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Justice (and Lunch) Is Served: Second Circuit Holds That Food Truck Branded With Ethnic Slurs Is Entitled to First Amendment Protection

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In a recently issued decision, the Second Circuit held that a food truck could not be excluded from a New York State lunch program solely because the truck and the food it sells was branded using ethnic slurs. *Wandering Dago, Inc. v. Destito et al*, 2018 WL 265383 (2d Cir. 2018). This case is an early example of how the Supreme Court's 2017 decision in *Matal v. Tam* (which involved an Asian-American band's trademark application for "The Slants") may impact advertisers who wish to engage in controversial branding in connection with a government-related activity or event.

The "Wandering Dago" food truck ("WD") offers sandwiches with names such as "Dago," "Goombah," "Guido" and "Polack." According to its owners, WD's ethnic slur branding is a nod to their heritage, "signaling an irreverent, blue collar solidarity with its customers" and "signal[ing] to . . . immigrant groups that this food truck is for them." WD contended that using the slurs in a mocking way would "weaken [their] derogatory force." In 2013 and 2014, WD applied to participate in New York's annual "Summer Outdoor Lunch Program," which was organized by New York's Office of General Services ("New York" or "OGS") and took place in Albany's Empire State Plaza. Those applications were denied.

It was undisputed that the sole basis for denial was OGS's view that WD's branding was offensive. WD alleged that this amounted to a violation of its free speech and equal protection rights under the United States Constitution and the New York State Constitution. The district court disagreed, holding that the First Amendment did not apply to WD's speech because WD's speech must be considered either (1) government speech, (2) speech by a government contractor, or (3) private speech in a government-owned forum. The district court also rejected WD's federal equal protection claim and its state law claims. New York was awarded summary judgment on all of WD's claims.

A unanimous Second Circuit panel reversed on all counts. As an initial matter, the Second Circuit rejected the district court's forum analysis as legally irrelevant, holding that "we would apply the same level of scrutiny whether WD sought to speak in a public forum (as WD contends) or a nonpublic forum (as defendants contend)." Applying *Matal*, the Second Circuit concluded that WD's use of ethnic slurs reflected a viewpoint "about when and how such language should be used," and that New York engaged in viewpoint discrimination by denying WD's applications based solely on this viewpoint. The Court further held that whether New York denied WD's applications because of how consumers might react to the slurs—as opposed to because of WD's intended message—was inconsequential to its decision.

The Second Circuit also disagreed that New York's denial of WD's application could be construed as government speech. The Court "[found] it implausible that OGS, by permitting WD's full participation in the Lunch Program, would be viewed by the public as having adopted WD's speech as its own." Although the Court did not doubt that New York wanted to make the lunch program family friendly, the record did not reflect any effort to communicate a particular message through the program. On these facts, the Court "[was] unable to conclude that OGS was aiding the transmission of a government message by denying WD's Lunch Program applications."

Nor were New York's actions justified as a condition on a prospective government contractor's speech. OGS merely provided access to a forum for food trucks. In exchange for this access, the food trucks *paid OGS*. Accordingly, WD and other food vendors were not government contractors, but rather were "private entities that pay to access public benefits and, in using those benefits to their economic advantage, secondarily satisfy a government purpose."

Having concluded that WD's food truck branding was private speech and that New York engaged in viewpoint discrimination by denying WD's applications, the Court then considered whether that discrimination was narrowly tailored to achieve a compelling government interest. The Second Circuit found that no compelling government interest existed in the record for New York to deny WD's applications to participate in the lunch program. Thus, not only did the Second Circuit reverse the district court's grant of summary judgment to New York, it also awarded WD summary judgment on its First Amendment claim. The Second Circuit also reversed on WD's federal equal protection claim and state law claims and awarded WD summary judgment on those claims too.

WD’s complete victory before the Second Circuit suggests that advertisers taking part in a government program have substantial leeway to brand their products—and may even engage in speech that many would consider to be offensive—so long as the government lacks a compelling interest that justifies limiting the advertiser’s speech.

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