Blog Post

Ninth Circuit Extends Tam lst Amendment Protections to Advertising

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The Ninth Circuit extended the First Amendment protections enunciated by the Supreme Court in *Matal v. Tam*, 137 S.Ct. 1744 (2017)[1] to advertising in *American Freedom Defense Initiative, et al. v. King County* (9th Cir. Sept. 27, 2018).

Plaintiff American Freedom Defense Initiative is an organization co-founded by Pamela Geller and Robert Spencer, whose focus is to raise awareness and educate the public about the dangers of Islamic terrorism. Both Geller and Spencer are strident opponents of various Islamic organizations, which they believe are terrorist front-groups. It is therefore not surprising that they and their work, which includes sponsoring bus and billboard campaigns promoting their viewpoint, have met with considerable push-back.

In 2013, the United States State Department submitted the following ad to King County's (Seattle, Washington) transit agency Metro:

Metro approved the ad, which ran for a short period before Metro received a small number of complaints expressing concern that the ad would lead to hate crimes. The State Department pulled the ad.

Plaintiffs then decided to run the ad on their own, with minor changes indicating that they, not the State Department, sponsored the ad.

Metro rejected the ad on the ground that it violated its ad policy because: (1) it made false statements; (2) it contained demeaning or disparaging content; and (3) it could harm or disrupt the transit system.

Plaintiffs filed an action under 42 USC 1983 alleging that Metro's rejection of the ad violated the First and Fourteenth Amendments. The Ninth Circuit Court of Appeals upheld Metro's rejection based on false statements contained in the ad – the FBI was not offering $25 million for the capture of one of the terrorists, but was offering at most $5 million.

Plaintiffs revised the ad and resubmitted it to Metro:

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Metro rejected the revised ad, claiming it was "demeaning" and could disrupt the transit system. Finding for Plaintiffs, the Ninth Circuit held that Metro's actions violated the Plaintiffs' First Amendment free speech rights.

First, the Ninth Circuit stated that bus advertising programs are "nonpublic forums" or "limited public forums," and are therefore entitled to an intermediate level of constitutional scrutiny. Thus, Metro's rejection of Plaintiffs' ad must be ***reasonable*** and ***content neutral***.

The "disparagement" clause in Metro's ad policy stated that Metro will reject any ad that "contains material that demeans or disparages an individual, group of individuals or entity." Applying the Supreme Court's decision in *Tam*, the Ninth Circuit concluded that the disparagement clause in Metro's ad policy failed because it was not content neutral.

As readers of this blog will remember, the *Tam* case involved the USPTO's rejection of the trademark THE SLANTS to be used for an Asian-American rock band. The USPTO there relied on a statute that prohibited registration of demeaning trademarks. The Supreme Court held unanimously that the disparagement prohibition was facially invalid under the free speech clause of the First Amendment because the prohibition was not content neutral. Offensive speech is, itself, a viewpoint and the government engages in viewpoint discrimination when it suppresses speech on the ground that speech offends.

The Ninth Circuit held that *Tam* applies "with full force" to Metro's disparagement clause. That disparagement clause required a rejection of an ad because it offends. In the words of the Circuit, "[g]iving offense is a viewpoint, so Metro's disparagement clause discriminates, on its face, on the basis of viewpoint." Although Metro argued that the disparagement clause applied equally to all ads, the Ninth Circuit reasoned that a prohibition to express a particular viewpoint is, by definition, viewpoint discrimination.

The Court distinguished this case from other First Amendment precedents upon which the Defendant relied because, in the Court's view, in such cases the regulations that were permitted were viewpoint-neutral.

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Trademark applications infrequently implicate broad philosophical or jurisprudential questions about free speech and its possible limits as present in *Tam*. The Ninth Circuit clearly (and correctly in our view) saw and applied *Tam* case as standing for the proposition that the government is not permitted to impose special prohibitions on speakers who express views on disfavored subjects or because of hostility towards the messenger or the underlying message expressed.

[1] We reported extensively on *Tam* here.