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Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

MAY JUN 2023
VOL.64 NO.03

COMPELLED SPEECH: YOU CAN'T MAKE ME SAY THAT



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Compelled Speech: You Can't Make Me Say That

AIMEE ALCORN-REED,
Assistant City Attorney, Corpus Christi, Texas



INTRODUCTION

Because municipal governments tend to be the most accessible to citizens, they end up in the middle of controversial topics relatively easily. The City of Corpus Christi, Texas, like many municipalities, has a method for citizens to petition the City Council through initiative.[1] On November 8, 2021, Corpus Christi received a qualified Statement of Intent to Circulate Petitions Calling for an Initiative requesting that City Council pass an ordinance that, among other things, would require "Corpus Christi hospitals, medical facilities, health care professionals and pharmacies to provide information on COVID-19 early treatment protocols..."

When a qualified Statement of Intent to Circulate Petitions Calling for an Initiative is received, the City Attorney's Office is charged with drafting an ordinance, in legal form, that incorporates the substance of the text submitted.[2] In order to comply with the Charter provision, the City Attorney must determine which requested provisions comply with State and Federal law. For the reasons explored in this article, the provision listed above could not be included in an ordinance that complies with State and Federal law.

Freedom Not To Speak

The First Amendment of the United States Constitution, which is applied to states and local governments through the Equal Protection Clause of the Fourteenth Amendment, generally protects the right to freedom of speech.[3] The government (local, state, or federal) cannot prohibit private speech or abridge the right of its citizens to speak their own mind. On its face, however, the First Amendment does not address the potential that a citizen be required to speak or otherwise confess loyalty to a government.

As children, many Americans attended schools where they routinely recited the Pledge of Allegiance, sang "The Star-Spangled Banner," or otherwise showed respect or patriotism in the presence of the flag of the United States. Despite that common practice, some students, for religious or other reasons, might choose not to participate in such displays. The Gobitis children, for example, were Jehovah's Witnesses, aged ten and twelve, who attended a public school in Minersville, Pennsylvania, and refused to salute the flag as required daily.[4] The school district expelled the children.[5] Given the age of the children, compulsory school attendance laws required the parents to send the children to private school, denying a free public education to the family.[6] In reviewing the children's expulsion, the United States Supreme Court determined that the school district's requirement to salute the flag did not violate the First Amendment.[7] The Court reasoned that "[a] society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty."[8]

Following the *Gobitis* decision, the West Virginia Board of Education passed a resolution that required all teachers and students to salute the flag daily as a part of normal school activities.[9] Any child that refused to participate in the salute would be expelled for insubordination and could not be readmitted until he or she complied with the requirement.[10] Further, the parents or guardians of the child could be convicted for failing to send the child to school and face a fine and confinement in jail.[11] Parents brought a lawsuit seeking an injunction to prohibit the enforcement of this requirement against their own children and other Jehovah's Witnesses, whose religious beliefs did not allow them to participate in the salute.[12] The Court took this opportunity to reconsider the *Gobitis* decision.[13] In reviewing West Virginia's requirement that students salute the flag, the Court overruled *Gobitis* and held that a public school cannot compel students and teachers to salute the flag.[14] The Court empha-

sized that the very intent of the First Amendment was to ensure that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[15]

Over the years, the Court has expanded its holdings on compelled speech, determining, for example, that the government cannot prohibit residents from covering the state motto, "Live Free or Die" on their vehicles' license plates.[16] The Court has further found that prohibitions on compelling speech apply to parades,[17] space in an envelope[18] or a newspaper,[19] and hiring of a Scoutmaster.[20] The Court has also found limits, however, to the activity that is protected under the compelled speech doctrine. During the days of "don't ask, don't tell," Congress passed the Solomon Amendment, which required universities who receive certain federal funding to allow military recruiters equal access to students or lose the funding.[21] An association of law schools and law faculties sued, alleging that compelling the schools to allow military recruiters equal access to law students violated their First Amendment rights.[22] The schools, in protest of the military's treatment of homosexuals, wished to restrict military recruiters from interviewing students at the law schools, limiting them to interview locations at undergraduate facilities.[23] The Court found that the Solomon Amendment restricted the law schools' conduct, not its speech.[24] The Court further found that the Solomon Amendment did not restrict the law schools' right to freedom of association, including expressive association, as allowing military recruiters on campus does not make association with the law schools less attractive.[25] Because the law schools were free to express their disagreement with the military's policies while allowing access to recruitment facilities, the Solomon Amendment was a regulation of conduct, not speech.[26]

