

No. 66294-5-1

COURT OF APPEALS
 DIVISION 1
 OF THE STATE OF WASHINGTON

MARIA PEREZ GUARDADO, individually and as Personal Representative of the Estate of DIEGO ESTEBAN CAMPOS PEREZ, and CAIN RAFAEL CAMPOS,

Appellants

v.

VALLEY MEDICAL CENTER, a King County Public Hospital District; KERRI R. FITZGERALD, M.D., individually and the marital community with John Doe Fitzgerald and DOES 1 through 50, inclusive,

Respondents

BRIEF OF RESPONDENT KERRI R. FITZGERALD, M.D.

Mary K. McIntyre, WSBA #13829
 Amy K. Robles, WSBA #38404
 McIntyre & Barns, PLLC
 2200 Sixth Avenue, Ste. 925
 Seattle, WA 98121-1829
 (206) 682-8285

2011 MAY 27 AM 11:52
 COURT OF APPEALS
 DIVISION 1
 SEATTLE, WA

TABLE OF CONTENTS

I. INTRODUCTION1

 A. The Parties1

 B. Positions of the Parties2

 C. Procedural History of Summary Judgment Motions3

II. COUNTER-STATEMENT OF THE ISSUES3

III. COUNTER-STATEMENT OF THE CASE4

 A. The Perez Fetus was Extremely Premature4

 B. Plaintiffs Agreed to No Resuscitation5

 C. The Fetus was Non-Viable at Delivery10

 D. Plaintiffs’ Experts Agree the Fetus Would Probably Not
Survive11

IV. ARGUMENT13

 A. There is No Cause of Action for an Unviable Fetus and
Plaintiffs’ Complaint was Properly Dismissed13

 B. Summary Judgment was Appropriate Because Plaintiffs
Failed to Establish Proximate Cause15

 C. *Herskovits* is Not Applicable to the Facts of This Case16

 D. The Trial Court Properly Denied the Motion for
Reconsideration19

V. CONCLUSION24

VI.	APPENDIX	A-1
A.	<i>Ashland Oil, Inc. v. Arnett</i> , 875 F.2d 1271 (7 th Cir. 1989)	A-1
B.	<i>Lakewood v. Plain Dealer Pub. Co.</i> , 486 U.S. 750, 108 S.Ct. 2138, 2148 n. 9, 100 L.Ed.2d 771 (1988)	A-18
C.	<i>Montero v. Compugraphic Corp.</i> , 531 So. 2d 1034, (Fla.App. 3 Dist. 1988)	A-48
D.	<i>Smith v. Boston Elevated Ry, Co.</i> , 106 C.C.A. 497, 184 Fed. 387 (1 st Cir. 1911)	A-52
E.	<i>Yniguez v. State of Arizona</i> , 939 F. 2d 727, (9 th Cir. 1991)	A-57

TABLE OF AUTHORITIES

WASHINGTON CASES

Adams v. Western Host, Inc.,
55 Wn. App. 601, 779 P.2d 281 (1989)20-21

Baum v. Burrington,
119 Wn. App. 36, 79 P.3d 456 (2003)13, 14

Berger v. Sonneland,
144 Wn.2d 91, 26 P.3d 257 (2001)15

Herskovits v. Group Health Cooperative of Puget Sound,
99 Wn.2d 609, 664 P.2d 474 (1983)16-17, 19

Holst v. Fireside Realty, Inc.,
89 Wn. App. 254, 948 P.2d 858 (1997)23

Koker v. Armstrong Cork,
60 Wn. App. 466, 804 P.2d 659 (1991)17

Morinaga v. Vue,
85 Wn. App. 822, 935 P.2d 637 (1997)21

Richards v. Overlake Hospital,
59 Wn. App. 266, 796 P.2d 737 (1990)16

Southcenter Joint Venture v. National Democratic Policy Comm.,
113 Wn.2d 413, 780 P.2d 1282 (1989)17

Young v. Group Health,
85 Wn.2d 332, 534 P.2d 1349 (1975)16

Young v. Key Pharmaceuticals, Inc.,
112 Wn.2d 216, 770 P.2d 182 (1989)16

Zueger v. Public Hospital District No. 2,
57 Wn. App. 584, 789 P.2d 326 (1990)17

OTHER CASES

Ashland Oil, Inc. v. Arnett,
875 F.2d 1271 (7th Cir. 1989)24

Lakewood v. Plain Dealer Pub. Co.,
486 U.S. 750, 108 S.Ct. 2138, 2148 n. 9, 100 L.Ed.2d 771 (1988)17

Montero v. Compugraphic Corp.,
531 So. 2d 1034, (Fla.App. 3 Dist. 1988)24

Smith v. Boston Elevated Ry, Co.,
106 C.C.A. 497, 184 Fed. 387 (1st Cir. 1911)23

Yniguez v. State of Arizona,
939 F. 2d 727, (9th Cir. 1991)24

STATUTES

RCW 4.24.01014

RULES

CR 59 (a)19-20

OTHER AUTHORITIES

Orland & Tegland,
Washington Practice: Trial Practice Civil § 382 (5th ed. 1996)23

I. INTRODUCTION

The plaintiffs have appealed the summary judgment dismissal of their medical negligence case, which contended that the defendant healthcare providers ignored their request to resuscitate their non-viable, newborn fetus/infant. The trial court properly dismissed the claim because the newborn, at only 23-weeks gestation and severely infected, was non-viable and would not have survived regardless of any resuscitation efforts.

A. The Parties

Plaintiff Maria Perez Guardado (hereinafter “Ms. Perez”) is the mother and personal representative of the estate of the deceased newborn, Diego Esteban Campos Perez. Plaintiff Cain Rafael Campos is listed as the father.

Defendant Kerri Fitzgerald, M.D., is the neonatologist who was consulted and asked to advise Ms. Perez about the realities and consequences of giving birth to a fetus of barely 23 weeks gestation. Dr. Fitzgerald was also present at the time of delivery. Defendant Valley Medical Center is in the case on the basis of vicarious liability for the actions of Dr. Fitzgerald.

Two non-party physicians involved with Ms. Perez’s care were obstetricians David Lawrence and Dorcas McLennan. Dr. Lawrence

initially assumed the care of Ms. Perez when she was admitted to the hospital on February 18, 2008. Dr. McLennan assumed the care of Ms. Perez on the morning of February 19 and performed the delivery that day at 11:38 a.m. It was Dr. McLennan who requested that Dr. Fitzgerald speak with Ms. Perez because she wanted her to know that the loss of the baby was inevitable.

B. Positions of the Parties

All the physicians in the case, treaters and experts alike, agree that on a more probable than not basis Ms. Perez's baby would not have survived even if resuscitation efforts had been undertaken. Despite that consensus, plaintiff argues that she is entitled to pursue her case on a "loss of chance" theory. The defendants contend that the "loss of chance" theory is not applicable to the facts of this case. Even if the theory were found to apply to these facts, the case was still properly dismissed. Plaintiffs presented no expert testimony that this particular fetus, given its extreme prematurity and infection, had any chance of survival. The trial court correctly accepted that reasoning and properly granted summary judgment.

C. Procedural History of Summary Judgment Motions

Defendant Valley Medical Center filed its motion for Summary Judgment of Dismissal on September 2, 2010 [CP 23-33]; defendant Fitzgerald filed her motion on September 3, 2010 [CP 86-98]. Plaintiffs filed their Responses to Dr. Fitzgerald's motion [CP 151-63] and Valley General's motion [CP 322-30] on September 20. Defendant Fitzgerald filed her Reply [CP 333-38] on September 24 and the defendant hospital filed its Reply [CP 371-75] on September 27. Then, citing no authority for filing such a pleading, plaintiffs filed a "Sur-Reply" [CP 376-77] on September 29. Defendant Fitzgerald filed an Objection to the Sur-Reply [CP 385-86] but the trial court considered it in its decision as reflected in the Revised Order Granting Defendant Fitzgerald's Motion for Summary Judgment [CP 392-95]. Plaintiffs then filed a Motion for Reconsideration [CP 389-410], which was denied [CP 512-14].

II. COUNTER-STATEMENT OF THE ISSUES

1. Was the case properly dismissed when the plaintiffs failed to produce competent expert testimony that this particular fetus had a significant chance of survival even if resuscitation efforts had been undertaken?

2. Did the trial court properly refuse to consider supplemental evidence submitted in support of the plaintiffs' motion for reconsideration when that evidence was not "newly discovered" and was available to plaintiffs at the time of the original summary judgment hearing?

III. COUNTER-STATEMENT OF THE CASE

A. The Perez Fetus Was Extremely Premature

Maria Perez was admitted to Valley Medical Center on February 18, 2008 in labor. She was 22 weeks and 6 days pregnant. She had been having contractions at home before coming to the hospital. Ms. Perez was accompanied by plaintiff Cain Campos with whom she was living. Ms. Perez testified that she and Mr. Campos were not married. [CP 105] (Deposition of Maria Perez Guardado at p. 7).

Ms. Perez was evaluated by obstetrician Dr. David Lawrence on admission. He told her they would do everything they could to try to stop her labor because of the extreme prematurity of the fetus. Ms. Perez was placed on bed rest, in trendelenberg position and given magnesium sulfate. It quickly became apparent that treatment was unlikely to stop the labor and that delivery was inevitable. Because of the extreme prematurity of the fetus, Dr. Lawrence determined that no interventions would be performed such as a C-section. A C-section would pose risks for Ms.

Perez and was unlikely to benefit the fetus due to his extreme prematurity. [CP 107] (labor flow sheet, Dr. Lawrence entry at 22:02 on 2/18/08). As Dr. McLennan explained in her deposition, the plan at the beginning was not to resuscitate the baby due to its extreme prematurity [CP 125-26].

B. Plaintiffs Agreed to No Resuscitation

Dr. Dorcas McLennan, OBGYN, assumed Ms. Perez's care on the morning of February 19, 2008. She saw Ms. Perez at approximately 7 a.m. and gave orders for set up of the delivery table. [CP 109] (Labor Flow Sheet, 2/19/08, 7:12–7:45 a.m.) Later that same morning, Ms. Perez reversed her earlier position on resuscitation, and told labor nurse Yvonne Duncan that she did want resuscitative measures for the baby and if not successful, she wanted to hold the baby and to have footprints and photographs obtained. [CP 111] (Labor Flow Sheet, 2/19/08, 8:43-8:44 a.m.).

Because it is not uncommon for mothers to express such reservations during this type of situation, Dr. McLennan instructed the nurse to have Dr. Fitzgerald explain to Ms. Perez that loss of the baby was inevitable. [CP 113] (Labor Flowsheet, 2/19/08, 9:37 a.m.).

Dr. Fitzgerald was paged and asked to provide a neonatology consult for Ms. Perez and Mr. Campos. Mr. Campos had left the hospital

and the nurse was to call Dr. Fitzgerald when he returned so that she could come to speak with him and Ms. Perez about the reality of birth at this gestation. [CP 115] (Labor Flow Sheet, 2/19/08, 9:19 a.m.).

In the interim, Dr. McLennan ordered an OB ultrasound to check on the fetal position. She stopped it when it showed that the baby's feet, hips and legs had descended into the vagina. She instructed the nurse to urgently page Dr. Fitzgerald to come to speak to the mother even though Mr. Campos had not yet returned. [CP 113] (Labor Flow Sheet at 9:28-9:37 a.m.). Dr. McLennan gave the charge nurse the order to notify Dr. Fitzgerald and to have her "inform the patient that loss is inevitable." *Id.* at 9:37 a.m.

Dr. Fitzgerald promptly responded and was at Ms. Perez's bedside by 9:40 a.m. Dr. Fitzgerald spent forty minutes on her consult, twenty minutes in talking with Ms. Perez, ten minutes in reviewing her records and ten minutes writing her notes. Dr. Fitzgerald explained the outcome expectation and standard management of an infant born at 23 0/7 weeks gestation. She explained the available data to Ms. Perez including that infants born at 23 weeks gestation have less than a nine percent chance of surviving without major disabilities. As the Perez baby was only barely 23

weeks gestation (23 0/7 weeks) the chances were even less. [CP 117-18]
(Dr. Fitzgerald's Neonatology Note).

In talking with Ms. Perez, Dr. Fitzgerald explained resuscitation and what this would entail if attempted for the baby under these circumstances. She answered Ms. Perez's questions and Ms. Perez elected comfort care, to hold her baby after delivery without resuscitation. Ms. Perez also asked Dr. Fitzgerald to have the same discussion with Mr. Campos when he returned to the hospital. Dr. Fitzgerald agreed to do so.¹ [CP 117-18]. Dr. Fitzgerald also said she would attend the delivery, assess the baby and provide resuscitation if he was more mature and capable of survival. Ms. Perez agreed with this plan [CP 117-18].

After Dr. Fitzgerald provided the neonatology consult, Dr. McLennan, attending obstetrician, spoke with both Mr. Campos and Ms. Perez about the delivery of the baby and their decision not to resuscitate the fetus. Dr. McLennan documented in her pre-delivery note that: "Pt. and husband aware of plan not to resuscitate infant." [CP 120] (McLennan Progress Note, 2/19/08, 10:45 a.m.) Dr. McLennan also documented in

1

Mr. Campos did not return to the hospital until shortly before the delivery and thus Dr. Fitzgerald did not have an opportunity to speak with him.

her delivery note at 11:45 a.m. “Dr. Fitzgerald present - confirms extreme prematurity & confirms plan to not resuscitate infant.” [CP 122] (Dr. McLennan’s Delivery Note, 2/19/08, 11:45 a.m.) Dr. McLennan remembered her discussion with Mr. Campos and Ms. Perez:

Q. Did you have an opportunity to talk to Ms. Perez and Mr. Campos before the delivery of the baby?

A. When I came to do – I was notified that the patient was feeling pushy. I was notified, I was up in my office, and I headed towards the labor and delivery unit, and when I arrived, in my note the husband was there.

Q. Okay.

A. And I confirmed the plan, which had been iterated by Dr. Lawrence initially and by me earlier, that the plan because of the extreme prematurity of this baby was not to do resuscitation, and confirmed with the patient and family members, whoever they were, and I only remember the patient and her husband. I don’t know if there were other people in the room –

Q. All Right.

A. –that we were not going to resuscitate this very premature baby, based on their conversation earlier with Dr. Fitzgerald and understanding.

Q. And with Dr. Lawrence?

A. And with Dr. Lawrence although I was not present for Dr. Lawrence’s conversation with the patient.

[CP 125-26] (Deposition of Dorcas McLennan, M.D.)

When further questioned about her note in the chart Dr. McLennan explained:

Q. You say, "Anticipate vaginal delivery of very premature infant. Patient and husband aware of plan not to resuscitate infant." Did I read that correctly?

A. That's right.

Q. All right. Did you discuss with them, or confirm with them the plan not to resuscitate the baby?

A. Yes. That's what the note says.

Q. All right. Can you tell us what was said in that discussion?

A. I don't remember the exact words, but I know that I would have said that we all are on the same page here. Dr. Fitzgerald is here to assess the baby, and if the baby is as premature as we expect it is, then we will not resuscitate the baby, which is what ended up happening.

Q. Now, when you had this discussion with Ms. Perez and Mr. Campos and said, We're all on the same page, if the baby is this premature, there won't be resuscitation, did Ms. Perez speak up and disagree with the plan in any way?

A. There was never a disagreement. There was no request for a different doctor, a different opinion, a different plan, there was no request for intervention from an obstetrical standpoint, there was no question about vaginal birth, there were no questions.

[CP 128-29].

Dr. McLennan in fact confirmed with both Ms. Perez and Mr. Campos that their plan was for no resuscitation of the baby. [CP 135]. She further explained that it was her long term understanding that the baby was not going to be resuscitated; this was her understanding of the plan when she assumed Ms. Perez's care that day. [CP 130-31]. This plan was formed long before Dr. Fitzgerald ever spoke with Ms. Perez at approximately 10 a.m. on February 19, 2008.

C. The Fetus Was Non-Viable at Delivery

Dr. McLennan stated the plan was not to resuscitate the baby because he was not viable given his extreme prematurity. [CP 134 at lines 1-10]; [CP 136, lines 9-25]; [CP 127, lines 7-21]. The baby was too premature to survive and also had an infection. He had no chance for survival. [CP 132 at lines 2-24]; [CP 137 at lines 2-5].

The Perez fetus was not viable when delivered. He had stopped moving and his one minute apgar score was one. He did not move, he had no muscle tone, no reflexes; he was blue; he was not breathing. [CP 147] (page 1 of Delivery Summary). He had only an abnormally low heart rate of 80 which dropped to less than 40, giving him the apgar score of one out of a possible ten. [CP 149-50] (pages 3 and 4 of Delivery Summary); [CP 122] (handwritten delivery note). Dr. Fitzgerald assessed the baby and

conferred with the team all of whom concluded that the fetus was extremely premature and given the plan with the parents, would not be resuscitated. He was wrapped in a blanket and given to Ms. Perez to hold and comfort until there was no longer a heart beat.

The hospital chart is replete with notations that the fetus was not viable at delivery: “complications: pre-viable gestation” [CP 344]; “Neo consultation provided re no resuscitation due to previability.” [CP 346]; “Pt pushed well, delivered nonviable (symbol = male) infant over intact perineum.” [CP 348].

The only two physicians to see and assess the Perez fetus at the time of his delivery were Dr. McLennan, the delivering obstetrician, and Dr. Fitzgerald, the attending neonatologist. Both Dr. Fitzgerald and Dr. McLennan concluded that **this fetus at 23 weeks gestation in this particular condition was not viable**. Indeed, this is the very reason Dr. Fitzgerald went to the delivery. She went to assess the baby to determine if he was viable, sufficiently mature to survive. He was not.

D. Plaintiffs’ Experts Agree the Fetus Would Probably Not Survive

Plaintiffs now claim that resuscitation should have been performed even though Ms. Perez knew the baby would likely die despite such

efforts. However, the plaintiffs' two experts admitted in their depositions that even with heroic resuscitative efforts, the baby was unlikely to have survived. According to plaintiffs' perinatology expert, Dr. Michael Hussey, there was about a 90-91 percent chance that the baby would not survive even with heroic resuscitation. [CP 140] (Deposition of Hussey at lines 12-20).

Dr. Hermansen, plaintiffs' neonatology expert, testified similarly. He stated that even with resuscitation, the baby "more likely than not, would have died." [CP 145] (Deposition of Hermansen at lines10-15). Dr. Hermansen went even further and explained that as a general rule no attempt is made to resuscitate 23-week gestation fetuses:

Q In *Appling*, you testified that, in New England, most providers do not try to save 23 week gestation babies. While we are willing to try if the parents insist, we tend to discourage resuscitation and most parents decide not to try to save these babies?

A. I stand by that.

[CP 143] (Deposition of Hermansen at p. 33, ll. 20-25, p. 34, ll. 1-3.)

As Dr. McLennan explained, this fetus could not survive because he was pre-viable; he had not yet reached the gestational age of viability where he was capable of surviving outside his mother's womb and without placental support. He had other challenges as well. One of the leading

causes of premature birth is infection. Dr. McLennan was highly suspicious that infection, including chorioamnionitis, was the likely cause of the premature birth; the infection further decreased the fetus's chances of survival. [CP 133] (Deposition of Dr. McLennan at lines 1-17).

Plaintiffs' experts, when offering their opinions, were unable to predict the impact of the fetus's infection on its ability to survive. For instance, the following exchange took place during the deposition of Dr. Hermansen:

Q: Are you going to offer any opinions in this case about the impact of any chorioamnionitis or infection on this baby?

A: No.

[CP 354]. The failure to take into account the presence of infection is significant, since Dr. Hermansen had already acknowledged that pathology studies showed that chorioamnionitis was present [CP 353] and that if a 23 week gestation fetus was infected, this would further decrease the chances of survival. [CP 354].

IV. ARGUMENT

A. There is No Cause of Action for an Unviable Fetus and Plaintiffs' Complaint Was Properly Dismissed.

At common law a person killed by another had no right to recovery for damages. *Baum v. Burrington*, 119 Wn. App. 36, 42, 79 P.3d 456

(2003). Statutes in derogation of the common law are to be strictly construed absent legislative intent to the contrary. *See Id.* at 41. Where a statute fails to define a term there is a presumption that the legislature intended the term to mean what it meant at common law. *See Id.* As the legislature never defined the phrase “minor child” to include recovery for a pre-viable fetus, RCW 4.24.010 is construed narrowly and precludes recovery for the death of an unviable fetus. *See Id.* at 42.

In *Baum v. Burrington, supra*, summary judgment was granted dismissing wrongful death claims for the death of two non-viable fetuses. A viable child is one who is “capable of independent existence outside of his or her mother’s womb, . . . even if only in an incubator.” *See Id.* at 39. Summary judgment was affirmed on appeal by Division One because the fetuses were not viable. Washington statutes did not authorize such recovery nor do the majority of the jurisdictions across the country recognize recovery for the death of an unviable fetus.

As the plaintiffs in this medical malpractice lawsuit, Ms. Perez and Mr. Campos bear the burden of proving, more probably than not, that the Perez fetus was viable on February 19, 2008. Plaintiffs have clearly failed to do so. The attending obstetrician Dr. McLennan, who is not a party to this litigation, testified repeatedly that the fetus was not viable based on

his extreme prematurity and that he had no chance of survival. She also testified the fetus was not viable based on his condition after birth. [CP 134, 136, and 127] (Deposition of Dr. McLennan at p. 63, ll. 1-10; p. 75, ll. 9-25; p. 30, 7-21). Even plaintiffs' own experts conceded that they could not testify, more probably than not, that the fetus was viable or that it could survive outside the womb even if heroic measures were provided. In fact, both of plaintiffs' experts testified to the contrary. Most likely the fetus would not have survived outside the womb even if resuscitation and other care was provided. The Perez fetus simply was not viable and the granting of summary judgment was appropriate.

B. Summary Judgment was Appropriate Because Plaintiffs Failed to Establish Proximate Cause

Plaintiffs had the duty to establish the applicable standard of care, its breach and actual and proximate causation. Proof of proximate causation must be by expert medical testimony in a case such as this one. *Berger v. Sonneland*, 144 Wn.2d 91, 110-11, 26 P.3d 257 (2001). The testimony of the medical experts must be based on reasonable medical certainty or probability. The proof must be that the alleged negligence more probably than not caused the alleged injury. Evidence that different actions "might have" or "possibly could have" produced a different and

better result are insufficient as a matter of law. *Young v. Group Health*, 85 Wn.2d 332, 534 P.2d 1349 (1975); *Richards v. Overlake Hospital*, 59 Wn.App. 266, 796 P.2d 737 (1990).

Plaintiffs claim that Dr. Fitzgerald was negligent for failing to resuscitate their fetus when he was born. Plaintiffs and their experts concede, however, that even had she done so the fetus most likely would have died. Plaintiffs, therefore, lack the necessary proof to establish proximate causation, an essential element of their prima facie case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989). Accordingly, the trial court was correct in granting summary judgment.

C. Herskovits Is Not Applicable to the Facts of This Case

In support of their argument that their case should not have been dismissed, plaintiffs rely entirely on *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474 (1983). Their reliance is misplaced.

The issue facing the *Herskovits* court was “whether a patient, with less than a 50 percent chance of survival, has a cause of action against a hospital and its employees if they are negligent in diagnosing a lung cancer which reduces his chances of survival by 14 percent.” *Herskovits* at 611. The plurality of a deeply divided court held that a plaintiff did have a

cause of action under those facts. However, *Herskovits* is a case which has been essentially limited to its facts; subsequent appellate courts have been reluctant to apply or to extend it. *E.g. Koker v. Armstrong Cork*, 60 Wn. App. 466, 481-82, 804 P.2d 659 (1991).

As the appellate court noted in *Zueger v. Public Hospital District*

No 2:

When no rationale for a decision of an appellate court receives a clear majority the holding of the court is the position taken by those concurring on the narrowest grounds. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S.Ct. 2138, 2148 n. 9, 100 L.Ed.2d 771 (1988); *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wn.2d 413, 427-28, 780 P.2d 1282 (1989). **Following this principle, if *Herskovits* stands for anything beyond its result, we believe the plurality represents the law on a loss of the chance of survival. The plurality would allow instructions on a loss of a chance of survival in this case only if the evidence shows (1) a substantial reduction in the chance of survival, and (2) the negligence of the defendant caused the reduction.**

57 Wn. App. 584, 591, 789 P.2d 326 (1990) (emphasis added).

The plaintiffs' evidence falls far short of establishing the required "substantial reduction in the chance of survival." Using general statistics for all 23-week gestation fetuses, Dr. Hermansen testified that only 30 to 40 percent of them will survive at all. [CP 262-63]. Dr. Hermansen was rather vague as to the period of time involved in terms of survival. The best he could do was say that 90 percent of those who do not survive die

within the first week. [CP 264]. After that first week, “there aren’t too many deaths after that.” *Id.* Thus the jury would be left to speculate on whether the fetus’s chance of survival had been reduced by 30 percent or 40 percent. Then, adding to that speculation, Hermansen said that “30 to 40 percent of the survivors will turn out normal.” [CP 265]. He then said that “about a third” of the survivors will be normal. [CP 266]. Thus, based on Dr. Hermansen’s figures the jury would have to speculate on whether to use the 30 percent or 40 percent figure for survival, and whether to use the 30 percent, 33 1/3 percent, or 40 percent chance of any survivor being normal.

More importantly, a jury could not use Dr. Hermansen’s figures at all, because he did not take into account the infection that was present in this particular fetus. In his deposition he had acknowledged that infection would further decrease the chance of survival. [CP 354]. It is apparent that he did not take the fetus’s infection into account in his testimony, because he stated that he would not be offering any opinions on the impact of infection. [CP 354]. Thus there is no way that a jury could reach a verdict without entering into the realm of hopeless speculation.

Further, there was no indication in the materials filed by plaintiffs in opposition to the motions for summary judgment that Dr. Hermansen

had taken into account the condition of the fetus as observed at birth: The fetus had stopped moving and his one minute apgar score was one. He did not move, he had no muscle tone, no reflexes; he was blue; he was not breathing. [CP 147]. He had only an abnormally low heart rate of 80 which dropped to less than 40, giving him the apgar score of one out of a possible ten. [CP 149-50]. Nowhere did Dr. Hermansen indicate that such findings are “normal” for a 23-week gestation fetus and thus were taken into account in his “30 percent to 40 percent” figure.

The plaintiffs’ evidence failed to establish facts which would allow the *Herskovits* rationale to be applied to this case.

D. The Trial Court Properly Denied The Motion for Reconsideration

Following the trial court’s granting of the summary judgment motions, plaintiff filed a Motion for Reconsideration. [CP 398-410]. The trial court denied the motion. [CP 512-514].

There was nothing in the materials supplied with the Motion for Reconsideration that was not available to plaintiffs and their counsel at the time they responded to the motions for summary judgment. Civil Rule 59(a) provides in pertinent part:

Grounds for a new Trial or Reconsideration. The verdict or other

decision may be vacated and a new trial granted to all or any of the parties and on all or part of the issues, when such issues are clearly and fairly separable and distinct, on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such parties:

....

(4) Newly discovered evidence, material for the party making the application, ***which he could not with reasonable diligence have discovered and produced at the trial.***

Emphasis added.

The above portion of the rule was cited in *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 779 P.2d 281 (1989). In that case the trial court held that the declaration of plaintiffs' expert was insufficient to establish a prima facie case of negligence and granted summary judgment for the defendant. The plaintiff then moved for reconsideration and supported the motion with a second declaration from the expert. The Court of Appeals affirmed the dismissal and noted that the expert's second declaration did not constitute "newly discovered evidence" as required by CR 59(a):

[Plaintiff's] contention that she was unable to obtain [the expert's] second declaration in the time between receipt by her attorney of [defendant's] opposing memorandum and the date of the hearing does not satisfy the definition of "newly discovered" evidence. [The expert's] testimony, as set forth in his

second declaration, was available to [plaintiff] at the time . . . the first declaration was presented to the court. The realization that . . . the first declaration was insufficient does not qualify the second declaration as newly discovered evidence. The motion for reconsideration was properly rejected by the trial court.

Adams at 608.

Similarly, in *Morinaga v. Vue*, 85 Wn. App. 822, 935 P.2d 637 (1997), a medical malpractice case, the court held that only newly discovered evidence which was not available may be considered on a motion for reconsideration. *Id.* at 831. Because the information she sought to introduce in support of her motion for reconsideration was in her possession at the time of summary judgment, it could not be considered.

Id.

In this case, page 2 of the Order Denying Reconsideration [CP 513] lists the material the trial court considered. The *only* item that was submitted but not considered was a second declaration from Dr. Hermansen, which was precisely the issue in the *Adams* case, *supra*.

In the motion for reconsideration the plaintiffs submitted excerpts from the deposition of her other expert, Dr. Michael Hussey. [CP 437-454]. The purpose of the proffered testimony was to create an issue fact as

to whether the fetus truly was infected. Since the deposition was taken long before the summary judgment hearing there was no reason it could not have been submitted at that time.

Plaintiffs seek to excuse the failure to submit the testimony earlier by arguing that the infection issue was not raised in Dr. Fitzgerald's original motion for summary judgment. That is not the case. At page 8 of the motion [CP 93] it is stated:

As Dr. McLennan explained, this fetus could not survive because he was pre-viable; he had not yet reached the gestational age of viability where he was capable of surviving outside his mother's womb and without placental support. *He had other challenges as well. One of the leading causes of premature birth is infection. Dr. McLennan was highly suspicious that infection, including chorioamnionitis, was the likely cause of the premature birth, further decreasing the fetus's chances of survival.*

Clearly the issue of infection further reducing the chances of survival was addressed in the original motion. If the plaintiffs felt the need to address that issue they should have done so at the time rather than in a motion for reconsideration.

There is still another reason to disregard the testimony of Dr. Hussey which was offered by plaintiffs in their motion for reconsideration.

In plaintiffs' original opposition to the motions for summary judgment they made the following observation:

Defendant Valley Medical Center wrongfully quotes and relies on the testimony of Dr. Michael Hussey. Dr. Hussey is not a pediatrician or neonatologist. He is an OB/GYN, Fetal Maternal Specialist. Opinions regarding viability of a fetus are more properly addressed by a pedestrian [sic] or neonatologist such as Dr. Hermansen and Dr. Fitzgerald.

