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School Outlaws Religious Songs from Holiday Concert

SUMMARY: A New Jersey school did not demonstrate hostility toward religion and did not violate the Establishment Clause of the United States Constitution when it removed religious songs from its December holiday concert. The United States Court of Appeals for the Third Circuit decided *Stratechuk v. Board of Education, South Orange-Maplewood School District*, on November 24, 2009.

BACKGROUND: In April 2001, the South Orange-Maplewood Board of Education adopted Policy 2270, entitled "Religion in the Schools." Recognizing the importance of religion in the lives of many of the school's students, the board's goal was to promote mutual understanding and respect for the rights of all individuals regarding their beliefs, values and customs. The board further recognized in adopting the policy that it served a diverse community with varying cultural, ethnic and religious orientation.

Policy 2270 stated that "when determining the appropriateness of activities: (1) the activity should have a secular purpose, (2) the activity should neither advance nor inhibit religion, and (3) the activity should have relevance to the curriculum."

The December 2003 concert included the Star Spangled Banner, Sounds of Hanukkah (a medley of 3 Hanukkah tunes), and the Christmas Sing Along, a medley of Joy to the World, Silent Night, Oh Come All Ye Faithful, and Hark the Herald Angels Sing. Following the concert, a parent wrote in to complain about the Christmas Sing Along because it focused on Christianity.

In an October 2004 Memo, Nicholas Santoro, the school's director of fine arts, set forth rules for the school's December concert. It included removal of religious songs addressing the winter holidays, though such songs continued in the classroom. The memo prompted complaints among music teachers, parents, other community members. They asked for religious tolerance.

The December 2004 concert had very limited religious content. The same month, Michael Stratechuk sued the school, arguing that Policy 2270 was hostile to religion and therefore violated the Establishment Clause.

ANALYSIS: The United States Supreme Court has determined that the First Amendment's Establishment Clause not only prohibits government from establishing or favoring a particular religion, it also prohibits singling out a particular religion for censorship or other disfavored treatment. Statechuk argued that Policy 2270 discriminated against Christian beliefs.

The Third Circuit analyzed this claim under two different Supreme Court standards. First, it used the three-pronged test of the 1971 Supreme Court case called *Lemon v. Kurtzman*. This test is referred to as the *Lemon* test. Government action violates the Establishment Clause if it 1) lacks a secular purpose, 2) has a principal or primary effect of advancing or inhibiting religion, or 3) fosters excessive entanglement with religion. The government action is unconstitutional if it has any of the three attributes. The second approach, called the *endorsement* test, asks whether a reasonable observer familiar with the history and context of a religious display would perceive it as a government endorsement of religion.

Applying each test, the court found that the school board had not violated the Establishment Clause with Policy 2270. Clearly, the policy had the secular purpose of respecting and tolerating the range of religious beliefs and traditions of its students. The goal and the effect of the policy was neither to advance nor inhibit religion. True, the policy required the school to analyze the religious content of songs and other materials, but this did not foster excessive entanglement—some entanglement is not necessarily excessive. The Third Circuit also concluded that, in light of the policy's efforts to respect and understand religions within specific boundaries, a reasonable observer would not find the policy to endorse religion.

The court therefore dismissed Stratechuk's appeal and left Policy 2270 intact.

EXCERPTS FROM THE COURT'S OPINION (By Judge Sloviter): "Under the Establishment Clause of the First Amendment, 'Congress shall make no law respecting an establishment of religion.' The Supreme Court has read this clause to forbid not only law respecting an establishment of a religion, but also an official purpose to disapprove of a particular religion or of religion in general. The touchstone for our [Establishment Clause] analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

"Here, there is no religious purpose – only a secular one – so the issue is whether this secular purpose is actually, as Stratechuk maintains, a purpose to disapprove of religion. The School District argues, and the District Court found, that the purpose of the policy was to avoid government endorsement of religious holidays and a potential Establishment Clause violation. Although there are few opinions addressing this type of secular purpose, the District Court cited several courts of appeals' opinions where the courts held that '[a]ctions taken to avoid potential Establishment Clause violations have a secular purpose under the purpose prong of the Lemon test.'

