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Contracts: Unless Approved or Ratified by Board Resolution, Municipal Commitment to Reimburse Third-Party Lender is Unenforceable

PHL v. Town of Oyster Bay, No. 18-cv-0575 (July 9, 2019).

A lender that was the third-party beneficiary of an agreement between a town and a developer who had borrowed from the lender could not rely on the town's ostensible repayment obligation on default unless it could point to a board resolution expressly authorizing such an obligation.

The Town of Oyster Bay, New York (Town) owns and operates a municipal golf course that offers multiple dining and concession facilities. In 2000 the Town signed a concession agreement (Agreement) with SRB, a catering company (SRB) to operate the concession for a 20-year term, in exchange for which SRB would pay fees to the Town and make $2.1 million in capital improvements. The Agreement was authorized by Town Board Resolution 638-2000. In 2005, in light of the fact that SRB had expended $4,600,000 for such improvements, the Town amended the Agreement to run through 2029; in 2008, based on SRB's commitment to spend a further $3,250,000 in improvements, the parties again extended the Agreement, through 2049. Those

amendments were also approved by resolution.

Recognizing that it would need financing to complete the improvements, SRB approached PHL, which was initially unwilling to lend funds due to a lack of collateral. According to PHL, the respective attorneys for SRB, the Town, PHL, and its broker "collaboratively created a vehicle whereby, if SRB defaulted on its loan, the Agreement would be terminated automatically and "[the Town] would be required to" pay PHL the outstanding balance on SRB's loan. PHL then agreed to provide financing to SRB in the amount of $7.8 million, inclusive of interest (Loan).

Contemporaneously with the PHL Loan transaction, SRB and the Town again amended the Agreement. That amendment, referred to by the court as "SACA" provided that, if SRB defaulted on the Loan, the Town would be obligated to pay PHL. Furthermore, if the Town terminated the Agreement with SRB for cause , it would be required to make a "Cause Termination Payment" to PHL. The SACA also provided that the Town's obligation to pay PHL "would not be subject to any defenses, including but not limited to, the defenses of bankruptcy, or insolvency of [SRB]."

SRB ceased making payments to PHL on the Loan, and in 2015 PHL, as a third-party beneficiary, demanded more than $6.2 million from the Town. The Town refused to pay, stating that the SACA was "of no legal effect because" it "purport[s] to make [the Town] a guarantor of the . . . [L]oan, which violates Article VIII, § 1 of the New York State Constitution, and because [the SACA] was [not] approved by a Town Board Resolution, as required under New York State Town Law § 64(6)."

PHL sued the Town in 2016, asserting 12 causes of action for damages: two alleging breach of contract; one alleging unjust enrichment; and nine alleging fraudulent, or negligent, or innocent misrepresentations in documents PHL received from firms or attorneys representing or employed by the Town. PHL alleged that it agreed to make the SRB loan only after receiving from the Town Attorney a copy of the SACA and confirmation that if SRB defaulted on the Loan, the Town would make payments to PHL, as well as an opinion letter from the Deputy Town Attorney and from the Town's outside counsel opining that the Town had the "power and authority to conduct the business" described in the SACA, that the SACA was "duly authorized by all necessary action" by the Town, and that the SACA was a "valid binding obligation" of the Town.

The Town moved to dismiss the Amended Complaint for failure to state a claim on which relief can be granted, based on, inter alia, the absence of a Town Board resolution authorizing the SACA. The district court granted the motion in 2017, concluding principally that the SACA was invalid because there was no indication in the Amended Complaint that the SACA was ever approved or ratified by the Town Board, as required by New York statute.

In opposition, PHL submitted Town Resolution No. 13 256-2010 as indicating Town approval of the Loan guarantor arrangement. The court found that resolution inapposite, because it merely "authorized and directed" the Town Supervisor "to enter into an agreement with [SRB and a third-party bank] relating to the loan," and an agreement regarding use of the Loan proceeds. The court also denied PHL's fraud claims, finding that because "it is clear from the face of the SACA that it did not comply with the statutory requirements [of New York law], PHL . . . could not have reasonably relied upon the purported misrepresentations in the [attorneys' opinion letters]."