The question then remained as to whether compelled funding of speech was a regulation of conduct or speech. In 1977, in *Abood v. Detroit Bd. of Educ.*, the Court held that an agency shop arrangement that required all public-school teachers to make payments to the union, even if not union members, was constitutional.[27] The Court did, however, limit the expenditure of such funds to costs related to the collective-bargaining duties of the union.[28] Similarly, in 1990, the Court found that mandatory dues to the State Bar can fund activities that are germane to the practice of law, but not ideological or political activities that fall outside of the practice of law.[29] The Court went further in 2018, overruling *Abood* and holding that public employees cannot be forced to pay an agency fee to the union.[30] In *Keller v. State Bar of Cal.*, the Court held that "In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay."[31] Some cases have questioned the *Keller* decision related to compulsory State Bar dues because it relied on *Abood*, but the Court has since denied certiorari on a case challenging mandatory State Bar dues in Wisconsin.[32] Limitations on expending the funds for non-related purposes remain, however, even where professionals are required to pay dues.

Antidiscrimination and Strict Scrutiny

The line between regulating conduct and speech can sometimes be difficult to define. Antidiscrimination laws, prohibiting discrimination on the basis of sex, race, religion, or sexual orientation in the provision of services, are typically aimed at regulating the conduct of the person. Such laws may, however, inadvertently regulate speech when applied to certain expressive services. A Colorado anti-discrimination law, for example, has been applied to the baking of a cake for a homosexual wedding ceremony.[33] A homosexual couple was turned away from Masterpiece Cakeshop in 2012 when they inquired about a wedding cake.[34] The baker stated that he could not make the cake because doing so would violate his religious belief that marriage should be between one man and one woman.[35] The couple reported the baker to the Colorado Civil Rights Commission (Commission) which determined that the baker violated the antidiscrimination statute by refusing to provide services on the basis of sexual orientation.[36] The Court noted that, in determining whether the service at issue qualified as speech, there might be a difference between designing a unique cake or selling a pre-made cake.[37] While Justice Kennedy did opine, on behalf of the Court, that some services may qualify as protected forms of expression, the *Masterpiece Cakeshop* decision did not fully resolve the issue.[38] The Court ultimately sent the case back

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Aimee Alcorn-Reed has served as an Assistant City Attorney for the City of Corpus Christi for almost ten years. Ms. Alcorn-Reed received her law degree, with honors, from The University of Texas School of Law in 2012. Prior to law school, she obtained her B.A. in English and Spanish from The University of Texas at Austin in 2006 and her M.A. in Publishing and Writing from Emerson College in 2008. During her time with the City of Corpus Christi, Ms. Alcorn-Reed has handled multiple municipal law issues, including purchasing, economic development, municipal court prosecution, redistricting, and water. Her background in writing as well as her municipal work has left her particularly interested in the interplay between municipal governance and the right to freedom of speech.

due to improper handling of the Free Exercise issue at the Commission.[39] During the Commission hearing, commissioners were openly hostile toward the baker's claims regarding his religious beliefs, which prevented the baker from having a hearing that was neutral as to the religion.[40] The disposition of *Masterpiece Cakeshop* on a procedural issue has left open the question of the extent to which a state's interest in protecting the equality of disadvantaged or underserved communities may weigh against the right of an individual to refuse to perform a service that qualifies as speech.