"Stratechuk maintains that this alleged purpose is a sham because the Establishment Clause does not require a prohibition on performing religious music and [v]irtually every court that has been asked to review year-end holiday concerts or music programs that have included religious music or music associated with religious holidays has upheld them. In support of this assertion, Stratechuk cites cases from the Eighth, Tenth, and Fifth Circuits that upheld the constitutionality of performing religious music in public schools.

"[A]s the District Court noted, the assumption that

the Establishment Clause does not require the restrictions enacted by Defendants . . . does not automatically render Defendants' stated purpose a sham. In other words, even if performance of religious songs did not violate the Establishment Clause, it does not follow that the goals underlying the School District's desire to avoid a potential Establishment Clause violation were disingenuous or impermissible.

"Moreover, as the School District points out, Stratechuk's argument that the purpose of the current interpretation of Policy 2270 is to unconstitutionally disapprove of religion and, in particular, Christianity . . . is based largely upon plaintiff's inaccurate factual contention that defendants' policy amounts to a ban on religious music in the school system. To the contrary, it is clear that the policy, as interpreted, does not prevent – and the record shows that it has not in fact prevented – the teaching of religious holiday songs in the classroom or the performance of songs with religious content at the December concerts (albeit not songs specifically related to winter holidays).

"We reject Stratechuk's argument that the fact that numerous students and parents have petitioned the school board and strongly urged it to reverse its policy demonstrat[es] beyond genuine dispute that a reasonable observer could only perceive that the policy disfavors religion. The constitutionality of a school board's policy toward religion cannot be decided by reference to popular opinion.

"The District Court acknowledged that the interpretation of the policy involves some entanglement with religion because the teachers must make selections with religious concerns in mind and because Santoro must approve these selections. However, the Court concluded that [t]his type of oversight - this drawing of distinctions between secular and religious themes - strikes the Court as no different from the screening that school districts engage in every day to ensure neutrality in matters of religion. The District Court also observed that [t]o conclude otherwise ignores the evidence and would undermine governmental efforts to comply with the Establishment Clause. We agree, and conclude that when examined under the *Lemon* test, Policy 2270 does not contravene the Establishment Clause."

COMMENTS & QUESTIONS

1. What was the school board's purpose in creating Policy 2270?
2. Did the policy amount to a complete ban on religious activities and discussions in the school?
3. What did Michael Stratechuk complain about?

Freedom of religion is the freedom to individually believe and to practice or exercise one's belief. The First Amendment to the United States Constitution contains two provisions regarding freedom of religion. The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Establishment Clause language prohibits a state or the federal government from setting up a church or passing laws which aid one, or all, religions, or giving preference to one religion, or forcing belief or disbelief in any religion. The Free Exercise Clause prohibits the state or federal governments from interfering with an individual's religious practices.

Stratechuk based his claim on a violation of the establishment clause. Stratechuk did not make a Free Exercise Clause claim because his children had not attempted to, and been stopped in their efforts to engage in particular religious activities or express particular religious beliefs. Do you think he might have been successful if he had made a claim under the free exercise clause?

Stratechuk argued on appeal that the court should follow three other circuit courts of appeal that upheld school districts decisions to allow religious music at year end holiday concerts. The court found that the First Amendment did not prevent the district from formulating a policy that precluded performance of religious holiday songs. They felt that there was a difference between allowing religious music at concerts and compelling a school district to permit religious holiday music or risk running afoul of the First Amendment. Do you agree with the Court's reasoning?

Schools are given much discretion in making decisions as to how to best create an inclusive environment in public schools. Do you think they exercise that discretion properly in this case? Do you think that this ruling is neutral towards religion? Or, do you think it represents a trend of cleansing religion from public schools?

How many accepted religions are there in the world? Is it reasonable for a school to include music from all of them in a concert? What's the best way to decide among them fairly? Would the school be violating the Establishment Clause if it allowed only Christmas songs at the December concert? What if it allowed Christmas and Hanukkah songs? If you still say yes, what about adding Muslim songs? Religion is a controversial subject area around the world. In light of that, do you think it's right to talk about it in schools?

If no student practiced a particular religion, could it be excluded from the curriculum? Is the correct way to be fair to survey the students and play songs and learn facts in direct proportion to the student body's religious composition?

