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MLRC Media Law Resource Center

MEDIALAWLETTER

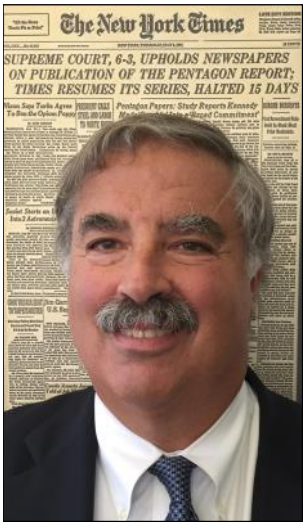
Reporting Developments Through August 28, 2018

From the Executive Director's Desk

Trump v. the Media: We Must Push Back

The free press in this country is under siege. It has been battered, impugned and undermined every day by a President who has no knowledge of, or care about, the fact that a system of checks and balances undergirds our constitutional democracy. The only question is: what are we, as media lawyers, going to do about it?

A year and a half into this Presidency the fact that this is the vilest and most antagonistic Administration as to the media is true beyond any reasonable doubt. While most presidents have had many issues with the press that covers them, none have shown the public enmity Trump has displayed on a daily basis. Those of us of a certain age remember Nixon – and his tapes evidence a real hatred and vindictiveness to the liberal press – but much of what he said was in private (to be made public only by the actions of Alexander Butterfield and the Supreme Court) and some of it actually spoken by his VP Spiro Agnew – "the nattering nabobs of negativism" penned by my former client at the Times Bill Safire. That seems downright picturesque in contrast to Trump's crude and rude tweets and speeches. Quite simply, no president has shown such indifference and, worse, hostility to justice, the rule of law and the constitutional role of the Fourth Estate.



George Freeman

Beyond the meaningless mantra of fake news – last month Trump added a new adjective to his nickname for the media: "the fake, fake, disgusting news" – he has repeatedly called the press "the enemy of the people," an expression his mendacious press secretary has expressly declined to disavow. Doubling down on this theme, last month on the very day 350 newspapers pushed back with editorials supporting the importance of a free and independent press, Trump stated that "the fake news media is the opposition party." And at rallies he has pointed to journalists and called them "absolute scum" and "dishonest," loudly claiming – blind to its irony - that "they only make up stories," all serving to rile up already hostile and potentially violent supporters at his events. As but one specific example, during the campaign he set his sights particularly on NBC's Katy Tur – our delightful moderator of last year's MLRC Annual Dinner- calling her out as a "liar" and "third rate reporter."

None of this is simply emotional or accidental. It is all part of a distinct strategy. As he explained to CBS's Lesley Stahl – a panelist at our Annual Dinner program about 1968 this coming November – his attacks on the media are all part of an attempt to "discredit" what is being reported. Since the press and the judiciary are the two branches (given the Congress' impotence) which can help block his agenda, not to mention cause him severe criminal and political troubles, he is manipulating the public into not believing whatever the media says that might be critical of him and his positions. By his daily bluster against the media, he is attempting to lower its credibility so that the public won't believe the news which is being – accurately - reported. Fundamentally, our Liar-in-Chief is weakening the role and respect of the

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A year and a half into this Presidency the fact that this is the vilest and most antagonistic Administration as to the media is true beyond any reasonable doubt. Quite simply, no president has shown such indifference and, worse, hostility to justice, the rule of law and the constitutional role of the Fourth Estate.

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media to the extent it can no longer fulfill its duty as a watchdog over government – and leave him unchecked to lie, commit abuses and take actions in his, not the country's, interests. (This is combined with a complementary agenda of putting out the absurd notion that there is no truth, and that, in Ms. Conway's laughable words, "alternative facts" are as valuable as the actual facts. Hence, his attorney Rudy Giuliani's recent remarkable statement that "truth isn't truth" – one can't help but wonder whether Rudy took that position while prosecuting cases as the U.S. Attorney for the Southern District of New York.)

Unfortunately, his strategy is working. Huckster that he is, he has successfully sold a bill of goods about the press to the American people. Across a number of polls in the last year, on the question of who is more believable, or who do you trust more, the media or Trump, there is a virtual dead heat – and that's for a man whom The Washington Post's Fact Checker found has made more than 4,000 false or misleading claims during his first 18 months in office. Surveys have shown the number of Americans who trust the press has dropped 30% since the post-Watergate era; only about 25% of Americans report to have a great deal of trust in the national media. Of course, given our polarized society, it's not surprising that these numbers vary directly with political affiliation: only about 15% of Republicans have a great deal of trust in the national media, while close to 40% of Democrats do. According to a '17 Pew survey, 85% of Republicans and GOP-leaners believe the news media has a negative effect on the country. Even worse from a purely First Amendment point-of-view, 26% of our countrymen agree that "the president should have the authority to close news outlets engaged in bad behavior."

Interestingly, his attack on the media has not occurred, as we suspected and feared on Inauguration Day, through legal actions. Within a month of Trump's election, the MLRC

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convened a meeting of media inside counsel to beginning strategizing what to do about the new President's threatened legal moves against the media. In addition, we drafted a model brief which could be used in support of a case brought to protest retaliation by way of lack of access against disfavored journalists. Most of what we talked about at the meeting has not come to fruition. To our knowledge, the model brief has never been used.

Thus, Trump's threats to "open up the libel laws" were just bloviation. First, libel law is a creature of the state, not the federal government. Second, on a federal level, it's the Supreme Court, not the Executive, which might be able to somehow revise it. Third, and most important, when Trump was asked what he meant by that phrase, he said that when the media lie and intentionally write false things about people, plaintiffs ought to win lots of money – seemingly unaware that he was restating what the law already is; in fact, he was giving a pretty good definition of actual malice. Fourth, ironically, given his big mouth, he is far more likely to be a libel defendant than a plaintiff, so he will have need for the very defenses he is belittling; indeed, last week, his lawyers filed an anti-SLAPP motion to dismiss Stormy Daniels' libel suit against him.

Since the press and the judiciary are the two branches (given the Congress' impotence) which can help block his agenda, not to mention cause him severe criminal and political troubles, he is manipulating the public into not believing whatever the media says that might be critical of him and his positions.

While he has kicked a few disfavored reporters out of press conferences and photo ops (and Sean Spicer did keep some liberal reporters from a press gaggle), those have been rather unsuccessful and relatively insignificant one-offs, not worthy of a legal confrontation. His administration's responses to FOIA requests has been poor – but so have every other recent administration's, Democratic or Republican. And despite much bluster about leaks and leakers – ironic in light of his leaks, acting as a fake anonymous source, about how good he was in bed with Marla – his team has prosecuted leakers at about the same rate as the previous administration. Most important, despite some threats, there has been no gamechanging prosecution of the mainstream media for publishing leaks, even national security leaks, a step which, if taken, could really change journalism as we know it.

So the damage has been on the PR front, not in the legal arena. But that doesn't mean that we, as media lawyers with journalists as clients and with a deep knowledge of, and abiding devotion to, the First Amendment and a free press should sit idly by while the press is being decimated. Marty Baron, editor of The Washington Post, has said that the way newspapers can respond to Trump's attacks is with good journalism. And that has happened, but I fear all the solid journalism which has taken place – and there has been a lot of great work – has not been enough.

Last month, some 350 newspapers heeded the call of The Boston Globe, and ran editorials in support of the free press. With an irony that seemed to escape him, Trump labeled the effort "collusion," even though each newspaper obviously had its own ideas and wrote its own editorial. Many included pro-press quotes from the founding fathers; others emphasized themes

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of informing the citizenry, bringing communities together and keeping government accountable. Many were quite telling:

- "The true enemies of the people – and democracy – are those who try to suffocate truth by vilifying and demonizing the messenger." Des Moines Register
- "At a practical level, we journalists sit through boring government meetings…so you don't have to. It's not as lofty a statement as the First Amendment, but it serves." Arizona Daily Star
- "Mr. Trump's behavior has placed the American experiment in democracy in unprecedentedly perilous times, and a free press has become even more central to our nation's survival than ever." Berkshire Eagle
- "It sends an alarming signal to despots from Ankara to Moscow, Beijing to Baghdad, that journalists can be treated as a domestic enemy." Boston Globe
- "The true enemy of any democracy is ignorance, and the only way to battle ignorance is through the acquisition of knowledge: a single set of well-researched, incontrovertible, unbiased facts." Cape Cod Times
- "When someone calls the news 'fake' simply because they don't like what they read, they are trampling on your First Amendment rights." Chagrin (Ohio) Valley Times

And so on.

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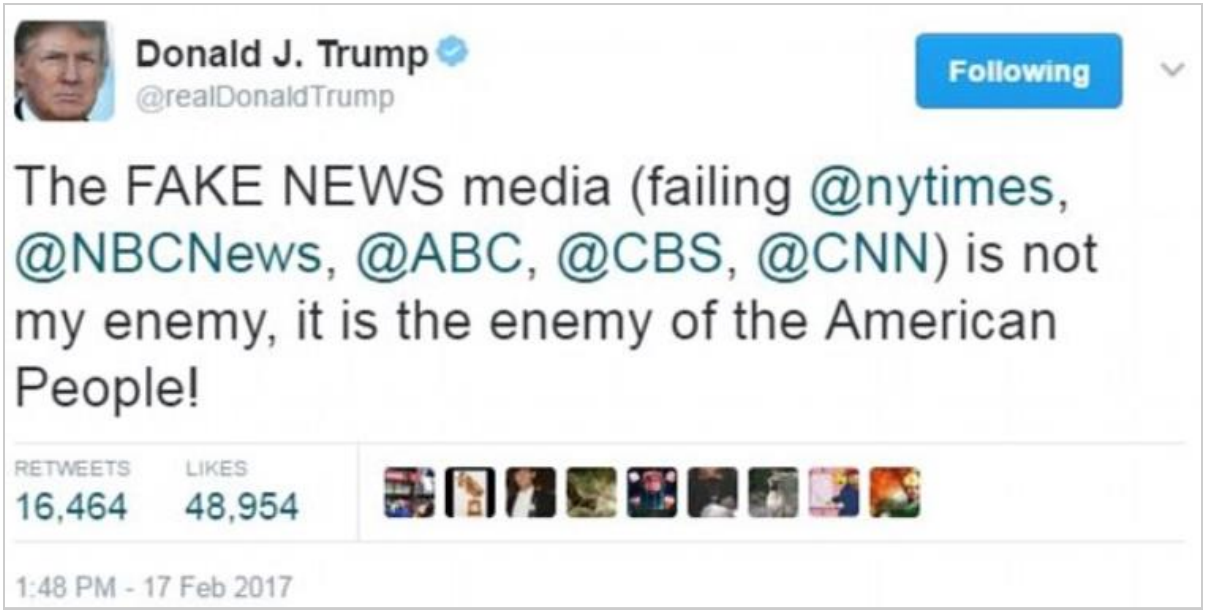

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To me, this concerted and timely action was entirely proper, and, in fact, much needed. But it was only a small, albeit worthwhile, step. More is needed.

In addition to the in-house counsel strategy meeting and model brief described above, we have this summer gone on the road to many journalistic conferences and, in addition to our usual legal workshops, presented a program on Trump's Threats to a Free Press and the First Amendment. As I have indicated in this column before, we have joined with four other media non-profit groups to work on a social media campaign heralding the importance of a free press which is to launch early next year. We also are supporting and combining with the efforts of another group to encourage the public to write and engage candidates in the upcoming midterm elections on the question of what the candidates' plans are to protect press freedom. Last year we initiated a plan to hold town meeting at local newspapers and broadcast stations in the red states to discuss the role of the press and the significance of First Amendment freedoms, but, frankly, we were unsuccessful in getting that off the ground.

As always, I'm happy to receive ideas from members as to what other steps we might take, and I would be happy to publish in my next column any emails or letters reacting to this column or giving examples of what you are doing on this vital topic.

One last note: the MLRC is not a political organization, and I certainly don't mean to argue politics, either as a representative of MLRC or on my own. We are proud of the diversity in our membership and respect those on all sides of the political spectrum. But I strongly believe that the issues confronted here are not political, and give rise to themes and views which all our members share. Indeed, how can those of us who are knowledgeable about the country's First Amendment heritage and values and work alongside journalists every day not be of common mind on this subject?

The opinions expressed in this column are those of the author and not the MLRC. We welcome responses at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

Hassell v. Yelp: California Supreme Court Affirms Broad Section 230 Immunity

By Thomas R. Burke, Rochelle Wilcox, and Ambika Doran

In a closely watched case, the California Supreme Court confirmed it will continue to broadly interpret the immunity provided by Section 230 of the Communications Decency Act, 47 U.S.C. § 230. *Hassell v. Bird*, S235968 (Cal. July 2, 2018). The court reversed an order requiring the online review website Yelp, a non-party, to take down allegedly defamatory reviews that the defendant in the case allegedly posted.

Factual Background

San Francisco attorney Dawn Hassell and her law firm sued Ava Bird, a former client, for libel, false light invasion of privacy, and emotional distress after Bird allegedly posted critical reviews on Yelp, a popular website that publishes tens of millions reviews and ratings of local businesses and other entities. The lawsuit sought damages as well as an injunction requiring Bird to remove the reviews. Hassell intentionally did not name Yelp as a party nor seek any relief (injunctive or otherwise) from Yelp. When Bird defaulted, the trial court held a "prove-up" hearing to hear Hassell's evidence and at her request, the court entered a default judgment that ordered both Bird *and* Yelp to remove the allegedly defamatory reviews.

The California Supreme Court confirmed it will continue to broadly interpret the immunity provided by Section 230 of the Communications Decency Act.

After Hassell pressured Yelp to comply with the order, Yelp filed a motion to set aside and vacate the judgment, arguing that it violated Yelp's due-process rights and was barred by Section 230. The superior court denied the motion, reasoning that Yelp had been aiding and abetting Bird's violation of the injunction through its continued publication of the reviews and its attempt to vacate the judgment.

The Court of Appeals affirmed the trial court's decision, holding that the trial court's removal order was permissible because it did not "impose any liability on Yelp." The court refused to follow cases holding that Section 230 applies to injunctive relief because in those cases, it said, there had not been a "judicial determination that defamatory statements had, in fact, been made…" Yelp petitioned for review by the California Supreme Court, which unanimously voted to hear the case.

California Supreme Court's Ruling

In an opinion by Chief Justice Cantil-Sakauye, the California Supreme Court reversed the Court of Appeals' decision. The court concluded that '"[w]here, as here, an Internet intermediary's relevant conduct in a defamation case goes no further than the mere act of

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publication—including a refusal to depublish upon demand, after a subsequent finding that the published content is libelous—section 230 prohibits this kind of directive".' (Citations omitted.)

In other words, "[t]he duty that plaintiffs would impose on Yelp … wholly owes to and coincides with the company's continuing role as a publisher of third party online content." The court noted, "[e]ven though plaintiffs did not name Yelp as a defendant, their action ultimately treats it as "the publisher or speaker of . . . information provided by another content provider." (§ 230(c)(1).) With the removal order, plaintiffs seek to overrule Yelp's decision to publish the three challenged reviews." (Op. at 22).

The court underscored the need to interpret Section 230 to accomplish its intent to promote the flow of information on the internet. In particular, the court noted that had Yelp been named as a defendant, it would have been entitled to immunity, and held that Section 230 barred this effort to "accomplish indirectly what Congress has clearly forbidden … directly." "Section 230(e)(3) does not expressly demand that a cause of action always be alleged directly against an Internet intermediary as a named defendant for the republisher to claim immunity under the statute." Rather, the court said, the "broad scope of section 230 . . . conveys an intent to shield Internet intermediaries from the burdens associated with defending against state-law claims that treat them as publisher or speaker of third party content, and from compelled compliance with demands for relief that, when viewed in the context of a plaintiff's allegations, similarly assign them the legal role and responsibilities of a publisher qua publisher." (Op. at 27 [citing *Barrett v. Rosenthal*, 40 Cal. 4th 33, 53, 56-57]).