[CP 162]. It is therefore somewhat ironic that plaintiffs would then attempt to rely on testimony by Dr. Hussey concerning infection and the viability of the fetus.

Furthermore, the doctrine of judicial estoppel prevents the plaintiffs from taking inconsistent positions regarding the reliability of Dr. Hussey's testimony. The rule of preclusion of inconsistent positions, commonly referred to as the doctrine of judicial estoppel, prevents a party from making assertions that are inconsistent with assertions the person previously made in litigation. *Holst v. Fireside Realty, Inc.*, 89 Wn. App. 254, 259, 948 P.2d 858 (1997). The doctrine prevents a party from taking inconsistent positions at successive stages in the case. *Orland & Tegland*, Washington Practice: Trial Practice Civil § 382 (5th ed. 1996), citing *Smith v. Boston Elevated Ry, Co.*, 106 C.C.A. 497, 184 Fed. 387 (1st Cir. 1911).

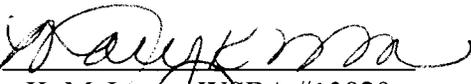
Judicial estoppel is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. *Yniguez v. State of Arizona*, 939 F.2d 727, 738 (9th Cir. 1991). The doctrine may be applied to estop a party from pursuing inconsistent factual and legal assertions. *Id.* The trial court has broad discretion to hold a party to pretrial representations made in their trial brief. *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1989). A litigant cannot, in the course of litigation, occupy inconsistent and contradictory positions. *Montero v. Compugraphic Corp.*, 531 So.2d 1034, 1036 (Fla.App. 3 Dist. 1988).

V. CONCLUSION

The trial court properly granted the defense motions for summary judgment and denied plaintiffs' motion for reconsideration. The two physicians present at the birth both testified that the fetus was non-viable. The only evidence offered by plaintiffs on the viability of the fetus was based on general statistics that failed to take into account the condition of this particular fetus, including the infection. The trial court's rulings should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of May 2011.

McINTYRE & BARNES, PLLC

By: 
Mary K. McIntyre, WSBA #13829
Attorneys for Respondent Fitzgerald

**DECLARATION OF SERVICE
BRIEF OF APPELLANTS**

I, JOY LYNN, state and declare as follows:

1. I am over the age of 18, am competent to testify and to make this declaration based on my personal knowledge and belief.

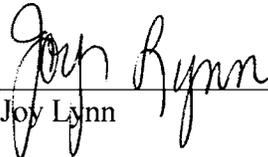
2. On this day, May 27, 2011, I caused to be delivered by personal service a copy of the Brief of Respondent to the following:

Ms. Georgia Trejo Locher, P.S.
237 SW 153rd Street
Burien, WA 98166

Mr. Craig L. McIvor
Lee Smart, P.S., Inc.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated the 27th day of May, 2011, in Seattle, Washington.



Joy Lynn

APPENDIX A

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)



United States Court of Appeals,
Seventh Circuit.
ASHLAND OIL, INC., a Kentucky corporation, Bell
Fuels, Inc., a Nevada corporation, Jasper County
Farm Bureau Cooperative Association, Inc., an Indi-
ana corporation, Marathon Petroleum Company, an
Ohio corporation, Plaintiffs-Appellants/Cross-
Appellees,
v.
Toy Rex ARNETT, Jr., Thomas R. Arnett, and Don-
ald G. Richards, Defendants-Appellees/Cross-
Appellants,
and
Rena Arnett, Super Payless Gas, Inc., Charles Arnett,
Norma Arnett, William Shireman, Steel City Gas
Stop, Inc., Carson Truck Plaza, Inc., Kenneth Ford,
Carson Petroleum Company, Interstate Truck Plazas
of America, Inc., and Richards, Isenberg & Co., Inc.,
Defendants-Appellees.

Nos. 87-2139, 87-2140 and 87-2198.
Argued April 13, 1988.
Decided May 16, 1989.

Oil suppliers brought suit against distributor, dis-
tributor's principals, and accountant which prepared
distributor's financial statement for defendants' al-
leged RICO violations and common-law fraud. The
United States District Court for the Northern District
of Indiana, Allen Sharp, Chief Judge, entered judg-
ment against distributor and distributor's principals
on RICO claims and granted accountant's motion for
directed verdict on common-law fraud claim, and
appeal was taken. The Court of Appeals, Fairchild,
Senior Circuit Judge, held that: (1) predicate acts of
arson, bankruptcy, and wire fraud committed over
four-month period to deprive four different petroleum
companies of oil were sufficiently "continuous" to
constitute a "pattern of racketeering activity," not-
withstanding that acts were all part of single scheme;
(2) distributor qualified as RICO "enterprise"; and (3)
whether the supplier had reasonably relied on un-
audited financial statement prepared by accountant
was question for jury.

Affirmed in part, reversed in part and remanded.

See also, 656 F.Supp. 950.

West Headnotes

**[1] Racketeer Influenced and Corrupt Organiza-
tions 319H ↪28**

319H Racketeer Influenced and Corrupt Organiza-
tions

319HI Federal Regulation

319HI(A) In General

319Hk24 Pattern of Activity

319Hk28 k. Continuity or Relatedness;
Ongoing Activity. Most Cited Cases
(Formerly 83k82.71)

**Racketeer Influenced and Corrupt Organizations
319H ↪29**

319H Racketeer Influenced and Corrupt Organiza-
tions

319HI Federal Regulation

319HI(A) In General

319Hk24 Pattern of Activity

319Hk29 k. Time and Duration. Most
Cited Cases
(Formerly 83k82.71)

**Racketeer Influenced and Corrupt Organizations
319H ↪30**

319H Racketeer Influenced and Corrupt Organiza-
tions

319HI Federal Regulation

319HI(A) In General

319Hk24 Pattern of Activity

319Hk30 k. Number of Persons In-
volved or Victimized. Most Cited Cases
(Formerly 83k82.71)

Predicate acts of arson, bankruptcy and wire
fraud committed over four-month period to deprive
four different petroleum companies of oil by convey-
ing fraudulent picture of distributor's net worth were

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

sufficiently "continuous" to constitute a "pattern of racketeering activity," notwithstanding that acts were all part of "single scheme." 18 U.S.C.A. § 1961(5).

[2] Racketeer Influenced and Corrupt Organizations 319H ↪26

319H Racketeer Influenced and Corrupt Organizations

319HI Federal Regulation

319HI(A) In General

319Hk24 Pattern of Activity

319Hk26 k. Number of Predicate Acts.

Most Cited Cases

(Formerly 83k82.70)

Racketeer Influenced and Corrupt Organizations 319H ↪31

319H Racketeer Influenced and Corrupt Organizations

319HI Federal Regulation

319HI(A) In General

319Hk24 Pattern of Activity

319Hk31 k. Multiple Mailings or Communications; Mail or Wire Fraud. Most Cited Cases

(Formerly 83k82.70)

Sheer number of predicate acts committed is never enough to establish requisite RICO "pattern," at least not where only predicate acts alleged are mail and wire fraud. 18 U.S.C.A. § 1961(5).

[3] Racketeer Influenced and Corrupt Organizations 319H ↪27

319H Racketeer Influenced and Corrupt Organizations

319HI Federal Regulation

319HI(A) In General

319Hk24 Pattern of Activity

319Hk27 k. Number of Schemes, Goals, Episodes, or Transactions. Most Cited Cases

(Formerly 83k82.70)

Mere fact that predicate acts relate to same overall scheme does not necessarily mean that acts failed to satisfy RICO "pattern" requirement. 18 U.S.C.A. § 1961(5).

[4] Racketeer Influenced and Corrupt Organizations 319H ↪63

319H Racketeer Influenced and Corrupt Organizations

319HI Federal Regulation

319HI(B) Civil Remedies and Proceedings

319Hk56 Persons Entitled to Sue or Recover

319Hk63 k. Separate or Distinct Racketeering or Criminal Enterprise Injury. Most Cited Cases

(Formerly 83k82.72)

Oil suppliers that sustained injury significantly different from those of distributor's other creditors, when distributor fraudulently obtained large quantity of oil from suppliers and diverted it to other concerns prior to filing for bankruptcy relief, had standing to bring civil RICO action for damages they sustained as result. 18 U.S.C.A. §§ 1962(c), 1964(c).

[5] Racketeer Influenced and Corrupt Organizations 319H ↪38

319H Racketeer Influenced and Corrupt Organizations

319HI Federal Regulation

319HI(A) In General

319Hk33 Enterprise

319Hk38 k. Separateness from Predicate Acts, Pattern, or Persons. Most Cited Cases
(Formerly 83k82.71)

Oil company which employed several individuals other than officers who conspired to operate it through pattern of racketeering activity was sufficiently distinct from officers to constitute RICO "enterprise." 18 U.S.C.A. § 1961(4).

[6] Conspiracy 91 ↪2

91 Conspiracy

91I Civil Liability

91I(A) Acts Constituting Conspiracy and Liability Therefor

91k1 Nature and Elements in General

91k2 k. Combination. Most Cited Cases

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

Corporation may conspire, even with its own officers, to conduct another enterprise's affairs through a pattern of racketeering activity and may, on that basis, be liable under RICO. 18 U.S.C.A. § 1962(c).

[7] Federal Civil Procedure 170A ↪1938.1

170A Federal Civil Procedure

170AXIV Pre-Trial Conference

170Ak1938 Effect

170Ak1938.1 k. In General. Most Cited Cases
(Formerly 170Ak1938)

Trial court may choose to hold party to pretrial representations.

[8] Estoppel 156 ↪68(2)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

Trial court has broad discretion in deciding whether to hold party to representations made in nonbinding trial brief.

[9] Federal Civil Procedure 170A ↪1741

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)2 Grounds in General

170Ak1741 k. In General. Most Cited Cases

Denial of RICO defendant's motion to dismiss plaintiffs' common-law fraud claim, on ground that plaintiffs had indicated their intent to seek dismissal of claim two weeks earlier, was not abuse of discretion, where claim had been in pleadings for more than one year and defendant was not prejudiced as result.

[10] Accountants 11A ↪10.1

11A Accountants

11Ak10 Actions

11Ak10.1 k. In General. Most Cited Cases
(Formerly 11Ak10)

Fraud 184 ↪64(5)

184 Fraud

184II Actions

184II(F) Trial

184k64 Questions for Jury

184k64(5) k. Reliance on Representations and Inducement to Act. Most Cited Cases

Whether oil supplier had reasonably relied on unaudited financial statement prepared by accountant in supplying distributor with oil was question for jury, in supplier's fraud action against distributor and accountant.

[11] Accountants 11A ↪9

11A Accountants

11Ak9 k. Duties and Liabilities to Third Persons.

Most Cited Cases

Accountant's disclaimer as to accuracy of figures contained in unaudited financial statement did not relieve it of duty to refrain from knowingly being party to alleged fraud.

*1272 Melbourne A. Noel, Jr., Brad A. Levin, Laser, Schostok, Kolman and Frank, Chicago, Ill., for plaintiffs-appellants/cross-appellees.

Karen L. Hughes, Lucas Holcomb & Medrea, Merrillville, Ind., Alan S. Brown, Locke Reynolds Boyd & Weissell, Indianapolis, Ind., Roger J. McFadden and Thomas J. Dillon, Schuyler, Roche & Zwirner, Chicago, Ill., for appellees.

Before MANION and KANNE, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

FAIRCHILD, Senior Circuit Judge.

This case involves an appeal and cross-appeals from a judgment entered following a jury trial. The plaintiffs, four oil suppliers, alleged that Toy and

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

Thomas Arnett orchestrated two episodes of fraud, executed through a petroleum wholesale corporation owned by them, named Arnett Oil, Inc. According to the plaintiffs, the two Arnetts, in league with Arnett Oil's accountant, Donald G. Richards, induced three of the plaintiffs to extend or expand Arnett Oil's credit by mailing them a false financial statement showing Arnett Oil to be in sound financial condition, when in fact it was not. The plaintiffs also alleged that the Arnetts, beginning approximately ten months after sending out the false financial statement, picked up unusually large quantities of petroleum product from the plaintiffs' sales terminals without intending to pay. The plaintiffs argued that the frauds were a part of the Arnett brothers' scheme to "bust out" Arnett Oil; that is, to expand the company's assets at the expense of the plaintiffs, and then to funnel those assets or their proceeds to themselves through intermediary companies also owned or controlled by them or their relatives. As a result, Arnett Oil would become unable to pay the plaintiffs for their product.

The plaintiffs contended that the defendants (including a number of defendants exonerated by the jury and not before us) had violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.*, as amended. The plaintiffs alleged that the Arnetts and Mr. Richards conducted the affairs of Arnett Oil through two patterns of racketeering activity in violation of § 1962(c). They alleged that the credit fraud involved predicate *1273 acts of mail and wire fraud which constituted one pattern of racketeering activity within the meaning of § 1961(5), and that predicate acts of mail, wire, and-bankruptcy fraud, and arson, committed during the product theft episode formed another. They also alleged that Mr. Richards' preparation of Arnett Oil's financial statement was common law fraud.

The district court submitted to the jury detailed interrogatories based on each of the plaintiffs' RICO and fraud counts. The plaintiffs were unsuccessful in persuading the jury that the defendants had used or invested the proceeds derived from racketeering activity in five defendant companies owned or controlled by the Arnetts (Counts III, IV, VI, VII, and VIII). 18 U.S.C. § 1962(a). These counts are not involved in this appeal. The jury also found that Arnett Oil's "trucking arm," Super Payless Gas, Inc., (Super Payless) did not violate § 1962(d) by conspiring to

violate § 1962(c).

The jury did find, however, that Toy and Thomas Arnett had participated in or conducted the affairs of Arnett Oil through the two patterns of racketeering activity, in violation of 18 U.S.C. § 1962(c) (Counts I and II). The district court entered judgment (after trebling the actual damages found by the jury) against Toy and Thomas Arnett in favor of plaintiffs Marathon Petroleum Company (Marathon) for \$1,062,249.00, Jasper County Farm Bureau Cooperative Association, Inc. (Jasper) for \$1,577,145.00, Bell Fuels, Inc. for \$286,623.00, and Ashland Oil, Inc. (Ashland) for \$1,647,027.00.

The district court granted a directed verdict on the fraud claim (Count X) against all plaintiffs in favor of Richards & Company (Mr. Richards' accounting firm), and against Marathon in favor of Mr. Richards. Jasper voluntarily dismissed its fraud claim during trial. The jury found in favor of the remaining two plaintiffs, Ashland and Bell Fuels, and against Mr. Richards. The court entered judgment accordingly, awarding \$75,000 in damages to Bell Fuels, and \$100,000 to Ashland.^{FN1}

^{FN1}. The jury also answered that it found in favor of Ashland and Bell Fuels on their punitive damage claim against Mr. Richards, but fixed the amount at \$0.

I. THE FACTS

The four plaintiffs supplied petroleum products to Arnett Oil, a wholesale dealer headquartered in Remington, Indiana. Arnett Oil resold to a network of service stations, truck stops and other oil-related businesses, some controlled or run by the Arnett family and its business associates. Arnett Oil began as the sole proprietorship of Toy Arnett, and was incorporated in 1978. In late 1979 Thomas Arnett became general manager, and Toy Arnett moved to Florida, but remained president and controlling shareholder.

A. The Credit Fraud

The gist of the facts alleged in Count I was that the Arnett brothers fraudulently schemed to induce Ashland, Marathon and Bell Fuels to extend credit to Arnett Oil beyond the level justified by its financial condition.

Arnett Oil often purchased on credit. To estab-

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

lish or maintain a credit account with Ashland, Bell Fuels and Marathon, Arnett Oil periodically sent each company financial compilations. Arnett Oil commissioned monthly and year-end compilations from defendant Richards, a certified public accountant.

On June 7, 1982, Ashland cancelled Arnett Oil's credit based upon a February, 1982 financial statement which showed Arnett Oil in very poor financial condition. Mr. Richards produced a March, 1982 statement which inflated Arnett Oil's accounts receivable by \$400,000 and its inventory by \$75,000. This statement was mailed to Ashland, Bell Fuels and Marathon. (Neither the Arnetts nor Mr. Richards challenges the sufficiency of proof of the statement's falsity.)

Relying solely on the "special accrual" statement, Marathon increased Arnett Oil's credit limit from \$100,000 to \$185,000.

After receiving the March, 1982 financial compilation, Bell Fuels' credit manager first called Mr. Richards to clarify its contents. Relying on the compilation and what it considered to be Mr. Richard's assurance of the statement's accuracy, Bell *1274 Fuels opened a credit account for Arnett Oil of \$75,000.

Mr. Richards also responded to telephone and written inquiries from Ashland's credit manager in Columbus, Ohio concerning the "special accrual" statement. Ashland subsequently re-established Arnett Oil's previously cancelled credit, setting a \$100,000 limit.

B. The Product Theft

Count II alleged a scheme by which Arnett Oil would get large quantities of plaintiffs' product without paying or intending to pay for it, and then would divert the product or its proceeds to the Arnett brothers' benefit. The crux of the scheme was to take fuel from the plaintiffs' automatic petroleum terminals rapidly enough to obtain huge amounts of fuel before their billing mechanisms could catch up and terminate Arnett Oil's credit.

Ashland and Marathon used Marathon's automated terminal facility in Hammond, Indiana to deliver fuel to their wholesale customers, such as Arnett Oil. The wholesaler, by using coded cards, could pick

up supplies of petroleum products 24 hours a day, seven days a week, without immediate payment. A computer at the terminal would transmit the data to Marathon's Findlay, Ohio office, which, if appropriate, would relay the information to Ashland's office in Kentucky. Because it could take up to three and a half days for Ashland and Marathon's credit departments to learn of a customer's pick-up, it was possible for a customer to "lift" fuel in excess of its credit limit before access to the terminal could be cut off.

Jasper, headquartered in Rensselaer, Indiana, sold through the Indiana Farm Bureau Cooperative in Peru, Indiana, which was open six days a week, twenty-four hours a day. Jasper provided release numbers to customers, allowing them to pick up fuel.

Bell Fuels used the Mobil Oil terminal in Hammond, Indiana, and employed an honor system allowing customers to pick up fuel without first paying for it or getting the seller's authorization.

Beginning April 21, 1983, Arnett Oil took substantial amounts of petroleum product from Marathon's Hammond terminal, making "lifts" around the clock. During four and a half days, Arnett Oil took product worth over twice its credit limit with Marathon. Because the period ran over a weekend, Marathon's credit department did not learn that Arnett had exceeded its credit limit until Tuesday morning, April 27. After failing to receive the money which Arnett Oil had told Marathon that they would wire, Marathon locked Arnett out of its terminal on April 28, 1983. Arnett Oil now owed Marathon \$354,083.28.

When Arnett Oil was locked out of Marathon's terminal on April 28, it began taking petroleum product unusually rapidly from Bell Fuels. That day, Tom Arnett from his Remington, Indiana office called Paul Davenport, Bell Fuels' Chief Credit Officer in Chicago, telling him (falsely) that Arnett Oil had a profitable average year, and that he would send Mr. Davenport a new financial statement of Arnett Oil within the next ten days which would be comparable to the figures on the statement Bell Fuels already had. On the basis of this conversation, Bell Fuels authorized Arnett Oil to pick up ten loads of fuel. Arnett Oil became indebted to Bell Fuels for \$170,541.86.

From April 27 until May 5, 1983, again hauling loads twenty-four hours a day, Arnett Oil took more

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

than \$600,000 of fuel from Ashland, exceeding its \$100,000 credit limit six times over. It never paid for any of the fuel it picked up during this "run"; by June 1, 1983, Arnett Oil owed Ashland \$649,009.03.

From May 9 through May 12, Arnett Oil picked up fuel from Jasper, resulting in a balance due of \$525,708.38, over five times its credit limit of \$100,000. Arnett Oil paid approximately \$50,900.00 of this balance on May 15, 1983, but no further payment was made.

The plaintiffs introduced evidence that Arnett Oil lost \$1,700,000 during the three months after March 31, 1983, implying a massive diversion of funds. As a specific instance of a diversion, the plaintiffs pointed*1275 to a wire transfer of \$350,000 made on April 28, 1983 from Arnett Oil's bank account in Indiana to a bank account of Arnett Oil of Florida, a separate entity controlled by the Arnetts. Toy Arnett drew out approximately \$178,000 of this money in checks which he then cashed. Toy Arnett testified that he considered this amount to be a loan from Arnett Oil. Arnett Oil, which was having "cash flow problems" at the time, financed the \$350,000 wire by using a line of credit personally guaranteed by Toy and Thomas Arnett, and their wives. Within ten days (a time when Arnett Oil was not paying its suppliers), Arnett Oil had paid back \$280,000 on the line of credit, considerably reducing the Arnetts' personal exposure.

Ashland, Bell Fuels and Jasper filed a petition placing Arnett Oil in involuntary bankruptcy in June, 1983. Marathon joined in the proceeding sometime after the initial hearing. There remains some disagreement over the amount of assets the bankruptcy trustee could locate; even accepting the figures claimed by the Arnetts, at the time of trial the bankrupt estate had about \$170,000 in assets, while claims totaled almost \$2,000,000. The trustee was also unable to locate any inventory or physical assets of any type belonging to Arnett Oil, apparently including petroleum product. Any equipment used in Arnett Oil's operations apparently all belonged to Super Payless.

II. RICO CLAIMS

The Arnett brothers appeal from the judgment entered against them, claiming the court should have granted their motion for judgment n.o.v. because: (1)

the evidence failed to establish the "pattern of racketeering activity" required by RICO; (2) the plaintiffs lacked standing to bring a RICO action; and (3) Arnett Oil is not a proper "enterprise" under § 1962(c) of RICO.

A. Pattern of Racketeering Activity

[1] As we have noted, the plaintiffs alleged two episodes of fraud—the credit fraud and the product theft.

Although the plaintiffs claim the credit fraud and product theft were both part of the "bust out" scheme, they somewhat inconsistently have characterized them as separate patterns of racketeering activity: the plaintiffs plead them in two counts and have constantly maintained that they were independent patterns of racketeering activity, not a single pattern of which each scheme was an element. The credit fraud and product theft accordingly were separated in the jury's special interrogatories. The jury found that each episode was sufficient to form a pattern, and made a single award of damages based on its findings.

Count I alleged predicate RICO offenses of mail and wire fraud. The mailings of the "special accrual statement" and the interstate phone calls between Mr. Richards and Ashland and Bell Fuels were alleged to be in furtherance of the scheme to fraudulently induce Ashland, Bell Fuels and Marathon to grant or expand Arnett Oil's credit.

The plaintiffs did not clearly demonstrate how much the fraudulent obtaining of credit in 1982 facilitated the product theft months later in 1983. Doubtless Arnett Oil had to have some kind of credit standing to obtain access to the terminals. But, since we find the evidence as to the product theft (Count II) sufficient to support the verdict, as explained below, we need not be concerned with the nexus between the credit fraud and the product theft.

Count II alleged RICO predicate offenses of mail and wire fraud, bankruptcy fraud and arson. The mail and wire fraud offenses involved interstate phone calls between Arnett Oil, and Bell Fuels and Ashland, (requesting further credit from the former and stalling payment of debt to the latter), possibly the numerous wire communications and mailings generated during the billing process, and the \$350,000 wire transfer of

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

Arnett Oil assets to Florida. The bankruptcy fraud involved the failure to accurately account for this \$350,000 on its Statement of Affairs filed with the bankruptcy court, and Toy and Thomas Arnetts' recognition of a false claim for Carson Petroleum Company against Arnett *1276 Oil's estate. The arson concerned the burning of Arnett Oil's records immediately before the bankruptcy trustee requested them, while the records were being transported in Charles and Norma Arnett's (Toy and Thomas' brother and sister-in-law) trailer.^{FN2}

^{FN2}. Arson and "any offense involving fraud connected with a case under title 11" are RICO predicate acts. 18 U.S.C. § 1961(1)(A) and (D). The jury was asked whether the plaintiffs proved "that these acts of mail fraud or wire fraud or arson or bankruptcy fraud as alleged in Count II constituted a pattern of racketeering activity conducted by one or more, if any, of the defendants." As to Charles and Norma Arnett, and Carson Petroleum, the jury answered "no"; as to Toy and Thomas Arnett, they answered "yes." The findings favoring Charles and Norma Arnett and Carson Petroleum do not mean the arson and bankruptcy fraud did not occur. The jury could have decided that the arson occurred, and that the misstatement on the bankruptcy filing was fraudulent, but exonerated Charles and Norma Arnett and Carson Petroleum because they only committed a single predicate act, not a pattern. Likewise, the finding that these defendants had not conspired to violate 18 U.S.C. § 1962(c) could have been based on lack of evidence of an agreement.

Appellants argue that the evidence was insufficient to sustain the jury's finding of a pattern of racketeering activity.

A pattern of racketeering activity "requires at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). "Racketeering activity," in turn, includes any act or threat "chargeable" under certain state laws (including arson), and any act "indictable" under a number

of enumerated federal criminal statutes (including wire and mail fraud, and bankruptcy fraud). 18 U.S.C. § 1961(1).

Prior to 1985, little attention was paid to the meaning of pattern, a pattern often being found without discussion when there was proof of any two acts of racketeering activity. See, e.g., *United States v. Weatherspoon*, 581 F.2d 595, 601-02 (7th Cir.1978).

In 1985, however, the Supreme Court commented on the pattern requirement in *Sedima, S.P.R.L. v. Imrex Co.*, blaming the "extraordinary" uses of civil RICO partly on "the failure of Congress and the courts to develop a meaningful concept of 'pattern.'" 473 U.S. 479, 499-500, 105 S.Ct. 3275, 3286-87, 87 L.Ed.2d 346 (1985).

In its now-famous footnote 14, the Court in *Sedima* provided guidance in tackling further definition of a pattern. The Court noted that while a pattern requires at least two acts of racketeering activity, it does not mean any two such acts: "[i]ndeed, in common parlance two of anything do not generally form a 'pattern.'" *Id.* at 496 fn. 14, 105 S.Ct. at 3285 n. 14. The Court stated that "[t]he target of [RICO] is ... not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." *Id.* (quoting S.Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)) (emphasis added by Court). The Court found additional direction in another provision of the bill containing RICO which defined a pattern as conduct embracing "criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e) (1984) (later repealed).

Since *Sedima*, the pattern of racketeering activity question has appeared in an extraordinary number of cases. This Court alone has considered the issue no less than sixteen times,^{FN3} and the Supreme Court currently has pending thirteen petitions for review on the question (March 21, 1989 *1277 U.S.L.W. Topical Index) and has granted review and heard argument in a fourteenth. *H.J. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir.1987), cert. granted, --- U.S. ---, 108 S.Ct. 1219, 99 L.Ed.2d 420

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

(1988).

FN3. See Deppe v. Tripp, 863 F.2d 1356 (7th Cir.1988); Brandt v. Schal Associates, Inc., 854 F.2d 948 (7th Cir.1988); SK Hand Tool Corp. v. Dresser Industries Inc., 852 F.2d 936 (7th Cir.) petition for cert. filed, 57 U.S.L.W. 3237 (Sept. 15, 1988) (No. 88-458); Jones v. Lampe, 845 F.2d 755, 756 fn. 4 (7th Cir.1988) (and cases collected therein); United States v. Horak, 833 F.2d 1235 (7th Cir.1987); Ill. Dept. of Rev. v. Phillips, 771 F.2d 312 (7th Cir.1985) (Phillips); Lipin Enterprises, Inc. v. Lee, 803 F.2d 322 (7th Cir.1986).

This Circuit has attempted to navigate a middle course between requiring proof of multiple, independent criminal schemes^{FN4} and minimizing any requirement in addition to two predicate acts.^{FN5} We have focused on the dual notions of “continuity and relationship” emphasized in Sedima. See Morgan v. Bank of Waukegan, 804 F.2d 970, 975-77 (7th Cir.1986). In Morgan, we recognized the tension between the two concepts:

FN4. See Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir.1986). The Supreme Court now has under consideration this approach, as applied in H.J. Inc., above.

FN5. See, e.g., R.A.G.S. Couture, Inc. v. Hvatt, 774 F.2d 1350 (5th Cir.1985); Cal. Arch. Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1469 (9th Cir.1987), cert. denied, 484 U.S. 1006, 108 S.Ct. 698, 98 L.Ed.2d 650, (1988).

Requiring both continuity and relationship among the predicate acts for the pattern requirement to be met is a sound theoretical concept that is not easily accomplished in practice. This is because the terms “continuity” and “relationship” are somewhat at odds with one another. Relationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct. Continuity, on the other hand, would embrace predicate acts occurring at different points in time or involving different victims. To focus excessively on either continuity or relationship alone effec-

tively negates the remaining prong.
804 F.2d at 975.

While defining the proper degree of relationship in a pattern has not caused courts great difficulty, this Court has continued to struggle with the proper application of the continuity branch, which probably cannot be defined more precisely than it was in Morgan:

In order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e., “transactions ‘somewhat separated in time and place.’” Graham v. Slaughter, 624 F.Supp. 222, 225 (N.D.Ill.1985) (quoting United States v. Moeller, 402 F.Supp. 49, 57-58 (D.Conn.1975)). [Citations omitted.] Relevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries.

804 F.2d at 976. See also Deppe, 863 F.2d at 1366; Brandt, 854 F.2d at 952; Liquid Air v. Rogers, 834 F.2d 1297, 1304 (7th Cir.1987), petition for cert. filed, 56 U.S.L.W. 3531 (U.S. Jan. 28, 1988) (No. 87-1262). “The doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative.” Morgan, 804 F.2d at 976. Subsequent cases have borne this out. Neither the presence of a single scheme^{FN6} nor a single victim^{FN7} has precluded the finding of a pattern of racketeering activity. (Although we have held that “multiple acts of mail fraud in furtherance of a single episode of fraud involving one victim and relating to one basic transaction cannot constitute the necessary pattern.” Tellis v. U.S. Fidelity & Guar. Co., 826 F.2d 477, 478 (7th Cir.1986) vacated and remanded on other grounds, 483 U.S. 1015, 107 S.Ct. 3255, 97 L.Ed.2d 755 (1987).) Despite a degree of amorphism, the multi-factor test in Morgan has found approval in recent commentary. See Ethan M. Posner, Note, Clarifying a “Pattern” of Confusion: A Multi-Factor Approach to Civil RICO’s Pattern Requirement, *127886 Mich.L.Rev. 1745, 1775-79 (1988); Michael Goldsmith, RICO and “Pattern:” The Search

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

for “Continuity Plus Relationship,” 73 *Cornell L.Rev.* 971, 982 (1988); Lisa A. Huestis, RICO: The Meaning of “Pattern” Since *Sedima*, 54 *Brooklyn L.Rev.* 621, 633 (1988). Until the Supreme Court or Congress provides further guidance, the best approach remains a careful fact-specific scrutiny of each case in light of the relevant factors, this court’s precedent, and the purposes underlying RICO.