On appeal, the Second Circuit affirmed. While the Town and SRB had an ongoing contractual relationship; the Town had no obligation, contractual or regulatory, to assist SRB in obtaining financing; and there is no plausible suggestion that the Town received in the SACA anything more than what it was already entitled to from SRB under contracts previously approved by Board resolutions. The Circuit reemphasized longstanding New York law that "A party contracting with a municipality is chargeable with knowledge of the statutes which regulate its contracting powers and is bound by them." Furthermore, "[a]lthough application of this rule results in occasional hardship," it is appropriate that "the loss should be ascribed to the negligence of the person who failed to ascertain the authority vested in the public agency with whom he dealt and statutes designed to protect the public should not be annulled for his benefit."

LINK

Legislative Prayer: County Board's Selection of Only Monotheistic Believers to Give Invocations Violates Establishment Clause

Williamson v. Brevard County, No. 17-15769 (11th Cir. July 8, 2019).

Affirming the district court, the Eleventh Circuit holds that the Brevard County Board of Commissioners' practice of selecting only believers of "monotheistic" religions-overwhelmingly Christian-to deliver invocations violates the Establishment Clause; however the Circuit finds that the lower court's injunction, requiring that plaintiff humanists and atheists be given the opportunity to deliver such invocations, is overly broad.

The Brevard County, Florida Board of County Commissioners (Board) opens its meetings with a religious invocation, delivered by speakers selected by Board members on a rotating basis. The invocations are uniformly monotheistic in nature. During the period from 2010 to 2016, 195 such invocations were given; all but seven of them were given by Christians or contained Christian content, and all of the invocations "contained specifically monotheistic content, meaning that they were in line with 'the doctrine or belief that there is but one God.'"

In 2014, plaintiff David Williamson (Williamson), an American Humanist, sent the Board two letters from the Central Florida Freethought Community (CFFC), requesting the opportunity to give an invocation at a Board meeting. He explained that the CFFC was "a local educational organization of more than two hundred members" and that "[o]ne of the organization's objectives is to educate the public on the need for equal treatment of non-believers and the value of Humanism; a world view which relies on reason and science as the best decision-making tools humankind has at its disposal."

The Board declined:

> The invocation portion of the agenda is an opening prayer presented by members of our faith community. The prayer is delivered during the ceremonial portion of the County's meeting and typically invokes guidance for the County Commission from the highest spiritual authority, a higher authority which a substantial body of Brevard constituents believe to exist. The invocation is also meant to lend gravity to the occasion, to reflect values long part of the Country's heritage and to acknowledge the place religion holds in the lives of many private citizens in Brevard County.
>
> Your website leads us to understand your organization and its members do not share those beliefs or values which, of course, is your choice under the laws of the United States. . . . You or your Brevard members have the opportunity to speak for three minutes on any subject involving County business during the Public Comment portion of our meeting.

Over the following year, other non-monotheist groups, including atheists, offered to provide invocations. The Board responded to one such proposal stating: "[Y]our suggestion to allow atheists to provide the invocation would, in fact, show hostility toward the faith-based community . . . ." It then adopted Resolution 2015-101 titled in part: "A Formal Policy Relating to Traditional Ceremonial Pre-Meeting Prayer" (Resolution). The Resolution stated that the Board chose to codify a policy that was "not hostile to faith-based religions and [did] not endorse secular humanism or non-belief over traditional faith-based religions comprised of constituents who believe in God." The "findings" section of the Resolution scrutinized websites of the CFFC and

other applicant entities, highlighting so-called "Godless quotes" on the sites, the organizations' stated goals concerning the separation of church and state, and CFFC's "strategic[]" attempts at "offend[ing] faith based religions in open forums in order to pressure the local government into closing the forum or censoring the content and exposing itself to liability."

The Resolution averred that allowing the humanists and atheists to speak only during the public comment period "reflects a longstanding practice of the Board to provide a limited public forum under the Public Comment section," which is not subject to censorship. It also stated that "supplanting traditional ceremonial pre-meeting prayer . . . with an 'invocation' by atheists, agnostics or other[s] . . . could be viewed as County hostility toward monotheistic religions."