Following the *Masterpiece Cakeshop* decision, a Circuit split remains. The Eighth Circuit, reviewing a Minnesota antidiscrimination statute, determined that the law at issue was not narrowly tailored to serve a compelling government interest sufficient for the regulation of speech.[41] In that case, a married couple, who owned and operated a videography business, wished to create a series of videos featuring opposite-sex weddings to promote their religious beliefs related to marriage.[42] The videographers sued Minnesota seeking an injunction to prevent Minnesota from enforcing the antidiscrimination statute, which would require the videographers to make similar videos for homosexual couples if they chose to make their desired videos about heterosexual marriages.[43] The Eighth Circuit determined that the antidiscrimination law cannot compel the videographers to make videos in violation of their religious beliefs.[44] While the court recognized the importance of regulating discriminatory conduct, the court found that "regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be."[45] The court did distinguish regulation of conduct, which an antidiscrimination law may do under the Constitution, and regulation of speech, which may include expressive conduct.[46] Thus, the court reasoned that it was the application of the law to speech, not the law itself, that violated the First Amendment.[47]

Alternatively, the Tenth Circuit, in reviewing a challenge to the same Colorado law at issue in *Masterpiece Cakeshop*, found that while the law may regulate the speech of certain vendors, such regulation was narrowly tailored to achieve a compelling state interest and survived strict scrutiny.[48] In that case, a website designer sued seeking an injunction to prevent the enforcement of Colorado's antidiscrimination law against her proposed new service of designing wedding websites.[49] The designer, while generally willing to provide other services to homosexual clients, stated that designing wedding websites for homosexual couples would violate her deeply-held religious beliefs regarding marriage.[50] In determining that the law met the strict scrutiny standard, the Tenth Circuit pointed out that "unique goods and services are where public accommodation laws are most necessary to ensuring equal access."[51] Essentially, the court reasoned that failing to protect access to unique, custom services for marginalized communities leaves such communities with only access to lower-quality generic services.[52] Protecting such equal access to services is a compelling government interest and the law is narrowly tailored to serve such interest.[53] The United States Supreme Court has granted the website designer's writ for certiorari and held oral arguments in *303 Creative LLC v. Elenis*.[54] At the time this article is being published, the Court has not yet issued its opinion. Perhaps the ultimate decision there will resolve the Circuit split and help legislatures determine which services are merely conduct and which qualify as speech. Further, the case may answer the question as to whether or how such applications of antidiscrimination laws might survive strict scrutiny.

Compelled Speech in Regulation of Profession

Another area where it might be difficult to distinguish between conduct and speech is in the regulation of a profession. Regulation of conduct related to a profession may often touch on speech. A requirement to take an oath of office, for example, would inherently require speech. Even so, the Court has allowed the government to require public employees to take an oath of office.[55] *Cole v. Richardson* holds that the government may not, however, require public employees to take oaths that impinge on their constitutional rights, such as oaths affirming a certain political beliefs.[56] The Court also held, in *Bond v. Floyd*, that it was improper to prevent an elected official from taking the oath of office where the official had made statements that were considered politically unfavorable, specifically, speaking out against the Vietnam War.[57] As seen in both *Cole* and *Bond*, the government may be able to require an employee or official to take an oath of office, but it cannot condition employment on specific political statements.

In regulating a profession, the government may also wish to impose restrictions on advertising. The State Bar in Ohio, for example, disciplined an attorney based on the content of an advertisement.[58] The complaint against the attorney in *Zauderer v. Office of Disciplinary Counsel* was based both on content that did not comply with the rules on attorney advertising and on failure to include required disclosures.[59] The Court found that attorneys cannot be disciplined for advertisements that contained truthful and nondeceptive language.[60] The state can, however, require an

attorney to include certain disclosures in advertising "as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers."[61] The Court determined, in another case, that the state can require a bankruptcy law firm's advertising to identify that the law firm is a debt relief agency and include the disclosures generally required in advertising of debt relief agencies.[62] While it seems apparent that the required disclosures regulate speech, such regulation is permissible when it is directed at commercial speech in a profession and serves the government interest of protecting consumers from deceptive marketing.[63]