What is your school's policy with respect to singing religious songs during the holiday season? What policy do you think is appropriate?

Wrongful Termination of Health Insurance

SUMMARY: A punitive damages award of $10 million was warranted where an insurance company wrongfully terminated and failed to reinstate health insurance coverage for a man with HIV. The South Carolina Supreme Court decided *Mitchell v. Fortis Insurance Company* on September 14, 2009.

BACKGROUND: Before entering college, Jerome Mitchell applied for health insurance with Fortis Insurance Company because he was no longer covered under his mother's policy. The Fortis application included a number of questions about his health. One of these asked whether he had ever been diagnosed as having or been treated for any immune deficiency disorder. Mitchell answered no. After reviewing his application, Fortis issued Mitchell a health insurance policy.

In April 2002, Mitchell offered to donate blood to the Red Cross. Before he could do so, the Red Cross took a sample of his blood to screen for infectious diseases. On May 13, the Red Cross informed Mitchell that his blood sample had tested positive for human immunodeficiency virus (HIV). The Red Cross advised Mitchell to see his personal physician to confirm or deny their finding. Mitchell immediately called Dr. Michael Chandler, who tested Mitchell the following day. Chandler's test confirmed the Red Cross's results. An assistant in the doctor's office made a chart note that said, "Gave blood in March -- got letter yesterday stating blood tested [positive for] HIV." The assistant inadvertently dated the chart note May 14, 2001 instead of 2002.

Bills for Mitchell's testing and care were sent to Fortis, which asked for releases from Mitchell to obtain his medical records. Mitchell supplied these and the records Fortis obtained included the chart with its erroneously dated note from Dr. Chandler's office. In response to the note, Fortis cancelled Mitchell's insurance by letter. The letter included the statement that Fortis would welcome any additional information Mitchell had regarding their decision. Mitchell attempted to contact Fortis to correct their error. His call was routed to a customer service representative who told him there was nothing the representative could do.

Mitchell sought treatment at a free clinic called Hope Health. That facility's manager called Fortis to explain the error behind their termination of Mitchell's policy, offering to send it records proving their error by fax or mail. Fortis rejected this offer, saying there was nothing they could do about the termination.

Mitchell then hired a lawyer who sent Fortis a letter informing them that Mitchell was first diagnosed with HIV in May 2002. A review committee denied the appeal and upheld the cancellation. Mitchell then sued Fortis for breach of contract and bad faith in wrongfully terminating his insurance policy. A jury ruled in Mitchell's favor, awarding him $36,000 in actual damages for breach of contract, $150,000 in actual damages for Fortis's bad-faith rescission of his policy, and $15 million for engaging in bad faith in denying Mitchell insurance benefits. Fortis appealed.

BACKGROUND: Fortis argued that the jury award of $15 million was so disproportionate to the value of Mitchell's claim as to violate due process by denying Fortis of property without legal basis. In evaluating Fortis's claim, the South Carolina court reviewed both United States Supreme Court precedent and their own.

The U.S. Supreme Court has refused to find a specific mathematical formula to which punitive damage awards must adhere for constitutional validity. The Court has reasoned, however, that punitive damages must be proportionate to the underlying wrongful conduct. A massive award based on a minor economic or personal injury denies a defendant of due process in two ways: the defendant is deprived of (excess) property without legal basis, and the defendant is denied notice of the magnitude of the punishment that can follow from wrongdoing. Despite its refusal to provide specific numbers, the Court has indicated that punitive damage awards that exceed a plaintiff's actual damages by more than a single-digit multiplier may be excessive.

The South Carolina Supreme Court also looked to its own case law, which raised a number of considerations courts should evaluate in a punitive damage claim. The court distilled these into considerations the state's courts should follow in reviewing constitutional challenges to punitive damages awards. These considerations included reprehensibility, the ratio of the plaintiff's harm to the amount of the award, and a comparison to awards in similar cases.

Applying its own standards, the court found Fortis's conduct reprehensible. It had denied Mitchell's claim on an erroneous basis, had failed to allow him to explain his situation by phone, had rejected Hope Health's offer to send clarifying records, and had rejected Mitchell's attorney's efforts to provide Fortis with correct dates so they would reinstate his coverage. Had he been unable to secure free assistance from Hope Health, Mitchell's condition would have declined substantially during the course of their dispute, causing his HIV to devolve into AIDS.

