Daniel Bursuck - [New post] Fed. Dist. Court in NY Finds Utility Pole Warning Signs are Forced Speech in Violation of First Amendment

From: LAW OF THE LAND <comment-reply@wordpress.com>
To: <piroschka.glinsky@tucsonaz.gov>
Date: 09/20/2016 5:01 PM
Subject: [New post] Fed. Dist. Court in NY Finds Utility Pole Warning Signs are Forced Speech in Violation of First Amendment

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New post on **LAW OF THE LAND**

Fed. Dist. Court in NY Finds Utility Pole Warning Signs are Forced Speech in Violation of First Amendment

by Patricia Salkin

Editor's note: This posting originally appeared on the Rocky Mountain Sign Law Blog at: http://www.rockymountainsignlaw.com/2016/09/court-utility-pole-warning-signs-forced-speech-violation-first-amendment/#more-2087

A federal court in New York found a town law requiring the placement of warning signs on utility posts violated the First Amendment as a content based restriction on noncommercial speech.

In 2014, the Town of North Hempstead, New York adopted a local law requiring warning signs on utility posts in the town. The law came about following local opposition to the erection of a new overheard electricity transmission line through the town. As part of the project, the Long Island Power Authority (LIPA) and PSEG Long Island LLC (PSEG) placed new utility poles along existing right-of-ways. The new poles were, like the prior poles, treated with a chemical called pentachlorophenol ("Penta"), which was used for the purpose of preventing damage to the wood poles. Around April 2014, opponents of the project unsurfaced EPA information suggesting that Penta was harmful to human health. In June 2014, the Town Supervisor announced that the town would consider local bills to require the placement of warning signs on the utility poles advising the public of the dangers of Penta. The town bill was eventually approved in September 2014.

In January 2015, LIPA and PSEG commenced a judicial action in federal court, alleging violations of the federal and New York constitutional provisions pertaining to freedom of speech, alleging that the local law was vague and overbroad, and also arguing that the town's law was preempted by state statutes giving the New York State Department of Environmental Conservation jurisdiction over Penta and other pesticides.

On summary judgment, the court found that the warning signs in question constituted noncommercial, as opposed to commercial, speech. Generally, the government may require mandatory disclosures with respect to commercial speech, but the government's power to compel certain speech is far more circumscribed in the area of noncommercial speech. In the court's words, "the warning signs bear no discernible relationship to the Plaintiffs' products, services, or other commercial interests, and are therefore outside the purview of the commercial speech doctrine." The court also found that the speech in question was not government speech, since the government was not speaker on the signs in question and the government appropriated no funds in order to transmit the message.

Moving on to strict scrutiny analysis, the court found that the town had neither a compelling interest in the warning signs nor were the signs narrowly tailored to the government's interest. In the court's eyes, the town could have chosen to convey its message through television advertising, public education campaigns, or signs on public property, even though the town argued that placing warning signs on the utility poles was more effective. Per the court, the town failed to establish that there was a serious public safety concern regarding Penta, and further failed to provide evidence supporting the efficacy of its chosen method of addressing public safety concerns.

This case reflects a growing trend in which courts place exceedingly high evidentiary demands on local governments to demonstrate the importance of asserted governmental interests and to justify the means selected to further such interests. Furthermore, this case has uncovered the most significant problem with Justice Thomas's suggestion in *Reed* that local governments *can*satisfy strict scrutiny by demonstrating interests in public safety: the lower courts are generally unwilling to find in favor of the government when strict scrutiny is applied, and there is virtually no clear standard for determining whether a local government's safety interests are actually compelling. While the court in *PSEG v. Town of North Hempstead* may have been swayed by the nature of public opposition to the new utility line, it seems that Justice Breyer's worst nightmares about content neutrality—that necessary government safety warnings might become unconstitutional—may be coming true.

PSEG Long Island LLC v. Town of North Hempstead, 158 F.Supp.3d 149 (E.D.N.Y. 2016).

