

Defending Regulatory Schemes: Litigating the Constitutionality of Landlord Regulations

Brian S. Carter

Minneapolis City Attorney's Office

Minneapolis
City of Lakes

Litigating the Constitutionality of Landlord Regulations: Outline

- Examples of Tenant Protection Ordinances
  - Minneapolis, Saint Paul, Seattle, Portland
- Course of litigation
- Causes of Action
  - Takings
  - Substantive Due Process
  - Compelled Speech
- Large role of amici
- Critical importance of pre-enactment advice and strategy
- Current status of our example ordinances

Examples of Ordinances

- Minneapolis Tenant Screening
  - Enacted September 2019
  - Effective June 2020 and December 2020 depending on number of units
  - Ordinance regulates how landlords may screen rental applicants
  - Does not prohibit any particular screening criterion, but requires one of two screening methods: (1) inclusive screening with criteria defined in ordinance; or (2) an individualized assessment.

Examples of Ordinances

- Minneapolis Tenant Screening Ordinance
  - (1) Inclusive screening criteria:
    - Landlords may use litmus-test screening criteria, but certain criteria cannot be considered
      - misdemeanors older than 3 years;
      - certain felonies older than 7 years and certain felonies older than 10 years;
      - evictions older than 3 years;
      - settlements older than 1 year; dismissed evictions or evictions resulting in judgment for the applicant;
      - insufficient rental history;
      - require an income of 3x the rent w/o exception
      - may not screen based on credit score but can consider information in a credit report

Examples of Ordinances

- Minneapolis Tenant Screening
  - (2) Individualized assessment:
    - Landlord may consider any non-discriminatory criteria in accordance with the Fair Housing Act.
    - Must consider all additional evidence provided by the applicant to explain, justify, or negate the relevance of information revealed by screening.
    - Must consider: the nature and severity of the incidents that would lead to a denial; the number and type of the incidents; the time that has passed since the incidents occurred; and the age of the individual at the time the incidents occurred.

Examples of Ordinances

- Minneapolis Tenant Screening
  - Rejection notifications:
    - Landlords must notify the applicant in writing within fourteen days of rejecting a rental application and identify the specific criteria the applicant failed to meet.
    - Landlord shall notify the applicant in writing within fourteen days providing: the basis for denial; and the supplemental evidence, if any, that the landlord considered and an explanation why the supplemental evidence did not adequately compensate for the factors that informed the landlord's decision to reject the application.

Examples of Ordinances

- Saint Paul Tenant Protection Ordinance
  - Screening criteria limited:
    - vacated or expunged convictions; misdemeanor convictions older than 3 years; certain felonies;
    - no rejection based solely on credit history though landlord may use credit report information to the extent it shows an inability to pay rent or utilities
    - restricts use of certain aspects of rental history
    - restrictions on income requirements
  - Security deposits
    - Limited to an amount equal to one month's rent
    - May require prepayment of only one month's rent, except in certain circumstances where an additional month may be required.
  - Just cause notice
    - Landlords required to renew lease unless the landlord can "prove in court that Just Cause exists"
    - Just cause consists only of non-payment of rent; late for five out of twelve consecutive months; or material noncompliance with lease.

Examples of Ordinances

- Seattle Tenant Protection Code
  - First-in-time Rule:
    - Owner must first “provide notice to a prospective occupant” of “the criteria the owner will use to screen prospective occupants and the minimum threshold for each criterion,” as well as “all information, documentation, and other submissions necessary for the owner to conduct screening.”
    - Owner must “note the date and time of when the owner receives a completed rental application” and “screen completed rental applications in chronological order.”
    - If owner needs more information than was stated in the notice, the owner must “notify the prospective occupant in writing, by phone, or in person of what additional information is needed.”
    - Owner must “offer tenancy of the available unit to the first prospective occupant meeting all the screening criteria necessary for approval of the application.” The first qualified applicant has 48 hours to accept the offer. If the applicant does not accept, “the owner shall review the next completed rental application in chronological order until a prospective occupant accepts the owner’s offer of tenancy.”

