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IMLA NEWS
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FEATURED CASE:

Speech: Sheriff's Placement of "No Trick-or-Treating" Signs in Registered Sex Offenders' Yards is Impermissible Compelled Speech

McClendon v. Long, no. 20-10092 (11th Cir. Jan. 19, 2022).

Reversing the court below, the Eleventh Circuit holds that a sheriff's placement of "no trick-or-treating" signs in the front yards of 57 registered sex offenders was compelled government speech; the fact that the occupants could hypothetically have placed signs challenging the sheriff's warnings did not resolve the First Amendment violation.

Several days before Halloween 2018, deputies in Butts County, Georgia (County) placed warning signs in the front yards of all 57 registered sex offenders in the County, at the direction of Sheriff Gary Long (Long). Also left at each residence was a leaflet stating that the signs were the property of Long and could not be removed by anyone except Long's office.

Long then posted a message on his official Facebook page, along with a picture of the sign, explaining that the signs had only been placed in front of the homes of registered sex offenders, and that Georgia law forbids registered sex offenders from participating in Halloween—which was incorrect. He explained that he believed the signs were "imperative" to warn the public about the residences of registered sex offenders—even though during his six-year tenure as Sheriff, there had been no issues with any registered sex offender in the County reoffending with minors at any time.

In September 2019, three registrants sued Long in his official and individual capacities, alleging that he had compelled their speech in violation of the First Amendment. The

district court granted a preliminary injunction based on the First Amendment claim and prohibited Long from placing signs in the plaintiffs' yards for Halloween 2019.

In September 2020, both parties moved for summary judgment; the plaintiffs also sought a permanent injunction. Long attached to his motion a declaration that he had never prohibited a sex offender from placing a sign contesting his warning: "To my knowledge there was never a situation where any sex offender registrant expressed some desire to place the offender's own sign or message relating to the Sheriff's Office sign. The Sheriff's Office has never had a policy about that, and there is no Sheriff's Office prohibition on signage on private property that complies with state law and local ordinances."

The district court granted the defendants' motion for summary judgment. Regarding the plaintiffs' compelled speech claim, the district court found that "[t]he Plaintiffs are free to offer speech competing with the Sheriff's Office's views and to disassociate themselves from those views." Thus, because (1) the signs were government speech and (2) the plaintiffs were free to disagree by posting a competing message, no reasonable observer could conclude that the residents agreed with the sign's message: "No reasonable jury could find that there is a risk the Plaintiffs will appear to endorse the signs' message." The district court further found that Long was immune from any damages claims in his official capacity under the Eleventh Amendment and entitled to qualified immunity, as he had not violated any clearly established law.

The district court dismissed the plaintiffs' First Amendment claims for injunctive relief without prejudice and their claims for damages with prejudice.

COMPELLED SPEECH: On appeal, the Eleventh Circuit found that Long's signs were compelled government speech, improperly forced upon the plaintiffs. The First Amendment protection "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435 (1977). In *Wooley*, the Supreme Court held that it was unconstitutional for the State of New Hampshire to prosecute a citizen for covering the State motto, "Live Free or Die," on his license plate--a state could not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." This case was materially similar to *Wooley.* Long's signs were government speech, bearing the imprimatur of government, and were not removable except by the government.

In concluding otherwise, the district court had erred in two ways. First, it determined that a compelled government speech claim requires a finding that a reasonable third party would view the speech as "endorsed" by the plaintiff. *Wooley* contains no such requirement; it merely found that the New Hampshire law required the plaintiff to "participate in the dissemination of an ideological message" against his will, and it used the plaintiff's private property (his vehicle) to do so.

Second, the district court erred in finding that the plaintiffs' ability to place their own yard signs disagreeing with the warning signs could cure the original violation. This ignored that the harm was the forced display of a government message on private property in violation of the "right to refrain from speaking at all." Indeed, yard signs at "one's own residence" are a "distinct and traditionally important medium of expression" *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), and residents should be able to decide whether to use that traditional medium for speech in the first instance:

> If the only constitutional requirement for the government to compel citizens to host its speech on their private property is that it also permits them to post a second sign disagreeing with the first, the Sheriff could place any sign identifying himself as the speaker in any county resident's yard. This result is inconsistent with *Wooley*. The Sheriff's yard signs are compelled government speech, and their placement in a homeowner's yard is unconstitutional unless the signs are a narrowly tailored means of serving a compelling government interest.

