Wilmoth (Wilmoth), and Trenton Pool (Pool), professional petition circulators from Michigan and Texas, respectively, filed suit arguing the law imposes an impermissible burden on their First Amendment rights to engage in core political speech - specifically that the law inhibited their ability to "(a) disseminate their political views unimpeded; (b) choose the most effective mode of conveying their message; (c) associate with the voters of New Jersey in a meaningful way to elicit political change; and (d) . . . secure ballot access for the candidates of their choice in the most effective, efficient and cost-effective manner possible." The district court held for the state, finding no constitutional violation: New Jersey's "goal [of] ensur[ing] the integrity of [its] election [system] . . . clearly outweigh[ed] the adverse effect[s] on Wilmoth and Pool."

Third Circuit disagreed and vacated the lower court ruling. The Circuit began by setting out the legal landscape of election regulation, namely that while states have (and need) broad discretion to regulate their own election processes, that broad authority ends at the federal Constitution and most often with the First Amendment protections it affords. The Supreme Court holds that whether a state's election must yield to the First Amendment is determined by the *Anderson-Burdick* balancing test, which requires weighing several factors, including "(1) the character and magnitude of the alleged constitutional injury; (2) the precise interests put forward by the State as justifications for the burden imposed by its rule; and (3) the extent to which those interests make it necessary to burden the plaintiff's rights." If a court finds the law imposes a severe restriction on First Amendment rights, the law is only upheld if it is narrowly tailored to further a state's

compelling interest. On the other hand, if the law imposes a reasonable, nondiscriminatory restriction on First Amendment rights, the law is upheld without the state advancing such tailoring or interest(s).

The Circuit easily determined that that residency restrictions imposed on circulators have, since the turn of the 19th century, needed to meet strict scrutiny to be upheld. The fact that the "language of N.J. Stat. Ann. § 19:23-11 makes clear that one's residency is the sine qua non for determining whether he or she may lawfully circulate nomination petitions in New Jersey" raised constitutional red flags. The court questioned New Jersey's asserted two compelling interests - that the law "protect[s] political parties from the raiding of their closed primaries and . . . preserv[es] the associational rights of New Jersey political parties - and acknowledged its task of determining whether these interests were "real . . . and that the regulation in fact alleviate[s] these harms in a direct and material way."

The Circuit found it could not complete this task because of the procedural posture of the case; the district court had granted New Jersey's motion to dismiss prior to discovery. The court thus held that the complaint set forth a plausible claim and the lower court erred in dismissing at such an early stage, and vacated the order, remanding so the lower court could "develop an appropriate factual record for the purposes of determining whether the New Jersey law does in fact violate the Appellants' constitutional rights."

LINK

Jurisdiction: Complaint that Municipality Owes Severance to Village Manager is Matter of State Law and Does not Create Federal Court Jurisdiction

Linear v. Village of University Park, No. 17-1940 (7th Cir. Apr. 17, 2018).

Although it did not agree with the District Court's rationale-that the plaintiff had no property interest in severance where his contact had already expired-the Seventh Circuit also dismissed, finding that a dispute about severance payments was a matter of state law and did not require federal Due Process consideration.

Lafayette Linear (Linear) was hired as the Village Manager of University Park, Illinois (Village) for a four-year term, coextensive with the mayoral term, which ended in May 2015. Linear's contract was terminated in May 2015. Linear argued he was due six months of severance pay under his contract because he was discharged for a reason other than criminality. The Village Board of Trustees argued any contract extension was illegal under Illinois law, meaning that the only valid term he possibly could have had expired May 2015, and no such severance pay was owed. Linear filed a federal lawsuit alleging the Board violated the Due Process Clause by failing to provide a hearing before his termination. The district court determined that Illinois law prohibits a Village Manager's term from going beyond a mayor's term and that, therefore, Linear was not deprived of a property interest, and therefore had no right to a hearing.

The Seventh Circuit questioned why the case was in federal court at all. The court recognized that sometimes a federal practice or statute itself creates a federally-protected property interest that the Supreme Court in *Roth* and its progeny hold requires a pre-termination hearing, but that here the lower court held Linear had no such property interest. Here, state law precluded any such claim of entitlement to remain the Village Manager. The dispute thus boiled down to whether Linear should have gotten severance pay under the terms of his contract, which was solely a matter of Illinois state law. Linear pressed that he had a right to hearing before his termination based on his contract and a Village ordinance, but the court identified the fault with that argument

to be that procedural rights so created are unrelated to the federal Due Process Clause and, thus, do not provide federal court jurisdiction.

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Sovereign Immunity: Municipal Agencies are not Immune from Punitive Damages for Violations of the Driver's Privacy Protection Act

Truesdell v. Thomas, No. 16-16388 (11th Cir. May 2, 2018).

A Florida Sheriff's Office is liable for punitive damages and for liquidated damages of $2,500 for each of two instances where its officer improperly accessed individual driver and vehicle information in violation of the Drivers Privacy Protection Act.

Between January 2010 and July 2013 Clayton Thomas (Thomas), a sergeant at the Marion County Florida Sheriff's Office (Sheriff's Office), accessed thousands of people's information through the Florida driver and vehicle identification database, including, on two occasions, data about Kellean Truesdell (Truesdell). Once the Sheriff's Office was notified by the state, an internal investigation revealed Thomas was responsible, prompting Truesdell to sue Thomas and the Sheriff's Office for punitive damages under the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (DPPA). The Sheriff's Office succeeded in rebuffing Truesdell's effort to certify a class action and aggregate claims of more than 40,000 people, but was found liable for $5,000 in liquidated damages and $5,000 in punitive damages. It appealed, arguing that the DPPA did not allow punitive damages against municipal entities, and that the liquidated damages had been wrongly calculated.

