

SCOTUS and the First Amendment: Can Any Governmental Regulation Survive?

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The Supreme Court's 2017 docket is nearly complete and it is certain not to disappoint. By my most recent count, there are at least fifteen cases on the docket that are relevant to local governments on a wide range of topics: from speech to religion to states' rights and nearly everything in between. As the Court grapples with partisan gerrymandering and the intersection of new technology and privacy rights under the Fourth Amendment, it has also recently granted three new First Amendment cases, which this article will highlight, bringing the total of First Amendment cases it will decide this term to seven. To say that this is a Court that is interested in free expression and religious rights is an understatement.

In the context of municipal regulation, that interest increasingly arcs towards ever-broader protection of First Amendment rights. Last term, the Court decided four First Amendment cases, three of which were losses for the government (*Packingham v. North Carolina*, *Matal v. Tam*, and *Trinity Lutheran Church of Columbia v. Comer*) and the fourth was a neutral outcome (*Expressions Hair Design v. Schneiderman*). And of course, none of us will soon forget the impact of *Reed v. Town of Gilbert* to First Amendment jurisprudence. While nothing is certain in terms of predicting Supreme Court outcomes, given recent trends with the First Amendment and the Court's statistics more generally, the prospects in these cases may not bode well for the governments. Statistically speaking, the Court tends to reverse the lower court's decision more often than not. For example, the Court reversed the lower court's decision between 67% and 80% of the time over the last three years. Thus, the fact that in all three of the cases discussed below (and in five of the seven First Amendment cases this term), the governments were victorious below portends that it may be an uphill battle for them at the High Court. That being said, IMLA will file an amicus brief in all three of these cases in support of the governments' positions. We hope to buck recent trends and pull out victories for local governments.

Lozman v. City of Riviera Beach

Fane Lozman has been a thorn in the side of the City of Riviera Beach for quite some time. In fact, he has the improbable honor of making it to the Supreme Court for the second time in a dispute with the City of Riviera Beach. The first case, back in 2012, had to do with a fairly obscure issue involving maritime law and whether his house boat was wrongfully seized by the City. The case resulted in a victory for Mr. Lozman. The second case, which the Court recently accepted, will likely have far broader implications for local governments under the First Amendment.

As the foregoing may intimate, Mr. Lozman was an outspoken critic of the City. During a regular public City Council meeting, Mr. Lozman was granted permission to speak during the "non-agenda" public comments portion of the proceedings. He began by criticizing Palm Beach County officials as corrupt; a Councilperson interjected and told him to stop his comments as they were not relevant to *City* business given that the City and County are distinct entities. When he refused to curtail his soliloquy, the Councilmember asked law enforcement to intervene. A police officer informed Mr. Lozman that if left the meeting, he would not be arrested–but Lozman refused to depart and the officer therefore arrested him. He was charged with disorderly conduct and resisting arrest. The state's attorney determined there was probable cause for the arrest, but dismissed the charges.

Mr. Lozman subsequently filed a Section 1983 action against the City claiming that the arrest was retaliatory, in violation of the First Amendment. The case went to trial and the jury returned a verdict in favor of the City. The Eleventh Circuit upheld the jury verdict, concluding that the officer had probable cause to arrest Mr. Lozman, which therefore defeated his claim of First Amendment retaliatory arrest as a matter of law.

And that is precisely the issue that the Supreme Court will decide here: whether the existence of probable cause defeats a First Amendment retaliatory arrest claim as a matter of law. While the facts of this case may cast Mr. Lozman in a sympathetic light, IMLA nonetheless believes a bright line rule is appropriate in this context; otherwise law enforcement will be chilled from making lawful arrests anytime someone exercises a First Amendment right. For example, protesters at a rally who violate the law may claim their arrests were in violation of their First Amendment rights. A person who curses at a police officer but is arrested based on probable cause could claim a retaliatory arrest, because cursing is (often) protected under the First Amendment. And so on, and so on. IMLA believes that a police officer in this situation should not have to conduct a potentially amorphous First Amendment analysis when determining whether probable cause exists to make an arrest.

National Institute of Family and Life Advocates (NIFLA) v. Becerra

This case involves the California Fact Act, which requires certain disclosures by licensed pregnancy-related clinics and unlicensed clinics. Specifically, licensed pregnancy-related clinics are required under the law to disseminate a notice stating the existence of publicly-funded family-planning services, including contraception and abortion. The Fact Act also requires that unlicensed clinics disseminate a notice stating that they are not licensed as a medical facility by the State of California.