FN6. *Deppe*, above; *Liquid Air*, above; *Appley v. West*, 832 F.2d 1021 (7th Cir.1987); *Phillips*, above.

FN7. *Morgan*; *Phillips*; *Appley*.

The plaintiffs claim that the evidence in Count II was sufficient under *Morgan* because it involved “literally hundreds of predicate acts” of mail and wire fraud, plus arson and bankruptcy fraud, and because four victims were injured over a period of time.

The plaintiffs are mistaken to emphasize the raw number of mail and wire fraud violations. Some of the present uncertainty over the pattern element stems from such arguments which depend upon the unusual nature of these two most commonly alleged RICO predicate acts.

RICO includes as “racketeering activity” any act indictable under the mail and wire fraud statutes.^{FNB} 18 U.S.C. § 1961(1)(B). In mail and wire fraud, each mailing or interstate communication is a separate indictable offense, even if each relates to the same scheme to defraud, and even if the defendant did not control the number of mailings or communications. *United States v. Aldridge*, 484 F.2d 655, 660 (7th Cir.1973). See *Badders v. United States*, 240 U.S. 391, 393, 36 S.Ct. 367, 368, 60 L.Ed. 706 (1916). Thus, the number of offenses is only tangentially related to the underlying fraud, and can be a matter of happenstance. While we have encouraged prosecutors to be restrained in the number of mail or wire fraud counts charged relating to a single scheme to defraud, *United States v. Joyce*, 499 F.2d 9, 25 (7th Cir.1974) (Swygert, C.J., concurring in relevant part, joined by the Court), each mailing or wire communication remains a separate offense. *United States v. Zeidman*, 540 F.2d 314, 317 (7th Cir.1976).

FN8. The mail fraud statute, 18 U.S.C. § 1341, makes it a crime for any person to use

the United States Postal Service for the purpose of executing “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises...” The wire fraud statute, 18 U.S.C. § 1343, likewise prohibits the use of “wire, radio, or television communication in interstate or foreign commerce” for the purpose of executing a scheme or artifice to defraud.

Because of this peculiarity, when the crimes of mail and wire fraud are alleged as RICO predicate acts, any fraud which generates mailings or wire communications involves as many acts of “racketeering activity” as mailings or communications which further the scheme. This encourages bootstrapping ordinary civil fraud cases into RICO suits. Consider, for example, *Lipin Enterprises Inc.*, above, where we affirmed the dismissal of an action alleging that the fraudulent sale (involving twelve mailings) of a company and its wholly-owned subsidiary to a single buyer was a RICO violation. 803 F.2d at 323. Despite the existence of many predicate acts, we held that the defendants’ actions lacked the “threat of continuing activity” necessary for a RICO violation. *Id.* at 324 (quoting Sen.Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)). See also *SK Hand Tool Corp.*, 852 F.2d at 940-43 (seller’s misrepresentation of sold company’s true financial condition not a “pattern,” despite multiple mailings and wire communications). Likewise, the finding of a pattern formed by multiple mail and wire fraud violations was sustained in *Liquid Air* only because “each [predicate] act resulted in a distinct injury,” which demonstrated the necessary continuity. 834 F.2d at 1297.

[2] A review of our post- *Sedima* cases shows that the raw number of predicate acts has never been determinative, especially when only mail and wire fraud are alleged.

Mail fraud and wire fraud are perhaps unique among the various sorts of “racketeering activity” possible under RICO in that the existence of a multiplicity of predicate acts ... may be no indication of the requisite continuity of the underlying*1279 fraudulent activity. Thus, a multiplicity of mailings does not necessarily translate into a ‘pattern’ of racketeering activity.

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

Lipin Enterprises Inc., 803 F.2d at 325 (Cudahy J., concurring). Accord, Elliot v. Chicago Motor Club Ins., 809 F.2d 347, 350 (7th Cir.1986).

Nevertheless, we conclude the evidence in this case is sufficient to support the jury's finding of a pattern of racketeering activity.

The defendants' actions harmed four different victims. The number of victims is an important consideration; only twice has this court found an absence of a pattern when multiple victims were injured by a defendant's acts, and in both of those cases the several injuries flowed from the same acts. Jones, 845 F.2d at 758; Elliot, 809 F.2d at 350. Here, each victim was hurt in the same manner (showing relationship), and the injuries were inflicted through independent sequential actions (showing continuity)-the "separate transactions" required by Morgan. 804 F.2d at 976. Each truckload taken advanced the scheme and caused an injury to one plaintiff. See Liquid Air, 834 F.2d at 1297.

Also, the product theft involved a *variety* of predicate acts: wire fraud, in the interstate phone conversations with oil companies requesting further credit or extensions, and in using wire communications to divert company assets; bankruptcy fraud, in the Arnett brothers' two misrepresentations to the bankruptcy court; and arson, in the destruction of Arnett Oil's records. More than the number of predicate acts, proof that the defendants used several unlawful means of achieving the scheme's goal separates this case from ordinary business fraud cases. We think that although the approximately four months between the start of the product theft and the last proved predicate act-from the start of the runs to the bankruptcy fraud-was not an especially long period of time, it was sufficient, viewed in light of the other evidence of continuity.

[3] Characterizing the Count II allegations as a single scheme does not preclude the finding of a pattern. In SK Hand Tool Corp., we noted that it is an exception to the general rule to find a pattern within a single scheme. 852 F.2d at 941 (citing Jones, 845 F.2d at 758-59). However, we have done just that in a number of cases, including this court's most recent decision on the issue, in Deppe, 863 F.2d at 1364-66, and in Morgan, where we said "the mere fact that the predicate acts relate to the same overall scheme or

involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement." 804 F.2d at 976. See also Horak, 833 F.2d at 1240; Liquid Air, 834 F.2d at 1303-05; Appley, 832 F.2d at 1027-28. But see H.J. Inc., above at n. 4.

Therefore, we conclude that the record supports the jury's finding that the product theft scheme, victimizing four companies, lasting over four months, and involving multiple wire fraud offenses, plus bankruptcy fraud and arson, constituted a pattern of racketeering activity.

B. Standing

[4] Section 1964(c) permits any person injured in his or her business or property by reason of a violation of § 1962(c) to recover treble damages. Plaintiffs here seem plainly qualified to sue under § 1964(c). They pleaded, and the jury found, that the Arnett brothers conducted the affairs of Arnett Oil through a pattern of racketeering activity. The fraudulent scheme alleged in Count II involved exploiting the plaintiffs' sales and billing procedures so that Arnett Oil could rapidly obtain unusually large quantities of the plaintiffs' property, and then diverting that fuel or its proceeds, making worthless Arnett Oils' obligations to pay the plaintiffs for the fuel taken. The plaintiffs' injury from such conduct of the enterprise was direct and substantial.

The Arnetts argue that the plaintiffs lacked standing to sue. They rely on the fact that in diverting the assets of Arnett Oil, the Arnetts would be violating their fiduciary duties as officers of the corporation. It would follow, they argue, that the trustee in bankruptcy would have the right *1280 to sue the Arnetts, and that the plaintiffs would have only the rights of bankruptcy estate creditors.

The Arnetts rely on two cases. Koch Refining v. Farmers Union Cent. Exchange, Inc., 831 F.2d 1339 (7th Cir.1987), decided that under Illinois and Indiana law a bankruptcy trustee of a cooperative can bring a cause of action based on an alter ego theory directly against the member-owners of the cooperative. Id. at 1342-43. The court further decided that the plaintiff creditors of the cooperative did not have standing to sue the member-owners directly, where they had not shown that they themselves were injured by the member-owners. Id. at 1354.

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

In Koch Refining, the court noted that creditors' fraud claims under RICO have been found to be assertable only by the trustee, citing Dana Molded Products, Inc. v. Brodner, 58 B.R. 576, 578 (N.D.Ill.1986). 831 F.2d 1343. Dana held that a creditor of a bankrupt corporation lacked standing to bring a RICO claim against the corporate president. The court made it plain, however, that "the predicate acts of racketeering on which plaintiff bases its claim all involve fraudulent transfers of money from [the bankrupt corporation] and the injuries plaintiff asserts are indistinguishable from those suffered by [the bankrupt corporation] itself." 58 B.R. at 579. It appears the predicate acts were bankruptcy frauds perpetrated while the president was operating the corporation as debtor in possession.

Here, the plaintiffs have shown injury distinct from that of other creditors. Although a part of the underlying scheme was the diversion of corporate assets (for which the trustee may well have a cause of action against the Arnetts^{FN9}) an essential part of the scheme, on which its success depended, was the fraudulent taking from the plaintiffs of exceptionally large quantities of fuel. We conclude that the facts show an injury to the plaintiffs significantly different from the injuries to creditors in general resulting from the diversion of corporate assets.

FN9. Plaintiffs concede they will not be able to maintain claims against Arnett Oil for any amounts which they recover from defendants in this action.

C. Enterprise

[5] Next, the Arnetts claim that Arnett Oil was not a sufficiently distinct entity to be considered the enterprise whose affairs they conducted through a pattern of racketeering activity.

"Enterprise," defined in § 1961(4), includes corporations. While the enterprise under RICO cannot simply be the person who allegedly conducted his own affairs through a pattern of racketeering activity, United States v. DiCaro, 772 F.2d 1314, 1319 (7th Cir.1985), there need be shown "only some separate and distinct existence for the person and the enterprise." Haroco, Inc. v. American Nat. B. & T. Co. of Chicago, 747 F.2d 384, 402 (7th Cir.1984) *aff'd*, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985). The evidence showed that Arnett Oil was an incorpo-

rated business which employed several people besides the Arnett brothers, which is sufficient to support the conclusion that Arnett Oil and the Arnett brothers were not one and the same. See McCullogh v. Suter, 757 F.2d 142, 144 (7th Cir.1985) (sole proprietorship with several employees is a sufficiently distinct enterprise).

III. SUPER PAYLESS

[6] Defendant Super Payless, Inc., was Arnett Oil's "trucking arm." It transported, in trucks it owned and operated, all the petroleum product Ashland Oil purchased, including that taken during the runs on the plaintiffs' terminals. Super Payless was managed by Thomas Arnett, operated out of the same office as Arnett Oil, and employed basically the same people. Toy and Thomas Arnett each owned 50% of Super Payless, and were its only officers, Toy its President/Treasurer and Thomas its Vice-President/Secretary.

The plaintiffs claim that the jury's finding that Super Payless did not conspire to violate RICO is inconsistent with the finding that its officers, the Arnett brothers, did so conspire, and is against the manifest *1281 weight of the evidence, so that the trial judge should have granted their motion for new trial on that issue. Since Toy and Thomas Arnett were the sole owners and officers of Super Payless, and since Super Payless transported the fuel under the unusual circumstances of this case, and was chargeable with the knowledge and intent of its officers, it is hard to see how Toy and Thomas conspired but Super Payless did not.

Super Payless cites an exception to corporate liability in claims under § 1962(c) of RICO which avoids penalizing a corporation which is an "unwitting conduit" of its employees' RICO violations. D & S Auto Parts, Inc. v. Schwartz, 838 F.2d 964, 967 (7th Cir.1988). The corporation's responsibility depends upon the role it plays in the scheme-victim, prize, instrument or perpetrator. Haroco Inc., 747 F.2d at 401. The exception is narrow, though, and only applies when a RICO claim is brought against the "enterprise" itself. D & S Auto Parts, Inc., 838 F.2d at 966-986; Liquid Air, 834 F.2d at 1306; Haroco Inc., 747 F.2d at 399-402. The plaintiffs in this case alleged that Super Payless conspired with Toy and Thomas Arnett to conduct another enterprise's affairs through a pattern of racketeering activ-

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

ity, not its own. Thus, the concern engendering the exception, that *respondeat superior* might be used to circumvent § 1962(c)'s requirement that the person conducting the racketeering activities be separate from the enterprise through which those activities are conducted, does not apply here. See *Gruber v. Prudential-Bache Securities, Inc.*, 679 F.Supp. 165, 179 (D.Conn.1987).

Super Payless also briefly argues that a corporation cannot be found to conspire with its own officers, citing footnote 7 of *Medallion TV Enterprises Inc. v. SelecTV of California, Inc.*, 627 F.Supp. 1290, 1301 (C.D.Cal.1986), *aff'd* 833 F.2d 1360, *petition for cert. filed* 56 U.S.L.W. 3649 (U.S. March 5, 1988) (No. 87-1478).^{FN10} The plaintiffs respond in kind, citing footnote 22 in *Haroco Inc.*, 747 F.2d at 403, where this court distinguished the Supreme Court's disapproval of antitrust intracorporate conspiracies in *Copperweid Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) from conspiracies alleged under RICO. In *Haroco Inc.*, we noted that *Copperweid Corp.*, at least in an alleged conspiracy between a parent corporation and its wholly-owned subsidiary, "does not extend to RICO's provisions in 18 U.S.C. § 1962(c) primarily because the Sherman Act is premised, as RICO is not, on the basic distinction between concerted and independent action. 747 F.2d at 403 n. 22 (citing *Copperweid Corp.*, 467 U.S. at 769, 104 S.Ct. at 2740). Since a subsidiary and its parent theoretically have a community of interest, a conspiracy "in restraint of trade" between them poses no threat to the goals of antitrust law-protecting competition. In contrast, intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits. *Russello v. United States*, 464 U.S. 16, 26-28, 104 S.Ct. 296, 302-03, 78 L.Ed.2d 17 (1983); *Pandick Inc.*, above.

FN10. Contrary to the plaintiffs' assertion, the clear weight of authority does not support its position. The district courts are at best about evenly divided, and no other circuit has considered the question. For cases accepting RICO intracorporate conspiracy theories, see *Pandick Inc. v. Rooney*, 632 F.Supp. 1430, 1435 (N.D.Ill.1986); *Callan v. State Chemical Mfg. Co.*, 584 F.Supp. 619, 623 (C.D.Ill.1984); *Saine v. A.I.A., Inc.*,

582 F.Supp. 1299, 1307 n. 9 (D.Colo.1984); *Mauriber v. Shearson/American Exp., Inc.*, 567 F.Supp. 1231, 1241 (S.D.N.Y.1983). *Contra*, see *Lawaetz v. Bank of Nova Scotia*, 653 F.Supp. 1278, 1287 (D.V.I.1987) (collecting cases).

In light of the great weight of evidence supporting the jury's finding that Toy and Thomas Arnett violated and conspired to violate RICO, and the glaring inconsistency between those findings and the finding that Super Payless did not conspire to violate RICO, we deem it an abuse of discretion to deny the plaintiffs' motion for a new trial on this issue. Accordingly, we reverse and remand in this respect.

IV. THE RICHARDS DEFENDANTS

A. RICO

The district court granted summary judgment in favor of defendants Mr. Richards*1282 and his corporation, Richards, Isenberg & Co., Inc. on the RICO counts (I, II and VIII), based on our holding in *Tellis v. U.S. Fidelity and Guarantee Company*, 805 F.2d 741 (7th Cir.1986), *vacated and remanded*, 483 U.S. 1015, 107 S.Ct. 3255, 97 L.Ed.2d 755 (1987), that a two-year statute of limitations applied to RICO. On June 22, 1987 (the day the district court entered its final judgment) the Supreme Court found that RICO, which does not have its own limitations period, was analogous to suits for treble damages under the Clayton Act, and thus is subject to a four-year statute of limitations. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 107 S.Ct. 2759, 2764-66, 97 L.Ed.2d 121 (1987).

The acts complained of occurred less than four years before suit was filed. Although this court has not yet decided whether *Agency Holding* applies retroactively, Mr. Richards concedes that it does, agreeing that the summary judgment in his favor should be reversed.^{FN11}

FN11. Since Mr. Richards waives the issue, we do not decide it. We note, however, that other courts have applied *Agency Holding* retroactively. *Lund v. Shearson/Lehman/American Exp., Inc.*, 852 F.2d 182 (6th Cir.1988); *Beneficial Standard Life Ins. v. Madariaga*, 851 F.2d 271 (9th

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

Cir.1988); Davis v. A.G. Edwards and Sons, Inc., 823 F.2d 105 (5th Cir.1987); Charter Oak Fire Ins. Co. v. Domberg, No. 83 C 4522, 1987 WL 15413 (N.D.Ill. August 3, 1987) (available on Lexis and Westlaw).

Mr. Richards does argue, though, that the reversal should not include Richards, Isenberg & Co., Inc. because it was incorporated after the allegedly wrongful conduct took place, and no showing of successor liability was made. Since the plaintiffs do not point to anything in the record to the contrary, we reverse only as to Mr. Richards.

B. Fraud

All four plaintiffs brought a pendent state claim alleging that Mr. Richards, his company, and the Arnetts committed common law fraud (Count X). Before trial, Count X was voluntarily dismissed by each plaintiff as to each defendant except Mr. Richards and Richards & Company (as Mr. Richards' company was then called). Although the court had already dismissed the RICO claims against Mr. Richards and Richards & Company, it retained pendent jurisdiction over the state law claim. Once a trial court has dismissed the only federal claim against a defendant, it may retain pendent state claims if doing so will promote judicial economy, convenience and fairness to litigants. Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); Zepik v. Tidewater Midwest, Inc., 856 F.2d 936, 944-45 (7th Cir.1988). Mr. Richards does not question the judge's decision to retain jurisdiction, and the decision appears to be a proper exercise of his discretion. See Zabkowitz v. West Bend Co., Div. Dart Industries, 789 F.2d 540, 546 (7th Cir.1986).

During trial, Jasper voluntarily dismissed its fraud claim against both Mr. Richards and Richards & Company. At the close of the plaintiffs' case, the court granted a directed verdict against all plaintiffs in favor of Richards & Company, and against Marathon in favor of both Mr. Richards and Richards & Company. The jury found in favor of the remaining two plaintiffs, Ashland and Bell Fuels, against Mr. Richards. The court entered judgment accordingly, awarding \$75,000 in damages to Bell Fuels, and \$100,000 to Ashland.

(1) Mr. Richards' Cross-appeal

Mr. Richards claims that Count X should have

been dismissed prior to trial because the plaintiffs "renege" on their stated intention to seek a dismissal of that count.

On March 9, 1987, the plaintiffs filed a trial brief in compliance with a pre-trial order and included a statement that they wished to "pare-down" their complaint "by seeking stipulations to dismiss the ... common law fraud count." The plaintiffs did not discuss the fraud theory or facts supporting it in their trial brief or any other pretrial submission, nor did Mr. Richards.

In the meantime, counsel for Mr. Richards had filed a summary judgment motion claiming that the RICO claims were barred *1283 by the statute of limitations. The plaintiffs responded on March 13, 1987, asking the court to reserve ruling on the summary judgment motion, claiming that applying a "discovery rule" on the statute of limitations question would require findings of fact better determined at trial.

When the trial court ordered summary judgment in favor of Mr. Richards and Richards & Co. on the first day of trial, March 23, 1987, the plaintiffs' counsel indicated they intended to pursue Count X, their only remaining claim against the Richards defendants. Opposing counsel objected and filed a motion to dismiss Count X. The court reserved ruling on the motion, allowing the plaintiffs to file a supplemental trial brief covering Count X.

Mr. Richards argues that the plaintiffs' original trial brief was an "addendum" to the court's "Order With Reference to Conduct of Trial," and that the two together constituted a binding pre-trial order which could be modified "only to prevent manifest injustice." FED.RULE CIV.PRO. 16(e); Erff v. Markhon Industries, Inc., 781 F.2d 613, 617 (7th Cir.1986).

[7][8] A trial court may choose to hold a party to pretrial representations. Knight v. Otis Elevator Co., 596 F.2d 84, 89 (3d Cir.1979); Moore v. Sylvania Electric Products, Inc., 454 F.2d 81, 83-84 (3d Cir.1972). Since the decision to hold parties to a formal pretrial order is within the trial court's broad discretion, Sadowski v. Bombardier Ltd., 539 F.2d 615, 618 (7th Cir.1976), the discretion whether to hold a party to a non-binding trial brief must be broader

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

still. When making that decision, the trial court should consider:

- (1) the prejudice or surprise in fact of the opposing party;
- (2) the ability of the opposing party to cure the effects of any prejudice;
- (3) the disruption of the orderly and efficient trial of the case or of other cases in the court; and
- (4) the bad faith or willfulness in the party's failure to adhere to its pretrial representation.

Smith v. Rowe, 761 F.2d 360, 365 (7th Cir.1985); Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, 1245 (7th Cir.1982), *aff'd on other grounds*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984).

[9] The fraud claim had appeared in the pleadings for more than a year. Although counsel for Mr. Richards claims he ceased preparation on Count X in reliance on the plaintiffs' representation that they would seek dismissal, only two weeks passed before the plaintiffs revived Count X. The trial then covered four weeks, and included a ten-day recess during the plaintiffs' case. We are unpersuaded by Mr. Richards' claim that he was prejudiced.

We also note that the plaintiffs' promise to seek stipulations dismissing Count X was explicitly intended to pare down the complaint to just RICO claims; when the RICO claim against Mr. Richards was dismissed, the situation materially changed. We are unconvinced that the plaintiffs' counsel's actions demonstrated any bad faith. We conclude that the trial judge acted within his discretion in declining to dismiss Count X.

(2) Marathon's Appeal

[10] At the end of the plaintiffs' case, Chief Judge Sharp granted Mr. Richards' motion for directed verdict against Marathon, but denied it as to Ashland and Bell Fuels. He did not state the basis for his ruling. Reviewing the record, it seems fairly clear that he accepted Mr. Richards' argument that Toro Co. v. Krouse, Kern & Co., Inc., 644 F.Supp. 986 (N.D.Ind.1986), *aff'd* 827 F.2d 155 (7th Cir.1987)

required the plaintiffs to show "privity or near-privity" between themselves and Mr. Richards in order to recover for fraud. While there was evidence that Mr. Richards had spoken directly with employees of Ashland and Bell Fuels, such evidence was lacking as to Marathon, so the court granted a directed verdict against the latter. Marathon appeals.

Toro was a suit by a third party claiming to have detrimentally relied upon negligently prepared audit reports. 644 F.Supp. at 991. The court held that in accountant negligence actions Indiana would follow *1284 the restrictive "privity or near privity" rule of Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), and granted summary judgment against the plaintiff, who had had no contact or contract with the accountants preparing the audit reports.

In Ultramares Corp., then Chief Judge Cardozo was concerned with the possibly limitless liability for negligence accountants would face unless their duty of care was restricted to those who employ them. He plainly recognized the distinction between an accountant's duty of care and duty to refrain from fraud:

The defendants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of contract to make it with the care and caution proper to their calling.... To creditors and investors to whom the employer exhibited the certificate, the defendants owed a like duty to make it without fraud, since there was notice in the circumstances of its making that the employer did not intend to keep it himself. [citation omitted] *A different question develops when we ask whether they owed a duty to these to make it without negligence.*

255 N.Y. at 179, 174 N.E. 444 (emphasis added). The court went on to hold that the defendants' duty of care extended only to those with whom they had contractual privity, or a relationship "so close as to approach that of privity." 255 N.Y. at 182-83, 174 N.E. at 446. Toro, which adopted Ultramares Corp., was likewise grounded in accountant negligence, not fraud. Privity, however, is not an element of fraud in Indiana. See, e.g., Parke County v. Ropak, Inc., 526 N.E.2d 732, 736 (Ind.App.1988); Plymale v. Upright, 419 N.E.2d 756, 760 (Ind.App.1981) (collecting cases). To require a showing of privity or near privity would "emancipate accountants from the conse-

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

quences of fraud," just what *Ultramares Corp.* explicitly did not do. 255 N.Y. at 189, 174 N.E. 448.

Mr. Richards reminds us that we may affirm the district court's decision even though its reasoning was incorrect, if the record discloses a fair basis for doing so. *Haroco Inc.*, 747 F.2d at 399. While Mr. Richards does not challenge the sufficiency of the evidence showing that the statement was false, he claims there was insufficient evidence to find that he made a representation to Marathon, and that Marathon reasonably relied on that representation, if made.

There was sufficient evidence to present a jury question on both issues. The cover letter which accompanied the "Special Accrual Statement" plainly shows that Mr. Richards was aware that the statement would be given to Arnett Oil's suppliers:

Here are the statements you need to provide your suppliers which shows Arnett Oil, Inc. on the accrual basis. As you know, Arnett Oil, Inc. tax returns are prepared on the cash basis and therefore, the tax return for March 31, 1982 will differ significantly from the attached.

While Mr. Richards claimed at trial he was unaware at the time *which* suppliers would receive the statement, he knew that *some* would.

[11] Mr. Richards also argues that the accountant's disclaimer which accompanied the financial statement sent to Marathon makes any reliance on the accuracy of the statement unreasonable as a matter of law, or in any case that there was no evidence that reliance on such a statement was reasonable. ^{FN12} Mr. Richards points out that the "special accrual statement" was merely an unverified compilation of figures provided by Arnett Oil, not an audit, and did not carry an accountant's assurance of accuracy. He claims it could not reasonably be relied upon as accurate. Such a claim is inconsistent with the testimony of employees of Ashland and Bell Fuels that they contacted Mr. Richards directly to confirm the accuracy of the figures in the statement, and with Marathon's theory of Mr. *1285 Richards' liability-Marathon did not merely claim that Mr. Richards failed to verify the accuracy of the statement; it claimed, and the jury reasonably found, that Mr. Richards knew that statement was fraudulent and that it would be relied on as accurate. A disclaimer cannot

relieve an accountant from the duty to refrain from knowingly being party to fraud.

FN12. Mr. Richards does not challenge the jury's implicit finding of the reasonableness of Ashland and Bell Fuels' reliance on the statement and any assurances of its accuracy made by him.

A jury could reasonably find that Marathon's reliance on the statement was justified. While unaudited statements do not carry an accountant's guarantee of accuracy, the plaintiffs' expert accounting witness, Mr. Hatcher, testified that they are governed by generally accepted accounting principles unless stated differently on their face; that an accountant cannot ethically prepare a compilation using figures known to be wrong; and if the accountant later learns the figures used are incorrect, the accountant must notify whoever received the compilation of the inaccuracies. Since a jury could conclude that Marathon was reasonable in its practice of accepting such unaudited compilations when making credit determinations, we decline to uphold the directed verdict against Marathon.

We do not accede to Marathon's suggestion that we order entry of judgment in its favor against Mr. Richards based on the jury's findings against him on Ashland and Bell Fuel's fraud claims. The cases are not identical. While we conclude that a jury properly could find that Marathon's reliance on the compilation alone was reasonable, we cannot say as a matter of law that it was. Therefore we reverse and remand for trial on Marathon's fraud claim.

V. CONCLUSION

Insofar as the judgment was in favor of Super Payless and Mr. Richards on the plaintiffs' RICO claims, and was in favor of Mr. Richards on Marathon's fraud claim, it is REVERSED and the cause REMANDED for trial. In all other respects, the judgment is AFFIRMED. The plaintiffs are awarded costs on appeal.

C.A.7 (Ind.),1989.
Ashland Oil, Inc. v. Arnett
875 F.2d 1271, RICO Bus.Disp.Guide 7213

END OF DOCUMENT

875 F.2d 1271, RICO Bus.Disp.Guide 7213
(Cite as: 875 F.2d 1271)

APPENDIX B

▷

Supreme Court of the United States
 CITY OF LAKEWOOD, Appellant
 v.
 PLAIN DEALER PUBLISHING CO.

No. 86-1042.
 Argued Nov. 4, 1987.
 Decided June 17, 1988.

Newspaper brought action challenging ordinance granting mayor authority to grant or deny applications for annual permits to place newsracks on public property. The United States District Court for the Northern District of Ohio entered judgment in favor of city and newspaper appealed. The Court of Appeals for the Sixth Circuit, 794 F.2d 1139, reversed and city appealed. The Supreme Court, Justice Brennan, J., held that: (1) facial challenge could be maintained, and (2) statute giving mayor unbridled discretion over whether to permit newsracks was unconstitutional.

Affirmed and remanded.

Justice White dissented and filed an opinion in which Justice Stevens and Justice O'Connor joined.

Chief Justice Rehnquist and Justice Kennedy took no part.

West Headnotes

[1] Constitutional Law 92 ↪ 1535

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)2 Commercial Speech in General
92k1535 k. In General. Most Cited Cases
 (Formerly 92k90.2)

Constitutional Law 92 ↪ 2070

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2070 k. In General. Most Cited Cases
 (Formerly 92k90.2, 92k90.1(8))

Degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ↪ 1592

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(B) Licenses and Permits in General
92k1592 k. Prior Restraints. Most Cited Cases
 (Formerly 92k90.1(4))

In the area of free expression, licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.

[3] Constitutional Law 92 ↪ 1590

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(B) Licenses and Permits in General
92k1590 k. In General. Most Cited Cases
 (Formerly 92k90.1(4))

Major First Amendment risks associated with unbridled licensing schemes are self-censorship by speakers in order to avoid being denied a license to speak and the difficulty of effectively detecting, reviewing, and correcting content-based censorship as applied without standards by which to measure the licensor's actions. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ↪ 1590

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(B) Licenses and Permits in General
92k1590 k. In General. Most Cited Cases
(Formerly 92k90.1(4))

When statutes significantly threaten the risk of self-censorship by speakers in order to avoid being denied a license and the risk of difficulty in detecting and correcting content-based censorship, courts must entertain an immediate facial attack on the law. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ↪ 1590

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(B) Licenses and Permits in General
92k1590 k. In General. Most Cited Cases
(Formerly 92k90.1(4))

Facial challenge under the First Amendment lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ↪ 1499

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General
92XVIII(A)1 In General
92k1499 k. Censorship. Most Cited Cases
(Formerly 92k90(1))

Not every law involving discretion may be challenged as censorship by the press or a speaker; law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ↪ 2080

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(U) Press in General
92k2080 k. Newsracks and Newsstands.
Most Cited Cases
(Formerly 92k90.1(8))

Facial challenge could be brought to constitutionality of ordinance giving mayor unbridled authority to approve or deny application for license to place newsracks on public property because ordinance required newspapers to apply annually for newsrack licenses and because licensing system was directed at expression or conduct commonly associated with expression. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ↪ 2080

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(U) Press in General
92k2080 k. Newsracks and Newsstands.
Most Cited Cases
(Formerly 92k90.1(8))

Municipal Corporations 268 ↪ 683(1)

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(A) Streets and Other Public Ways
268k679 Grant of Rights to Use Street for Purposes Other Than Highway
268k683 Making, Requisites, and Validity of Grant or License
268k683(1) k. In General. Most Cited Cases

City may require periodic licensing of newsracks on public property and may even have special licensing procedures for conduct commonly associated with expression, but city is required to establish neutral criteria to ensure that its licensing decision is not based on the content or viewpoint of the speech being considered. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 ↪ 1590

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(B) Licenses and Permits in General

92k1590 k. In General. Most Cited Cases

(Formerly 92k90.1(4))

Even if government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion. U.S.C.A. Const. Amend. 1.