On the ratio question, the court did find Fortis's complaint valid. Expert testimony at trial suggested that the cost of Mitchell's treatment to manage his HIV would be about $1,081,000. The $15 million punitive damages award was 13.9 times greater than this amount. The court reduced this award to $10 million, which was 9.2 times greater. This amount did not exceed considerations created by the U.S. Supreme Court and held up to comparisons with other bad faith cases in South Carolina.

By adjusting the punitive damages award, the court brought punishment for Fortis's wrongful behavior within the court's perception of constitutional limits.

EXCERPTS FROM THE COURT'S OPINION (Chief Justice Toal): "The practice of awarding punitive damages originated in principles of common law to deter the wrongdoer and others from committing like offenses in the future. Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition. The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that the punishment should fit the crime.

"Nevertheless, while states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.

"First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Reprehensibility is perhaps the most important indicium of the reasonableness of a punitive damages award. This principle reflects the view that some wrongs are more blameworthy than others. In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

"Second, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The ratio of actual or potential harm to the punitive damages award is perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award. Although the Supreme Court has been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award, and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. Nevertheless, the Supreme Court has made clear that there are no rigid benchmarks that a punitive damages award may not surpass, so long as the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered. With this instruction in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award.

"Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying comparable cases a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant."

COMMENTS & QUESTIONS

1. Why did Jerome Mitchell apply for health insurance when he did?
2. Did the company sell him a policy?
3. Why did Fortis deny his claim?

Individuals and businesses of all types can enter into contracts for goods or services. Many students have cell phones, for example, which typically involve a contract for cell phone service. The contract provides what each party is supposed to do--the cell phone user pays a monthly fee and the cell-phone service provider supplies a working phone number and ability to make and receive calls, send text messages, etc., as provided in the contract.

Insurance contracts involve higher stakes than many other types of contracts. Instead of losing cell phone service if the company breaches, the holder of an insurance policy may lose the cost of essential health care or of a burned-down home or of valuable merchandise stolen from a store. Because of the stakes involved, many states have "bad faith" statutes and case law imposing strict penalties on insurers for failing to honor valid claims. These laws are intended to influence insurance companies to pay claims quickly and fairly.

The information in Mitchell's records did, in fact, support Fortis's decision to cancel Mitchell's policy. Fortis was justified in canceling Mitchell's policy based on a pre-existing condition. However, they were not entitled to continue to deny coverage once the initial information was clarified. It was Fortis' conduct after the initial denial that the jury and court found reprehensible. Do you agree with the jury and the court?

What is a pre-existing condition?

A pre-existing condition is a health condition or illness that you have had before your first day of coverage under an insurance plan. Because a person with a pre-existing condition can cost an insurance company millions, it is in their best interest to exclude those who have them from coverage. Different rules applied for individual health insurance plans and group plans set up by your employer. Generally, a group plan may exclude coverage for a pre-existing condition for up to a period of one year. Individual health plans may simply deny coverage based on a pre-existing condition altogether.

Pre-existing conditions have been in the news recently with all of the discussions in Washington D.C. surrounding health care reform. Federal law may be enacted to preclude denial of coverage based on pre-existing conditions. Do you think this is appropriate? Or, should the insurance companies be able to deny coverage? What is the public benefit in precluding denial of coverage based on pre-existing conditions? Should there be a right to health insurance coverage regardless of pre-existing health conditions? If not, who will bear the cost of no health insurance coverage? Will it be borne by the individual, or by society?

Private Property Taken for Private Development

SUMMARY: Residents of a Brooklyn neighborhood were not protected by the New York Constitution from having their property taken for a private development project including a stadium and housing units. The New York Court of Appeals decided *Goldstein v. New York State Urban Development Corporation* on November 24, 2009.

BACKGROUND: Since 1968, an area of Brooklyn containing rail and bus yards by Atlantic and Flatbbush Avenues has been called the Atlantic Terminal Urban Renewal Area (ATURA). Private developer Bruce Ratner sought to build a 22-acre development at the ATURA site. The footprint for the proposed development included ATURA as well as some adjacent residential buildings. Ratner's proposal involved high-rises, commercial and residential space and an arena for the New Jersey Nets basketball franchise. Between 5,325 and 6,430 dwelling units were to built, more than a third of which were for low and middle income families.