Finally, the Resolution adopted an amendment governing opening invocations:

> Secular invocations and supplications from any organization whose precepts, tenets or principles espouse or promote reason, science, environmental factors, nature or ethics as guiding forces, ideologies, and philosophies that should be observed in the secular business or secular decision making process involving Brevard County employees, elected officials, or decision makers including the Board of County Commissioners, fall within the current policies pertaining to Public Comment and must be placed on the Public Comment section of the secular business agenda. Pre-meeting invocations shall continue to be delivered by persons from the faith-based community in perpetuation of the Board's tradition for over forty years.

Williamson and numerous others filed suit the day the Resolution was passed. The Amended Complaint raised six claims, alleging violations of the First Amendment's Establishment, Free Speech, and Free Exercise Clauses (Counts I, II, and III); the Fourteenth Amendment's Equal Protection Clause (Count IV); and the Equal Protection and Establishment Clauses of the Florida Constitution (Count V and VI), and sought declaratory and injunctive relief, along with damages, fees, and costs.

In September 2017, the district court entered an order granting summary judgment to the plaintiffs on almost every issue.-The district court also issued a permanent injunction prohibiting the Board from requiring "theistic content in opening invocations," and requiring that the plaintiffs be given "opportunities to deliver secular opening invocations at Board meetings on a schedule that is equivalent to that afforded to individuals and organizational representatives delivering religious opening invocations."

On appeal, the Eleventh Circuit cited the Establishment Clause decree that "Congress shall make no law respecting an establishment of religion," but noted that "we have struggled mightily over the years to explain just what these words mean." While the "principle of denominational neutrality" is a central requirement of the Establishment Clause, "[a]t the same time, though, we know that the Establishment Clause does not require that the state extirpate all references to religion or religious symbols from the public life of this nation. Thus, for example, most recently the Supreme Court rejected a challenge to a Christian cross that had stood on public land as a World War I memorial since 1925." (citing *American Humanist Society v. American Legion*). That decision reinforced the Court's deference to longstanding practice. As Justice Breyer stated in his *American Humanist* concurrence: "The passage of time gives rise to a strong presumption of constitutionality,"

Reviewing legislative prayer cases including *Marsh v. Chambers*, 473 U.S. 783 (1983), *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) and its own Florida precedents, the Eleventh Circuit summarized the current status of legislative prayer law:

> The state of our law, then, is clear at least about this much: local governments have significant freedom to conduct legislative prayers at the start of their sessions, even prayers that are explicitly sectarian and predominantly Christian. They may even employ a single cleric from only one denomination to deliver their invocations. But there is an

> exception to this: local governments violate the Constitution if they organize and conduct their prayers in a way that discriminates against other religious beliefs.

The Circuit assessed three factors which have been the subject of legislative prayer litigation-the composition of the speakers, the nature of their messages, and the process by which they are selected. The first two of these have been found to survive constitutional scrutiny: invocation-givers can be overwhelmingly from one sect, denomination or belief system, particularly when viewed in relation to the community's religious demographics, and their messages can be overwhelmingly sectarian or religious, so long as not overtly proselytizing or denigrating other beliefs. But the process by which the speakers are selected cannot be an exclusionary one which denies other believers, or non-believers, the opportunity to speak.

The Circuit took the time to reveal some of the unsustainable principles that Board members believed would flow from the Resolution, which barred "[s]ecular invocations and supplications from any organization whose precepts, tenets or principles espouse or promote" not just "reason" and "science" but also "environmental factors, nature" and even "ethics." This created an expansive platform for disqualifying potential invocation-givers. Sikhism, Native American beliefs, Wicca, Hinduism and Rastafarianism (a monotheistic and Abrahamic religion) would be rejected outright by various Board members.