[10] Courts 106 ↪ 90(2)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k90 Decisions of Same Court or Co-Ordinate Court

106k90(2) k. Number of Judges Concurring in Opinion, and Opinion by Divided Court. Most Cited Cases

When no single rationale commends a majority of the Supreme Court, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.

[11] Constitutional Law 92 ↪ 2080

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(U) Press in General

92k2080 k. Newsracks and Newsstands.

Most Cited Cases

(Formerly 92k90.1(8))

Municipal Corporations 268 ↪ 680(2)

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(A) Streets and Other Public Ways

268k679 Grant of Rights to Use Street for Purposes Other Than Highway

268k680 Power to Grant Franchises and Privileges in General

268k680(2) k. Power of Particular Officers or Boards. Most Cited Cases

Ordinance authorizing mayor to either deny or grant application for permit to place newsrack on public property, stating the reasons for that denial or grant and allowing the mayor to base the grant or denial on "such other terms and conditions deemed necessary and reasonable" by the mayor was facially unconstitutional. U.S.C.A. Const. Amend. 1.

[12] Constitutional Law 92 ↪ 1490

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1490 k. In General. Most Cited Cases

(Formerly 92k90(1))

Doctrine forbidding unbridled discretion in regulation of speech precludes courts from presuming that official given unbridled discretion will act in good faith and adhere to standards which are absent from the face of the regulatory statute. U.S.C.A. Const. Amend. 1.

[13] Constitutional Law 92 ↪ 1591

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(B) Licenses and Permits in General

92k1591 k. Discretion in General. Most Cited Cases

(Formerly 92k90.1(4))

Doctrine forbidding unbridled discretion with respect to government permit for speech or speech-related activity requires that any limits on governmental discretion in the matter be made explicit by textual incorporation, binding judicial or administrative construction, or by well-established practice.

U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 92 ↪ 2500

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2499 Particular Issues and Applica-

tions

92k2500 k. In General. Most Cited

Cases

(Formerly 92k70.1(2))

Court will not write nonbinding limits into a state statute which is silent with respect to restrictions on government official's discretion to grant or deny permit for speech-related activity. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 92 ↪ 961

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional

Questions

92VI(C)1 In General

92k960 Judicial Authority and Duty in

General

92k961 k. In General. Most Cited

Cases

(Formerly 92k45)

Facial challenge to constitutionality of statute or ordinance regulating speech may be permitted even though the government authority is thus deprived of the chance to obtain a construction from a state court which would render the statute constitutional or to establish a local practice which would show it to be constitutional. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 92 ↪ 1016

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional

Questions

92VI(C)3 Presumptions and Construction as to Constitutionality

92k1006 Particular Issues and Applica-

tions

92k1016 k. First Amendment in

General. Most Cited Cases

(Formerly 92k48(4.1), 92k48(4))

When state law has been authoritatively construed so as to render it constitutional or a well understood and uniformly applied practice has developed that has virtually the force of judicial construction, state law is read in light of those limits when challenged on First Amendment grounds. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 92 ↪ 1594

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(B) Licenses and Permits in General

92k1594 k. Availability of Judicial Review.

Most Cited Cases

(Formerly 92k90.1(4))

Even if judicial review of denial of permit for speech-related content were relatively speedy, that review could not substitute for concrete standards within the statute or ordinance to guide the decision maker's discretion. U.S.C.A. Const.Amend. 1.

****2140 *750 Syllabus ^{EN*}**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

In federal-court proceedings, appellee newspaper publisher challenged, on First Amendment grounds, the facial constitutionality of appellant city's ordinance authorizing the mayor to grant or deny applications for annual permits to publishers to place their newsracks on public property, and, if the application is denied, requiring the mayor to "stat[e] the reasons for such denial." If the application is granted, the ordinance provides that the permit is subject, *inter alia*, to any "terms and conditions deemed necessary and reasonable by the Mayor." The District Court found the ordinance constitutional in its entirety, and

entered judgment for the city. The Court of Appeals reversed, finding the ordinance unconstitutional on the ground, among others, that it gave the mayor unbounded discretion to grant or deny a permit application and to place unlimited terms and conditions on any permit that issued.

Held:

1. Appellee may bring a facial challenge to the ordinance without first applying for, and being denied, a permit. Pp. 2143-2150.

(a) When a licensing statute vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without first submitting to the licensing process. Such a statute constitutes a prior restraint and may result in censorship, engendering risks to free expression that can be effectively alleviated only through a facial challenge. The mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. Standards limiting the licensor's discretion provide guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without those standards, the difficulties of proof and the case-by-case nature of "as applied" challenges render the licensor's action in large measure effectively unreviewable. Pp. 2143-2145.

(b) The press or a speaker may not challenge as censorship every law involving discretion to which it is subject; the law must have a close enough nexus to expression, or to conduct commonly associated with expression,*751 to pose a real and substantial threat of censorship risks. The allowance of a facial challenge here is justified by the features that (1) the ordinance requires annual permit applications, thus permitting the licensor to measure the probable content or viewpoint of future expression by speech already uttered, and (2) the ordinance is directed narrowly and specifically at expression or conduct commonly associated with expression—the circulation of newspapers—and creates a licensing agency that might tend to favor censorship over speech. The Constitution requires that the city establish neutral criteria to insure that the mayor's licensing decision is not

based on the content or viewpoint of the speech being considered. Pp. 2145-2147.

**2141 (c) There is no merit to the theory that the ordinance is not subject to facial challenge because the particular manner of speech (the use of newsracks) may be prohibited entirely, and thus no "First Amendment protected activity" is implicated by the ordinance's imposing less than a total prohibition, even assuming that newsracks may be prohibited entirely. Presumably in the case of a hypothetical ordinance that completely prohibits a particular manner of expression, the law on its face is both content and viewpoint neutral, and the Court would apply the well-settled time, place, and manner test. In contrast, a law permitting communication in a certain manner for some but not for others raises the danger of content and viewpoint censorship, which is at its zenith when the determination of who may speak and who may not is left to an official's unbridled discretion. Even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not *condition* that speech on obtaining a license from an official in that official's boundless discretion. Use of the "greater-includes-the-lesser" reasoning in the latter context is not supported by this Court's First Amendment cases. Pp. 2147-2150.

2. The portions of appellant city's ordinance giving the mayor discretion to deny a permit application and authority to condition a permit on any terms he deems "necessary and reasonable" are unconstitutional. It cannot be presumed that the mayor will adhere to standards absent from the ordinance's face, and so will deny a permit application only for reasons related to the health, safety, or welfare of city citizens, and that additional terms and conditions will be imposed only for similar reasons. The doctrine forbidding unbridled discretion requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. The ordinance's minimal requirement that the mayor state his reasons for denying a permit does not provide the standards necessary to ensure constitutional decisionmaking, nor does it, of necessity, provide a solid foundation for eventual judicial review. Even if judicial review *752 under the ordinance's provision were relatively speedy, such review does not substitute for concrete standards to guide the decision-maker's discretion. Pp. 2150-2151.

3. Other questions as to the ordinance's constitutionality presented for review need not be resolved, since the holding regarding the ordinance's mayoral-discretion provisions alone sustains the Court of Appeals' judgment if those provisions of the ordinance are not severable from the remainder. Severability of a local ordinance is a question of state law, and is therefore best resolved below. P. 2152.

794 F.2d 1139, affirmed in part and remanded.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, and SCALIA, JJ., joined. WHITE, J., filed a dissenting opinion, in which STEVENS and O'CONNOR, JJ., joined, *post*, p. 2152. REHNQUIST, C.J., and KENNEDY, J., took no part in the consideration or decision of the case.

Henry B. Fischer argued the cause for appellant. With him on the briefs were *Frederick W. Whatley* and *Roger D. Tibbetts*.

James P. Garner argued the cause for appellee. With him on the briefs were *David L. Marburger*, *Bruce W. Sanford*, and *Peter C. Gould*.*

* Briefs of *amici curiae* urging reversal were filed for the National Institute of Municipal Law Officers by *William I. Thornton, Jr.*, *Roger F. Cutler*, *Roy D. Bates*, *William H. Taube*, *John W. Witt*, *Robert J. Alfton*, *James K. Baker*, *Joseph N. deRaismes*, *Frank B. Gummy III*, *Robert J. Mangler*, *Neal E. McNeill*, *Analeslie Muncy*, *Dante R. Pellegrini*, *Clifford D. Pierce, Jr.*, and *Charles S. Rhyne*; and for the National League of Cities et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, *Beate Bloch*, and *Peter Buscemi*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation by *Gordon J. Beggs*, *John A. Powell*, *Steven R. Shapiro*, *Bruce A. Campbell*, and *Paul L. Hoffman*; and for the American Newspaper Publishers Association et al. by *Robb M. Jones*, *Robert C. Bernius*, *Peter G. Stone*, *Lawrence W. Boes*, *William Niese*, *Boisfeuillet Jones, Jr.*, *W. Terry Maguire*, *Tonda F. Rush*, *Harold W. Fuson, Jr.*, *Alice Neff Lucan*, and *Norton L. Armour*.

Justice BRENNAN delivered the opinion of the Court.

The city of Lakewood, a suburban community bordering Cleveland, Ohio, appeals a judgment of the Court of Appeals *753 for the Sixth Circuit enjoining enforcement of its local ordinance regulating the placement of newsracks. The court's decision was based in part on its conclusion that the ordinance vests the mayor with unbridled discretion over which publishers may place newsracks on public property and where.

**2142 I

Prior to 1983, the city of Lakewood absolutely prohibited the private placement of any structure on public property. On the strength of that law, the city denied the Plain Dealer Publishing Company (Newspaper) permission to place its coin-operated newspaper dispensing devices on city sidewalks. In response, the Newspaper brought suit in the District Court for the Northern District of Ohio challenging the ordinance. The District Court adjudged the absolute prohibition unconstitutional, but delayed entering a permanent injunction to give the city time to amend its law.

Although the city could have appealed the District Court's judgment, it decided instead to adopt two ordinances permitting the placement of structures on city property under certain conditions. One of those ordinances specifically concerns newsracks. § 901.181, Codified Ordinances, City of Lakewood (1984).^{FN1} That ordinance gives the mayor the authority to grant or deny applications for annual newsrack permits. If the mayor denies an application, he is required to "stat[e] the reasons for such denial." In the event the mayor grants an application, the city issues an annual permit subject to several terms and conditions. Among them are: (1) approval of the newsrack design by the city's Architectural Board of Review; (2) an agreement by the newsrack owner to indemnify the city against any liability arising from the newsrack, guaranteed by a \$100,000 insurance policy to *754 that effect; and (3) any "other terms and conditions deemed necessary and reasonable by the Mayor."^{FN2}

^{FN1}. The other ordinance deals with all other structures and is unchallenged. § 901.18, Codified Ordinances, City of Lakewood (1984).

FN2. The portions of the ordinance relevant to this appeal are as follows:

“901.181 NEWSPAPER DISPENSING DEVICES; PERMIT AND APPLICATION

“Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City.

“The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

“(a) ... The design of [newsracks] shall be subject to approval by the Architectural Board of Review.

“(b) Newspaper dispensing devices shall not be placed in the residential use districts of the City....

“(c) The rental permit shall be granted upon the following conditions:

“(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy ... shall be in an amount not less than One Hundred Thousand Dollars (\$100,000)....

“(6) rental permits shall be for a term of one year and shall not be assignable; and

“(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

“(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council....”

The ordinance is quoted in full in the opinion below. 794 F.2d 1139, 1141, n. 1 (CA6 1986).

Dissatisfied with the new ordinance, the Newspaper elected not to seek a permit, and instead amended its complaint in the District Court to challenge facially the law as amended. The District Court found the ordinance constitutional in its entirety, and entered judgment in the city's favor. *755 The Court of Appeals for the Sixth Circuit reversed, finding the ordinance unconstitutional in three respects. First, it held that the ordinance gives the mayor unbounded discretion to grant or deny a permit**2143 application and to place unlimited additional terms and conditions on any permit that issues. Second, it concluded that in the absence of any express standards governing newsrack design, the design approval requirement effectively gives the Board unbridled discretion to deny applications. Finally, a majority of the panel decided that the indemnity and insurance requirements for newsrack owners violate the First Amendment because no similar burdens are placed on owners of other structures on public property. ^{FN3} The court found that the foregoing provisions of the law were not severable, and therefore held the entire ordinance unconstitutional insofar as it regulates newsracks in commercial districts. ^{FN4} The city appealed, and we noted probable jurisdiction. 480 U.S. 904, 107 S.Ct. 1345, 94 L.Ed.2d 517 (1987).

FN3. The city asserts that it will apply the indemnity and insurance requirements to all structures on public property except as to the public utilities (telephone booths, utility poles, and bus shelters) already extant on public property when § 901.181 was enacted.

FN4. The court decided that the absolute ban on residential newsrack placements was

both constitutional and severable. Its decision in that respect is not challenged here.

II

At the outset, we confront the issue whether the Newspaper may bring a facial challenge to the city's ordinance. We conclude that it may.

A

[1] Recognizing the explicit protection accorded speech and the press in the text of the First Amendment, our cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, *756 and being denied, a license.^{FN5} *E.g.*, *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965) (“In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, *whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license*”) (emphasis added); *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940) (in the First Amendment context, “[o]ne who might have had a license for the asking may ... call into question the whole scheme of licensing when he is prosecuted for failure to procure it”). See also *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 939, 22 L.Ed.2d 162 (1969) (“ ‘The Constitution can hardly be thought to deny to one subjected to the restraints of [a licensing law] the right to attack its constitutionality, because he has not yielded to its demands’ ” (quoting *Jones v. Opelika*, 316 U.S. 584, 602, 62 S.Ct. 1231, 1242, 86 L.Ed. 1691 (1942) (Stone, C.J., dissenting), adopted *per curiam* on rehearing, 319 U.S. 103, 104, 63 S.Ct. 890, 890, 87 L.Ed. 1290 (1943))); *Lovell v. Griffin*, 303 U.S. 444, 452-453, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938) (“As the ordinance [providing for unbridled licensing discretion] is void on its face, it was not necessary for appellant to seek a permit under it”); cf. *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-957, 104 S.Ct. 2839, 2846-2847, 81 L.Ed.2d 786 (1984).^{FN6}

^{FN5} Of course, the degree of First Amendment protection is not diminished merely

because the newspaper or speech is sold rather than given away. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385, 93 S.Ct. 2553, 2558, 37 L.Ed.2d 669 (1973).

^{FN6} In general, compare *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 34 S.Ct. 359, 58 L.Ed. 713 (1914) (coal mining), *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 33 S.Ct. 40, 57 L.Ed. 193 (1912) (railroad), and *New York ex rel. Lieberman v. Van De Carr*, 199 U.S. 552, 26 S.Ct. 144, 50 L.Ed. 305 (1905) (dairy business), all requiring challenges “as applied,” with *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. at 964-968, 104 S.Ct. at 2851-2853 (charity solicitation), *Hynes v. Mayor of Oradell*, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976) (registration requirement for political candidate or charity solicitation door to door), *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (parade), *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965) (film censorship), *Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) (handbills), *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948) (sound trucks), and *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938) (leaflets), all allowing facial challenges.

****2144 [2] *757** At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. *E.g.*, *Shuttlesworth, supra*, 394 U.S. at 151, 89 S.Ct. at 938; *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Staub v. City of Baxley*, 355 U.S. 313, 321-322, 78 S.Ct. 277, 281-282, 2 L.Ed.2d 302 (1958); *Kunz v. New York*, 340 U.S. 290, 294, 71 S.Ct. 312, 315, 95 L.Ed. 280 (1951); *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951); *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948). And these evils engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge. First, the mere existence

of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. As we said in *Thornhill*:

"Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas.... The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by the reason of the *threat to censure comments on matters of public concern*. It is not merely the sporadic abuse of power by the censor but the *pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion*." 310 U.S. at 97. 60 S.Ct. at 741-742 (emphases added).

See also *Freedman, supra*. Self-censorship is immune to an "as applied" challenge, for it derives from the individual's own actions, not an abuse of government power. It is not difficult to visualize a newspaper that relies to a substantial degree on single issue sales feeling significant pressure to endorse the incumbent mayor in an upcoming election, or to refrain*758 from criticizing him, in order to receive a favorable and speedy disposition on its permit application. Only standards limiting the licensor's discretion will eliminate this danger by adding an element of certainty fatal to self-censorship. Cf. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498. 102 S.Ct. 1186, 1193. 71 L.Ed.2d 362 (1982) (vagueness doctrine). And only a facial challenge can effectively test the statute for these standards.

Second, the absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression. See, e.g., *Joseph H.*

Munson Co., supra, 467 U.S. at 964, n. 12. 104 S.Ct. at 2850, 2851, n. 12; *Cox v. Louisiana, supra*, 379 U.S. at 557, 85 S.Ct. at 465. Further, the difficulty and delay inherent in the "as applied" challenge can itself discourage litigation. A newspaper espousing an unpopular viewpoint on a shoestring budget may be the likely target **2145 for a retaliatory permit denial, but may not have the time or financial means to challenge the licensor's action. That paper might instead find it easier to capitulate to what it perceives to be the mayor's preferred viewpoint, or simply to close up shop. Even if that struggling paper were willing and able to litigate the case successfully, the eventual relief may be "too little and too late." Until a judicial decree to the contrary, the licensor's prohibition stands. In the interim, opportunities for speech are irretrievably lost. *Freedman, supra*, 380 U.S. at 57, 85 S.Ct. at 738; see also *Saia, supra*, 334 U.S. at 560, 68 S.Ct. at 1149; *Cantwell v. Connecticut*, 310 U.S. 296, 306, 60 S.Ct. 900, 904, 84 L.Ed. 1213 (1940). In sum, without standards to fetter the licensor's discretion, the difficulties of proof and the *759 case-by-case nature of "as applied" challenges render the licensor's action in large measure effectively unreviewable.

B

[3][4][5][6] The foregoing concepts form the heart of our test to distinguish laws that are vulnerable to facial challenge from those that are not. As discussed above, we have previously identified two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards by which to measure the licensor's action. It is when statutes threaten these risks to a significant degree that courts must entertain an immediate facial attack on the law. Therefore, a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. This is not to say that the press or a speaker may challenge as censorship any law involving discretion to which it is subject. The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.

[7] The regulatory scheme in the present case contains two features which, at least in combination, justify the allowance of a facial challenge. First, Lakewood's ordinance requires that the Newspaper apply annually for newsrack licenses. Thus, it is the sort of system in which an individual must apply for multiple licenses over time, or periodically renew a license. When such a system is applied to speech, or to conduct commonly associated with speech, the licensor does not necessarily view the text of the words about to be spoken, but can measure their probable content or viewpoint by speech already uttered. See *Saia v. New York*, *supra*. A speaker in this position is under no illusion regarding the *760 effect of the "licensed" speech on the ability to continue speaking in the future. Yet demonstrating the link between "licensed" expression and the denial of a later license might well prove impossible. While perhaps not as direct a threat to speech as a regulation allowing a licensor to view the actual content of the speech to be licensed or permitted, see *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963), a multiple or periodic licensing requirement is sufficiently threatening to invite judicial concern.

A second feature of the licensing system at issue here is that it is directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers. Such a framework creates an agency or establishes an official charged particularly with reviewing speech, or conduct commonly associated with it, breeding an "expertise" tending to favor censorship over speech. *Freedman*, *supra*. Indeed, a law requiring the licensing of printers has historically been declared**2146 the archetypal censorship statute. See 4 W. Blackstone, Commentaries *152. Here again, without standards to bound the licensor, speakers denied a license will have no way of proving that the decision was unconstitutionally motivated, and, faced with that prospect, they will be pressured to conform their speech to the licensor's unreviewable preference.

[8] Because of these features in the regulatory system at issue here, we think that a facial challenge is appropriate, and that standards controlling the mayor's discretion must be required. Of course, the

city may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression; but the Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered.

In contrast to the type of law at issue in this case, laws of general application that are not aimed at conduct commonly *761 associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship. For example, a law requiring building permits is rarely effective as a means of censorship. To be sure, on rare occasion an opportunity for censorship will exist, such as when an unpopular newspaper seeks to build a new plant. But such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse. And if such charges are made, the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the licensor's occasional speech-related decision.

The foregoing discussion explains why the dissent's analogy between newspapers and soda vendors is inapposite. See *post*, at 2150-2151. Newspapers are in the business of expression, while soda vendors are in the business of selling soft drinks. Even if the soda vendor engages in speech, that speech is not related to the soda; therefore preventing it from installing its machines may penalize unrelated speech, but will not directly prevent that speech from occurring. In sum, a law giving the mayor unbridled discretion to decide which soda vendors may place their machines on public property does not vest him with frequent opportunities to exercise substantial power over the content or viewpoint of the vendor's speech by suppressing the speech or directly controlling the vendor's ability to speak.

The proper analogy is between newspapers and leaflets. It is settled that leafletters may facially challenge licensing laws. See, e.g., *Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960); *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). This settled law is based on the accurate premise that peaceful pamphleteering "is not fundamentally different from the function of a newspaper." *Organization for a Better Austin v. Keefe*,

402 U.S. 415, 419, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971); see also *Lovell, supra*, 303 U.S., at 450-452, 58 S.Ct., at 668-669. The dissent's theory therefore would turn the law on its head. That *762 result cannot be justified by relying on the meaningless distinction that here the newspapers are ultimately distributed by a machine rather than by hand. First, the ordinance held invalid in *Lovell* applied to distribution "by hand or otherwise." 303 U.S., at 447, 58 S.Ct., at 667. The Court did not even consider holding the law invalid only as to distribution by hand. Second, such a distinction makes no sense in logic or theory. The effectiveness of the newsrack as a means of distribution, especially for low-budget, controversial neighborhood newspapers, means that the twin threats of self-censorship and undetectable censorship are, if anything, greater for newsracks than for pamphleteers. Cf. *Schneider v. State*, 308 U.S. 147, 164, 60 S.Ct. 146, 152, 84 L.Ed. 155 (1939) (relying on the effectiveness of pamphleteering); **2147 *Martin v. Struthers*, 319 U.S. 141, 145-146, 63 S.Ct. 862, 864-865, 87 L.Ed. 1313 (1943) (same).

C

In an analysis divorced from a careful examination of the unique risks associated with censorship just discussed and their relation to the law before us, the dissent reasons that if a particular manner of speech may be prohibited entirely, then no "activity protected by the First Amendment" can be implicated by a law imposing less than a total prohibition. It then finds that a total ban on newsracks would be constitutional. Therefore, the dissent concludes, the actual ordinance at issue involves no "activity protected by the First Amendment," and thus is not subject to facial challenge. However, that reasoning is little more than a legal sleight-of-hand, misdirecting the focus of the inquiry from a law allegedly vesting unbridled censorship discretion in a government official toward one imposing a blanket prohibition.^{FN7}

^{FN7} Because we reject the dissent's overall logical framework, we do not pass on its view that a city may constitutionally prohibit the placement of newsracks on public property.

[9] The key to the dissent's analysis is its "greater-includes-the-lesser" syllogism. But that syllogism is blind to the radically different *763 constitutional harms inherent in the "greater" and "lesser"

restrictions.^{FN8} Presumably in the case of an ordinance that completely prohibits a particular manner of expression, the law on its face is both content and viewpoint neutral. In analyzing such a hypothetical ordinance, the Court would apply the well-settled time, place, and manner test. *E.g., Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 535, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). The danger giving rise to the First Amendment inquiry is that the government is silencing or restraining a channel of speech; we ask whether some interest unrelated to speech justifies this silence. To put it another way, the question is whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972).

^{FN8} The dissent informs us that it abjures any reliance on a "greater-includes-the-lesser" theory. Yet in the very next sentence we are told that "where an activity ... could be forbidden altogether (without running afoul of the First Amendment)," then for that reason alone, "the *Lovell-Freedman* doctrine does not apply, and our usual rules concerning the permissibility of discretionary local licensing laws (and facial challenges to those laws) must prevail." *Post*, at 2159. In other words, the greater power to prohibit a manner of speech entirely includes the lesser power to license it in an official's unbridled discretion. A clearer example of the discredited doctrine could not be imagined.

In contrast, a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. As demonstrated above, we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of *764 the

speaker. *E.g.*, *Cox v. Louisiana*, 379 U.S., at 557, 85 S.Ct., at 465; *Staub*, 355 U.S., at 322, 78 S.Ct., at 282. Therefore, even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion. It bears repeating that "[i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing**2148 discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman*, 380 U.S., at 56, 85 S.Ct., at 737. Fundamentally, then, the dissent's proposal ignores the different concerns animating our test to determine whether an expressive activity may be banned entirely, and our test to determine whether it may be licensed in an official's unbridled discretion.

[10] This point is aptly illustrated by a comparison of two of our prior cases: *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948), and *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949). In *Saia*, this Court held that an ordinance prohibiting the use of sound trucks without permission from the Chief of Police was unconstitutional because the licensing official was able to exercise unbridled discretion in his decisionmaking, and therefore could, in a calculated manner, censor certain viewpoints. Just seven months later the Court held in *Kovacs* that a city could absolutely ban the use of sound trucks. The plurality distinguished *Saia* precisely on the ground that there the ordinance constituted censorship by allowing some to speak, but not others; in *Kovacs* the statute barred a particular manner of speech for all. 336 U.S., at 80, 69 S.Ct., at 450 (plurality opinion of Reed, J.).^{FN9}

^{FN9} The dissent suggests that the *Kovacs* plurality's distinction of *Saia* is somehow not good law because four other Justices (three of whom were in dissent) adopted the far broader rationale that *Saia* was actually repudiated. Justice WHITE's interpretation of *Kovacs* does not square with our settled jurisprudence: when no single rationale commands a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the

judgmen[t] on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977). Clearly, in *Kovacs* the plurality opinion put forth the narrowest rationale for the Court's judgment. In any event, history has vindicated the plurality's distinction. *Saia* has been cited literally hundreds of times in its 40-year history (a strange phenomenon had that case been "repudiated"), and never with the notation "overruled on other grounds." See, *e.g.*, *Joseph H. Munson, Co.*, 467 U.S., at 965, n. 13, 104 S.Ct., at 2851, n. 13 (citing *Saia* for the proposition that where a law on its face presents an unacceptable risk of the suppression of ideas, that law may be struck on its face); *Schad v. Mount Ephraim*, 452 U.S. 61, 84, 101 S.Ct. 2176, 2190-2191, 68 L.Ed.2d 671 (1981) (STEVENS, J., concurring in judgment) ("Presumably, municipalities may regulate expressive activity—even protected activity—pursuant to narrowly drawn content-neutral standards; however, they may not regulate protected activity when the only standard provided is the unbridled discretion of a municipal official. Compare *Saia v. New York*, 334 U.S. 558 [68 S.Ct. 1148], with *Kovacs v. Cooper*, 336 U.S. 77 [69 S.Ct. 448]"); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976) (*Kovacs* and *Saia* compared in course of a string cite to illustrate that the Court approves time, place, and manner restrictions that are content neutral); *Kunz v. New York*, 340 U.S. 290, 294, 71 S.Ct. 312, 315, 95 L.Ed. 280 (1951) (opinion of the Court by Vinson, C.J., joined by Reed, Douglas, Burton, Clark, and Minton, JJ.) (citing *Saia* for the proposition that a regulation placing unbridled discretion in the hands of a government official over the use of a loudspeaker or amplifier is unconstitutional). Nor has *Saia* been cited merely because *Kovacs* has been ignored. See, *e.g.*, *California v. LaRue*, 409 U.S. 109, 117, n. 4, 93 S.Ct. 390, 396, n. 4, 34 L.Ed.2d 342 (1972) (*Kovacs* cited for the proposition that "States may validly limit the manner in which the First Amendment freedoms are exercised by forbidding sound trucks in residential neighborhoods"); *Red Lion*

Broadcasting Co. v. FCC, 395 U.S. 367, 386-387, 89 S.Ct. 1794, 1804-1805, 23 L.Ed.2d 371 (1969) (citing *Kovacs* for the proposition that sound trucks may be neutrally regulated); Edwards v. South Carolina, 372 U.S. 229, 242, 83 S.Ct. 680, 687, 9 L.Ed.2d 697 (1963) (Clark, J., dissenting) (*Kovacs* cited for the proposition that there is no right to broadcast from a sound truck on public streets).

*765 *Saia* is irreconcilable with the logic the dissent now puts forward. Under the dissent's novel rule, the Court in *Saia* should first have determined whether the use of sound trucks could be prohibited completely. If so, as was held in *Kovacs*, the Court should have rejected the constitutional facial challenge. *766 No "activity protected by the First Amendment" (as the dissent defines it) would have been at issue. **2149 ^{FN10}

FN10. *Saia* cannot be distinguished from the instant case on the theory that it involved a criminal prosecution. It would be foolish indeed, and contrary to the federal courts' declaratory judgment authorization, 28 U.S.C. § 2201 (1982 ed., Supp. IV), to require the Newspaper to place a newsrack on city property illegally in order to obtain standing to challenge the ordinance. Cf. Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974).

The *Kovacs/Saia* comparison provides perhaps the clearest example of the flaw in the dissent's "greater-includes-the-lesser" reasoning. However, in a host of other First Amendment cases we have expressly or implicitly rejected that logic, and have considered on the merits facial challenges to statutes or policies that embodied discrimination based on the content or viewpoint of expression, or vested officials with open-ended discretion that threatened the same, even where it was assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression or circulation at issue.