The government also has an interest in regulating the medical profession, which may require certain disclosures. The Court has, over the years, allowed some regulation of speech that is incidental to the regulation of the medical profession. For example, the Court upheld a New York law that required medical professionals to disclose the names of people who were prescribed certain Schedule II drugs.[64] While that decision does not focus on the regulation of the content of speech, disclosure laws do require medical professionals to speak, whether they want to or not. The Court has also found that the government can require doctors to disclose certain information in order to obtain informed consent from patients.[65] In *Planned Parenthood v. Casey,* the Court considered a Pennsylvania law that required abortion providers to relay certain information to patients before performing the procedure.[66] The Court noted, in a plurality opinion, that this compelled speech was part of the "practice of medicine, subject to reasonable licensing and regulation of the State."[67] The Court further laid out that such regulations are permissible so long as the speech at issue is (1) truthful, (2) non-misleading, and (3) relevant to the medical procedure at issue.[68]

While the *Casey* decision was overturned along with *Roe v. Wade* in 2022, the decision overturning it focused on the issue of the right to obtain an abortion and did not discuss compelled speech.[69] *Casey* is still instructive as well because this reasoning was part of the basis for the holding in a subsequent case that was not overturned by *Dobbs*.[70] The Court, in *Nat'l Inst. of Family and Life Advocates v. Becerra*, looked at a California law that required crisis pregnancy centers to provide certain information to women.[71] The crisis pregnancy centers were generally pro-life establishments that provided some early pregnancy services, such as pregnancy tests and ultrasounds.[72] The law required that crisis pregnancy centers provide all women obtaining services with information about available state-sponsored services, including abortions.[73] The Court held that this requirement did not meet either the *Zauderer* or the *Casey* standard.[74] The required disclosure, which was not related to services that the clinics provided, could not meet the *Zauderer* standard, which requires that authorities may only compel explanatory wording in commercial speech that is factual and noncontroversial.[75] Further, the required disclosure was not necessary to obtain informed consent for any medical procedure as it was not related to a procedure offered at the clinic and was applied to all meetings with women "regardless of whether a medical procedure is ever sought, offered, or performed."[76]

In the context of state regulation of a profession, then, it is constitutionally permissible to compel some speech, as long as it falls into the boundaries laid out in *Zauderer*, *Casey*, and *Becerra*. Municipalities, however, are not states. The ability of a municipality to act is limited by state law and state action.[77] "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state . . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state."[78] In Texas, as in many states, the legislature has given the state medical board authority over the regulation of the practice of medicine and the state pharmacy board authority over the regulation of the practice of pharmacy.[79] While home-rule municipalities like Corpus Christi generally have discretion in adopting ordinances, municipalities in Texas do not have the authority to regulate a subject area that has been preempted by the state.[80] Accordingly, even though the state might have had authority to impose some regulations on speech in a medical setting, municipalities likely would not. Similar structures exist throughout United States, limiting the power of municipalities to compel speech even when the Constitution might give such authority to the state.[81]

Government Speech

Despite their limited authority to compel private speech, municipalities often require the posting of certain items, such as building permits. This sort of document qualifies as government speech, which is not subject to the First Amendment.[82] The government may use the funding available to it to express a government opinion or advocate for certain government policies.[83] Further, the Court has found that the government can compel funding of government speech.[84] In *Johanns*, the Court considered a challenge to the Beef Promotion and Research Act of 1985 which allowed the use of funds from an assessment on the beef industry for promotion and marketing of beef consumption.[85] The Court looked at previous cases, such as *Barnette*

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and *Wooley,* that had determined that the government cannot compel a person to endorse a message that he does not agree with.[86] The Court also analyzed cases, such as *Keller* and *Abood*, that had found that the government cannot compel funding of private speech that a person disagrees with.[87] Distinguishing its facts from those cases, the Court found that compelled funding of government speech is permissible, whether or not the person compelled to fund the speech agrees with its message.[88]

