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Due Process: Members of Certain Industries, Such as Horse Racing, Are Entitled to Prompt Deprivation Hearings, Given the Severe Consequences of Even Temporary Suspensions

Moody v. Michigan Gaming Control Board, no's. 16-2369, 16-2244 (6th Cir. Sept. 11, 2017).

A deprivation hearing that took place 30 months after harness drivers were banned from state race tracks was deemed to violate procedural due process.

Upon receiving an anonymous tip, the Michigan Gaming Control Board (MGCB) began an investigation into allegations of race-fixing among a group of gamblers and harness-racing drivers. Plaintiffs, four MGCB-licensed harness drivers, attended an administrative investigatory hearing but invoked the Fifth Amendment when asked questions. The next day, the MGCB suspended all four plaintiffs' licenses, citing their failure to comply with a Michigan state occupational licensing law requiring that license applicants "cooperate in every way . . . during the conduct of an investigation, including responding correctly, to the best of his or her knowledge, to all questions pertaining to racing." Six months later, MGCB also issued an order banning the

plaintiffs from all state race tracks.

Plaintiffs sued under Section 1983, claiming violations of their procedural due process and Fifth Amendment rights. The district court held that the state was entitled to immunity because the plaintiffs had failed to identify a constitutional violation. The plaintiffs appealed.

As to the Fifth Amendment claim, the appellate court reversed, holding that unless the state was willing to grant the plaintiffs immunity from prosecution, it was a clear constitutional violation to punish them for not testifying at their hearing. The court then affirmed in part but also reversed in part with respect to the plaintiffs' due process claim, holding instead that there was a disputed issue of material fact as to whether plaintiffs' exclusion from the state racetracks was a violation of due process. Initially, the appellate court found that the drivers were entitled to a post-exclusion hearing. However, as it would turn out in oral argument before the Sixth Circuit, the drivers *had*, in fact had a hearing--it just didn't hadn't taken place until over two years after the initial exclusion and nearly five months after the plaintiffs had requested a post exclusion hearing.

Armed with this new information, the Sixth Circuit held that the defendants were not entitled to qualified immunity on either claim. Because of the nature of the horse racing, the court noted that the Supreme Court has held that horse drivers and trainers are entitled to prompt deprivation hearings, since the consequences of even a temporary suspension can be severe. The thirty-month delay between the drivers' exclusion and their post-exclusion hearing was too long (even though the drivers themselves had delayed in requesting a hearing). Further, the court also noted that under specific conditions, a public employee "may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers."

LINK

Preemption: Thirteen Years Later, Federal Law is Found not to Preempt California's Ban on Force-Fed Foie Gras

Association des Éleveurs de Canards et D'oies du Québec v. Becerra, No. 15-55912 (9th Cir. Sept. 15, 2017).

Vacating an injunction by the court below, the Ninth Circuit has found that a law passed by the California legislature in 2004 banning the sale of foie gras produced via force-feeding is not preempted by the 60-year old federal Poultry Products Inspection Act.

In 2004, the California legislature, joining at least 14 countries that have come to the same conclusion, determined that the process known as "gavage"--inserting a 10- to 12-inch metal or plastic tube down the esophagus of a young duck or goose to forcibly deliver large amounts of concentrated food and compressed air in order to expand the bird's liver to more than ten times its normal size--is cruel and inhumane. It passed Health & Safety Code §§ 25981 and 25982, prohibiting the practice of force-feeding ducks or geese and prohibiting the sale in California of foie gras produced in such a manner.

California provided a grace period of over seven and a half years, until mid-2012, for producers to transition to alternative methods of production.

On July 2, 2012, the day after the law finally took effect, plaintiffs (who produce foie gras via the gavage process in New York and Quebec) sued, challenging §25982--the provision banning the sale of products made from force-fed birds. After their initial Due Process and Commerce Clause arguments were dismissed, they amended their complaint to allege that the federal Poultry Products Inspection Act (PPIA) preempted the state provision.

