One Man's Trash is Another Man's Treasure: Charitable Solicitation via Donation Box

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They take many forms and are known by various names and acronyms. Donation box. Unattended charitable donation bin or UDCB.[1] Public donations receptacle.[2] Donation drop box.[3] Regardless of the nomenclature, these often-unassuming containers have become big business for the recycling companies that employ them to collect used goods for resale in the marketplace. Local and national charities and non-profits have utilized these boxes to collect donations from residents with excess personal goods that might otherwise go in the garbage. In the process, these organizations raise, either directly or indirectly, funds for operations and expenditures related to their goals. And cities benefit by seeing less personal property finding its way into municipal landfills.

But donation boxes are not without their own sets of problems. Commonly cited issues include dumping, illegally placed boxes, graffiti, and traffic-related hazards. Donation box operators come in many forms as well. While some are simple recyclers, attempting to divert clothing and other goods into their own resource stream, many donation box operators have contracted with charities, both large and small, to collect in their names. Contractual arrangements between charities and collectors often take the form of either flat fee or weight-based contingent on the number of tons of collected goods. While some will argue that such arrangements perpetuate fraud on the charitable-giving public, others will point to the positive symbiotic relationship enjoyed by many such charities and collectors. The low overhead associated with the business of collecting items through donation boxes is an inviting option for organizations looking to reduce solicitation costs to fund their objectives. Attempts by governmental entities to combat stated goals of reducing fraud have resulted in many of the same judicially struck-down efforts used to mandate specific requirements for in-person solicitation efforts. As this article will attempt to show, the Courts have not been reluctant to extend constitutional protections under the First Amendment to all forms of charitable solicitation, including unattended donation boxes. But as in the case of signs, recent case law interpreting the scope of such regulations impacting free speech rights has not resulted in cities being completely proscribed from regulating donation boxes.

I. The *Village of Schaumburg* trilogy

The concept of solicitation is not new. The notion of requesting assistance, either for money or tangible items, directly or indirectly, for oneself or for a collective, goes back as long as people have engaged in social discourse.[4] During the Twentieth Century, the United States Supreme Court has grappled with First Amendment infringement claims covering a spectrum of different types, methods, and parties. Most recent cases discussing donation boxes begin with a review of Justice White's opinion in *Village*

ILLUSTRATION: TRUJILLO DESIGN

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of Schaumburg v. Citizens for a Better Environment, as that case and its progeny established current controlling judicial precedent for First Amendment solicitation claim consideration.[5]

The Village of Schaumburg ("the Village") adopted an ordinance in 1974 with the intended desire to combat fraudulent representations by solicitors seeking funds either door-to-door on private property or by use of the public streets and right-of-ways.[6] The Village attempted to prohibit some solicitors from operating within the city by means of a permitting process and a contingent requirement that a solicitor must prove that not less than 75% of the proceeds of the applicant's solicitations would be used directly for the charitable purpose of the organization.[7] A not-for-profit corporation, Citizens for a Better Environment, filed suit alleging that the Village's ordinance and its subsequent denial of a permit under the ordinance, was unconstitutional and violated the First and Fourteenth Amendments of the United States Constitution.[8]

The issue considered by the Supreme Court was whether the Village had exercised its power to regulate solicitation in such a manner as to not unduly intrude upon the rights of free speech.[9] The Supreme Court found that the 75% threshold was a direct and substantial limitation on protected free speech activity.[10] Further, the Court held that the regulations could not be sustained unless they served a sufficiently strong, subordinating interest that the Village was entitled to protect.[11] Concluding that the solicitation was protected under the First Amendment and entitled to review under strict scrutiny, the Court held that while preventing fraud, protecting public safety, and preserving residential privacy were legitimate interests for the Village, there were less intrusive and more appropriate related regulations to address these concerns.[12]

Finding that the Village's ordinance was unconstitutionally overbroad, the Supreme Court quoted its earlier opinion in *Schneider v. State*.[13] The Court drew a distinction between punishing frauds and forbidding trespasses.[14] While a municipality might be tempted to adopt regulations that might be more efficient and convenient, such considerations do not empower a municipality to abridge freedom of speech and press.[15]