It can be difficult to distinguish the holding in *Johanns* from *Wooley*, which found that the state cannot prohibit a citizen from covering up the state motto "Live Free or Die" on his vehicle's license plate.[89] Logically, a license plate is not dissimilar from a building permit, which must be displayed on private property. *Johanns* itself distinguishes *Wooley* by stating that the presence of the motto essentially required the citizen to use his vehicle as an advertisement or billboard for the State's ideologic message.[90] Taking that reasoning on its face, municipalities might run into problems when requiring a building permit displayed on private property. One focus in the *Wooley* decision, however, was on the interest that the state provided for requiring the message.[91] In fact, the *Wooley* decision likely would have come out differently if the citizen had covered the words "New Hampshire" or the license plate number itself. The State had provided that its interest in requiring the words to be visible was in identifying that the vehicle had the proper license plates for its type.[92] The Court found that this is not sufficient reasoning because the license plates at issue have other distinguishing features and the motto is an expression of ideology that is not needed for that purpose.[93] As long as a building permit is tailored to the government interest it is intended to support, without ideological commentary, the government can likely compel a property owner to display this government speech.

Further, the Court has previously found that a requirement to allow private speech on private property did not infringe on the property owner's First Amendment rights where it was not likely to be identified as the speech of the owner and the owner was free to dissociate himself from all such views.[94] In *PruneYard*, the Court reviewed a requirement that a privately-owned shopping center in California allow private citizens to speak and pass out petitions on the property.[95] The Court distinguished *Wooley* in stating that the shopping center had chosen to be open to the public.[96] Because it is a publicly-accessible property, it is not as likely that the views expressed by members of the public would be attributed to the property owner as they would when attached to a citizen's personal vehicle.[97] The property owners are also free to put up signage stating that they do not agree with the messaging.[98] Similarly, building permits and other postings required by municipalities tend to be placed in areas open to the public. If a property owner disagreed with the contents of the document, he would be free to express his opinion as well. Based on this analysis, it seems clear that cities would not violate the First Amendment rights of property owners when requiring these documents to be displayed.

Conclusion

Because the governing body of a municipality is generally more accessible to citizens than the state or federal legislature, direct petitions or requests from citizens are more common at city hall. When citizens request that the municipality compel speech, the city attorney's office must be careful to review the limitations that the First and Fourteenth Amendments might put on the requested action. Both the federal Constitution and preemption from the state impact the ability of a municipality to act. These limitations leave municipalities with little ability to compel the speech of others. City attorneys should be aware of these limitations both in the context of requested legislation within their municipalities and with regards to the content of government documents that private property owners are compelled to display. In the case of Corpus Christi's initiative petition, the City Attorney's Office opined that City Council did not have the authority to compel medical professionals to provide information about alternative COVID-19 treatment practices. When presenting the initiative petition to City Council, the City Attorney's Office included an ordinance without the compelled speech requirements.

Notes

1. "*Initiative*. The registered voters of the city shall have the power to propose ordinances to the city council and, if the council fails to adopt the ordinance in substantially the form in which it was presented, to adopt or reject the ordinance proposed at an election as provided herein." Corpus Christi, Tex. City Charter art. I, § 4(a)(1) (2010)
2. Corpus Christi, Tex. City Charter art. I, § 4(d) (2010).
3. U.S. Const. amend. I; U.S. Const. amend. XIV, §1.
4. Minersville School District v. Gobitis, 310 U.S. 586, 591 (1940).
5. *Id.*
6. *Id.* at 592.
7. *Id.* at 600.
8. *Id.*
9. W. Va. State Bd. of Education v. Barnette, 319 U.S. 624, 626 (1943).
10. *Id.* at 629.
11. *Id.*
12. *Id.*
13. *Id.* at 630.
14. *Id.* at 642.
15. *Id.*
16. Wooley v. Maynard, 430 U.S. 705 (1977).

17. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (finding that the government could not require a parade organizer to allow an LGBT group to participate and display a banner).
18. Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986) (finding that a utility company could not be compelled to include certain information in envelopes sent to customers).
19. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (finding that state law cannot compel a newspaper to run an opposing viewpoint).
20. "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." Boy Scouts of America v. Dale, 530 U.S. 640, 650 (2000) (finding that the government cannot compel the Boy Scouts of America to hire a homosexual Scoutmaster as employment by the Boy Scouts is expressive association).
21. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 52 (2006).
22. *Id.*
23. *Id.* at 53.
24. "As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do--afford equal access to military recruiters--not what they may or may not say." *Id.* at 60.
25. *Id.* at 69-70.
26. *Id.*
27. Abood v. Detroit Bd. of Educ., 431 US 209, 232 (1977).
28. *Id.* at 235-36.
29. Keller v. State Bar of Cal., 496 US 1, 13-14 (1990).
30. Janus v. AFSCME, Council 31, 138 S.Ct. 2448, 2467 (2018).
31. *Id.*
32. Jarchow v. State Bar, 140 S. Ct. 1720 (2020).
33. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018)
34. *Id.* at 1723.
35. *Id.*
36. *Id.*
37. "If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference." Id.
38. *Id.* at 1727 (opining that while the rights of homosexuals should be recognized, "the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.")
39. *Id.* at 1731-32.
40. *Id.*
41. Telescope Media Group v. Lucero, 936 F.3d 740 (8th Cir. 2019).
42. *Id.* at 747-48.
43. *Id.* at 749.
44. "Even antidiscrimination laws, as critically important as they are, must yield to the Constitution. And as compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment." *Id.* at 755 (citing *Hurley*, 515 U.S. at 579).
45. *Id.*
46. *Id.* at 757-59.
47. *Id.* at 759.
48. 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021).
49. *Id.* at 1169-70.
50. *Id.* at 1170.
51. *Id.* at 1181.
52. *Id.*
53. *Id.* at 1179.
54. 303 Creative LLC v. Elenis, 143 S. Ct. 77 (2022) (granting certiorari); Transcript of Oral Argument, 303 Creative LLC v. Elenis, held on December 5, 2022 (No. 21-476), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-476_n7io.pdf.
55. *See, e.g.,* Cole v. Richardson, 405 U.S. 676 (1972); Bond v. Floyd, 385 U.S. 116 (1966); Connell v. Higginbotham, 403 U.S. 207 (1971).
56. *Cole*, 405 U.S. at 680 (citing Law Students Research Council v. Wadmond, 401 U.S. 154 (1971); Baird v. State Bar of Arizona, 401 U.S. 1 (1971); *Connell*, 403 U.S. at 209 (1971) (MARSHALL, J., concurring in result)).
57. "Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected." *Bond*, 385 U.S. at 136.
58. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 632-34 (1985).
59. *Id.*
60. *Id.* at 647.
61. *Id.* at 651.
62. Milavetz, Gallop, & Milavetz v. United States, 559 U.S. 229, 252-53 (2010).
63. *Zauderer*, 471 U.S. at 651.
64. Whalen v. Roe, 429 U.S. 589, 602-04 (1977).
65. Planned Parenthood v. Casey, 505 U.S. 833, 882-85 (1992).
66. *Id.* at 884.
67. *Id.*
68. *Id.* at 882-83.
69. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
70. Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).
71. *Id.* at 2368.
72. *Id.*
73. *Id.* at 2372.
74. *Id.* at 2372-73.
75. *Id.* at 2372.
76. *Id.* at 2373.
77. *See* Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907).
78. *Id.*
79. *See* Texas Occupations Code §151.003 (providing that the "primary means of licensing, regulating, and disciplining physicians" lies with

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the Texas Medical Board); and Texas Occupations Code §554.002 (providing that the Texas State Board of Pharmacy regulates the practice of pharmacy).
80. *See* Dall. Merch.'s & Concessionaires Ass'n. v. City of Dallas, 852 S.W.2d 489 (Tex. 1995).
81. *Hunter*, 207 U.S. at 178.
82. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009).
83. "[I]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000)
84. Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 559-60 (2005).
85. *Id*. at 553.
86. *Id*. at 557.
87. *Id*. at 557-58.
88. *Id*. at 559.
89. *Wooley*, 430 U.S. at 715.
90. *Johanns*, 544 U.S. at 557.
91. *Wooley*, 430 U.S. at 716-17.
92. *Id*. at 716.
93. *Id*.
94. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85-88 (1980).
95. *Id*. at 77.
96. *Id*. at 87.
97. *Id*.
98. *Id*.