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Characterizing plaintiffs' attempt to deprive Yelp of immunity as "creative, but it was not difficult," the court also emphasized that plaintiffs' "maneuver, if accepted, could subvert a statutory scheme intended to promote online discourse and industry self-regulation," and "would be particularly conductive to stifling, skewing, or otherwise manipulating online discourse." (Op. at 30-31). The court "conclude[d] that in light of Congress's designs with respect to section 230, the capacious language Congress adopted to effectuate its intent, and the consequences that could result if immunity were denied here, Yelp is entitled to immunity…." Because Yelp's Section 230 defense was dispositive, the court did not address the due-process argument.

Justices Chin and Corrigan joined the chief justice's opinion.

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Justice Kruger's Concurring Opinion: Due Process

In a concurring opinion, Justice Kruger noted multiple times that on the facts of this case, Section 230 also barred the removal order creating a majority on the Section 230 holding. But Justice Kruger ruled in favor of Yelp on due-process grounds, observing that "there is no exception that permits the sort of order we confront here: an order directing a nonparty website operator to remove third-party user content just in case the user defaults on her own legal obligation to remove it. Before Yelp can be compelled to remove content from its website, the company is entitled to its own day in court." (Op. at 1) She observed that the "trial court made no finding that Bird acts, or has ever acted, 'through' Yelp in the sense, relevant under *Berger* [*v. Superior Court*, 175 Cal. 719, 721 (1917)], nor does the record contain any such indication; we have no facts before us to suggest that Yelp is Bird's 'agent' or 'servant.'"

Section 230 barred this effort to "accomplish indirectly what Congress has clearly forbidden … directly."

Three justices dissented. Justice Cuellar, joined by Justice Stewart (a Court of Appeals associate justice assigned to the case by the chief justice), in a 40-page dissent, insisted that Yelp could not assert immunity under Section 230 because no cause of action was asserted nor liability imposed on it as the speaker or publisher of Bird's speech. Still, these dissenters also would have vacated the judgment and remanded the case to the trial court to determine whether Yelp had aided and abetted or otherwise acted in concert with Bird in violation of the court's injunction. In a separate opinion, Justice Liu concluded that Yelp had no statutory immunity from the removal order and that its due-process rights were not violated.

Chief Justice Cantil-Sakauye's plurality opinion took direct aim at the dissents, stating that "[t]he narrow, grudging view of section 230's immunity provisions advanced in both dissents is at odds with this court's analysis in *Barrett*, and for that matter with the views of virtually all courts that have construed section 230."

Davis Wright Tremaine LLP partner Thomas R. Burke represented Yelp in the Court of Appeals, along with former DWT Counsel Deborah Adler. Burke and DWT partner Rochelle L.

Florida Supreme Court Declines Review of Order Releasing Parkland Surveillance Videos

By Daniela B. Abratt

After months of legal wrangling between news organizations and government officials, the Florida Supreme Court in late August finally cleared the way for release of some video depicting the chaotic law enforcement response to the Valentine's Day mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida.

The video, captured by surveillance cameras mounted outside several of the school's buildings, depicted police officers arriving at the school just after Nikolas Cruz used an AR-15 automatic rifle to kill 17 students and staff members, as well as injure 17 others.

After expedited briefing, the Florida Supreme Court swiftly denied review of separate petitions filed by the School Board of Broward County, *School Bd. of Broward Cty. v. Cable News Network, et. al.*, SC 18-1280 (Fla. Aug. 22, 2018), and the Broward State Attorney's Office, *State Attorney's Office v. Cable News Network, et. al.*, SC 18-1227 (Fla. Aug. 22, 2018), for discretionary review of a Fourth District Court of Appeal decision requiring the release of the videos. The Court gave no reasons for its denials, stating only that rehearing would not be considered.

The Florida Supreme Court in late August finally cleared the way for release of some video depicting the chaotic law enforcement response to the mass shooting at Marjory Stoneman Douglas High School.

Public Records Requests and Petition for Access

The legal battle began in February when a coalition of news media companies sued the Broward County Sheriff's Office ("BSO") and the School Board after they were denied access to surveillance video from outside the school. The lawsuit was filed after news coverage and public officials' statements revealed confusion among first-responder law enforcement agencies, which may have hindered or delayed access to the freshman building where the shooting occurred.

Specifically, approximately a week after the shooting, Broward Sheriff Scott Israel held a news conference in which he discussed events captured by video recordings from the school's outdoor cameras. In particular, Israel described in detail the actions of the school's resource officer, Deputy Scot Peterson, whom he accused of failing to take affirmative steps during the shooting to confront "the killer." News stories and public records additionally revealed conflicting information as to the actions of various agencies after they arrived at the scene.

Accordingly, on February 26, 2018, CNN, the *Miami Herald* and the *South Florida Sun Sentinel* filed a petition for access to the exterior video recordings pursuant to the Florida Constitution and the Florida Public Records Act (Chapter 119), naming BSO and the School Board as respondents. Shortly thereafter, more news organizations including ABC, The Associated Press, the *Bradenton Herald,* Florida's First Amendment Foundation, the Florida

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Press Association, Gannett Co., Inc., the *Los Angeles Times*, *The New York Times*, and the *Orlando Sentinel*, joined the petition. Additional news organizations and the Broward State Attorney's Office ("SAO") intervened.

The news media did not seek videos that depicted victims of the shooting, witnesses, students, or Cruz. Instead, the news media focused on obtaining video footage depicting the law enforcement response, initially focusing on the well-publicized and known footage of Deputy Peterson outside Building 12.

After initially opposing release, BSO stated at the first hearing that the agency was not seeking to shield the videos and agreed they should be disclosed. The School Board, however, continued to oppose release, arguing that the videos were exempt because they disclosed the school's security system. The SAO similarly opposed release, asserting that the videos were exempt as "active criminal investigative information" under Chapter 119.

After conducting an evidentiary hearing, the trial court ordered release of approximately 17 minutes of redacted videos depicting the school resource officer's actions. In the initial order, the trial court ruled that the video did not reveal the school's security system, nor was it active criminal investigative information. In any event, the trial court found that that evidence and facts constituted good cause for release (under a statutory exception to the security plan exemption). No party appealed that order, and the video was released.

The legal battle began in February when a coalition of news media companies sued the Sheriff's Office and the School Board after they were denied access to surveillance video.

As a result of developing information and review of the released video, on March 21, 2018, the news media parties filed a motion for further relief seeking additional video. The School Board again argued that release of the video would reveal blind spots in the security system and jeopardize the school (as well as other schools in Broward County). The SAO continued to assert that release of the video would hinder its investigation and prosecution of Cruz.

After conducting additional hearings and an *in camera* review, the trial court again concluded that the exterior videos sought should be released. Specifically, the court held that release of the videos would not impede the investigation of the shooter because the videos did not "directly relate to the prosecution of Nikolas Cruz." The court additionally ruled that various sections of Chapter 119 did not bar disclosure of the videos because they only "minimally" revealed "information relating to the [school's] security system." Nevertheless, after balancing "the public's right to be informed regarding the law enforcement response against the potential harm to the current security system," good cause existed for their release.

The court's order also stayed release of the videos, and both the School Board and the SAO filed appeals in Florida's Fourth District Court of Appeal.

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The Fourth District's Decision Affirming Release

On appeal, both appellants rehashed their arguments made below. The Fourth District, however, agreed with the trial court and, on July 25, 2018, issued an opinion affirming the ruling requiring release of the videos. *State Attorney's Office of the Seventeenth Judicial Circuit v. Cable News Network*, Nos. 4D18-1335, 18-1336, 2018 WL 3569397 (Fla. 4th DCA July 25, 2018).

In a 2-1 opinion by Judge Robert M. Gross, the Fourth District rejected the State Attorney's Office's argument that the footage constituted "active criminal investigative information" and is thus exempt from disclosure under Florida's Public Records Act. In so doing, the court first considered the term "criminal investigative information," which is defined as information "compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission." *Id.* at *5 (citing Fla. Stat. § 119.011(3)(b)).

The court noted that the surveillance videos sought were created by the School Board prior to the initiation of the criminal investigation. And it emphasized that public records of another government agency may not be shielded from disclosure just because they are transferred to a law enforcement agency. The court accordingly held that the active criminal information exemption did not apply to the videos because they were created by the School Board.

The news media did not seek videos that depicted victims of the shooting, witnesses, students, or Cruz. Instead, the news media focused on obtaining video footage depicting the law enforcement response.

Next, the court reviewed the School Board's argument that the footage was exempt from disclosure under the "security plan" exemption contained in section 119.071(3), Florida Statutes, which exempts audio and visual presentations that "directly relate" to the physical security of a facility. The court found that this exemption applied because the surveillance videos directly related to the school's security system, including its "capabilities and its vulnerabilities." *Id.*

Even though the exemption applied, the court agreed with the trial court that the news media had established good cause for release of the videos. *Id.* at *8. Explaining that good cause is evaluated on the particular facts of each case, the court held that the trial court did not abuse its discretion in finding that the "minimal" revelation of security information was outweighed by the public's right to know the information and evaluate for themselves what occurred on the day of the shooting. The court noted that:

> It is a sad commentary on our times that there must be a full and open public discussion about (1) the type of security system that is appropriate for a large public high school and (2) the appropriate law enforcement response to an active shooter on a high school campus. Parents have such a high stake in the ultimate decisions that they must have access to camera video footage here at issue and not blindly rely on school board experts to make decisions for them.

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> Here, the Media showed that the footage would reveal the response of law enforcement personnel and other first responders during and immediately after an active shooting at Douglas during school hours. The Media showed the need for the public to actually *witness* the events as they unfolded because the narrative provided by "the authorities" is confusing and has shifted and changed over time. Reviewing the footage would allow the public to witness and evaluate:
>
> (1) when first responders arrived on campus;
> (2) where the first responders went when they arrived on campus; and
> (3) what the first responders did when they arrived on campus.

Id. (emphasis in original). Because the surveillance videos sought would shed light on the conduct of public officials, as well as the failures of the school's security system, the media had shown good cause for their release. *Id.*

In dissent, Judge Burton C. Conner acknowledged that the videos were not active criminal investigative information, but disagreed there was good cause for release of information that could potentially pose a security threat by revealing weaknesses and "holes" in the surveillance system. Nevertheless, he recognized the significance of this information in the public's evaluation of the law enforcement response and of the safety measures in place at the school, adding that "[o]nce significant changes are made to the surveillance camera system, I would agree that the requested footage for February 14, 2018, should be released under the 'good faith' exception, so the public can have a better understanding of what happened that day." *Id.* at *9.

While the videos depict various officers storming toward the building, they also contain significant and unexplained gaps that will continue to fuel public debate.

The original mandate issued the following day. The SAO filed an emergency motion to withdraw the mandate, which the court immediately denied. The School Board filed a similar motion, which was granted pending consideration by the Fourth District of the School Board's request to certify a question of great public importance to the Florida Supreme Court -- which would have provided the agencies with a more direct appellate path. Ultimately, the Fourth District declined to certify a question. *State Attorney's Office*, 2018 WL 3569397 at *10.

The separate School Board and SAO petitions to the Florida Supreme Court followed.

Florida Supreme Court Denies Review

The School Board sought review under the discretionary jurisdiction provisions of the Florida Constitution and Florida appellate rules, claiming that the appellate opinion "expressly declared valid" and "expressly construed" various statutes and constitutional provisions. The State Attorney's Office made similar arguments, in addition to contending that the opinion affected a "class of constitutional officers" (*i.e.*, state attorneys).

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The media filed responses to each brief, arguing that neither petition for review sufficiently stated a basis for jurisdiction and that both merely argued the merits of the appeal. Approximately one week later, the Court entered two orders declining to review either petition.

Accordingly, on August 22, videos from five cameras depicting the surrounding areas of Building 12 for a 45-minute time period were released, with the images of students and victims blurred. While the videos depict various officers storming toward the building, they also contain significant and unexplained gaps that will continue to fuel public debate. Regardless of these lingering questions, the rulings by courts at all levels were important victories for transparency and the public's crucial right to evaluate the actions of its officials in the wake of the tragic shooting.

Dana J. McElroy, James J. McGuire and Carol Jean LoCicero, partners in Thomas & LoCicero's Fort Lauderdale and Tampa offices, represented the news media petitioners along with associates Jon M. Philipson and Daniela B. Abratt.

DC Superior Court Granted Anti-SLAPP Special Motion to Dismiss Suit Arising From "Trump Dossier"

By Leslie Paul Machado

When it comes to the DC anti-SLAPP statute, the District of Columbia federal court and the DC Superior (trial) Court currently exist in parallel universes**:** the federal court is likely to conclude the statute cannot be applied in that court (as three separate judges have already held here, here, and here), while the Superior Court is ready, willing and able to utilize the statute to dismiss suits.

The latest example of this bifurcated universe comes courtesy of Messrs Kahn, Fridman and Aven. They are three "international businessmen" who, in December 2017, sued Fusion GPS and Glenn Simpson, who allegedly retained Christopher Steele to research any Russian connections to Donald Trump, in DC federal court. The complaint alleged the plaintiffs were defamed by certain statements contained in one of the reports comprising the "Trump Dossier." The one-count defamation complaint alleged that one (out of 17) reports in the dossier ("CIR 112") made false and defamatory statements about the plaintiffs, including that:

- Alfa Group, a consortium in which plaintiffs are investors, is close to Vladimir Putin, that "[s]ignificant favors continue to be done in both directions," and that "FRIDMAN and AVEN [are] still giving informal advice to PUTIN, especially on the US" and "currently are on very good terms with" him;
- a former Alfa employee, Oleg Govorun, who is now the head of a government department in Putin's administration, "delivered illicit cash directly to PUTIN" "throughout the 1990s," when Govorun was an "[Alfa] executive" and Putin was the Deputy Mayor of St. Petersburg;
- "GOVORUN had been Head of Government Relations at Alpha Group and in reality the 'driver' and 'bag carrier' used by FRIDMAN and AVEN to deliver large amounts of illicit cash to the Russian president, at that time deputy Mayor of St. Petersburg"
- Mr. Fridman "recently met directly with PUTIN" and that "much of the dialogue and business between them was mediated" by Govorun, the former [Alfa] employee; and
- "[Alfa] held 'kompromat' on PUTIN and his corrupt business activities from the 1990s whilst although not personally overly bothered by [Alfa's] failure to reinvest the proceeds of its TNK oil company sales into the Russian economy

When it comes to the DC anti-SLAPP statute, the District of Columbia federal court and the DC Superior (trial) Court currently exist in parallel universes.

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> since, the Russian president was able to use pressure on this count from senior Kremlin colleagues as a lever on FRIDMAN and AVEN to make them do his political bidding."

Fusion GPS and Simpson filed an anti-SLAPP special motion to dismiss that argued the plaintiffs were not likely to succeed on the merits because, *inter alia*, they are public figures who failed to plead facts showing the statements were made with actual malice. That motion is fully briefed.

In April 2018, the same three plaintiffs sued Christopher Steele and Orbis Business Intelligence in DC Superior Court. The Superior Court complaint mirrored the federal court complaint, alleging that certain statements and the headline in CIR 112 are false and defamatory because they suggest plaintiffs and Alfa Group "cooperated in the alleged Kremlin-orchestrated campaign to interfere in the 2016 U.S. presidential campaign"; that Alfa Group is close to Putin and two of the plaintiffs have been giving him informal advice; and that a former Alfa Group employee gave Putin cash in the 1990's and is now high up in the Putin administration, where he can facilitate communications between the plaintiffs and Putin.