Examples of Ordinances

- Seattle Tenant Protection Code
  - Fair Chance Housing Ordinance:
    - Makes it an unfair practice for landlords and tenant screening services to "[r]equire disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history," subject to certain exceptions.

Examples of Ordinances

- Portland Tenant Protection Code
  - Key components:
    - 72-hour waiting period between advertising an available unit and processing applications.
    - First-in-time provision
    - Requirements for notice of vacancies
    - Provision of various notices authored by the municipality
    - Screening criteria requirements and minimal restrictions
    - Encouragement of landlord to voluntarily agree not to reject based on specific criminal history, credit history, and rental history
    - If no agreement to use “low barrier” screening criteria, then individualized assessment must be use.
    - Limitations on security deposits.

Typical Beginning

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

301, 712, 2103 AND 3151 LLC; 12 TWENTY-SECOND AND 1827 LASALLE LLC; 137 EAST SEVENTEENTH STREET LLC; 1522 LASALLE AVENUE LLC; 1728 SECOND AVENUE AND 1801 THIRD AVENUE LLC; 1806 AND 1810 THIRD AVENUE LLC; 1816, 1820 AND 1830 STEVENS AVENUE LLC; 1817 SECOND AVENUE LLC; 1900 AND 1906 CLINTON AVENUE LLC; 1924 STEVENS AVENUE LLC; 2020 NICOLLET AVENUE LLC; 2101 THIRD AVENUE LLC; 2323 AND 2401 CLINTON AVENUE LLC; 2417, 2423 AND 2439 BLAISDELL AVENUE LLC; 2427 BLAISDELL AND 2432 FIRST AVENUE LLC; 25 TWENTY-FIFTH STREET LLC; 2535 CLINTON AVENUE LLC; 2545 BLAISDELL AVENUE LLC; 2609 HENNEPIN AVENUE LLC; 2633 PLEASANT AVENUE LLC; 2720 PILLSBURY AVENUE LLC; 2738 AND 2750 PILLSBURY AVENUE LLC; 2809 PLEASANT AVENUE LLC; 600 FRANKLIN AVENUE LLC; AMY SMITH; BLAISDELL 3322, LLC; BLOOMINGTON 4035, LLC; BRYANT AVENUE PROPERTIES LLC; COLFAX APARTMENTS LLC; DUPONT PROPERTIES LLC; FLETCHER PROPERTIES, INC.; FRANKLIN VILLA PARTNERSHIP, L.L.P.; FREMONT APARTMENTS, LLC; FREMONT TERRACE APARTMENTS, L.L.C.; GARFIELD COURT PARTNERSHIP, L.L.P.; GASPARRE NEW BOSTON SQUARE, LLC; GATEWAY REAL ESTATE, L.L.C.; JEC PROPERTIES, LLC; LAGOON APARTMENTS, LLC; LL LLC;

CIVIL ACTION NO. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

301, 712, 2103 AND 3151 LLC; 12 TWENTY-SECOND AND 1827 LASALLE LLC; 137 EAST SEVENTEENTH STREET LLC; 1522 LASALLE AVENUE LLC; 1728 SECOND AVENUE AND 1801 THIRD AVENUE LLC; 1806 AND 1810 THIRD AVENUE LLC; 1816, 1820 AND 1830 STEVENS AVENUE LLC; 1817 SECOND AVENUE LLC; 1900 AND 1906 CLINTON AVENUE LLC; 1924 STEVENS AVENUE LLC; 2020 NICOLLET AVENUE LLC; 2101 THIRD AVENUE LLC; 2323 AND 2401 CLINTON AVENUE LLC; 2417, 2423 AND 2439 BLAISDELL AVENUE LLC; 2427 BLAISDELL AND 2432 FIRST AVENUE LLC; 25 TWENTY-FIFTH STREET LLC; 2535 CLINTON AVENUE LLC; 2545 BLAISDELL AVENUE LLC; 2609 HENNEPIN AVENUE LLC; 2633 PLEASANT AVENUE LLC; 2720 PILLSBURY AVENUE LLC; 2738 AND 2750 PILLSBURY AVENUE LLC; 2809 PLEASANT AVENUE LLC; 600 FRANKLIN AVENUE LLC; AMY SMITH; BLAISDELL 3322, LLC; BLOOMINGTON 4035, LLC; BRYANT AVENUE PROPERTIES LLC; COLFAX APARTMENTS LLC; COLFAX VILLAS I, LLC; DUPONT PROPERTIES LLC; FLETCHER PROPERTIES, INC.; FRANKLIN VILLA PARTNERSHIP, L.L.P.; FREMONT APARTMENTS, LLC; FREMONT TERRACE APARTMENTS, L.L.C.; GARFIELD COURT PARTNERSHIP, L.L.P.; GASPARRE NEW BOSTON SQUARE, LLC; GATEWAY REAL ESTATE, L.L.C.; JEC PROPERTIES, LLC; LAGOON APARTMENTS, LLC; LL LLC; NORTHERN GOPHER