In *Secretary of Maryland v. Joseph H. Munson Co.*, the Supreme Court took up the discussion of a state statute enacted to address concerns of potential fraud.[16] There, the Court considered the State of Maryland's requirement that charitable organizations not pay professional fundraisers more than 25% of the total gross income raised by a fundraising activity. Unlike the municipal ordinance discussed in *Schaumburg*, the Maryland statute allowed a waiver to be granted by the state that would allow charitable organizations that would not otherwise be able to operate in Maryland.[18]

The question considered by the Supreme Court was whether the distinctions between the Schaumburg ordinance and the Maryland statute were sufficient to render the statute constitutionally acceptable.[19] After reviewing its analysis in *Village of Schaumburg*, the Court found that "While there no doubt are organizations that have high fundraising costs not due to protected First Amendment activity and that, therefore, should not be heard to complain that their activities are prohibited, this statute cannot distinguish those organizations from charities that have high costs due to protected First Amendment activities."[20] Additionally, the Court stated that the statute in all of its applications operated on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud.[21] One could argue, the Court stated, that the State's interest could just as easily be read as preventing mismanagement as well as fraud, but regardless the percentage limitation adopted by the statute was too imprecise to achieve either purpose.[22] Finding that the waiver provision only served to decrease the number of impermissible applications of the statute, the

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Court held that the statute as a whole was fundamentally defective.[23]

In 1988, the United States Supreme Court considered the third of its "big three" solicitation cases for the decade. In *Riley v. National Federation of Blind*, the Court considered North Carolina's three-tiered state licensing schedule that was purportedly enacted to combat fraud by professional fundraisers soliciting charitable contributions on behalf of their clients.[24] Citing *Schaumburg* and *Munson*, the Court stated "Our prior cases teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud."[25]

When determining whether there was any meaningful distinction between charitable organizations soliciting on their own behalf or contracting a professional fundraiser to do so on their behalf, the Court found the result to be the same.[26] "Whether one views this restriction of the charities' ability to speak … or a restriction of the professional fundraisers' ability to speak … the restriction is undoubtedly one on speech, and cannot be countenanced here."[27] The Court restated its earlier quote from *Schaumburg*, but renders it here more concisely as: "[W]e reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency."[28]

The Court was unmoved by the State's argument that the speech of a professional fundraiser should be treated differently than that of a charitable organization. "But even assuming, without deciding, that such speech in the abstract is indeed merely 'commercial,' we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech."[30] Finding that the North Carolina Charitable Solicitations Act's licensing requirements, compelled disclosure of donors, and reasonable fee requirements were all subject to strict scrutiny, the Court held all three components of the statute to unconstitutionally infringe on the First Amendment.[31]

II. The *Metromedia* trilogy

One year after the Supreme Court's decision in *Schaumburg*, Justice White delivered an equally important opinion that impacts regulations related to donation boxes. Instead of in-person solicitation, the subject matter this time was off-site advertising (i.e. billboards). The specific issue in question was the validity of a City of San Diego ordinance prohibiting outdoor advertising displays.[31]

Metromedia, Inc. and its fellow appellants were companies engaged in the outdoor advertising business in San Diego. The appellants sued alleging that the ordinance would effectively eliminate their business.[33] As the case worked its way through the California court system, each level of appeal reversed the previous one until the California Supreme Court ultimately held that the two purposes of the ordinance were within the City's legitimate interests and that the ordinance was "a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare."[34]

Addressing the subject of billboards and the First Amendment, the opinion quotes Justice Jackson, saying "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."[35] The Court stated that because the billboard creates a unique set of problems for land-use planning and development, the government has legitimate interests in controlling the noncommunicative aspects of the medium.[36] The government's interests in regulating the noncommunicative aspects of signs, the Court found, must be balanced against the individual's right to expression of the communicative aspects of signs.[37]