Enacted in 1957, the PPIA was intended to ensure that the nation's poultry products "are wholesome, not adulterated, and properly marked, labeled, and packaged." The law authorizes the inspection of poultry-processing plants, establishes labeling and record-keeping standards, and prohibits the sale of adulterated poultry products. In 1968, Congress passed the Wholesome Poultry Products Act, which amended the PPIA and added an express preemption clause: " [m]arking, labeling, packaging, or *ingredient requirements . . .in addition to, or different than*, those made under [the PPIA] may not be imposed by any State."

In 2015, the district court concluded that California's ban on products made by force-feeding birds constitutes an "ingredient requirement" covered by the PPIA's preemption clause. It permanently enjoined the enforcement of §25982.

The Ninth Circuit disagreed, interpreting the preemptive sweep of the PPIA much more narrowly. It looked first to Congressional intent. "Where the federal statute contains an express preemption clause, we must . . . assume 'that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Furthermore, "[b]ecause animal cruelty is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required."

The Circuit then examined the specific language at issue - whether California's ban of gavage-produced foie gras sales imposed an "ingredient requirement" that is "in addition to, or different than, those made under [the PPIA]." Because "'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning,'" the court looked to a dictionary definition: "'Ingredient'" is defined as "'one of the foods or liquids that you use in making a particular meal.'" This meaning was evidenced in other legislative acts implementing the PPIA "ingredient" standards, which had been applied to "acidifiers, antifoaming agents, artificial sweeteners, food binders and extenders, coloring agents, and proteolytic enzymes."

In contrast, Congressional language around the PPIA's codification in 1957 supported the conclusion that "ingredient requirements" could not be read to reach animal husbandry practices, because the federal law "does not regulate in any manner the handling, shipment, or sale of live poultry." The difference between force-fed production and non-force-fed production was not one of ingredient; it was merely a difference in feeding technique:

> The same logic applies to the difference between regular chicken and cage-free chicken. "Cage-free" is no more an "ingredient" than "force-fed." Although Plaintiffs invite us to expand the definition of "ingredients" to include animal husbandry practices, that is within Congress's bailiwick, not ours.

Having found that the California law was not expressly preempted by the PPIA, the Ninth Circuit also dispensed with plaintiffs' further arguments--that §25982 was impliedly preempted under the doctrines of field and obstacle preemption. Neither argument prevailed. Under field preemption, "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." The PPIA's own language precluded this argument-it states that the PPIA "shall not preclude any State . . . from making requirement[s] or taking other action, consistent with [the PPIA], with respect to any other matters regulated under [it]."

Plaintiffs' theory of obstacle preemption fared no better. Obstacle preemption, which is a form of conflict preemption, occurs "where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" But plaintiffs failed to explain how §25982 stood as any obstacle to the PPIA's objectives of ensuring that poultry products were wholesome, not adulterated, and properly marked, labeled, and packaged.

The district court's grant of summary judgment to plaintiffs was reversed, and its permanent injunction vacated-the case was remanded to the Central District of California.

LINK

Qualified Immunity: No Clearly Established Duty to Refrain from Shooting Wounded Dog a Second Time

Hansen v. Black, no. 16-4162 (8th Cir. Sept. 18, 2017).

Reversing a district court's denial of qualified immunity to a state trooper who, after shooting and disabling a dog that had been running free on a Missouri interstate, shot the animal a second time rather than attempt to pick it up and move it to safety, the Eighth Circuit has found no clearly established duty to take such action where the officer had no appropriate mechanism to handle the wounded animal and the highway traffic buildup was creating a significant risk of accidents.

On a Sunday morning in May 2012, Trooper Thomas Black (Black) responded to a call regarding a dog on a ramp leading to a 65-mile per hour Missouri interstate. He observed the animal-collared but not on a leash--running loose in the roadway, requiring oncoming traffic to swerve onto the shoulder or other lanes to avoid hitting the dog.

He positioned his vehicle across both southbound lanes, shutting down traffic, and attempted to catch the dog. It ran off. He then pursued the animal in his vehicle for a short distance, using his siren to divert it-but to no avail. He again exited his cruiser and attempted additional capture tactics, but the dog ran further down the empty southbound lanes.

