

## CONSTITUTIONAL LAW

### Constitutional Law: Due Process

***Massey v. Charlotte County,***  
842 So. 2d 142 (Fla. 2d Dist. App. 2003)

*Editor's Note: The following case digest was originally published in the 2004 Local Government Law Symposium. 33 Stetson L. Rev. 714 (2004). In the Facts and Procedural History section, the digest mischaracterized the ruling by the Second District Court of Appeal. The court quashed the Charlotte County Code Enforcement Board's order; it did not affirm the order. We regret this error and have included the corrected version in its entirety.*

When a government imposes fines and liens on a property owner for not complying with a county building code-enforcement board's mandate, due process requires that the property owner have the right to address factual findings that may lead to a deprivation of property.

#### FACTS AND PROCEDURAL HISTORY

Frank and Stephen Massey owned property in Charlotte County. The Charlotte County Code Enforcement Board determined, in a hearing, that, before renovating their property, the Masseys failed to obtain proper permits in compliance with the County building code. The Masseys received notice, attended the hearing, and had an opportunity to be heard. The Board issued an order stating that they had violated the County code, that they must apply for the proper permits within thirty days, and that they must have a final inspection within six months, or alternatively, that the Masseys must receive a demolition permit and remove the constructed improvements. Nearly four months later, a building inspector submitted an affidavit to the Board that stated that the Masseys had not complied with the Board's previous order, and requested the imposition of fines and costs.

The Board met nearly six months after its original order. At this meeting, the Board heard from the building inspector, but neither notified the Masseys nor offered them an opportunity to

be heard. The Board issued an order assessing fines and costs and imposed a lien against the Masseys' nonexempt property in the County. The order did not include "any avenue by which the Masseys could challenge" the action. *Massey*, 842 So. 2d at 144. Some indication exists that the Masseys applied for the proper permits before the Board issued the final order.

The Masseys appealed the Board's order to the circuit court acting in its appellate capacity. After the circuit court affirmed the Board's order, the Masseys sought a petition for writ of certiorari to quash the Board's order. The Second District Court of Appeal quashed the Board's order.

### ANALYSIS

Florida Statutes Chapter 162 controls the enforcement of local building codes and ordinances by code-enforcement boards. Chapter 162 provides, in relevant part, that after an initial opportunity to correct a code violation, a violator must be notified by a code-enforcement board, and may attend a hearing. Chapter 162 also requires that, at the hearing, the board take testimony from the code inspector and the violator, make factual determinations, and issue an order. If the violator fails to comply with the order, the board may, *without a hearing*, fine the violator for each day he or she is not in compliance with the order after evaluating "(1) the gravity of the violation, (2) any actions taken by the violator to correct the violation, and (3) any previous violations committed by the violator." *Id.* at 145 (citing Fla. Stat. § 162.09(2)(b), (2000)). Then, the order may be recorded as a lien.

In *Massey*, the court noted "procedural gaps" in Chapter 162 and, after finding no caselaw on point that addressed whether a hearing was required to issue a lien, used a "common-sense application of basic principles of due process" to reach its conclusion. *Id.* (quoting *City of Tampa v. Brown*, 711 So. 2d 95, 96 (Fla. 2d Dist. App. 1998)). Generally, due process requires "fair notice and a real opportunity to be heard 'at a meaningful time and in a meaningful manner'" to insure fair treatment when parties face "governmental decisions that deprive individuals of liberty or property interests." *Id.* at 146 (quoting *Keys Citizens for Responsible Govt., Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001), and citing *County of Pasco v. Riehl*, 620 So. 2d 229,

231 (Fla. 2d Dist. App. 1993)). This due-process requirement must be based upon, at least,

(1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute safeguards; and (3) the government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

*Id.* (citing *Keys Citizens*, 795 So. 2d at 948–949, and *Riehl*, 620 So. 2d at 229). If required, either a pre- or post-deprivation hearing may satisfy due process.

The Masseys had a compelling interest in keeping their property; thus, the court found that a hearing was necessary to safeguard that interest. Also, the court found that the Board did not use the least restrictive means by which to deprive the Masseys of their property. Accordingly, the court concluded that the Masseys were deprived of appropriate due process. Due process required that the Masseys be given an opportunity to address findings that they had not complied with the Board's original order, upon which the penalties were based. Either a pre- or post-deprivation hearing would satisfy the due-process requirements.

#### SIGNIFICANCE

Although not expressly found in the language of Florida Statutes Chapter 162, the Second District Court in *Massey* used common sense to expand the due-process requirement to include an opportunity for a party to be heard when a county code-enforcement board attempts to deprive that party of property through a lien or fines imposed for violation of the county code. However, the court stopped short of dictating a particular time within which the hearing must occur, stating that the deprivation hearing may occur either before or after a county board orders the penalty.

#### RESEARCH REFERENCE

- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 41 (1998 & Supp. 2003).

Jason M. Bard

**Constitutional Law: First Amendment, Equal Protection*****Rowe v. City of Cocoa, Florida,***  
358 F.3d 800 (11th Cir. 2004)

A local government body does not violate the First Amendment or the Equal Protection Clause when it limits the speech of nonresidents at city council meetings for the purpose of conducting an efficient meeting, and the limitation is not based on content or viewpoint.

**FACTS AND PROCEDURAL HISTORY**

The Rules of Procedure for the City of Cocoa's Council meetings allowed the Council to restrict the speech of non-residents, except in specific circumstances. The Council reserved the option of allowing up to thirty minutes of "delegations" during the meeting. *Rowe*, 358 F.3d at 801. During delegations, any taxpayer or city resident was permitted to address the Council on "any subject of general or public interest." *Id.*

Clarence Rowe was a non-resident who frequently participated in City of Cocoa Council meetings. During two separate meetings, Mayor Judy Parrish referred to the residency requirement in the Rules of Procedure and restricted Rowe's speech during the delegations segment. Mayor Parrish restricted Rowe's remarks to issues related to the Council's agenda for that meeting.