The Court lists the four-part test for determining the validity of government restrictions on commercial speech (as distinguished from more fully protected speech).[38] This test was adopted in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), and states: (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.[39]

With little discussion given to three parts of the test, the Court focused on a single question: does the ordinance directly advance governmental interests in traffic safety and in the appearance of the city? The Court found that the City could reasonably conclude that a commercial enterprise – as well as the interested public – has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises elsewhere.[41] Finding

that the ordinance was not overly broad and that it did directly advance substantial government interests, the Court concluded that the ordinance passed the constitutional test laid out in *Central Hudson*.[42]

San Diego's billboard ordinance still implicated noncommercial messages and as a result the Court found that while San Diego could distinguish between the relative value of different categories of commercial speech, it did not possess the same latitude when it came to noncommercial speech.[43] As a result, under the First and Fourteenth Amendment, because some noncommercial messages may be conveyed by billboards, San Diego must similarly allow billboards conveying other noncommercial messages through the same commercial and industrial zones.[44] The Court concluded that since the San Diego ordinance reached too far into the realm of protected speech, it was unconstitutional on its face.[45]

The Supreme Court considered a much smaller sign in *City of Ladue v. Gilleo* in 1994.[46] The sign at issue was originally a 24 by 36-inch sign placed in Margaret Gilleo's front yard in 1990 that read "Say No to War in the Persian Gulf, Call Congress Now."[47] Ms. Gilleo was advised that her sign violated the City of Ladue sign ordinance. After being denied a requested variance to the ordinance, Ms. Gilleo sued the City of Ladue and alleged that the ordinance violated her right to free speech under the First Amendment.[49] After obtaining a preliminary injunction against enforcement of the ordinance, Ms. Gilleo posted a letter-sized sign in her second story window that read "For Peace in the Gulf."[50] Ms. Gilleo's signs expressed noncommercial messages to the public and were prohibited under city ordinance as they did not satisfy any of the list of exceptions the code allowed for a number of different types of signs, including "for sale or rent" signs for residential property.[51] The Supreme Court affirmed the Court of Appeals which held that the ordinance was invalid as a "content-based" regulation because the City treated commercial speech more favorably than noncommercial speech and some types of commercial speech more favorably than other types of commercial speech.[52] Finding that the City of Ladue had totally excluded political, religious, or personal messages from the medium, the Supreme Court held that the City of Ladue's ban on almost all residential signs violated the First Amendment.[53] On top of discussing the disparity between the sign code's treatment of commercial and noncommercial speech, the Court also discussed the role of the location (i.e. the residential yard of a neighbor) as a significant factor in considering the prohibition on residential signs.[54] With reference to Aristotle, the Court stated "[T]he identity of the speaker is an important component of many attempts to persuade."[55] As the location of a sign placed on one's residential property conveys to the reader the "identity" of the "speaker", the message conveyed may have more meaning than a similar sign with similar wording placed elsewhere.[56]

A content-based regulation was the subject of the Supreme Court's decision in *Reed v. Town of Gilbert*. The Town of Gilbert ("Town") had adopted a municipal sign code that classified different types of signs into different type of categories and enforced different requirements on each category.[57] One such category was "temporary directional signs" and the Town of Gilbert considered signs put out by the Good News Community Church and its pastor, Clyde Reed, to advertise the time and location of its services, to be such a sign.[58] The Town imposed strict time restrictions on such signs, restrictions that were not imposed on "ideological signs" and "political signs".[59] While an "ideological" sign could be up to 20 square feet in size and displayed for any length of time, a "temporary directional sign" was limited to 6 square feet in size and could not be displayed more than 12 hours before a qualifying event and 1 hour after.[60] The Supreme Court found that the Town's sign code was content-based on its face and applied strict scrutiny.[61] Finding that the Town's sign code was "hopelessly underinclusive", the Court held that the Town had not met its burden under strict scrutiny to prove that its sign code was narrowly tailored to further a compelling government interest.[62] Further, in her concurring opinion, Justice Kagan pointed that considering the *City of Ladue v. Gilleo* as a previous model, the Court could have resolved the issue without deciding the level-of-scrutiny question because "the law's breadth made it unconstitutional under any standard."[63] "[T]he law's distinctions between directional signs and others—does not pass strict scrutiny, or immediate scrutiny, or even the laugh test."[64]