Patricia Salkin | September 10, 2016 at 8:00 pm | Categories: Current Caselaw - New York, Signs, Uncategorized | URL: http://wp.me/p64kE-2Co

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Daniel Bursuck - [New post] Fed. Dist. Court in NY Finds Village Sign Law Content Based

From: LAW OF THE LAND <comment-reply@wordpress.com>
To: <piroschka.glinsky@tucsonaz.gov>
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New post on **LAW OF THE LAND**

Fed. Dist. Court in NY Finds Village Sign Law Content Based

by Patricia Salkin

Editor's note: This post originally appeared in the Rocky Mountain Sign Law Blog at: http://www.rockymountainsignlaw.com/2016/09/federal-court-finds-new-york-villages-sign-code-content-based

A federal magistrate judge in New York recommended invalidating yet another sign code as content based in violation of the First Amendment to the U.S. Constitution. In February 2015, a resident of the Village of Perry, New York, Carolyn Grieve, posted signs complaining about the village's spending policies. Grieve received a notice of violation from the village. In April 2015, Grieve filed suit against the village, alleging that the sign code was content based and an unconstitutional prior restraint on speech, and that the village had engaged in selective enforcement of the code against her. Because the village code allowed the display of several types of commercial signs without a permit while requiring permits for the display of noncommercial signs, the magistrate judge found the sign code to be content based. As the village offered no rationale to support its code provisions, the magistrate found that the village failed strict scrutiny review, and recommended summary judgment in favor of the plaintiff.

Grieve v. Vill. of Perry, 2016 WL 4491713 (W.D.N.Y. Aug. 3, 2016).

Patricia Salkin | September 9, 2016 at 7:57 pm | Categories: Signs, Uncategorized | URL: http://wp.me/p64kE-2Ck

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Daniel Bursuck - [New post] TX Appeals Court Finds that Political Sign Exception in the Highway Beautification Act is Content Based in Violation of the First Amendment

From: LAW OF THE LAND <comment-reply@wordpress.com>
To: <piroschka.glinsky@tucsonaz.gov>
Date: 09/20/2016 5:08 PM
Subject: [New post] TX Appeals Court Finds that Political Sign Exception in the Highway Beautification Act is Content Based in Violation of the First Amendment

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New post on **LAW OF THE LAND**

TX Appeals Court Finds that Political Sign Exception in the Highway Beautification Act is Content Based in Violation of the First Amendment

by Patricia Salkin

Editor's Note: This posting originally appeared on the Rocky Mountain Sign Law Blog here:

The Texas Highway Beautification Act permits "political" signs to be displayed no more than 90 days before an election and 10 days after an election. Because this provision regulates speech based on its content, two weeks ago, the Texas Court of Appeals found the entire Highway Beautification Act violates the First Amendment to the U.S. Constitution. The court's decision in *Auspro Enterprises, LP v. Texas Department of Transportation* is a major blow to state and local efforts to control billboard advertising.

The case began in 2011 when a head shop owner in Bee Cave, Texas, Auspro Enterprises, displayed a sign advocating the election of Ron Paul for President outside of the time limits prescribed by the Highway Beautification Act. The state Department of Transportation brought an enforcement action against the landowner in county district court to have the sign removed. The district court ruled in favor of the state. While the landowner's appeal was pending, the U.S. Supreme Court granted certiorari in *Reed v. Town of Gilbert*. In *Reed*, the Court found that regulations of speech that contain facial distinctions between subjects and messages were content based and subject to strict scrutiny.

Like most of the state highway advertising laws that came into existence following the Federal Highway Beautification Act of 1965, the Texas law contains a general ban on advertising signs along state highways, with several exceptions. Among the exceptions to the ban were: signs located in commercial or industrial areas, real estate signs, signs

advertising natural or historical sites, on-premises advertising signs, safety warning signs, and the political sign exception in question in the case.

The Texas appeals court found that the political sign exception in the Highway Beautification Act was content based and subject to strict scrutiny under *Reed*. The Texas transportation department defended the exception on the grounds that it actually *protected* political speech by allowing such speech when it would otherwise be prohibited by the act, however, because the law was nearly identical in structure to the Gilbert sign code at issue in *Reed*, the court did not agree. The state agreed that the act could not pass strict scrutiny review, and the court thus found the act unconstitutional. The court went on to find that the provisions in question were not severable from the remaining advertising restrictions in the Highway Beautification Act, and invalidated all of the advertising restrictions in the act.