Rowe sued the City and Mayor Parrish under 42 U.S.C. § 1983 (2000). He argued that the limitations on non-resident speech violated his First Amendment freedom of speech and expression. He also alleged that the limitation violated his right to equal protection under the Fourteenth Amendment. The district court granted summary judgment in favor of the City and Mayor Parrish. Rowe appealed the grant of summary judgment order to the Eleventh Circuit Court of Appeals, asserting that the residency restriction was (1) a violation of his First Amendment rights because it was facially overbroad; and (2) an infringement on his Fourteenth Amendment right to equal protection because it treated residents and non-residents differently. The Eleventh Circuit Court affirmed the district court's decision to grant summary judgment in favor of the City.

## ANALYSIS

The Eleventh Circuit Court first addressed the issue of whether the residency requirement constituted a facial violation of the First Amendment. Relying on its decisions in *Jones v. Heyman*, 888 F.2d 1328, 1331–1332 (11th Cir. 1989), and *Crowder v. Housing Authority of City of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993), the court established that, because a city council meeting is a limited public forum, the government may restrict speech at the meetings to designated subject matter. However, such restrictions are permissible only to the extent they are “content-neutral” and “narrowly tailored to serve a significant government interest.” *Rowe*, 358 F.3d at 803 (quoting *Perry Educ. Assn. v. Perry Loc. Educators Assn.*, 460 U.S. 37, 45–46 (1983)). The City Council’s rules restricted non-resident speech based on its relevance to the meeting’s agenda and not according the speech’s content; therefore, the court reasoned that the rules were content-neutral. Consistent with its prior decision, the court found a substantial government interest in the Council’s goal of holding “orderly, efficient meetings of public bodies.” *Id.* (quoting *Jones*, 888 F.2d at 1332). Thus, the court held that the residency requirement in the City Council’s rules was facially valid under the First Amendment.

Next, the court examined whether the City Council’s rules violated Rowe’s right to equal protection under the Fourteenth Amendment. The court relied on *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992), to explain that the purpose of the Equal Protection Clause is to prevent the government from treating similarly situated persons differently from one another. It is not to prevent classifications. In the instant case, because the purpose of the City Council meetings was to “conduct business for the City and its residents,” the residents and non-residents were differently situated at the meetings. *Rowe*, 358 F.3d at 803. Therefore, the City’s goal of allowing its residents a greater voice at its meetings was reasonable. The court noted that speech at a limited public forum may not be restricted based on viewpoint. Because the City Council based its regulation solely on residency, the court held that the regulation was “reasonable and viewpoint-neutral.” *Id.* at 804. Accordingly, the court decided that the regulation on non-resident speech did not violate the Equal Protection Clause of the Fourteenth Amendment.

### SIGNIFICANCE

*Rowe* clarifies the previously unresolved issue of whether residency is an acceptable restriction on speech at a limited public forum. It establishes that residency restrictions are a permissible means of restraining speech to promote the government's interest in a systematic and efficient meeting.

### RESEARCH REFERENCES

- Fla. Atty. Gen. Op. 2004-53 (Oct. 14, 2004) (available at 2004 WL 2339339).
- Eugene McQuillan, *The Law of Municipal Corporations* vol. 5, § 19:25 (3d ed., West database updated July 2004).

Deirdre F. Aretini

### Constitutional Law: First Amendment—Ordinances

***Burk v. Augusta-Richmond County*,**  
365 F.3d 1247 (11th Cir. 2004)

An ordinance requiring a permit for political demonstrations is not content-neutral, and therefore, is subject to strict scrutiny analysis under the First Amendment. Further, a provision requiring applicants to submit an indemnification notice “in a form satisfactory to the” municipal attorney gives the municipality excessive discretion to deny permit applications, also invalidating the ordinance.

### FACTS AND PROCEDURAL HISTORY

Appellants Martha Burk, Chairperson of the National Council of Women's Organizations, and the Rainbow/PUSH Coalition (Burk) announced in 2002 that they were going to protest Augusta National Golf Club's male-only membership policy during the 2003 Masters Tournament. Br. of Appellants at 2, *Burk*, 365 F.3d 1247. The tournament is hosted by Augusta National in Richmond County, Georgia. In response, the Augusta-Richmond County Commission enacted County Code § 3-4-11. That section requires groups of five or more people to apply for a permit before a demonstration or protest. Another code section defines “protest” and “demonstration” as “[a]ny expression of support for, or protest

of, any person, issue, political or other cause or action which is manifested by the physical presence of persons, or the display of signs, posters, banners, and the like.” *Burk*, 365 F.3d at 1250 (quoting Augusta Richmond County Code (Ga.) § 3-4-1(e) (2003)). Section 3-4-11 also requires applicants to indemnify the county by submitting a hold-harmless notice in a form “suitable to the county attorney.” *Id.*

Burk and the Coalition applied for a permit under § 3-4-11 to protest on the public sidewalk outside of Augusta National’s main gate during the tournament. Richmond County Sheriff Ronald Strength denied that application, but allowed the demonstrators to stage their protest at another part of the club. Br. of Appellants at 3, *Burk*, 365 F.3d 1247.

Burk sued the County in federal court to enjoin the enforcement of § 3-4-11, claiming that the ordinance was, both on its face and as applied to Burk, a violation of the First Amendment. The United States District Court for the Southern District of Georgia declined to issue the injunction, finding it unlikely that Burk would prevail on the merits of her claim. Burk appealed the trial court’s decision as to her facial challenge to the Eleventh Circuit Court of Appeals. Holding that § 3-4-11 was not a content-neutral speech restriction, the Eleventh Circuit Court ruled that the ordinance did not withstand strict scrutiny because there were less restrictive means to accomplish the ordinance’s aims. The court also ruled that the indemnification provision allowed the County too much discretion to deny permit applications. For both of these reasons, the court found § 3-4-11 to be unconstitutional and reversed the district court’s ruling.