Prior to construction Ratner--who received millions of dollars in public funds for the project--was able to buy many of the occupied properties. Daniel Goldstein and some other residents refused to sell, however. Ratner then asked the state to exercise its power of eminent domain to turn out the resistant residents and to pay them market value for their properties.

Goldstein sued in federal court, arguing that his expulsion from property he owned in favor of another private party violated the federal and state constitutions. The federal district court denied his federal claim but declined to rule on his state claim; the Second Circuit Court of Appeals affirmed. Goldstein then filed suit in state court for a ruling on his claim under the New York Constitution. The district and appeals courts denied his claim and he appealed to the New York Court of Appeals, that state's highest court.

ANALYSIS: During the Great Depression, the New York Constitution was amended to grant the state legislature the power to address blighted or "substandard and insanitary areas." The legislature was also empowered to grant the power of eminent domain to any public corporation. Pursuant to these powers, the legislature granted the Empire State Development Corporation (ESDC) the right to exercise eminent domain.

Goldstein argued that while some of the ATURA property may rightly be deemed blighted, his property and others Ratner sought to seize and destroy could not. The power of eminent domain, Goldstein maintained, can be exercised only for "public use," which included removal of unsanitary and substandard dwellings and constructing living space for low-income families, particularly those displaced by removal of the blighted buildings. Transference to Ratner of non-blighted properties so that he could build commercial and residential properties and a basketball arena was not the sort of public use the New York Constitution contemplated.

A majority of the court disagreed. Although the judges conceded that not all of the properties within the proposed site were substandard or unsanitary, the majority were, and the development plan did reserve more than a third of the residential space for low and middle income families. The majority reasoned that once a public corporation has undertaken a study and determined that the subject buildings were adequately blighted, it was not a court's job to second guess their findings and say no they're not. There was enough blight and enough public use involved in the project for it to satisfy the state requirements for eminent domain.

One judge dissented. He reasoned that private developers get themselves appointed to the Empire State Development Corporation and then support pro-business decisions, shaping the city in ways that suit them rather than the limits of the state constitution. The dissent chided the majority for expressing that it had no power to second guess ESDC's decision with respect to the subject property's condition. This approach, he said, made ESDC its own judge in the case and left the New York Court of Appeals stepping back from its duty to interpret and uphold the state constitution.

EXCERPTS FROM THE MAJORITY OPINION (By Chief Judge Lippman): "[I]t is indisputable that the removal of urban blight is a proper, and, indeed, constitutionally sanctioned, predicate for the exercise of the power of eminent domain.

"Petitioners, of course, maintain that the blocks at issue are not, in fact, blighted and that the allegedly mild dilapidation and inutility of the property cannot support a finding that it is substandard and insanitary within the meaning of article XVIII. They are doubtless correct that the conditions cited in support of the blight finding at issue do not begin to approach in severity the dire circumstances of urban slum dwelling described by the court in 1936, and which prompted the adoption of article XVIII at the State Constitutional Convention two years later. We, however, have never required that a finding of blight by a legislatively designated public benefit corporation be based upon conditions replicating those to which the Court and the Constitutional Convention responded in the midst of the Great Depression. To the contrary, in construing the reach of the terms 'substandard and insanitary' as they are used in article XVIII -- and were applied in the early 1950's to the Columbus Circle area upon which the New York Coliseum was proposed to be built -- we observed:

"Of course, none of the buildings are as noisome or dilapidated as those described in Dickens' novels or Thomas Burke's 'Limehouse' stories of the London slums of other days, but there is ample in this record to justify the determination of the city planning commission that a substantial part of the area is 'substandard and insanitary' by modern tests.

"And, subsequently, in Yonkers Community Dev. Agency v. Morris (1975), in reviewing the evolution of the crucial terms' signification and permissible range of application, we noted:

"Historically, urban renewal began as an effort to remove 'substandard and insanitary' conditions which threatened the health and welfare of the public, in other words 'slums,' whose eradication was in itself found to constitute a public purpose for which the condemnation powers of government might constitutionally be employed. Gradually, as the complexities of urban conditions became

better understood, it has become clear that the areas eligible for such renewal are not limited to slums as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.