Ironically, four of seven Board members would also bar a deist from delivering the invocation. Defined in Webster's Dictionary as "a rationalistic movement of the 17th and 18th century whose adherents generally subscribed to a natural religion based on human reason and morality, on the belief in one God who after creating the world and the laws governing it refrained from interfering with the operation of those laws, and on the rejection of every kind of supernatural intervention in human affairs," deism was practiced by Thomas Jefferson, Benjamin Franklin, John Adams, and many others among the nation's founders-who would apparently be foreclosed from opening the proceedings of the Board.

This flaw in the selection process could not be remedied by the fact that there is little to no evidence of discriminatory content in the invocations actually given. As the Circuit put it: " The Establishment Clause provides no safe harbor based on end results because an impermissible motive in the selection process may taint the whole scheme."

The Circuit, however, was unwilling to go as far as the district court had in terms of remedy. It refused to require that the Board affirmatively allow the plaintiffs to speak within a given timeframe or in proportionality to monotheist speakers:

> We vacate the district court's injunction, except insofar as it prohibits the County from continuing the present speaker-selection practices and procedures as explained by the Commissioners and as embodied in Resolution 2015-101. The trial court's injunction goes too far and says too much. Again, all that we hold today is that the Board's current invocation speaker selection procedures are unlawful.

(The Circuit cited in a footnote the recent decision by the D.C. Circuit in *Barker v. Conroy*, 921 F.3d 1118, (D.C. Cir. 2019) which ruled that the Chaplain of the U.S. House of Representatives was not obligated to provide a self-professed atheist the opportunity to deliver a "nonreligious prayer" because, regardless of whether he was denied the opportunity on account of being an atheist or because he was going to deliver a nonreligious prayer, "the House permissibly limits the opening prayer to religious prayer" and the atheist's prayer would not have qualified by those terms. That potentially anomalous decision was justified in that limiting the opening invocation to religious prayer "fit 'within the tradition long followed in Congress and the state legislatures.'" The Eleventh Circuit cited language from *Barker* which it saw as ameliorating the two ostensibly competing rationales: "Even while accepting that invocations can permissibly be limited to religious prayers, the D.C. Circuit noted that 'the Court has warned against discriminating among religions or tolerating a pattern of prayers that proselytize or disparage certain faiths or beliefs.')

The Circuit affirmed in part, vacated in part, and remanded.

LINK

Speech: Minimal Clothing by "Bikini Baristas" is Not "Expressive Conduct" Protected by the First Amendment

Edge v. City of Everett, no. 17-36038 (July 3, 2019).

Reversing the lower court, the Ninth Circuit finds that a municipality's ordinances requiring that "bikini baristas" must cover minimal body areas while working and imposing increased penalties for noncompliance are not void for vagueness and do not interfere in constitutionally protected expressive conduct.

Everett, Washington (City) police confirmed citizen complaints that some "bikini baristas" were engaging in lewd conduct at their establishments, that some baristas had been victimized by patrons, and that other crimes were associated with the coffee stands. The City responded by adopting Everett Municipal Code (EMC) § 5.132.010-060 (the Dress Code Ordinance) requiring that the dress of employees, owners, and operators of "Quick-Service Facilities" cover "minimum body areas." The City also amended its Lewd Conduct ordinance, seeking "to create the new crime Facilitating Lewd Conduct, a gross misdemeanor punishable by a maximum penalty of 364 days in jail and a $5,000.00 fine[.]"

A stand owner and several baristas from "Hillbilly Hotties" sued the City pursuant to 42 U.S.C. § 1983. They contended that their attire conveyed messages such as "female empowerment," "confiden[ce]," and "fearless body acceptance" explaining that "a bikini is not a sexual message, [it's] more a message of empowerment," and the Dress Code Ordinance violated their First Amendment rights. They also argued that the amendments to the Lewd Conduct law used ambiguous language to define parts of the body that must be covered, meaning that a person of ordinary intelligence was denied a reasonable opportunity to know what conduct the City prohibited, violating Due Process standards.

The district court concluded that plaintiffs had demonstrated a likelihood of success on the merits of their vagueness challenges. The court expressed concern that various descriptions of body areas were vague, and that both ordinances were susceptible to "arbitrary enforcement." The court also concluded that plaintiffs had established a likelihood of success on the merits of their First Amendment free expression challenge to the Dress Code Ordinance, based on its conclusion that wearing pasties and g-strings at their place of business was sufficiently expressive to merit constitutional protection. It granted plaintiffs' motion for a preliminary injunction and enjoined enforcement of the City's provisions.

