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FEATURED CASES:

Fifth Circuit Reversal: Takings Clause Did Not Require Compensation Where Police Damaged Residence

***Baker v. City of McKinney*, No. 22-40644 (5th Cir. Oct. 11, 2023).**

The Fifth Circuit reversed partial summary judgment that found the City liable for violating the Fifth Amendment and the Takings Clause of the Texas Constitution. The court ruled the Takings Clause does not require compensation for damaged property when it was objectively necessary for officers to damage that property in an active emergency to prevent imminent harm to persons.

On appeal, IMLA Submitted an amicus brief in support of the City of McKinney and in favor of a reversal. Authored by Timothy Dunn from Messer Fort PLLC, the brief urged the Fifth Circuit to adhere to established legal precedents, while highlighting the consequences of expanding the Fifth Amendment Takings Clause.

Background: In July 2020, Vicki Baker ("Baker"), a long-time McKinney resident, moved to Montana, leaving her daughter, Deanna Cook ("Cook") to prepare her McKinney home for sale. On the morning of July 25, Cook saw a Facebook post that Wesley Little ("Little") was on the run with a 15-year-old female "runaway." Cook recognized Little because he "did some work inside of Baker's home more than a year before the incident occurred." Baker had fired him at that time because of comments that made Cook uncomfortable. That same morning, McKinney police spotted Little driving a Corvette with the 15-year-old girl. Officers began pursuit, but "[i]t was a very fast Corvette," and Little evaded police.

He arrived at the Baker residence shortly thereafter with the 15-year-old girl and knocked on the door. Cook answered, and Little asked to come in and to put his car in the garage. Cook recognized the girl and, though frightened, formulated a plan to help: She agreed to let Little into the house, but then told him, falsely, that she had to go to the supermarket. Once away from the house, she called Baker and described the situation, and Baker called the police.

The police surrounded the home and engaged in a lengthy standoff with Little, who claimed to have terminal cancer and intended to get into a shootout with police to avoid prison. The minor with Little was allowed to safely leave the house and let police know that Little was heavily armed with long guns, and pistols. A standoff ensued, police used heavy mechanical equipment, explosives, gas grenades and drones to resolve the situation.

Eventually, Little took his own life. It was undisputed that the police actions during the standoff were considered beyond reproach, but they caused significant damage to Baker's property. Explosives used by the police left Baker's dog permanently blind. Extensive damage to the house resulted from the gas grenades being deployed. Structural damage was incurred due to heavy mechanical equipment, and nearly all of Baker's personal belongings, including valuable antique collectibles, were destroyed.

Baker sued the City of McKinney for violating her property rights under the Fifth Amendment and the Texas Constitution. Baker claimed the City was liable under the Fifth Amendment directly and under §1983. The City replied with a 12(b)(1) and 12(b)(6) motions, primarily arguing Baker had no cause of action under the Fifth and Fourteenth Amendment, and the complaint failed to properly allege a *Monnell* claim.

Baker was granted partial summary judgment on the Fifth Amendment and Texas Constitution questions. The City filed for a JMOL, arguing that the §1983 claim was not adequately plead, and that Baker's *Monnell* claim failed because she did not show her alleged constitutional injury was caused by an official city policy, or policymaker. The district court denied the motion.
After a one-day trial, the jury found the City liable for damages under §1983. The jury found the City was acting under color of state law when it refused to compensate Baker and awarded her just over $60,000 for damages to her home and personal property.

Appeal: The City appealed. The central issue in the appeal was whether the Takings Clause requires compensation for property damage when it was objectively necessary for police officers to damage property in an active emergency to prevent imminent harm to persons.

The City argued for a bright line approach: property was damaged pursuant to the exercise of lawful police powers, therefore there had been no compensable taking under the Fifth Amendment. Baker argued that although the damage was necessary, the claim must be analyzed as a Takings because this was a case of government agents destroying private property.

