Supreme Court Update & some trends

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Maryland-National Parks Comm'n v. American Humanist Association

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Facts

- In 1925, the American Legion and a group of bereaved mothers erected a memorial to honor the 49 residents of Prince George's County, Maryland, who perished in World War I. To evoke the grave markers on the battlefields in Europe, the memorial bears the shape of a cross.
- The cross is 40 feet tall and has the words "valor," "endurance," "courage," and "devotion" inscribed on it.
- It is a part of Veteran's Memorial Park, which contains other memorials but by far the largest.

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Facts

- Park Commission acquired the memorial in 1961 due to traffic / safety concerns given that it was on a busy roadway median.
- Since then, the Commission has spent $117,000 in costs associated with maintenance and repair of the memorial.
- American Humanist Association and 3 individuals sued, claiming the cross constitutes an unconstitutional endorsement of religion.

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Fourth Circuit

- Cross violated the Establishment Clause under *Lemon v. Kurtzman* given that its primary / principal effect was endorsing Christianity and because it represented excessive entanglement between government and religion.
- Even making "de minimis" expenditures to maintain the memorial constituted entanglement with religion causing "any reasonable observer" to believe that the "Commission either places Christianity above other faiths" or "views being American and Christian as one in the same."

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Issue

- **Issue**: Whether the establishment clause requires the removal or destruction of a 93-year-old memorial to American servicemen who died in World War I solely because the memorial bears the shape of a cross.

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Oral Argument Highlights

- Is there a difference between doing this then (in 1925) versus if the government wanted to erect the same cross now?
- The Cross Stands:
- Alito, Roberts, Breyer, Kavanaugh and Kagan – Cross while Christian has become secular and defacing it would be anti religious
- Alito, Roberts, Breyer Kavanaugh – Lemon doesn't always work and we should not reject our history.
- Breyer history dictates here.
- Kavanaugh – Lemon test a poor one that doesn't support many of Court's decisions
- Thomas – Agree on conclusion, but never should have been incorporated and Lemon sucks.
- Thomas and Gorsuch –Offended Observer has no standing.
- Kagan concurs in part to prefer a case by case analysis rather than rejecting Lemon or allowing history to decide all cases
- Ginsberg and Sotomayor dissent.

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Rehaif vs U.S.

- The Government prosecuted him under 18 U. S. C. §922(g), which makes it unlawful for certain persons, including aliens illegally in the country, to possess firearms, and §924(a)(2), which provides that anyone who "knowingly violates" the first provision can be imprisoned for up to 10 years. The jury at Rehaif's trial was instructed that the Government was not required to prove that he knew that he was unlawfully in the country. It returned a guilty verdict. The Eleventh Circuit affirmed.

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Rehaif vs. U.S.

- In a prosecution under §922(g) and §924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.
- Whether a criminal statute requires the Government to prove that the defendant acted knowingly is a question of congressional intent.
- This inquiry starts from a longstanding presumption that Congress intends to require a defendant to possess a culpable mental state regarding "each of the statutory elements that criminalize otherwise innocent conduct," United States v. X-Citement Video, Inc., 513 U. S. 64, 72, normally characterized as a presumption in favor of "scienter."

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Nieves v. Bartlett

- **Issue**: Whether probable cause defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983.
- Third time this issue is before the Court
  - *Lozman* – municipal policy custom
  - *Reichele* – decided on qualified immunity grounds

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Holding (Kennedy)

- The Court held 8-1 that Lozman could pursue his claim against the City for an **"official municipal policy"** of intimidation / retaliation in violation of the First Amendment under *Monell*.
- Transcript of a closed-door city council session wherein Wade suggested the City should "intimidate" Lozman.
- Court assures us that there is "little risk of a flood of retaliatory arrest suits against highlevel policymakers."