Orbis and Steele filed an anti-SLAPP special motion to dismiss. In it, they argued the suit arose from an act in furtherance of the right of advocacy on issues of public interest because the complaint alleged the dossier was "published to a worldwide public" "to be used in connection with the election of the President of the United States." Orbis and Steele argued CIR 112 reported on the "commercial and political relationship between Russian oligarchs and the Russian government," which they argued was an issue of "incontrovertible public interest."

Orbis and Steele argued the plaintiffs could not show they were likely to prevail on the merits because, among other reasons, they are limited purpose public figures who cannot show the challenged statements were made with actual malice. The brief argued that, while the complaint appears to fault Steele's reliance on unnamed sources and the fact CIR 112 was unverified, neither of these arguments was sufficient to show actual malice.

The plaintiffs' opposition brief argued the Superior Court should deny defendants' special motion to dismiss for multiple reasons. First, plaintiffs argued defendants could not invoke the DC anti-SLAPP statute because they are "non-resident foreigners who have not demonstrated deep ties to the United States." Plaintiffs argued that, while the Superior Court could exercise personal jurisdiction over the defendants, the threshold for gaining rights protected by the First Amendment is higher, and was not satisfied here.

Second, plaintiffs argued that, even if defendants could simply rely upon the allegations in the complaint, it does not show defendants engaged in the expression of views on issues of public interest. Next, plaintiffs argued the DC anti-SLAPP statute was not intended to protect defendants because defendants were not engaging in "grassroots activism" and are not "District residents or average Americans being 'sued into silence.'" Finally, plaintiffs argued they were likely to succeed on the merits of their single-count defamation claim because they have satisfied all of the elements of the claim. On the actual malice argument upon which defendants

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focused, plaintiffs argued they are not limited purpose public figures and, in any event, have either adduced sufficient evidence of actual malice, or could do if allowed limited discovery.

On August 20, 2018, the Superior Court granted defendants' anti-SLAPP special motion to dismiss and dismissed the suit with prejudice. The Superior Court's opinion first addressed the plaintiffs' argument the DC anti-SLAPP statute did not apply unless the defendants had a right of speech guaranteed by the First Amendment. The court was dubious of this assertion: "[t]he Act does not explicitly limit its protection to activity that is also protected by the First Amendment, and indeed the Act's legislative history indicates that the Council intended the Act to apply more broadly." The court nevertheless stated it was assuming, without deciding, "the Anti-SLAPP Act applies only to conduct that is protected by the First Amendment."

The court next turned to the plaintiffs' related argument – that defendants were not entitled to any protections under the First Amendment because they were not citizens. After noting that it was "ironic" "that Plaintiffs, who are non-resident aliens with Russian and/or Israeli citizenship (Complaint ¶ 15), argue that non-resident aliens do not have rights that the First Amendment requires a U.S. court to respect — while petitioning a U.S. court for a redress of their grievances and invoking a constitutional right to conduct discovery," the court rejected this argument, holding that "advocacy on issues of public interest has the capacity to inform public debate, and thereby furthers the purposes of the First Amendment, regardless of the citizenship or residency of the speaker."

The court easily concluded that plaintiffs were, at a minimum, limited purpose public figures "for the broad controversy relating to Russian oligarchs' involvement with the Russian government and its activities and relations around the world, including the United States."

The court noted that, "by its terms, the Anti-SLAPP Act does not limit its protections to U.S. citizens or entities" and reasoned that "[r]eading an implied limitation to District residents into the Act would be contrary to the purposes of the Act and the First Amendment to provide broad protection for speech on issues of public interest." The court held that, to the extent a non-resident alien's connections with the United States needed to be "substantial" to merit the protections of the First Amendment, defendants and their speech "have ample connections with the United States that are clearly substantial enough to merit First Amendment protection."

The court then addressed – and rejected – the plaintiffs' argument that defendants had not made a prima facie showing, noting that "Plaintiffs challenge Mr. Steele's provision of his dossier to the media precisely because he expected and intended the media to communicate the information to the public in the United States and around the world," and held that, as such, defendants had carried their prima facie burden to show the suit arose from an act in furtherance of the right of advocacy. The court also held the DC anti-SLAPP statute "applies to statements that consist of 'raw intelligence.'" Finally, the court held the dossier, as a whole, concerned an "issue of public interest" "because it relates to possible Russian interference with the 2016 presidential election" and that CIR 112 specifically discussed Russia's policy towards the United States and Putin's advisors on Russia/US policy, which were issues of public interest.

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The court easily concluded that plaintiffs were, at a minimum, limited purpose public figures "for the broad controversy relating to Russian oligarchs' involvement with the Russian government and its activities and relations around the world, including the United States." It held that, as such, they needed to offer evidence a reasonable jury could find, by clear and convincing proof, that defendants knew the facts stated in, or reasonably implied by, CIR 112 were false or that they published CIR 112 with reckless disregard of the falsity of these stated or implied facts. The court held that plaintiffs had not carried their burden to show actual malice, and that they were not entitled to "targeted discovery." As such, it dismissed the case with prejudice. (The plaintiffs have already filed a notice of appeal).

The two suits show the need for a federal anti-SLAPP statute. The Superior Court has granted an anti-SLAPP special motion to dismiss a defamation suit on the basis the plaintiffs cannot show the challenged statements were made with actual malice. The federal court is likely to hold it cannot even consider an anti-SLAPP special motion to dismiss a virtually identical complaint, by the same plaintiffs, asserting the same claim, and about the same publication and the same statements. The availability of a substantive defense should not depend on the court in which the case is filed.

Leslie Paul Machado is a partner at LeClair Ryan in Washington, D.C. Plaintiffs were represented by Kim Hoyt Sperduto of Sperduto Thompson & Glasser and Alan S. Lewis and John J. Walsh of Carter Ledyard & Milburn. Defendants were represented by Christina Hull Eikhoff, Kristin Ramsay and Kelley C. Barnaby of Alston & Bird.

West Virginia Federal Court Dispenses With Pharmacist's Defamation Case Against CBS

By Max Mishkin

A federal judge in West Virginia has rejected a pharmacist's defamation claims arising out of two Peabody Award-winning *CBS Evening News* reports about the opioid epidemic. Granting CBS's motion for summary judgment, Judge Joseph R. Goodwin noted that the plaintiff's pharmacy had "filled eye-popping quantities of pain prescriptions written by reckless doctors," and the court described CBS's reporting as "applaudable." Ballengee v. CBS Broadcasting Inc., 2018 WL 3999719 (S.D. W. Va. Aug. 21, 2018). The court in its lengthy opinion emphasized plaintiff's failure to come forward with evidence on the basis of which he could meet his burden of proving material falsity.

The Underlying Litigation

Samuel "Randy" Ballengee formerly owned and operated Tug Valley Pharmacy in Williamson, West Virginia. When Mr. Ballengee opened Tug Valley in July 2007, it was located within two blocks of two pain clinics. According to West Virginia Board of Pharmacy records, Tug Valley filled tens of thousands of prescriptions from those pain clinics for controlled substances – mostly hydrocodone – in 2008 and 2009. In late 2009 and early 2010, both of the clinics were shut down by law enforcement, and several of the doctors who worked there later pleaded guilty to federal criminal charges arising out of their prescribing practices.

Judge Joseph R. Goodwin noted that the plaintiff's pharmacy had "filled eye-popping quantities of pain prescriptions written by reckless doctors," and the court described CBS's reporting as "applaudable."

Starting in 2010, Mr. Ballengee began facing civil lawsuits from several of his own customers, who claimed that Tug Valley negligently filled prescriptions for controlled substances for them while "knowing, or having good reason to know, that [they] were addicted and that the prescriptions were not for any legitimate medical reason and were prescribed by physicians at offices which were widely known in the community as 'pill mills.'" Mr. Ballengee was deposed as part of that litigation in 2011, and he testified that when one of the local pain clinics was at its peak, he had filled "maybe 150 to 200" prescriptions a day for that clinic alone, and that "most" of the pain clinic's patients received pain medication.

Mr. Ballengee and his co-defendants in the negligence cases moved for summary judgment on the ground that the plaintiffs' own "illegal" and "immoral" conduct barred their claims, and the trial court certified that as a question of law to the West Virginia Supreme Court of Appeals. In May 2015, the high court issued its decision in *Tug Valley Pharmacy, LLC v. All*

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Plaintiffs Below in Mingo County, ruling that the customers' lawsuits could proceed. Those cases remain pending.

The Challenged CBS News Reports

In 2016, *CBS Evening News* aired a series of reports about the opioid epidemic in West Virginia, examining the roles that doctors, pharmacists, drug distributors, and others have played in its escalation and the various ways in which state and federal officials are attempting to address the epidemic. In the second of those reports, broadcast in January 2016, CBS reported that Mr. Ballengee was being sued for negligence and that his pharmacy had filled 150 pain prescriptions a day for one clinic alone. After seeing that report, Tug Valley's drug distributor conducted its own review and decided to stop supplying drugs to the pharmacy. In May 2016, CBS reported on a West Virginia lawsuit against that same drug distributor and mentioned its decision to cease doing business with Mr. Ballengee's pharmacy.

In January 2017, Mr. Ballengee sued CBS and three of its journalists for defamation, false light invasion of privacy, tortious interference, and intentional infliction of emotional distress. Mr. Ballengee claimed that CBS falsely reported that he had filled 150 pain prescriptions a day for one clinic alone, and that the broadcasts also conveyed several false and defamatory implications about him, namely that he (1) had been sued by the State of West Virginia, (2) had been criminally charged or was under criminal investigation, and (3) had intentionally acted illegally or immorally or contributed to the opioid epidemic for profit.

Judge Goodwin granted CBS's motion for summary judgment on August 21, 2018, six weeks before trial was scheduled to begin.

Mr. Ballengee alleged that he was forced to sell his pharmacy at a loss as a result of the CBS reports. In his complaint, he demanded $15 million in compensatory and punitive damages.

In June 2018, CBS moved for summary judgment, principally arguing that everything it had reported about Mr. Ballengee was true. As for the defamation-by-implication claims, CBS argued that, because all of the allegedly false implications arose out of literally true statements, Mr. Ballengee could not make the "especially rigorous showing" required under *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993). In that case, the Fourth Circuit held that, where a plaintiff alleges defamation by implication arising from true statements, the challenged language itself must (1) "be reasonably read to impart the false innuendo," and (2) "affirmatively suggest that the author intends or endorses the inference." CBS also has argued that Mr. Ballengee was a limited purpose public figure or an involuntary public figure, and that he could not carry the heavy burden of proving that CBS acted with actual malice fault.

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The Court's Decision

Judge Goodwin granted CBS's motion for summary judgment on August 21, 2018, six weeks before trial was scheduled to begin. Without reaching the public figure issue, the court determined that everything CBS had reported about Mr. Ballengee was true, noting in particular that records obtained by CBS during discovery showed that Tug Valley did in fact fill more than 150 pain prescriptions from just one clinic on multiple days.

The court further found that the implications identified by Mr. Ballengee either were also substantially true or were not reasonable interpretations of what CBS had actually reported. For instance, the court held that even if the CBS reports implied that Mr. Ballengee had been sued by the State of West Virginia, the sting of that implication was the same as the undisputed truth that in a lawsuit against several drug distributors, the State characterized Tug Valley as "'among the most notorious of the pill mill pharmacies in Southern West Virginia,' and described in detail some of Tug Valley's concerning practices regarding the distribution of narcotics."

The implications identified by Mr. Ballengee either were also substantially true or were not reasonable interpretations of what CBS had actually reported.

Throwing out Mr. Ballengee's tag-along claims as well, the court concluded that CBS had "thoroughly investigated the opioid epidemic in West Virginia, an epidemic that has greatly harmed the State," adding that "the people of West Virginia, indeed those all over the country, deserve to know about the evolution of the opioid epidemic and the identities of the bad actors."

CBS and its journalists were represented by Anthony M. Bongiorno and Naomi B. Waltman of CBS; Michael D. Sullivan, Jay Ward Brown, Celeste Phillips and Maxwell S. Mishkin of Ballard Spahr LLP; and Thomas V. Flaherty and Wesley P. Page of Flaherty Sensabaugh Bonasso PLLC. Plaintiff was represented by James D. McQueen, Jr. of McQueen Davis PLLC and Christopher J. Heavens of Heavens Law Firm PLLC.

Summary Disposition Granted for Detroit News Station in Defamation Suit by Local Businessman Robert Shumake

By Brian D. Wassom & Katherine L. Pullen

On June 7, 2018, the Oakland County Circuit Court ruled that WJBK-TV (Fox 2 Detroit) and veteran reporter Rob Wolchek did not defame local Detroit businessman Robert Shumake. Judge Rae Lee Chabot granted Fox 2's Motion for Summary Disposition and tossed Shumake's seven-count complaint. The case arose after Fox 2 Detroit aired multiple episodes of its "Hall of Shame" series featuring Shumake.

The story actually begins in 2010, when Shumake was first featured in Fox 2 Detroit's Hall of Shame. In those reports, Wolchek broke the story of how dozens of local residents had accused Shumake and his company of running a scam that took $2,000 from homeowners facing foreclosure in exchange for a "mortgage audit" that was promised but never delivered. Shumake had responded to that story with a defamation lawsuit as well, although he abruptly withdrew it.

Fast-forward to March 2017. Fox 2 Detroit aired follow-up reports after learning that Shumake—who had spent much of the intervening time apparently brokering business deals in Africa—was now back in Michigan, where Attorney General's office had recently filed charges against Shumake and his former company stemming from the allegations in the 2010 report.

The case arose after Fox 2 Detroit aired multiple episodes of its "Hall of Shame" series.

Shumake was charged with two felony counts of false pretenses and 16 misdemeanor counts of violation of the Credit Services Act. Fox 2's reports also discussed pending criminal proceedings against Shumake in California, Shumake's 2013 petition for bankruptcy, and his dealings in Africa. Moreover, in keeping with the "Hall of Shame" motif, reporter Wolchek made no effort to hide his disapproval of Shumake's known and alleged activities.

Shumake quickly filed another defamation suit, demanding more than $150,000,000 in damages. Fox 2 Detroit and Wolchek responded to the complaint with an early dispositive motion (on state-law grounds equivalent to both Federal Rules of Civil Procedure 12(b)(6) and 56). The motion emphasized the importance of avoiding a chilling effect when claims of libel or slander are made against news organizations on matters of public interest, highlighting the First Amendment's maximum protection of this type of speech.

The motion also relied on Michigan's statutory fair reporting privilege, arguing that the defamation claims were not actionable because the challenged statements about the pending criminal charges were a fair and accurate report of a public record, as well as several additional defenses common in defamation cases, including opinion, rhetorical hyperbole, and substantial truth.

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In response, Shumake argued that the publications conveyed a false impression that was materially different than the literal truth. For instance, Shumake claimed that statements and criminal charges attributed to Michigan's Attorney General were in fact authored by the AG's subordinate, and that this made the charges appear more serious than they actually were. Shumake further alleged that three of Wolchek's statements constituted defamation by implication, arguing Wolchek reported in a manner that suggested he had knowledge of specific facts that could substantiate his opinions on Shumake's business acumen and dealings abroad.

The court ultimately agreed with the media defendants and threw out Shumake's case in its entirety. Judge Chabot found Shumake to be a public figure subject to the actual malice standard, based largely on Shumake's own claims to be a "best selling" author on Amazon, "prominent business man," and an honorary consul for various African and Caribbean nations. The court also found the statements paraphrased in Wolchek's report regarding the criminal matter to be clearly attributable to the Attorney General, and agreed with Fox 2 that these statements were also not actionable under Michigan's fair reporting privilege.

With respect to the report on Shumake's pending criminal matter in California, Judge Chabot held that the statements were substantially true and thus nonactionable. Judge Chabot reached this conclusion despite the fact that Wolchek reported that Shumake had an "active" warrant for his arrest in California when in fact the warrant had been officially cleared just a few days before the broadcast. According to the court, the difference between the issuance of a warrant and the filing of a report of charges to be *de minimis* and therefore substantially true and nonactionable.