## ANALYSIS

### The Permitting Provision

Augusta-Richmond County argued that § 3-4-11 was a content-neutral regulation and was therefore subject only to intermediate scrutiny. The County compared its ordinance to the Colorado statute at issue in *Hill v. Colorado*, 530 U.S. 703 (2000). In *Hill*, the United States Supreme Court examined a statute prohibiting solicitation and other forms of communication including “protest, education, and counseling,” outside of health-care facilities. *Burk*, 365 F.3d at 1252 (quoting Colo. Rev. Stat. § 18-9-122(3) (1999), as cited in *Hill*, 530 U.S. at 707). The County rea-

soned that, if the protest was included among *Hill*'s several content-neutral classifications of communication, then an ordinance regulating only protest, like § 3-4-11, is likewise content-neutral. Because the ordinance serves the legitimate government interest of protecting pedestrian safety and keeping road traffic moving, the County argued, the court should find § 3-4-11 to be a reasonable "time, place, and manner" restriction. *Id.* at 1251.

The Eleventh Circuit Court found the *Hill* analogy lacking for two reasons. First, in *Hill*, the statute in question achieved its goal (i.e., protecting patients entering and exiting clinics) irrespective of speech content. The Colorado law did not ignore other types of speech that were likely to cause the harm that the law was designed to prevent. Section 3-4-11, by contrast, was directed only at political speech. The court noted that a sidewalk musical ensemble or a tailgate party could be just as unsafe or disruptive to traffic as a political protest, yet these forms of expression did not require a permit.

Additionally, the court pointed out that a five-person political discussion or silent sit-in would be far less disruptive than a larger gathering such as a street party, which would also fall outside § 3-4-11's scope. For these functions, the County had another ordinance with a broader scope—it required a permit for gatherings of more than 1,000 people. In the court's view, the idea that five political picketers might be more disruptive than 1,000 football tailgaters undermined the County's argument that § 3-4-11 was content-neutral. *Id.* at 1251 n. 7.

Having determined that the ordinance was content-based, the court then determined that it would not withstand the requisite strict scrutiny analysis. For § 3-4-11 to survive, the County would have to demonstrate that the ordinance was the least restrictive way to satisfy a compelling government interest. Because the County could have more effectively defined both the harm it sought to prevent and the speech it intended to regulate, the court ruled that the ordinance was unconstitutional.

In her concurring opinion, Judge Barkett stated that, even if § 3-4-11 was content-neutral (which she maintained it was not), it would still be unconstitutional because it grants excessive discretion to the sheriff to reject permit applications based on safety concerns. Because the court decided that the ordinance was content-based, the majority opinion did not address this issue.

Judge Roney's dissenting opinion suggested that § 3-4-11 was actually content-neutral because it applied to all political protests and demonstrations, not just those subscribing to a certain viewpoint or containing certain subject matter. The dissent, however, did not address the issue of the indemnification provision.

#### The Indemnification Provision

The Eleventh Circuit Court also examined § 3-4-11's indemnification requirement. The ordinance required that applicants provide "an indemnification and hold[-]harmless agreement in favor of [the City and County] in a form satisfactory to the attorney for Augusta, Georgia." *Id.* at 1255 (quoting Augusta Richmond County Code (Ga.) § 3-4-11(a)(3)). Burk alleged that this provision granted excessive discretionary authority to the County, a defect that would, at a minimum, introduce non-enumerated content-based criteria for the permits, and, at worst would have a chilling effect on political speech. The County's only argument was that it had not abused its discretion to date.

The court took the County's argument as a de facto concession that the ordinance granted excessive discretion to the municipal attorney. Because the ordinance had almost no historical context, even the most permissive and flexible practices could not cure the otherwise unconstitutional provision.

#### SIGNIFICANCE

*Burk* reminds municipalities of the importance of carefully tailoring ordinance language regarding prior restraints on speech. In this case, the County relied on the definitions of "protest" and "demonstrations" found in other code sections. Code drafters should be wary that, if such definitions limit the focus of a permitting ordinance (e.g. political protests in this case), then the ordinance itself will be considered content-based and therefore subject to strict scrutiny. In the words of the *Burk* court, "[f]ew laws survive such scrutiny, and this [o]rdinance [was] no exception." *Id.*

Additionally, it is important to note that a provision allowing the municipality to approve the form of any part of the applicant's request (e.g., the indemnification provision in this case), absent objective criteria to guide such approval, will likely render the ordinance unconstitutional. Provisions allowing such impermissi-

bly broad discretion also allow local officials to deny applications for reasons other than the application's format.

#### RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 5, §§ 19:48, 19:53 (3d rev. ed., Westlaw database updated July 2004).
- Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* vol. 1, §§ 6:14, 8:42 (Westlaw database updated Oct. 2004).
- Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 Ind. L.J. 801 (2004).

H. Brendan Burke

### **Constitutional Law: First Amendment—Religious Freedom**

#### ***Bannon v. School District of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004)**

Avoiding the disruption of a school's learning environment is a legitimate pedagogical concern that permits content-based censorship of a school-sponsored mural project when the mural project occurs in the context of curricular activity and bears the imprimatur of the school.

#### FACTS AND PROCEDURAL HISTORY

During a remodeling project, Boca Raton Community High School invited its students to paint murals on plywood construction barriers. The school assigned a faculty advisor to supervise the mural project and establish content guidelines that prohibited the creation of profane or offensive displays. The guidelines did not specifically prohibit the display of religious statements.