Noting that "hundreds" of southbound vehicles were now backed up for more than a quarter mile, creating a risk of secondary accidents, Black reentered his patrol car, drove to the running dog, and fired a shot, hitting the animal. As Black approached, the dog continued to pull itself down the highway; because its rear legs had been injured, it could only use its front paws. Black shot the dog a second time in the torso or chest. The dog then dragged itself onto the grass median between the southbound and northbound lanes. Observing the animal was now in pain and gravely wounded, Black fired two more shots "to humanely kill the dog."

The dog's owner filed a § 1983 damage action, alleging that Black's "shooting and killing Plaintiff's dog" violated her rights under the Fourth Amendment. The district court denied Black's qualified-immunity based motion for summary judgment.

The Eighth Circuit reversed. To defeat summary judgment based on qualified immunity, plaintiff was required to establish *both* that she suffered a violation of a constitutional or statutory right *and* that the right was clearly established at the time of Black's alleged violation.

The Fourth Amendment undeniably protects "persons, houses, papers, and effects, against unreasonable searches and seizures"-and dogs have been considered "effects." The dog's owner therefore argued that Black committed an unconstitutional seizure when he shot and killed her dog.

As the Circuit Court saw it, "[T]hat over-simplifies the Fourth Amendment issue." Trooper Black unquestionably had the authority--indeed the duty--to seize a large, unleashed dog running unrestrained down a busy high-speed interstate highway, causing vehicles to swerve and change lanes. Accordingly, it was not the seizure that was subject to question, it was degree of force Black employed to accomplish the (necessary) seizure.

The district court had concluded that the force used was excessive:

> A jury could find that Trooper Black's seizure was not objectively reasonable under the circumstances. Although the dog may have posed a risk to motorists while it was running on the Interstate, that risk ended when Trooper Black shot the dog the first time. . . . The first shot caused the dog to drop, and by Trooper Black's own testimony, the dog was only able to drag itself on its front paws. At this point, Trooper Black could have picked up the dog. Instead, Trooper Black walked towards the dog and then shot it a second time. After the first shot . . . the dog had been stopped, the Interstate could be opened, and the risk to the public was over. Once the justification for a seizure ends, it is no longer reasonable for a seizure to occur.

Plaintiff had cited various dog-shooting cases where excessive force was found. But none involved an unleashed, unsupervised dog that was risking public safety on a busy interstate highway and would not respond to numerous attempts at a safe, harmless seizure. In one instance, an officer looking for a large black dog loose in a residential neighborhood shot another dog that was harmlessly urinating in a fenced backyard, with its owner standing a few feet away. In another, an officer repeatedly shot a pet "without any provocation and with knowledge that it belonged to the family who lived in the adjacent house and was available to take custody."

The district court had reasoned, citing the above precedents, that it was "clearly established that pets who do not pose an imminent danger cannot be shot, regardless of the specific facts that demonstrate the lack of danger," and Black's "first shot made it possible to remove the dog from Interstate through means that did not require it to be shot again."

The Circuit found that this analysis failed to "make this determination from the perspective of a reasonable officer on the scene." Black "did not have a taser, catch, or snare pole, so he shot the dog a second time." While the district court, "employing hindsight" reasoned that Black could simply have carried the dog off the roadway, "[W]e are not prepared to say that, in these circumstances, the Fourth Amendment required an officer to approach and attempt to carry a large wounded animal that his extensive efforts had failed to control."

Black was entitled to qualified immunity because existing precedent did not place "beyond debate" that his conduct contravened the dog owner's clearly established Fourth Amendment rights.

LINK

Qualified Immunity: Where Tenant has Been Evicted, Tenant's Guest Cannot Claim Privacy Rights in Challenging Warrantless Entry

Woodward v. City of Tucson, no. 16-15784 (9th Cir. Sept. 15, 2017).

Reversing the district court, the Ninth Circuit has held that the estate of a decedent cannot assert Fourth Amendment claims against police who entered an apartment without a warrant; the decedent was the guest of a former tenant who had been formally evicted and could not avail himself of landlord-tenant based privacy expectations.

