Compelled Speech:
You Can't Make Me Say That

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Aimee Alcorn-Reed
Assistant City Attorney
City of Corpus Christi

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

What I always thought free speech issues would look like:





What free speech issues actually look like in municipal law:

Initiative (Petition) to the Corpus Christi Mayor and City Council
from the Citizens of Corpus Christi

To the Honorable Mayor and City Councilmen of the City of Corpus Christi:

We, The People of the United States and Citizens of Corpus Christi, humbly petition the Corpus Christi City Council to redress and correct the grave injustices and the crimes against humanity related to Coronavirus Disease 2019 (COVID-19). Many in our medical community and the current Corpus Christi Nueces County Public Health District have failed to inform the public of and treat patients according to COVID-19 early treatment protocols that use safe, United States Food and Drug Administration (FDA) approved medicines. They have not ensured informed consent to experimental gene-transfer/therapy, while actively promoting COVID-19 shots and boosters. And, they have failed to inform the public of methods to improve individual immune systems and health.

WHEREAS: There are inexpensive and effective early treatment protocols for COVID-19 developed by independent doctors, physician groups and associations—Dr. Vladimir Zelenko, the Front Line COVID-19 Critical Care Alliance, the Association of American Physicians and Surgeons, and other medical organizations—who have separated themselves from the mainstream medical system, which parrots after the pharmaceutical industry. Doctors world-wide and several United States-based telemedicine organizations used these protocols, preventing hospitalization and death; and

Initiatives

- The City of Corpus Christi, like many cities, has a process for citizen initiative.
- Per our City Charter, when a qualified initiative petition is received, the City Attorney's Office must draft an ordinance, in legal form, that incorporates the substance of the text submitted.
- That ordinance is presented to City Council at the next regular meeting.

- On November 8, 2021, the City of Corpus Christi received a qualified initiative petition 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*, and prescribe such medicines as Hydroxychloroquine, Ivermectin, Budesonide and other safe, FDA-approved drugs as suggested by early treatment protocols.*

Flags

- *Minersville School District v. Gobitis*, 310 U.S. 586 (1940): allowed schools to expel students for refusing to salute the flag for religious reasons.
- *W. Va. State Bd. Of Education v. Barnette,* 319 U.S. 624 (1943): overturned *Gobitis.* Cannot require public school students to salute the flag.

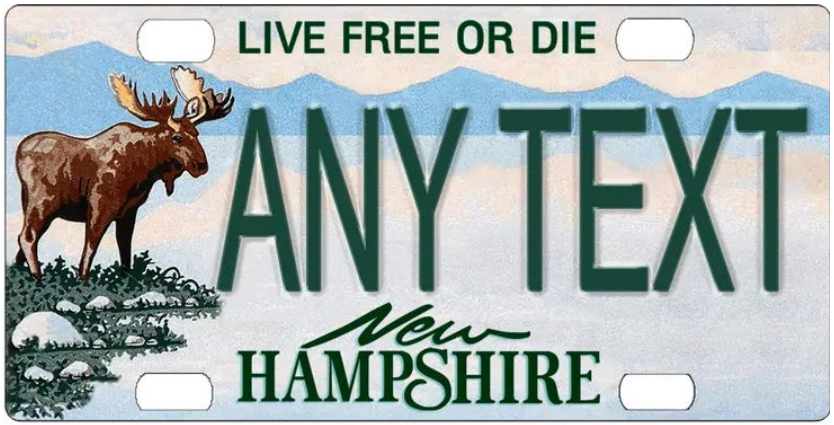


Freedom Not to Speak

- Inherent in the right to freedom of speech is the freedom not to speak.
- "If there is any fixed star in our constitutional constellation, it is 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."
  - *W. Va. State Bd. Of Education v. Barnette,* 319 U.S. 624, 642 (1943)

License Plates

- *Wooley v. Maynard*, 430 U.S. 705 (1977) – Cannot prohibit residents from covering the motto “Live Free or Die” on their license plates.



What Counts As Speech?

- Parades? Yes.
  - *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)
- Space in an envelope or a newspaper? Yes.
  - *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U.S. 1 (1986)
  - *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974)

What Counts As Speech?

- Flag Burning? Yes (symbolic speech).
  - *Texas v. Johnson,* 491 U.S. 397 (1989)
- Employment of a Scoutmaster? Yes (expressive association).
  - *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)
  - "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." At 650.

What Counts As Speech?