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Notes

1. These include *Groff v. DeJoy* (a Title VII religious accommodation case); *303 Creative v. Elenis* (which involves the intersection of free speech and anti-discrimination laws); *Harper v. Moore* (the Independent State Legislature Theory case); *Tyler v. Hennepin County* (an important Takings case); *Sackett v. Environmental Protection Agency* (a WOTUS case); and National *Pork Producers Council v. Ross* (which involves the dormant commerce clause and the extraterritoriality principle).
2. Berry v. Bd. of Supervisors of Fairfax Cnty., No. 211143, 2023 WL 2604163, at *9 (Va. Mar. 23, 2023).
3. *Id*. at *1.
4. *See* Fairfax County Zoning Ordinance Modernization Project: Notable Changes from the 1978 Ordinance (April 6, 2021), available at: https://www.fairfaxcounty.gov/planning-development/sites/planning-development/files/assets/documents/zmod/executive-summary-notable-changes.pdf.
5. Va. Code Ann. § 2.2-3707(B).
6. In 2021, the General Assembly amended Va. Code Ann. § 15.2-1413 to allow a continuity ordinance to remain in effect for twelve months rather than six months.
7. The court refers to the County's ordinance as the "Continuity Ordinance" as it was an uncodified ordinance that was adopted on April 14, 2020.
8. *Id*. at *10, citing the Continuity Ordinance 1C
9. *Id*. at 3.
10. Berry, 2023 WL 2604163, at *9.
11. *Id*. at *10.
12. *Id*.
13. *See* Board of Supervisors v. Board of Zoning Appeals, 268 Va. 441, 446 (2004) (quoting Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915)) ("a local government's exercise of its zoning authority is 'one of the most essential powers of government[.]'")
14. Berry, 2023 WL 2604163, at *11.

Removing Individuals *cont'd from page 13*

to cross a particular parcel of land, enter a chosen dwelling, or gain admittance to a specific government building"); *see also* Harper v. Houston, 2017 U.S. Dist. LEXIS 214988, at *9 (W.D. Tenn. Nov. 15, 2017) ("municipalities are constitutionally permitted to limit access to facilities without impinging on the right to free movement"); *see also* Hannemann v. S. Door County Sch. Dist., 673 F.3d 746, 757 (7th Cir. 2012) (right to intrastate travel protects the right to move from place to place, not the right to access certain public places such as community centers and government office buildings); *see also* Banuelos v. Martinez, 2015 U.S. Dist. LEXIS 76039, at *7-8 (E.D. Cal. June 10, 2015) (no liberty interest to enter into any state office without restriction); *see also* McCraw v. City of Okla. City, 973 F.3d 1057, 1080-81 (10th Cir. 2020) (fundamental right to freedom of movement applies only interstate travel, not intrastate travel).
35. *See* Hirt v. Unified Sch. Dist. No. 287, 2019 U.S. Dist. LEXIS 70477, at *32 (D. Kan. Apr. 24, 2019) (policy not void for vagueness because it clearly spelled out the conduct that may lead to someone being denied access to a school).
36. Thomas v. Chi. Park Dist., 534 U.S. 316, 317 (2002).
36. *See* Yeakle v. City of Portland, 322 F. Supp. 2d 1119, 1122 (D. Or. 2004) ("A narrowly-tailored ordinance would not have a one-size-fits-all 30-day exclusion irrespective of the nature of the violation.").
37. *See* Cyr v. Addison Rutland Supervisory Union, 60 F. Supp. 3d 536, 552 (D. Vt. 2014) (notices against trespass deficient because they were not issued pursuant to any protocol and did not set out a process for contesting the notices); *see also* Sanchez v. City of Austin, 2012 U.S. Dist. LEXIS 190686, at *21-25 (W.D. Tex. Sep. 27, 2012) (city violated the protestor's procedural due process rights because of the broad guidelines provided for use by officials in implementing the policy, the lack of notice, and the post-deprivation-only nature and burden placed on the ban recipient for appeal process).