Shumake and his company struck a plea deal and were convicted on various of the charges that were the subject of the challenged reports shortly after the motion was argued.

The court also rejected Shumake's defamation by implication claim, which he premised as much on Wolchek's "sarcastic" tone and word choices as the content of his reporting. In the end, Shumake simply failed to plausibly suggest that any of the statements—literal or implied—were false.

The court also tossed out Shumake's four tag-along tort claims that were based on the same purportedly defamatory statements underlying his slander and libel claims. Because the speech at issue was protected, Judge Chabot held that Fox 2 Detroit's defenses to the defamation claims also applied to these tort claims.

Finally, Judge Chabot rejected Shumake's seventh and final claim for stalking, which stemmed from Wolchek's assertive questioning of Shumake as he walked through courthouse hallways. The Court observed that the statute prohibiting stalking and harassment includes an exception for "constitutionally protected activity or conduct that serves a legitimate purpose." Because the speech and conduct were constitutionally protected and Wolchek was reporting a story in the public interest about a public figure, Wolchek's activities fell within the statutory exemption and the court dismissed the claim.

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Given the early nature of the motion, the court's ruling was based solely on the pleadings and the undisputed record. If anyone had retained any doubt as to the soundness of the ruling, however, it would have been quickly erased by the fact that Shumake and his company struck a plea deal and were convicted on various of the charges that were the subject of the challenged reports shortly after the motion was argued—by a judge in the adjacent courtroom, no less.

Fox 2 Detroit and Wolchek duly informed their viewers of this development as well.

Fox 2 Detroit and Rob Wolchek were represented by Brian D. Wassom and Katherine L. Pullen of Warner Norcross + Judd LLP in Southfield, Michigan.

Nevada Court Grants Anti-SLAPP Motion by the Associated Press on Fair Report Grounds

By Chad R. Bowman and Jay Ward Brown

A Nevada state court on August 23 granted a special motion to dismiss brought by The Associated Press (AP) and one of its reporters under the state's anti-SLAPP statute. Wynn v. The Associated Press.

The court dismissed a defamation claim by casino magnate Steve Wynn over an AP news report summarizing allegations of sexual assault in the 1970s that were made against him to police earlier this year. In so doing, the Court held that the AP's summary of a police complaint was subject to the fair report privilege, which is an absolute privilege under established Nevada law.

In what appears to be a ruling of first impression in interpreting the state's recently amended anti-SLAPP statute, the court additionally held that a news report that qualifies as a privileged fair report also constitutes a "good faith communication" for purposes of the statute. The AP is thus entitled to recover attorneys' fees accrued during the course of the case.

The court additionally held that a news report that qualifies as a privileged fair report also constitutes a "good faith communication" for purposes of the statute. The AP is

The Challenged Report

National news reports broke in late January implicating Mr. Wynn in a decades-long pattern of sexual misconduct at his casino properties, allegations that the billionaire denied but that led him to resign leadership roles at Wynn Resorts and the Republican National Committee. In the immediate aftermath of that controversy, the Las Vegas Metropolitan Police Department (LVMPD) in February released a public statement summarizing allegations by two women that Mr. Wynn had sexually harassed or assaulted them years earlier.

AP reporter Regina Garcia Cano filed a public records request for the police complaints. The LVMPD produced copies—redacted to protect information that would have identified the two alleged victims—to Ms. Garcia Cano. The AP then published her news report summarizing the two official records, which included the LVMPD's statements that it could not investigate the allegations because of Nevada's 20-year statute of limitations but that it had forwarded to Chicago authorities a report concerning the incident alleged to have occurred there.

The news report included both a description of the alleged assaults and the claim by the alleged Chicago victim that she had later given birth to Mr. Wynn's child in unusual circumstances in a gas station restroom—a claim Ms. Garcia Cano paraphrased in her article.

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Mr. Wynn asserted defamation based only on the portion of the article summarizing the incident that was alleged to have taken place in Chicago. He contended that the complainant was obviously "delusional" and that the AP's failure to quote verbatim the description of the alleged childbirth scenario rendered the news article unfair because readers would have found the allegation incredible if they had read the entire police case report.

The Special Motion

The AP and its reporter filed a special motion to dismiss under Nevada's anti-SLAPP statute, which as amended involves a two-step legal analysis.

The statute first requires a defendant to show that a claim "is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS sec. 41.660(3)(a). A "good faith communication" is defined in Nevada in relevant part as a "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood." NRS sec. 41.637(4). Once this "initial showing" has been met, the burden shifts to a plaintiff to demonstrate a likelihood of success on the merits of the claim. NRS sec. 41.660(3)(b).

AP argued that Nevada precedent, the Restatement, and courts around the country extend the fair report privilege to official government records generally, and to police complaints specifically, as within the scope of records legitimately of interest to the public.

Garcia Cano submitted an affidavit with the special motion and the AP defendants argued that, in light of the public controversy and reliance on official police records, the statute applied. AP then argued that Mr. Wynn could not meet his burden to show a probability of prevailing on the merits of his claim for two reasons: (1) the news article was an absolutely privileged fair report of the police record in question, and (2) he was a public figure who could not establish "actual malice" fault as a matter of law.

Mr. Wynn did not dispute that a published news report about allegations of sexual assault made to police about a public figure satisfies the first prong of the AP's initial burden under the anti-SLAPP statute, but argued that, because the news report was an unfair summary of the police record and purportedly published with actual malice, it was not "truthful."

The parties submitted a stipulation to the court deferring a dispute over whether Wynn was entitled to discovery on fault, agreeing that discovery was unnecessary to decide the first argument for dismissal on the merits—"the fair report privilege under the Nevada Anti-SLAPP Statute, a question of law"—and bifurcating that issue from actual malice. The Court entered that order, which provided that "[i]f the Court finds the reporting in this case not to be covered by the fair reporting privilege, the Court shall continue to a second hearing to consider the issue of fault."

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Fair Report Privilege

The focus of the briefing then became the fair report privilege. Mr. Wynn first argued that police reports—or at least those that do not lead to arrests or charges—fall outside the scope of the privilege recognized in Nevada, or around the country. He then urged that, even if the privilege applied, by failing to quote *verbatim* the description of the childbirth passage in the police complaint, the AP had failed to summarize the report fairly.

In reply, AP argued that Nevada precedent, the Restatement, and courts around the country extend the fair report privilege to official government records generally, and to police complaints specifically, as within the scope of records legitimately of interest to the public. AP also argued that the birth anecdote was a red herring because it was collateral to the alleged defamatory allegation in the police report—the alleged sexual assault. In addition, the anecdote was paraphrased in the report and far from "obviously exculpatory," as Mr. Wynn had argued.

The Court's Ruling and Order

At the conclusion of oral argument on the motion, Clark County District Court Judge Ronald Israel indicated his intention to grant the AP's motion. In the interval between argument and entry by the court of its opinion, Mr. Wynn submitted a letter to the court arguing that he should be entitled to take discovery regarding alleged actual malice before the court ruled.

Based in part on the stipulation the parties had entered into bifurcating consideration of the fair report and actual malice arguments advanced by the AP—and in part on the fact that the fair report privilege is absolute and cannot be defeated by a showing of actual malice under Nevada law—the court rejected that effort:

The Court finds that the reporter accurately described the Police reports, and therefore, the privilege is absolute. The Court further finds that the Nevada fair reporting privilege applies to the news report at issue and, therefore, pursuant to the parties' stipulation, no hearing on the issue of fault is required. The Nevada Anti-SLAPP Statute applies in this case[.]

Through counsel, Mr. Wynn has said that he will appeal.

The AP and Ms. Garcia Cano were represented by AP's in-house lawyers Karen Kaiser and Brian Barrett, and by Ballard Spahr attorneys Jay Ward Brown and Chad Bowman, in the firm's Washington, D.C. office, and Joel Tasca and Justin Shiroff, in the firm's Las Vegas office. Mr. Wynn was represented by L. Lin Wood, Nicole Jennings Wade, Jonathan D. Grunberg, and G. Taylor Wilson, all of L. Lin Wood, P.C., in Atlanta, and by Tamara Beatty Peterson and Nikki L. Baker, of Peterson Baker, PLLC in Las Vegas.

Virginia State Court Dismisses Right-Of-Publicity Claim Involving Oscar and Emmy Nominated Documentary Film

By Cindy Gierhart and Christine Walz

A Virginia Circuit court dismissed a right of publicity claim against the makers of the short documentary film *Edith + Eddie*, finding the film depicts a matter of public interest and therefore falls under the newsworthiness exception to the Virginia right-of-publicity statute. *Barber v. Kartemquin Films Ltd.*, Case No. CL18001993 (Va. Cir. Ct. Aug. 8, 2018).

The film *Edith + Eddie* is a short documentary film exploring the relationship between 95 and 96-year-old newlyweds struggling to keep their autonomy while a court-appointed guardian and daughter direct the choices in their lives. At a pivotal point in the film, Edith Hill's daughter arrives to take her mother to Florida, separating Edith and Eddie against their wishes. The Film explores the degradation of rights that occurs as people age and exposes the reach of a legal guardian's powers and influence over those in their care.

The Film explores the degradation of rights that occurs as people age and exposes the reach of a legal guardian's powers and influence over those in their care.

The film was nominated for an Academy Award for Best Documentary-Short Subject, as well as a 2018 News & Documentary Emmy for Outstanding Short Documentary.

Following her mother's death, the daughter sued the filmmakers for use of her and her mother's names and likenesses without their written consent. The suit alleged violations of Virginia's right-of-publicity statute against Kartemquin Educational Films, the film's director, and her production company. The entertainer Cher, an executive producer of the film, was also named as a co-defendant.

Virginia does not recognize a common law right of privacy and permits only a limited cause of action for the use of one's name or likeness without permission "for the purposes of trade or advertising," pursuant to Virginia Code § 8.01-40. Virginia courts have held that reports of newsworthy events or matters of public interest are exempt from the statute as they do not constitute uses "for the purposes of trade or advertising."

Virginia's statute is modeled after New York's right-of-privacy statute, and the two jurisdictions have broadly applied the newsworthiness exception. While New York courts have

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previously applied the newsworthiness exception to films such as *Super Size Me* and *Borat* to dismiss claims by individuals appearing in those films, this is the first time a Virginia court has held that a documentary film falls under the statute's newsworthiness exception.

Plaintiffs argued that there should be a balancing test that favors Plaintiffs' right of privacy because of the extensive use of their names and likenesses in the film. However, as Defendants argued, the scope of use has no bearing on the actionability of the claim. Plaintiffs further argued that the film was "fictionalized" because, they allege, it dramatized events and left out important details. Defendants successfully argued that choosing what content to include in a film and the manner in which it is depicted is an editorial decision and cannot be equated to fictionalization.

Alexandria Circuit Court Judge James Clark issued a letter opinion on August 8, 2018, finding that *Edith + Eddie* "has a substantial newsworthiness component, in addition to relatively wide commercial distribution." Given this, the Court found that the "public's right to information and the protections afforded by the 1st Amendment prevail" over the individual right to privacy protected by the Virginia statute. As a result, the Court dismissed the case as to all defendants.

Christine Walz, Cindy Gierhart, and Kevin D'Olivo of Holland & Knight LLP represented Defendants Kartemquin Educational Films, the film's director, and the director's production company. Benjamin Chew of Brown Rudnick LLP represented Cher. Plaintiffs were represented by Dirk McClanahan of McClanahan Powers, PLLC.

Florida Federal Court Dismisses Lawsuit by Former Major League Baseball Player Against AP, ESPN, and USA Today

Claim Time Barred Under NY Law; Article Substantially Correct; A Fair Report

By Allison Kirkwood Simpson

A Florida federal district court put an end to a former Major League Baseball (MLB) player's attempt to sue AP, ESPN, and USA Today for fairly and accurately reporting on his lawsuit against MLB. Nix. v. ESPN et al., No. 1:18-cv-22208-UU (S.D. Fla. Aug. 30, 2018).

The court dismissed Plaintiff Neiman Nix's defamation lawsuit against the media entities with prejudice finding the lawsuit was improper for a number of reasons, including that (1) the suit was barred by New York's one-year statute of limitations for defamation, (2) the news stories contained statements that were substantially correct and protected by the fair report privilege, (3) the claims against ESPN and USA Today were barred by the wire service defense, and (4) the defamation by implication claim failed because Plaintiff admitted the statements contained in the news stories were true.

MLB launched an investigation into the illegal sale of performance enhancing drugs to MLB players. Plaintiff and his company were included in that investigation.

Background

All three defendants published identical news stories on July 14, 2016 regarding litigation in New York filed by Plaintiff against MLB. The case against MLB was one of a myriad of lawsuits filed by Plaintiff related to his ongoing war with MLB concerning his business, which sells performance enhancing substances in the form of "supplements which can legitimately be claimed to increase physical strength, enhance athletic performance, increase energy levels, retard the aging process, sharpen memory and concentration, rejuvenate the libido, and provide many other health benefits." In particular, Plaintiff's business sold a bioidentical form IGF-1, which is derived from deer and elk antler. IGF-1 is listed on MLB's Prohibited Substance List.

In 2013, MLB launched an investigation into the illegal sale of performance enhancing drugs to MLB players. Plaintiff and his company were included in that investigation. On July 14, 2016, Nix filed a tortious interference suit against MLB in the Southern District of New York for harm to Nix's reputation resulting from the investigation. On the same day, AP published a news article about the lawsuit, and ESPN and USA Today republished it. The articles all contained the following statement about Nix's tortious interference suit: "The suit admits Nix and his company used bioidentical insulin like growth factor (IGF-1), which is

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derived from elk antlers and is on baseball's list of banned substances." This statement gave rise to Plaintiff's defamation claim.

Plaintiff sued AP, ESPN and USA Today alleging the statement in the news stories was defamatory because it did not differentiate between natural and synthetic IGF-1 (the synthetic form is a Schedule III illegal drug in the same category as cocaine) and thus it implied that Plaintiff sold illegal drugs and that he sold banned substances to MLB players. Despite the fact that IGF-1 is listed on MLB's Prohibited Substance List, Plaintiff has always argued that the natural or bioidentical form of IGF-1 is not actually banned by MLB.

Nix sued AP, ESPN, and USA Today in Florida state court and Defendants removed the case to the Southern District of Florida based on diversity jurisdiction and Plaintiff's settlement demand of $50,000,000.00.

The Motions to Dismiss

AP moved to dismiss the lawsuit and argued that New York law should apply to Plaintiff's claims because the lawsuit it reported on was in New York federal court, AP is based in New York, the AP article bore a New York dateline, the publication and writing both occurred in New York, and the decision to publish occurred in New York. If New York law applied to the claims, Nix's defamation claim was barred by New York's one-year statute of limitations (Florida has a two-year statute of limitations for defamation claims and the lawsuit was filed within the limitations period).

The court found that New York law applied, focusing particularly on the fact that the decision to publish the AP article was made in New York.

AP also argued that even if Florida law applied, the defamation claim failed for a number of other reasons. First, the news story was protected by the fair report privilege because the statements at issue were fair and accurate accounts and characterizations of the contents of court records, namely Plaintiff's lawsuit against MLB. Second, the statements were true or substantially true as demonstrated by the court records in the MLB case where Plaintiff admitted to selling IGF-1 with the explanation that IGF-1 was derived from elk antlers and on MLB's List of Prohibited Substances. Third, the implications regarding drug dealing were not supported by the actual text of the news story. Fourth, Plaintiff could not establish even the lowest standard of fault (negligence) needed for the court to find liability because the statements were a near verbatim report of court records and a related MLB press release.

ESPN and USA Today filed a separate motion to dismiss in which they adopted the arguments of AP and also argued that they were protected from suit by the wire service defense because they merely republished a news story from a reliable source of daily news.