Although the Fifth Circuit was unconvinced by the City's argument, finding it overly broad, and not based on history, tradition and precedent, the appeals court reversed.

Analysis: In analyzing the historical and legal precedents, the court determined that a "necessity" or "emergency" privilege has been recognized in Takings Clause jurisprudence since the Founding. Notably, the court cited *Respublica v. Sparhawk*, 1 U.S. 357, 1 L. Ed. 174 (1788) as a significant historical case that upheld the principle of necessity, allowing the government to take action without compensation in times of public emergency. *Respublica* illustrated the longevity of the necessity privilege, and the Supreme Court, in *Bowditch v. City of Boston*, 101 U.S. 16, 25 L. Ed. 980 (1879), had acknowledged this privilege in the context of Massachusetts law.

The court emphasized that this necessity exception has a deep historical and traditional basis, allowing for the government to damage or destroy property without compensation in times of imminent peril or grave threats to public safety. The court did not set specific boundaries for this exception but held that in the present case, it applied because it was objectively necessary for law

enforcement officers to damage or destroy Baker's property during an active emergency to prevent imminent harm to persons.

The court concluded that the Takings Clause did not require compensation for Baker's damaged or destroyed property in this specific context, without making a definitive determination on the broader scope of the necessity exception. This ruling reinforces the principle that private property rights may be subordinated to the higher demands of public welfare in times of emergency.

Baker v. City of McKinney

Fifth Circuit Rules in Favor of Communities, Clarifying Evidentiary Standard for First Amendment Restrictions on Sexually Oriented Businesses

***Ass'n of Club Exec's. v. City of Dall.,* No. 22- 22-10556 (5th Cir. Oct. 12, 2023).**

The Fifth Circuit, citing *Renton* and Justice Kennedy's concurrence in *Alameda*, vacated a preliminary injunction that blocked the enforcement of an Ordinance restricting the operation of a sexually oriented business. The appeals court determined that the City satisfied both components of the *Renton* standard, as the ordinance was crafted to advance a significant governmental interest while also providing reasonable alternative means of communication.

On appeal, IMLA submitted an amicus brief supporting the City of Dallas. The brief, authored by Joshua Skinner from the City of Arlington Texas, argued that the regulations of sexually oriented businesses are subject to intermediate scrutiny and presented several arguments in alignment with the Circuit Court's perspective.

Facts: In 2021, a streak of violent crime prompted the city of Dallas, Texas to establish a police task force to surveil local sexually oriented businesses (or "SOBs") which were associated with the surge. Over an approximately eight-month period, the task force produced over 100 felony arrests, over 1,100 citations, and performed hundreds of contraband seizures in the areas associated with these SOBs.

In January 2022, Ordinance No. 32125 was unanimously passed by the city council with the stated purpose to "reduce crime and conserve police and fire-rescue resources" and promote the public welfare. Under this new rule, licensed SOBs were prohibited from operating between the hours of 2:00 a.m. and 6:00 a.m., which were the hours which the council determined correlated most directly with an increase in violent crime. In addition to the task force observations, significant supplemental evidence was submitted to the city council. This included an analysis of "2019-21 data on crime occurring within a 500-foot radius of licensed SOBs," illustrating an increase in violent crime and 911 calls during these hours, and corroborative reports from the nearby cities of Beaumont and Amarillo showing similar patterns.

The plaintiffs, a small group of SOB's and their trade association, initially, requested and were granted a preliminary injunction based on their claims that "the Ordinance was a content-based restriction on their speech" and "that the City enacted it 'without valid empirical information to support it.'" The cCity appealed.

Analysis: While noting the "unsettled" nature of "caselaw on the continuing validity of the secondary effects doctrine," the district court had concluded that the Ordinance would likely fail under both intermediate and strict scrutiny. The Circuit Court disagreed with this evaluation of the case law. In contrast, the Fifth Circuit asserted that, "[f]or over three decades, the Supreme Court has analyzed such regulations under a two-step test adopted in *City of Renton v. Playtime Theatres*," 475 U.S. 41 (1986). According to this rule, "the Ordinance must be upheld if it is 'designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication.'"

