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First Amendment: Ordinance Granting Police Chief Power to Deny License Deemed Prior Restraint

American Entertainers, LLC v. City of Rocky Mount, No. 17-1577 (4th Cir. April 27, 2018).

The Fourth Circuit finds that a city ordinance regulating an exotic dance club does not pass constitutional muster because it requires a Police Chief to pick and choose which local and state laws are applicable.

Rocky Mount regulated sexually oriented businesses by requiring them to obtain a license prior to operation. The two provisions at issue permitted Rocky Mount's police chief to deny a license if either (1) "the operation [of the sexually oriented business], as proposed by the applicant, if permitted, would not comply with all applicable laws, including, but not limited to, the city's building, zoning, and health regulations;" or (2) any license applicants or other specified business principals are "not over the age of twenty-one . . . years." American Entertainers, an exotic dancing venue, sued the city, arguing that the licensing regulation violated the First Amendment by being overbroad and a prior restraint that gave government officials "unbridled discretion" to deny license applications. They also alleged an Equal Protection claim because the city barred eighteen-to twenty-one-year-olds from owning a "sexually oriented business." The district court

rejected all three claims.

On appeal, the Fourth Circuit affirmed the district court's denial of overbreadth and Equal Protection challenges; however, the court held that the district court erred by rejecting American Entertainers' prior restraint claim where the challenged provision was insufficiently narrow, objective, and definite to pass constitutional muster. The relevant license-denial provision was deemed to sweep too broadly by requiring the police chief to choose on a case-by-case basis which particular laws to consider in evaluating applications. Further, the court suggested that even if the police chief somehow each time considered every law across all relevant jurisdictions, the sophisticated analysis inherent in various laws' application would require the police chief to exercise a constitutionally impermissible amount of discretion in evaluating applications.

Accordingly, the court held as unconstitutional the relevant denial provision in the ordinance and remanded to the district court to consider whether and to what extent the provision was severable from the remainder of the ordinance.

LINK

Opioids: Extent of Bad Actors' Criminality

United States v. Garrison, No. 15-50137 (9th Cir. Apr. 25, 2018).

One of many criminal cases illustrating the consequences of Big Pharma ignoring its responsibilities and unscrupulous medical professionals taking advantage of a flood of prescription narcotics.

As the Ninth Circuit begins its opinion, "[W]e trust doctors and healthcare professionals to be conscientious gatekeepers to these dangerous and potentially fatal drugs. But unfortunately some medical professionals betray their duty to do no harm as healthcare providers and abuse their prescription pads."

That is what occurred at the Lake Medical Group clinic (Clinic), where David Garrison (Garrison) worked as a licensed physician's assistant from summer 2009 until the Clinic was closed in February 2010.

The facts described by the Circuit are unfortunately not unique-the Clinic was a "pill mill" which generated 13,207 prescriptions over a two-year period, resulting in the acquisition of more than one million maximum-strength OxyContin tablets. But Garrison and his co-conspirators were particularly enterprising:

> The Clinic employed "patient recruiters" who induced people living in homeless shelters and rescue missions to visit the Clinic. These of course were not true "patients" in the ordinary sense of that word. The Clinic would then use the names and Medicare or Medi-Cal cards of the recruited patients to generate fraudulent OxyContin prescriptions. The recruited patients did not retain the OxyContin that they were prescribed. Instead, people working for the Clinic retrieved the drug from participating pharmacists or from the recruited patients, and the Clinic operators then had the pills sold illegally.

Given that maximum-strength OxyContin pills were selling for up to $100 each at the time, the potential proceeds to Garrison and his Clinic colleagues would have been stratospheric.

Recruited patients testified at trial that they had never been examined by anyone at the Clinic, yet their medical files reflected that they had been given an OxyContin prescription in Garrison's

handwriting, although on other physicians' prescription pads. The prosecution also produced video evidence of Garrison prescribing OxyContin to a person posing as a recruited patient after only a six- minute interaction; a medical expert testified that based on the discussion in the video there was no medical basis for that OxyContin prescription.

The Ninth Circuit upheld Garrison's ten-year sentence, refusing to find credible his protestations that he had no knowledge of the Clinic's criminal enterprise.

LINK

Opioids: No Federal Question Jurisdiction Merely Because Plaintiff Names Federal Controlled Substances Act; Remand to State Court

State of Delaware v. Purdue Pharma, no. 1:18-383 (D. Del. Apr. 25, 2018).