Sharah Harris, along with other members of the Fellowship of Christian Athletes, painted several murals with various religious messages and symbols. One mural, located next to the school's main office, included a crucifix and paraphrased *John* 3:16. A second mural, also near the office read, "Jesus has time for you; do you have time for Him?" *Bannon*, 307 F.3d at 1211.

And, finally, a third mural, located in a main hallway, read, "God Loves You. What Part of Thou Shalt Not Didn't You Understand? God." *Id.* Sarah and her friends did not receive content approval from the school administration prior to commencement of the murals.

After the students completed the murals, they attracted a great deal of attention from other students, faculty, and local media outlets. The publicity and controversy the murals generated distracted the students and teachers, and interfered with the administration of school operations. In an attempt to resolve the issue, school administrators told Sarah she would need to paint over the religious words and symbols in her murals, but that the other artwork could remain. She was not the only student asked to edit her artwork. Other students had been instructed to remove profanity, gang symbols, and satanic symbols from their murals. Sarah complied with the school's request.

Sarah's mother, Shelda Harris Bannon, filed suit on Sarah's behalf, alleging that being required to remove religious words and symbols violated Sarah's First Amendment rights. The federal district court granted summary judgment for the School District, finding that the mural project was not a public forum and that the school-sponsored speech was subject to censorship to the degree that the censorship served a legitimate pedagogical purpose. The district court held that avoiding the disruption of school operations was a legitimate pedagogical reason to censor Sarah's mural. On appeal, the Eleventh Circuit Court of Appeals affirmed the district court ruling.

#### ANALYSIS

The Eleventh Circuit Court began its analysis by determining the type of forum the mural project constituted. Schools do not possess the attributes of public forums normally used for assembly and the communication of political thought and public questions. Therefore, public schools are not treated as traditional public forums for the purpose of a First Amendment analysis. *Id.* at 1212 (citing *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)). Furthermore, a designated public forum is created "only by intentionally opening a nontraditional forum for public discourse." *Id.* at 1213 (emphasis omitted and citations omitted) (quoting *Hazelwood*, 484 U.S. at 267). Thus, a school creates a

designated public forum when the school opens its facilities for use by the general public, or a segment of the public.

The Eleventh Circuit Court found that in this case, the mural program was not a designated public forum. The school invited individual students to create the murals but did not give any indication that it intended to create a public forum to express any political, religious, or other view. The school maintained editorial control by prohibiting profane or offensive material, designated a faculty advisor for the project, and instructed the students to express themselves, not their political or religious views. For these reasons, the Eleventh Circuit Court agreed with the district court that Sharah's expression occurred in a nonpublic forum.

The regulation of scholastic nonpublic fora involves four categories of expression: vulgar expression, pure student expression, government expression, and school-sponsored expression. The court determined that the mural project represented school-sponsored expression. This category of expression is a hybrid between pure student expression and government expression, and occurs when the public might reasonably believe that the student activities "bear the imprimatur of the school." *Id.* (quoting *Hazelwood*, 484 U.S. at 271). Under this classification, schools may exercise censorship as long as the censorship is reasonably related to a legitimate pedagogical goal.

The United States Supreme Court's censorship analysis in *Hazelwood* applies to expression that (1) bears the imprimatur of the school, and (2) is exercised in a curricular context. Bannon argued the mural program did not meet the curricular activity criterion. The Eleventh Circuit Court disagreed. It explained that the *Hazelwood* Court defined curricular activities very broadly. Expressive activities are considered curricular if they are supervised by a faculty member and are intended to impart particular knowledge or skills to the students.

Because a faculty advisor supervised the mural project, and because the project was designed to allow the students to express themselves artistically while gaining an appreciation for the artwork of others, the court found that the mural program satisfied the *Hazelwood* test for curricular context. The Eleventh Circuit Court said it did not matter that the activity was not graded, was not mandatory, was outside of the regular school hours, and required a fee. The court said that the *Hazelwood* definition was

broad enough to capture the mural program. Because Sharah's expression was curricular and bore the imprimatur of the school, the School District could censor her expression provided the censorship served a legitimate pedagogical goal.

While *Hazelwood* allows censorship in some circumstances, it does not stand for the proposition that a school can censor school-sponsored speech based on viewpoint. *Id.* at 1215 (citing *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989)). *Hazelwood* did, however, authorize censorship based on content. The Eleventh Circuit found that Sharah's expression was clearly aimed at communicating inherently religious messages. She did not simply present secular topics from a religious perspective. Because no students were permitted to include religious words or symbols in their murals, the court found that the school restricted expression on the basis of content, not viewpoint.

Finally, the Eleventh Circuit Court held that because the censorship was aimed at abating the disruption that the religious words and symbols in Sharah's mural precipitated, the censorship served a legitimate pedagogical goal. Therefore, the content-based censorship of Sharah's mural met the *Hazelwood* criteria for censorship of school-sponsored expression, and the Eleventh Circuit Court affirmed the district court's decision.

#### SIGNIFICANCE

*Bannon* clarifies the United States Supreme Court's holding in *Hazelwood School District v. Kuhlmeier*. It applies the Supreme Court's criteria for the classification of activities as curricular, highlighting the broad spectrum of events that could be captured by the definition. Additionally, it establishes that the disruption of school operations, which the publicity of a controversial event could provoke, is a legitimate pedagogical concern that justifies content-based censorship in a non-public forum.

#### RESEARCH REFERENCES

- William M. Howard, *Cause of Action to Prevent the Display of Religious Symbols on Public Property*, 25 Causes of Action 2d 221 (2004).
- William M. Howard, *First Amendment Challenges to Display of Religious Symbols on Public Property*, 107 A.L.R.5th 1 (2003 & Supp. 2005).