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Facts

- "Arctic Man" festival = lots of drinking, extreme sports in remote portion of Alaska
- Troopers encounter Bartlett who refuses to speak to them. They then see a minor who appears to be drinking alcohol and go to talk to him.
- Bartlett, who is intoxicated and weighs 240 lbs, rushes over and stands very closely to Trooper Weight, who took his actions as " hostile and aggressive" so he pushes Bartlett to create space. They then arrest him for disorderly conduct / resisting arrest.

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Nieves v. Bartlett (Lozman Part Deux)

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Facts

- Bartlett alleges that after the arrest, Trooper Nieves said: "bet you wish you would have talked to me now" – First Amendment hook.
- Charges are dropped against Bartlett due to budgetary constraints.

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Ninth Circuit Ruling

- Plaintiff can proceed on a retaliatory arrest claim even if the officers had probable cause to arrest.
- In this case, because Bartlett alleged that Nieves said: "bet you wish you would have talked to me now," a reasonable jury could have found that the arrest was in retaliation for his refusal to answer questions earlier in the evening and summary judgment was therefore inappropriate.

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Holding - Win with "Narrow Qualification"

- Generally, a plaintiff must plead and prove the absence of probable cause to move forward with a retaliatory arrest claim under the First Amendment.
- BUT, the Court notes that there is a "narrow qualification" to the rule it announces. In a situation where an officer has probable cause to arrest but where officers "typically exercise their discretion not to do so," a plaintiff can present **objective evidence that other similarly situated individuals** not engaged in protected First Amendment activity were not arrested.
  - Example: Jaywalking

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Social Media & Elected Officials

Davison v. Randall
(Loudoun County)

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Davison v. Randall - Issue

When is a social media account maintained by a **public official** considered "**governmental**" in nature, subjecting it to constitutional constraints?

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Davison v. Randall Facts

- Randall is the Chair of the Loudoun County Board of Supervisors.
- 3 Facebook pages: "Chair Phyllis Randall" Facebook page where she posts about County business and her personal page where she discusses family matters and a "Friends of Phyllis Randall" page where she discusses politics.

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Chair Phyllis Randall Facebook Page

- Uses it to address County residents and share information about the County
- "About" section lists her as a "governmental official" and uses her County contact info
- However, created outside official County channels and will remain in her control when she leaves office

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Public Meeting and Facebook Ban

- During a public meeting, Defendant posted about a panel discussion on her "Chair of Phyllis Randall" FB page.
- Plaintiff made a comment about corruption on the part of the County's School Board to Randall's post on her page.
- Randall deleted the entire post from her page and **banned** the Plaintiff from her page for 12 hours (then "unbanned" him).

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Plaintiff Sued

- The Plaintiff brought suit against Randall under § 1983, alleging **First Amendment** violation when she **banned** him from her Facebook page for a period of 12 hours.
- He also sued the County, claiming it had a custom, policy, or practice that brought about the constitutional violation.

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IMLA Amicus Brief

Argued the court should establish a bright-line division between the First Amendment principles that govern **public forums on government property** and within government programs, and the very different First Amendment principles that govern the **private choices of political officeholders on their personal social media platforms.**

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Fourth Circuit Issues

- Questions: (1) whether Randall was acting "u**nder color of state law**" when she administered her Chair's Facebook Page and banned Davison for the purposes of Section 1983; and (2) Whether her Facebook page was a **public forum**.

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Fourth Circuit: Under Color of State Law?

- Court concluded yes, she acted under color of state law. She created and administered the Chair's Facebook Page to **further her duties as a municipal official.** She used the Chair's Facebook Page "as a tool of governance," **uses it to provide information to the public about her official activities and solicits input from the public on policy issues**. She also "swathed the page in the trappings of her office" (her title, government contact info, etc.)

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Fourth Circuit: Under Color of State Law

- Additionally, Randall's banning of Davison was linked to events which arose out of her official status.
- That Randall's ban of Davison amounted to an effort "to suppress speech critical of such members' conduct of their official duties or fitness for public office" further reinforces that the ban was taken under color of state law.

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Fourth Circuit Opinion – Public Forum?