City of Tucson (City) police officers were alerted by an apartment complex employee that one unit appeared to be occupied by squatters. The officers went to a supposedly vacant apartment formerly occupied by Amber Watts (Watts), without a warrant. The front door was unlocked, and they entered. When they opened a bedroom door, they were confronted by Michael Duncklee (Duncklee), who aggressively rushed at them while growling and brandishing a broken hockey stick. Duncklee was shot and killed.

Plaintiff, the representative of Duncklee's Estate, argued that police had illegally entered the apartment without a warrant and had used excessive force against Duncklee. The district court determined that plaintiff's excessive force claim turned on the force defendants used in entering the apartment and concluded that "it was clearly established as a matter of law that drawing their guns and letting themselves into the apartment violated a constitutional right to be free from excessive force."

The district court granted in part and denied in part plaintiff's motion for summary judgment. It found that the warrantless seizure of the apartment was a Fourth Amendment violation since there were neither exigent circumstances nor proper consent to enter. Thus, the court granted plaintiff's motion on this issue. However, the court denied the motion as to the excessive force claim, finding that there were outstanding factual issues.

A panel of the Ninth Circuit reversed. It found that plaintiff had standing to assert Fourth Amendment violations as to Duncklee's seizure and the use of force against him, buy also held that plaintiff lacked standing to assert a Fourth Amendment violation for the warrantless entry and seizure of the vacant apartment: The district court appeared to have erroneously viewed the case through a landlord/tenant lens. Although plaintiff described Duncklee as an overnight guest of Watts, the former tenant who was in the apartment with Duncklee, the Circuit held that Watts had no privacy rights to assign to Duncklee, because she had been formally evicted and was aware of that fact-she no longer had a key to the premises. "One who has been formally evicted has no reasonable expectation of privacy in his or her previous residence."

This nuance was critical. It served to undermine the "provocation theory" espoused in *Billington v. Smith*, 292 F.3d 1177, 1188 (9th Cir. 2002):

> If the police committed an independent Fourth Amendment violation by using unreasonable force to enter the house, then they could be held liable for shooting [a] man - even though they reasonably shot him at the moment of the shooting - because they "used excessive force in creating the situation which caused the man to take the actions he did."

More significantly, after the district court's opinion, *Billington* had been abrogated by the Supreme Court. In *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), the Court concluded that the provocation theory was incompatible with established federal excessive force jurisprudence and held that "an earlier Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure."

Against this backdrop, the facts of the confrontation itself had to be evaluated apart from the entry. Officers were confronted by an advancing, hostile man swinging a stick. The apartment was small and cluttered, making it difficult for the officers to retreat. Before firing, one yelled "police, stop" at Duncklee.

The Ninth Circuit concluded that reasonable officers in defendants' positions would not have known that shooting Duncklee violated a clearly established right. Indeed, case law makes clear that the use of deadly force can be acceptable in such a situation. *See Tennessee v. Garner*, 471 U.S. 1, 11-12, (1985) ("[I]f the suspect threatens the officer with a weapon . . . , deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

In sum, the district court erred in denying qualified immunity to defendants based on their entry into the apartment and use of force on Duncklee; moreover, because Defendants were entitled to qualified immunity on plaintiff's claim arising out of their entry into the apartment, the district court erred by granting partial summary judgment for plaintiff as to use of force.

LINK

Speech: Ordinance Distinguishing Between Commercial and Noncommercial Signs is Valid, post-*Reed*

Contest Promotions LLC v. City and County of San Francisco, no. 17-15909 (Aug. 16, 2017).

Rejecting the argument that *Reed* has eliminated a municipality's prerogative to discriminate between commercial and non-commercial signage, the Ninth Circuit has found that San Francisco's prohibition on new commercial billboards meets intermediate scrutiny requirements of *Central Hudson*.