The Ninth Circuit found otherwise. It was not persuaded that the public would be left to guess at the meaning of the terms defining body areas requiring coverage: "[W]e conclude that a person of ordinary intelligence reading the ordinance in its entirety will be adequately informed about what body areas cannot be exposed or displayed 'in a public place or under circumstances where such act is likely to be observed by any member of the public.'" Furthermore, those descriptions of body parts was clear enough to avoid arbitrary enforcement by authorities. The Circuit found that the district court abused its discretion in ruling that plaintiffs were likely to succeed on their void-for-vagueness challenges.

The Circuit also contradicted with the lower court's analysis of plaintiffs' First Amendment challenge to the Dress Code Ordinance. The district court had found that the baristas' choice to wear provocative attire (pasties and gstrings) constituted sufficiently expressive conduct to

warrant First Amendment protection, that the Dress Code Ordinance amounted to a content-neutral restriction on the baristas' speech, and that it failed intermediate scrutiny under the "secondary effects" line of cases. Disagreeing, the Circuit cited Supreme Court precedent: "Conduct that is 'sufficiently imbued with elements of communication' is protected by the First Amendment . . . but the Court "has consistently rejected 'the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'"

Individuals claiming the protection of the First Amendment for nonverbal conduct carry the burden of demonstrating that such conduct fulfills two requirements: (1) "an intent to convey a particularized message" and (2) a "great likelihood . . . that the message would be understood by those who viewed it." The Ninth Circuit found that, even if plaintiffs could show that their intent was to convey a particularized message, "plaintiffs' First Amendment claim falters for failure to show a great likelihood that their intended message will be understood by those who receive it." In comparison to secondary effects cases where plaintiffs wore political insignias or displayed the American flag, the context here was starkly different: "The baristas' act of wearing pasties and g-strings in close proximity to paying customers creates a high likelihood that the message sent by the baristas' nearly nonexistent outfits vastly diverges from those described in plaintiffs' declarations."

Because they had not demonstrated a "great likelihood" that their messages would be understood by those who viewed them as connoting empowerment and confidence, the Circuit concluded that the mode of dress was not sufficiently communicative to merit First Amendment protection. Given that wearing pasties and g-strings while working at Quick-Service Facilities "is not 'expressive conduct' within the meaning of the First Amendment" the Dress Code Ordinance did not burden protected expression.

The district court's application of intermediate scrutiny under the "secondary effects" line of authority was therefore inapposite--that doctrine only applies to regulations that burden speech within the ambit of the First Amendment's sphere of protection. Here, because the Ordinance did not burden expressive conduct protected by the First Amendment, the City need only demonstrate that it "promotes a substantial government interest that would be achieved less effectively absent the regulation." The district court had not analyzed the Ordinance under this less demanding framework. The Circuit vacated the preliminary injunction and remanded for further proceedings.

LINK

Speech: Selection and Presentation of Flags on City Flagpoles is Government Speech

Shurtleff v. City of Boston, No. 18-1898 (1st Cir. June 27, 2019).

The First Circuit had upheld a lower court's denial of an injunction which would have required Boston to allow an organization to fly its overtly Christian flag on City flagpoles, agreeing that the City's longstanding control over which flags flew on the site, and the fact that the public would construe the placement of flags on the site as government endorsement of a religious message, supported the City's contention that the flags on its flagpole constituted government speech.

Camp Constitution is a volunteer association whose goal is to promote and educate on the U.S.'s "Judeo-Christian moral heritage". In celebration of Constitution Day and Citizenship Day, Harold Shurtleff, director of Camp Constitution (Shurtleff) organized an event in front of Boston's City Hall to "celebrate the Christian community's contributions to the City and the Commonwealth of

Massachusetts, as well as Christian Support for religious tolerance, the rule of law, and the United States Constitution". As part of that event, Shurtleff sought a permit from Boston (the City) to raise a "Christian flag" on one of City Hall's flag poles flying next to the United States flag, the Massachusetts flag, and the City of Boston's flag. The Christian flag contained a white field and red Latin cross inside a blue canton.