For instance, in *Mosley*, we considered an ordinance banning all picketing near a school *except* labor picketing. The Court declared the law unconstitutional because the ordinance was sensitive to the content of the message. Whether or not the picket could

have been prohibited entirely was not dispositive of the Court's inquiry. 408 U.S., at 96-99, 92 S.Ct., at 2290-2292. Similarly, in *Flower v. United States*, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972), the Court summarily reversed a conviction based on Flower's return to a military facility to leaflet after having been ordered to leave once before. It was never doubted that a military commander may generally restrict access to a military facility. But, where the base was for all other purposes treated as part of the surrounding city, the Court refused to allow the commander unbridled discretion to prohibit Flower's leafletting. In *Schacht v. United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970), the Court struck down a statute permitting actors to wear a military uniform in a theater or motion picture production*767 only "if the portrayal does not tend to discredit that armed force." The Court noted that although a total prohibition would be valid, a prohibition sensitive to the viewpoint of speech could not stand. *Niemotko* provides yet another example of the Court's rejection of "greater-includes-the-lesser" logic in the First Amendment area. There, a Jehovah's Witness was convicted of disorderly conduct after speaking in a park without a license. The Court decided that whatever power a city might have to prohibit *all* religious speech in its parks, it could not allow some but not all religious speech, depending on the exercise of unbridled discretion. 340 U.S., at 272-273, 71 S.Ct., at 327-328. Or, as Justice Frankfurter put it in his concurring opinion, "[a] licensing standard which gives an official authority to censor the content of speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like." *Id.*, at 282, 71 S.Ct., at 333. Cf. *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (public university need not create a public forum, but having done so, it may not restrict access so as to exclude some groups based on the religious content of their speech without constitutional justification); *Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976) (School Board need not create a public forum, but having done so, it cannot restrict who may speak based on the content or viewpoint of the speech). To counter this unanimous line of authority, the dissent does not refer to a single case supporting its view that we cannot consider a facial challenge to an ordinance alleged to constitute censorship over constitutionally protected speech merely because the manner used to circulate that speech might

be otherwise regulated or prohibited entirely.

Ultimately, then, the dissent's reasoning must fall of its own weight. As the preceding discussion demonstrates, this Court **2150 has long been sensitive to the special dangers inherent in a law placing unbridled discretion directly to license speech, or conduct commonly associated with speech, in the *768 hands of a government official. In contrast, when the government is willing to prohibit a particular manner of speech entirely—the speech it favors along with the speech it disfavors—the risk of governmental censorship is simply not implicated. The “greater” power of outright prohibition raises other concerns, and we have developed tests to consider them. But we see no reason, and the dissent does not advance one, to ignore censorship dangers merely because other, unrelated concerns are satisfied.

The dissent compounds its error by defining an “activity protected by the First Amendment” by the time, place, or (in this case) manner by which the activity is exercised. The actual “activity” at issue here is the circulation of newspapers, which is constitutionally protected. After all, “[l]iberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value.” *Ex parte Jackson*, 96 U.S. (6 Otto) 727, 733, 24 L.Ed. 877 (1878); *Lovell*, 303 U.S., at 452, 58 S.Ct., at 669.

The dissent's recharacterization of the issue is not merely semantic; substituting the time, place, or manner for the activity itself allows the dissent to define away a host of activities commonly considered to be protected. The right to demonstrate becomes the right to demonstrate at noise levels proscribed by law; the right to parade becomes the right to parade anywhere in the city 24 hours a day; and the right to circulate newspapers becomes the right to circulate newspapers by way of newsracks placed on public property. Under the dissent's analysis, ordinances giving the Mayor unbridled discretion over whether to permit loud demonstrations or evening parades would not be vulnerable to a facial challenge, since they would not “requir[e] a license to engage in activity protected by the First Amendment.” *Post*, at 2154. But see *Gravned*, 408 U.S., at 113, 92 S.Ct., at 2302 (implying that a law banning excessively loud demonstrations was not facially invalid because its terms could not invite “subjective or discriminatory en-

forcement”).

*769 Moreover, we have never countenanced such linguistic prestidigitation, even where a regulation or total prohibition of the “manner” of speech has been upheld. In determining whether expressive conduct is at issue in a censorship case, we do not look solely to the time, place, or manner of expression, but rather to whether the activity in question is commonly associated with expression. For example, in *Kovacs*, it was never doubted that the First Amendment's protection of expression was *implicated* by the ordinance prohibiting sound trucks. The Court simply concluded that the First Amendment was not *abridged*. 336 U.S., at 87, 69 S.Ct., at 453. See also *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). So here, the First Amendment is certainly implicated by the city's circulation restriction; the question we must resolve is whether the First Amendment is abridged.

III

[11] Having concluded that the Newspaper may facially challenge the Lakewood ordinance, we turn to the merits. Section 901.181, Codified Ordinances, City of Lakewood, provides: “The Mayor shall either deny the application [for a permit], stating the reasons for such denial or grant said permit subject to the following terms...” Section 901.181(c) sets out some of those terms, including: “(7) such other terms and conditions deemed necessary and reasonable by the Mayor.” It is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion. Indeed, nothing in the law as written requires the mayor to do more than make the statement “it is not in the public interest” when denying a permit application. Similarly, **2151 the mayor could grant the application, but require the newsrack to be placed in an inaccessible location without providing any explanation whatever. To allow these illusory “constraints” to constitute the standards necessary to bound a licensor's discretion renders the guarantee against censorship little *770 more than a high-sounding ideal. See *Shuttlesworth*, 394 U.S., at 150-151, 89 S.Ct., at 938-939.

[12][13][14][15][16] The city asks us to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and

conditions will be imposed only for similar reasons. This presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows. *E.g., Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). The doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. *Poulos v. New Hampshire*, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953); *Kunz v. New York*, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951). This Court will not write nonbinding limits into a silent state statute.^{FN11}

^{FN11} Some have argued, unpersuasively, that pre-enforcement challenges, like this one, unfairly deprive the city of the chance to obtain a constitutional state-court construction or to establish a local practice. It is true that when a state law has been authoritatively construed so as to render it constitutional, or a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction, the state law is read in light of those limits. That rule applies even if the face of the statute might not otherwise suggest the limits imposed. *Poulos v. New Hampshire*, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953). Further, this Court will presume any narrowing construction or practice to which the law is "fairly susceptible." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601, 617-618, 93 S.Ct. 2908, 2918-2919, 37 L.Ed.2d 830 (1973). But we have never held that a federal litigant must await a state-court construction or the development of an established practice before bringing the federal suit. Cf. *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (declining to abstain or order certification to allow the state courts to construe a criminal statute where the statute was not fairly susceptible to a narrowing construction).

Once it is agreed that a facial challenge is permissible to attack a law imposing cen-

sorship, nothing is gained by requiring one actually denied a license to bring the action. Facial attacks, by their nature, are not dependent on the facts surrounding any particular permit denial. Thus, waiting for an alleged abuse before considering a facial challenge would achieve nothing except to allow the law to exist temporarily in a limbo of uncertainty and to risk censorship of free expression during the interim.

*771 Although the dissent disclaims a desire to pass upon the actual ordinance at issue, it apparently cannot resist making a few comments in this regard. *Post*, at 2163, n. 13. First, it asserts that the ordinance's requirement that the mayor state his reasons for denying a permit distinguishes this case from other licensing cases. However, the mayor's statement need not be made with any degree of specificity, nor are there any limits as to what reasons he may give. Such a minimal requirement cannot provide the standards necessary to insure constitutional decisionmaking, nor will it, of necessity, provide a solid foundation for eventual judicial review.

[17] The dissent is also comforted by the availability of judicial review. However, that review comes only after the mayor and the City Council have denied the permit. Nowhere in the ordinance is either body required to act with reasonable dispatch. Rather, an application could languish indefinitely before the Council, with the Newspaper's only judicial remedy being a petition for mandamus. Cf. *Freedman*, *supra*, at 54-55, 59, 85 S.Ct., at 736-737, 739. Even if judicial review were relatively speedy, such review cannot substitute for concrete standards to guide the decision-maker's discretion. **2152 *E.g., Saita*, 334 U.S., at 560, 68 S.Ct., at 1149, and *supra*, at ---- - ----.

Finally, the dissent attempts to distinguish newspaper permits from parade permits in that the latter are often given for a particular event or time, whereas the former supposedly have no urgency. This overstates the proposition. We agree that in some cases there is exceptional force to the argument that a permit delayed is a permit denied. However, we cannot agree that newspaper publishers can wait indefinitely for a permit only because there will always be news to report. News is not fungible. Some stories may be

particularly well covered by certain publications, providing that newspaper with a unique opportunity to develop readership. In order to benefit from that event, a paper needs public *772 access at a particular time; eventual access would come “too little and too late.” *Freedman, supra*, 380 U.S., at 57, 85 S.Ct., at 738. The Plain Dealer has been willing to forgo this benefit for four years in order to bring and litigate this lawsuit. However, smaller publications may not be willing or able to make the same sacrifice.

IV

We hold those portions of the Lakewood ordinance giving the mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems “necessary and reasonable,” to be unconstitutional. We need not resolve the remaining questions presented for review, as our conclusion regarding mayoral discretion will alone sustain the Court of Appeals’ judgment if these portions of the ordinance are not severable from the remainder. Severability of a local ordinance is a question of state law, and is therefore best resolved below. See *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 274, 56 S.Ct. 457, 459, 80 L.Ed. 675 (1936). Accordingly, we remand this cause to the Court of Appeals to decide whether the provisions of the ordinance we have declared unconstitutional are severable, and to take further action consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and Justice KENNEDY took no part in the consideration or decision of this case.

Justice WHITE, with whom Justice STEVENS and Justice O’CONNOR join, dissenting.

Today the majority takes an extraordinary doctrine, developed cautiously by this Court over the past 50 years, and applies it to a circumstance, and in a manner, that is without precedent. Because of this unwarranted expansion of our previous cases, I dissent.

I

At the outset, it is important to set forth the general nature of the dispute.

*773 The Court quite properly does *not* establish any constitutional right of newspaper publishers

to place newsracks on municipal property. The Court expressly declines to “pass” on the question of the constitutionality of an outright municipal ban on newsracks. *Ante*, at 2147, n. 7. My approach to the specific question before us, which differs from that of the majority, requires me to consider this question; and, as discussed below, our precedents suggest that an outright ban on newsracks on city sidewalks would be constitutional, particularly where (as is true here) ample alternative means of 24-hour distribution of newspapers exist. In any event, the Court’s ruling today cannot be read as any indication to the contrary: cities remain free after today’s decision to enact such bans.

Moreover, the Court expressly rejects the view, heretofore adopted by some lower courts, that any local scheme that seeks to license the placement of newsracks on public property is *per se* unconstitutional.^{FN1} **2153 Cities “may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression.” *Ante*, at 2145. It is only common sense that cities be allowed to exert some control over those who would permanently appropriate city property for the purpose of erecting a newspaper dispensing device.

FN1. See, e.g., *Minnesota Newspaper Assn. v. Minneapolis*, 9 Med.L.Rptr. 2116, 2122-2123 (DC Minn.1983); *Gamett Co. v. City of Rochester*, 69 Misc.2d 619, 330 N.Y.S.2d 648 (1972).

My disagreement with the Court is not over the constitutional status of newsracks, or the more specific question of the propriety of the licensing of such newspaper vending devices. The dispute in this case is over a more “technical” question: What is the scope of the peculiar doctrine that governs facial challenges to local laws in the First Amendment area? The majority reads our cases as holding that local licensing laws which have “a close enough nexus to expression, or to conduct commonly associated with expression, to *774 pose a real and substantial threat of [an] identified censorship risk [k],” will be considered invalid “whenever [such a law] gives a government official ... substantial power to discriminate based on the content or viewpoint of speech.” *Ante*, at 2145. This is true, the majority believes, whether or not the speaker can prove that the official’s power has been or will be used against him;

indeed, it is true even if the government official indicates a willingness to abjure the use of such power (as is the case here).

It is true that certain licensing laws that “giv[e] a government official ... substantial power to discriminate based on the content or viewpoint of speech” are unconstitutional on their face—without any showing of actual censorship or discrimination, or even without the potential licensee even making an application for a license. But the sweep of this potent doctrine must be limited in a way that is principled; one that is rooted in our precedents and our history. The Court’s statement that this doctrine applies *whenever* the license law has “a close ... nexus to expression, or to conduct commonly associated with expression,” is unduly broad. The doctrine, as I see it, applies only when the specific conduct which the locality seeks to license is protected by the First Amendment. Because the placement of newsracks on city property is not so protected (as opposed to the circulation of newspapers as a general matter), the exception to our usual facial challenge doctrine does not apply here.

II

Our prior cases, and an examination of the case before us, indicate that the Lakewood ordinance is not invalid because it vests “excessive discretion” in Lakewood’s mayor to grant or deny a newsrack permit.

A

The Court has historically been reluctant to entertain facial attacks on statutes, *i.e.*, claims that a statute is invalid in all of its applications. Our normal approach has been to determine^{*775} whether a law is unconstitutional as applied in the particular case before the Court.^{FN2} This rule is also the usual approach we follow when reviewing laws that require licenses or permits to engage in business or other activities. In *New York ex rel. Lieberman v. Van De Carr*, 199 U.S. 552, 26 S.Ct. 144, 50 L.Ed. 305 (1905), for example, plaintiff in error was convicted of selling milk in New York City without a permit. Plaintiff in error claimed before this Court that the licensing law vested arbitrary power in an administrative board to select those who would be permitted to sell milk. This Court’s response was:

FN2. See, *e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-503, 105 S.Ct. 2794,

2800-2802, 86 L.Ed.2d 394 (1985); *United States v. Grace*, 461 U.S. 171, 175, 103 S.Ct. 1702, 1705, 75 L.Ed.2d 736 (1983); *Nixon v. Administrator of General Services*, 433 U.S. 425, 438-439, 97 S.Ct. 2777, 2787-2788, 53 L.Ed.2d 867 (1977); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 52, 86 S.Ct. 1254, 1264, 16 L.Ed.2d 336 (1966); *United States v. Raines*, 362 U.S. 17, 20-24, 80 S.Ct. 519, 522-524, 4 L.Ed.2d 524 (1960); *Watson v. Buck*, 313 U.S. 387, 402, 61 S.Ct. 962, 967, 85 L.Ed. 1416 (1941).

****2154** “[Prior] cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal court.” *Id.*, at 562, 26 S.Ct., at 146.

There being no showing that the law had been unconstitutionally applied to plaintiff in error, his conviction was affirmed. “One who is required to take out a license will not be heard to complain, in advance of application, that there is a danger of refusal. He should apply and see what happens.” ***776** *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 616-617, 57 S.Ct. 549, 553, 81 L.Ed. 835 (1937) (citations omitted). Other cases are to the same effect.^{FN3} Thus, the usual rule is that a law requiring permits for specified activities is not unconstitutional because it vests discretion in administrative officials to grant or deny the permit. The Constitution does not require the Court to assume that such discretion will be illegally exercised. *Douglas v. Noble*, 261 U.S. 165, 170, 43 S.Ct. 303, 305, 67 L.Ed. 590 (1923); *Lieberman, supra*, 199 U.S., at 562, 26 S.Ct., at 146.^{FN4}

FN3. See, *e.g.*, *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70, 88, 67 S.Ct. 1062, 1072, 91 L.Ed. 1346 (1947); *Smith v. Cahoon*, 283 U.S. 553, 562, 51 S.Ct. 582,

585, 75 L.Ed. 1264 (1931); *Douglas v. Noble*, 261 U.S. 165, 170, 43 S.Ct. 303, 305, 67 L.Ed. 590 (1923); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 544-545, 34 S.Ct. 359, 362-363, 58 L.Ed. 713 (1914); *Bradley v. Richmond*, 227 U.S. 477, 482-483, 33 S.Ct. 318, 319-320, 57 L.Ed. 603 (1913); *Western Union Telegraph Co. v. Richmond*, 224 U.S. 160, 168, 32 S.Ct. 449, 451, 56 L.Ed. 710 (1912); *Fischer v. St. Louis*, 194 U.S. 361, 371, 24 S.Ct. 673, 675, 48 L.Ed. 1018 (1904); *Baer v. City of Wauwatosa*, 716 F.2d 1117, 1123-1124 (CA7 1983); *Spanish International Broadcasting Co. v. FCC*, 128 U.S.App.D.C. 93, 104, 385 F.2d 615, 626 (1967); *Wallach v. City of Pagedale*, 376 F.2d 671, 674-675 (CA8 1967).

FN4. Confining our attention to the actual impact of a law upon the complaining party is a policy of restraint that rests upon the time-tested advisability of having concrete, rather than hypothetical, cases before us. As a general proposition, we can arrive at informed judgments only when we have a record showing the actual impact of the challenged statute.

Much the same approach underlies the case-or-controversy requirement of Article III. As-applied adjudication also serves the end of deciding no more than necessary to dispose of the specific case under submission and of avoiding unnecessary confrontations with Congress and state or local legislators. Cf. *Ashwander v. TVA*, 297 U.S. 288, 346-348, 56 S.Ct. 466, 482-484, 80 L.Ed. 688 (1936).

There are, however, a few well-established contexts in which the Court has departed from its insistence on an as-applied approach to constitutional adjudication. One of them is where a permit or license is required to engage in expressive activities protected by the First Amendment, and official discretion to grant or deny is not suitably confined. "In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his

conduct could be proscribed by a properly drawn statute, and whether or not he applied for a *777 license." *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965).^{FN5} It is this line of cases on which the majority draws to support its conclusion that the Lakewood ordinance is unconstitutional on its face. *Ante*, at ---- - ----.

FN5. See also, e.g., *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964, n. 12, 104 S.Ct. 2839, 2850, n. 12, 81 L.Ed.2d 786 (1984); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969); *Cox v. Louisiana*, 379 U.S. 536, 557-558, 85 S.Ct. 453, 465-466, 13 L.Ed.2d 471 (1965); *Staub v. City of Baxley*, 355 U.S. 313, 319, 78 S.Ct. 277, 280, 2 L.Ed.2d 302 (1958).

****2155** The prevailing feature of these exceptional cases, however, is that each of them involved a law that required a license to engage in activity protected by the First Amendment. In each of the cases, the expressive conduct which a city sought to license was an activity which the locality could not prohibit altogether. Streets, sidewalks, and parks are traditional public fora; leafletting, pamphletting, and speaking in such places may be regulated, *Cox v. New Hampshire*, 312 U.S. 569, 574-575, 61 S.Ct. 762, 765, 85 L.Ed. 1049 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 306-307, 60 S.Ct. 900, 904-905, 84 L.Ed. 1213 (1940); but they may not be entirely forbidden, *Jamison v. Texas*, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943); *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). Likewise, in *Freedman*, *supra*, at issue was a license requirement that was a prerequisite for any exhibition of a film in the State of Maryland. *Id.*, 380 U.S., at 52-53, and n. 1, 85 S.Ct. at 735-736 and n. 1. In all of these cases, the scope of the local license requirement included expressive activity protected by the First Amendment. See also Part II-C, *infra*.

This is how the cases themselves have defined the scope of *Lovell-Freedman* doctrine. Such license requirements are struck down only when they affect the "enjoyment of freedoms which the Constitution guarantees." See *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S.Ct. 277, 282, 2 L.Ed.2d 302 (1958). It is laws "subjecting the exercise of First Amendment freedoms to" license requirements that we have found

suspect, see Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151, 89 S.Ct. 935, 938-939, 22 L.Ed.2d 162 (1969), not merely laws with some amorphous “nexus” to expression.

For example, the *Lovell-Freedman* line of cases would be applicable here if the city of Lakewood sought to license the distribution of all newspapers in the city, or if it required licenses*778 for all stores which sold newspapers. These are obviously newspaper circulation activities which a municipality cannot prohibit and, therefore, any licensing scheme of this scope would have to pass muster under the *Lovell-Freedman* doctrine. But—and this is critical—Lakewood has not cast so wide a net. Instead, it has sought to license only the placement of newsracks (and other like devices) on city property. As I read our precedents, the *Lovell-Freedman* line of cases is applicable here only if the Plain Dealer has a constitutional right to distribute its papers by means of dispensing devices or newsboxes, affixed to the public sidewalks. I am not convinced that this is the case.

B

Appellee has a right to distribute its newspapers on the city's streets, as others have a right to leaflet, solicit, speak, or proselytize in this same public forum area. But this “does not mean that [appellee] can ... distribute [its newspapers] where, when and how [it] chooses.” See Breard v. Alexandria, 341 U.S. 622, 642, 71 S.Ct. 920, 932, 95 L.Ed. 1233 (1951). More specifically, the Plain Dealer's right to distribute its papers does not encompass the right to take city property—a part of the *public* forum, as appellee so vigorously argues—and appropriate it for its own exclusive use, on a semi-permanent basis, by means of the erection of a newsbox.^{FN6} “The publisher**2156 of a newspaper.... *779 has no special privilege to invade the rights and liberties of others,” Associated Press v. NLRB, 301 U.S. 103, 132-133, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937); these protected “rights of others” have always included the public-at-large's right to use the public forum for its chosen activities, including free passage of the streets. See Schneider v. State, 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939).

FN6. Appellee resists this “characterization” of its placement of newsboxes on city property, arguing that it is not seeking to “ren[t]” or have “permanently set aside” portions of

the sidewalk for its newsracks. See Tr. of Oral Arg. 37, 47. Rather, appellee contends, it is merely seeking to exercise its “First Amendment right” to distribute newspapers by means of a newsrack, “the mechanical cousin” of the traditional means of selling papers on city streets, the “newsboy.” See Brief for Appellee 10; cf. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 115-116, 64 S.Ct. 851, 853, 88 L.Ed. 1170 (1944).

This “characterization” of its activities is unpersuasive. While newsboxes may not be “permanent” structures in the way that buildings are, they are not a peripatetic presence either. See Tr. of Oral Arg. 37-38; cf. McDonald v. Gannett Publications, 121 Misc.2d 90, 90-91, 467 N.Y.S.2d 300, 301 (1983); Editor & Publisher, Apr. 9, 1983, p. 8, col. 1 (discussing “bolting” of newsracks to city sidewalks). Here, the District Court found that the “placement of a newspaper dispensing device on property is normally of a permanent nature, the device generally occupying a specific portion of property for months or years.” App. to Juris. Statement A30-A31.

There is little doubt that if a State were to place an object of the size, weight, and permanence of a newsrack on private property, this “physical occupation” would constitute a “taking” of that property. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427-430, 434-435, 102 S.Ct. 3164, 3171-3173, 3175-3176, 73 L.Ed.2d 868 (1982); Lovett v. West Virginia Central Gas Co., 65 W.Va. 739, 742-743, 65 S.E. 196, 197-198 (1909); Southwestern Bell Telephone Co. v. Webb, 393 S.W.2d 117, 121 (Mo.App.1965). The character of the newsrack's intrusion on city sidewalks is not lessened by the fact that the property here is public, the occupation is by a private party, or that the purpose of the “taking” is the communication of ideas. See generally St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 98-99, 13 S.Ct. 485, 487-488, 37 L.Ed. 380 (1893) (discussed in text *infra* at ----).

From the outset of its contemporary public forum cases, this Court has recognized that city streets and sidewalks “have immemorially been held in trust for use of the public.” Hague v. CIO, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939). This means *all* of the public, and does not create a First Amendment right in newspaper publishers to “cordon” off a portion of the sidewalk in an effort to increase the circulation of their papers. Cf. Schneider, supra, 308 U.S., at 160, 60 S.Ct., at 150. As this Court wrote long ago, in upholding an ordinance that restricted a telegraph company's placement of telegraph poles on city property:

“The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting.... This use is common to all members of the public, and it is a use open equally to [all] citizens.... But the use made by *780 the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive.... Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public.” St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 98-99, 13 S.Ct. 485, 488, 37 L.Ed. 380 (1893).

While there is a First Amendment right to publish newspapers, publishers have no right to force municipalities to turn over public property for the construction of a printing facility. There is a First Amendment right to sell books, but we would not accept an argument that a city must allow a bookseller to construct a bookshop—even a small one—on a city sidewalk. The right to leaflet does not create a right to build a booth on city streets from which leafletting can be conducted. Preventing the “taking” of public property for these purposes does not abridge First Amendment freedoms. Just as there is no First Amendment right to operate a bookstore or locate a movie theater however or wherever one chooses notwithstanding local laws to the contrary, see Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the First Amendment does not create a right of newspaper publishers to take city streets to erect structures to sell their papers.

It may be that newspaper distributors can sell more papers by placing their newsracks on city sidewalks. But those seeking to distribute materials protected by the First Amendment do not have a right to appropriate public property merely because it best facilitates their efforts. “We again **2157 reject the ‘notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.’” Regan v. Taxation with Representation of Wash., 461 U.S. 540, 546, 103 S.Ct. 1997, 2001, 76 L.Ed.2d 129 (1983) (quoting Cammarano v. United States, 358 U.S. 498, 515, 79 S.Ct. 524, 534, 3 L.Ed.2d 462 (1959) (Douglas, J., concurring)). Consequently, *781 a city need not subsidize news distribution activities by giving, selling, or leasing a portion of city property for the erection of newsracks. “The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” Adderley v. Florida, 385 U.S. 39, 47, 87 S.Ct. 242, 247, 17 L.Ed.2d 149 (1966). Preserving public forum space for use by the public *generally*, as opposed to the exclusive use of one individual or corporation, is obviously one such “lawfully dedicated” use. “The streets belong to the public and are primarily for the use of the public in the ordinary way.” Packard v. Banton, 264 U.S. 140, 144, 44 S.Ct. 257, 259, 68 L.Ed. 596 (1924).

To hold otherwise, and create a First Amendment right of publishers to take city property to erect newsboxes, would ignore the significant governmental interests of cities like Lakewood—that are threatened by newsrack placements.^{FN7} One of these interests, discussed supra, at ---, is keeping the streets and sidewalks free for the use of all members of the public, and not just the exclusive use of any one entity. But this is not the only concern at issue here.

^{FN7} The conflict between cities' efforts to protect important public interests and the desire of publishers to place newsracks on city property no doubt accounts for the recent spate of litigation in the lower courts over the constitutionality of city regulation of newsracks. See, e.g., Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (CA2 1984); Miami Herald Publishing Co. v. Hallandale, 734 F.2d 666 (CA11 1984); Providence Journal Co. v. City of Newport,

665 F.Supp. 107 (R11987); Gannett Satellite Information Network, Inc. v. Norwood, 579 F.Supp. 108 (Mass.1984); City of New York v. American School Publications, Inc., 69 N.Y.2d 576, 516 N.Y.S.2d 616, 509 N.E.2d 311 (1987); Burlington v. New York Times Co., 148 Vt. 275, 532 A.2d 562 (1987); News Printing Co. v. Totowa, 211 N.J.Super. 121, 511 A.2d 139 (1986). See also Ball, Extra! Extra! Read All About It: First Amendment Problems in the Regulation of Coin-Operated Newspaper Vending Machines, 19 Colum.J.L. & Soc.Probs. 183, 185-187 (1985).

The Court has consistently recognized the important interest that localities have in insuring the safety of persons using *782 city streets and public forums. See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 650, 101 S.Ct. 2559, 2565, 69 L.Ed.2d 298 (1981); Graved v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972); Cox v. New Hampshire, 312 U.S., at 574, 61 S.Ct., at 765. In this case, testimony at trial detailed a variety of potential safety risks posed by newsboxes, running the gamut from the obvious to the unimaginable.^{FN8} Based on such testimony, the District Court found that newsracks “along **2158 the streets, ... increas[e] the probability for accidents and injury.” App. to Juris. Statement A32. This finding was not disturbed by the Court of Appeals, even as it reversed the District Court’s constitutional ruling.

^{FN8}. A city official testifying at trial reported numerous incidents where objects located in the sidewalk areas where appellee wishes to erect its newsboxes-signposts, signal poles, and utility poles-were hit by cars, bicycles, or pedestrians. App. 144-145. A vehicle may strike a newsrack on a city sidewalk, injuring its occupants or passersby. Cf. Tua v. Brentwood Motor Coach Co., 371 Pa. 570, 92 A.2d 209 (1952). Cars may stop so that their drivers can purchase papers from newsracks, increasing the traffic hazards of city driving. App. 89, 124-128.

Other testimony at trial and exhibits introduced there described newsracks restrict-

ing pedestrian traffic, blocking ramps for the handicapped, or being too near fire hydrants. *Id.*, at 151-154; Defendant’s Exs. GG-1, GG-7, GG-9, App. 391-393. Even a one-on-one encounter with a seemingly benign newsrack has its risks. Cf. McDermott v. Engstrom, 81 So.2d 553 (Fla.1955). Indeed, appellee’s newspaper reported recently that a man had received a serious electrical shock when he approached a newsrack, apparently resulting from the fact that the bolts used to anchor the newsrack to the ground had penetrated an electrical power line. See Are These Streets for Walking?, The Plain Dealer, July 3, 1987, p. 12-A, cols. 1-2; see also N.Y. Times, Nov. 14, 1986, p. A14, col. 5; Editor & Publisher, Apr. 16, 1983, p. 13, cols. 1-2.

A third concern is the protection of cities’ recognized aesthetic interests. Lakewood and countless other American cities have invested substantial sums of money to renovate their urban centers and commercial districts. Increasingly, *783 they find newsracks to be discordant with the surrounding area.^{FN9} A majority of this Court found that similar aesthetic considerations would be sufficient to justify a content-neutral ban on all outdoor advertising signs, notwithstanding the extent to which such signs convey First Amendment protected messages. See Metromedia, Inc. v. San Diego, 453 U.S. 490, 507-508, 101 S.Ct. 2882, 2892-2893, 69 L.Ed.2d 800 (1981) (plurality opinion); id., at 552-553, 101 S.Ct., at 2915-2916 (STEVENS, J., dissenting in part); id., at 559-561, 101 S.Ct., at 2919-2920 (Burger, C.J., dissenting); id., at 570, 101 S.Ct., at 2924 (REHNQUIST, J., dissenting). This reasoning applies to newsracks as well as billboards. “[T]he city’s interest in attempting to preserve the quality of urban life is one that must be accorded high respect.” Young v. American Mini Theatres, Inc., 427 U.S. 50, 71, 96 S.Ct. 2440, 2453, 49 L.Ed.2d 310 (1976) (opinion of Stevens, J.). See also City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806-807, 104 S.Ct. 2118, 2129-2130, 80 L.Ed.2d 772 (1984); Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949).