Contest Promotions, LLC, (CP) rents advertising space from businesses in cities including San Francisco (SF), and places third-party advertising signs in that space, framed by text inviting passersby to enter the business and win a prize related to the sign. Through its Planning Code (Code), SF prohibits new billboards but allows onsite business signs subject to various rules. Noncommercial signs are exempt from the rules. The purposes of the Planning Code article which contains advertising rules, include "promot[ing] the aesthetic and environmental values of San Francisco," "protect[ing] public investment in and the character and dignity of public buildings, streets, and open spaces," "protect[ing] the distinctive appearance of San Francisco," and "reduc[ing] hazards to motorists, bicyclists, and pedestrians."

The Code distinguishes between "general advertising signs" and "business signs." A general advertising sign "directs attention to a business, commodity, industry or other activity which is sold, offered or conducted *elsewhere than on the premises* upon which the sign is located . . ." In contrast, a business sign "directs attention to the primary business, commodity, service, industry or other activity which is sold, offered, or conducted *on the premises* upon which such sign is located . . ."

The Code decrees that "[n]o new general advertising signs shall be permitted at any location within the City as of March 5, 2002;" however, business signs are permitted.

The Code further distinguishes between commercial and noncommercial signs--the latter are exempted altogether-although the Code does not define "noncommercial" except by reference to a non-exhaustive list that includes "[o]fficial public notices," "[g]overnmental signs," "[t]emporary display posters," "[f]lags, emblems, insignia, and posters of any nation or political subdivision," and "[h]ouse numbers."

CP argued that the distinction between commercial and noncommercial signs violates the First Amendment. The district court dismissed.

The Circuit's first order was to determine the proper level of scrutiny. The Code provision was clearly a regulation of commercial speech, which the court held should be subject to intermediate scrutiny under *Central Hudson.* The court rejected CP's argument that a greater standard should apply after *Reed*: "We have likewise rejected the notion that *Reed* altered *Central Hudson*'s longstanding intermediate scrutiny framework." (citing *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016) ("[A]lthough laws that restrict only commercial speech are content based, such restrictions need only withstand intermediate scrutiny."

Applying *Central Hudson's* first step, the court easily found that CP's advertisements concerned lawful, non-misleading activity. The second step was to assess the locality's asserted interests in the Code provision--in the Ninth Circuit, "[i]t is well-established that traffic safety and aesthetics constitute substantial government interests."

The last aspect of *Central Hudson* analysis required a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends. The Code provision did not need to be the least-restrictive means to accomplish SF's goals; rather, those means had to be narrowly tailored to achieve the desired objective.

CP argued that the Code provision faltered under this last aspect of *Central Hudson* analysis because it exempted noncommercial signs for reasons unconnected to SF's asserted interests in safety and aesthetics. The Circuit disagreed, citing the proposition that "It is well established that a law need not deal perfectly and fully with an identified problem to survive intermediate scrutiny." It cited as an example the Supreme Court's long-standing rejection of the notion "that a prohibition against the use of unattractive signs cannot be justified on [a]esthetic grounds if it fails to apply to all equally unattractive signs."

The Ninth Circuit held that the distinctions drawn in the Code provision between commercial and noncommercial speech directly advanced SF's substantial interests. "We find no constitutional infirmity in the ordinance's failure to regulate every sign that it might have reached, had [SF] (or its voters) instead enacted another law that exhausted the full breadth of its legal authority."

The distinction drawn between commercial and noncommercial signs in the Code survived intermediate scrutiny under *Central Hudson*. The district court affirmed the dismissal of CP's First Amendment claims.

LINK

Speech: Requirement to Include Sugar Warning in Soft Drink Advertising Fails First Amendment Challenge

American Beverage Association v. City and County of San Francisco, no. 16-16072 (9th Cir. Sept. 20, 2017).

The Ninth Circuit has reversed a lower court decision upholding San Francisco's law requiring a large warning in outdoor soft drink ads that "added sugar contributes to obesity, diabetes and tooth decay," finding that the ordinance essentially forces the inclusion of an inaccurate statement in protected commercial speech.

San Francisco (SF) enacted an ordinance in June 2015 applicable to advertisements (SSB Ads) for sweetened beverages with more than 25 calories per fluid ounce. The law required that advertisements on billboards, buildings and large-scale outdoor venues in SF for sugar-sweetened beverages must include the following statement:

> WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.