STRICT SCRUTINY: All parties agreed—as did the Circuit—that Long's interest in protecting children from sexual abuse was compelling. However, placing signs in 57 yards, without knowledge as to whether any of those residents posed a heightened risk of recidivism, was not narrowly tailored. Long provided no evidence that the registrants in the County actually posed a danger to trick-or-treating children, or that the signs would prevent such danger. Long himself testified that a sex-offender registry containing each registrant's name, address, and photograph, was available on the State of Georgia's website, on the County website, and at County administrative buildings Superior Court Clerk's Office. The Georgia statute even requires county sheriffs to maintain a list of each resident offender's risk classification. In the absence of evidence that the yard signs would accomplish the compelling purpose of protecting children from sexual abuse, their placement in homeowner's yards was not narrowly tailored to serve a compelling government interest.

PUBLIC RIGHTS-OF-WAY: Long also argued that, even if his signs were compelled government speech that did not survive strict scrutiny, his intent was to place them in the public rights-of-way abutting the registrants' homes: homeowners could not, he said, control what a government actor like a sheriff might place on public property in front of private residences. But even if a government entity may own a public right-of-way outright, Long had not shown that any government entity owned a right-of-way in fee across the front yards where these plaintiffs resided. Further, he could cite no authority allowing him to place signs in the right of way, while the plaintiffs cited *Fortner v. Town of Register*, a Georgia Supreme Court decision finding that the defendant municipality could be held liable for negligence because it erected unauthorized structures in the right of way that created a traffic hazard. "Because both sections of the Georgia statute contain the same coverage language ('any person') and forbid similar conduct, the *Fortner* decision suggests that the Sheriff, like the municipality in *Fortner*, is subject to the restrictions in § 32-6-51 and is barred by § 32-6-51(a) from placing his warning signs in the alleged public rights-of-way without legislative authority to do so."

APPLICATION TO THE THREE APPELLANTS: One plaintiff, who owned and occupied his home, was entitled to summary judgment and a permanent injunction. The other two plaintiffs lived with their parents; it was therefore unclear if they had the right to complain about a sign displaying government speech on another person's property. But both had expressed an intent on remand to amend their complaint to add their parents as plaintiffs: "If the district court allows the plaintiffs to so amend, that would resolve the issues. If not, the district court will need to address these issues in the first instance." Until that development, the Circuit was not amenable to granting those two plaintiffs summary judgment. Reversed in part; vacated in part; and remanded.

LINK

Short Summaries:

1st Circuit – Right to A Civics Education

Apparently, the Rhode Island educational system does not require students to have educational opportunities that include civics instruction; albeit, some schools do offer courses but not all do and because it's not mandated, its not tested so teachers generally "teach to the test" and don't include civics in their lesson plans. A whole bunch of folks sued asserting that Rhode Island failed in its constitutional duty to educate its population in this way. The lower court dismissed the claims and that decision was upheld by the First Circuit. Aside from my own opinion that folks form Rhode Island that I know seem pretty darn smart, the court pointed out the following:

> We also take judicial notice of relevant Rhode Island law, which has since 2007 required at least some civics education in its schools, even if it is not as comprehensive as the framework
>
> Appellants desire, and this law was amended recently during the pendency of this appeal to require civics proficiency, among other changes. See, e.g., R.I. Gen. Laws § 16-22-2 (2021).

The Court also noted that even reading the claims in the light most favorable to the Students that the allegations were insufficient to reflect a true threat on the guarantee of a republican form of government. And the court concluded: "We conclude by echoing the district court's observations in dismissing this case, that the Students have called attention to critical issues of declining civic engagement and inadequate preparation for participation in civic life at a time when many are concerned about the future of American democracy."

