

UFO Chuting v. Smith United States Courts of Appeals for the Ninth Circuit 508 F.3d 1189 (Filed November 28, 2007)

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HAWAII STATE LAW BANNING PARASAILING ON THE WEST AND SOUTH SHORES OF MAUI FOUND TO BE REASONABLE AND NONDISCRIMINATORY

The United States Court of Appeals for the Ninth Circuit declared Hawaii's ban on parasailing during five months of the year was nondiscriminatory and reasonable. The ban did not completely infringe UFO's right to maritime passage afforded them by federal license. The Court of Appeals therefore granted the State of Hawaii's motion for summary judgment.

UFO Chuting v. Smith
United States Court of Appeals for the Ninth Circuit
508 F.3d 1189
(Filed November 28, 2007)

UFO Chuting of Hawaii, Inc. ("UFO") operated a commercial parasailing business off the coast of Maui and the Big Island of Hawaii. According to Haw. Code R. §13-250-5, parasailing is an "activity in which an individual is transferred or carried aloft by a parachute, sail, or other material attached to a towline which is towed by a vessel." Part of the area used by UFO is located in "Maui Humpback Whale Protected Waters." Between December 15 and May 15 each year, Hawaii state law prohibits any person from "operat[ing] a thrill craft, or engage[ing] in parasailing . . . or operat[ing] a motor vessel towing a person engaged in . . . parasailing on the west and south shore of Maui."¹ UFO brought suit claiming the federal Marine Mammal Protection Act ("MMPA") preempted Hawaii state law. The United States District Court for the District of Hawaii granted UFO's motion for summary judgment. The court declared that the MMPA preempted the parasailing provision, prohibiting the state from enforcing state law related to the taking of marine mammals within Hawaii.

Shortly after the district court's published opinion, President George W. Bush signed the Fiscal Year 2005 Omnibus Appropriations Bill, Pub. L. No. 108-447, §213, 118 Stat. 2809 which provided that "Hawaii may enforce any state law or regulation with respect to . . . operation[s] in state waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales, [so long as it] is no less restrictive than federal law." In light of the passage of the statute, the district court vacated its prior judgment and granted summary judgment for the State. The court rejected its previous contention that the MMPA preempted state law.

On appeal, UFO claimed its Coast Guard license, which authorized UFO to carry up to twelve passengers in coast-wide trade, preempted Hawaii's ban on parasailing. UFO argued that the license granted it a federal right of maritime passage that actually conflicted with Hawaii's seasonal ban. UFO claimed that because its two vessels were designed for parasailing, Hawaii could not ban parasailing on the navigable waters in which its license authorized it to engage in coast-wide trade.

The court declared that, since the ban on parasailing was only in effect for five months of the year, the state did not "completely exclude" UFO from engaging in coast-wide trade. UFO failed to show that it was economically infeasible to operate business with the ban and, therefore, did not show it could not comply with both federal law and state law. The court did state that "a longer ban or a ban on a different type of maritime business could result in such an economic impact to the licensee as to make operations of its business wholly infeasible."² The court pointed out that Congress permitted the state of Hawaii to regulate the operation of commercial vessels in order to protect humpback whales. The court

¹ UFO Chuting v. Smith, 508 F.3d 1189, 1191 (9th Cir. 2007).

² *Id.* at 1194.

reasoned “Congress meant the Hawaii legislation . . . to continue in force, despite a known impact on parasailing and similar commercial boating activity.”³

The court next held that the parasailing ban was a reasonable regulation of federal licenses. UFO cited *United States v. Locke*, 529 U.S. 89 (2000), which stated that, “in the field of coast-wide navigation, state legislation of this stripe is not presumed reasonable.” The court was not persuaded by this precedent, and stated that, where states have traditionally occupied the field, as was the case here with Hawaii, an assumption of non-preemption still exists. The court ruled, therefore, that UFO had the burden of showing any unreasonableness in the enactment of the parasailing ban. Hawaii’s legislature, in enacting the ban, declared that operation of motorized vessels during certain times of the year posed an “unacceptable risk of harm to endangered sea creatures.” *UFO Chuting*, 508 F.3d at 1195 (citing H.B. 2994, 1990 Haw. Sess. Laws 972). Since UFO failed to meet its burden, the court declared the ban to be reasonable.

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³ *Id.*