^{FN9}. One article introduced at trial in this case discussed growing frustration among

local officials with rapidly escalating numbers of newsracks on city streets. See Longhini, *Coping with High-Tech Headaches*, 50 *Planning Contents*, 31-32 (Mar.1984). Esthetic problems are among the chief complaints. See *id.*, at 31.

Many other accounts have quoted city officials and city residents expressing dismay over newspaper distributors' seeming disregard for local esthetic concerns and standards. See, e.g., *Editor & Publisher*, Sept. 8, 1984, p. 11, cols. 1-3; *N.Y. Times*, Aug. 22, 1984, p. A12, cols. 3-5; *Editor & Publisher*, May 28, 1983, p. 43, col. 1.

We should be especially hesitant to recognize the right appellee claims where, as is the case here, there are "ample alternative channels" available for distributing newspapers. See *Arcara*, 478 U.S., at 705-706, n. 2, 106 S.Ct., at 3177, n. 2; *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 53, 103 S.Ct. 948, 959, 74 L.Ed.2d 794 (1983); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976). The District Court found that no person in Lakewood lives more than one-quarter mile from a 24-hour newspaper outlet: either a store open all night or a newsbox located on private property. *784 App. to Juris. Statement A27. Home delivery, the means by which appellee distributes the vast majority of its newspapers, *id.*, at A26, is an option as well. The First Amendment does not require Lakewood to make its property available to the Plain Dealer so that it may undertake the most effective possible means of selling newspapers. See *Heffron v. International Society for Krishna Consciousness, Inc.*, *supra*, 452 U.S., at 647, 101 S.Ct., at 2563.

In sum, I believe that the First Amendment does not create a right of newspaper publishers to take a portion of city property to erect a structure to distribute their papers. There is no constitutional right to place newsracks on city sidewalks over the objections of the city.

C

Because there is no such constitutional right, the predicate for applying the *Freedman v. Maryland* line

of cases, see *supra*, at ----, is not present in this case. Because the Lakewood Ordinance does not directly regulate an activity protected by the First Amendment, we should instead take the traditional, as-applied approach to adjudication exemplified by the *Lieberman* line of cases. Appellee's facial challenge to **2159 the mayor's discretion under § 901.181(c)(7) should therefore be rejected.

The Court offers three reasons for departing from this time-tested approach for applying the *Lovell-Freedman* doctrine, and for substituting its new "nexus to expression" test. I consider these three reasons in turn.

(1)

First, the majority seeks support for its rejection of the foregoing analysis by comparing two previous decisions: *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948), and *Kovacs v. Cooper*, *supra*. *Saia* struck down a local ordinance vesting absolute discretion in a local official over permits for the use of sound-amplification trucks; *Kovacs* upheld a local law which totally *785 banned the use of such trucks. Today's majority states that in *Kovacs*, *Saia* was distinguished on grounds that support its position here. *Ante*, at 2147-2148.

The majority's reading of these two cases is flawed for several reasons. First, the "rationale of *Kovacs*" on which the majority relies was not the Court's view at all, but rather, an opinion for a three-Justice plurality. See *Kovacs*, 336 U.S., at 78-89, 69 S.Ct., at 449-450 (opinion of Reed, J.). In fact, four other Justices in *Kovacs* understood the Court's action in that case in the exact contrary manner—i.e., as being a repudiation of the earlier decision in *Saia*. See *Kovacs*, *supra*, at 97-98, 69 S.Ct., at 459 (Jackson, J., concurring); *id.*, at 101-102, 69 S.Ct., at 460-461 (Black, Douglas, and Rutledge, JJ., dissenting). Thus, the majority's explanation of how a comparison of *Kovacs* and *Saia* support its conclusion rests on a view of those two cases that was rejected by more Justices than accepted it at the time that *Kovacs* was decided.

An equally plausible reading of *Saia* is the one that a plurality of Justices took when revisiting the sound-truck question in *Kovacs*: *Saia* rested on the "assumption"—later proved erroneous in *Kovacs*—that a municipality could not ban sound trucks altogether.

Saia repeatedly suggests that a “ban” on sound trucks would not pass constitutional muster. See 334 U.S., at 562, 68 S.Ct., at 1150. Cf. also *id.*, at 559-560, 561, 68 S.Ct., at 1150. And the Court in *Saia* indicated that it was moved by its view that sound trucks were “indispensable instruments of effective public speech.” *Id.*, at 561, 68 S.Ct., at 1150.

Since *Saia*’s underlying premise was called into question in *Kovacs*, 336 U.S., at 97-98, 69 S.Ct., at 459 (Jackson, J., concurring); *id.*, at 101-102, 69 S.Ct., at 460-461 (Black, J., dissenting), at the very least, the majority’s *Saia-Kovacs* comparison is a shaky foundation for the departure from prior precedent which the Court now undertakes.

(2)

Second, the Court incorrectly suggests that I rely on the now-discredited “greater-includes-the-lesser” formulation of Justice Holmes, as adopted by this Court in *786 Davis v. Massachusetts, 167 U.S. 43, 17 S.Ct. 731, 42 L.Ed. 71 (1897). *Ante*, at 2146-2148. The majority then engages in a detailed analysis of cases having no applicability here whatsoever, *ante*, at 2148-2149, to slay this straw man of its own creation.

As defined at its inception, “greater-includes-the-lesser” reasoning holds that where a State or municipality may ban an activity altogether, it is consequently free “to determine under what circumstances such [activity] may be availed of, as the greater power contains the lesser.” See *Davis, supra*, at 48, 17 S.Ct., at 733. But if, for example, a Lakewood ordinance provided for the issuance of newsrack licenses to only those newspapers owned by persons of a particular race, or only to members of a select political party, such a law would be clearly violative of the First Amendment (or some other provision of the Constitution), and would be facially invalid. And if the mayor of Lakewood granted or refused license applications for similar improper reasons, his exercise of the power provided him under § 901.181(c)(7) would ****2160** be susceptible to constitutional attack. Thus, I do not embrace the “greater-includes-the-lesser” syllogism—one that this Court abandoned long ago. Cf. *Hague v. CIO*, 307 U.S., at 515, 59 S.Ct., at 963.

Instead, my view is simply this: where an activity that could be forbidden altogether (without run-

ning afoul of the First Amendment) is subjected to a local license requirement, the mere presence of administrative discretion in the licensing scheme will not render it invalid *per se*. In such a case—which does not involve the exercise of First Amendment protected freedoms—the *Lovell-Freedman* doctrine does not apply, and our usual rules concerning the permissibility of discretionary local licensing laws (and facial challenges to those laws) must prevail.

(3)

Finally, the Court asserts that I do not understand the nature of the conduct at issue here. *Ante*, at ----. It is asserted that “[t]he actual ‘activity’ at issue here is the circulation*787 of newspapers, which is constitutionally protected.” *Ibid.* But of course, this is wrong. Lakewood does not, by its ordinance, seek to license the circulation of newspapers within the city. In fact, the Lakewood ordinance does not even require licenses of all newsracks within the jurisdiction—the many newsracks located within Lakewood on private property are *not* included within the scope of the city’s ordinance. See App. 373-374. Thus, it is the majority—and not I—that is guilty of “recharacterizing” the activity that Lakewood licenses. The Lakewood ordinance must be considered for what it is: a license requirement for newsracks on city property.

This is why, notwithstanding the Court’s intimations to the contrary, *ante*, at 2148-2150, my approach would not change the outcome of our previous cases in this area. In those cases the local law at issue required licenses—not for a narrow category of expressive conduct that could be prohibited—but for a sweeping range of First Amendment protected activity. Thus, the law at issue in *Shuttlesworth v. Birmingham*, 394 U.S., at 149, 89 S.Ct., at 937, required a license for “any parade”; the license scheme under attack in *Freedman v. Maryland*, 380 U.S., at 52-53, and n. 1, 85 S.Ct., at 735-736, and n. 1, applied to all films shown in the State of Maryland; the law at issue in *Lovell v. Griffin*, 303 U.S., at 451, 58 S.Ct., at 668, applied to any distribution of leaflets or pamphlets within the city limits. Surely, even at the extreme level of abstraction at which the Court operates in its opinion, the majority can recognize a difference between the scope and dangers of these laws, and Lakewood’s more focused regulation. See also n. 13, *infra*.

III

I now address the rule of decision the majority offers.

A

Instead of the relatively clear rule that the Court's prior cases support, the majority today adopts a more amorphous measure of when the *Lovell-Freedman* doctrine should apply. *788 As I see it, the Court's new "nexus to expression, or to conduct commonly associated with expression" test is peculiarly troublesome, because it is of uncertain scope and vague expanse.

The Court appears to stop short of saying that any statute that delegates discretionary administrative authority that has the *potential* to be used to suppress speech is unconstitutional. A great variety of discretionary power may be abused to limit freedom of expression; yet that does not mean that such delegations of power are facially invalid. See *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503-504, 102 S.Ct. 1186, 1195-1196, 71 L.Ed.2d 362 (1982).^{FN10}

^{FN10} For example, the power to hire and fire public employees can be abused to suppress discussion on matters of public concern, see, e.g., *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), but that does not render facially invalid all laws that give public employers discretion to hire and fire. The plenary power given state public utility commissions to regulate local utilities too can be misused to infringe on protected speech rights, see *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 10-15, 106 S.Ct. 903, 908-911, 89 L.Ed.2d 1 (1986); *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 533-535, 100 S.Ct. 2326, 2330-2332, 65 L.Ed.2d 319 (1980), but that does not render the statutes granting such regulatory power facially infirm. Even the power to grant or deny liquor licenses can be abused in violation of the First Amendment, cf. *Reed v. Village of Shorewood*, 704 F.2d 943, 949-951 (CA7 1983), but this does not *per se* invalidate all local liquor laws.

**2161 The new Lakewood ordinance enacted in

tandem with § 901.181 illustrates this principle well. As discussed, *ante*, at 2142, when the District Court invalidated Lakewood's complete ban on all structures on city property (then § 901.18 of the city code), the city enacted two new ordinances. One, § 901.181, provides for licensing newsracks on city property—the subject of this appeal. The second, § 901.18, gives the City Council *unlimited* discretion to grant or deny applications for all other exclusive uses of city property. App. 266-267. Someone who wishes to apply for permission under § 901.18 to erect a soft-drink vending machine on city property may fear that his application will be denied because *789 he has engaged in some First Amendment protected activities which are not to the City Council's liking. These fears may even be substantial, and they may be based on facts eminently provable in a courtroom; e.g., that the applicant opposed a City Councilwoman in her last election campaign. Yet surely § 901.18 is not invalid on its face merely because it creates the *possibility* that the discretion accorded therein to the City Council could be abused in the way that the soft-drink vending machine applicant fears. Cf. *Gravned v. City of Rockford*, 408 U.S., at 121, n. 50, 92 S.Ct., at 2306, n. 50; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-396, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926).

Seeking a way to limit its own expansive ruling, the Court provides two concrete examples of instances in which its newly crafted "nexus to expression" rule will *not* strike down local ordinances that permit discretionary licensing decisions. First, we are told that a law granting unbridled discretion to a mayor to grant licenses for soda machine placements passes constitutional muster because it does not give that official "frequent opportunities to exercise substantial power over the content or viewpoint of the vendor's speech." *Ante*, at 2145-2146. How the Court makes this empirical assessment, I do not know. It seems to me that the nature of a vendor's product—be it newspapers or soda pop—is not the measure of how potent a license law can be in the hands of local officials seeking to control or alter the vendor's speech. Of course, the newspaper vendor's speech is likely to be more public, more significant, and more widely known than the soda vendor's speech—and therefore more likely to incur the wrath of public officials. *But* in terms of the "usefulness" of the license power to exert control over a licensee's speech, there is no difference whatsoever between the situation of the soda vendor and the newspaper vendor.^{FN11}

FN11. Indeed, in practical terms, if two businesses contemplated the prospect of standing before Lakewood's officials to seek vending machine permits—a sole proprietorship seeking a license for a soda machine that is the only source of the owner's income, and the Plain Dealer Publishing Co. seeking licenses for newsracks—I have little doubt about which applicant would be more likely to feel constrained to alter its expressive conduct in anticipation of the encounter.

*790 If the Court's treatment of the soda machine problem is not curious enough, it also “assures” us that its ruling does not invalidate local laws requiring, for example, building permits—even as they apply to the construction of newspaper printing facilities. These laws, we are told, provide “too blunt a censorship instrument to warrant**2162 judicial intervention.” *Ante*, at 2146. Thus, local “laws of general application that are not aimed at conduct commonly associated with expression” appear to survive the Court's decision today. *Ibid*.

But what if Lakewood, following this decision, repeals local ordinance § 901.181 (the detailed newsrack permit law) and simply left § 901.18 (the general ordinance concerning “any ... structure or device” on city property) on the books? That section vests absolute discretion (without any of the guidelines found in § 901.181) in the City Council to give or withhold permission for the erection of devices on city streets. Because this law is of “general application,” it should survive scrutiny under the Court's opinion—even as applied to newsracks. If so, the Court's opinion takes on an odd “the-greater-but-not-the-lesser” quality: the more activities that are subjected to a discretionary licensing law, the more likely that law is to pass constitutional muster.

B

As noted above, our tradition has been to discourage facial challenges, and rather, to entertain constitutional attacks on local laws only as they are applied to the litigants. The facts of this case indicate why that policy is a prudent one.

Most importantly, there could be no allegation in this case that the mayor's discretion to deny permits

actually has been abused to the detriment of the newspaper, for the Plain *791 Dealer has not applied for a permit for its newsracks under § 901.181. *App. to Juris*. Statement A30. Indeed, the District Court found that the “Mayor stands ready and willing to permit coin-operated newspaper dispensing devices in the commercial areas of the City” pursuant to the ordinance. *Ibid*. It also found that the “only reason why the [appellee] has not placed newspaper dispensing devices along the streets of Lakewood where permitted, is that the [appellee] has not applied for such use.” *Id.*, at A32.

Indicative of the true nature of this litigation is the fact that the city of Lakewood has had on the books, since January 1987, an interim ordinance that licenses the placement of newsracks on city property—an ordinance that is free of the constitutional defects challenged here. Eighteen months have passed since the interim ordinance was enacted, and the Plain Dealer apparently still has not applied for a license to place its newsracks on city property. FN12 Thus, the Court, with a strange rhetorical flourish, belittles the usefulness of judicial review as a tool to control the mayor's discretion in granting newsrack licenses, because newspaper publishers and their reading public cannot afford to await the results of the judicial process. *Ante*, at 2151. “[N]ewspaper publishers*792 can[not] wait indefinitely for a permit” and “a paper needs public access at a particular time,” we are remonstrated. *Ante*, at 2152. Yet the Plain Dealer has eschewed the availability of a wholly constitutional permit for its newsracks for a year and a half.

FN12. The discussion of the interim ordinance at oral argument highlights this point:

“QUESTION: Well, then, while [the interim] ordinance is in effect, have you gone ahead and installed some boxes?”

“MR. GARNER [Appellees' Counsel]: No, we have not, Your Honor.

“QUESTION: Why not?”

“MR. GARNER: We thought, as I suggested earlier, we think this is a very important case, and from the Plain Dealer's immediate standpoint certainly-

“QUESTION: In other words, you'd rather win the lawsuit then get the boxes out there.

“MR. GARNER: Yes, that's correct, Your Honor...” Tr. of Oral Arg. 43-44.

See also n. 13, *infra* (comparing this case to Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and Shuttlesworth v. Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969)).

The Court mentions the risk of censorship, the ever-present danger of self-censorship, and the power of prior restraint to justify the result. See, *e.g.*, *ante*, at 2143-2145, 2149. Yet these fears and concerns have little to do with this case, which **2163 involves the efforts of Ohio's largest newspaper to place a handful of newsboxes in a few locations in a small suburban community. Even if one accepts the testimony of appellee's own expert, it seems unlikely that the newsboxes at issue here would increase the Plain Dealer's circulation within Lakewood by more than a percent or two; the paper's overall circulation would be affected only by about one one-hundredth of one percent (0.01%). See App. 82-84, 214.

It is hard to see how the Court's concerns have any applicability here. And it is harder still to see how the Court's image of the unbridled local censor, seeking to control and direct the content of speech, fits this case. In the case before us, the city of Lakewood declined to appeal an adverse ruling against its ban on newsracks, and instead amended its local laws to permit appellee to place its newsboxes on city property. See *id.*, at 270-274. When the nature of this ordinance was not to the **Plain Dealer's** liking, **Lakewood** again amended its local laws to meet the newspaper's concerns. See *id.*, at 275. Finally, when the newspaper, still disgruntled, won a judgment against **Lakewood** from the Court of Appeals, the city once again amended its ordinance to address the constitutional issues. See App. to Brief for Appellee A56-A59. The Court's David and Goliath imagery concerning the balance of power between the regulated and *793 the regulator in this case is wholly inapt-except, possibly, in reverse.^{FN13}

FN13. It should be noted that several aspects of the particular ordinance at issue here diminish the possibility that it will result in the general abuses that the majority fears. These factors also distinguish the Lakewood ordinance from the local licensing laws under consideration in the cases that the Court relies on in its opinion.

First, unlike many regulatory schemes we have struck down in the past, cf. *e.g.*, Shuttlesworth v. Birmingham, *supra* at 149-150, 153, 157-158, 89 S.Ct., at 937-938, 940, 942-943, § 901.181 requires that the mayor state the reasons for any denial of a newsrack permit application. This statement of reasons should facilitate review of the mayor's decision, and help to insure that it does not rest on an unconstitutional rationale.

Second, the availability of such review of mayoral decisions is another distinguishing aspect of the ordinance. Cf. *e.g.*, Staub v. City of Baxley, 355 U.S., at 325, 78 S.Ct., at 284. Section 901.181(e), allows (in the first instance) appeal to the City Council of any unfavorable mayoral decision. Then, if this appeal is unsuccessful, a dissatisfied applicant can seek relief from the Ohio courts under state law. Ohio Rev.Code Ann. § 2506.01 *et seq.* (Supp.1987). These appeals provide assurance that any abuse of the mayor's discretion under the ordinance is unlikely to go unremedied.

Finally, the Court ignores the fact that the license that appellee seeks is not for conducting an activity (such as showing films or organizing a parade) for which a “most propitious opportunity for exhibition [may] pas [s],” Freedman, *supra*, 380 U.S., at 61, 85 S.Ct., at 740, but rather, for the erection of a semi-permanent structure on city property. Thus, the administrative and judicial appeals processes made available by city and state laws can serve as a more effective check on the mayor's decisionmaking, with less of a burden on the permit-applicant, than was the case in

Freedman or Shutlesworth.

IV

Because, unlike the Court, I find that the Lakewood ordinance is not invalid by virtue of the discretion it vests in the city's mayor, I must reach the question whether the law is invalid for the other reasons the Court of Appeals cited. I conclude that it is not.

A

A similar analysis to the one I suggest in Parts II and III, *supra*, applies to Lakewood ordinance § 901.181(a), concerning the Architectural Review Board. Appellee argues *794 that this ordinance provision, like the one giving discretion to the mayor to grant or deny permit applications, vests excessive and unbridled discretion in the Board, and thereby is violative of the First Amendment. But for the reasons that I concluded, *supra*, at ----, that § 901.181 does not directly regulate activity protected by the First Amendment, I think this facial challenge to the Architectural Review Board's role under the ordinance must fail as the challenge to § 901.181(c)(7) did. Section**2164 901.181(a) does not fall simply because the Board *may* find a way to use its discretion to suppress speech.

The fallacy of the **Plain Dealer's** argument to the contrary is exposed by considering its full implications. Under **Lakewood** Codified Ordinance § 1325.04, the Architectural Review Board has discretion to approve or reject designs for "all new construction ... within the City." See App. 386 (emphasis added). If we were to accept the **Plain Dealer's** analysis that any potentially speech-suppressing discretion renders a local law facially invalid, we would have to strike § 1325.04 as well: after all, the Board could use its discretion under that ordinance to punish or chill the speech of any person in the city seeking to construct a new building.^{FN14} Yet this mere possibility is not sufficient to invalidate § 1325.04. Likewise, the potential for abuse under § 901.181(a)-which simply subjects newsracks to the same architectural review applied to all other structures erected in Lakewood-is not sufficient to invalidate that provision either.

^{FN14}. Not only would Lakewood's ordinance fall to such a challenge, but so too would countless other local laws that grant Architectural Review Boards substantial

discretion to approve the construction plans of applicants who may fear reprisal for the exercise of their First Amendment rights, or who wish to construct some structure in which First Amendment protected activities will take place. See App. B to Brief for National Institute of Municipal Law Officers as *Amicus Curiae*.

The First Amendment does not grant immunity to the Plain Dealer from the city's general laws regulating businesses that operate therein. "The publisher of a newspaper *795 has no special immunity from the application of general laws." *Associated Press v. NLRB*, 301 U.S., at 132, 57 S.Ct., at 656; see also, *e.g.*, *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139, 89 S.Ct. 927, 931, 22 L.Ed.2d 148 (1969); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-193, 66 S.Ct. 494, 497-498, 90 L.Ed. 614 (1946). The District Court found that Lakewood has applied its architectural review process to *all* new construction in the city. App. to Juris. Statement A36. According to the city, bookstores, theaters, and churches under construction or renovation have all been required to obtain board approval for their construction. See Brief for Appellant 37-38. To hold that all structure where First Amendment protected activities take place are somehow exempt from this normal local regulation would be anomalous and contrary to our precedents. See *Young v. American Mini Theatres, Inc.*, 427 U.S., at 62, 96 S.Ct., at 2448.

The Court of Appeals, 794 F.2d 1139, 1146 (CA6 1986), thought it significant that the Board had no specific standards applying to newsrack designs, but rather, had only general architectural standards applicable to "buildings." Of course, this basis for disapproval is particularly ironic, since the "narro[w] and specifi[c]" focus of § 901.181 on the placement of newsracks is one reason why this Court finds that law to be suspect. *Ante*, at 2145. Consequently, with respect to a future ordinance free from the defect the Court finds fault with today, the city of Lakewood finds itself between a rock and a hard place: make the rules newsrack-specific, and be accused of drawing the noose too tightly around First Amendment protected activities; apply more general rules to newsracks, and be told that your regulators lack standards sufficiently specific to pass constitutional muster.

The conundrum is unfortunate. Simply because a newspaper may find new ways to distribute its papers, via semi-permanent structures that are not "buildings," should not permit the publisher to escape otherwise all-inclusive city regulation. Section 901.181(a) simply takes the rule that applies generally to all new structures in Lakewood and extends it to cover the structures at issue here: newsracks. *796 Newsracks have no First Amendment right to be placed on city streets with disregard for these important economic and esthetic concerns,**2165 or to contribute to the "visual blight" cities are working so hard to eradicate. See Vincent, 466 U.S., at 810, 104 S.Ct., at 2131.

Finally, the Court's opinion provides substantial support for the view that Lakewood's Architectural Review Board requirement is constitutional. As I noted, *supra*, at 2161, the Court today holds that laws of general application are not invalid due to excessive discretion, even when they are applied to expressive activities. *Ante*, at 2145. Since the architectural review requirement is such a law of general application, it appears to me that the Court's opinion implicitly sustains the constitutionality of the imposition of this requirement on appellee's newsboxes. Moreover, since this portion of the Lakewood ordinance only requires the approval of the Architectural Review Board on a single occasion, at the time of the initial adoption of a particular newsbox design, I think it is clearly encompassed within the Court's discussion of permissible building permit laws. *Ibid*.

B

The final disputed provision of the Lakewood ordinance, § 901.181(c)(5), requires that newsrack owners indemnify the city for "any and all liability ... occasioned upon the installation and use" of any newsrack. It also requires newsrack permittees to obtain liability insurance in the amount of \$100,000 to cover any such liability.

The city's reasons for imposing such requirements are obvious. Under Ohio law, a municipality has no sovereign immunity, and "is liable for its negligence in the performance or nonperformance of its acts." Haverlack v. Portage Homes, Inc., 2 Ohio St.3d 26, 30, 442 N.E.2d 749, 752 (1982); cf. Dickerhoof v. Canton, 6 Ohio St.3d 128, 451 N.E.2d 1193 (1983). While there is some dispute between the parties as to how substantial is the city's risk of being

held liable for an injury caused by a newsbox located on city property, there *797 remains sufficient risk to suggest that avoiding such liability is a legitimate concern of Lakewood's City Council.

In fact, appellee acknowledges that, standing alone, the city's indemnification and insurance requirements would be constitutional; the Plain Dealer recognizes that there is no constitutional bar to requiring newspaper distributors to meet such requirements.^{FN15} Nor does it argue that such insurance policies are unobtainable, or make the use of newsboxes economically infeasible.^{FN16} Rather, appellee argues (and the Court of Appeals found), that this provision is invalid because it applies to newsracks and not other "users" of the public streets. 794 F.2d at 1147.

FN15. The following excerpt from oral argument makes this point clear:

"QUESTION: [Y]ou assert that it is not possible under the First Amendment for the city to require indemnity insurance for those devices? I think that is a remarkable proposition.

"MR. GARNER [Appellee's Counsel]: No, I am not suggesting that, Your Honor. No. No, I am not suggesting that...." Tr. of Oral Arg. 48.

FN16. Nor could the **Plain Dealer** so argue. **Lakewood** introduced as exhibits at trial copies of \$1 million liability insurance policies (10 times the amount required by ordinance § 901.181(c)(5)) that the **Plain Dealer** obtained for the benefit of 11 other cities in Ohio—including the city of Cleveland—where it has located newsracks on public property. App. 401.

This Court has consistently held that "differential treatment ... [for] the press ... is presumptively unconstitutional." See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585, 103 S.Ct. 1365, 1372, 75 L.Ed.2d 295 (1983). Yet, in this case, I find this argument inapposite and unpersuasive. First, it ignores the obvious difference between those on-street objects that are essential to the public safety and welfare—such as bus shelters, telephone and electric wiring poles, and emergency

phone boxes-and the preferred distribution means of a private newspaper company, the Plain Dealer's newsboxes. Judge Unthank, in concurrence below, recognized the difference between these "public services of a **2166 quasi-governmental nature," and appellee's newsracks. *798794 F.2d, at 1148. I also find the difference to be a significant one.^{FN17}

FN17. In addition, it may be beyond Lakewood's control to impose indemnity and insurance requirements on those entities that have structures on public property that pre-date the city's recent legislation. According to appellant, many of these placements of utility poles, signal boxes, and the like are on property obtained by utilities from the city via easement grants several decades old. See Tr. of Oral Arg. 28.

The city contended at argument (without dispute from the Plain Dealer) that it is Lakewood's policy to place indemnification and insurance requirements in all city rental contracts at this time. See *ibid.* Henceforth, then, the pre-existing nonindemnifying structures on city property will become the "isolated exceptions and not the rule." See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583, n. 5, 103 S.Ct. 1365, 1371, n. 5, 75 L.Ed.2d 295 (1983); cf. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 193-194, 66 S.Ct. 494, 497-498, 90 L.Ed. 614 (1946). Any future discriminatory application of what the city claims to be its current, uniform policy would, of course, be unconstitutional. See *Minneapolis Star*, *supra*, 460 U.S. at 583-584, 103 S.Ct., at 1370-1371.

Until this litigation ensued, a Lakewood ordinance banned the construction of any new structure on city property. The new ordinances adopted in response to the initial District Court decision below, which allow such structures, do explicitly require insurance from newsrack-permittee holders, while being silent on this question with respect to other potential permittees on public land. Compare § 901.181(c)(5) with § 901.18. But there is nothing in the record to suggest that the city would not require such insurance of any applicant under § 901.18. Cf.

Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767, 773-774 (CA2 1984); see also *ante*, at 2142, n. 3. If the city does begin to treat nonpress permittees more favorably than newsrack permittees, the Plain Dealer may have a valid constitutional challenge to § 901.181(c)(5) at that time. But I am unwilling to imply that such will be the city's practice based on the record before us. See *Renton v. Playtime Theatres, Inc.*, 475 U.S., at 53, 106 S.Ct., at 932. Consequently, I would reject appellee's facial challenge to § 901.181(c)(5).

*799 V

For the foregoing reasons, I dissent from the Court's opinion and its judgment in this case. I would reverse the Court of Appeals' decision invalidating the Lakewood ordinance.

U.S. Ohio, 1988.
City of Lakewood v. Plain Dealer Pub. Co.
486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771, 56 USLW 4611, 15 Media L. Rep. 1481

END OF DOCUMENT

APPENDIX C

531 So.2d 1034, 13 Fla. L. Weekly 2276
(Cite as: 531 So.2d 1034)

▷

District Court of Appeal of Florida,
Third District.

Juan E. MONTERO, Appellant,
v.
COMPUGRAPHIC CORPORATION, a foreign
corporation, Appellee.

No. 87-1342.
Oct. 4, 1988.

Buyer sued computer seller for fraudulent inducement, rescission, and return of property. The Circuit Court for Dade County, Francis X. Knuck, J., denied buyer's motion for leave to file second amended complaint, and granted seller's motion for summary judgment, and buyer appealed. The District Court of Appeal, Ferguson, J., held that court should have granted buyer's motion.

Reversed and remanded.

West Headnotes

[1] Estoppel 156 ↪ 68(2)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

A litigant cannot, in course of litigation, occupy inconsistent and contradictory positions.

[2] Judgment 228 ↪ 181(7)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(5) Matters Affecting Right to

Judgment

228k181(7) k. Bar of Statute of Limitations. Most Cited Cases

Pleading 302 ↪ 246(2)

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k242 Amendment of Declaration, Complaint, Petition, or Statement

302k246 Subject-Matter and Grounds in General

302k246(2) k. Actions Ex Contractu. Most Cited Cases

Motion to amend complaint to allege failure of acceptance should have been granted, and resultant fact question as to existence of contract precluded summary judgment based on limitations period contained in agreement.