III. The donation box trilogy: The Fifth, Sixth, and Ninth Circuits weigh in

With the foregoing cases in the background, the Fifth Circuit Court of Appeals heard the first of the three donation box-related cases that would be considered by the Fifth, Sixth, and Ninth Circuit Courts of Appeals.[65] The Fifth Circuit's case dealt with a familiar theme: the government's efforts

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to combat fraud in the area of charitable solicitation.[66]

In *National Federation of the Blind of Texas, Inc. v. Abbott*, the Fifth Circuit Court of Appeals considered the claims of nonprofit organizations who retained professional resellers to operate public receptacles for the purpose of soliciting donations.[67] The claims were made against a 2009 Texas statute requiring disclosures to be included on said public receptables. The provisions challenged consisted of three components: (1) an "identification" requirement, (2) a "sold for profit" disclosure requirement, and (3) a "fee arrangement" disclosure requirement.[68]

While the State of Texas argued that the statute was regulating mere commercial speech, the Court of Appeals was not convinced.[69] It found that "[a]t a minimum, the donation boxes implicitly advocate for their charity's views, ideas, goals, causes, and values. It is clear that Texans have choices when choosing to dispose of unwanted clothing or household goods."[70] The Court went on and stated "[T]he public receptacles are not mere collection points for unwanted items, but are rather silent solicitors and advocates for particular charitable causes."[71]

Upon reviewing the *Schaumburg* trilogy of charitable solicitation cases, the Fifth Circuit quoted the requirements of *Munson* and *Schaumburg*, saying "The Act will therefore be sustained as constitutional under the Speech Clause if (1) it 'serves a sufficiently strong, subordinating interest that the [government] is entitled to protect' and (2) it is 'narrowly drawn … to serve the interest without unnecessarily interfering with First Amendment freedoms.'"[72] Finding that the State of Texas could not meet its burden under strict scrutiny, the Court determined that the "fee arrangement" disclosure requirements of the statute were unconstitutional. The Court held that said disclosures should be modified to remove the offending provision, namely, the requirement that if a professional solicitor collects for a charitable organization under a flat fee agreement, that said flat fee amount be disclosed to the potential donor on the face of the donation box.[73] The statutory requirements related to identifying the charitable organization and disclosing that the donated goods would be sold for profit were upheld, but the provision requiring the disclosure of how the proceeds would be allocated between the charity and the donation box operator was found to be an unconstitutional infringement of the First Amendment.[74] Once again, much like the results in *Munson* and *Riley*, a court found that combating fraud through a mandatory disclosure requirement was not a sufficiently strong interest for the government to claim to infringe on free speech.

The Sixth Court of Appeals discussed donation boxes in 2015 when a non-profit corporation named Planet Aid sued the City of St. Johns, Michigan, ("City") for prohibiting the placement and use of donation boxes within the city limits.[75] During the City's appeal of a preliminary injunction, Planet Aid argued that its speech regarding charitable giving was protected by the First Amendment and that the ordinance was a content-based restriction subject to strict scrutiny. The City conceded that the speech was eligible for First Amendment protection, but that the bins were analogous to outdoor advertising signs, and that the ordinance was therefore a content-neutral time, place, and manner restriction that passes constitutional muster.[77] The Court disagreed, instead agreeing with the Fifth Circuit that donation boxes were "silent solicitors and advocates for particular charitable causes."[78] The Court held that speech regarding charitable giving and solicitation was entitled to strong constitutional protection, and the fact that such speech may take the form of a donation bin does not reduce the level of its protection.[79]