On appeal, the Eleventh Circuit reviewed the language of the DPPA: for purposes of liability, it defines a "person" as "an individual, organization or entity, but does not include a State or agency thereof." However, that definition does not explicitly exclude municipal agencies; had Congress intended to exclude such entities, it would have done so. The DPPA's remedies provision provides that "[a] *person* who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual . . . [for, among other things] (1) actual damages, but not less than liquidated damages in the amount of $2,500; [and] (2) punitive damages upon proof of willful or reckless disregard of the law . . ." The Circuit found the Sheriff's Office argument that punitive damages did not apply to municipal agencies to be an inexplicable severing of the DPPA provisions, and its posture that liquidated damages could not be cumulative was also unsupportable, particularly because Thomas' two instances of accessing of Truesdell's data occurred eight months apart.

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Pleadings: Adding Actual Name of Defendant Officer in Lieu of "Jane Doe" After Statute of Limitations has Expired is Ineffective

Buck v. City of Highland Park, No. 17-2151 (6th Cir. May 2, 2018).

A bystander accidentally shot by an officer during a robbery who brought suit against "Jane Doe" could not, seven years later, amend his complaint to add the officer's actual

name and avoid the statute of limitations on "necessary party" grounds.

On October 10, 2009 Sergeant Curtis White (White) and Officer Heather Holcomb (Holcomb) responded to a silent burglar alarm at the Gold Nugget Pawnshop in Highland Park, Michigan. Carleton Buck, a patron of the shop, was entering the premises just as an armed robber was fleeing - with police in tow - and, after the robber fired and shot Sgt. White, Officer Holcomb returned fire and hit Buck twice. He survived and sued Holcomb, bringing a negligence action under Michigan law and a Section 1983 claim alleging violation of a constitutional right. The district court dismissed the case, leading Buck to appeal.

At the Sixth Circuit, the problem for Buck was the Michigan statute of limitations for a tort/negligence claim, which is three years. In his initial complaint, he had only alleged that a "Jane Doe" officer shot him; seven years later, he amended his complaint to name Officer Holcomb. Buck asserted that his amended claim could proceed because Officer Holcomb was a "necessary party" and could not assert a statute of limitations defense-- but that argument was a misinterpretation of a recent Michigan Supreme Court decision involving the inclusion of an additional defendant in a paternity case: while the court had held that a necessary party could be added after the applicable statute of limitations, it also held that the added party could thereafter assert a statute of limitations defense.

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Voting: Indiana Law Barring Convicted Sex Offender from Voting at High School is Rationally Related to Legitimate Governmental Interest

Valenti v. Lawson, No. 17-3207 (7th Cir. May 7, 2018).

A law which prohibits convicted sex offenders from voting at schools but provides multiple alternate sites survives rational basis scrutiny.

Brian Valenti (Valenti) is a convicted felon and registered sex offender in Indiana, where he moved after his 1993 California conviction. Indiana allows felons to vote once released, but because Valenti was convicted of a sexual act with a child, he is not permitted to knowingly or intentionally enter school property in Indiana. This means Valenti cannot vote at his neighborhood polling station - a high school three miles from his house. Rather, and because Indiana law apparently anticipated the issue of child sex offenders, he would have to use one of a few other options: 1) vote absentee, 2) vote at the county courthouse 500 yards from his home at least one day before the election or 3) on election day, vote at the civic center 12 miles from his house. Valenti alleged these options were inadequate and that Indiana law violates his constitutional right to vote under the First Amendment, resulting in his filing an as-applied challenge. The lower court analyzed the case under *Burdick,* weighing the state's interest in preventing sex offenders from accessing school property against the burden on Valenti's rights and held that, especially in light of his myriad voting options, the state prevailed. Valenti appealed.

The Seventh Circuit affirmed but did not agree with the lower court's reasoning. The Circuit pointed out that felons have no right to vote under Section 2 of the Fourteenth Amendment and therefore, no interest-balancing under *Burdick* should have been done. What Valenti does have - thanks to Indiana allowing felons to vote after release- is a statutory right to vote that comes with conditions, such as for example, not entering school property to accomplish voting. Having established that the case does not involve a fundamental constitutional right of a suspect class, the Circuit determined the proper analysis was the rational basis test. The Court easily found that the Indiana law was rationally-related to a legitimate government interest, specifically that the law does not even ban all sex offenders from school property, only those convicted of crimes involving

children, and that doing so serves the clearly legitimate interest in protecting children from these convicted persons. Valenti could not meet the extraordinarily high burden of negating "every conceivable basis which might support the statute." The lower court holding was thus affirmed.

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eNews Brief:

TAXPAYER STANDING - EXPENDITURES - SALE OF PUBLIC PROPERTY
In a recent decision the Alabama Supreme court concluded that taxpayers who did not identify any particularized harm in the action of the State Superintendent's proposed sale of a school lacked standing as taxpayers since taxpayer standing only allows suits challenging disbursements. *Richardson v. Relf* (Al. May 4, 2018)

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