

Constitutional Civil Rights

by John Sanchez*

I. INTRODUCTION

The 2002 survey period was an average year for constitutional civil rights litigation in the Eleventh Circuit. In eleven cases, the court addressed contentious issues arising under the First Amendment. Nine of those cases examined free speech issues, while one case involved the Press Clause and one involved freedom of religion. One case addressed the constitutionality of a city zoning ordinance regulating nude dancing.¹ Three cases involved retaliatory discharges allegedly over the exercise of protected speech: Two cases dealt with public employees' free speech rights,² while one touched on the free speech rights of an independent contractor who had an ongoing commercial relationship with a state agency.³ Another case addressed the constitutionality of state regulation of the free speech rights of judicial candidates.⁴ One case reviewed state electoral code provisions regulating which candidates may be listed on the ballot for federal office.⁵ Two cases covered the legal intersection between the law of defamation and the First Amendment.⁶ One case spelled out the powers of a court to discipline attorneys for use of offensive language in court documents.⁷ One case involved the right of motion picture companies to portray real individu-

* Professor of Law, Nova Southeastern University, Fort Lauderdale, Florida. Pomona College (B.A., 1974); University of California, Berkeley (Boalt Hall) (J.D., 1977); Georgetown University (LL.M., 1984).

1. Gary v. City of Warner Robins, 311 F.3d 1334 (11th Cir. 2002).
2. Brochu v. City of Riviera Beach, 304 F.3d 1144 (11th Cir. 2002); Matthews v. Columbia County, 294 F.3d 1294 (11th Cir. 2002).
3. Mangieri v. DCH Healthcare Auth., 304 F.3d 1072 (11th Cir. 2002).
4. Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).
5. Cartwright v. Barnes, 304 F.3d 1138 (11th Cir. 2002).
6. Horsley v. Feldt, 304 F.3d 1125 (11th Cir. 2002); Horsley v. Rivera, 292 F.3d 695 (11th Cir. 2002).
7. Thomas v. Tenneco Packaging Co., 293 F.3d 1306 (11th Cir. 2002).

als, without their consent, in movies based on real events.⁸ Finally, a federal district court exhaustively reviewed, under the Establishment Clause,⁹ the power of a state supreme court chief justice to install a two-and-one-half ton monument depicting the Ten Commandments in the rotunda of the state judiciary building.¹⁰

II. FIRST AMENDMENT

A. *Free Speech*

1. Nude Dancing. In *Gary v. City of Warner Robins*,¹¹ the United States Court of Appeals for the Eleventh Circuit addressed the constitutionality of a city ordinance barring persons under the age of twenty-one from entering or working at places selling two-thirds more alcohol than food.¹² The court affirmed the district court's decision to grant summary judgment to the city,¹³ concluding that the ordinance did not violate fundamental freedoms of association or movement,¹⁴ which might have triggered strict scrutiny; that the ordinance was rational under the Equal Protection Clause;¹⁵ and that the ordinance did not violate the dancer's freedom of expression.¹⁶

Plaintiff, while under the age of twenty-one, worked at Teasers as a nude dancer. Teasers is an adult entertainment establishment that sells alcohol, but not food. After the city amended its ordinance to bar minors from working in establishments that sell alcohol for consumption on the premises, plaintiff unsuccessfully sued the city for damages and injunctive relief. After discovery, the district court granted summary judgment for the city.¹⁷

On appeal, the Eleventh Circuit applied rational basis analysis to plaintiff's Equal Protection claim because the age classification framed by the ordinance implicated neither a fundamental right nor a suspect class.¹⁸ While acknowledging that freedom of association is a fundamental right, the court concluded that there is no generalized right to

8. *Tyne v. Time Warner Entm't Co.*, 204 F. Supp. 2d 1338 (M.D. Fla. 2002).

9. U.S. CONST. amend. I.

10. *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002).

11. 311 F.3d 1334 (11th Cir. 2002).