A.C. vs McKee
LINK

5th Circuit – State Actors – Section 1983 – Bail Schedules – Indigents -Sheriffs – County Judges

A friend once described some older court opinions as those that were written before paragraphs were invented. Often those opinions suffered from other faults that made them difficult to read if not unintelligible. In an effort to replicate those opinions of old (other than the paragraph problem), the Fifth Circuit en banc decided to reverse a lower court's decision regarding a suit aimed at attacking the Dallas County bail system. BTW, I was pretty far down the ladder in my writing class too, so, maybe I'm not a good judge of deft writing. I'll not try to translate from the opinion in detail, but report only that the majority concluded that certain Dallas County and District judges were state officials acting on behalf of the state when they developed bail schedules that magistrate judges used in determining bail. Thus, the injunction could not lie against Dallas County or these judges. Whether the Sheriff in Texas is a state or county official will be left for another day. Questions of standing and abstention raised their heads but seemed to avoid any sort of direct shot as the court remanded the question of abstention to the lower court reserving the remainder of the case for a decision once the lower court makes that decision. In closing, enjoy this quote from the majority as it sends the abstention question back down:

> When the case returns, none of our precedent will be binding on us. Thus, in light of the district court's consideration of the issue after the en banc court has received the case, we give the district court authority on remand to reach the result it considers appropriate even if it is inconsistent with any of this court's precedent. What we have actually held in this opinion to be the law, though, must be applied as precedent.

Daves vs. Dallas County
LINK

5th Circuit – Resisting Arrest – Use of Taser – Excessive Force

In a world gone awry where resisting arrest seems a ticket to a multi-million dollar settlement, the fifth Circuit exercised some common sense by reversing a lower court decision that denied qualified immunity to an officer who tased a driver who was resisting. The driver was stopped and began engaging the officer by refusing to comply with the officer's reasonable instructions. Eventually, the officer tased the driver and arrested him. The driver pled guilty to resisting arrest but nevertheless brought suit for use of excessive force in the conduct of the arrest he resisted. The lower court bought into the argument that the driver was only passively resisting, but the Fifth Circuit reviewed the body cam "testimony" and found that the driver's conduct made the trooper's use of the Taser reasonable under the circumstances. To some extent I think the court concluded that the guilty plea to resisting arrest helped undermine the Plaintiff's case, but they did not clearly express that view.

Betts vs. Brennan

LINK

7th Circuit – Injunctions – Emergency Orders affecting Churches – Covid 19 – Official Capacity – Qualified Immunity

The Court concluded that the District Court did not err in denying an injunction to two churches who sued to enjoin the Governor from issuing mandates preventing large numbers of people to gather at their churches. A previous effort to enjoin the Governor was not successful and despite changed law from the Supreme Court there was not outstanding order to enjoin. In short the court concluded that there was not outstanding order and that state officials should be entitled to make decisions based on facts as are then present. The case sought damages but had only brought an official capacity suit, so no damages and even if the suit had been against the Governor individually the Governor would have been entitled to qualified immunity.

Elim Romananian Pentecostal Church vs. Pritzker
LINK

7th Circuit – Due Process – Knowledge of the Law – Snow Routes – Fines and Fees

Judge Easterbrook writing for a panel observed that "ignorance of the law is no excuse" and more importantly to this case noted that had the Plaintiff simply appealed her fine through the process set up by the state she'd likely have won. Instead, like so many eager litigation lottery entrants, she raced to federal court to complain about a law that prohibits people from parking their cars on roads and leaving them there when more than 3 inches of snow has fallen. Doing so resulted in a $50 fine. Off to federal court we go – apparently figuring the mess the 6th Circuit created with the Saginaw chalking tire controversy would lead to untold riches. Not so. The court recognized that motorists do not need a sign on every street to alert them to laws that are clear and apply to them.

Lewis vs. Village of Alsip
LINK

9th Circuit – Excessive Force – Medical Conditions deliberate indifference – Taser – No municipal policy

A panel of the 9th Circuit reversed a decision to deny qualified immunity to several officers while upholding the denial to two of them and reversed the lower court's decision as to the city. The lower court had concluded that the city could be held liable based on the actions of the officers for failure to train finding that one event does not support the municipal liability under Section 1983. The two officers that were held in the case had allegedly tased the deceased and put him in a head restraint after he was handcuffed, shackled and no longer resisting. The court concluded that the officers did

not know of the deceased's mental condition so qualified immunity applied to the deliberate indifference claims. (To be candid, I'm doing this in a rush, so leave it to you to read the case for the full details.)