Order of Dismissal

Less than three months after the case was removed, the court granted the motions to dismiss and dismissed the case with prejudice. In doing so, the court found that New York law applied

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for the reasons articulated by AP in its motion to dismiss, focusing particularly on the fact that the decision to publish the AP article was made in New York. Because New York has a one-year statute of limitations for defamation claims, the court found Plaintiff's claim to be time-barred. The court went on to discuss the other reasons why Plaintiff's complaint failed.

The court determined that, as a matter of law, the statement was substantially correct and fell within the protection of the fair report privilege. The allegedly defamatory statement read: "The suit admits Nix and his company used bioidentical insulin like growth factor (IGF-1), which is derived from elk antlers and is on baseball's list of banned substances." The suit referred to in this statement is Plaintiff's tortious interference suit filed in the Southern District of New York. Plaintiff's complaint in that suit alleged, "one of the main ingredients used by Nix and DNA Sports Lab come from Bio-identical Insulin like Growth Factor, which is derived from elk antlers." MLB's list of banned substances includes IGF-1, including all isomers of IGF-1 as number 68 on the list of prohibited performance enhancing substances. Based on these two latter statements, the reported statement at issue was protected.

As a matter of law, the statement was substantially correct and fell within the protection of the fair report privilege.

Next, the court found Plaintiff's claims against the republishers of the story, ESPN and USA Today, were barred by the wire service defense. In doing so, the court noted that AP "is a reputable news agency, and its article was a substantially accurate summary of judicial proceedings."

Finally, the court found that the news stories, by Plaintiff's own admissions, were true and could not form the basis of a defamation by implication claim. Plaintiff admitted to selling IGF -1 in his lawsuit in the Southern District of New York. AP's decision to omit that Plaintiff sold the *natural* form of IGF-1 was an editorial decision that the court would not disturb. The court dismissed Plaintiff's claims with prejudice.

This case is one of many filed by Plaintiff in his ongoing war against MLB and is the second time a court has found that Plaintiff failed to state a claim for defamation related to the sale of IGF-1.

Allison Kirkwood Simpson is an attorney at Thomas & LoCicero in Tampa, Florida. Plaintiff was represented by The Law Office of David H. Pollack, LLC. Defendants were represented by Carol Jean LoCicero and Allison Kirkwood Simpson of Thomas & LoCicero.

The "Weaponization" of Freedom of Speech

Does NIFLA v. Becerra *Demonstrate a Flaw in the First Amendment, or Just a Flaw in its Application?*

By Jeff Hermes

At the end of the last Supreme Court term, the Court released two controversial opinions in First Amendment cases: *National Institute of Family and Live Advocates v. Becerra*, No. 16-1140 (June 26, 2018) and *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, No. 15-1466 (June 27, 2018). In both cases, the Court split along ideological lines with the conservative wing in the majority. And in both cases, the Court invoked the First Amendment to strike down legislation perceived to be progressive or liberal in nature: mandatory disclosures about the availability of abortion services in *NIFLA v. Becerra*; and mandatory financial contributions by non-members to the advocacy efforts of public-sector unions in *Janus v. AFSCME*.

In dissent, the liberal wing of the Court accused the majority of extending the reach of the First Amendment for political ends. In *NIFLA*, Justice Breyer claimed the Court was "diluting" freedom of speech by applying it to economic and social legislation. *NIFLA*, dissenting op. of Breyer, J. at 7. In *Janus*, Justice Kagan accused the majority in both *Janus* and *NIFLA* of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy." *Janus*, dissenting op. of Kagan, J. at 26.

But what does it mean for the First Amendment to be "weaponized"? If free speech is implicated by a particular regulation, it is implicated, regardless of whether the result is favorable to a particular interest group. Media attorneys celebrate the fact that the breadth of the First Amendment is not a partisan issue, protecting both left and right, centrist and extremist. The suggestion that this breadth could be a flaw rather than a feature of the First Amendment puts free speech in jeopardy, making the appreciation of free speech itself a potential casualty of the political divide.

But what does it mean for the First Amendment to be "weaponized"? If free speech is implicated by a particular regulation, it is implicated, regardless of whether the result is favorable to a particular interest group.

On the other hand, perhaps "weaponization" refers to the invocation of the First Amendment where free speech principles are not in fact threatened. It is possible that the majority has simply become unmoored in its First Amendment analysis, losing touch with the reasons why we respect freedom of speech. If so, that would itself be problematic and run the risk of

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"diluting" free speech – but it would not point to an underlying problem with freedom of speech itself as a founding principle of our society.

To sort out this dilemma, we must be able to articulate the difference between (1) a case where the application of the First Amendment is flawed and (2) a case where the First Amendment, properly applied, produces results that demonstrate a flaw in the underlying principle of freedom of speech. This exercise can be difficult if we focus solely on judicial rulings, because the accretion of precedent over time can obscure points at which the application of the First Amendment becomes detached from its philosophical premises.

Instead, we must temporarily set aside our usual process of argument by reference to authority (because the authority itself may be flawed) and start from first principles. This article undertakes such an analysis with respect to the California compelled speech law at issue in *NIFLA v. Becerra*, in order to determine whether it is the First Amendment or merely the Court that might have gone astray. (For the sake of length, and because its issues relate less to compelled speech than to the government employee speech doctrine, I will leave *Janus v. AFSCME* for now.)

Part I. Returning to Basics

By "first principles," I refer to the actual philosophical underpinnings of freedom of expression. For these purposes, however, we need not conduct a detailed review of the history of free speech thought (not to worry, we need not return to John Milton's *Areopagitica*). With respect to compelled speech, we can start from the principle that, in the American tradition, freedom of speech has taken into account the interests of both speakers and listeners.

This article undertakes such an analysis with respect to the California compelled speech law at issue in *NIFLA v. Becerra*, in order to determine whether it is the First Amendment or merely the Court that might have gone astray.

This is, of course, a familiar idea. We see listener-side interests reflected in theories of the First Amendment such as Justice Holmes' marketplace of ideas, *see U.S. v. Abrams*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), which is based not so much on the interests of any particular speaker but on the results of debate for those whose opinions are not yet formed, or Dean Meiklejohn's interest in an informed populace, where it is the availability of pertinent information to voters that ensures meaningful self-governance, *see* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Harper & Brothers 1948).

In contrast, we see speaker-side interests in theories such as Prof. Emerson's articulation of an interest in personal involvement in government, *see* Thomas L. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 885 (1963), or Prof. Baker's theory of freedom of speech as a vehicle for self-fulfillment, *see* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 991-92 (1978).

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These interests generally align when we discuss free speech objections to censorship: speakers want to share information and listeners want to hear it. But these interests diverge in the case of compelled speech, where listeners might have an interest in receiving a message that speakers do not have an interest in providing.

The question then becomes how to balance these respective interests when they are in conflict. To answer that question, we cannot merely assume that listener and speaker interests are in equipoise and find that the First Amendment results in paralysis; nor can we declare the First Amendment analysis a wash and leave unbridled discretion to the government. Instead, we must think more deeply about the nature of listener and speaker interests, respectively, and what that means for the protection to which they are entitled.

1. Listeners' Interests

In a free society, one is at liberty to act without government interference so long as one's actions do not cause harm to others. However, freedom of speech is an exception to that general principle; we protect the sharing of information in some cases even when it might cause injury to other interests (such as personal interests in reputation). Thus, freedom of speech must presume that the social value of expression outweighs the collateral injury that speech might cause, distinguishing it from a more general interest in personal liberty. But what is the basis for that presumption?

A listener's interest, fundamentally, is based in the idea that the receipt of information allows the recipient to better understand, appreciate, or deal with the world around them. This is what might be termed a "rationality" interest, inasmuch as people need information in order to order their lives meaningfully and guide their behavior. Though this interest is easiest to understand in the context of factual information such as news coverage, it also applies to aesthetic works and entertainment to the extent that these provide other kinds of insights or even just help people to cope with the world.

A listener's interest, fundamentally, is based in the idea that the receipt of information allows the recipient to better understand, appreciate, or deal with the world around them.

This "rationality" interest is of a different order than a general liberty interest. One who is restricted by law from certain behavior might be delayed or thwarted in achieving some particular goal. On the other hand, a listener whose access to information is blocked may be prevented from making any principled decision regarding possible goals or how to achieve them. That is, impairing a liberty interest may frustrate a particular course of action, but impairing a rationality interest interferes with all courses of action. It is information's role as a prerequisite to self-determination and self-government that demands greater protection for the sharing of information.

That said, listeners' rationality interest is circumscribed by the fact that communications that actually serve that interest would need to be protected. This necessarily introduces into the equation a concept of information quality, defined as the capacity of information to provide a

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rational guide to a listener's choices or to improve their capacity to interact with the world around them. That is vague, true, but the vagueness comes from the fact that the notion of information quality is dependent upon context and the nature of the audience. If we are talking about a person seeking news coverage, then accuracy will be a marker of quality. If we are talking about a person reading a work of escapist fiction in order to relax, aesthetic issues rather than truth will be relevant. And if we are talking about matters of political, religious, or other opinion, the relevant factors become highly complex and subjective.

Thus, quality will sometimes be within the capacity of a court to determine, and sometimes it will not. But in those cases where flaws in quality may be identified, e.g., with respect to falsity in news coverage, listener interests are muted and the rationality basis for protecting speech recedes. Thus, we might see liability for defamation for false speech but not for true statements that injure reputation. The nuance of fault standards can also be addressed through this rubric, in terms of the defamation tort chilling speech that possesses information quality.

2. Speakers' Interests

But what about speakers' interests? Speakers by definition already possess the information that they intend to convey, so their interest is not the rationality interest of listeners (at least, outside of the limited context of speaking to oneself, where the same person is both speaker and listener). Rather, speakers are interested in what might be accomplished by their choice to communicate. That might include self-realization and self-fulfillment, per Prof. Baker, developing a sense of personal investment in public life, per Prof. Emerson, or persuading others to assist with the speaker's other interests or needs. Put another way, the decision to speak is itself an exercise of personal liberty in aid of particular goals.

Speakers are interested in what might be accomplished by their choice to communicate. That might include self-realization and self-fulfillment, or persuading others to assist with the speaker's other interests or needs.

As such, a speaker's interest should be protected from arbitrary government interference like any other liberty interest; but, as a liberty interest, a speaker's interest would be subject to government regulation to prevent harm to others. Yet because listeners' interests in what a speaker has to say will override considerations of harm where the speech at issue possesses information quality (as discussed above), regulations to prevent harm will only be valid where it can be established that the speech in question lacks quality.

It is important to note, however, that a speaker's interest is not necessarily dependent on information quality in the same way as a listener's interest. A speaker such as a journalist might be interested in providing accurate information; in that case, the speaker's interest in quality derives from the ethics of the journalist and needs of the audience. On the other hand, a desperate borrower might consider lying on a loan application or omitting damaging information in order to obtain funding, with the bank's interest in accurate information on which to base underwriting decisions potentially conflicting with the borrower's financial needs. In the latter case, accuracy is not necessarily inherent in the ends to which the

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borrower's speech is directed; rather, it must be encouraged or compelled by outside forces (legal, social, or otherwise).

It is also important to recognize speech lacking information quality does not necessarily cause significant harm. Bad art, after all, is simply bad art. Sometimes even falsehoods have no significant or cognizable effect, as discussed in the Supreme Court's split decision in *U.S. v. Alvarez*, 132 S. Ct. 2537 (2012). In that case, six members of the court found that the Stolen Valor Act was unconstitutional for punishing false claims about military honors that was not shown to cause cognizable injury (although Justices Breyer and Kagan split from the majority on the level of scrutiny applicable to the specific type of false speech at issue).

Part II. Balancing Listeners and Speakers in the Context of Compelled Speech

One might attempt to justify a law compelling speech by arguing that it elevates the rationality interest of listeners in the information that is compelled over the liberty interests of speakers to refrain from speaking. After all, if listeners' interests are of a "higher order" than speakers' interests, it might seem like listeners' rights should prevail in the event of conflict. However, this is problematic because the First Amendment protects both listeners and speakers.

That being said, we can make the following observations regarding the respective interests in the case of compelled speech:

1. Quality of the Compelled Message

Listeners' interests depend on information quality. Accordingly, compelled speech that purports to be factual but is in fact false or misleading does not serve those interests. This makes it more likely that a compelled speech regulation will be appropriate when it deals with facts that are cut-and-dried, as in many commercial speech cases. As Justice Stewart put it in *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*,

Listeners' interests depend on information quality. Accordingly, compelled speech that purports to be factual but is in fact false or misleading does not serve those interests.

> In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression.

425 U.S. 748, 777 (1976) (opinion of Stewart, J., concurring).

In contrast, in more complex situations where the truth of a statement may be subjective, disputed, or a matter of context, it can be more difficult to establish that compelling speech

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serves listeners' interests. On this point, *see Sindi v. El-Moslimany*, No. 16-2347 (1st Cir. July 11, 2018), discussing a post-trial injunction in a defamation case:

> By its very nature, defamation is an inherently contextual tort. ... Words that were false and spoken with actual malice on one occasion might be true on a different occasion or might be spoken without actual malice. What is more, language that may subject a person to scorn, hatred, ridicule, or contempt in one setting may have a materially different effect in some other setting. ... The cardinal vice of the injunction entered by the district court is its failure to make any allowance for contextual variation.

Slip op. at 56-57.

There might, of course, be legitimate public interest in hearing the government's position on what the truth is in a case of disputed facts. But where factual issues are the subject of legitimate dispute and a compelled party disagrees with the government's version of events, a compelled speech regulation can create a materially false impression *that the compelled speaker agrees* with the government's facts. On the other hand, where facts are agreed upon or not a matter of legitimate dispute, any denial of those facts by the compelled party may more safely be treated as a pretense.

Similarly, with respect to statements of opinion, ideology, or other assertions that cannot be proven true or false, there may be value to the public in hearing the positions of the government or particular public officials. However, by compelling those unwilling to espouse those messages to voice them, a compelled speech regulation creates the false message that the compelled party agrees with the government's opinion.

Note that government appeals to "viewpoint neutrality" may address concerns with the government putting its thumb on the scales of public debate (though of course government speech does this all the time). Nevertheless, viewpoint neutrality does not address the problem of the literally false impression created by associating a speaker with messages in which they do not believe. A regulation that forces a party to host the speech of any and all comers regardless of viewpoint does not reduce the burden on the compelled speaker; if anything, it increases it.

2. Compelled Speech versus Compelled Support

While all compelled activity imposes a burden on the target of the compulsion, that burden does not constitute a threat to First Amendment interests unless it interferes with the compelled party's own speech. Such interference might be direct, by requiring the compelled party to present, as her own, a message that conflicts with her viewpoint.

On the other hand, where the compulsion at issue is not to adopt the compelled message but to provide resources to support the speech of the government or other entities (e.g., through funding or by providing space in forums or media controlled by the target), any effect on the expression of target's own viewpoints might be attenuated, as discussed further below.

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3. Attribution of Supported Messages

Depending on the circumstances, a party compelled to provide resources for another's communications might or might not be understood to believe in that message. For example, a party compelled to pay taxes which are later used to fund government speech is probably unlikely to be seen as personally endorsing that speech. On the other hand, a media outlet compelled to give room in a broadcast to a speaker they did not choose might well seem to an audience to be giving that speaker the benefit of their editorial discretion.

This issue may be particularly complex where the supported speech originates from an organization of which the compelled party is (or, at least, might be perceived to be) a member, such as a union or activist group. Determining whether such compelled messages may reasonably be attributed to particular individuals will depend substantially on factors such as the size of the organization and the breadth of the group for which the organization claims the right to speak.

4. Effectiveness of Disclaimers

Where a party is required to present a compelled message as their own, there is no question about ascribing those beliefs to the compelled speaker. Such compelled speech cannot be effectively disclaimed by the speaker; at best, a subsequent rejection of the compelled message might cause confusion as to both the compelled message and the speaker's own views.