Among other things, the ordinance required that the warning occupy at least 20 percent of the SSB Ad and be set off with a rectangular border.

A group comprising the American Beverage Association and various outdoor advertisers (Associations) sued, seeking to enjoin implementation of the ordinance. The district court denied the Associations' motion for a preliminary injunction, concluding that the warning was not misleading, would not place an undue burden on the Associations' commercial speech, and was rationally related to a substantial government interest.

On appeal, the Ninth Circuit reversed. Under C*entral Hudson,* even commercial speech, defined as "expression related solely to the economic interests of the speaker and its audience," enjoys "some First Amendment protection." Although the First Amendment was primarily an instrument to enlighten public decision-making in a democracy, the free flow of commercial information also served that end "because it is indispensable to ensuring that economic decisions 'in the aggregate, be intelligent and well informed.'"

Central Hudson established a standard of review for restrictions that limit commercial speech. Restrictions on non-misleading commercial speech regarding lawful activity must withstand intermediate scrutiny--that is, they must "directly advanc[e] a substantial governmental interest and be n[o] more extensive than is necessary to serve that interest."

By contrast, regulations that "impose a disclosure requirement rather than an affirmative limitation on speech" are governed by a lesser Supreme Court standard set forth in *Zauderer*. In *Zauderer*, the Court had considered an Ohio State Bar rule under which an attorney was disciplined for publishing a misleading advertisement which implied that, in his contingency fee cases, if there was no recovery, the client would pay nothing-when in reality clients would remain liable for costs. The Court determined that the intermediate scrutiny standard developed in *Central Hudson* was not applicable, because "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech."

Applying this lesser standard, the Court had upheld the disciplinary rule, reasoning that requiring disclosure of clients' payment responsibilities was "purely factual and uncontroversial," and not unduly burdensome. Under *Zauderer*, "If the required disclosure is not factually inaccurate or unduly burdensome, then it will pass constitutional muster so long as it is reasonably related to a government interest of sufficient weight."

Thus, the question here was whether SF's SSB Ad restriction was limiting otherwise lawful and truthful speech--requiring intermediate scrutiny--or simply requiring the disclosure of purely factual, uncontroversial information, which would subject the ordinance to a lesser standard of review.

The court concluded that the factual accuracy of the SF warning was, at a minimum, controversial. The warning provides the unqualified statement that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay" without any reference to the amount consumed or the impact of other lifestyle choices. Although SF's experts stated that "there is a clear scientific consensus" that sugar-sweetened beverages contribute to obesity and diabetes through "excessive caloric intake" and "by adding extra calories to the diet," those experts did not directly challenge the conclusion of the Associations' expert that "when consumed as part of a diet that balances caloric intake with energy output, consuming beverages with added sugar does not contribute to obesity or diabetes."

Because the warning did not state that *overconsumption* of sugar-sweetened beverages contributes to obesity, diabetes, and tooth decay, or that consumption of sugar-sweetened beverages *may* contribute to obesity, diabetes, and tooth decay, "the accuracy of the warning is in reasonable dispute."

As the Associations had argued, if car dealers were required to post a warning only on Toyota vehicles that said: "WARNING: Toyotas contribute to roll-over crashes," the common-sense conclusion would be that Toyotas are more likely to cause rollovers than other vehicles.

The Ninth Circuit found that the lower court erred in concluding that the warning should not be interpreted to mean that sugar-sweetened beverages are uniquely or inherently unhealthy. To the contrary, "the warning is not purely factual and uncontroversial," meaning that SF's imposition of the ordinance on the Associations did not even meet the lesser thresholds required under *Zauderer*.

The court also found that the warning unduly burdened protected commercial speech. The district court had noted that a commercial speaker could use the remaining 80 percent of its advertising space to engage in counter-speech. The Circuit found this logic unacceptable: In reaching it conclusion, the lower court had failed to recognize that forcing a speaker "to tailor its speech to an opponent's agenda" burdened its First Amendment right to be silent. It would also turn the ad into a vehicle for a debate about the health effects of sugar-sweetened beverages.