"[L]ending precise content to these general terms has not been, and may not be, primarily a judicial exercise. Whether a matter should be the subject of a public undertaking -- whether its pursuit will serve a public purpose or use -- is ordinarily the province of the Legislature, not the Judiciary, and the actual specification of the uses identified by the Legislature as public has been largely left to quasi-legislative administrative agencies. It is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for that of the legislatively designated agencies; where, as here, those bodies have made their finding, not corruptly or irrationally or baselessly, there is nothing for the courts to do about it, unless every act and decision of other departments of government is subject to revision by the courts."

EXCERPTS FROM THE DISSENT (By Judge Smith):
"Under the 19th century understanding of public use, the taking at issue in this case would certainly not be permitted. It might be possible to debate whether a sports stadium open to the public is a public use in the traditional sense, but the renting of commercial and residential space by a private developer clearly is not.

"Our 20th century cases, while not all consistent and containing some confusing language, are best read as modifying, rather than nullifying or abandoning, the established public use limitation. A series of cases upheld takings for what was variously characterized as slum clearance, removal of blight, or correction of unsafe, unsanitary or substandard housing conditions. While these cases undoubtedly expanded the old understanding of public use, they did not establish the general proposition that property may be condemned and turned over to a private developer every time a state agency thinks that doing so would improve the neighborhood.

"It is clear to me from the record that the elimination of blight, in the sense of substandard and unsanitary conditions that present a danger to public safety, was never the bona fide purpose of the development at issue in this case. Indeed, blight removal or slum clearance, which were much in vogue among the urban planners of several decades ago, have waned in popularity. It is more popular today to speak of an 'urban landscape' -- the words used by Bruce Ratner to describe his 'vision' of the Atlantic Yards development in a public presentation in January 2004.

"According to the petition in this case, when the project was originally announced in 2003 the public benefit claimed for it was economic development -- job creation and the bringing of a professional basketball team to Brooklyn. Petitioners allege that nothing was said about 'blight' by the sponsors of the project until 2005; ESDC has not identified any earlier use of the term. In 2005, ESDC retained a consultant to conduct a 'blight study.' In light of the special status accorded to blight in the New York law of eminent domain, the inference that it was a pretext, not the true motive for this development, seems compelling."

COMMENTS & QUESTIONS

1. What is ATURA and how is it relevant to this case
2. Who is Daniel Goldstein and what was his interest in this matter
3. What do the letters ESDC stand for? What role does this entity play?

The concept of eminent domain is embedded in the U.S. Constitution and in state constitutions. The Fifth Amendment states, "nor shall private property be taken for public use, without just compensation." Government relies on the power of eminent domain, or "takings," to achieve many of its basic purposes, like building roads and providing electric power and sewer service. Without the power to take the necessary land, government could be forced to divert a road or railroad line for miles around a reluctant landowner or to pay a fee of whatever amount the property owner demanded for access. Over time, politicians and developers have pressed for expanded use of this power to build arenas and stadiums, shopping malls, and resorts, and buildings for public and private tenants.

In the 2005, the United States Supreme Court handed down a decision in the case of *Kelo v. City of New London* and found that it was constitutional for a New London, Connecticut, economic-development corporation to seize private homes and businesses to build a research campus for Pfizer, Inc. Following that decision, a number of legislatures around the country amended they are state laws to prevent the government from seizing private land in some cases. New York did not change its constitution.

The New York court ruled that the New York Constitution allowed the state to seize the Brooklyn land to improve blighted conditions. They ruled this way in spite of the landowner's argument that the area was a stable neighborhood and was not blighted. The court found that the definition of blighted was a matter for the legislature, not for the courts. Who do you think should determine whether a neighborhood is blighted in a situation like this? Do you agree with the landowners in this case that their neighborhood was not blighted?

The other issue in this case is whether or not building a sports stadium opened to the public is actually a public use. Do you think it is? What about the other aspects of the project such as renting commercial and residential space? Is this a public use? Does the public use condos? Do they use a professional sports stadium? Do they use a shopping mall or resort? Do they use a church? Assume the Goldstein family had owned his Brooklyn property for over 200 years. Would you support a builder's right to take it? Could a builder take it for all of the previously listed uses?

