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1st Amendment Litigation: DC Circ. Edition

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On May 7, 2013, in National Association of Manufacturers v. National Labor Relations Board, No. 12-5068, the D.C. Circuit unanimously rejected the NLRB's attempt to force employers to display controversial new posters relating to union activity. This decision is notable not only for its immediate result — the injunction of the poster obligation — but also for its broad discussion of First Amendment principles. Those First Amendment issues are presently being litigated around the country as companies challenge increasingly aggressive government regulations.

The Controversial NLRB Poster Obligation Was Quickly Challenged

While workplaces have long been subject to mandatory informational obligations, including poster requirements, such regulations have infrequently been challenged. The NLRB's new poster obligation, however, was different.

The NLRB had determined that an employer would be guilty of an unfair labor practice if they did not post on their properties and on their websites a "Notification of Employee Rights under the National Labor Relations Act." 76 Fed. Reg. 54,006 (Aug. 30, 2011). At the time of its adoption, the obligation was controversial.

Not surprisingly, the rule was challenged in separate federal court actions, one of which was in the District of Columbia, claiming that the rule violated the NLRA and the First Amendment to the Constitution.

In May 2012, the U.S. District Court for the District of Columbia affirmed the board's authority to issue the rule, holding that the NLRB

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did not exceed its statutory authority under the NLRA in promulgating this rule and that the rule did not violate the First Amendment because it was "government speech." Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34, 58-59 (D.D.C. 2012).

The district court distinguished cases where the U.S. Supreme Court found unconstitutional laws or regulations forcing one speaker to host or accommodate another speaker's message on the basis that in this case, the employer's message was not "affected by the speech it was forced to accommodate." Id. at 59 (citing Rumsfeld v. Forum for Academic and Institutional Rights Inc., 547 U.S. 47 (2006)). Though it invalidated other provisions of the rule, the court deemed those provisions severable from the valid provisions and upheld the mandated posting rule.

On appeal, the D.C. Circuit Court reversed. The court concluded that the poster obligation did exceed the NLRB's authority as it was in conflict with provisions of the NLRA that preserved employers' rights to speak and communicate with their employees. The court held that these provisions "preclude[] regulation of speech about unionization," so long as the speech is not coercive. Slip Op. at 5 (quoting Chamber of Commerce v. Brown, 554 U.S. 60, 68 (2008)).

The NLRA specifically prohibits regulatory barriers not only to expressing a speaker's views but also to dissemination of these views. Slip Op. at 7 (citing 29 U.S.C. § 158(c)). The fact that the board's rule mandates dissemination of certain unionization speech rather than forbidding this speech does not change the outcome of the case; rather, the NLRA "necessarily protects ... the right of employers ... not to speak." Slip Op. at 7, 9.

The D.C. Circuit Rejected Key Government Arguments That Sought to Minimize the Intrusiveness of the Posters

Though several elements of the opinion are notable, the D.C. Circuit's decision is particularly important because of its broad discussion of businesses' First Amendment rights. In finding the obligation invalid under the NLRA, the court analyzed and rejected several First Amendment arguments that are regularly deployed by government regulators. The D.C. Circuit's discussion may encourage more companies and associations to view such obligations with skepticism.

The D.C. Circuit rejected the broad argument, which has been gaining traction in some quarters, that so long as the required speech is that of the "government," a private party can be forced to disseminate it. The D.C. Circuit Court disagreed. "The right to disseminate another's speech necessarily includes the right to decide not to disseminate it. First Amendment law acknowledges this apparent truth: 'all speech inherently involves choices of what to say and what to leave unsaid.'" Slip Op. at 7 (citing Pac. Gas & Electric Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 11 (1986) (plurality opinion)).

As the court explained, "It is obviously correct that the poster contains the Board's speech" and that the NLRB was free to disseminate this speech "on its website, as it has done" and in other ways. Slip Op. at 6.

Nevertheless, the court "doubt[ed] whether calling the poster 'Board speech' answers the question" presented by this case because "[t]he Supreme Court's opinions do not suggest that because the messages were ... 'government speech,' the First Amendment did not apply." Id. at 18.

The First Amendment protects private entities from being turned against their will into the purveyors of third parties' opinions. The "'dissemination' of messages others have created is entitled to the same level of protection as the "creation" of messages," so employers can neither be prohibited from disseminating nor mandated to disseminate unionization speech. Id. at 16 (citing Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667 (2011)).

The D.C. Circuit was similarly unpersuaded by the government's argument that the poster is acceptable because its content is "non-ideological." Slip Op. at 8. Indeed, the court concluded, "The right against compelled speech is not, and cannot be, restricted to ideological messages." Id.

Finally, the D.C. Circuit rejected the NLRB's attempt to seek protection under the more relaxed standard from Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985), governing cases involving required disclosures of purely factual and uncontroversial information related to commercial transactions to prevent consumer deception.