The Delaware district court has declined to find federal jurisdiction in an opioid action merely because the defendant was alleged to have violated the federal Controlled Substances Act; there were sufficient state-based claims to require that, in the absence of diversity jurisdiction, the case be remanded to the Delaware Superior Court.

In January 2018, the Attorney General of Delaware filed suit in the Superior Court of the State of Delaware against the manufacturers, distributors, and pharmacy retailers of prescription opioids, asserting a spectrum of state law claims including Consumer Fraud, Public Nuisance, Negligence, Unjust Enrichment, and Civil Conspiracy.

McKesson Corporation (McKesson), a primary opioid distributor and defendant in the action, filed a notice of removal to the district court on the basis of federal question jurisdiction, asserting that plaintiff's claims "aris[e] solely [from duties] under the [F]ederal Controlled Substances Act."

The federal district court in Delaware declined to assert jurisdiction, providing a textbook analysis of the relevant considerations:

> To remove this case to federal district court, McKesson must establish that this Court has "original jurisdiction" due to the action "arising under" federal law. 28 U.S.C. § 1331. Federal question jurisdiction is governed by the well-pleaded complaint rule, which "provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiffs properly pleaded complaint." *Kline,* 3 86 F .3d at 251. This Court has federal question jurisdiction over all civil actions "arising under the Constitution, laws, or treaties of the United States."

As the court explained, the "arising under" standard can implicate federal jurisdiction when "federal law creates the cause of action asserted." While some state law claims can implicate federal jurisdiction when they "implicate significant federal issues," those cases are exemplary and constitute a "special and small category" of federal question jurisdiction.

To determine whether a state-law claim implicates federal question jurisdiction, "the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." But "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharm. Inc. v. Thompson,* 478 U.S. 804, 813 (1986).

The challenge for McKesson was to demonstrate that the federal issue allegedly implicated in

Delaware's complaint was "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution without disrupting the federal-state balance approved by Congress."

In Count V of its complaint, Delaware asserted that that the distributor and pharmacy defendants "misrepresented material facts [or] suppressed, concealed, or omitted material facts with the intent that consumers will rely thereon." McKesson argued that asserts that this claim was based on federal law because it stated that defendants "have violated Delaware and Federal laws and regulations by ... habitually filling suspicious or invalid orders for prescription opioids ... and failing to operate a system to disclose suspicious orders of controlled substances."

As the court pointed out, however, Count V "makes reference to far more than McKesson draws attention to." While Delaware proffered one theory that made reference to federal law, it also asserted five other theories by which McKesson misrepresented or concealed facts--each of which was unrelated to federal law. Most importantly, the court found, Count V asserted that the defendants' misrepresentations and concealed facts constituted violations of the Delaware Consumer Fraud Act (DCFA). While violation of the federal Controlled Substances Act (CSA) could form the basis for a DCFA violation, "Defendants may be found to have violated the [DCFA] on any of the other five theories Plaintiff asserted in the complaint. The issue of whether Defendants misrepresented their compliance or violation of federal laws was therefore not necessarily raised-Delaware's claim could proceed solely under one of many state law theories. For example, "[d]efendants ... misrepresented or concealed material facts that they ... have failed to implement effective business practices to guard against diversion of highly-addictive opioid products."

McKesson's federal law argument was further stymied by the fact that Delaware has its own Controlled Substances Act which, like the federal CSA, requires distributors to maintain "effective controls against diversion [into illegitimate] channels."

In sum, Delaware's complaint was replete with more than sufficient state-law claims to avoid Federal Question removal to federal court (which would then have resulted in, with virtual certitude, transfer to the National Prescription Opiate MDL before Judge Polster in Cleveland).

LINK

Qualified Immunity - Officers Acted Reasonably under Split-Second Circumstances

Williams v. City of Chattanooga, no. 1:16-cv-477 (E.D. Tenn. Apr. 18, 2018).

An Eastern District of Tennessee decision finds that officers acted reasonably in shooting a man already lying on the ground, because they could not discern whether he had retrieved his weapon and was about to fire at them.

In December 2015, Chattanooga police responded to an incoherent midday 9-1-1 call placed by Javiero Eagle (Eagle). Eagle was standing in front of his apartment with his young daughter, but retreated inside as the squad car approached. A gunshot was heard and he returned to the doorway holding a pistol. Officers tried to convince him to drop the weapon, which he placed on the ground several times, only to retrieve it if police moved closer. He retreated and reappeared several times, dragging his daughter while brandishing the pistol and a samurai sword. He eventually left the girl alone, giving one officer a chance to whisk her to safety--but Eagle rapidly re-emerged and took aim at the officer carrying his child. Two officers fired one round each at Eagle and he fell to the ground, his pistol beneath him. As police approached him, Eagle rolled

onto his stomach and into a prone position and stretched his hands forward. Five officers then fired. Despite lifesaving efforts at the scene, Eagle soon succumbed.