Importantly, the plaintiffs' First Amendment claims depended on the incorrect assertion that *Renton* is no longer good law. This assertion relied heavily on a footnote located within the now overturned Fifth Circuit decision in *Reagan National Advertising of Austin, Inc. v. City of Austin* (*Reagan I*), 972 F.3d 696 (5th Cir. 2020). The decision in this case was based upon a rule developed in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), which suggests that strict scrutiny must be applied "whenever 'a regulation of speech on its face draws distinctions based on the message a speaker conveys, even if the law had a 'benign motive' or 'content-neutral justification.'"

While applying this rule in *Reagan I*, the Fifth Circuit included a footnote listing several precedents which may be abrogated by *Reed*, "including cases applying *Renton*." However, following the Supreme Court's reversal of *Reagan I* two terms ago in *City of Austin v. Reagan National Advertising,* 596 U.S. 61 (2022), the view of *Reed* upon which the footnote depended is no longer valid.

Furthermore, in its opinion, the Supreme Court specifically rejected *Reagan I*'s understanding of *Reed*, asserting that the overly broad interpretation "warning [inferior courts] that overreading *Reed* would 'contravene numerous precedents' upon which 'Reed did not purport to cast doubt.'" *City of Austin v. Reagan Nat'l Advert. of Austin, LLC* (*City of Austin*), 596 U.S. 61 (2022). Thus, the district court's failure to apply the secondary effects doctrine as prescribed in *Renton* is in direct conflict with the caution urged in *City of Austin* by the Supreme Court.

Plaintiffs additionally argue that, even if *Renton* still applies, the Ordinance would be subject to strict scrutiny because the imposed restriction is content based. Neither the Circuit nor the District Court agreed with this contention.

Under the district court's overly strict reading of *Renton*, the city council would be expected to "rule out" all other theoretical causes for the increase in violent crime and 911 calls in the vicinity of SOBs. This is incorrect. Rather, the reasonable belief standard of the secondary effects test merely requires that the city provide evidence "reasonably believed to be relevant." "So long as a city's 'inferences appear reasonable, we should not say there is no basis for its conclusion.'"

The first part of the *Renton* test is satisfied by the evidentiary standard established in *City of Los Angeles v. Alameda Books*. 535 U.S. 425. Notably, in their deliberation on how to apply the evidentiary standard, the court heavily relied on Justice Kennedy's concurrence in *Alameda*. In footnote 9, the court explicitly stated their alignment with "numerous other circuits in holding that Justice Kennedy's concurrence controls," and explained their rationale for following the concurrence when the Court has not generated a majority opinion. Where the district court deemed the council's evidence to be insufficient to prove that the Ordinance would be successful in reducing violent crime, the Circuit Court emphasizes the City's necessary "latitude" to make reasonable inferences about the association between crime and SOBs, particularly given the abundant data upon which this inference was based. Thus, because the City was able to show evidence which supported a reasonable inference that the "the operation of [SOBs] between 2 a.m. and 6 a.m. is detrimental to the public health, safety and general welfare," the *Renton* standard is satisfied.

Finally, the second part of the *Renton* test is satisfied, as the Ordinance does not substantially diminish the opportunities for and accessibility of the speech. In this case, SOBs remain free to operate "for twenty hours a day, seven days a week, while also, in the City's reasonable view, curtailing the violent crime and 911 calls with which the City was concerned." Thus, under intermediate scrutiny, the secondary effects test is satisfied.
The Fifth Circuit concluded that the district court's interpretation of *Renton* and *Alameda Books* was erroneous and "under longstanding Supreme Court precedent, the Ordinance is likely constitutional."

Ass'n of Club Exec's. v. City of Dall.