- Is the Chair Facebook page a traditional public forum or limited public forum? "The hallmark of both types of public fora is that the **government has made the space available**—either by designation or long-standing custom—**for "expressive public conduct**" or "expressive activity," and the space is compatible with such activity"
- Concluded that aspects of the page bear traditional hallmarks of public forum but did not decide what type since the court found she engaged in **viewpoint discrimination**.

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Public Forum Analysis

- Randall "intentionally opened the public comment section of the Chair's Facebook Page for public discourse" (she affirmatively invited any resident to post / comment on the page).
- Court noted that Supreme Court recently analogized social media sites to "traditional" public forums, characterizing the internet as "the most important place (in a spatial sense) for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).
- She created an electronic marketplace of ideas.

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Concurring Judge / Open Questions

- Is there a difference between a county council person who is 1 of 9 on a board v. a politician who can unilaterally implement policy (i.e., the President)
- How should hate speech be treated when private companies have policies that may conflict with First Amendment principles.
- What is the reach of the First Amendment with regard to social media?

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Other District Court Cases in Conflict

- *Morgan v. Bevin* (E.D. Ky. 2018) – held that First Amendment forum analysis **did not** apply to restrictions on speech in the official Facebook and Twitter pages of the Governor of Kentucky.
- *Knight First Amend. Inst. at Colum. Univ. v. Trump* (S.D.N.Y. 2018) – held that the interactive component of the President's Twitter account, as opposed to the President's tweets themselves, constituted a designated public forum).

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Chalking Tires

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Taylor vs. Saginaw

- On April 22, the 6th Circuit concluded that chalking tires might be a violation of the 4th Amendment and amounted to a search that did not fall within two exceptions to the warrant requirement – community caretaking function and the automobile (increased mobility exception).
- Quickly the Court amended its opinion to reflect that it was only ruling on the motion to dismiss and that there may be other exceptions that apply or that the two previously discounted might apply based on further pleadings and evidence.

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Taylor vs. Saginaw

- To find that chalking violates the 4th Amendment, the court relied on U.S. vs. Jones, a SCT case from a couple of years ago that concluded that the trespass prong of the 4th Amendment was alive and well and that Katz (creating an expectation of privacy prong) had not transformed a government trespass into an authorized act under the 4th Amendment.
- So, while no expectation of privacy on your parked car, it's a trespass to put a chalk mark on the vehicle and a search to use the mark for information of a violation.

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Willson vs. Bel Nor

- 8th Circuit on May 20, 2019, concludes that Bel Nor's sign ordinance creates a content based regulation when it describes a regulated flag as one having a government or corporate insignia.
- The court also concluded that the law was overly broad.
- The court noted that courts have never held traffic safety or aesthetics to be "compelling government interests" and able to survive strict scrutiny.
- "Due to the special significance of the right to speak from one's own home, severe restrictions of this right do not afford adequate alternatives."

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Willson vs. Bel Nor

- IMLA's Sample Sign Ordinance likely would have survived the issue involving the flag definition.
- IMLA's Sample Sign Ordinance may not have been able to survive the challenge based on overbreadth.
  - Determining a reasonable number of signs allowed on residential property can be very difficult.

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Homelessness

- Martin vs. Boise
- Seattle v. Long

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Homelessness & the 8th Amendment

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Boise's Ordinances

- Boise adopted a Camping Ordinance, which makes it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time." Boise City Code § 9-10-02. The Camping Ordinance defines "camping" as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence." *Id.*
- Boise also has a Disorderly Conduct Ordinance, which bans "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof."

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City of Boise v. Martin

- 867 homeless individuals in Ada County, which is where the City of Boise is located (likely an undercount).
- There were 3 homeless shelters operating in Boise, which are the only shelters in Ada County and between the 3 shelters, there are 354 beds and 92 overflow mats.
- One shelter imposes no religious requirements on its residents and has 96 beds available. Two other shelters are operated by Christian faith nonprofits and they contain religious imagery and information and one of them also runs a "Discipleship Program."