[3] Pleading 302 ↪ 233.1

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k233 Leave of Court to Amend

302k233.1 k. In General. Most Cited Cases (Formerly 302k233)

Pleading 302 ↪ 245(1)

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k242 Amendment of Declaration, Complaint, Petition, or Statement

302k245 Condition of Cause and Time for Amendment

302k245(1) k. In General. Most Cited Cases

Motion for leave to amend complaint should be freely given where there is no showing that privilege has been abused, and the more so where leave is sought at or before hearing on motion for summary

531 So.2d 1034, 13 Fla. L. Weekly 2276
(Cite as: 531 So.2d 1034)

judgment. West's F.S.A. RCP Rule 1.190(a).

*1035 Richard A. Beiley, Cooper Wolfe & Bolotin and Maureen E. Lefebvre and Sharon Wolfe, Miami, for appellant.

Silver & Silver and Ira S. Silver, Miami, for appellee.

Before BASKIN, FERGUSON and JORGENSON, JJ.

FERGUSON, Judge.

This appeal is brought from a summary judgment entered on a first amended complaint. Based on evidence discovered after the filing of the first amended complaint, the court should have granted the plaintiff's motion for leave to file a second amended complaint.

In September 1981 the appellant **Montero**, a Chilean businessman, purchased a computer printer from the appellee, **Compugraphic**, at its office in Miami, Florida. **Montero** paid \$24,251.76 for the printer. The machine needed electrical conversion in order to operate on the voltage system available in Chile. **Montero** alleges that he paid an additional \$1,000, relying on a promise by **Compugraphic's** sales manager that the printer would be delivered with the necessary modifications.

The sales contract provided that it would become effective when accepted by **Compugraphic's** home office in Massachusetts and limited the bringing of an action on the contract to one year after a cause of action arose. **Compugraphic** never delivered a printer which conformed to the terms of the September 1981 purchase agreement.

Montero's first amended complaint, filed in May 1986, was based on counts of fraudulent inducement, rescission, and return of property. **Compugraphic's** answer denied the existence of a contract and alleged that the cause of action was barred by the applicable statute of limitations. In July 1986, **Compugraphic** sought a summary judgment contending that the cause of action was barred by the limiting period contained in the purchase agreement.

Based on discovery taken while **Compugraphic's** motion for summary judgment was pending,

Montero learned that the September 1981 contract was never accepted by **Compugraphic** and sought leave of court to file a second amended complaint.^{FN1} This appeal is brought from the order denying **Montero's** motion for leave to file a second amended complaint and from a summary judgment entered for **Compugraphic**.

^{FN1} **Montero** claims that he discovered a second purchase agreement for a computer printer, unknown and unauthorized by him, which was accepted by **Compugraphic** at its Massachusetts office. The named buyer was Export Sales Corp., a company owned by Leonardo Caro, who was **Montero's** agent for the purpose of accepting delivery of and shipping the computer equipment. This machine, purchased by Caro, did not conform to **Montero's** specifications either. The existence of the second contract, however, was not a stated ground for entry of a summary judgment against **Montero**.

[1][2] **Compugraphic's** argument in defense of the judgment, that the limiting provisions of the agreement are binding on the parties even if the contract offer was never accepted, is without merit. In order *1036 to enforce a contractually shortened limitation period, there must be a valid contract. If, for failure of an acceptance, **Montero's** offer never became a binding contract, which **Compugraphic** concedes and the evidence shows, then the time-bar provisions in that offer are also invalid. **Compugraphic's** arguments that there is no contract, and that a time-limiting provision in the contract bars the action, are inconsistent. A litigant cannot, in the course of litigation, occupy inconsistent and contradictory positions. *Rigg v. Vernell*, 428 So.2d 668 (Fla. 3d DCA 1982); *Federated Mut. Implement & Hardware Ins. Co. v. Griffin*, 237 So.2d 38 (Fla. 1st DCA 1970), cert. denied, 240 So.2d 641 (Fla.1970).

If, alternatively, there is a contract and it was fraudulently induced, as is alleged, then the contractual limitation-of-action provision relied on by the appellees is ineffective. See *Burroughs Corp. v. Suntoys of Miami, Inc.*, 472 So.2d 1166 (Fla.1985). See also *Suntogs of Miami, Inc. v. Burroughs Corp.*, 433 So.2d 581 (Fla. 3d DCA 1983), reversed on other grounds.

531 So.2d 1034, 13 Fla. L. Weekly 2276
(Cite as: 531 So.2d 1034)

[3] On either version of the facts, one of which is already pleaded, and the other which can be pleaded based on newly discovered facts, entry of a summary judgment based on the statute of limitations was an abuse of discretion. Florida Rule of Civil Procedure 1.190(a) requires that a motion for leave to amend should be freely given where there is no showing that the privilege has been abused, and the more so where leave is sought at or before a hearing on a motion for summary judgment. Bowen v. Aetna Life and Cas. Co., 512 So.2d 248 (Fla. 3d DCA 1987); Old Republic Ins. Co. v. Wilson, 449 So.2d 421 (Fla. 3d DCA 1984); Affordable Homes, Inc. v. Devil's Run, Ltd., 408 So.2d 679 (Fla. 1st DCA 1982).

The summary judgment and the order denying leave to amend the complaint are reversed and the cause is remanded for further proceedings.

Fla.App. 3 Dist., 1988.
Montero v. Compugraphic Corp.
531 So.2d 1034, 13 Fla. L. Weekly 2276

END OF DOCUMENT

APPENDIX D

184 F. 387, 37 L.R.A.N.S. 429, 106 C.C.A. 497
(Cite as: 184 F. 387)



Circuit Court of Appeals, First Circuit.

SMITH

v.

BOSTON ELEVATED RY. CO.

No. 899.

January 31, 1911.

In Error to the Circuit of the United States for the District of Massachusetts.

Action at law by Pauline A. Smith against the Boston Elevated Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

West Headnotes

Appeal and Error 30 ↪1213

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in Lower Court

30k1209 New Trial

30k1213 k. Conduct of Trial. Most Cited Cases

Plaintiff recovered a judgment against a street railroad company for an injury received by being thrown down by the starting of a car as she was passing from the vestibule through the doorway, which judgment was reversed by the appellate court; one of its holdings being that the evidence was insufficient to show that the car started with an unusually violent jerk as alleged. Plaintiff had testified that, as the car started, she tried to catch hold of the door, but could not. On the second trial she testified that, when thrown, she was holding to the door, and leaning heavily against it, which testimony was uncorroborated. *Held*, that her testimony was so inconsistent with that given on the former trial as to discredit her, and to justify the court in directing a verdict for defendant; the other testimony being no more favorable to her than on the first trial.

Estoppel 156 ↪69

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k69 k. Testimony as Witness. Most Cited Cases

A party testifying under oath is more than a mere witness. He is an actor, seeking the intervention of the judicial power in his behalf, and a plaintiff, after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent, and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false.

*387 Julian C. Woodman, for plaintiff in error.

M. F. Dickinson and Walter Bates Farr, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge.

This is a writ of error brought after the direction of a verdict for the defendant on the second jury trial of an action of tort for personal injuries.

A verdict for the plaintiff at the first trial was set aside for reasons set forth in our opinion of March 16, 1909. 168 Fed. 628. At the second trial, though the plaintiff made changes in her testimony, a verdict was directed for the defendant.

At the first trial it appeared that the plaintiff fell while entering the defendant's car. At the argument before us on the former writ of *388 error it was contended that the testimony showed negligence of the defendant in two particulars: That the car was started with unusual violence, and that the conductor was guilty of negligence in starting the car too soon.

184 F. 387, 37 L.R.A.N.S. 429, 106 C.C.A. 497
(Cite as: 184 F. 387)

The charge of negligence in starting the car too soon was based upon the contention that the plaintiff 'was just in that unstable equilibrium which would make a start very dangerous for a woman in her situation, and that the conductor knew it or recklessly took the chances.'

Upon the hearing of the present writ of error it was contended in her behalf:

'She was holding her umbrella and small hand-bag and skirt in her left hand, and had a good hold on the side of the framework of the doorway with her right hand, and was leaning hard against it with her shoulder.'

While the present record hardly justifies this version of the plaintiff's testimony, it does contain testimony of the plaintiff to the effect that her right hand and right shoulder were braced against the facing of the door.

Having found in our previous opinion that under the authorities cited the car was not started prematurely though the plaintiff was not braced against the door, it follows that the changed testimony to the effect that she was braced can have no effect to modify our opinion as to the insufficiency of the testimony to show negligence in giving the starting signal too soon. As the present testimony upon this point is less favorable to the plaintiff than her previous testimony, our former opinion is conclusive upon this question.

As to the charge that the car was started with unusual violence, the changed testimony is apparently directed to meet that part of our former opinion which said that her position was such that any ordinary jerk of the car in starting would be likely to throw her down, and that the plaintiff's testimony as to the manner in which she fell was consistent with the ordinary jerk of the car in starting and inconsistent with any sudden or violent jerk.

It is now urged that although the plaintiff was holding on to the side of the framework of the door, and bracing herself against it with her shoulder, the start was so violent as to throw her down. The following Massachusetts cases are cited: Nolan v. Newton St. Ry. Co., Banker & Tradesman (September 7, 1910) 206 Mass. 384, 92 N.E. 505; Lacour v. Spring-

field St. Ry. Co., 200 Mass. 34, 85 N.E. 868; Black v. Boston Elevated Ry. Co., 206 Mass. 80, 91 N.E. 891; Cutts v. Boston Elevated Ry. Co., 202 Mass. 450, 89 N.E. 21.

In the former trial the plaintiff's whole testimony, as well as the argument of counsel thereon, shows that she was not braced. Her former statement-

'I tried to reach forward to catch the door or something to hold myself, but I couldn't,'

- is directly inconsistent with the statement that:

'I held on to the side of the door and leaned against it, and I leaned hard against it with my shoulder.'

*389 Upon a consideration of her testimony in the two trials, it is apparent that there is a complete departure from the original claim that the plaintiff was in such unstable equilibrium that it was negligent to give a starting signal, to the present claim that she was so well braced and had such a good hold that only a violent jerk of the car of an unusual character could have caused her to fall.

We have before us two inconsistent versions given by the plaintiff of the same occurrence.

As the inconsistency is in the testimony of a party, a stricter rule is applicable than where the inconsistency is in the testimony of an ordinary witness. Previous inconsistent statements of a witness other than a party ordinarily go merely to the credit of the witness, and upon a second trial it may be left to a jury to decide which of the inconsistent statements is to be credited. The sworn testimony of a party, who has control of his case, with power to bind himself conclusively by pleadings, stipulations or admissions, as to facts resting upon his own knowledge, is of such solemn character that, in the absence of a clear showing of mistake, inadvertency, or oversight, it should ordinarily be regarded as precluding him from seeking to establish before another jury an inconsistent state of facts. While it is true that upon a second trial the plaintiff's case may be changed or strengthened by new testimony, yet the right of a plaintiff at a second trial to make by his own testimony a complete departure from the case presented

184 F. 387, 37 L.R.A.N.S. 429, 106 C.C.A. 497
(Cite as: 184 F. 387)

at the first trial is not unlimited.

A plaintiff, we think, after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false. A party testifying under oath is more than a mere witness. He is an actor seeking the intervention of the judicial power in his behalf, and thus subject to the rule '*allegans contraria non est audiendus*,' which, as stated in *Broom's Legal Maxims*, p. 130, 'expresses in technical language the trite saying of Lord Kenyon that a man should not be permitted to 'blow hot and cold' with reference to the same transaction, or insist at different times, on the truth of each of two conflicting allegations according to the promptings of his private interest.' This principle is illustrated in *Harriman v. Northern Securities Co.*, 197 U.S. 244-294, 25 Sup.Ct. 493, 49 L.Ed. 739; *Davis v. Wakelee*, 156 U.S. 680, 689, et seq., 15 Sup.Ct. 555, 39 L.Ed. 578; *Sturm v. Boker*, 150 U.S. 312-334, 14 Sup.Ct. 99, 37 L.Ed. 1093; *National Steamship Co. v. Tugman*, 143 U.S. 28-32, 12 Sup.Ct. 361, 36 L.Ed. 63; *Pope v. Allis*, 115 U.S. 370, 6 Sup.Ct. 69, 29 L.Ed. 393; *Railway Co. v. McCarthy*, 96 U.S. 267, 24 L.Ed. 693.

In the present case, the plaintiff upon the former writ of error had a full hearing upon the question of her legal rights upon the state of facts upon which she rested before a jury and before this court. If, after an adverse decision of this court she is at liberty to change her own testimony at will, then there is no practical limit to litigation. In *Hamilton v. Frothingham*, 71 Mich. 616, 40 N.W. 15, it was said:

***390 * * *** The plaintiff cannot be permitted to take a position wholly inconsistent with that taken on the former trials. The contract now claimed under is wholly inconsistent with that claimed upon the former trials. If this contract was made, then the one upon which the former recovery was had did not exist, and no recovery could have been had thereunder. If the contract was to pay all over \$8000, then an express contract to pay a certain and specific sum did not exist.'

'If such inconsistent positions were allowed to be taken in courts of justice, there would be no end to

litigation. Parties finding that contracts upon which they have relied for recovery cannot be upheld in the courts are not permitted under the same pleadings and bills of particulars to retry their case upon an entirely different contract, and one entirely contradictory to the one first claimed under, even for the purpose of meeting the opinion of this court, and squaring their case with it.'

As the plaintiff was not corroborated, and as she was discredited by her former inconsistent testimony, we are of the opinion that, in the absence of any substantial explanation of this inconsistency, the trial judge was justified in concluding that, if the plaintiff should have a verdict, it would be his duty to set it aside, and therefore in directing a verdict for the defendant.

We have considered, of course, whether the testimony at the two trials is reconcilable upon the view that the changes were merely in supplying details inadvertently omitted upon the first trial, but are unable to avoid the conclusion that the statements are directly inconsistent and cannot be reconciled.

Recognizing the rule that upon a new trial a party should be afforded a large and liberal opportunity for supplying omissions and for explanations, this does not avail the plaintiff in error, since the most liberal application of this rule cannot justify the present substitution of a new and inconsistent case by the uncorroborated testimony of a party.

Upon the whole it seems apparent that at the second trial the plaintiff's testimony was directed to meeting the statement in our former opinion that the plaintiff was in such a position 'that any ordinary jerk of the car in starting would be likely to throw her down, unless she braced herself in some way against the side of the door,' by showing that she did this by bracing her shoulder heavily against the door, and also by showing that she had a good hold with her hand, thus bringing herself within those cases above cited in which it was held that the fact that a good hand hold was broken is evidence of a violent and negligent starting of the car.

The plaintiff also assigns error in the exclusion of expert testimony, but, as each of the questions excluded was predicated upon the plaintiff's changed testimony and upon an assumption that the plaintiff

184 F. 387, 37 L.R.A.N.S. 429, 106 C.C.A. 497
(Cite as: 184 F. 387)

was braced or leaning against the frame of the door when the car started, we need not consider them, since our finding that the plaintiff is precluded from asserting these facts cuts under all questions which assume the existence of these facts.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers its costs of appeal.

C.A.1 1911.
Smith v. Boston Elevated Ry. Co.
184 F. 387, 37 L.R.A.N.S. 429, 106 C.C.A. 497

END OF DOCUMENT

APPENDIX E

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

▷

United States Court of Appeals,
Ninth Circuit.
Maria-Kelly F. YNIGUEZ; Jaime P. Gutierrez,
Plaintiffs,

v.

STATE OF ARIZONA, Defendant-Appellee.
Robert D. Parks; Arizonans for Official English, Ap-
plicants in intervention-Appellants.

Maria-Kelly F. YNIGUEZ; Jaime P. Gutierrez,
Plaintiffs-Appellees,

v.

Rose MOFFORD, individually and as Governor of
the State of Arizona; Robert Corbin, individually
and as Attorney General of the State of Arizona,
Defendants-Appellants.

Robert D. Parks; Arizonans for Official English, Ap-
plicants in intervention-Appellees.

Nos. 90-15546, 90-15581.

Argued and Submitted Dec. 14, 1990.

Decided July 19, 1991.

After provision of Arizona Constitution declar-
ing English to be official language was declared un-
constitutional, 730 F.Supp. 309, motions to intervene
were filed by ballot initiative's sponsor, sponsor's
spokesman, and Attorney General, who had earlier
argued for and won dismissal of suit against him. The
United States District Court for the District of Ari-
zona, Paul G. Rosenblatt, J., 130 F.R.D. 410, denied
motions. Appeal was taken. The Court of Appeals,
Reinhardt, Circuit Judge, held that: (1) sponsor had
standing to pursue appeal; (2) spokesman had stand-
ing under Article III standards applicable to all pri-
vate citizens; and (3) Attorney General, although
estopped from arguing that he should be party, had
limited right to present argument regarding constitu-
tionality.

Affirmed in part, and reversed in part.

West Headnotes

[1] Federal Courts 170B ↪776

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk776 k. Trial de novo. Most Cited

Cases

Court of Appeals reviews de novo denial of mo-
tion to intervene. Fed.Rules Civ.Proc.Rule 24(a), 28
U.S.C.A.

[2] Federal Courts 170B ↪817

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk817 k. Parties; pleading. Most

Cited Cases

District court's determination of timeliness of
motion to intervene is reviewed only for abuse of
discretion. Fed.Rules Civ.Proc.Rule 24(a), 28
U.S.C.A.

[3] Federal Civil Procedure 170A ↪315

170A Federal Civil Procedure

170AII Parties

170AII(H) Intervention

170AII(H)1 In General

170Ak314 Grounds and Factors

170Ak315 k. Interest of applicant in

general. Most Cited Cases

Federal Civil Procedure 170A ↪316

170A Federal Civil Procedure

170AII Parties

170AII(H) Intervention

170AII(H)1 In General

170Ak314 Grounds and Factors

170Ak316 k. Inadequacy of repre-
sentation of applicant's interest. Most Cited Cases

Federal Civil Procedure 170A ↪320

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

170A Federal Civil Procedure

170AII Parties

170AII(H) Intervention

170AII(H)1 In General

170Ak320 k. Time for intervention.

Most Cited Cases

To be entitled to grant of motion to intervene at outset of litigation, intervener must show timeliness, interest in subject matter of litigation, practical impairment of his or her interest absent intervention, and inadequate representation of that interest by other parties. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

[4] Federal Civil Procedure 170A ↪315

170A Federal Civil Procedure

170AII Parties

170AII(H) Intervention

170AII(H)1 In General

170Ak314 Grounds and Factors

170Ak315 k. Interest of applicant in general. Most Cited Cases

Federal Civil Procedure 170A ↪321

170A Federal Civil Procedure

170AII Parties

170AII(H) Intervention

170AII(H)1 In General

170Ak321 k. Proceedings for intervention. Most Cited Cases

In order for individual to intervene in ongoing litigation between other parties, he need only meet *Sagebrush Rebellion* criteria; however, where no party appeals, "case or controversy" requirement of Article III also qualifies applicant's right to intervene postjudgment. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.; U.S.C.A. Const. Art. 3, § 1 et seq.

[5] Federal Courts 170B ↪546

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(B) Appellate Jurisdiction and Procedure in General

170Bk545 Parties

170Bk546 k. Intervention or addition of new parties on appeal. Most Cited Cases

Once party defendants have acquiesced in judgment against them, party seeking to intervene for purposes of appeal must demonstrate such stake in outcome of appeal that live Article III case or controversy remains for appellate resolution. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.; U.S.C.A. Const. Art. 3, § 1 et seq.

[6] Federal Courts 170B ↪546

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(B) Appellate Jurisdiction and Procedure in General

170Bk545 Parties

170Bk546 k. Intervention or addition of new parties on appeal. Most Cited Cases

Sponsor of ballot initiative had standing to intervene to appeal judgment holding ballot initiative unconstitutional, even though only defendant in case chose not to appeal; official sponsors of ballot initiative have strong interest in vitality of provision of State Constitution which they proposed and for which they vigorously campaigned, and Arizona law recognizes ballot initiative sponsor's heightened interest in measure by giving sponsor official rights and duties distinct from those of voters at large. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.; A.R.S. Const. Art. 28, § 1 et seq.

[7] Federal Courts 170B ↪546

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(B) Appellate Jurisdiction and Procedure in General

170Bk545 Parties

170Bk546 k. Intervention or addition of new parties on appeal. Most Cited Cases

Under Article III standards applicable to private citizens, spokesman for official sponsor of ballot initiative making English official state language of Arizona had standing to intervene to appeal judgment holding ballot initiative unconstitutional, even though only defendant in case chose not to appeal; initiative

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

gave spokesman right to sue initiative's challenger to enforce initiative, and at outset of litigation, challenger could have had reasonable expectation that spokesman would bring enforcement action against her. U.S.C.A. Const. Art. 3, § 1 et seq.; Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.; A.R.S. Const. Art. 28, § 1 et seq.

[8] Federal Courts 170B ↪546

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(B) Appellate Jurisdiction and Procedure in General

170Bk545 Parties

170Bk546 k. Intervention or addition of new parties on appeal. Most Cited Cases

Under *Sagebrush Rebellion* criteria, sponsors of ballot initiative could intervene to appeal judgment holding ballot initiative unconstitutional, even though only defendant in case, i.e., governor, chose not to appeal; motion to intervene was timely, as, although most prudent course would have been to attempt intervention as soon as sponsor had doubts about Attorney General's representation, sponsor could not be faulted for relying on Attorney General's representation that he would fully defend initiative, sponsor had sufficient interest in subject matter of litigation to intervene, sponsor's interest would be practically impaired absent intervention, as declaration that initiative was facially invalid bound governor and her successors in any actions against initiative's challenger, and sponsor was inadequately represented by other parties, as governor did not appeal and Attorney General was estopped from reentering litigation as party. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

[9] Federal Courts 170B ↪774

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk773 Estoppel to Allege Error; Invited Error

170Bk774 k. Particular errors. Most Cited Cases

Under rule pertaining to intervention of right,

where Arizona Attorney General in district court argued for and won dismissal as against him of action challenging constitutionality of ballot initiative, he was estopped on appeal from arguing that he should be party. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

[10] Estoppel 156 ↪63

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k63 k. Inconsistency of conduct and claims in general. Most Cited Cases

Doctrine of judicial estoppel, sometimes referred to as doctrine of preclusion of inconsistent positions, is invoked to prevent party from changing its position over course of judicial proceedings when such positional changes have adverse impact on judicial process.

[11] Attorney General 46 ↪6

46 Attorney General

46k5 Powers and Duties

46k6 k. In general. Most Cited Cases

Under statute which entitles Attorney General to make argument in "proceeding" to which no representative of state is party, Arizona Attorney General had limited right on appeal to make argument regarding constitutionality of ballot initiative, as governor was only participant after district court's dismissal of Attorney General, and governor could not be considered party to appeal, having failed to file notice of appeal, and having accepted district court's decision on merits; however, it was only because Court of Appeals held that initiative's sponsors could intervene and appeal that there was such proceeding and Attorney General could make argument. 28 U.S.C.A. § 2403(b).

*728 Robert K. Corbin, Atty. Gen., Anthony B. Ching, Sol. Gen., Paula S. Bickett, Asst. Atty. Gen., Phoenix, Ariz., for state appellants.

Robert J. Pohlman, Pohlman & Sanders, Phoenix, Ariz., for plaintiffs-appellees.

*729 Barnaby W. Zall, Williams & Jensen, Washing-

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

ton, D.C., for the appellant, movants & intervenors.

James F. Henderson, Gust, Rosenfeld & Henderson, Phoenix, Ariz., for the appellants, movants, intervenors.

Appeal from the United States District Court for the District of Arizona.

Before TANG, FLETCHER and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

This case presents two novel questions concerning post-judgment intervention: first, whether the sponsors of a ballot initiative may intervene after judgment to appeal a decision holding the ballot initiative unconstitutional when the only defendant in the case chooses not to appeal; and second, whether the Attorney General, having argued for and won a dismissal of the suit against him in the district court, may intervene on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Arizonans for Official English ("AOE") and its spokesman Robert D. Park campaigned for adoption by ballot initiative of an amendment to the **Arizona** Constitution entitled "English as the Official Language." In the November 1988 general election, the **Arizona** voters approved the new constitutional provision. That new provision, Article XXVIII of the **Arizona** Constitution ("Article XXVIII") provides in part:

English shall be the official language of the **State** of **Arizona** and all of its political subdivisions, that the Article is applicable to all branches of government and to all government officials and employees during the performance of government business, that the **state** and its political subdivisions shall take all reasonable steps to preserve, protect and enhance the role of English as the **state's** official language, that the **state** and its political subdivisions ... shall act only in English....

Section Four of Article XXVIII states that "[a] person who resides in or does business in this **State** shall have standing to bring suit to enforce this Article in a court of record of the **State**. The Legislature may enact reasonable limitations on the time and

manner of bringing suit under this subsection." The **Arizona** legislature has not enacted any limitations on private lawsuits to enforce Article XXVIII.

Maria-Kelly **Yniguez**, an employee of the **Arizona** Department of Administration, ceased speaking Spanish while performing her official **state** duties immediately upon passage of Article XXVIII. She feared that under Article XXVIII she was vulnerable to discipline by her **state** employer if she were to continue to speak Spanish on the job. In November 1988 **Yniguez** sued (in a series of amended complaints) the **State** of **Arizona**, Governor Rose Mofford, **Arizona** Attorney General Robert Corbin, and Director of the **Arizona** Department of Administration Catherine Eden in federal district court. **Yniguez** sought an injunction against **state** enforcement of Article XXVIII and a declaration that it violates the first and fourteenth amendments of the United States Constitution.

The **state** defendants all moved for dismissal, arguing that the eleventh amendment barred **Yniguez's** suit and that there was no live "case or controversy," U.S. Const. art. III, between **Yniguez** and any of the defendants. All of the **state** defendants were represented by the Attorney General's office. The district court then proceeded to issue a series of thoughtful and carefully reasoned rulings, most of which are not now before us.

On February 6, 1990, the district court dismissed all defendants from the suit except the Governor. The court held that the eleventh amendment bars suit against Arizona. The court further held that the Attorney General is an improper party under the doctrine of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), because he has no authority to enforce Article XXVIII against **Yniguez**. Therefore, the court held that the eleventh amendment also bars **Yniguez's** suit against the *730 Attorney General. Although the district court found that Eden has authority to enforce Article XXVIII, she had not threatened to do so, and thus the court held that no case or controversy was ripe for adjudication as to her. The district court therefore dismissed Eden from the suit as well. Finally, the district court held that the Governor has the authority to enforce Article XXVIII against **Yniguez** and had sufficiently threatened to do so for **Yniguez** to sue her under *Ex parte Young*.

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

Having dismissed all the defendants except the Governor, the district court proceeded on the same date, February 6, 1990, to rule on the merits of Yniguez's claim. The court held that Article XXVIII is facially unconstitutional under the first amendment. It therefore granted Yniguez declaratory relief, but denied injunctive relief because there was no enforcement action pending. Governor Mofford—who had publicly opposed the adoption of Article XXVIII during the 1988 election—immediately announced her decision not to appeal the district court's opinion and order.

On February 16, 1990, AOE and its spokesperson Park moved to intervene post-judgment for the purpose of pursuing an appeal of the district court's order. They sought to intervene both as of right and permissively under Fed.R.Civ.P. 24. During arguments before the district court and this court, the attorneys for the Attorney General's office and for AOE and Park averred that AOE had inquired of the Attorney General at an early stage of the lawsuit whether he would vigorously defend the constitutionality of Article XXVIII, and that they had been assured that he would. Yniguez does not contend otherwise. On March 2, 1990, the Attorney General sought to intervene for the purpose of prosecuting the appeal pursuant to 28 U.S.C. § 2403(b).

On April 3, 1990, the district court denied both motions to intervene. 130 F.R.D. 410. Although the court found that AOE's and Park's motion was timely, it denied it on two grounds. First, the court held that the prospective intervenors did not satisfy the Article III requirement of injury-in-fact necessary for there to be a justiciable controversy. In addition, the court denied the motion to intervene as of right on the ground that AOE and Park did not have an adequate interest in the litigation under Fed.R.Civ.P. 24(a)(2). The district court stated that its decision on the merits would not bind the Arizona courts, and therefore that AOE's and Park's ability to enforce Article XXVIII was not impaired by the decision.^{FN1} The district court also denied the Attorney General's motion to intervene under 28 U.S.C. § 2403(b). Section 2403(b) authorizes intervention by a state attorney general in actions "to which [the] State or any agency, officer, or employee thereof is not a party." The district court noted that although the Governor had not appealed, she remained a party. Accordingly, the court concluded that section 2403(b) is not applicable. These

timely appeals of the denial of the motions to intervene followed.

^{FN1} In its written memorandum opinion and order denying the post-judgment intervention motion, the district court indicated that the reason its opinion on the merits would have no *stare decisis* effect in the Arizona courts was because the decision rested on an interpretation of state law. The district court cited Moore v. Sims, 442 U.S. 415, 428, 99 S.Ct. 2371, 2379, 60 L.Ed.2d 994 (1979) and Blake v. Pallan, 554 F.2d 947, 954 (9th Cir.1977), both of which recite the familiar principle that state courts have the final word on the meaning of state law. A state court may avoid a federal court decision striking down a provision of state law by giving that provision an appropriate narrowing construction. All of this is unexceptional. However, during oral argument on the post-judgment intervention motion the district court expressed a more sweeping view on the power of state courts to ignore federal decisions not just about state law, but federal law. The district court suggested that even if the Arizona state courts were to interpret Article XXVIII exactly as the federal court had interpreted it, the Arizona courts would not be bound to follow the federal court decision that it is unconstitutional, because only decisions of the United States Supreme Court can bind the states on questions of federal law. We address this view below, *infra* at 737.

STANDARD OF REVIEW

[1][2] We review de novo the denial of a motion to intervene. Waller v. Financial Corp. of America, 828 F.2d 579, 582 (9th Cir.1987). The district court's determination*731 of timeliness, however, is reviewed only for an abuse of discretion. County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir.1986), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987).

DISCUSSION

I. AOE and Park

[3] AOE and Park contend that they have a right to intervene on appeal under Fed.R.Civ.P. 24(a) ("Intervention of Right"). Rule 24 of the Federal Rules of

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

Civil Procedure confers a right to intervene “[u]pon timely application” when:

the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed.R.Civ.P. 24(a)(2). In Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir.1983), we interpreted Rule 24(a) to require the granting of a motion to intervene at the outset of litigation if four criteria are met: (1) timeliness; (2) an interest in the subject matter of the litigation; (3) absent intervention the party's interest may be practically impaired; (4) other parties inadequately represent the intervenor. *Id.* at 527.