Concluding that the City's ban on donation boxes was a content-based restriction on protected speech, the Court determined that in order for the ordinance to pass constitutional muster, the City bore the burden of establishing that the ordinance was narrowly tailored to promote a compelling government interest.[80] After assuming that the City's stated interests in preventing blight and aesthetics were compelling, the Court held that the ordinance was not narrowly tailored to promote those interests.[81] The Court found that the ordinance "preemptively and prophylactically prevents all charities from operating outdoor, unattended donation bins within the City in the interest of aesthetics and preventing blight."[82] As a result, the Court held that Planet Aid was likely to succeed on the merits of its First Amendment claim and affirmed the preliminary injunction granted by the District Court.[83]

The Ninth Circuit got an opportunity to discuss donation boxes in *Recycle for Change v. City of Oakland*. In 2015, the City of Oakland adopted a comprehensive licensing scheme governing the operation of donation boxes within the city limits.[84] Referring to donation boxes as unattended donation collection boxes ("UDCBs"), the Oakland ordinance required an annual permit and

established numerous restrictions on the placement, size, maintenance, and density of said boxes.[85]

The Court condensed the issue of whether the regulation implicated protected expression to the following question: does a law that requires an enforcing officer to decide whether a UDCB collects personal items for the purpose of distributing, reusing, or recycling those items – regardless of the purposes of such activity – discriminate on the basis of content?[86]After reviewing the difference between the restrictions in Oakland's ordinance and the ban in St. Johns' ordinance, the Court concluded that the Oakland ordinance did not discriminate on the basis of any message.[87] Rather, the Court held, the ordinance discriminates on the basis of non-expressive, non-communicative conduct.[88] By disregarding the charitable or business purpose of the collection of goods, and focusing only on the conduct (which is neither expressive, nor communicative), the Oakland ordinance simply restricts the boxes themselves, as collection devices for discarded material.[89] The Court held that by doing so, the ordinance was therefore content-neutral to the extent it regulates speech or expressive activity at all.[90]

After concluding that the Oakland ordinance regulating UDCBs was content-neutral, the Court determined whether the ordinance would survive the immediate scrutiny standard outlined in *United States v. O'Brien*, 391 U.S. 367 (1968).[91] The Court held that Oakland's ordinance satisfied that level of scrutiny.[92] Further, the Court held that the ordinance was narrowly tailored to achieve its goal, which was stated in this case as "combating blight, illegal dumping, and graffiti."[93]

IV. Conclusion

So, what have we learned from the caselaw surrounding solicitation and commercial versus noncommercial speech? And how will the courts treat ordinances regulating donation boxes in the context of this caselaw?

Even before *Reed*, the courts were reluctant to let the government label donation boxes as commercial speech. Also, much like burning draft cards, the courts struggled with the problem of intertwined protected speech and unprotected conduct. The courts had to determine whether commercial interests could "outweigh" the protected speech interests of charitable organizations; in order words, could the use of professional fundraisers change protected charitable solicitation into less protected commercial speech? What degree of involvement changed the result? And finally, could the mere involvement of a charitable organization "elevate" the protection of a solicitor?

The answer, post-Reed, was content-neutral regulation. And perhaps most importantly, not focusing on the "content" component of the speech at all, but rather focusing on the "conduct" component. Just as a sign may implicate different interests if it waves in the hand of a panhandler than if it is placed in the second-story window of a residential structure, or installed along a major thoroughfare on a third-party billboard, so can a regulation be struck down as a violation of the First Amendment if it focuses on the content of a sign, or the charitable or business purpose of soliciting used goods through donation boxes. A city wishing to regulate donation boxes should clearly limit all types of boxes collecting discarded goods and narrowly tailor its ordinance to address the direct concerns associated with illegal dumping, blight, and graffiti. Efforts to differentiate between charitable solicitors, professional solicitors working on behalf of charitable solicitors, and pure commercial recyclers are likely to be invalidated by the courts. Cities should learn from earlier cases that attempts to combat fraud through permits for solicitors or mandatory disclosures are not likely to survive an allegation that they are infringements of protected free speech. Cities would be wise to focus on the boxes themselves, rather than attempt to restrict or categorize the "speech" of these "silent solicitors." ML