- 16A Am. Jur. 2d *Constitutional Law* § 436 (Westlaw database updated May 2004).

Nicole Guillet

### **Constitutional Law: First Amendment—Signs and Billboards**

#### *Café Erotica of Florida, Inc. v. St. John's County*, 360 F.3d 1274 (11th Cir. 2004)

A county's sign ordinance was an impermissible prior restraint, authorizing "suppression of speech in advance of its expression," when the ordinance gave a County Administrator unlimited discretion to deny a sign permit based on the content of the proposed sign. *Café Erotica*, 360 F.3d at 1282 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 795 n. 5 (1989)). The ordinance also impermissibly favored commercial signs over political signs when it permitted commercial billboards to a size of 560 square feet but limited non-commercial signs to a size of thirty-two square feet; this content-based discrimination could not pass the strict scrutiny required of a time, place, and manner regulation. Severance of the discriminatory provision was inappropriate because the Administrator's discretion would have remained unbridled.

#### **FACTS AND PROCEDURAL HISTORY**

*Café Erotica of Florida, Inc.*, sued St. John's County to enjoin enforcement of the County's sign ordinance, Ordinance 99-51, alleging that it violated the First Amendment by imposing a content-based restriction on speech and by acting as a prior restraint on speech. The district court issued a preliminary injunction against the County, which then attempted to amend the ordinance. *Café Erotica* sued to have that ordinance declared unconstitutional, both on its face and as applied. The district court agreed that Ordinance 99-51 was unconstitutional, and found that the problematic provisions were not severable from the rest of the County's Land Development Code. The County appealed, arguing that different treatment of different types of signs (billboards, on-premise signs, and political-message signs) was based

solely on “safety and aesthetics.” *Id.* at 1291. The Eleventh Circuit Court of Appeals affirmed the finding that Ordinance 99-51 was facially unconstitutional and that the County Administrator’s unlimited discretion to deny permits constituted an impermissible prior restraint on speech.

### Prior Restraint

An ordinance is an unconstitutional prior restraint on speech even if it only “*authorizes* suppression of speech in advance of its expression.” *Id.* at 1282 (quoting *Ward*, 491 U.S. at 795 n. 5) (emphasis in *Ward*). A permitting regulation such as the County’s ordinance in this case “must (1) ensure that permitting decisions are made within a specified time period . . . and . . . (2) avoid ‘unbridled discretion’ in the hands of a government official.” *Id.*

Permitting decisions must be made within a specified time period to avoid “the risk of indefinitely suppressing permissible speech.” *Id.* at 1283 (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 214, 227 (1990)). This entails a two-part analysis: “(1) licensing officials must be required to make prompt decisions; and (2) prompt judicial review must be available to correct erroneous denials.” *Id.* In *Café Erotica*, the Eleventh Circuit Court found that Ordinance 99-51 met both parts: the ordinance provided that a permit application could not be delayed indefinitely, that applicants would receive any final denials within ninety days of submission, and that any adverse decision could be appealed to the circuit court within thirty days of the decision.

The court found, however, that Ordinance 99-51 was an unconstitutional prior restraint because it granted the County Administrator “unbridled discretion.” *Id.* Of paramount importance to the court was the need for “‘reasonably specific and objective’ grounds for denying a permit application that are ‘narrowly drawn, reasonable, and definite’ so as to sufficiently reduce the *potential* for content-based decision making.” *Id.* at 1284 (quoting *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002) (emphasis in *Café Erotica*)). Because Ordinance 99-51 lacked any limits on the Administrator’s discretion, it created the “potential” for content-based discrimination, and so was facially unconstitutional. *Id.*

### Content-Based Analysis

In order to be valid under the First Amendment, a time, place, and manner regulation must be content-neutral, “narrowly tailored to serve a significant governmental interest, and must leave open ample alternative channels for communication.” *Id.* at 1286. A regulation that is found to be content-based must pass the more rigid requirements of strict scrutiny: it must be narrowly tailored to serve a compelling governmental interest. Because Ordinance 99-51 favored commercial signs over political messages in terms of allowable size, it was content-based and therefore was required to pass strict scrutiny or be declared unconstitutional.

The County argued that it allowed larger commercial billboards but only smaller non-commercial signs for reasons of “safety and aesthetics.” *Id.* at 1291. The Eleventh Circuit Court was unpersuaded and concluded that Ordinance 99-51 was not narrowly tailored. Therefore, the court did not need to address whether aesthetics and public safety were compelling governmental interests.

### Severability

Finally, the court concluded that the ordinance’s unconstitutional provisions could not be severed because severance of the discriminatory, content-based provisions would not address the problematic unbridled discretion granted to the Administrator. Therefore, the court struck down the entire ordinance.

### SIGNIFICANCE

This case clarifies requirements that local governments must meet when drafting license permitting ordinances. The ordinances must be content-neutral, may not favor one type of speech over another, and may not give local government officials unlimited discretion to grant or deny applications. The Eleventh Circuit Court relied heavily on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) in deciding that the St. John’s County ordinance at issue was facially unconstitutional. The court recognized that Florida law requires severance of unconstitutional provisions in an ordinance, “*but only if* problematic provisions ‘can be distinguished . . . clearly [and] separated’ from the remainder” of the ordinance. *Id.* at 1292 (emphasis in original) (quoting *Lysacht v.*

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*City of New Smyrna Beach*, 159 So. 2d 869, 870 (Fla. 1964)). Therefore, local governments should not rely on notions of severability to save ordinances from being declared unconstitutional.

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### **Constitutional Law: Liberty Interests**

#### ***Zurla v. City of Daytona Beach*, 876 So. 2d 34 (Fla. 5th Dist. App. 2004)**

The right to walk while playing golf is not a fundamental liberty interest and thus is not protected by the United States Constitution. Municipalities may require golf cart usage to increase revenue at public courses.