Auriana Williams (Williams), Eagle's girlfriend and the mother of his daughter, brought suit against various officers and the City of Chattanooga under 42 U.S.C. §1983 and under the Tennessee Governmental Tort Liability Act. Defendants moved for summary judgment on the basis of qualified immunity.

The district court's decision provides a thorough summary of the relevant case law. To overcome qualified immunity, Williams had to show: "(1) defendant's act violated a right that was so clearly established that a reasonable person would have known of it at the time of the incident, and (2) evidence that shows what happened 'was objectively unreasonable in light of the clearly established constitutional right.'"

The only circumstance in which the Fourth Amendment permits police to use deadly force is when there is probable cause to believe the suspect poses an imminent threat of serious physical harm, either to the officers or to others. But standards like "probable cause" are not susceptible to precise definitions. As Justice Scalia noted with characteristic flourish in *Scott v. Harris*, 550 U.S. 372, 383 (2007), "[I]n the end we must still slosh our way through the factbound morass of 'reasonableness.'"

The court founded its inquiry on *Graham's* reasonableness standards, applying the perspective of a hypothetical reasonable officer in the defendant's position and with his knowledge at the time, but without regard to the actual defendant's subjective intent when taking his actions.

Here, there was no doubt that the first volley-fired at Eagle as he attempted to shoot the officer retreating with his daughter-was reasonable. The second volley, implicating all five officers who shot Eagle as he was prostrate but moving, necessitated a more thorough discussion. The court looked first at "the most obvious circumstance that overshadowed the events leading up to Eagle's death, which was his mental state." A reasonable officer would have rightly concluded that Eagle was highly volatile and unpredictable. As the Supreme Court had found in *Mullenix*, 136 S. Ct. at 311-12 "[C]onsidering the unpredictability of [the suspect's] behavior ... we think the police need not have taken [a] chance and hoped for the best."

The location of Eagle's weapon was central to assessing the second volley. It was unclear to the officers after Eagle fell where or whether he had dropped his gun. "Plaintiff now concedes-after months of discovery and carefully viewing a bystander cell phone video frame-by-frame-that Eagle's pistol fell near or underneath him. However, Plaintiff was able to reach her conclusion with the benefit of hindsight, which was something Defendant-Officers did not enjoy." They offered conflicting testimony regarding the gun's location prior to the second volley. But "[s]uch inconsistencies do not create a genuine issue of material fact as Plaintiff insinuates. Instead, discrepancies in perception are common after tense and rapidly unfolding confrontations." Under these circumstances, the defendant officers has a strong reason to believe he would use the weapon.

That belief was further bolstered due to Eagle's prior acts in drawing officers out of cover and attacking them. As the court noted, it would not have been unreasonable to suspect that Eagle was feigning incapacity as he lay on the ground to draw out the officers. When he quickly moved from a fetal position to lying prone, stretching out his arms toward one officer only six feet away, all the officers were justified in using deadly force.

Faced with this scenario, Williams advanced a novel argument to hold some of the officers liable, presenting an expert who asserted, in sum, that they fired on Eagle in the second volley based-not on their own threat assessment-but on a "sympathetic firing response" triggered by the sound of an inadvertent, isolated initial shot. The district court found the assertion contradicted by the video evidence; the initial shot was not inadvertent, and the firing sequence did trigger a constitutional violation. "Here, if some Defendant-Officers' fired at Eagle based on another

officers' decision to shoot, it did not violate a right that was clearly established at the time. It is not constitutionally unreasonable for an officer to rely on other officers' conclusions when deciding to apply deadly force if there is an independent basis to believe the suspect is armed and dangerous."

Given that there was no liability on the part of the officers, there could be no *Monell* liability for Chattanooga, whether based on a failure to train theory or otherwise.

LINK

IMLA congratulates Phillip Noblett, Chattanooga Deputy City Attorney, Keith Reisman, Assistant City Attorney and Janie Varnell of Davis & Hoss P.C. who collaborated to achieve dismissal of all Section 1983 claims against the City of Chattanooga and the six police officers.

Sanctuary Cities: Department of Justice has no Authority to Condition Localities' Receipt of Byrne JAG Funding on "Access" or "Notice"

City of Chicago v. Sessions, no. 17-2991 (7th Cir. Apr. 19, 2018).