Case No. 0:20-cv-01904 (PAM/BRT)

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Course of litigation

- **Course of litigation**
  - **Preliminary injunction**
    - **Immediate motion practice and likely appeal**
  - **Negotiated stays**
    - **Plaintiffs are often interested in a stay pending an appeal from the district court's decision on the injunction**
      - **Consistent with plaintiffs trying a multitude of forums to break ground on legal issues without incurring costs of discovery**
    - **Your cost benefit analysis may vary on this issue**
  - **Tailored discovery and dispositive motion practice**
    - **May be able to negotiate a brief discovery period with production of the administrative record, followed by cross motions that will resolve the case without trial.**
    - ***Penn Central* factors would limit this possibility.**
  - **Creative tactics**
    - **Filing a dec action in state court—attempt to lay a solid foundation with a quick win under the state law.**

Causes of Action

- Taking
- Substantive Due Process
- Compelled Speech

Causes of Action--Taking

CAUSES OF ACTION

COUNT ONE
Unconstitutional Taking
U.S. Const. Amend. V, Amend. XIV and Minn. Const. Art. I, § 13
42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202

172. Plaintiffs incorporate by reference the preceding paragraphs as if set forth at length herein.

173. The Fifth Amendment of the United States Constitution, applicable to state action under the Fourteenth Amendment, and Article I, Section 13 of the Minnesota Constitution provide that private property shall not be taken for public use without just compensation.

174. By enacting the Ordinance, the City has seized Plaintiffs' and other Owners' property without just compensation in violation of the Fifth Amendment of the United States Constitution and Article I, Section 13 of the Minnesota Constitution.

175. If Plaintiffs and other Owners continued to lease their property to their choice of tenants, based upon all the information they deem necessary to determine the suitability and qualifications for their choice of tenants, Plaintiffs and other Owners would be in violation of the Ordinance. The unstated goal of the Ordinance is to require Owners to lease their property to individuals to whom they would not otherwise allow access.

176. The entry upon property without the voluntary consent of the owner is a physical invasion of property and a trespass. The invasion is substantial in that the tenant

Causes of Action--Taking

- Key issue is per se taking v. regulatory taking
  - *Cedar Point Nursery* (2021) is latest word from SCOTUS on issue
    - Involved state labor regulation allowing union reps to enter private, agricultural land 120 days a year for a few hours at a time.
    - Two ag operators challenged the regulation as a per se taking.
    - SCOTUS held that it was a per se taking.

Causes of Action—Taking: per se v. regulatory

- *Cedar Point Nursery* (2021)
  - "The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: '[N]or shall private property be taken for public use, without just compensation.' The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.'" 141 S. Ct. 2063, 2071 (2021)

Causes of Action—Taking: per se v. regulatory

- *Cedar Point Nursery* (2021)
  - "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." 141 S. Ct. 2063, 2071 (2021).
  - Contrasted with previous case law that stresses permanency or temporary nature of occupation, and legal source of taking, i.e., is it a regulation?

Causes of Action—Taking: per se v. regulatory

- *Cedar Point Nursery* (2021)
  - Permanency—
    - "There is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364." 141 S. Ct. 2063, 2074 (2021).
    - "Our cases establish that 'compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary.'" 141 S. Ct. 2063, 2074 (2021).
    - To the extent length of occupation is an issue, it bears on compensation not whether there is a per se taking.