Can government take private land without paying? If not, what amount must it pay? Once a large neighborhood is identified as a target for demolition to support a building project, which direction do you think property values go? Should that be factored into "just compensation?" Do you like the majority's or the dissent's position in this case?

If there were five row houses, four of which were condemned and one of which was totally restored to beautiful condition, could it be taken with the others under New York law? On what basis would the value the state had to pay be determined?

Should private property ever be taken for another private party's use? Is what Ratner proposes a private use, or is it public? If the city took Goldstein's property for a public library, but changed its mind and sold it to Ratner to build a big home for himself, would that be constitutional?

How much help do you think that the government should give to private developers?

Names on Referendum Petition Not Confidential

SUMMARY: Washington residents who signed a referendum petition to challenge a law granting domestic partners more rights could not use the First Amendment to keep their names confidential. The United States Court of Appeals for the Ninth Circuit decided *John Doe #1 v. Washington Families Standing Together* on October 22, 2009.

BACKGROUND: The Washington Public Records Act (PRA) was passed by referendum in that state. Its primary purpose was to keep the citizens informed so that "they may maintain control over the instruments that they have created." The act further provides that "This chapter shall be liberally construed and its exceptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." The PRA states that when it conflicts with another act, the PRA shall govern.

In response to a state senate bill that expanded domestic partners' rights to make them equivalent to Washington married couples' rights, a group called Protect Marriage Washington (PMW) gathered petitions for "Referendum 71," designed to overcome the bill. The state's referendum process permits groups who can gather signatures of at least four percent of the number of voters who cast ballots in the most recent governor's election to put their referendum bill onto the ballot for public vote. PWM turned in petitions bearing over 138,500 signatures.

A group called Washington Coalition for Open Government requested to see the petitions submitted for Referendum 71. PWM opposed their effort, seeking a restraining order preventing state officials from making them public. PWM argued that the First Amendment protected the anonymity of signers of a referendum petition. The federal district court agreed and granted the restraining order. Washington Coalition for Open Government (WCOG) appealed to the Ninth Circuit

ANALYSIS: PWM argued that the Public Records Act was unconstitutional as applied to their referendum petition. Their petition, they reasoned, was political speech entitled to First Amendment protection. The correct standard to interpreting any infringement on this First Amendment right was "strict scrutiny," which applies to the most important expressive rights. To withstand a court's strict-scrutiny review, a law must be "narrowly tailored to serve a compelling government interest." The PRA, when weighed against the referendum process, did not meet this standard.

The district court reasoned that the Public Records Act was intruding on anonymous public speech in this case. The situation was analogous to voting, a type of speech the public may engage in while withholding from public view, if they choose, the specific way in which individuals cast their ballots. The Ninth Circuit disagreed with this comparison. The petition process was not anonymous. Names, addresses and signatures were gathered 20 per page, meaning each person presented with the petition got to see as many as 19 supporters' names--possibly more if they flipped through the petitions without being stopped by those gathering signatures. Each legitimate signer knew his or her name was thus displayed.

In light of the limited privacy signers had during the petition process, the Ninth Circuit concluded that the correct level of scrutiny to apply was intermediate scrutiny. Under this standard, the PRA is constitutionally applied to the referendum process if it serves an important government interest unrelated to the suppression of free expression and the incidental restrictions on expressive activity are no greater than necessary to justify the interest. The court concluded that PRA's purpose of ensuring that the lawmaking process is legitimate and fair satisfied intermediate scrutiny. Ensuring that the signatures were valid and thus actually met the referendum minimum was an important government interest the PRA served in this case. The fact that citizens whose names were exposed during the signing of the petition might have them more broadly exposed if the petitions became public did not overcome the PRA's important accountability function.

The court reversed, ordering removal of the restraining order.