Where a party is required to present a compelled message as their own, there is no question about ascribing those beliefs to the compelled speaker. Such compelled speech cannot be effectively disclaimed by the speaker.

But in cases where a party is merely compelled to provide resources for another's speech, disclaimers might be effective to eliminate a false impression of ideological support for that speech. However, a disclaimer might be ineffective if it cannot be as timely or as widespread as the compelled message, or if a disclaimer is otherwise impracticable.

5. Interference with Speaker's Desire Not to Speak

Requiring a target who wishes to prevent a false association with another's message to take affirmative measures to disclaim that message is itself a burden that can interfere with a speaker's interests. The need for a disclaimer might force the compelled party to declare their allegiance or lack thereof to particular ideas when they are either uninterested in doing so or unprepared to do so.

6. Practical Interference with Compelled Party's Own Speech

In addition to the prior point, compulsion might also interfere with the party's own speech as a practical matter. The resources devoted to the compelled message (e.g., funding, space in mailings or publications, use of forums) might in some circumstances prevent, limit or obscure

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the party's own speech. The same holds true for resources dedicated to disclaimers to dispel false associations with a message that a party is compelled to support.

But this issue is somewhat different than the other matters discussed here, because the content of the compelled speech might be incidental to the suppressive effect of such practical interference. The dedication of limited resources to compelled speech can force time, place and manner limitations on the compelled party's own messaging, regardless of the nature of the government's message. Indeed, similar effects might be achieved through more mundane time, place and manner restrictions on speech.

This is not to say, however, that the content of the compelled speech is entirely irrelevant to this issue. Reallocation of resources from one's own message to speech compelled by the government might be justified by a need to supplant deceptive or misleading information from a particular speaker with accurate information. This is discussed further below.

7. Quality and Harm of the Compelled Speaker's Own Messaging

Because a speaker's liberty interests are weaker where a speaker's own message lacks quality and causes harm, those interests might be required to yield where compelled speech is necessary to prevent such harm.

Because a speaker's liberty interests are weaker where a speaker's own message lacks quality and causes harm, those interests might be required to yield where compelled speech is necessary to prevent such harm.

Most often this lack of quality will relate to falsity or harmful omissions. For example, a manufacturer who advertises dangerous products but does not provide warnings may create the false implication that use of the products poses no substantial risk. Compelling the manufacturer to provide warnings, either by regulation or by injunction, interferes with the seller's choice not to speak but does not necessarily infringe the speaker's First Amendment rights.

Note that the strength of the speaker's interests does not depend on whether the compulsion takes the form of requiring the speaker to endorse the compelled message or to provide resources to enable another's speech. However, it does depend on the compelled speech not being subject to serious dispute. Otherwise, the government cannot legitimately claim to be serving listeners' interests by superseding the compelled party's message with its own.

8. Necessity and Tailoring of Compelled Speech

Not all harm, or potential harm, is equivalent. In the previous example, compulsory warnings or disclosures might be required at the point of sale in order to be effective. Otherwise, consumers might be injured before they encounter warnings delivered through other channels.

But in other circumstances, where the alleged harmful effect is less specific or immediate, a government announcement or press release might be sufficient to counteract the injury. In such

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cases, it would not be necessary to resolve a conflict between speakers and listeners, and thus listener interests could not justify interference with speakers' First Amendment rights.

Similarly, to the extent that compelled speech is necessary to avoid harm, it is still important to consider the breadth of its impact on the compelled party's own speech. Even where some mandatory disclosures are justifiable, compelled messaging that overrides more legitimate speech by the target than is necessary can raise free speech issues.

9. Viewpoint Discrimination

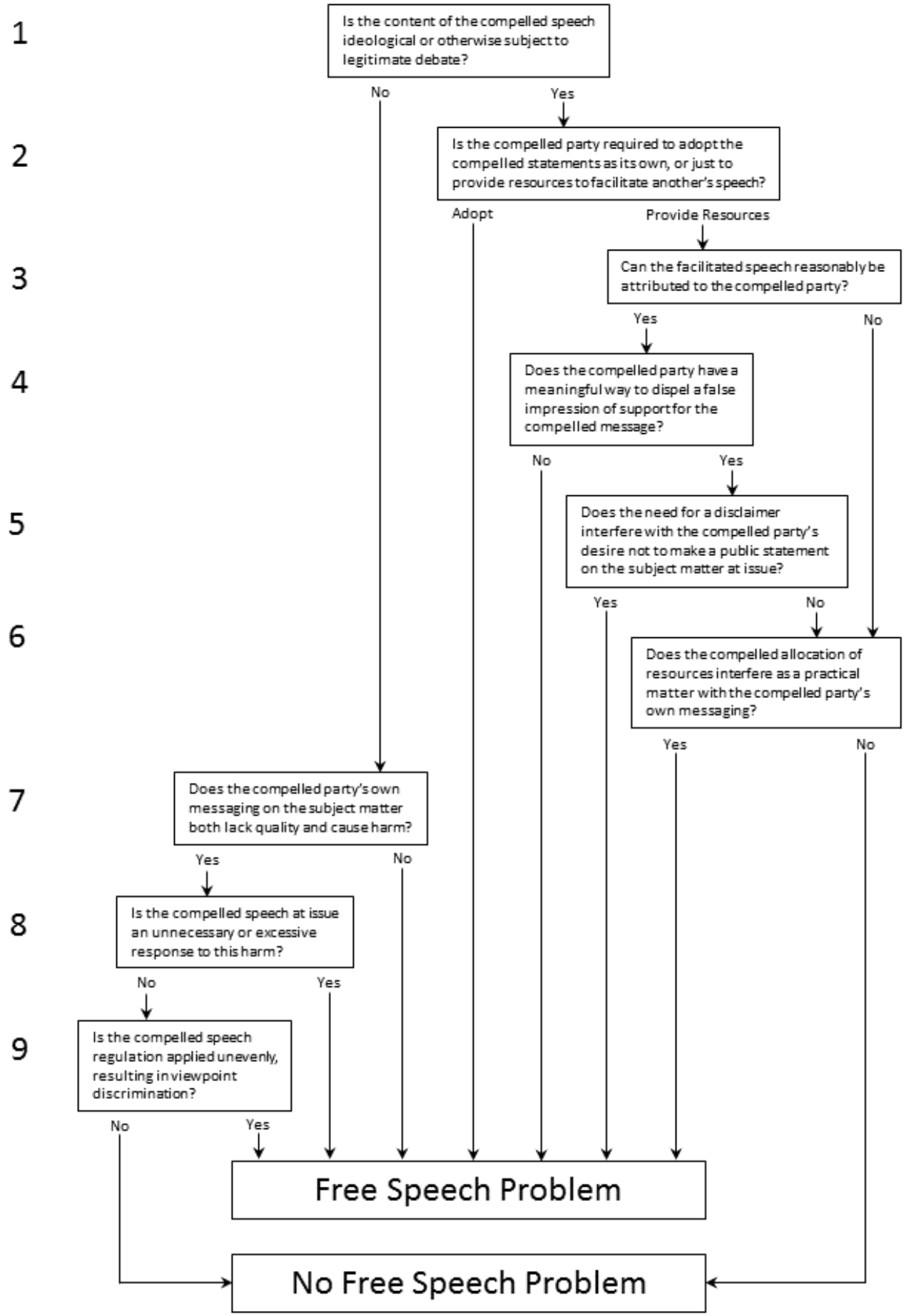
While all compelled speech that is ideological or controversial in nature by definition advances particular viewpoints over others, even compelled speech laws that impose "uncontroversial" disclosures can tilt the scales in favor of certain speakers in the marketplace of ideas.

For example, consider a compelled disclosure in attorney advertising that past performance is not indicative of future results. If that disclosure were applied to all attorneys evenly, there might be no issue. However, if it applied only to law firms of under 20 lawyers, it could result in the appearance that small firms are less reliable than large firms, undercutting the former's appeal to potential clients. Not only would such a disparate impact be unfair, but it would also create a false impression regarding the comparable reliability of large firms that would undermine rather than serve the public's informational interest.

Even compelled speech laws that impose "uncontroversial" disclosures can tilt the scales in favor of certain speakers in the marketplace of ideas.

* * *

Assembling the observations above, we can derive a framework for analyzing free speech issues with respect to compelled speech regulations as follows:



Part III. Past Cases in the Framework

With this framework in place, it is possible to compare the analysis used by the Supreme Court in some of its major compelled speech cases see what that might say about potential soft spots or oversights in the Court's logic and the compelled speech doctrine as a whole.

1. West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943)

It is relatively straightforward to determine that the mandatory pledge of allegiance at issue in *Barnette* would not pass muster under the framework. The compelled pledge was intended to enforce ideological uniformity rather than to improve or to correct information available to the public. As such, it addresses matters of belief and opinion (step 1 in the framework), and forces endorsement rather than mere support (step 2). That being the case, it is unnecessary to determine whether the compelled speaker could disclaim the compelled message (step 4 and following); such a disclaimer could not effectively offset the participation in the pledge. Nor is it necessary to parse whether the compelled speakers' own beliefs are somehow flawed (step 7).

The Court, to be sure, did not unpack its analysis in this fashion. Rather, it discussed the offensiveness of the government "prescrib[ing] 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," 319 U.S. at 642, and the futility of attempts to enforce patriotism by law, *id.* at 640-41. But this is largely the same thing. The Court recognizes that a compelled pledge of allegiance is an inherently flawed statement, because the compulsion itself undermines its credibility.

To media lawyers familiar with the powerful language in *Barnette*, reframing the case in terms of a flowchart analysis probably seems somewhat antiseptic – but that is only because the strong endorsement of First Amendment rights in *Barnette* is already built into the recognition of speaker and listener interests that is the entire basis of the framework. This exercise is less about acknowledging that the First Amendment plays a role in these cases than evaluating whether these rights are applied consistently and in a principled fashion.

2. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)

As with the prior example, the compelled right of reply at issue in *Tornillo* quickly runs into problems in this framework; however, the Court's own analysis tracks the framework more closely.

The Florida statute at issue in *Tornillo* required newspapers to run a response provided by any candidate for nomination or election whose personal character or official record was impugned in the paper. The right was not limited to undisputed facts; to the contrary, it was intended to establish the existence of a dispute on particular allegations and did not turn on proof of any falsity in the allegations reported in the paper. 418 U.S. at 244.

While the law merely required the paper to provide candidates with space (step 2) and did not prevent the paper from printing its own view in opposition (step 4), the Court found that the allocation of a portion of the limited space in a paper necessarily interfered with the paper's

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own choices about what to publish (step 6). *Id.* at 256-57. Thus, the Court held, the compelled right of reply violated publishers' First Amendment rights.

3. Wooley v. Maynard, 430 U.S. 705 (1977)

Wooley involved a statutory prohibition on car owners obscuring letters or figures displayed on New Hampshire license plates; the appellant was cited for violation of the statute by placing tape over the state's "Live Free or Die" motto based upon ideological objections. Thus, as applied, the law at issue in *Wooley* resulted in a requirement to display the government's ideological message on one's automobile (a compulsion to provide assistance to disseminate the message, step 2) coupled with a refusal to allow the owner to disclaim the objectionable part of this message by obscuring it (step 4).

However, a key point of contention in the case was whether endorsement of the motto could be attributed to the vehicle owner at all (step 3). The Court cited to *Barnette* and *Tornillo* to hold that the ban on modification of license plates coupled with the requirement to display a plate violated the First Amendment, holding that Wooley had been compelled to become "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." 430 U.S. at 714-15. In dissent, Justices Rehnquist and Blackmun argued that car owners would no more be associated with the message on their license plates than with other taxpayer-funded government speech such as the motto on U.S. currency or government messages on billboards. *Id.* at 721-22 (opinion of Rehnquist, J., dissenting). In response, the majority noted that, unlike other instances where an ideological message appears, a person's vehicle is uniquely associated with its owner. *Id.* at 717 n.15.

This raises the question: Was the majority actually reacting to the fact that car owners would be understood to agree with the state motto, or were they responding to a perceived indignity in being compelled individually to provide a channel for government speech that few would realistically ascribe to every New Hampshire vehicle owner? If the latter, is that dignity interest the same as a speech interest? Perhaps there is a separate level of speech issue if car owners are forced to tacitly indicate their acceptance of the compulsion unless they protest – but if so, is not that tacit statement of acceptance implicit every time the government requires a citizen to do something they would prefer not to do?

Interestingly, Justices Rehnquist and Blackmun also pointed out in dissent that vehicle owners could disclaim the "Live Free or Die" message with bumper stickers rather than by obscuring the message; the majority did not grapple with this argument. It would have been interesting to know how the majority would have parsed the idea that an owner might need to devote part of the limited space on the bumper—which could have been devoted to other messages—if they wished to explicitly disclaim an unpalatable idea (i.e., steps 5-6).

The problems with applying the compelled speech analysis to the facts of *Wooley* suggest that it might be more sensibly read as a censorship/prior restraint case, focused not on the compulsion to have a license plate bearing a motto on one's car but on the prohibition from engaging in the symbolic act of covering up part of the plate. That, at least, is explicitly

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expressive activity on the part of the vehicle owner that was directly suppressed by the law at issue.

4. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)

Three years after *Wooley*, the Court in *PruneYard* considered the consequences of an interpretation of the free speech provision of California's constitution that required the owners of certain privately-owned but publicly-accessible spaces to allow members of the public to exercise their free speech rights therein. The owner of the PruneYard Shopping Center sued, claiming that the compulsion to allow members of the public to use his property violated his own First Amendment rights against compelled speech.

The Court (in an opinion written by Justice Rehquist) disagreed, holding that the owner was merely being required to provide space in which others could speak (step 2). 447 U.S. at 87-88 Given that the shopping mall was generally open to the public, the Court found that the owner would be unlikely to be seen as endorsing the speech in question (step 3). *Id.* at 87. And even if such endorsement could be inferred, the Court found that it would be a simple matter to post disclaimers in the space where speakers were allowed to stand (step 4), *id.*, echoing Rehnquist's discussion of disclaimers in his dissent in *Wooley*.

Because the owner's challenge was to access for speech activity generally rather than to specific messages, the Court did not parse whether the speech thus facilitated was factual or ideological (step 1). Rather, the Court presumed that the speech allowed would not be restricted to particular types of content. It did stress that the California government was not endorsing any particular viewpoint, *id.* at 87-88, though as discussed above that does not necessarily resolve the issue from the compelled party's point of view.

The majority did not directly address whether such disclaimers could themselves interfere with the shopping owner's rights to speak or remain silent, either by clogging channels for the owner's own speech or by compelling him to take sides (steps 5 and 6). Justices Powell and White, concurring, did believe that in other circumstances not before the Court the pressure brought upon the owner of a private space to disclaim particularly offensive messages – even when not directly attributed to the owner – might result in the compelled relinquishing of the "freedom to maintain his own beliefs without public disclosure." *Id.* at 100 (opinion of Powell, J., concurring). However, because PruneYard's owner did not object to any specific messages, Powell and White concurred in the Court's judgment.

5. Zauderer v. Office of Disciplinary Counsel of Ohio, 471 U.S. 626 (1985)

Five years after *PruneYard*, the Court in *Zauderer* considered mandatory disclosures in attorney advertising imposed upon the Ohio bar. Recognizing that First Amendment protection for commercial speech is "justified principally by the value to consumers of the information such speech provides," 471 U.S. at 651—i.e., listeners' interests—it held that such compelled speech did not violate attorneys' First Amendment rights if the disclosures were "purely factual and uncontroversial" (step 1), and "reasonably related to the State's interest in preventing

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deception of consumers" by misleading statements or omissions in attorney advertising (step 7), *id.*

The Court did not explicitly address the question of whether there might be alternative means to address the information problems with attorney advertising. It did note the possibility that compelled speech regulations might be unjustified or unduly burdensome, *id.*, which might consider those concerns. The Court did not clarify, however, whether or how compelled disclosures could be found unduly burdensome if there actually were some deception at work.