NIFLA is a national religiously affiliated non-profit organization, composed of numerous pregnancy centers in California including both licensed and unlicensed clinics. NIFLA is strongly opposed to abortion. NIFLA and other similar organizations brought suit against the California Attorney General, claiming that the Fact Act violates its First Amendment free speech and free exercise rights.

The district court denied NIFLA's preliminary injunction and the Ninth Circuit upheld that denial. Regarding the free speech argument, the Ninth Circuit held that although the Act is content-based, it does not discriminate on viewpoint and therefore strict scrutiny does not apply. Notably, the court expressly held that even though it found that the Act was content-based, *Reed v. Town of Gilbert* did not require that every content-based regulation be subject to strict scrutiny. The court therefore concluded that intermediate scrutiny was applicable as the Act regulated professional speech, and the court found that the Act survived intermediate scrutiny. The panel also concluded that the notice for unlicensed facilities survived any level of scrutiny, including strict scrutiny.

NIFLA petitioned the Supreme Court for certiorari on the question of whether the disclosures required by the California Reproductive Fact Act violate the protections set forth in the free speech clause of the First Amendment.

IMLA believes this case presents a compelling issue for local governments, particularly because local governments have a strong interest in the promulgation of laws that promote public health. These ordinances are generally enacted to address information gaps (whether intentional or not) to help promote truthful, non-misleading information related to public health. We believe that local governments' police powers authorize their use of these disclaimers.

Perhaps more importantly, this case could directly impact the scope of *Reed v. Town of Gilbert* given that the Ninth Circuit held that *Reed* did not apply to these disclaimers even though it concluded that the law was content-based. This may be the first case where the Court directly analyzes the breadth of *Reed* and whether it can indeed be construed to exclude expression like commercial speech and/or professional speech. As we all are aware, local governments are battling *Reed*'s impact on many fronts, and this case offers an opportunity for local governments to argue that the reach of that decision should be more circumscribed.

Minnesota Voters Alliance v. Mansky

This case involves Minnesota Statute § 211B.11, which prohibits wearing a "political badge, political button, or other political insignia . . . at or about the polling place on primary or election day." To help determine which materials were political, Minnesota election officials distributed an Election Day Policy with examples including: "Issue oriented material designed to influence or impact voting" and "Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." Election judges were instructed to ask anyone wearing an item violating the Policy to remove or cover it. If a person refused, the election official would allow the person to vote, but record the person's name and address for potential misdemeanor prosecution.

A number of political associations brought suit claiming First Amendment violations. The district court granted the state's summary judgment motion on the plaintiffs' as-applied First Amendment challenge (after previously dismissing its facial challenge). The Eighth Circuit ruled that Minnesota's statute does not violate the First Amendment, citing *Burson v. Freeman* 504 U.S. 191 (1992), which upheld a Tennessee statute that banned the "solicitation of votes" and "campaign materials" within 100 feet of the polling place. In citing to *Burson*, the Eighth Circuit noted that a state "has a legitimate interest in maintaining peace, order and decorum in the polling place and a compelling interest in protecting voters from confusion and undue influence and 'preserving the integrity of its election process.'" 849 F.3d 749 (8th Cir. 2017), quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966); then quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (internal quotations omitted).

The Eighth Circuit did not address whether the statute is overbroad. Instead it opined that polling places are nonpublic forums and that the regulation is viewpoint neutral and facially reasonable.

The plaintiffs argued that banning Tea Party apparel at polling places is unreasonable because the Tea Party is not a political party. The Eighth Circuit rejected this argument, noting that the statute prohibits election-related apparel more generally. Further, the Eighth Circuit found that even if the Tea Party apparel was not election-related, it was still not unreasonable to ban it from a polling place because all "political material" was banned under the statute and such a ban helped ensure a "neutral, influence-free polling place." Minnesota put forth evidence that the Tea Party is political and the plaintiff offered nothing to rebut that evidence.

The Supreme Court accepted certiorari on the issue of whether Minnesota statute Section 211B.11, which broadly bans all political apparel at the polling place, is facially overbroad under the First Amendment. The Supreme Court has held that governments have a compelling interest in "preventing voter intimidation and election fraud." These laws are intended to maintain peace, order, and decorum in polling places and to protect voters from confusion and undue influence and to preserve the integrity of the election process. Local governments have strong interests in preserving the integrity of the election process and they should be entitled to enact laws aimed toward that goal. This is particularly true where polling places are found to be nonpublic forums and we would not want the Court to erode a government's ability to regulate speech in a nonpublic forum, as that could have broader implications.

For more information about these cases or IMLA's amicus activities, please contact Amanda Kellar, IMLA's Legal Advocacy Director, at akellar@imla.org. ML