Causes of Action—Taking: per se v. regulatory

- *Cedar Point Nursery* (2021)
  - Takings without compensation, greatest hits
    - In *United States v. Causby*, the Court held that the invasion of private property by overflights effected a taking. 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). "The government frequently flew military aircraft low over the Causby farm, grazing the treetops and terrorizing the poultry." Only happened in ~10% of flights, but that infrequent event was still a taking.
    - *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330, 43 S.Ct. 135, 67 L.Ed. 287 (1922) (government assertion of a right to fire coastal defense guns across private property would constitute a taking).

Causes of Action—Taking: per se v. regulatory

- *Cedar Point Nursery* (2021)
  - Takings without compensation, greatest hits
    - *Kaiser Aetna v. United States:* the appropriation of an easement effected a taking. A real-estate developer dredged a pond, converted it into a marina, and connected it to the ocean. The government asserted that the developer could not exclude the public from the marina because the pond had become a navigable water.
    - In *Loretto v. Teleprompter Manhattan CATV Corp*., the Court held that a permanent physical occupation constitutes a per se taking regardless of whether it results in only a trivial economic loss. This one was a requirement that landlords allow installation of cables and cable boxes on their buildings.

Causes of Action—Taking: per se v. regulatory

- *Cedar Point Nursery* (2021)
  - Takings without compensation, greatest hits
    - In *Horne v. Department of Agriculture*, the Court observed that "people still do not expect their property, real or personal, to be actually occupied or taken away." 576 U.S. at 361, 135 S.Ct. 2419. The appropriation by the government of the raisins in Horne was a per se taking, even if a regulatory limit with the same economic impact would not have been. "The Constitution, is concerned with means as well as ends."

Causes of Action—Taking: per se v. regulatory

- *Cedar Point Nursery* (2021)
  - These cases have been the central features of the plaintiffs' takings claims in lawsuits challenging tenant protection ordinances.
  - Plaintiffs are already citing *Cedar Point* as crystallizing their argument that restrictions on exclusion of leasing applicants are per se takings.

Causes of Action—Taking: per se v. regulatory

- *Cedar Point Nursery* (2021)
  - Strong argument that *Cedar Point* does not affect central features of argument that tenant protections statutes are not per se taking.
  - The two cases primary cases in support of this argument were cited favorably in *Cedar Point* and left undisturbed by its holding:
    - *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)
    - *Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992)

Causes of Action—Taking: per se v. regulatory

- *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)
  - In *PruneYard Shopping Ctr. v. Robins*, the Supreme Court addressed a challenge to state law that forced owners of private shopping centers to allow individuals to physically occupy their property for the exercise of speech and petitioning.
  - Key feature of reasoning was that Plaintiffs in *PruneYard* had opened their property up to the public

Causes of Action—Taking: per se v. regulatory

- *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)
  - "It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. And here there has literally been a 'taking' of that right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property. But it is well established that 'not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense.'"

Causes of Action—Taking: per se v. regulatory

- *Yee v. City of Escondido, Cal., 503 U.S. 519, 528–29 (1992)*
  - *California regulation required owners of mobile home parks to rent to purchasers of mobile home from previous tenant of the mobile home "pad."*

Causes of Action—Taking: per se v. regulatory

- *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 528–29 (1992)
  - "On their face, the state and local laws at issue here merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant. 'This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.' When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge or require the landowner to accept tenants he does not like, without automatically having to pay compensation."

Causes of Action—Taking: per se v. regulatory

- *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 528–29 (1992)
  - "The same may be said of petitioners' contention that the ordinance amounts to compelled physical occupation because it deprives petitioners of the ability to choose their incoming tenants. Again, this effect may be relevant to a regulatory taking argument . . . . But it does not convert regulation into the unwanted physical occupation of land. Because they voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals."

Causes of Action—Taking: per se v. regulatory

- *Yee* and *PruneYard* remain intact after *Cedar Point*, and therefore so does the strongest argument that tenant protection regulations do not amount to per se takings.
- In the terms relied upon by *Cedar Point*, the regulations amount to limitations on the use of real property—they do not amount to a physical occupation forced by the government.
- Minneapolis's ordinance is awaiting scheduling for oral argument on appeal from denial of a preliminary injunction, so we will soon see how the Eighth Circuit will analyze the issue in light of *Cedar Point*.

