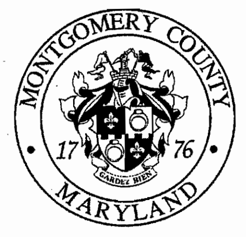

Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

OFFICE OF THE COUNTY ATTORNEY

MEMORANDUM

TO: Timothy L. Firestine
Chief Administrative Officer

David Dise, Director
Department of General Services

VIA: Leon Rodriguez
County Attorney

VIA: Marc P. Hansen
Deputy County Attorney

FROM: Karen L. Federman Henry
Chief, Division of Finance and Procurement

DATE: September 3, 2008

RE: Recent decision of the Supreme Court—Impact on use of County funds for union activities

In June of this year, the United States Supreme Court issued a decision in which the Court invalidated a California law that prohibited the use of State money by employers to promote or deter union activities. *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008). A similar provision appears in the Montgomery County Code at § 11B-33B. This Office has reviewed the County law in relation to the Supreme Court decision, and it is our opinion that §11B-33B has become unenforceable.

Issue Presented

Does federal law mandating that certain zones of labor activity be unregulated preempt a local law that prohibits the use of public funds to assist, promote, or deter union organizing?

Short Answer

In light of the reasoning presented in the recent Supreme Court decision, a local government cannot restrict the use of its funds in a manner that affects free debate regarding union organization.

Summary of Supreme Court Decision

California enacted a detailed law that prohibited employers from using state funds "to assist, promote, or deter union organizing." *See* Cal. Gov't Code Ann. §§ 16645-16649 (2007). Several organizations challenged the law as regulating employer speech about union organizing, which conflicts with the intent of Congress that free debate be permitted under the National Labor Relations Act. The Supreme Court focused on two sections of the California law—one section addressing grants and another involving private employers who receive more than $10,000 in State funds. *See* Cal. Gov't Code Ann. § 16645.2 and § 16645.7, respectively.

The Court acknowledged that the NLRA does not expressly preempt the law enacted by California, but that two types of implicit preemption exist. First, States must not "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Chamber of Commerce v. Brown*, 128 S. Ct. at 2412. Second, neither a State nor the National Labor Relations Board may regulate conduct that Congress intended to be unregulated and left to the control of the "free play of economic forces." *Id.* The Court found the California law to be preempted under these principles, because the provisions regulate within a zone protected and reserved for market freedom. *Id.* In doing so, the Court emphasized the policy of the NLRA to favor open debate regarding unionization, making any restriction on that discussion preempted, regardless of whether it promoted or deterred union activities. 128 S. Ct. at 2413-2414.

Comparison of California Law and Montgomery County Code

The provisions in the California law that the Supreme Court held to be unconstitutional are analogous to Montgomery County Code § 11B-33B. Where California law prohibits all recipients of state grants from using the funds "to assist, promote, or deter union organizing," the County's law states that "funds appropriated for . . . a grant award to participate in a County-funded program must not be . . . used to assist, promote, deter, or otherwise influence union activity or organizing." *Compare* Cal. Gov't Code Ann. § 16645.2(a) *with* Montg. Co. Code §11B-33B(b). Although the County law limits the scope of the prohibition to grants awarded "to participate in a County-funded program," the law also expands the prohibition to include a use of funds to "influence union activity." *Id.*

The other section of California law prohibits private employers who receive "state funds in excess of ten thousand dollars in any calendar year on account of participating in a state program" from using the funds in connection with union organizing. Cal. Gov't Code Ann. §16645.7(a). The County does not have a specific provision for private employers, nor does it identify a minimum amount of funds received to trigger application of the law. Montg. Co. Code § 11B-33B. This suggests that the County law may apply to more situations than the California law, which does not protect it from the same preemption analysis used by the Court.

The California and County statutes are sufficiently similar that the Supreme Court's analysis would almost certainly find the County's law to be preempted. The Court noted that "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *See Chamber of Commerce v. Brown*, 128 S. Ct. at 2414 (citing *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614 n. 5 (1986)). Even though California did "not directly regulate noncoercive speech about unionization," the law "indirectly regulated such conduct by imposing spending restrictions on the use of state funds." *Id.* at 2414-2415. The real effect of California's law regulated noncoercive speech about unionization, which the NLRA pre-empts. *Id.* The same could be said of Montg. Co. Code § 11B-33B.

To survive the level of scrutiny that the Supreme Court recently applied, the law would need to find a safe harbor within those Supreme Court cases that have afforded latitude to laws that impinge upon free expression. Unfortunately, the law cannot do so, because it does not regulate in a field that has traditionally been subject to government control. Nor does the law seek to ensure the coherence or consistency of government speech. More importantly, the law is not narrowly tailored, but prohibits the use of County funds for a broad range of speech and speech-related activities regardless of the reason that the funds were granted or appropriated.

Conclusion

In light of the recent Supreme Court decision and the related constitutional issues, we conclude that the County law cannot survive legal scrutiny. The law is not narrowly tailored to serve a compelling, or documented, government interest. And the law cannot be justified as a mere exercise of the County's spending authority. As a result, we recommend that the County Code be amended to remove Montg. Co. Code § 11B-33B. In the meantime, §11B-33B should not be enforced.

If you have any questions or would like to discuss this matter, please do not hesitate to contact us.

cc: Isiah Leggett, County Executive
Kathleen Boucher, Special Assistant to the County Executive
Michael Knapp, President, Montgomery County Council
Michael Faden, Senior Legislative Attorney
Pamela Jones, Chief, Office of Procurement, Department of General Services