The district court had cited the example of restrictions on tobacco and pharmaceutical advertising, which the Circuit found equally unpersuasive: "Sugar-sweetened beverages do not have the same physiologically addictive qualities as tobacco, nor are they prescribed by doctors to treat health conditions like pharmaceutical products."

In sum, although there was no dispute that SF had a substantial government interest in the health of its citizens, the ordinance was misleading and would chill the Associations' protected commercial speech; therefore, the Associations had shown a likelihood of success on the merits. They also demonstrated that they would likely to suffer irreparable harm (the deprivation of a First Amendment right alone would satisfy this test, even before financial loss was considered), and that balancing the hardships clearly tipped in their favor. Reversed and remanded.

LINK

Speech: Wyoming Law Prohibiting Crossing of Private Lands to Collect Environmental Data Violates First Amendment

Western Watersheds Project v. Michael, no 16-8083 (10th Cir. Sept. 7, 2017).

The fact that an individual crosses private land to obtain environmental resource data does not save a Wyoming law criminalizing such behavior, if the impact of the law is to inhibit "speech"-the collection, further analysis or cataloguing of such data-while on public lands.

Wyoming has long prohibited trespass as a matter of both criminal and civil law. Criminal trespass occurs when an individual "enters or remains on the property of another with knowledge or subsequent notification that he is not authorized to do so." One convicted of criminal trespass is subject to not more than six months' imprisonment and a $750 fine. For civil trespass, Wyoming generally follows the Restatement (Second) of Torts.

In 2015, Wyoming enacted a pair of statutes (one civil, one criminal) that prohibited individuals from entering "open land for the purpose of collecting resource data" without permission from the owner. "Resource data" was defined as "data relating to land or land use," including data related to "air, water, soil, conservation, habitat, vegetation or animal species." The term "collect" was defined as requiring two elements: (1) taking a "sample of material" or a "photograph," or "otherwise preserv[ing] information in any form" that is (2) "submitted or intended to be submitted to any agency of the state or federal government." Information obtained in violation of these provisions could not be used in any proceeding other than an action under the statutes themselves. The statutes also required government agencies to expunge data collected in violation of their provisions and forbade the agencies from considering such data "in determining any agency action."

The 2015 criminal statute imposed heightened penalties, providing for a maximum of one year's imprisonment of one year and a $1,000 fine for first time offenders. The 2015 civil statute

imposed liability for proximate damages and "litigation costs," including attorneys' fees.

Plaintiff advocacy organizations challenged the 2015 statutes. They argued that the statutes violated the Free Speech and Petition Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and were preempted by federal law. Defendants moved to dismiss. Granting the motion in part and denying it in part, the district court held that plaintiffs had stated plausible free speech, petition, and equal protection claims, but failed to state a preemption claim.

After the district court's decision, Wyoming amended the two statutes in 2016. The revised statutes continue to impose heightened criminal punishment and civil liability. But the amendments eliminate reference to "open lands" and instead penalize any individual who without authorization: (1) enters private land "for the purpose of collecting resource data"; (2) enters private land and "collects resource data"; or (3) "crosses private land to access adjacent or proximate land where he collects resource data." There is no requirement that resource data be submitted to, or intended to be submitted, to a government agency. Instead, the term "collect" now means: (1) "to take a sample of material" or "acquire, gather, photograph or otherwise preserve information in any form"; and (2) "recording . . . a legal description or geographical coordinates of the location of the collection."

Plaintiffs amended their complaint to challenge the 2016 statutes, re-alleging free speech and equal protection claims. This time, the district court granted defendant's motion in full, concluding that the revised version of the statutes did not implicate protected speech.

On appeal, plaintiffs challenged only the district court's ruling regarding subsection (c) of the statutes under the Free Speech Clause of the First Amendment. That provision states:

(c) A person [is guilty of trespassing/commits a civil trespass] to access adjacent or proximate land if he:

> (i) Crosses private land to access adjacent or proximate land where he collects resource data; and
> (ii) Does not have:
>> a. An ownership interest in the real property or, statutory, contractual or other legal authorization to cross the private land; or
>> b. Written or verbal permission of the owner, lessee or agent of the owner to cross the private land.