The City denied the permit to raise the flag, but allowed the event to take place on the City Hall's plaza. The City indicated that flying non-secular flags on City Hall flagpoles was against the City's unwritten policy and maintained that the City would be willing to fly a non-religious flag if Camp Constitution provided one. Almost one year later, Shurtleff and Camp Constitution filed suit arguing violations of the First Amendment's Free Speech and Establishment Clauses as well as the Fourteenth Amendment's Equal Protection Clause, and seeking a preliminary injunction to prevent the City from denying the flag-raising permit. The district court denied the injunction holding that the City's selection and presentation of flags on the City flagpoles constitute government speech, which is free from the Free Speech clause's scrutiny.

The First Circuit affirmed the judgment of the lower court denying the injunction because Shurtleff and Camp Constitution failed to demonstrate a strong likelihood that they will prevail on the merits of their First Amendment claims, which is a showing required by law.

Free Speech: The Summum/Walker Factors

The Court explained that it disagreed with Shurtleff's contention that the *Summum*/*Walker* test did not apply in this context. For reference, the *Summum/Walker* test asks: (1) whether the government has traditionally used the message or conduct at issue to speak to the public, (2) whether persons would interpret the speech as conveying some message on the government's behalf, and (3) whether the government maintains control over the selection of the message. The Court found that under the three-part *Summum*/*Walker* test for government speech, a city engages in government speech when it decides which flags to display on government property in the place of the city flag even though the placement is temporary.

The Court noted flags have long been used to communicate messages, and more importantly, that the City follows this historic use of flags such as replacing flags when a foreign dignitary visits or to signify the mayor is attending an event. In this context, use of the flagpole is done to speak to the public.

Moreover, a witness would likely attribute the display of another's flag on City property (such as the Christian flag proposed by Camp Constitution) to the City. The third-party flag would fly on an 83-foot pole next to the flags of the United States and the Commonwealth of Massachusetts at the very seat of Boston's government. The height of the flag would make it visible from far distances and the proximity to government property as well as other symbols of government make it more likely that a witness would attribute the third party flag as government speech.

Finally, the Court found that the City's decision regarding which flags are placed on a city-owned flagpole is likely government speech because the City owns the flagpole and controls which third party flags are raised, requires interested parties to apply and subjects those applications to the requirement that they comply with city policy and guidelines, and the flagpole is rarely occupied by a third-party flag suggesting a greater degree of control by the City in terms symbolic speech. The fact that there is an unwritten policy governing the approval process for third-party flags is irrelevant under *Summum*. Additionally, the fact that the placement of a third-party flag would be temporary and that the flag does not belong to the City is immaterial. Permanence is not a requirement for a finding of government speech as discussed by the *Walker* Court. Even though the flags are privately owned, the City still has the same free speech rights when it "receives assistance from private sources for the purpose of delivering a government-controlled message".

Because there was a finding of government speech, Shurtleff's argument that the flagpole is a public forum was invalidated. Importantly, regardless of whether there is government speech, the public forum analysis still would not render the flagpole a public forum because there is no clear

evidence that City has intentionally opened a nontraditional forum for public use and discourse. Also, the nature of a flagpole is inconsistent with unregulated expressive activity.

The Establishment Clause

The Circuit found it unlikely that Shurtleff would be able to win on the Establishment Clause claim as well. Shurtleff argued that because previously permitted third party flags on the flagpole in question included religious symbols or references (for example, the City's own flag includes the Latin phrase "God be with us as He was with our fathers"), "religious flags" had already been allowed. The court disagreed: just because a flag references religion by using religious symbols does not mean that the flag itself is religious. There was also no evidence, as conceded by Shurtleff at oral argument, that the City had ever permitted the flag of any religion to be raised on the flagpole at issue. The fact that the City had allowed "secular" flags to fly on the flagpole in question (flags of secular organizations and causes such as the LGBTQ flag) did not demonstrate that the City had a preference for non-religion over religion. Absent such a showing, Shurtleff's Establishment Clause claim would fail.