6. Turner Broadcasting System, Inc. v. FCC, 512 U. S. 622 (1994)

Turner involved federal regulations requiring cable operators to make channels available for certain broadcast signals, which the operators challenged as infringing their First Amendment right to select programming. The Supreme Court recognized the operators' First Amendment interests. 512 U.S. at 636. However, it found little risk that the content of the broadcast signals would be attributed to the operators given their regular practice of disclaiming the viewpoints expressed on their channels, and little risk that the compelled carriage would interfere with the programming that the operator would itself choose to carry. *Id.* at 655-56. It also specifically noted that compelled carriage laws could serve audience interests in information they might not otherwise receive. *Id.* at 656-57.

So far, this is more or less a straight-up application of the framework analysis. The Court apparently assumed that there might be controversial content (step 1) but treated the regulations as requiring only a platform for third-party speech (step 2). Nevertheless, that speech was not attributable to the operator (step 3), could be disclaimed in any event (step 4), and did not interfere with the operator's own selections (steps 5-6).

But rather than terminating its analysis at that point with a decision that the operators' First Amendment rights were not infringed, the Court held that these findings merely indicated that intermediate rather than strict scrutiny should be applied to the regulations at issue. *Id.* at 661-62. The Court then split on the appropriate resolution from that point forward. Four justices voted to remand for a determination of whether the regulations were in fact necessary to protect the availability of broadcast programming and whether they burdened substantially more speech than necessary. *Id.* at 664-668.

Justice Stevens concurred in the remainder of the opinion and the judgment, but argued that the record was already sufficient to demonstrate the constitutionality of the must-carry provisions, *id.* at 669-74; nevertheless, in order to ensure that a majority of the Court agreed on the disposition of the case, he joined in the plurality's final judgment as an "accommodation." *Id.* at 674.

It must be said that Justice Stevens had a point. The Court's analysis already premised on the suggestion that the regulations were necessary and not unduly burdensome, as discussed above. However, the case was before the Court on an appeal of summary judgment; perhaps the

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Court was uncertain enough about its conclusions to want further factual findings from the district court.

7. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995)

In *Hurley*, the Court considered the application of anti-discrimination provisions of Massachusetts' public accommodations law to require that the privately-sponsored St. Patrick's Day-Evacuation Day Parade in Boston allow participation by the Irish-American Gay, Lesbian and Bisexual Group of Boston (aka "GLIB").

The Court held that while both the parade organizers' message and that of GLIB might be imprecise, both were involved in expressive activity. 515 U.S. at 568-70 The Court did not discuss whether GLIB's message was factual or ideological in nature (step 1), instead holding that speakers outside of *Zauderer*'s commercial context have the right to avoid both factual and ideological speech in which they do not wish to engage. *Id.* at 573. That represents a slight divergence from the framework analysis above, in which the key distinction at step 1 is whether speech is controversial or uncontroversial, not whether it is commercial or non-commercial. However, in the context of *Hurley*, the distinction is of limited importance.

Contrasting *Turner*, the Court then found that GLIB's message might be attributed to the parade organizers as part of the overall meaning of the parade (step 3). *Id.* at 574-75. Moreover, the Court found that as a practical matter it would be awkward if not impossible for the organizers to disclaim GLIB's message during the parade itself (step 4). *Id.* at 576-77 ("Practice follows practicability here, for such disclaimers would be quite curious in a moving parade.").

This, the Court held, violated the principle of speakers' autonomy. Comparing the addition of GLIB's message into that of the organizers to the compelled pledge of allegiance in *Barnette*, it stated,

> Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective. … The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.

Id. at 578-79. Thus, it held that the application of Massachusetts' public accommodation law to the parade was unconstitutional.

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These examples demonstrate how the framework we developed in Part II can help to surface questions about the Court's logic and to evaluate the consistency of its holdings with one another and with overarching principles. None of the above is intended to suggest that the Court's decisions in these cases were necessarily "correct"; the Court might ask the right questions for the compelled speech analysis but reach the wrong answers as a factual matter.

With the above discussion as a preface, we can turn to the decision in *NIFLA*.

Part IV. NIFLA v. Becerra

NIFLA v. Becerra involved two different compelled speech provisions of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency ("FACT") Act applicable to clinics primarily providing pregnancy and/or family planning services. The first, which applies to such clinics licensed by the state, requires the clinic to inform women of the fact that California provides free or low-cost health services, including abortions, and to provide a phone number for additional information. The second, which applies to unlicensed clinics, requires the clinic to inform women that the state has not licensed the clinic to provide medical services.

NIFLA v. Becerra involved two different compelled speech provisions of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency ("FACT") Act.

With respect to the licensed clinic notice, California's stated justification was low awareness among women of state-sponsored services. Meanwhile, the state asserted that the unlicensed clinic notice served the goal of ensuring that women only received medical care from licensed professionals.

Both licensed and unlicensed clinics challenged the respective provisions of the FACT Act, and sought a preliminary injunction against its enforcement. The district court denied the preliminary injunction, and that decision was affirmed on appeal by the Ninth Circuit. The Court, in an opinion by Justice Thomas, reversed, holding that the clinics were likely to succeed in proving that both notices were unconstitutional.

1. The Licensed Clinic Notice

The majority's analysis of the licensed clinic notice takes a bizarre turn almost immediately. The Court starts by invoking *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), to suggest that a law compelling speech on a particular subject matter will generally be subject to strict scrutiny. *NIFLA*, slip op. at 6-7. While the Ninth Circuit had based its opinion on distinguishing "professional speech" as a category subject to greater regulation, the majority rejected the notion that the Supreme Court had itself recognized that distinction. *Id.* at 7-8. Rather, the majority stated, the Court had recognized two more limited exceptions potentially applicable to certain speech by medical professionals: the compelled commercial speech doctrine, as

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enunciated in *Zauderer*, and a limited exception for regulation of professional conduct that incidentally involves speech, per *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447 (1978).

The problem with this framing is that it is not at all clear that *Reed* should be applied to compelled speech cases. Justice Breyer noted in dissent that *Reed* involved a prohibition on speech, not compulsion, and virtually every disclosure law would be a content-based regulation of speech under the majority's logic. *NIFLA*, dissenting op. of Breyer, J. ("Breyer Dissent") at 2-3.

That said, the potential reach of the majority's logic is not by itself a flaw. What is problematic, however, is that strict scrutiny generally applies when the government seeks to advance some outside interest over the rights of both speakers and listeners. As we have discussed at length above, a compelled speech regulation may serve a communicative purpose by balancing the interests of speakers and listeners within the framework of the First Amendment.

Applying strict scrutiny to compelled speech by default treats the listener interests that the government seeks to protect as if they were alien to the purposes of the First Amendment, and tilts the analysis in favor of speakers' interests. It would at the least be more appropriate to determine first whether the government regulation serves speech-related interests. *See, e.g., Turner* at 656-57 (noting that the informational interests served by regulations compelling cable operators to carry broadcast programming distinguish those regulations from other compelled speech laws for which strict scrutiny is appropriate).

The Court goes on to dismiss the idea that *Zauderer* applies to the case because, rather than involving factual and uncontroversial information about the clinic's own services, it involves disclosures about state-sponsored services. *NIFLA*, slip op. at 9. Furthermore, the Court concludes that the licensed clinic disclosures are not "uncontroversial" under *Zauderer* because they reference abortion services – in the Court's words, "anything but an 'uncontroversial' topic." *Id.* It then rejects the application of *Ohralik* on the basis that the FACT Act regulates professionals' speech directly, not services with an incidental effect on speech. *Id.* at 10-11.

The disregard for *Zauderer* is problematic for multiple reasons. As Justice Breyer points out, nothing in the logic of *Zauderer* (with its focus on the informational needs of consumers) requires the compelled statements to relate to the compelled party's own services. Breyer Dissent at 15-16. Rather, *Zauderer* merely suggests that compulsion may be appropriate to prevent deception of consumers. In most cases, this will probably relate to misleading information about the compelled party's own goods or services, but it could just as easily involve deception by the compelled speaker about competing services in the marketplace.

Moreover, the majority's suggestion that any statement touching the word "abortion" is "controversial" raises significant issues. Breyer's dissent accurately comments, "Abortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth." Breyer Dissent at 17. For the majority's point to make sense, it must be suggesting that while the content of licensed clinic notice itself

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might be factual, it is a subject of significant debate as to whether such a compelled statement is normatively a good idea.

This results in a branching of the First Amendment analysis. On the one hand is the factual information that the clinics are required to provide, the accuracy of which is not disputed. On the other is the potential false implication that the clinic staff think it wise or proper to provide that information when they believe the opposite. The Court conflates the analysis, but relevant questions for each branch differ significantly.

a. Factual Information About Abortion Services

For the basic factual information in the disclosure, it does not matter whether the disclosure is presented as the clinic's own message or as the speech of the state because that does not affect the accuracy or utility of the information. For Justice Breyer, the fact that the statements were true was sufficient to avoid constitutional problems. *See* Dissenting Opinion at 16 ("In *Zauderer*, the Court emphasized the reason that the First Amendment protects commercial speech at all: 'the value to consumers of the information such speech provides.' ... [A] doctor's First Amendment interest in not providing factual information to patients is the same: minimal, because his professional speech is protected precisely because of its informational value to patients.").

The majority opinion thus explicitly recognizes that speakers deserve independent First Amendment recognition that is not merely derivative of listener interests.

That, however, disregards the fact that *Zauderer* explicitly relies not only on the uncontroversial truth of a particular compelled statement but also upon the need to prevent deception from the compelled party's own messaging. *Zauderer*, 471 U.S. at 651. As a result, Breyer gives little weight to speakers' own independent interests that might militate against imposing such a burden when there is no deception or other injury (step 7).

It is clear that California, in passing the FACT Act, was concerned about awareness of state-sponsored services, but that is different from a concern that the clinics compelled were actually misleading women regarding the availability of such. While California might have suspected that deception regarding the availability of low-cost abortion services might in fact be occurring at pro-life clinics, no such findings were referenced in either the majority or the dissenting opinions.

Absent such justifications, the majority held that the limited effectiveness of the state's own direct public information campaign and the belief that notices point-of-service notices might be more successful were not sufficient reasons to burden the clinics' speech. *NIFLA*, slip op. at 16. The majority opinion thus explicitly recognizes that speakers deserve independent First Amendment recognition that is not merely derivative of listener interests. The end result is that the licensed clinic notice has potential First Amendment issues solely with respect to its purely factual aspects, though as the case progresses further below there might be additional evidence of deception warranting correction by means of such a notice.

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The majority also hints (without holding) that the factual aspects of the notice might be tainted by viewpoint discrimination (step 9) because not all medical centers to which women might go for family planning and pregnancy-related services are required to provide the notice. *Id.* at 15. Rather, the licensed clinic notice is only required at clinics that (1) have a primary purpose of providing such services, and (2) provide two or more of a list of six specific services identified in the statute. It is not clear, however, why the mere factual disclosure of the availability of state-sponsored services would undermine the message of those clinics affected by the law in such a way as to result in viewpoint discrimination.

b. Implied Approval of State-Mandated Message

By introducing the idea that compelled factual disclosures also result in an implied ideological statement with respect to the wisdom of the disclosure, the Court opens a separate can of worms. This idea will be familiar from our discussion of *Wooley*, above, and raises a similar issue – namely, that every acquiescence to behavior compelled by law arguably conveys the same implication. If the First Amendment were to extend so far, it would represent a significant hurdle to the rule of law as a whole.

The conceptual divide between speech, on the one hand, and implications drawn from conduct, on the other, can be blurry.

This in fact points to a deeper issue lying at the boundaries of speech protected by the First Amendment. The conceptual divide between speech, on the one hand, and implications drawn from conduct, on the other, can be blurry. Virtually every action in which a person can engage may be communicative in some sense, to the extent that it expresses the actor's attitudes and intent. Conversely, "pure speech" is a theoretical extreme rather than a real thing, inasmuch as every communication is dependent on an interaction with the physical world -- even if that is as simple as disturbing the air with the breath on which one's words are carried. Things get murky in the middle.

To the extent that courts have been able to draw a line between speech and conduct, it has been based on both the communicative intent of the speaker and the understanding of a conveyed message by the audience. *See Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (exhibition of U.S. flag bearing peace symbol was expressive activity: "An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."). But in the case of compelled speech, the speaker by definition has no communicative intent. Certainly, a clinic forced to provide the notice under the FACT Act would disclaim any intent to convey the impression that it approves of the notice. Without an intent to communicate, the usual speech/conduct analysis would not apply.

That seems paradoxical – after all, the compelled act is the provision of information. But instead of looking to the compelled speaker for communicative intent, we must look to the intent of the government that is using the compelled party as a channel. If a law is intended to

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require that a party not only provide a particular disclosure but also indicate its support for the idea of doing so, then we can reasonably interpret the compelled message as having an ideological dimension.

But that is the same as enquiring whether the compelled party must adopt the compelled message as their own, or, if not, whether they have the right and ability to disclaim any potential inferred approval of messages that they are merely required to transmit. In the case of the FACT Act, while the clinics could not disclaim the factual information in the disclosures, there appears to have been no requirement that they had to present that information as originating from the clinic as opposed to the State of California. Nor was there a prohibition on clinics making a simple statement along the lines of: "The State of California requires us to notify you about these services, but we don't believe that abortion is the right solution for you."

Because the FACT Act allowed the licensed clinic notice to be presented to clients individually, such a disclaimer statement could at the clinic's option be made virtually simultaneously with the notice (step 4). Nor would the need for a disclaimer impose any significant burdens either upon the clinics' ideology or their resources (steps 5 and 6). Given that the clinics opposing the notice are dedicated to providing alternatives to abortion, there was unlikely to be an issue about the disclaimer drawing the clinics into a debate in which they were not already willingly engaged (for example, every time a client herself asked about abortion services).

As such, the majority's identification of a free speech problem by virtue of the mere fact that the licensed clinic notice touches on abortion is a mistake. While the decision to impose the licensed clinic notice requirement might have been politically controversial, the clinics themselves were only required to abide by the result of that controversy – not to voice their approval.

2. The Unlicensed Clinic Notice

On its face, the unlicensed clinic disclosure (which required unlicensed clinics providing pregnancy-related services to notify clients that they were not licensed to provide medical services) seems like a straightforward attempt to avoid potential confusion over the nature of the services provided by particular clinics. As with the licensed clinic notice, the possibility that clients of particular clinics might be confused or misled as to whether they are staffed by licensed practitioners does not seem like an outlandish concern.

However, the Court found that this justification for the disclosure was undercut by a lack of evidence in the record that clients of unlicensed pregnancy clinics were unaware of the nature of those facilities. *NIFLA*, slip op. at 18. Thus, while the Court recognized that evidence supporting such concerns might emerge later in the case, it held that on the current record the clinics were likely to succeed on their constitutional claims. *Id.* at 18 n. 4. In his dissent, Justice Breyer found the potential misunderstanding of the nature of these clinics to be "self-evident" due the types of medical services and counseling provided, and thus more than hypothetical. Dissenting Opinion at 21.

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So far, this is a relatively simple analysis, assuming the notice is non-controversial (step 1) and then considering whether it is remedying some flaw in the information available to the public (step 7). But, as with the licensed clinic notice, the Court suggested that there was a deeper issue.