#### **FACTS AND PROCEDURAL HISTORY**

In Daytona Beach, two municipally owned golf courses specify certain days and times when golfers must use golf carts, rather than walk, while playing. Golfer Daniel Zurla brought suit against the municipality, arguing that he has a constitutionally protected liberty interest to walk for exercise while playing golf. The trial court dismissed Zurla's pro se second amended complaint with prejudice. On appeal, Zurla sought injunctive relief and damages. The Fifth District Court of Appeal upheld the trial court's dismissal.

#### **ANALYSIS**

The Fourteenth Amendment guarantees individuals substantive due process protections including a fundamental liberty interest. This liberty interest includes "the right to contract, to marry, to bodily integrity, . . . and to raise one's children as one deems fit." *Zurla*, 876 So. 2d at 35. It does not, however, include the right to walk while playing golf. Thus, the Fifth District Court found that Zurla failed to state a cause of action under the Fourteenth Amendment.

Zurla also argued that the City's regulation was arbitrary and capricious. The Fifth District Court noted, however, that there is a presumption of rationality in a municipality's regulation. A plaintiff has "the burden . . . 'to negative every conceivable

basis which might support” the regulation. *Id.* (quoting the trial court’s order) (internal citations omitted). If a rational relationship exists between a legitimate governmental purpose and the challenged regulation, then the regulation will be upheld. Further, the rational relationship may be based upon unsupported speculation and does not have to be proven through fact-finding. In this case, the trial court noted and the Fifth District Court agreed that even the United States Supreme Court has observed that the use of golf carts may expedite play to increase revenue. Thus, the district court found that a rational basis supported the City’s regulation. The court further reasoned that, under Florida Law, “when a municipality operates in its proprietary capacity, it is governed by the same law and may exercise the same rights as a private corporation engaged in a similar undertaking.” *Id.* at 36 (emphasis omitted) (quoting the trial court’s order citing *City of Winter Park v. Montesi*, 448 So. 2d 1242, 1245 (Fla. 5th Dist. App. 1984)).

#### SIGNIFICANCE

Although the Constitution protects fundamental rights, an individual has no constitutional right to an unprotected interest. When a plaintiff makes a claim that a municipality’s regulation has violated his or her liberty interest, the courts will strictly interpret the Constitution. The municipality will prevail if the interest is not protected and the regulation has any conceivable rational basis.

#### RESEARCH REFERENCES

- 10A Fla. Jur. 2d *Constitutional Law* §§ 470–474 (Westlaw database updated Apr. 2005).
- 12A Fla. Jur. 2d *Counties and Municipal Corporations* §§ 93, 96 (Westlaw database updated Apr. 2005).

Mary Ellen Pullum

#### **Constitutional Law: Privacy**

***Thomas v. Smith*,**  
882 So. 2d 1037 (Fla. 2d Dist. App. 2004)

Floridians possess a reasonable expectation of privacy regarding their Social Security numbers as a matter of law. A trial court

should not inquire into the purpose behind the request for the information, when determining whether an individual possesses a reasonable expectation of privacy in a piece of information. Once the expectation for privacy is established, the underlying purpose should be evaluated as part of the court's review of the compelling interest and least-intrusive-means tests.

#### FACTS AND PROCEDURAL HISTORY

Fred A. Thomas and Joy S. Thomas (Thomasases) applied to the Property Appraiser's Office to have Florida's homestead tax exemption applied to the value of their home. They declined, however, to provide their Social Security numbers (SSNs) as required on the exemption-application form. Because their application was incomplete without the SSNs, the Property Appraiser denied their application. The Thomasases appealed the appraiser's decision to the Value Adjustment Board, which affirmed the application's denial. The Thomasases then paid the property taxes without benefit of the exemption.

The Thomasases sued Jim Smith, the Property Appraiser of Pinellas County, Florida, alleging that the requirement to provide their SSNs on the application for the homestead tax exemption violated the right to privacy provided by the Florida Constitution, the federal Privacy Act of 1974, and the Equal Protection Clauses of both the Florida and United States Constitutions. The Thomasases sought summary judgment, but the trial court denied their motion and dismissed their claims with prejudice. The Second District Court of Appeal reversed the trial court's decision and remanded the case for further inquiry.

#### ANALYSIS

After affirming the trial court's dismissal of the Privacy Act and Equal Protection claims, the Second District Court of Appeal reviewed the trial court's dismissal of the Thomasases' privacy claim under the Florida Constitution. The district court began by noting that the Florida Constitution provides the homestead tax exemption as a matter of right, so long as those claiming the exemption establish their "right thereto in the manner prescribed by law." *Thomas*, 882 So. 2d at 1039 (quoting Fla. Const. art. VII, § 6(a)). To satisfy the "manner prescribed by law" requirement, those seeking the exemption must comply with Florida Statutes

§ 196.011(1)(b) (1997), which requires that the exemption-application form “include a space for the applicant to list the social security number of the applicant” and his or her spouse. *Id.* (quoting Fla. Stat. § 196.011(1)(b)). The statute also provides that an applicant’s failure to file a completed application form by April 1 of the year for which the exemption is sought “constitutes a waiver of the exemption privilege.” Fla. Stat. § 196.011.

The Second District Court then reviewed the broad right of privacy given to Floridians by article I, § 23, of the Florida Constitution and the applicable test when reviewing “a claim of unconstitutional governmental intrusion into” that right. *Thomas*, 822 So. 2d at 1044. That test requires a court to first determine whether the person asserting the claim “possesses a legitimate expectation of privacy in the information . . . at issue.” *Id.* Once the plaintiff establishes a legitimate expectation of privacy, the burden shifts to the governmental body to show that a compelling interest justifies the intrusion and that “the intrusion is accomplished by the least intrusive means.” *Id.* (referencing *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985)).