- Allowing military recruiters on campus? No.
  - *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).
  - Several law schools had stopped allowing participation of military recruiters in opposition to Don't Ask, Don't Tell.
  - Solomon Amendment – took federal funding from campuses if they did not treat military recruiters the same as other recruiters.
  - SCOTUS says this is okay because law regulates conduct, not speech.

What Counts As Speech?

- Services related to same-sex weddings? Yes for at least some services, but strict scrutiny TBD.
  - *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719 (2018) – could have resolved this issue but sent back to properly consider religious belief.



Same-Sex Weddings Cont.

- Circuit split on strict scrutiny:
  - 8th Cir. – *Telescope Media Group v. Lucero*, 936 F.3d 740 (2019): videographers can refuse to provide services to homosexual couple on basis of religious beliefs. Anti-discrimination law did not pass strict scrutiny.
  - 10th Cir. - *303 Creative LLC v. Elenis*, 6 F.4th 1160 (2021): web designer cannot refuse to provide services to homosexual couple on basis of religious beliefs. Anti-discrimination law passes strict scrutiny. Cert. granted at SCOTUS. Case pending.

Required Funding of Speech

- *Abood v. Detroit Bd. of Educ.*, 431 US 209 (1977): can require all employees to pay amount equal to union dues, even if not member of union.
- *Keller v. State Bar of Cal.*, 496 US 1 (1990) – Bar dues can be used for items germane to the practice of law, but not political or ideological actions not relevant to the practice of law.
- *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018) – overruled *Abood* and determined that public sector employees cannot be forced to pay agency fees to union.

Compelled Speech in Regulation of Profession

- Oath of Office: Several cases have found that the State can require a person (typically an elected official or other government officer) to take an oath of office before serving.
  - Cole v. Richardson, 405 U.S. 676 (1972), for example, upheld a Massachusetts law that required all public employees to take an oath of office.
  - Limit: Cannot require oath that otherwise impacts constitutional rights or is vague.

Regulation of Profession Cont.

- Regulation of ads: Can include requirement that ads be accurate and contain certain disclosures.
  - *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985): can require certain disclosures in attorney advertisements.
  - *Milavetz, Gallop, & Milavetz v. United States*, 559 U.S. 229 (2010): can require bankruptcy law firm to identify itself as a debt relief agency and provide certain disclosures in advertising.

Regulation of Profession Cont.

- Required disclosures in medical profession:
  - Mandatory reporting - *Whalen v. Roe*, 429 U.S. 589 (1977): in regulating medical profession, can require disclosure of prescription information to State.
  - Informed Consent - *Planned Parenthood v. Casey*, 505 U.S. 833 (1992): regulation of medical practice that incidentally regulates speech is acceptable. Can require doctors to disclose certain information in order to obtain informed consent of the patient.

Regulation of Profession, Cont.

- *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018): clearly lays out the two ways that the government may regulate professional speech.
  - May require disclosure of factual, noncontroversial information in commercial speech (citing *Zauderer*).
  - May regulate professional conduct even if doing so incidentally burdens speech, specifically in the context of informed consent for a medical procedure (citing *Casey*).

Preemption

- State's right to act is superior to that of a municipality. State may preempt City from taking action.
  - *See Hunter v. Pittsburgh*, 207 U.S. 161 (1907).
- The State, not the City, has the authority to regulate most professions, including requirements that medical professionals disclose of information for purposes of informed consent.

Municipalities have limited authority to compel speech, but we all require posting documents like these.





Government Speech

- Government speech is not subject to the First Amendment Free Speech Clause as the government has a right to speak for itself.
  - *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009)

Use of Gov't Funds for Speech

"[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)

Compelling Gov't Speech

- *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005)
  - Federal government imposed an assessment on sale and importation of cattle to fund beef promotional campaign.
  - Under logic of the *Janus* case, beef industry filed suit.
  - Holding: Gov't can compel funding of government speech.

Compelling Gov't Speech Cont.

- *Wooley* (license plate case) likely would have been decided differently if the citizen had covered the words "New Hampshire."
  - There is a legitimate government interest in ensuring that all vehicles have proper type of plate.
  - Motto (Live Free or Die) did not need to be visible to serve that purpose and it was ideological.

Gov't Speech Best Practices

- Can use funds for government speech, even where taxpayer disagrees with content. (*Southwork* and *Johanns*)
- When requiring display of government speech/document, limit the content of the to serve gov't purpose and avoid ideologic statements. (*Wooley*)
- Require it to be placed in a publicly-accessible area where the owner is free to express his disagreement with any content. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)

Questions or Comments

Aimee Alcorn-Reed

AimeeL@cctexas.com

361-826-3360