[4] In order for an individual to intervene in ongoing litigation between other parties, he need only meet the Sagebrush Rebellion criteria. However, where no party appeals, the “case or controversy” requirement of Article III also qualifies an applicant's right to intervene post-judgment. In Legal Aid Soc'y. of Alameda County v. Brennan, 608 F.2d 1319 (9th Cir.1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980), we restated the rule that “post-judgment intervention for purposes of appeal may be appropriate if the intervenors ... meet traditional standing criteria.” *Id.* at 1328 (citations omitted). As the Supreme Court stated in Diamond v. Charles, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986), “[a]lthough intervenors are considered parties entitled, among other things, to seek review ... an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.” *Id.* at 68, 106 S.Ct. at 1706 (citation omitted; emphasis added). This requirement assures the jurisdictional prerequisite of a live “case or controversy.”

[5] As we explained in Brennan, once the party defendants have “acquiesced in the judgment against them,” as the Governor did here, applicants “must demonstrate such a stake in the outcome of an appeal that a live Article III case or controversy remains for appellate resolution.” Brennan, 608 F.2d at 1328 n. 6.

Therefore, an interest strong enough to permit intervention with parties at the onset of an action under Rule 24(a) is not necessarily a sufficient basis for intervention after judgment for the purpose of pursuing an appeal which all parties have abandoned. In Brennan we cited a commentator to illustrate this jurisdictional limitation:

A distinction between standing to intervene and to appeal makes particular sense when the “case or controversy” limitation on the federal judicial power is recalled. Adding C to the litigation between A and B may pose no problems under Article III of the Constitution, but permitting C to be the sole adversary of B on appeal, when his interest in the case may be only in its value as precedent, certainly does give difficulty since there is no real controversy between A and C.

Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv.L.Rev. 721, 753-54 (1968) (cited with approval in Brennan, 608 F.2d at 1328 n. 9). Hence, before assessing whether AOE and Park meet the Sagebrush Rebellion criteria, we must first decide whether permitting them to intervene on appeal would be consistent with the requirements of Article III.

A. Article III Standing

[6] AOE and Park can meet the Article III “standing criteria by alleging a threat *732 of particularized injury from the order they seek to reverse that would be avoided or redressed if their appeal succeeds.” Brennan, 608 F.2d at 1328. AOE and Park contend, as they did in the district court, that they satisfy this test because, as the sponsors of Article XXVIII, they will be injured by its nullification. The district court held that this “abstract” interest is insufficiently concrete to satisfy Article III. Yniguez urges us to adopt the district court's reasoning, citing Diamond v. Charles.

In Diamond, a private physician had intervened at the trial level in an action to enjoin enforcement of an Illinois statute restricting the performance of abortions. After the Court of Appeals affirmed a permanent injunction against the enforcement of the statute, the state decided not to appeal. The private physician, claiming that he had an interest in seeing Illinois' laws enforced, attempted to appeal to the United States Supreme Court. The Court held that he lacked

939 F.2d 727, 20 Fed.R.Serv.3d 813

(Cite as: 939 F.2d 727)

standing because although he had “an interest” he lacked a “direct stake [] in the abortion process.” 476 U.S. at 66, 106 S.Ct. at 1706.

From *Diamond*, Yniguez would have us conclude that a mere “philosophical interest in the outcome of litigation is insufficient to confer a right to appeal.” While we agree with this statement, we reject the suggestion that AOE and Park are mere “‘concerned bystanders,’ who will use [the appeal] simply as a ‘vehicle for the vindication of value interests.’” *Diamond*, 476 U.S. at 62, 106 S.Ct. at 1703 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972); *United States v. SCRAP*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973)). We find that AOE's and Park's interest in Article XXVIII is qualitatively distinct from the physician's interest in the Illinois abortion law at issue in *Diamond*. Unlike the physician, neither AOE nor Park is a mere “private citizen.” 476 U.S. at 64, 106 S.Ct. at 1704. As the principal sponsors of Article XXVIII, their relationship to Article XXVIII is closely analogous to the relationship of a state legislature to a state statute. It is therefore useful to consider the law of legislative standing.

In *Karcher v. May*, 484 U.S. 72, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987), the Supreme Court held that state legislators who intervened in their official capacities to defend a lawsuit challenging the constitutionality of a statute that had been enacted over the Governor's veto did not have standing once they were out of office. But in arriving at that decision, the Court clearly indicated that jurisdiction had been proper in the district court and the court of appeals so long as the legislators held office, notwithstanding the fact that the Attorney General had declined to defend the suit. See *id.* at 72-73, 108 S.Ct. at 390-91. As Justice White pointed out in his concurrence in the judgment, by allowing the legislators to intervene to defend the suit when the state executive did not wish to assert the statute's constitutionality, the Court “acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court.” *Id.* at 84-85, 108 S.Ct. at 396. Furthermore, as the Court recognized over a half century ago, state legislators claiming that their votes “have been overridden and virtually held for naught” by an Executive decision have a sufficient stake in the outcome under Article III to vindicate their interests in

federal court. *Coleman v. Miller*, 307 U.S. 433, 438, 59 S.Ct. 972, 975, 83 L.Ed. 1385 (1939) (holding that 20 state senators who voted against ratification of a federal constitutional amendment had standing to challenge the state lieutenant governor's legal authority to cast the deciding vote in favor of the amendment).^{FN2}

^{FN2}. Also relevant in this regard is *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). In a section of the opinion in that case captioned “Case or Controversy” the Court stated that where the Executive Branch agreed with Chadha that the challenged statute was unconstitutional, Congress' defense of the statute on appeal guaranteed the “concrete adverseness” required by Article III. *Id.* at 939, 103 S.Ct. at 2778. The Court summarized its prior cases thus: “We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.” *Id.* at 940, 103 S.Ct. at 2778.

Although the question whether *individual* members of Congress have standing to sue seeking enforcement of a federal law is an open one, see *Burke v. Barnes*, 479 U.S. 361, 107 S.Ct. 734, 93 L.Ed.2d 732 (1987), the separation of powers issues raised by that question are not implicated in this case.

*733 It is therefore clear that were Article XXVIII a statute rather than a ballot initiative, the Arizona legislature would have standing to defend its constitutionality.^{FN3} AOE argues that as the principal sponsor of the initiative, it stands in an analogous position to a state legislature. We agree. The official sponsors of a ballot initiative have a strong interest in the vitality of a provision of the state constitution which they proposed and for which they vigorously campaigned. The district court's decision striking down Article XXVIII essentially nullified the considerable efforts AOE made to have the initiative placed on the ballot and to obtain its passage. Cf. *Coleman v. Miller*, *supra*, p. 439, 59 S.Ct. p. 975.

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

FN3. That the Supreme Court allowed legislative standing in the cases we have discussed shows that legislative standing is appropriate both under Article III and the prudential standing rules the Court has articulated. See, e.g., Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100, 99 S.Ct. 1601, 1607-08, 60 L.Ed.2d 66 (1979).

Arizona law recognizes the ballot initiative sponsor's heightened interest in the measure by giving the sponsor official rights and duties distinct from those of the voters at large. See, e.g., Ariz.Rev.Stat. Ann. § 19-111 ("person or organization intending to propose a law or constitutional amendment by petition" must file an application with the secretary of state); § 19-122 (if the secretary of state rejects a petition for a ballot initiative, he must provide the sponsor with a written statement of reasons for doing so); § 19-124 (sponsor may submit an argument in favor of the initiative at the time the application is filed).

Moreover, as appears to be true in this case, the government may be less than enthusiastic about the enforcement of a measure adopted by ballot initiative; for better or worse, the people generally resort to a ballot initiative precisely because they do not believe that the ordinary processes of representative government are sufficiently sensitive to the popular will with respect to a particular subject. While the people may not always be able to count on their elected representatives to support fully and fairly a provision enacted by ballot initiative, they can invariably depend on its sponsors to do so.

Finally, it is worth noting that there is a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of litigation concerning that initiative to intervene pursuant to Fed.R.Civ.P. 24(a). See *infra*, part I.B.2. While the interest required to intervene under the Rule is not identical to the interest required for standing under Article III, there are substantial similarities between the two. For the reasons we have already given, the added interest necessary to confer Article III standing—a particularized injury that distinguishes AOE from “concerned bystanders,” Diamond, 476 U.S. at 62, 106 S.Ct. at 1703—is present here.

We conclude that AOE, as the sponsor of Article XXVIII, has standing to pursue the instant appeal.^{FN4}

FN4. We do not suggest that the government of Arizona does not also have a sufficient interest in the validity of a provision of the Arizona Constitution to satisfy Article III. Although we need not address the question whether the Attorney General has Article III standing to pursue the present appeal, *see infra* at 737 (holding that Attorney General is estopped from re-entering the case as a party), we may assume that whenever the constitutionality of a provision of state law is called into question, the state government will have a sufficient interest under Article III. We merely point out that in the case of a successful ballot initiative, its sponsor will also have a sufficient interest.

[7] Quite apart from our consideration of AOE's status as the sponsor of the initiative, we hold that Park, as an individual, has standing under the traditional Article III standards applicable to all private citizens. Yniguez argues that because the district court's decision has not “injured” *734 Park in a tangible way, the Article III standing requirements are not met. However, when we consider Park's standing as an individual the relevant question is not: has Yniguez injured Park? Rather, because Yniguez brought this case seeking declaratory and injunctive relief, the crucial question for determining whether there is an Article III case or controversy is instead: was there a more than speculative threat that Park was about to bring an action to enforce Article XXVIII against Yniguez? If so, then there was a sufficiently ripe case or controversy between Yniguez and Park to justify an action for declaratory relief. See Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979) (federal declaratory relief is available “[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a [provision of state law], and there exists a credible threat of prosecution thereunder....”); Ripplinger v. Collins, 868 F.2d 1043, 1047 (9th Cir.1989) (because of the risk of self-censorship, a reasonable fear of prosecution for the exercise of first amendment rights was shown where plaintiff alleged that sheriff had conducted preliminary investigation of his activities and others had been indicted for similar activities); Polykoff v. Collins, 816 F.2d 1326, 1331 (9th Cir.1987) (declara-

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

tory relief available because of the chilling effect of obscenity statute).

It is plain from the face of Article XXVIII, that Park *could* have sued Yniguez to enforce it.^{FN5} We must now determine whether there was a more than speculative threat that he *would* do so. As we have indicated, this is a question of ripeness.

FN5. Section Four of Article XXVIII provides for enforcement actions by any “person who resides in or does business in this State.” This clearly includes Park, as Yniguez admits. In her brief in this court, Yniguez states that “an action could be instituted by AOE and Park against Kelly Yniguez should they believe her actions violate Article XXVIII.” We note that “person” may also include an organization such as AOE. However, because we hold that AOE has standing in the same way that a legislature might, we need not attempt to predict whether the courts of Arizona would entertain a suit brought by AOE to enforce Article XXVIII.

Generally the ripeness question on appeal in a declaratory judgment case focuses on whether there was a ripe case or controversy when the suit was initiated. See *Ripplinger*, 868 F.2d at 1047 (discussing reasonableness of the plaintiff's fear of prosecution “at the time of filing [of the] lawsuit”). Because Park was not a party to the action below, the district court made no specific finding as to whether he had threatened to enforce Article XXVIII against Yniguez. However, the Attorney General has attested that Park and AOE did not intervene at an early stage in the proceedings only because they had been expressly assured by the Attorney General that he would vigorously represent their interests. Thus, we may treat AOE's and Park's assertion of their interests in the litigation to the Attorney General as an expression, at the time of the initiation of the proceedings, of their intention to see Article XXVIII enforced against Yniguez. At the outset of litigation, Yniguez therefore could have had a reasonable expectation that Park (and possibly AOE as well) would bring an enforcement action against her. As a result, the *United Farm Workers Nat'l Union* requirements are met.

We therefore hold that AOE and Park have

standing to appeal.

B. *The Sagebrush Rebellion Criteria*

[8] We next consider the four criteria under Fed.R.Civ.P. 24(a) in turn.

1. Timeliness

The district court found that AOE's and Park's motion to intervene was timely. The court applied the general rule that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal. However, the district court also considered whether the motion was timely in light of the fact that AOE and Park did not move to intervene until after the judgment. The district court noted that AOE's and Park's complaints about the adequacy of the Attorney General's *735 defense of Article XXVIII indicated that they should have intervened during the litigation. The court also noted that AOE and Park did not realize the supposed inadequacy of the Attorney General's defense until very late in the proceedings. The court further acknowledged that an early motion to intervene could have been futile because of the Attorney General's opposition to intervention and his assurances to AOE and Park that he would vigorously defend Article XXVIII. After considering all of these factors, the district court concluded that the motion was timely.

There is no contention that the time that elapsed between the judgment and AOE's and Park's motion was excessive. The only question here is whether AOE and Park should have attempted to intervene before the final judgment in the court below. Although, as the district court noted, the most prudent course for AOE and Park to have followed would have been to attempt to intervene as soon as they had doubts about the Attorney General's representation, we cannot fault them for relying on that official's assurance that he would defend Article XXVIII fully. Having received that assurance, AOE and Park were not required to monitor the litigation closely to see if the government was asserting a position which, if accepted, could prejudice their interests. Moreover, given the Attorney General's stated view that he would fully defend Article XXVIII, we doubt whether an early motion by AOE and Park to intervene would have been granted, especially if it had been opposed by the Attorney General. Thus, we cannot say that the district court abused its discretion by finding that their motion to intervene was

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

timely.^{FN6}

FN6. It is worth recalling that the district court dismissed all the defendants except the Governor at the same time that it decided the merits. Thus, AOE and Park were first alerted to the inadequacy of the state's representation of its interests when the district court decided the merits. As we have stated, there is no contention that they did not act in a timely fashion after learning of that decision.

2. Interest in the Subject Matter of the Litigation

There appears to be a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of the litigation to intervene pursuant to Fed.R.Civ.P. 24(a). As we stated in Washington State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 630 (9th Cir.1982), cert. denied, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983), because “[r]ule 24 traditionally has received a liberal construction ... the public interest group that sponsored the initiative [is] entitled to intervention as a matter of right under Rule 24(a).” Accord Sagebrush Rebellion, 713 F.2d at 527-28. Moreover, because the Article III standing requirements are more stringent than those for intervention under rule 24(a), see *supra*, p. 731-32, our determination that AOE and Park have standing under Article III compels the conclusion that they have an adequate interest under the rule.

3. Practical Impairment Absent Intervention

Yniguez argues that AOE's and Park's interests are not impaired by the district court's decision because they retain the right to sue in state court to enforce Article XXVIII. Yniguez correctly notes that the district court's decision is not *res judicata* with respect to AOE and Park. As the Supreme Court has stated, “[i]t is a principle of general application in anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” Martin v. Wilks, 490 U.S. 755, 109 S.Ct. 2180, 2184, 104 L.Ed.2d 835 (1989) (quoting Hansberry v. Lee, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940)). However, this principle is not dispositive, because the question here is whether the district court's decision will result in *practical* impairment of the interests of

AOE and Park, not whether the decision itself binds them.

Yniguez next contends that the district court's judgment is no impediment to AOE *736 and Park because it is not a binding precedent on the state courts. All parties agree that it is not binding in the sense that the courts of Arizona are free to place a different interpretation on Article XXVIII and thereby render it constitutional. That is, there is no dispute that the Arizona courts are the definitive expositors of Arizona state law. However, Yniguez' argument goes one step further. She contends in her brief that even assuming that the district court correctly understood the meaning of Article XXVIII, its decision that Article XXVIII is unconstitutional as a matter of federal law has no *stare decisis* effect in the Arizona state courts.^{FN7} The district court also took this narrow view of the effect of its decision. See *supra*, p. 730 & n. 1. AOE and Park contend that the view advanced by Yniguez in her brief, and accepted by the district court, overstates the power of state courts to ignore decisions of the lower federal courts.

FN7. At the oral argument, Yniguez appeared to retreat from her categorical view. In any event, we note that there is considerable irony in the position Yniguez took on this issue in her brief. We may assume that she brought her suit in the hope of obtaining a broad declaration that Article XXVIII is unconstitutional on its face and therefore may not be applied constitutionally to anyone. That is, after all, precisely what the district court held. Having prevailed in the district court Yniguez argued in her brief that we should declare that all she really won is an extremely narrow ruling that Article XXVIII cannot be constitutionally applied to her by the state, the Governor, or the Attorney General, but that private parties are free to enforce it against her, and both official and private parties may enforce it against anyone else.

The view that decisions of the lower federal courts on questions of federal law do not bind the state courts has gained considerable acceptance in the academic literature.^{FN8} It has also been expressed by some state courts, although others have expressed the opposite view.^{FN9} And while the Supreme Court has

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

never squarely faced the question, several individual justices have stated that principles of federalism require that the state courts be treated as coordinate and coequal with the lower federal courts on matters of federal law.^{FN10}

FN8. See, e.g., Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv.L.Rev. 1130, 1231 n. 495 (1986); Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw.U.L.Rev. 759, 771 (1979); Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1053 (1977).

FN9. Compare *Bradshaw v. State*, 286 So.2d 4, 6 (Fla.1973), cert. denied, 417 U.S. 919, 94 S.Ct. 2626, 41 L.Ed.2d 225 (1974) ("It is axiomatic that a decision of a federal trial court, while persuasive if well-reasoned, is not by any means binding on the courts of a State"); *State v. Coleman*, 46 N.J. 16, 35-38, 214 A.2d 393, 403-05 (1965), cert. denied, 383 U.S. 950, 86 S.Ct. 1210, 16 L.Ed.2d 212 (1966); *Iowa Nat'l Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445, 454 (1930), with *Handy v. Goodyear Tire & Rubber Co.*, 230 Ala. 211, 160 So. 530 (1935); *Kuchenmeister v. Los Angeles & S.L.R.*, 52 Utah 116, 172 P. 725 (1918).

FN10. See *Steffel v. Thompson*, 415 U.S. 452, 482 n. 3, 94 S.Ct. 1209, 1227 n. 3, 39 L.Ed.2d 505 (1974) (Rehnquist, J., joined by Burger, C.J., concurring); *Perez v. Ledesma*, 401 U.S. 82, 125, 91 S.Ct. 674, 697, 27 L.Ed.2d 701 (1971) (Brennan, J., joined by White and Marshall, JJ., dissenting) (referring only to "the persuasive force" of a decision of a lower federal court on state courts). See also *Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir.), cert. denied, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 148 (1970) (holding that federal district court's decision on question of federal law was not a binding precedent for the Illinois courts).

Despite the authorities that take the view that the state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view. Having chosen

to create the lower federal courts, Congress may have intended that just as state courts have the final word on questions of state law, the federal courts ought to have the final word on questions of federal law. The contrary view could lead to considerable friction between the state and federal courts as well as duplicative litigation. Furthermore, the sparse authority on the subject appears to be concerned largely with the *stare decisis* effect of federal district court decisions on subsequent state court actions, rather than the effect of decisions of the federal courts of appeals; there may be valid reasons not to bind the state courts to a decision of a single federal district judge—which is not even binding on the same judge in a subsequent*737 action—that are inapplicable to decisions of the federal courts of appeals. Finally, if decisions of the federal courts of appeals invalidating state laws carry no authority, it would be difficult to comprehend why for so many years a right of appeal to the Supreme Court was provided in all cases in which federal circuit courts held state statutes unconstitutional. See 28 U.S.C.A. § 1254(2) (West 1979).^{FN11} In any event, we may assume without deciding that an unappealed judgment of the district court would have no precedential weight in the Arizona courts, for even under this assumption, we find that the interests of AOE and Park are practically impaired by the decision.

FN11. Congress eliminated the provision for such appeals in 1988. See Supreme Court Case Selections Act, Pub.L. 100-352 (1988); 28 U.S.C.A. § 1254(2) (West Supp.1990). However, the repeal was not the result of a determination by Congress that decisions of the federal courts of appeals invalidating state laws are without binding force. Rather, it was part of an Act eliminating nearly all of the Supreme Court's mandatory jurisdiction in response to the Court's unanimous request that Congress make its jurisdiction discretionary whenever possible. H.R.Rep. No. 100-660, 100th Cong., 2d Sess., 2, reprinted in 1988 U.S.Code Cong. & Admin.News 766, 767.

There is no dispute that the declaration that Article XXVIII is facially invalid binds Governor Moford and her successors in any actions against Ms. Yniguez. This fact alone suggests that the interests of AOE and Park have been practically impaired. More-

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

over, there is at least some uncertainty as to whether it would also bind the Governor of Arizona in enforcement suits against defendants other than Ms. Yniguez. Compare H.L. v. Matheson, 450 U.S. 398, 406, 101 S.Ct. 1164, 1169, 67 L.Ed.2d 388 (1981) (stating categorically that an unappealed ruling of a federal district court is binding on a state party), with United States v. Mendoza, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984) (holding that non-mutual offensive collateral estoppel may not be applied against the federal government). As a result, Arizona's Governor may hesitate to take any steps to implement Article XXVIII. Indeed, the Attorney General has represented to this court that in light of the district court's decision, he believes that any enforcement of Article XXVIII would be of questionable legality, and we cannot fault him for his willingness to abide by a federal court's declaration that the provision is unconstitutional. Yet Article XXVIII places an affirmative duty on that official to "take all reasonable steps to preserve, protect and enhance the role of English as the state's official language." The district court's decision casts a cloud over the state's power to enforce Article XXVIII. While it may have left AOE's and Park's right to sue intact, a right to bring a private enforcement action is not a complete substitute for executive enforcement and implementation. Hence, as a practical matter, the district court's ruling substantially weakened Article XXVIII, and thereby impaired the interest of AOE and Park.

Furthermore, even if we assume that the district court's ruling has no binding effect on the Arizona courts, we cannot wholly overlook the fact that jurisprudential concerns might cause those courts to find the reasoning of the district court more persuasive than they might otherwise find a similar argument to be, and that they might choose to accept the district court's reasoning to avoid confusion, lack of finality, and disrespect for law. See Commonwealth v. Negri, 419 Pa. 117, 121-22, 213 A.2d 670, 672 (1965). In any event, the district court's opinion will have impaired AOE's and Park's interests in the vitality of Article XXVIII.

4. Inadequacy of Representation by Other Parties

Having decided not to appeal the district court's decision on the merits, the Governor inadequately represents the interests of AOE and Park. Moreover, as we hold below, the Attorney General is estopped from re-entering this litigation as a party. See *infra*, p.

738. Thus, absent an appeal by AOE and Park, no party will be able to assert Article XXVIII's constitutionality. Because no representation constitutes inadequate representation, the fourth *Sagebrush Rebellion* criterion is met.

*738 Furthermore, even if the government were a party to this appeal, that would not ensure adequate representation of the interests of AOE and Park. The Attorney General has issued an opinion narrowly construing Article XXVIII. In his view, the English-only requirement applies solely to official acts of the Arizona government, and does not prohibit the use of languages other than English by state personnel such as Yniguez. The district court rejected the Attorney General's proffered construction because it is not binding on the Arizona courts and because, in the view of the district court, it contradicts the plain language of Article XXVIII. By contrast with the Attorney General, AOE and Park agree with the district court that Article XXVIII should be construed broadly, although they disagree with the court that the provision so construed is unconstitutional. In any event, at this stage in the proceedings it is clear that the Attorney General would not represent the views of AOE and Park adequately.

II. The Attorney General's Intervention Motion

Attorney General Corbin claims a right to intervene under Fed.R.Civ.P. 24(a) and 28 U.S.C. § 2403. Because we hold that there is an Article III "case or controversy" between Yniguez (on the one hand) and AOE and Park (on the other), we need not address the question whether the Attorney General would have standing to appeal under Article III if no other party were willing and able to appeal. Thus, we turn directly to his claims under Rule 24(a) and section 2403.

A. Rule 24(a)

[9] We note initially that the Attorney General did not contend in the district court that his putative right to intervene was located in Rule 24(a). The sole basis for his intervention motion in the court below was section 2403. Thus, we have serious doubts whether his claim under Rule 24(a) is properly before us. Even if it is, however, we find that having argued in the district court that he should not be a party, the Attorney General is estopped from now arguing that he should be.

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

[10] As we explained in Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir.1990), “[t]he doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process.” (Quoting Religious Technology Center v. Scott, 869 F.2d 1306, 1311 (9th Cir.1989) (Hall, J., dissenting)). Although “‘most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one,’” *id.*, it applies more generally as well. In Russell, for example, we applied the discretionary estoppel doctrine to preclude inconsistent *legal* assertions.

This case is ideally suited for the application of judicial estoppel. From the fact that we have estopped litigants from asserting mere *arguments* that are inconsistent with arguments on which they prevailed in the district court, it follows *a fortiori* that we will not allow a party to seek an *outcome* directly contrary to the result he sought and obtained in the district court. Yet that is precisely what the Attorney General is attempting to do here. The Attorney General represented to the district court that he did not wish to be a party to this litigation, presented arguments in support of that position, and persuaded the district court to rule in his favor on that point. Only after the district court granted the Attorney General's request and then reached a result on the merits with which the Attorney General disagreed did that official decide that he would rather be a party after all. We will not accept such a reversal in position.

Nor is the Attorney General's about-face excused by the Governor's decision not to appeal. Governor Mofford's position on Article XXVIII was well known at the outset of this litigation. Nonetheless, the Attorney General presented separate arguments to the district court in support of *739 dismissing the case against each individual defendant. The Attorney General should have realized that the district court might accept some but not all of these arguments, and should have made his tactical decisions accordingly.

Finally, the Attorney General argues that he is entitled to intervene as a party because no prejudice to Yniguez would result from his intervention. Were

we to hold that AOE and Park could not intervene this argument would surely be incorrect. In such circumstance, allowing the Attorney General to intervene would mean that there would be an appeal of an otherwise unappealable judgment in Yniguez' favor. Certainly this would prejudice Yniguez. Moreover, even in light of our decision that AOE and Park may appeal, the Attorney General's prejudice argument misses the point. The principal concern of the doctrine of judicial estoppel is the integrity of the judicial process. The district court expended valuable judicial resources evaluating and granting the Attorney General's request that he be dismissed from the suit. We will not render that expenditure for naught simply because subsequent circumstances, all of which were foreseeable, caused the Attorney General to change his mind.

B. Section 2403(b)

[11] 28 U.S.C. § 2403(b) provides:

In any action, suit or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall ... permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

The district court held that the instant case is not an action to which an officer of the state is not a party because the Governor is a party, albeit one who has not chosen to appeal. We consider this an overly narrow reading of the statute. Section 2403(b) entitles the Attorney General to make an argument in a “proceeding” to which no representative of the state is a party. Having failed to file a notice of appeal, and having accepted the district court's decision on the merits, the Governor cannot realistically be considered a party to an appeal by AOE and Park. The Governor is no longer in any sense a participant. Moreover, whether or not the Governor technically remains a party, the simple fact is that unless we allow the Attorney General to make his argument we will have to pass judgment on the constitutionality of a provision of Arizona law without hearing the views of the state of Arizona. That result would be contrary to both the letter and the spirit of section 2403(b).

939 F.2d 727, 20 Fed.R.Serv.3d 813
(Cite as: 939 F.2d 727)

From the face of section 2403(b) it is apparent that the Attorney General may intervene on appeal, but only to the extent that the section permits. The statute confers a right to intervene in any "court of the United States," a phrase which includes a circuit court of appeals. See Wallach v. Lieberman, 366 F.2d 254, 258 n. 9 (2d Cir.1966) (noting that intervention under section 2403(b) is appropriate at any stage of the proceedings) (citing Glidden Co. v. Zdanok, 368 U.S. 814, 82 S.Ct. 56, 7 L.Ed.2d 22 (1961)). However, contrary to the Attorney General's contention, section 2403(b) confers only a *limited* right upon him. Under that section, the Attorney General is permitted to make an argument on the question of constitutionality, but he is given no right to appeal *as a party*. Before the Attorney General can assert any right at all there must be a viable proceeding in which that right may be asserted. It is only because we hold that AOE and Park may appeal that we conclude that there is such a proceeding and that the Attorney General may, therefore, pursuant to section 2403(b), make an argument regarding constitutionality.^{FN12}

^{FN12}. It is worth mentioning that Yniguez' attorney stated during oral argument that if we were to hold that AOE and Park have a right to appeal, he would not object to the Attorney General's participation in the appeal as well. However, our decision that the Attorney General has a right to intervene under section 2403(b) does not depend on this concession.

*740 Finally, we note that there is no inconsistency between our determination that the Attorney General may make an argument about the constitutionality of Article XXVIII and our decision that he is estopped from claiming a right to appeal as a party. We emphasize that under section 2403(b) the Attorney General is not a party. His right to argue the constitutionality of Article XXVIII is contingent upon AOE and Park's bringing the appeal at issue. So long as there is such an appeal he may file a brief and participate in the oral argument, but having asked the district court to dismiss him as a party, he cannot now become one again. Should AOE and Park cease to be parties to this action for any reason, the Attorney General will have no right to complain.^{FN13}

^{FN13}. As we have noted, the Attorney General has taken a somewhat narrower view of

the effect of Article XXVIII than the view taken by AOE. In pursuing the question of constitutionality the Attorney General will necessarily argue questions of interpretation of the state provision at issue. Our holding that section 2403(b) should be narrowly construed with respect to the Attorney General's status should not be taken as an indication that we would similarly limit the scope of his argument. To the contrary, we think the court will benefit from receiving the widest range of views on the important issues presented in this case, including the proper meaning of Article XXVIII.

CONCLUSION

The district court's denial of the intervention motion of AOE and Park is reversed. The district court's denial of the Attorney General's intervention motion is affirmed insofar as the Attorney General sought to be designated a party to this appeal and reversed insofar as he seeks to make an argument as to the constitutionality of Article XXVIII pursuant to 28 U.S.C. § 2403(b). We shall retain jurisdiction over the appeal of the district court's decision on the merits.^{FN14}

^{FN14}. Yniguez has requested attorneys' fees under 42 U.S.C. § 1988. Because we have not yet heard the appeal on the merits we do not know whether she is a prevailing party entitled to attorneys' fees. We will decide that question after we decide the merits.

AFFIRMED IN PART AND REVERSED IN PART.

C.A.9 (Ariz.),1991.
Yniguez v. State of Ariz.
939 F.2d 727, 20 Fed.R.Serv.3d 813

END OF DOCUMENT