EXCERPTS FROM THE COURT'S OPINION (By Judge Tashima): "The district court's analysis was based on the faulty premise that the PRA regulates anonymous political speech. The signatures at issue, however, are not anonymous. First, the petitions are gathered in public, and there is no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition. Second, each petition sheet contains spaces for 20 signatures, exposing each signature to view by up to 19 other signers and any number of potential signers. Third, any reasonable signer knows, or should know, that the petition must be submitted to the State to determine whether the referendum qualifies for the ballot, and the State makes no promise of confidentiality, either statutorily or otherwise. In fact, the PRA provides to the contrary. Fourth, Washington law specifically provides that both proponents and opponents of a referendum petition have the right to observe the State's signature verification and canvassing process. Thus, the district court's finding that the speech at issue is anonymous is clearly erroneous. And, because it was based on that faulty premise, the district court's application of anonymous speech cases requiring strict scrutiny was error.

"[In the U.S. Supreme Court's] *O'Brien* case, a student was arrested for burning his draft card in protest of the Vietnam War. The student argued the statute was an unconstitutional infringement upon his right to engage in political speech. The Supreme Court first assumed that 'the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment.' The Court then concluded that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. Applying intermediate scrutiny, the Court concluded that the draft card statute was not unconstitutional as applied to O'Brien.

"Under intermediate scrutiny, as articulated in *O'Brien*, application of the PRA to referendum petitions is constitutional if the PRA is within the constitutional power of the government to enforce, it furthers an important government interest unrelated to the suppression of free expression, and the incidental restriction on alleged First

Amendment freedoms is no greater than necessary to justify the interest.

"Plaintiffs do not contend that aside from its impact on speech, [the PRA] is beyond the constitutional power of the State to enforce. We thus turn next to the government interests the PRA furthers. The State has asserted two interests: (1) preserving the integrity of the election by promoting government transparency and accountability; and (2) providing Washington voters with information about who supports placing a referendum on the ballot. Both interests plainly qualify as important.

"In Washington, the PRA plays a key role in preserving the integrity of the referendum process by serving a government accountability and transparency function not sufficiently served by the statutory scheme governing the referendum process. The oversight procedure provided by statute allows the Secretary of State to limit observers to two opponents and two proponents of the referendum. This procedure is insufficient to shift oversight from the special interest groups to the general public. Without the PRA, the public is effectively deprived of the opportunity independently to examine whether the State properly determined that a referendum qualified, or did not qualify, for the general election.

"[N]o one has claimed that the State's interests are at all related to the suppression or regulation of expression. The stated aim of the PRA, which itself was passed through the initiative process, is to keep the citizens "informed so that they may maintain control over the instruments that they have created." There is no indication that despite this clear statement, the PRA was nonetheless intended to suppress free expression."

COMMENTS & QUESTIONS

1. What is a referendum? What was Referendum 71?
2. What is the Washington Public Records Act?
3. What does the term "strict scrutiny" mean?

This case seems to be a very simple straightforward case. The court ruled that, since the signers of a petition do not sign the actual petition anonymously, there is no reason why the names on such a petition should not be made available to the public. However, the case raises some very interesting policy, if not constitutional, questions.

The court found that there is no constitutional right to sign a petition anonymously. However, should there be a statutory right to do so? Would it be good public policy to preclude the dissemination of the names and addresses on referendum petitions to the public?

While all U.S. states now use the secret ballot for just about every public election, there is no constitutional right to a secret ballot. Secret ballots are used principally on the grounds that secrecy protects voters and the public against coercion and bribery. Secret ballots remain secret because of statutory law, not because of a constitutional right. Does this surprise you?

In California, gay rights organizations publicize the names of businesses and their owners bad either publicly endorsed or contributed money to support proposition eight, which amended the state Constitution to forbid same-sex marriage. The primary purpose of such publicity appeared to be to enable supporters of legal same-sex marriage to boycott these businesses. Do you think this is appropriate?

Campaign-finance laws require the public release of the campaign donor information. With the Internet, it is possible to find out which of your friends or neighbors gave money to particular candidates in recent presidential elections. Do you think this is appropriate?

Is giving money to a candidate or signing a referendum petition entitled to the same secrecy as the actual ballot in an election? Does requiring public disclosure of this information have a chilling effect on political participation? Does it inhibit political participation by people holding unpopular views?

If the First Amendment allows us freedom of speech and the freedom to hold and to express our beliefs, whatever they are, why doesn't it this type of information? What is the public interest in making this information available?

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