The Second District Court then criticized the trial court’s initial finding that Floridians have no legitimate expectation of privacy in SSNs, stating that Florida citizens’ “legitimate expectation of privacy in [those numbers] is so obvious as to be hardly open to debate.” *Id.* at 1045. The court cited various federal and state laws, rules, and appellate decisions, all establishing that SSNs are recognized as private information.

The court also took issue with the manner in which the trial court reached its conclusion regarding the legitimacy of the Thomases’ expectation of privacy in the SSNs. The trial court concluded that the Thomases did not possess a legitimate expectation of privacy because the Thomases sought a benefit from the State, but the Second District Court noted that this analysis “misse[d] the point.” *Id.* at 1046. The court noted that, if governmental agencies were able to avoid the need to demonstrate a compelling state interest merely by conditioning the receipt of a governmental privilege upon disclosure, then the right to informational privacy in Florida would be rendered “a dead letter.” *Id.* at 1047.

After finding that the Thomases had a reasonable expectation of privacy in the SSNs, the Second District Court remanded their constitutional privacy claim and instructed the trial court to con-

sider the compelling-interest and least-intrusive-means prongs of the *Winfield* analysis.

#### SIGNIFICANCE

With this decision, the Second District Court established a legitimate expectation in the privacy of SSNs as a matter of law. It also clarified that, in determining whether a legitimate expectation of privacy exists in other pieces of information, a court must determine the legitimacy of the claimant's expectation without considering the purpose for which the information is sought. The purpose of the intrusion into a private matter should be evaluated as part of the *Winfield* analysis once the expectation of privacy is established.

#### RESEARCH REFERENCE

- 51A Fla. Jur. 2d *Taxation* §§ 1437, 1515 (Westlaw database updated Feb. 2005).

Lauren W. Berns, Jr.

### **Constitutional Law: Religious Freedom—FRFRA**

#### ***Warner v. City of Boca Raton,* 887 So. 2d 1023 (Fla. 2004)**

The Florida Religious Freedom Restoration Act of 1998 (FRFRA) provides greater protection for religious conduct than protections promulgated by federal law. 1998 Fla. Laws ch. 412. As a result, courts will analyze, under the strict scrutiny standard, any neutral law of general applicability that is challenged under the FRFRA if the plaintiff first establishes that the law in question substantially burdens the free exercise of religion.

#### FACTS AND PROCEDURAL HISTORY

In November 1982, the City of Boca Raton enacted a regulation that prohibited individuals from placing any vertical structures or decorations on gravesites within a City-owned and operated cemetery. Following that legislation, friends, families, and other visitors to the cemetery were restricted to placing only ground-level, horizontal stone or bronze structures on gravesites.

Nevertheless, several individuals continued to place vertical decorations on grave markers within the cemetery until 1991, when the City began more stringent enforcement of its regulation. First in 1991 and again in 1992, the City sent notices to cemetery plot owners requesting them to remove all vertical structures and decorations from their plots.

In 1996, however, after hearing much criticism from a group of plot holders, the City revised its regulation and allowed cemetery patrons to place vertical decorations on all gravesites during specified holidays and on individual gravesites for up to sixty days following new burials. Still, some plot owners declined to follow the City's amended regulation and, in 1998, the City advised those owners that it would begin removing any vertical structures that remained on gravesites in violation of the regulation. Some of the affected individuals brought a claim against the City alleging that its regulation violated FRFRA.

The plot owners initially brought suit in the United States District Court for the Southern District of Florida. The district court ruled in favor of the City, reasoning that the regulation did not significantly burden the plot owners' religious freedom because it still allowed them to express and follow their religious beliefs through the use of horizontal markers and decorations. The plot owners appealed to the Eleventh Circuit Court of Appeals, which certified two questions for consideration to the Florida Supreme Court. The Florida Supreme Court was asked to determine, first, whether FRFRA provided for protections of religiously motivated conduct beyond that protected by the United States Supreme Court's relevant holdings, and, if so, the breadth of that protection. The second question, which the Court rephrased after the Eleventh Circuit Court's certification, was simply whether the City's regulation violated FRFRA.

## ANALYSIS

Federal law concerning burdens on the free exercise of religious freedom changed frequently over the last several decades. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the United States Supreme Court overruled precedent that provided for the use of a rational-basis test when assessing the constitutionality of neutral laws of general applicability in favor of the more stringent strict scrutiny test. Then, in *Employment Division, Department of Hu-*

*man Resources of Oregon v. Smith*, 494 U.S. 872 (1990), after establishing a variety of exceptions to the *Sherbert* test, the Court completely eliminated the use of compelling state interest in religious expression cases. In 1993, Congress responded by enacting the Religious Freedom Restoration Act (RFRA), which restored the use of the *Sherbert* compelling-interest test to determine the constitutionality of general laws of applicability that burden religious freedom.

The Court later held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that RFRA's requirements did not apply to the states, thereby relieving state and local governments from applying *Sherbert's* compelling state interest test and holding them to the less stringent *Smith* rational-basis test. In 1998, in an attempt to counter the *Flores* decision, the Florida Legislature enacted FRFRA, which it modeled after RFRA. In *Warner*, the Florida Supreme Court was left to determine whether FRFRA imposed a higher burden on Florida's state and local governments than did the standards articulated by the United States Supreme Court in *Flores*.

The Florida Supreme Court held, with little discussion, that FRFRA provides more protections for the free exercise of religion than the applicable federal law. The Court was then left to determine just how much broader those protections are. It held that FRFRA requires courts to strictly scrutinize any neutral law of general applicability if such law substantially burdens individuals' religious freedom. However, the Court then inferred that, to invoke the strict-scrutiny analysis, plaintiffs must first prove that the regulations in question place a substantial burden on their right to the free exercise of religion. After considering several definitions, the Court held that, "a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Warner*, 887 So. 2d at 1033 (citing *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996)). Under that standard, cemetery plot owners were left to prove that the display of vertical decorations on gravesites was an expression of a sincere religious principle, and that the City's regulation prohibited them from making such an expression.