In an opinion which lets stand a nationwide injunction, the Seventh Circuit has affirmed a lower court decision finding that Congress did not provide either the Attorney General or the Assistant Attorney General with the authority to impose conditions on the receipt of Byrne JAG funding.

In 2006, Chicago enacted its "Welcoming City" ordinance (Ordinance), reflecting its determination that, because one out of five of its residents is an immigrant, "the cooperation of all persons, both documented citizens and those without documentation status, is essential to achieve the City's goals of protecting life and property, preventing crime and resolving problems." The Ordinance set forth prohibitions against requesting or disclosing information as to immigration status, and against detaining persons based solely on a violation of civil immigration law. And, unless acting pursuant to law enforcement purposes unrelated to enforcing of civil immigration law, no agency or agent would give Immigrations and Customs Enforcement (ICE) agents access to a person being detained. (The Ordinance did not protect anyone who "has an outstanding criminal warrant, ... has been convicted of a felony, ... is a defendant ... where ... a felony charge is pending, ... or has been identified as a known gang member either in a law enforcement agency's database or by his or her own admission."

That same year, the federal government established the Byrne JAG program, which the primary vehicle for federal criminal justice funding to state and local governments. While various bills had been introduced in Congress seeking to condition federal funding on compliance with 8 U.S.C. § 1373 (intended to address "sanctuary cities" and prohibit government officials from restricting the exchange of information with federal immigration authorities regarding citizenship or immigration status), had been passed.

On January 25, 2017 President Trump issued an Executive Order directing the Attorney General and the Department of Homeland Security to ensure that sanctuary jurisdictions not receive Federal grants except as deemed necessary for law enforcement purposes. That Executive Order was challenged by Santa Clara County and other jurisdictions and permanently enjoined. Attorney General Sessions then issued a purported mandate to would-be recipients of Byrne JAG funds, requiring compliance with "notice," "access," and "compliance" conditions. Two of these were particularly suspect: the "notice" condition mandating advance notice to federal authorities of the release date of persons in state or local custody who are believed to be aliens,

and the "access" condition which required the local correctional facility to ensure agents access to such facilities and meet with those persons.

Chicago challenged the Attorney General. The district court granted Chicago's request for preliminary injunction as to those two conditions, applying it nationwide, and denied the Attorney General's motion to stay. The district court noted that nothing in the Byrne JAG statute granted express authority to the Attorney General to impose the notice and access conditions, and concluded that a nationwide preliminary injunction was required to provide full relief.

On appeal, the Seventh Circuit affirmed. It found disingenuous the Attorney General's characterization of the issue as "whether localities can be allowed to thwart federal law enforcement," labeling it as a "red herring," because "nothing in the case involves any affirmative interference with federal law enforcement." Similarly, "[w]hether the conscription of local and state law enforcement for federal immigration enforcement through the sword of withholding federal funds presents other Constitutional concerns is not before us." The question was whether the Attorney General possessed statutory authority to impose the conditions.

On appeal, the Attorney General argued that if he did not possess the requisite authority, the Assistant Attorney General did, under 34 U.S.C. § 10102(a)(6). The Circuit found no such power:

> The inescapable problem here is that the Attorney General does not even claim that the power exercised here is authorized anywhere in the chapter, nor that the Attorney General possesses that authority and therefore can delegate it to the Assistant Attorney General. In fact, as set forth above, the Byrne JAG provisions set forth the duties of the Attorney General and do not provide any open-ended authority to impose additional conditions. See 34 U.S.C. §§ 10152-10157. Therefore, the Attorney General's argument is that the "including" clause itself is a stand-alone grant of authority to the Assistant Attorney General to attach any conditions to any grants in that subchapter or other subchapters even though that authority is not otherwise provided in the chapter and is not possessed by the Attorney General. Because that interpretation is so obviously belied by the plain meaning of the word "including," the Attorney General's position is untenable.

Reviewing the Byrne JAG enabling language as a whole, the court found no grounds to infer a broad grant of discretion: "[I]t is inconceivable that Congress would have anticipated that the Assistant Attorney General could abrogate the entire distribution scheme and deny all funds to states and localities that would qualify under the Byrne JAG statutory provisions, based on the Assistant Attorney General's decision to impose his or her own conditions-the putative authority for which is provided in a different statute."