In granting defendants' motion to dismiss, the district court concluded that the statutes did not regulate protected First Amendment activity. It relied on Supreme Court precedent holding that individuals generally do not have a First Amendment right to engage in speech on the private property of others. See *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976) (holding picketers "did not have a First Amendment right to enter [a privately owned] shopping center for the purpose of advertising their strike").

The Tenth Circuit found that the district court had erroneously focused on *Hudgens* and other private property precedents, because the statutory language at issue regulated activity on public property--provided that such land is adjacent or proximate to private property, subsection (c) would apply to the collection of resource data on public land. Plaintiffs were claiming that subsection (c) prohibited them from engaging in protected speech that would be otherwise permissible on public property.

Defendants countered that the statutes regulate conduct on public land only if an individual first trespasses on private land, and characterized plaintiffs' argument as asserting a right to trespass.

That analysis misstated the issue, said the Circuit. Wyoming already prohibited trespass in

general, albeit with lesser penalties than provided for in the statutes at issue. The effect of the challenged provisions was to increase a pre-existing penalty for trespassing if an individual subsequently collected resource data from public land.

The fact that one aspect of the challenged statutes concerned private property did not defeat the need for First Amendment scrutiny. The court found utility in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002). There, the ordinance "prohibit[ed] canvassers from going on private property for the purpose of explaining or promoting any cause, unless they receive[d] a permit and the residents visited [had] not opted for a no solicitation sign." The Supreme Court struck the measure: the notion that "a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so" was "a dramatic departure from our national heritage and constitutional tradition."

The Tenth Circuit thus considered whether the collection of resource data on public lands was entitled to First Amendment protection. It noted that the acts prohibited by the Wyoming laws--collecting water samples, taking handwritten notes about habitat conditions, making an audio recording of one's observation of vegetation, or photographing animals-were indispensable to plaintiffs' participation in the formation of public policy. The chilling effect on such participation could not survive constitutional challenge.

The court found analogies in sibling circuit decisions which have held that the First Amendment protects the recording of officials' conduct in public. "Many of the activities covered by the challenged statutes fit comfortably in the speech-creation category recognized in these cases. An individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter."

Because the court below had found that the statutes did not govern protected speech, it had not assessed what level of judicial review was appropriate. Stating that, "As a general rule, we do 'not consider an issue not passed upon below,'" the Tenth Circuit reversed and remanded to allow the district court to consider the issue of scrutiny in the first instance.

LINK

SHORT TAKES: Wisconsin's Right to Work Law and Seattle's Revised Use of Force/Firearm Policy are Both Upheld

International Association of Machinists District 10 v. Wisconsin, no. 2016AP820 (Wis. Ct. App. Sept. 19, 2017).

The Wisconsin Court of Appeals has concluded that the Wisconsin Right to Work Law does not effect an unconstitutional taking of union property.

LINK

Mahoney v. City of Seattle, no. 14-35970 (9th Cir. Sept. 19, 2017).

Congratulations to Pete Holmes, Seattle City Attorney and his great team in Seattle (argued by Gregory Colin Narver, Assistant City Attorney) on a nice win in an interesting case. Officers of the Seattle Police Department (about 125 of them), upset over an agreement by the city and the DOJ that adopted a new use of force (UF) policy, filed suit asserting that the new policy violated their Second Amendment rights to use their firearms in self-defense.

Not so, said the lower court and on September 19, the Ninth Circuit agreed. The Circuit noted:

"The UF Policy explicitly recognizes that Appellants may use their department-issued firearms in self-defense in an encounter with a suspect-including the use of deadly force with a firearm. The UF Policy states that "[d]eadly force may only be used in circumstances where threat of death or serious physical injury to the officer or others is imminent[,]" and recognizes that "sometimes the use-of-force is unavoidable[.]" As a result, the UF Policy does not impose a substantial burden on Appellants' right to use a firearm for the purpose of lawful self-defense."

LINK

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