Hyde vs. City of Wilcox
LINK

9th Circuit – Second Amendment – Covid Emergency Orders – tiered scrutiny

Ventura County passed orders to deal with Covid by closing Gun shops, firing ranges and ammunition shops for a 48 day period. The lower court found the orders valid under *Jacobson vs Massachusetts* but the panel of the 9th Circuit found that the Orders imposed upon a core constitutional right; i.e., the 2nd Amendment right to bear arms. The court evaluated the order under strict scrutiny finding it failed that test and under intermediate scrutiny finding it failed that as well. The gist of those findings was that the County's Health Officer had not identified why these businesses in particular caused increased risks of Covid over the 19 businesses deemed essential that were allowed to remain open. The court specifically declined to hold that the Orders categorically violated the 2nd Amendment but only that on the facts supporting the Orders, they did not overcome the scrutiny required.

McDougal vs. County of Ventura
LINK

10th Circuit – Federal Preemption – Railroads – Blocked at grade crossings

For those of you too young to remember, riding a train over a long distance was one of the great joys of years gone by. While in the US it was never quite so plush or nice as depicted on the "Orient Express," it was still a great joy. The soft sway of the train rocking you to sleep, the constant clickety clack of the rails and the expansive views of the countryside passing by as you read or just relaxed. Then, there was the dining car which offered some excellent meals, good drink and often a car with entertainment.

Those days are unfortunately past, and this case has nothing to do with the joys of railroading, but involves the problem with at grade crossings and what seems the subliminal evil that railroad engineers display in blocking at grade crossings for what seems like ages. Firetrucks and EMS are blocked from providing emergency services, people cannot get home or to work or other engagements and the fear of being blocked often cause people to take dangerous risks to avoid the blockade. To remedy this OK passed a measure called the Blocked Crossing Statute which prohibited trains from blocking at grade crossing for more than 10 minutes. Having done so and being ticketed, BNSF (a Berkshire Hathaway company) sued to challenge the measure alleging it was preempted by federal law. The lower court agreed as did the 10th Circuit.

It's now up to the federal government to take some action to address this problem. My guess is that the train will move more quickly than will the feds.

BNSF vs. Edmond
LINK

11th Circuit – Continuing Trespass – Bankruptcy – Property taxes

In a terrific victory for the City of New York's superb legal team, the 11th Circuit concluded that a bankrupt entity's complaint for continuing trespass and for improper taxation failed. The city used property for years for its transit system with an electric power plant on site. The City bought the property and then eventually sold it after dismantling the plant and burying some of the facility. There were other transactions that ensued but for these purposes the major factor was a study that determined that the buried parts of the former facility included PCB's and friable asbestos. The owner of the property filed for bankruptcy and filed this action claiming continuing trespass. The city defended based on a NY law that required suits on such claims to be filed within about a year from discovery which the Plaintiff did not do. As to the taxation issues the court noted that the company had for years not challenged the tax value of the property and could not do so now.

5200 Enterprises v. City of New York
LINK

Supreme Court – Confrontation Clause – The Open Door is not open

On a claim that the Defendant in a criminal case had "opened the door" the state introduced evidence of a statement a co-defendant had made as part of his guilty plea. The co-defendant did not testify against the Defendant and as a result introduction of the out of court statement violated the Defendant's 6th Amendment right.

Hemphill v. New York
LINK

Supreme Court – Miranda – Civil Rights Liability

On Friday, the Supreme Court granted certiorari in the case of *Vega v. Tekoh.* IMLA participated as an Amicus in asking the court to grant certiorari and we're gratified it did. The case involves a very important question in terms of liability and the expansion of rights and the question is essentially this: Is the Miranda requirement a constitutionally protected right where a person may sue for its violation, or is it a prophylactic rule designed to protect a constitutional right against self-incrimination? We believe it is the latter and should be and if the former, the doors to the courthouse may never close to people seeking damages for asserted wrongs. The facts of the case are essentially these – an officer was called to a hospital where a patient claimed to

have been sexually assaulted by a hospital worker. When the officer arrived the worker was identified and the officer began talking with him and after he admitted to "making a mistake" the officer asked him to move to a more private room to continue their conversation. Because the officer did not believe the worker was in custody at that point, the officer did not read him Miranda rights. If a prophylactic rule, the case should be over, but that's not how the 9th Circuit saw it and asserted that Miranda created rights that when violated meant the offending officer should be liable. To make the issue more complex, the decision to offer the "statements" was not the choice of the defendant officer, but that of the prosecutor – should that matter in the context of the analysis? We believe it should.

LINK

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