Notes

1. Recycle for Change v. City of Oakland, 856 F.3d 666 (9th Cir. 2017). *See also*, Planet Aid v. City of St. Johns, 782 F. 3d 318 (6th Cir. 2015).
2. National Federation of the Blind of Texas, Inc. v. Abbott, 647 F. 3d 202 (5th Cir. 2011).
3. Linc-Drop, Inc. v. City of Lincoln, 996 F. Supp. 2d 845 (D. Neb., Feb. 18, 2014).
4. Judith Welch Wegner and Mathew Norchi, *Regulating Panhandling: Reed and Beyond*, 63 S.D. L. Rev. 579. 581-585 (2019) (discussion of begging in the context of American panhandling and rise of "quality of life" regulations).
5. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 628-632 (1980) (provides a concise review of Supreme Court precedent beginning in the 1930s and through the 1970s on the topic of charitable solicitation and the difficulty of separating commercial intent from purely protected speech).
6. *Id.* at 622.
7. *Id.* at 624.

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8. *Id.* at 625.
9. *Id.* at 633.
10. *Id.* at 636.
11. *Id.*
12. *Id.* at 637-638.
13. *Id.* at 639, quoting *Schneider v. State*, 308 U.S. 147 (1939).
14. *Id.* at 639.
15. *Id.* at 639.
16. Secretary of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984).
17. *Id.* at 950.
18. *Id.* at 953.
19. *Id.* at 959.
20. *Id.* at 966.
21. *Id.*
22. *Id.* (footnote 14).
23. *Id.* at 968.
24. Riley v. National Federation of Blind, 487 U.S. 781, 784 (1988).
25. *Id.* at 789.
26. *Id.* at 794.
27. *Id.*
28. *Id.* at 795, quoting *Schaumburg* at 639.
29. *Id.* at 796.
30. *Id.* at 803.
31. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).
32. *Id.* at 496.
33. *Id.* at 497.
34. *Id.*
35. *Id.* at 501.
36. *Id.* at 502.
37. *Id.*
38. *Id.* at 507.
39. *Id.* quoting Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563-566 (1980)
40. *Id.* at 508.
41. *Id.* at 512.
42. *Id.*
43. *Id.* at 514.
44. *Id.* at 515.
45. *Id.* at 521.
46. City of Ladue v. Gilleo, 512 U.S. 43 (1994).
47. *Id.* at 45.
48. *Id.*
49. *Id.*
50. *Id.* at 46.
51. *Id.* at 45-46.
52. *Id.* at 47.
53. *Id.* at 58.
54. *Id. at 56.*
55. *Id.*
56. *Id.*
57. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2223 (2015).
58. *Id.* at 2225.
59. *Id.* at 2224-2225.
60. *Id.*
61. *Id.* at 2231.
62. *Id.*
63. *Id. at 2239.*
64. *Id.*
65. Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott, 647 F.3d 202 (5th Cir. 2011).
66. *Id.*
67. *Id.* at 207.
68. *Id.* at 206-207.
69. *Id.* at 213.
70. *Id.*
71. *Id.*
72. *Id.* quoting *Munson*, 467 U.S. at 960-61 (quoting *Schaumburg*, 444 U.S. at 636-37).
73. *Id.* at 215.
74. *Id.*
75. Planet Aid v. City of St. Johns, 782 F.3d 318 (6th Cir. 2015).
76. *Id.* at 322-323.
77. *Id.* at 323.
78. *Id.* at 325.
79. *Id.* at 326.
80. *Id.* at 330.
81. *Id.*
82. *Id.*at 331.
83. *Id.*
84. Recycle for Change v. City of Oakland, 856 F.3d 666, 668 (9th Cir. 2017).
85. *Id.* at 668-669.
86. *Id.* at 671.
87. *Id.* at 672.
88. *Id.*
89. *Id.* at 673.
90. *Id.*
91. *Id.* at 674.
92. *Id.*
93. *Id.* at 675.