LINK

Telecommunications: Ordinance Requiring Notice of Radio Frequency Risks Does not Violate First Amendment and is not Preempted

CTIA - The Wireless Association v. City of Berkeley, No. 16-15141 (9th Cir. July 3, 2019).

The Ninth Circuit holds that a municipal ordinance requiring notice to cell phone purchasers about potential radio frequency hazards does not violate the First Amendment because it is governmentally-compelled commercial speech providing factual safety information to consumers-meaning that intermediate scrutiny does not apply; in addition, there is no preemption issue because the FCC itself requires similar cautionary notices.

In 2015, the City of Berkeley (City) passed an ordinance (Ordinance) requiring cell phone retailers to warn prospective consumers that carrying a cell phone in certain ways may cause them to exceed the Federal Communications Commission (FCC) guidelines for radio frequency exposure.

The "Findings and Purpose" section of the Ordinance notably mentions that the radio frequency exposure standards have not changed since 1996, were based on usage popular at the time which we largely do not follow now, and that consumers are generally unaware of the potential health risks or recommended safety measures to reduce the risk of radio frequency exposure. The purpose of the Ordinance, according to the text, is to "assure that consumers have the information they need to make their own choices about the extent and nature of their exposure to radiofrequency radiation."

The disclosure provision of the Ordinance requires the cell phone retailer to provide each customer with the following language:

> The City of Berkeley requires that you be provided the following notice: To assure safety, the Federal Government requires that cell phones meet radiofrequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. Refer to the instructions in your phone or user manual for information about how to use your phone safely.

The City required the above disclosure language be prominently displayed on a poster no less than 8 ½ by 11 inches, no less than 28-point font, or on a handout no less than 5 by 8 inches, no less than 18-point font. The City of Berkeley logo was required on the poster or handout. The ordinance allows for additional information to be included on the poster or handout that is not required by the compelled disclosure at the discretion of the retailer as long as that information is distinct from the required disclosure language.

CTIA, a trade association for the wireless industry, requested a preliminary injunction staying enforcement of the ordinance on two grounds: that it violates the First Amendment, and that the ordinance is preempted. The district court denied CITA's request and the Ninth Circuit upheld that opinion in *CTIA-The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105 (9th Cir. 2017)* . CTIA challenged that decision, filing a petition for writ of certiorari, which the U.S. Supreme Court granted. The Supreme Court vacated the Ninth Circuit's judgment and remanded for consideration in light of its decision in *National Institute of Family and Life Advocates v. Becerra, - U.S. -, 138 S. Ct. 2361 (2018)*, a decision regarding regulation of commercial speech.

On remand, the district court held that the ordinance neither violates the First Amendment nor is it preempted and subsequently denied CTIA's request for preliminary injunction. CTIA filed an interlocutory appeal. The Ninth Circuit's decision (as discussed below) considers both the precedent set by *National Institute of Family Life Advocates*, as ordered by the U.S. Supreme Court, and the Ninth Ciruit's *en banc* decision in *American Beverage Ass'n v. City and County of San Francisco, 916 F.3d 749 (9th Cir. 2019) (en banc)*.

The Ninth Circuit affirmed the district court's decision denying CTIA's preliminary injunction. It found that CTIA's claims on both First Amendment grounds and preemption grounds were unlikely to succeed and therefore did not warrant an award of preliminary injunction against enforcement of the City's ordinance requiring compelled disclosure.

The First Amendment Argument

Both CTIA and the City agree that the ordinance in question is a regulation of commercial speech, but disagree as to whether *Central Hudson* or *Zauderer* are appropriate for analysis in this instance. The *Central Hudson* test requires intermediate scrutiny. Conversely, the *Zauderer* test allows the government to compel truthful disclosure in commercial speech so long as the disclosure is reasonably related to the substantial government interest, and involves purely factual and uncontroversial information that relates to the service or product provided.