The Court recognized the appellant's behavior as a "practice motivated by a sincere religious belief," so as to satisfy the initial

requirement of the substantial-burden definition. *Id.* at 1034–1035. The Court found, however, that the regulation did not substantially burden their free exercise of religion because the City’s requirements allowed individuals to express their religious beliefs by placing ground-level decorations on gravesites and allowed them to display vertical decorations at specific times. The Court held that, while the regulation may have inconvenienced the plot owners, it did not forbid them from expressing their religious beliefs. As a result, the Court did not require the City to prove the necessity of its regulation under the compelling-state-interest test, which FRFRA would have otherwise called for.

### SIGNIFICANCE

Under *Warner*, plaintiffs challenging a law or regulation under FRFRA must prove that the regulation forces them to act in a manner that their religion forbids, or prevents them from doing something that their religion requires, before a court will require the government to prove that the restrictions imposed by the law further a compelling state interest using the least intrusive means possible. While the *Warner* holding provides Florida plaintiffs with a much greater opportunity to successfully challenge the constitutionality of laws that restrict their religious freedom than do the corresponding United States Supreme Court holdings, it also places a heavy burden upon those plaintiffs.

This is not to say, however, that the *Warner* decision completely favors the government. If the Appellants had proven that the regulation substantially burdened their exercise of religion, the City may have been unable to prove that its regulation furthered a compelling state interest or that it could not have furthered that interest in a less intrusive manner. Had the Florida Legislature and the Florida Supreme Court chosen, instead, to adhere to the United States Supreme Court’s reasoning in *Flores*, governmental entities would have needed only to prove the validity of their laws under the rational-basis standard, even if those laws created a substantial burden on the free exercise of religion.

### RESEARCH REFERENCES

- *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 2004 U.S. Dist. LEXIS 25570 (S.D. Fla. Sep. 30, 2004).

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- Patrick T. Currier, Student Author, *Freeman v. State of Florida: Compelling State Interests and the Free Exercise of Religion in Post-September 11th Courts*, 53 *Cath. U. L. Rev.* 913 (2004).
- Brian L. Porto, *Validity, Construction, and Operation of State Religious Freedom Restoration Acts*, 116 *A.L.R.5th* 233 (2004).

J. Jervis Wise

**Constitutional Law: Voting Rights*****Levy v. Miami-Dade County*,**  
358 F.3d 1303 (11th Cir. 2004)

An equal protection voting rights claim is nonjusticiable when the plaintiff's proposed remedy does not directly address the violation or requires the court to redistribute power among elected officials. Weighted voting formats do not satisfy the requirements of a valid judicial remedy.

**FACTS AND PROCEDURAL HISTORY**

Residents of unincorporated portions of Miami-Dade County alleged an equal protection violation when the County allowed residents of incorporated portions to elect County Commissioners. Because the County Commission governed both the County as a whole and the unincorporated areas, the plaintiffs alleged that the votes cast within the incorporated areas diluted their votes and diminished their ability to elect their own governing body. The plaintiffs argued that allocating votes to the county commissioners based on the ratio of unincorporated residents they represented would adequately address the imbalance. *Levy v. Miami-Dade County*, 254 F. Supp. 2d 1269, 1284 (S.D. Fla. 2003). The federal district court dismissed the plaintiffs' claim, finding that the weighted voting scheme proposed by the plaintiffs was nonjusticiable. The Eleventh Circuit Court of Appeals agreed with the district court and affirmed the decision. The court held that, while the concept of justiciability is concededly amorphous, a plaintiff is nonetheless charged with offering a remedy that may be judicially crafted to correct the alleged violation.

## ANALYSIS

A proposed remedy to a constitutional infringement on voting rights must satisfy two elements before it will be considered justiciable. First, the remedy must “directly address and relate to the constitutional violation itself.” *Id.* (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)). Second, governmental power must not be redistributed or restructured. *Id.* The district court concluded that the plaintiffs’ remedy failed to satisfy these tests. *Id.* at 1287–1288.

The district court explained that the plaintiff’s proposed solution did not directly address the alleged violation because it did not entirely exclude incorporated voters from the electorate. The remedy merely would have ameliorated the violation, rather than solve it. *Id.* at 1285. Further, the court objected to the practical problems in the plaintiffs’ remedy, primarily its vagueness regarding what issues and circumstances might invoke the weighted voting format. *Id.* at 1286. Thus, the solution failed to directly address a voting rights claim as required by *Milliken*. *Id.* at 1287.

Because the weighted voting system required a considerable modification to local government, judicial intervention would have exceeded the court’s authority. *Id.* The authority to alter local government in this fashion rests solely with the state. *Id.* The weighted voting system would have required the County Commission to redistribute power based on the number of unincorporated voters in a given Commissioner’s district and would have transformed the manner in which the Commission operated. *Id.* While voting rights may be altered to cure constitutional defects, the judicial redistribution of power among elected officials is an improper exercise of a court’s authority. *Id.* at 1284.

## SIGNIFICANCE

This case clarifies the issue of justiciability in the context of alleged voting rights violations. When crafting potential remedies or defenses to voting rights violations, practitioners should be aware that the remedy must directly address the constitutional deficiency and may not exceed the judiciary’s authority.

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## RESEARCH REFERENCES

- Ashira Pelman Ostrow, *Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change*, 102 Colum. L. Rev. 1954 (Nov. 2002).
- 16C C.J.S. *Constitutional Law* § 931 (Westlaw database updated Jan. 2004).

Jay Daigneault