The court expressly stated that Zauderer has no application to the case: "Under Zauderer, the government may, consistently with the First Amendment, require a party to a commercial transaction to make disclosures in order to prevent that party from deceiving its customers ... But that has nothing to do with this case. As we said earlier, no one — and certainly not the Board — has even suggested that the posting rule was needed because employers are misleading employees about their rights under the National Labor Relations Act." Slip. Op. at 9, n.18. This serves as a useful reminder of the narrow reach of Zauderer's exception to heightened scrutiny of speech obligations.

Parallel Court Challenge: Similar Results but Reasoning May Differ

The D.C. Circuit Court's opinion reaches the same outcome as the U.S. District Court for the District of South Carolina in a parallel challenge to the poster obligation. That District Court invalidated the board's rule one month after the D.C. District Court issued its opinion. Chamber of Commerce v. NLRB, 856 F. Supp. 2d 778 (D.S. C. 2012), appeal pending, No. 12-1757 (4th Cir.).

The South Carolina District Court, however, did not rule on the First Amendment. The South Carolina court found that the unionization poster rule was not within the board's authority to promulgate rules "necessary to carry out" the other provisions of the NLRA, and the board had no other authority to make the rule. Id. at 789.

Reviewing the history of congressional regulation in the labor field, the court concluded that the notice provisions included in other laws but not included in Congress' multiple revisions of the NLRA demonstrated

that "Congress did not intend to impose a notice-posting obligation on employers, nor did it explicitly or implicitly delegate authority to the Board to regulate employers in this manner." Id. at 795.

The opinion declined to address whether such notices would be unconstitutionally compelled speech under the First Amendment. Id. at 797 n.20. This case is before the Fourth Circuit, awaiting decision.

This Decision Is One Battle in Increasing Litigation over the 1st Amendment as Companies Push Back on Compelled Speech Burdens

Importantly, the invalidation of the NLRB poster obligation comes against a backdrop of multiple government efforts to require companies to deliver varied government-dictated messages. Such government efforts run squarely into the established principle that the government cannot force private actors to promote messages — commercial or otherwise — with which they disagree. See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 7 (1986).

Simple and arguably factual disclosure obligations related to established health concerns — such as the surgeon general's smoking and alcohol warnings — are familiar and have gone largely unchallenged. However, governments are starting to go beyond known facts or proven dangers to inform consumers about what a legislative majority or a regulator considers a "good" or "bad" choice or policy.

For example, Congress and the U.S. Food and Drug Administration have moved to augment text-only tobacco warnings with graphic color images covering 50 percent of packaging. Such obligations were sustained by the United States Court of Appeals for the Sixth Circuit against a facial challenge in which a petition for certiorari was recently denied. See Discount Tobacco City & Lottery Inc. v. United States, 674 F.3d 509 (6th Cir. 2012), petition for certiorari denied, Apr. 22, 2013 (No. 12-521).

In parallel litigation, the particular gruesome images chosen by the FDA were invalidated by the D.C. Circuit in an as applied challenge, R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012), which the FDA declined to appeal to the Supreme Court after the Court of Appeals denied the FDA's petition for rehearing en banc. This virtually guarantees further litigation if and when the FDA promulgates new graphic images.

State and local governments are also active in compelling speech by businesses. For example, the city of San Francisco adopted a controversial "Cell Phone Right to Know" ordinance, which would have required cell phone retailers to display posters, stickers and disseminate lengthy "fact sheets" conveying alarmist city warnings about unproven dangers allegedly posed by cell phones. This regime was ultimately invalidated by the U.S. Court of Appeals for the Ninth Circuit. See CTIA-Wireless Ass'n v. City and County of San Francisco, 494 Fed.Appx. 752 (9th Cir. 2012), petition for rehearing en banc denied, Nos. 11-17707, 11-17773 (Feb. 27, 2013).

Similarly, the state of California entertained a ballot referendum that would have required mandatory labeling

regarding foods containing genetically modified organisms. That initiative was subject to heated debate and ultimately failed to pass.

As a result of these and other regulatory initiatives, First Amendment issues are being litigated around the country and are likely to occupy the Supreme Court's attention in the near future. Individuals and business should remember that "[t]he First Amendment is a limitation on government, not a grant of power." Int'l Soc'y for Krishna Consciousness Inc. v. Lee, 505 U.S. 672, 695 (1992).

As the Supreme Court recently explained, government is free to "express [its] views through its own speech" but cannot infringe others' rights, even in commercial settings, to advance its view or tilt public debate in a preferred direction. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2671 (2011). The D.C. Circuit's broadly framed decision in the NLRB case confirms that businesses should evaluate any informational or warning obligations with an eye toward protecting their First Amendment rights.