Strictly speaking, the Texas Court of Appeals' decision is limited to Texas's highway advertising law, yet the decision is now the second since 2015 invalidating a state highway beautification act (read about the first here). The decision also distinguishes an earlier, pre-*Reed* Texas Supreme Court case upholding the Highway Beautification Act against a similar challenge. Additionally, the court's determination that the state's severability law did not apply in the context of the challenge to the Highway Beautification Act means that the law now requires a legislative fix if it is to remain in effect.

The validity of state highway advertising laws, on which federal transportation funding to the states are conditioned, has been in question since the Court decided *Reed*. While several state and federal courts have upheld special restrictions on off-premises advertising, state highway advertising laws such as Texas's, that contain additional distinctions between forms of noncommercial speech over and above those set forth in the federal law, have fared poorly in the post-*Reed* era. It remains to be seen whether other states will see similar judicial challenges to their highway advertising laws, or whether any challenge will be brought against the Federal Highway Beautification Act. Such challenges could have significant ramifications for federal transportation funding programs, as well as state and local efforts to prevent a proliferation of off-premises billboards along state and federal highways.

Auspro Enterprises, LP v. Texas Dep't of Transp., 2016 WL 4506161 (Tex. Ct. App. Aug. 26, 2016).

Patricia Salkin | September 11, 2016 at 8:07 pm | Categories: Current Caselaw, Signs, Uncategorized | URL: http://wp.me/p64kE-2Ct

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Daniel Bursuck - [New post] 9th Circuit Court of Appeals Upholds Ordinances Limiting Motorized Mobile Billboards and Prohibiting Non-Motorized Mobile Billboards

From: LAW OF THE LAND <comment-reply@wordpress.com>
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9th Circuit Court of Appeals Upholds Ordinances Limiting Motorized Mobile Billboards and Prohibiting Non-Motorized Mobile Billboards

by Patricia Salkin

Editor's Note: This summary is reposted from the Illinois Municipal League Caselaw Summaries here: http://legal.iml.org/page.cfm?key=16762&parent=4196

This consolidated case challenged five ordinances among four municipalities – one (the "motorized mobile billboard ordinance") limited the type of sign that could be affixed to motor vehicles parked or left standing on public streets, and the others (the "non-motorized mobile billboard ordinances") prohibited non-motorized, mobile billboard advertising displays within city limits. The former only allowed for advertising signs that were painted directly upon or permanently affixed to the body of a vehicle and they could not extend beyond the length, width, or height of the vehicle. The latter ordinances prohibited "mobile billboard advertising displays" from parking on any public street.

The plaintiffs filed suit against the four municipalities claiming that the ordinances violated the First Amendment, an argument rejected by both the district court and the Ninth Circuit Court of Appeals. In considering whether the ordinances were content based, the courts found that although the ordinances used the term "advertising," that word refers to the activity of displaying a message and not to any particular content that may be displayed. The term "advertising" does refer to only commercial speech because all signs advertise some type of message regardless of whether the message is for commercial purposes. In addition, unlike the ordinances in *Reed v. Town of Gilbert*, No. 13-502 (U.S. June 18, 2015), the ordinances here did not single out a specific subject matter. Thus, the ordinances were content neutral.

The courts also found that the ordinances were proper time, place, and manner restrictions. The ordinances were narrowly tailored because they were not substantially

broader than necessary to achieve the cities' stated interests in traffic control, public safety, and aesthetics. Moreover, the ordinances provided ample alternative avenues of communication because they only foreclosed one form of expression – mobile billboards.

Lone Star Security and Video Inc. v. City of Los Angeles, Nos. 14-55014, 14-55050 (9th Cir. July 7, 2016)

Patricia Salkin | September 13, 2016 at 9:29 pm | Categories: Current Caselaw, Signs, Uncategorized | URL: http://wp.me/p64kE-2CJ

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