The Ninth Circuit determined that *Zauderer* is the appropriate test here because precedent dictates that the *Central Hudson* test does not apply in instances of compelled speech such as a compelled disclosure. Importantly, the Ninth Circuit, joining several other circuits, found that prevention of consumer deception is not the only valid governmental interest that may be furthered by compelled speech under *Zauderer*. Here, the Ninth Circuit held that the governmental interest in furthering public health and safety is sufficient under *Zauderer* so long as it is substantial (meaning more than trivial).

Applying the *Zauderer* test to the compelled speech ordinance, the Court held that the text of the disclosure was true, that the City's required disclosure was uncontroversial within the meaning of *National Institute of Family Life Advocates*, and that the compelled disclosure was not unduly burdensome. Considering that it is highly unlikely CTIA would win on its First Amendment claim that the compelled disclosure is unconstitutional, the Court affirmed the district court's denial of the preliminary injunction on the First Amendment claim.

The Preemption Argument

The Court set out the standard for federal preemption, taking care to discuss conflict preemption at length. CTIA's complaint alleged that the City's ordinance is invalid because of conflict preemption. Conflict preemption is "implicit preemption of state law that occurs where there is an actual conflict between state and federal law. It arises in situations where compliance with both

federal and state regulations is physically impossible, or when state law is an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress."

CTIA's main argument is that the FCC does not compel cell phone manufacturers to make disclosures to consumers on SAR limits on radio frequency exposure. Because CTIA waived this argument at the district court level by saying the exact opposite (that the FCC requires these types of disclosures) the argument is waived. The court noted however that even if they were to consider CTIA's argument on the merits, it would reject the argument because the FCC did begin to require such disclosures starting October 2015, in the separate manuals that accompany a cell phone.

The Ninth Circuit held that there is no conflict with federal law and policy, and therefore there is no preemption. Because the disclosure requirement the City requires the cell phone retailers to make is the same disclosure the FCC requires of cell phone manufacturers, the City's ordinance actually complements and enforces the federal requirement. The City's compelled disclosure requirement does no more than alert consumers to the safety disclosures the FCC requires, and directs consumers to the federally compelled instructions in the user manuals for specific information on how to avoid excessive radio frequency disclosure.

The full text of the City of Berkeley's Ordinance (Chapter 9.96, §§ 9.96.010 - 9.96.040) is available HERE.

LINK

THIS JUST IN: Fourth Circuit Strikes Anti-Disparagement Clauses in Government Settlement Agreements.

Yesterday, the Fourth Circuit held that Baltimore's settlement agreement anti-disparagement clauses-which provide that, where a complainant against the City accepts a financial settlement, the plaintiff will waive 50% of the settlement amount for disparaging the defendant(s)-violate the First Amendment.

Language from the opinion includes:

> As in 95% of settlement agreements between the City and persons alleging police misconduct, Overbey's settlement agreement included what we will call a "nondisparagement clause." This clause required Overbey to "limit [her] public comments" regarding her lawsuit "to the fact that a satisfactory settlement occurred involving the Parties." J.A. 96. It prohibited her from "discussing [with the news media] any opinions, facts or allegations in any way connected to" her case, her underlying allegations, or the settlement process. Id. And it provided that if Overbey were to ever make a prohibited comment regarding her lawsuit, the City would be entitled to a refund of half of her settlement. The clause placed no restriction on the City's freedom to speak about the case.
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> * * *
>
> [W]hen the government (1) makes a police-misconduct claimant's silence about her claims a condition of settlement; (2) obtains the claimant's promise of silence; (3) retains for itself the unilateral ability to determine whether the claimant has broken her promise; and (4) enforces the claimant's promise by, in essence, holding her civilly liable to itself, there can be no serious doubt that the government has used its power in an effort to curb speech that is not to its liking. The First Amendment is meant to serve as a bulwark against such

exercises of government power.

A dissent argued that the parties were free to conclude a contractual arrangement whereby Overbey knowingly agreed to forego some of her rights in exchange for compensation.

The case is ***Overbey v. Mayor and City Council of Baltimore*, no. 17-2444 (4th Cir. July 11, 2019).**

LINK

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