Causes of Action—Taking: Regulatory Taking

- *Penn Central* Factors
  - The economic impact of the regulation on the claimant.
  - Particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.
  - The "character of the governmental action"—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a taking has occurred.

Causes of Action—Taking: Regulatory Taking

- *Penn Central Factors*
  - Yet to litigate this aspect.
  - Often, plaintiffs have failed to pursue.
  - Dependent on precise nature of the regulation.
  - Likely to spur expansive discovery on all three factors, but especially the economic effects.

Causes of Action—Substantive Due Process

187. Plaintiffs have no adequate remedy at law for the harm caused by the Ordinance. Unless the City is enjoined from enforcing the Ordinance, Plaintiffs and other Owners will be irreparably injured, as they will be deprived of their rights under the United States Constitution and the Minnesota Constitution, will continue to suffer substantial loss of rents, profits, and good will, the nature and extent of which is impossible to ascertain, and will unnecessarily subject their tenants to unsafe situations.

COUNT TWO
Substantive Due Process – Unconstitutional Deprivation of Property Rights
U.S. Const. Amend. XIV and Minn. Const. Art. I, § 7
42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202

188. Plaintiffs incorporate by reference the preceding paragraphs as if set forth at length herein.

189. The Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the Minnesota Constitution provide that states shall not deprive any persons of life, liberty, or property without due process of law. U.S. Const. Amend. XIV; Minn. Const. art. I, § 7.

190. The Ordinance deprives Plaintiffs and other Owners of their rights to due process under Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

191. Under the Due Process clause, Plaintiffs and other Owners are entitled to heightened protection against governmental interference with their fundamental right to liberty, including those fundamental rights and liberties which are objectively and deeply rooted in the Nation's history and tradition. Such rights include property rights.

Causes of Action—Substantive Due Process

- Key fight is over the standard of review.
  - Rational basis v. strict scrutiny
    - Strict scrutiny, strict in theory, fatal in fact
    - Rational basis, lenient but still can be an avenue for striking down the ordinance

Causes of Action—Substantive Due Process

- Are property rights "fundamental rights"?
  - "[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property" is a landowners' ability to grant or deny access as they see fit. *Kaiser*, 444 U.S. at 176.
  - The right to exclude, which is "universally held to be a fundamental element of the property right," is considered "one of the most treasured" rights. *Id.*
  - "An essential element of individual property is the legal right to exclude others from enjoying it." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting))

Causes of Action—Substantive Due Process

- Are property rights “fundamental rights”?
  - “Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property.” *Moore v. City of E. Cleveland*, 431 U.S. 494, 520 (1977).

Causes of Action—Substantive Due Process

- Are property rights “fundamental rights”?
  - In my view, these arguments are based on plucking quotations out of context and stringing them together in a way that does not attempt a careful analysis.
  - No court has treated the rights at issue here as a fundamental right subject to strict scrutiny.

Causes of Action—Substantive Due Process

- Are property rights “fundamental rights”?
  - Framing the question is key:
    - Right to exclude from real property v. a landlords’ right to rent to whoever they wish

Causes of Action—Substantive Due Process

- Are property rights "fundamental rights"?
  - *PruneYard*
    - "There is also little merit to appellants' argument that they have been denied their property without due process of law. In *Nebbia v. New York*, 291 U.S. 502 (1934), this Court stated: '[N]either property rights nor contract rights are absolute . . . Equally fundamental with the private right is that of the public to regulate it in the common interest . . . .' "[T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained.' *Id.*, at 523, 525. Appellants have failed to provide sufficient justification for concluding that this test is not satisfied by the State's asserted interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution." *PruneYard*, at 84–85.
    - The *PruneYard* Court therefore applied rational basis scrutiny—not strict scrutiny—to a state law that limited a property owners' right to exclude individuals from their property.