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Lawsuit Background

- The plaintiffs, who are a number of homeless individuals, were each cited by Boise police for violated one or both of these ordinances and with one exception, sentenced to time served. One plaintiff testified that he reached the limits for how long he could stay in the shelters and refused to enter the Discipleship Program because of his religious beliefs. Because he had no other options on where to sleep, he slept outside for several weeks.
- Plaintiff's argue the City's prosecution of them for sleeping outside on public property violated the Eighth Amendment.

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Ninth Circuit

- Held the ordinance violated the Eighth Amendment "insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them."
- The court indicated that the Eighth Amendment places substantive limits on what the government may criminalize and where the "**conduct at issue here is involuntary and inseparable from status**…given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping," the government cannot "criminalize conduct that is unavoidable consequence of being homeless…"

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Dissent from Denial Rehearing En Banc

- Points out impossibility of complying with decision. For example, trying to determine the number of beds and homeless people in a jurisdiction each evening can literally be impossible. (LA uses thousands of volunteers and it still takes them 3 days to complete the task).
- "They must either undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety. The Constitution has no such requirement."
- Ramifications for other public health laws like prohibition of public defecation and urination (also inseparable from status so are they now unenforceable?)

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IMLA's Amicus Brief

- Improperly expanded the reach of the 8th Amendment into local government police powers.
- Local governments have limited resources and decision hampers their ability to combat a major issue associated with homelessness: public encampments, which present huge public health and safety issues for all residents. These include fires, human waste, garbage, discarded drug paraphernalia, blocked sidewalks and open spaces, and blight. The encampments also spread contagious disease and are marked by increased criminal activity.

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Similar Lawsuits

- *Manning v. Caldwell,* 930 F.3d 264, 268 (4th Cir. 2019), citing favorably to Boise decision, held that homeless alcoholics could bring an 8th Amendment challenge to a Virginia statute that made it a criminal offense for someone who has been declared a "habitual drunkard" to possess alcohol in pubic.
- Argue that the Virginia statutory scheme "targets them for special punishment for conduct that is both *compelled by their illness* and is *otherwise lawful* for all those of legal drinking age." If true, the court says that violtes the 8th Amendment.

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First Amendment Auditors

- Activists attempting to confront public official, public employees and police and filming them.
- Can involve hurling insults at the public officials or police and filming the reaction.
- Can involve filming office space while people are working and attempts to film in secure areas.

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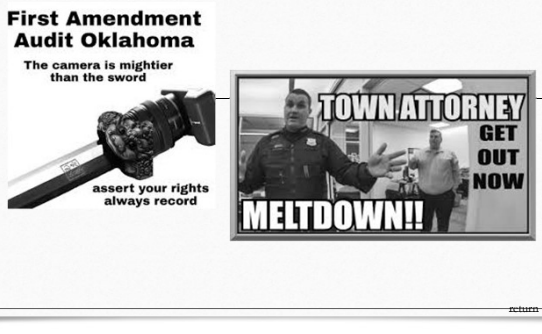

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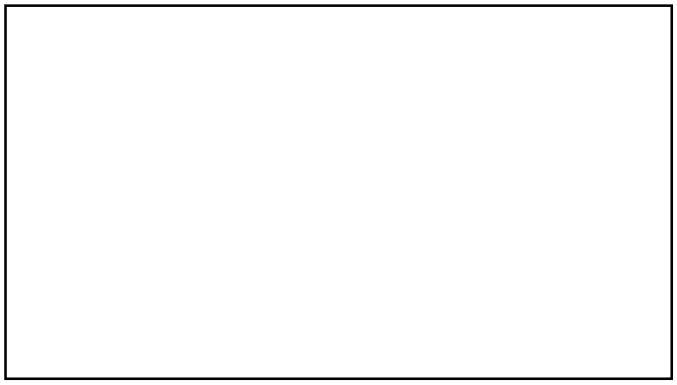

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