The court also upheld the nationwide scope of the injunction. The case presented essentially a facial challenge to a policy applied nationwide, the balance of equities favored nationwide relief, and the format of the Byrne JAG grant itself rendered individual relief ineffective to provide full relief. It opined that "the public interest would be ill-served here" by requiring simultaneous litigation of the same narrow question of law in countless jurisdictions, citing the large number of amici requesting the nationwide injunction--37 cities and counties, and 14 states and the District of Columbia.

The court could only reverse if the Attorney General had established that the district court abused its discretion. Given "the purely legal nature of the issue at stake, the broad and uniform impact on all grant recipients, the minimal harm to the Attorney General given the continued ability for voluntary cooperation, and the structure of the Byrne JAG statute that interconnects those grant recipients," the Circuit concluded that the lower court had not abused its discretion.

(**CONCURRENCE:** Judge Manion concurred with the Circuit's affirmance of the injunction to the City of Chicago but disagreed with its nationwide scope).

LINK

IMLA congratulates Benna Solomon and Justin Houppert of the Chicago Law Department on their win.

Sovereign Immunity: States Receiving Federal Funds Waive Rights to Immunity from Private Suits for Title IX Damages

Fryberger v. University of Arkansas, no. 16-4505 (8th Cir. May 2, 2018).

Disagreeing with the University of Arkansas and numerous state amici, the Eighth Circuit finds that acceptance of federal funds results in a waiver of a state's Eleventh Amendment immunity from a Title IX-based suit by a private citizen, including a claim for damages.

Elizabeth Fryberger (Fryberger) sued the University of Arkansas (University) over its response to her report of a sexual assault on campus. She sought compensatory and punitive damages for violations of Title IX, which says: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

The University moved to dismiss on the basis of sovereign immunity. The district court refused to dismiss the Title IX claims, citing the "Civil rights remedies equalization" amendment of 1986 - 42 U.S.C. §2000d-7 (the Remedies Equalization amendment).

Under the Eleventh Amendment, states are immune from suits brought in federal courts by their own citizens as well as by citizens of another state. However, a state may choose to waive such immunity. And Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds, and that waiver must be "unequivocally expressed."

Fryberger argued that under the Remedies Equalization amendment, the University consented to her suit for damages by accepting federal funds. The University acknowledged that it had accepted federal funds, and it did not challenge Congress's authority to enact Title IX or the Remedies Equalization amendment under the Spending Clause. The first question reviewed by the Eighth Circuit was therefore whether the University's consent was "unequivocally expressed in the Remedies Equalization amendment," which reads:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . ., *title IX of the Education Amendments of 1972* . . ., the Age Discrimination Act of 1975 . . ., title VI of the Civil Rights Act of 1964 . . ., or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) (emphasis added) are available for such a violation to the same extent as such remedies are available for such violation in the suit against any public or private entity other than a State.

The Circuit found that the Remedies Equalization amendment unequivocally expressed the University's consent to suit in federal court for violations of Title IX. That did not end the issue, because the University contended that its consent did not extend to the relief sought by Fryberger in her Title IX suit - *damages.* The University relied on Supreme Court precedent reaffirming that

"a waiver of sovereign immunity 'will be strictly construed, in terms of its scope, in favor of the sovereign,'" and "a waiver of sovereign immunity to other types of relief does not waive immunity to damages." That precedent, *Sossamon,* had addressed the waiver provision in the Religious Land Use and Institutionalized Persons Act. There, the waiver stated "A person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." The Court held that "appropriate relief" did not unambiguously include damages.

Here, the Remedies Equalization amendment stated that "remedies (*including remedies* both *at law* and in equity) are available for [violations of Title IX] to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a state." Damages were clearly a type of remedy at law.

The University and its amici (the states of Arizona, Arkansas, Kansas, Louisiana, Nebraska, South Carolina and Texas) argued that Congress did not intend the waiver to include Title IX suits for damages, because it was unclear in 1986 (when Congress enacted the Remedies Equalization amendment) whether there was a cause of action for damages. (In 1986, the Supreme Court had decided there is a private Title IX cause of action, but had not yet confirmed that the cause of action extends to suits for compensatory damages).

The Circuit disagreed, affirming the lower court. A review of the legislative history revealed a discernable intent to waive immunity to damages; "Congress 'specifically considered state sovereign immunity,' including immunity to Title IX suits for damages, and 'intentionally legislated on the matter,' conditioning funds on a waiver of that immunity."

Fryberger's claim for damages could not be so easily rebuffed: "The Remedies Equalization amendment clearly and unambiguously expresses the University's consent to Title IX suits for damages. By accepting federal funds, the University in fact consented to suits for compensatory damages for violations of Title IX."

LINK

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