Causes of Action—Substantive Due Process

- Are property rights "fundamental rights"?
  - *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251 (8th Cir. 1996).
    - Restrictions on rental discrimination against non-suspect classes need only pass rational basis review.
    - In *Oxford House-C,* a municipality challenged the Fair Housing Act's prohibition of housing discrimination. Included within the provisions of the Fair Housing Act that were challenged was the prohibition of housing discrimination based on a renter's disability. See 42 U.S.C. § 3604(f).
    - Eighth Circuit held that the Act was constitutional because it passed the rational basis test.
    - Implicit in the holding, then, is the proposition that a landlord's right to reject a rental applicant, be it because of disability or a poor credit score, is not a fundamental right.

Causes of Action—Substantive Due Process

- Are property rights “fundamental rights”?
  - This type of challenge implicates the legality of the Fair Housing Act.
  - Consistent with plaintiffs’ and amici’ “long game” of expanding property owners’ rights and attacks on regulations of landlord-tenant relationship

Causes of Action—Compelled Speech

28. MVA member landlords Garfield Court Partnership, LLP, Marissa Skaja, and Charles Halverson rent dwelling units to individuals in Minneapolis, Minnesota.

29. MVA member landlords or property owners Garfield Court Partnership, LLP, Marissa Skaja, and Charles Halverson have Minneapolis rental licenses to rent dwelling units to individuals.

COUNT I

Violation of Civil Rights under 42 U.S.C. § 1983, declaratory, and permanent injunctive relief against the City of Saint Paul

Saint Paul's adopted policy and ideology requiring landlords to provide information about voter registration to prospective tenants and tenants is the moving force of the constitutional violation of MVA owner-landlords' protected First Amendment rights not to speak.

30. The Plaintiffs adopt and incorporate by reference all previous paragraphs as if fully restated in support of the further allegations asserted under Count I.

31. The First Amendment of the United States Constitution protects the right to free speech.

32. The First Amendment of the United States Constitution protects an individual's right to refrain from speaking.

33. Under 42 U.S.C. § 1983, the statute provisions provide persons a federal cause of action based on state violations of federal law:

Causes of Action—Compelled Speech

- In *Minnesota Voters Alliance v. Saint Paul*, Plaintiffs challenged Saint Paul's and Minneapolis's ordinance requiring provision of voter registration information to new tenant.
- Central feature of the lawsuit was a compelled speech argument.
- In lawsuits challenging tenant protection ordinances, plaintiffs have also asserted that disclosure and notice requirements of those ordinances are compelled speech as well.

Causes of Action—Compelled Speech

- Government Speech
  - The Supreme Court has permitted the government to regulate the content of what is or is not expressed not only when it is the speaker, but also when it enlists private entities to convey its own message. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995).
  - The government may, and frequently does, use "private entities to convey a governmental message." *Id.* When it does so, the communication is still government speech and free from First Amendment scrutiny. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

Causes of Action—Compelled Speech

- Government Speech
  - The determination of whether speech is to be classified as government speech boils down to two key questions: (1) whether the government established and controlled the message, and (2) whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government. *Johanns v. Livestock Mktg. Assn*, 544 U.S. 550 (2005)*; see also Page v. Lexington County School Dist. One*, 531 F.3d 275, 281 (4th Cir. 2008).

Causes of Action—Compelled Speech

- Government Speech
  - These arguments proved unsuccessful in *MVA v. Saint Paul* at the district court. The parties did not appeal.
  - Implications for other notice and disclosure requirements? E.g., requirement that landlord post rental license on property.

Large role amici

- Housing groups
  - Often involved at the legislation stage
  - May be able to provide litigation help as amici or a resource. They might have a wide-angle view of the issues across the country.

Large role amici

- Property rights amici
  - Maintaining lawsuits across the country
  - Clearly playing a “long game” to shape the law
    - Cherry-picking ordinances from progressive cities in conservative circuits—Minneapolis is a good example.
    - Looks like they are trying to cause quantum leaps in the constitutional law regarding property rights.

Importance of pre-enactment legal advice

- Building the factual record
- Judicious application of legislative restraint

Status of our examples

- Minneapolis—plaintiffs' preliminary injunction denied and on appeal in Eighth Circuit.
- Saint Paul—plaintiffs' preliminary injunction granted.
- Seattle—ordinance upheld.
- Portland—ordinance upheld.


Thank you!