Specifically, the Court was concerned by the fact that the requirement applied to those unlicensed clinics providing "pregnancy-related" services but not those providing "family planning" services or access to contraception. This, in the Court's view, raised the possibility that California was attempting to burden specific clinics based upon the viewpoints they expressed. Slip op. at 18-19. The Court also notes that the length of the specific language required by the FACT Act – particularly in municipalities where disclosures in multiple languages would be necessary – could "drown out" the clinic's own messaging. *Id.*

It is true that even a simple and purely factual disclosure could be implemented in such a way as to advance the government's favored viewpoint (step 9). The factually accurate disclosure that a clinic is not licensed by the state has the potential to undermine clients' trust in whatever else the clinic might have to say. If, for example, only pro-life pregnancy clinics were compelled to make that disclosure while pro-choice clinics were not, the "non-controversial" factual statement would become a way to endorse one view and suppress the other.

But as Justice Breyer points out, the distinction in the statute is not between pro-life and pro-choice, but between family planning and contraceptive services on the one hand, and pregnancy -related services (whether related to abortion or to prenatal care) on the other. Dissenting Opinion at 22-23. The dissent therefore argues that the distinction in the statute did not reflect viewpoint bias but a recognition of the particular and urgent informational needs of women who are already pregnant. That seems logical enough.

Meanwhile, the idea of "drowning out" speech suggests the concerns addressed at step 6 of the framework analysis, but note that the framework as we have structured it bypasses that step if the disclosure merely encompasses non-controversial facts. The whole point of a notice requirement targeting deception would be to "drown out" problematic aspects of the clinics' messaging in favor of accurate information; and if it turns out there is no deception, such a compelled notice would not be justifiable in the first place (step 7).

And to the extent that a compelled disclosure suppresses more of the compelled party's speech than is actually necessary to respond to misinformation, that would be considered at step 8 in connection with the scoping of the regulation. On that issue, the dissent persuasively argues that the extent of the practical interference suggested by the majority will depend on the location of the clinic in question and the number of languages in which the notice must be provided, which would present an as-applied rather than facial challenge to the statute. Dissenting opinion at 23-24.

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Conclusion

From the above discussion, we can see that the Supreme Court's opinion in *NIFLA v. Becerra* becomes unmoored from principles of freedom of speech in at least three ways.

First, by suggesting that strict scrutiny is the default standard of review for a compelled speech regulation, the Court neglects the possibility that there are legitimate speech interests on both sides of the equation in such a case. This potentially confuses legitimate public interests in information that the First Amendment is itself intended to serve with other anti-communicative interests such as reputation and privacy with which both speaker and listener interests might come into conflict.

Second, by finding a free speech problem in the inferences that the public might draw from the clinics' adherence to the FACT Act, as opposed to content of the compelled communication itself, the Court invokes the First Amendment where no ideological statement was necessarily intended by either the government or the clinics. This would result in a potentially unlimited extension of the First Amendment's reach to any law compelling behavior from which an observer might infer some meaning.

Third, by reading *Zauderer* as inapplicable to statements about services in the marketplace other than those provided by the clinics themselves, the Court created a distinction between categories of compelled commercial speech that has nothing to do with the reasons why misleading commercial speech might sometimes be properly corrected through mandatory disclosures.

From the above discussion, we can see that the Supreme Court's opinion in *NIFLA v. Becerra* becomes unmoored from principles of freedom of speech in at least three ways.

These are not flaws in the theory of freedom of speech, but in the understanding and application of that theory. The consequence of the Court's decision might be the dilution of the force of the First Amendment, and that might itself be a danger, but the decision can be distinguished from the principles that it purports to implement.

This is not to say that the result the Court reached in *NIFLA* was necessarily incorrect. Leaving aside the problems above and focusing just on the majority's consideration of the factual content of the compelled disclosures, the majority notably recognized speaker-related interests that the dissent was apparently willing to disregard entirely. In that regard, the majority opinion is more consistent than the dissent with the idea of balancing listener concerns with speaker concerns.

While the dissent and the majority split on the interpretation of the record with respect to the issue of whether the licensed and unlicensed clinic notices were justified by flaws in the information available to the public, the majority was more or less asking the right questions as to whether it was necessary to burden the clinics in order to achieve the FACT Act's intended

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goals. (Of course, the dissent's view of the record might prove to be better founded as the case progresses below.) The majority also raised a legitimate question about the uneven application of compelled speech regulations to different categories of speakers, even though in the case at bar it is hard to see how the categorical distinctions in the FACT Act in particular would result in actual viewpoint discrimination.

As always, the long-term consequences of the Court's decision in *NIFLA* will depend on how the decision is interpreted in the future, and whether its logic is later harmonized with free speech principles. But for those of us concerned about accusations of "weaponization" of the First Amendment, we can perhaps take some comfort that the problematic aspects of the Court's decision arise from misapplication of First Amendment principles rather than flaws in those principles themselves.

Jeff Hermes is a Deputy Director at MLRC.

10 Questions to a Media Lawyer: Robert Latham

Robert (Bob) Latham is a partner at Jackson Walker in Dallas.

1. How'd you get into media law? What was your first job?

It was really a combination of two interests. I studied and fulfilled the major requirements for both political science and communications at Stanford. Then, in law school at UVA, not surprisingly I found that I was drawn to both constitutional law and trial law. In hindsight, pursuing a media law practice was an obvious and natural extension of those interests.

However, I would be remiss if I did not give my law firm full credit for my media law practice. My first legal job was my 2L summer, and I clerked with Jackson Walker in Dallas, where I have now been for 35 years. Jackson Walker had a media law practice that went back to 1905, when we incorporated the Dallas Times Herald. I was able to play more than a nominal role in a libel case (examining five witnesses) at the end of my second year at JW – in a case in which we represented a weekly newspaper.

I realized immediately why I liked it. First of all, I believe strongly in freedom of speech and of the press, and therefore the work was meaningful to me. But also, a libel suit - and especially a libel trial - is part street fight and part advocacy of lofty constitutional principles. Each part appealed to me.

2. What do you like most about your job? What do you like least?

Broadly speaking, when you have a client that has a clear objective and you help achieve that objective, it's a great feeling of accomplishment and it builds the relationship. That's what we are in the business to do. More specifically, I like the courtroom. I like when it's game time. What I don't like is all of the intramural scrimmaging you have to do to get there – much of it unnecessary.

3. What's the biggest blunder you've committed on the job?

Fortunately, it was in front of a limited audience. I was conducting voir dire, and one person on the jury panel said that she could not be a fair and impartial juror because she was psychic and

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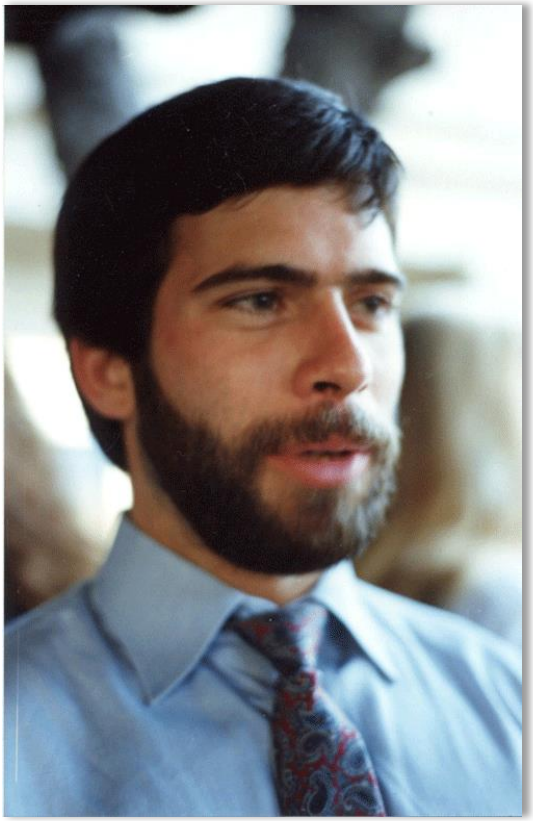

Portrait of the lawyer as a young man: Latham ca. 1987

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she knew how the trial was going to come out. I certainly didn't want to poison the rest of the panel by what her vision might be, so I said that we might want to ask her some more questions in private.

Once the group voir dire was concluded, the judge invited me to call the psychic up to the bench for further questioning outside the earshot of the other members of the venire. But he said, "Make it quick; I want to have the jury empaneled before lunch." So I said, "Ms. So-and-So, I do have a number of questions for you, but to speed things up, why don't you just go ahead and give me the answers."

The judge – a man not noted for a robust sense of humor - gave me a look that was beyond stern. I proceeded to question her in the conventional way, the judge did get over it, the trial went fine, the psychic was wrong in her prediction (at least as it related to my client) and all was forgotten or forgiven.

The most amusing blunder I have been part of, however, was when I was on a conference room speakerphone. My client, an associate, and I were on our end of the call and Ross Perot on the other. The associate accidentally hit a button that hung up the phone right as Mr. Perot was leading to his ultimate point. Needless to say, we had some fun with that for a long time.

4. Highest court you've argued in or most high profile case?

I've argued before the Fifth Circuit a number of times. I've also argued before the 11th Circuit, and once found myself before the Alabama Supreme Court.

Probably the most high profile case I have been involved in was a libel case that was shown live on Court TV in 1996 for 7 straight weeks: *Turner v. KTRK*. Chip Babcock and I represented KTRK. It was a single camera in the courtroom that shot from directly behind us. If it had gone on any longer, I might have explored the possibility of selling advertising on the back of my suitcoat. The facts of the case – which involved a fake death, among other novelties – were interesting, to say the least. They are detailed in the opinion by the Texas Supreme Court (which decided the case in our favor).

5. What's a surprising object in your office?

It's a hodge-podge. I should certainly mention the MLRC clock that is on my credenza, presented after the year I served as President of the Defense Counsel Section. Thank you very much for that.

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I played rugby for many years, and have stayed involved with the sport as an administrator, so there are a number of items around my office related to that, including a photo of three teammates and I crossing Abbey Road when we were playing a series of matches in England back in the day. I have commemorative rugby balls from every Rugby World Cup I have attended.

Parody of Bob Jackson's Pulitzer Prize winning photo

There is a photo I took at Camden Yards in 1995 when Cal Ripken broke Lou Gehrig's consecutive game streak and I caught the moment when the banner showing the number of consecutive games flipped from 2130 to 2131. It might have been the most astounding moment I have ever witnessed live at a sporting event. The crowd cheered for 20 minutes straight – as did the Orioles and even the opposing team (the Angels). That feeling comes back anytime I look at that photo.

I also have a parody of Bob Jackson's Pulitzer Prize winning photo from 1963. I once had a chance to ask Jackson what he thought of the parody, and he confessed to having a copy of it himself.

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Latham, second from left (aka Paul), crossing Abbey Road with rugby teammates.

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However, did you ever stop and realize how much of lawyers' office décor might have been bestowed by the Wizard of Oz? We may not have any more brains than the scarecrow, but we do have diplomas – though I'm not sure any of us have a "Doctor of Thinkology." We have "testimonials" to show that we are "good deed doers," even though our hearts may not be any bigger than the tin man's. I do have some of those things on my wall. But as a counter to all of that, and as an homage to the "Wizard of Oz," I have a replica of the tin man's oil can in my office. It's worth remembering that he was a kind character when he had just his oil can, even without the testimonials.

Rugy balls and an oil can - the latter a tribute to the Wizard of Oz's Tin Man, a good example for lawyers. "It's worth remembering that he was a kind character when he had just his oil can, even without the testimonials."

6. What's the first website you check in the morning?

If I say that it is a particular client, it might offend other clients! I'm tempted to invoke Sarah Palin's answer when questioned by Katie Couric about what magazines she reads: "Um, all of them." Most mornings I would go to ESPN or Yahoo Sports to get the important information, before I check in to make sure the world is still on its axis.

7. It's almost a cliché for lawyers to tell those contemplating law school: "Don't go." What do you think?

Well, if that is the conventional wisdom then I have failed! I have a daughter who is a 2L at Duke Law school. So I certainly have had this conversation fairly recently with her, as well as with her contemporaries who made the mistake of asking me for advice.

The main thing I try to get across is that if you want to go to law school, make sure you are doing so for the right reasons. And there is not any one right reason. Going to law school for the prospect of making a lot of money is a wrong reason, in my opinion. Going for the chance to do meaningful work and make a difference in the world is a right reason. And lawyers can make a difference in the world, and can do meaningful work.

Having said that, the profession has changed quite a bit in the generation (okay, a bit more than a generation) since I entered it. So I understand the cliché. Would I have had the opportunities if I started now that I had back then, especially the opportunities to get into court? Maybe not. There are also lifestyle issues. There were no cellphones or email or social media when I started – so when you left the office you had some downtime. That downtime has diminished. But

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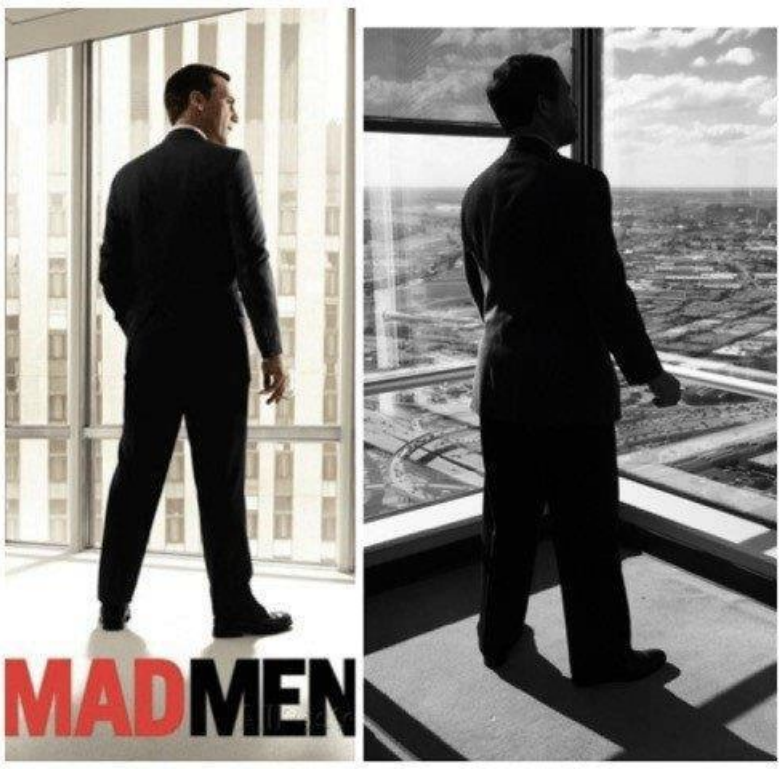

"This is when we were moving out of our old offices three years ago - and Mad Men had just gone off the air. So we had a little fun with that."

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that's a product of modern living, not necessarily the legal business. And those things that can be annoying also allow you to be on top of a mountain somewhere and still be connected. This generation will figure it out, and figure what works for their goals and sensibilities. I think that a law school education is great training for many, many things. I would suggest a discussion with someone wanting to go to law school, rather than an automatic "Danger, Will Robinson!"

8. One piece of advice for someone looking to get into media law?

I think we have an incredibly supportive national media law bar. I would encourage young attorneys to take advantage of that.

9. What issue keeps you up at night?

There are a number of things that regularly keep me up at night - old reruns of The Fugitive on MeTV being a primary culprit. That, and of course the concern as to whether democracy as our founders envisioned it, and a government of the people, by the people, for the people, will perish from this Earth.

10. What would you have done if you hadn't been a lawyer?

I feel like going Spinal Tap on you: "I'd be a full-time dreamer," or "I'd be a haberdasher." The job I had after graduating from college and before law school was coaching tennis in Europe. Two weeks before I needed to decide if I was going to law school, I had a number of intriguing inquiries that flowed from that summer job, such as a position as the house pro at a hotel that had recently opened in Abu Dhabi. But I was probably in that for the short term regardless of whether I went to law school then or not.

I might have been a journalist, or a writer of some kind. It's interesting that any time I write anything outside of the legal context, I have to throw most of the legal writing training and muscle memory out the window. So, to answer at least one of your questions concisely, I will say coach/teacher or journalist/writer. Final answer.