12. *Id.* at 1336.

13. *Id.* at 1340.

14. *Id.* at 1338.

15. *Id.* at 1339.

16. *Id.* at 1340.

17. *Id.* at 1336.

18. *Id.* at 1338.

associate with other adults in alcohol-selling businesses.¹⁹ Moreover, plaintiff remained free to observe and engage in nude dancing in businesses that sold more food than alcohol. Citing the city's aim to curb underage drinking, a legitimate governmental interest, the court deferred to the city and rejected plaintiff's Equal Protection claim.²⁰

The second issue the court addressed was plaintiff's claim that the ordinance interfered with her First Amendment right to engage in nude dancing. While conceding that nude dancing "falls only within the outer ambit of the First Amendment's protection,"²¹ the court rejected plaintiff's First Amendment claim, again making it clear that the ordinance did not prevent plaintiff either from observing or from engaging in nude dancing.²²

2. Public Employee Speech—Retaliatory Discharge. In *Matthews v. Columbia County*,²³ the Eleventh Circuit addressed whether the dismissal of a county employee was in retaliation for the employee exercising her free speech rights.²⁴ The district court entered judgment on the jury verdict for plaintiff.²⁵ Affirming in part, reversing in part, and remanding, the court of appeals ruled that the county was relieved of liability because only one of the county commissioners who voted to eliminate plaintiff's job evinced an unconstitutional motive.²⁶

Plaintiff, Director of Administrative Services for the county, criticized a company with which the county was considering contracting. Later, the county Board of Commissioners voted 3-2 to eliminate several county positions, including plaintiff's job. While plaintiff sued the three commissioners who voted to eliminate her job both in their official and individual capacities, the individual defendants won on grounds of legislative immunity, leaving the county as sole defendant. The jury held the county liable for emotional distress damages because two commissioners had been influenced by the third commissioner, whose vote to eliminate plaintiff's job was cast in retaliation for plaintiff's protected speech activity.²⁷

19. *Id.* (citing *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)).

20. *Id.* at 1339.

21. *Id.* at 1340 (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000)).

22. *Id.*

23. 294 F.3d 1294 (11th Cir. 2002).

24. *Id.* at 1296.

25. *Id.*

26. *Id.* at 1298.

27. *Id.* at 1295-96.

The county appealed both the district court's finding of liability and its award of emotional distress damages. Plaintiff cross-appealed the dismissal of the suits against the commissioners in their individual capacities.²⁸ The Eleventh Circuit concluded that even if plaintiff's speech was protected by the First Amendment, the district court erred in holding the county liable solely for the improper motives of one commissioner.²⁹ The court rejected plaintiff's claim that the unconstitutional motive of one commissioner could be imputed to the board as a whole either on grounds of a ratification or a delegation theory.³⁰ For ratification to have applied, the two commissioners who voted to eliminate plaintiff's job would have had to "ratify not only the decision itself, but also the unconstitutional basis for it."³¹ Influence alone, the court ruled, is insufficient grounds to show that the two commissioners ratified the unconstitutional basis for the vote.³² As for the delegation theory, the court concluded that even if the improperly motivated commissioner was assigned the power to select the posts to be eliminated, "his [decision] still had to be accepted by a majority of the board."³³ In sum, the county could not be liable unless all three commissioners who voted to eliminate plaintiff's position shared the illegal motive.³⁴

In *Brochu v. City of Riviera Beach*,³⁵ the Eleventh Circuit employed the *Pickering*³⁶ balancing test to decide whether a public employee who alleged he was terminated in retaliation for exercising his First Amendment rights had proved his case.³⁷ Reversing the district court, the Eleventh Circuit ruled that (1) plaintiff's transfer was not retaliatory, but mere coincidence,³⁸ (2) plaintiff's scheme to oust the sitting police administration and place himself and his cronies in control was not protected public speech,³⁹ and (3) the city's offer to reinstate plaintiff was not binding.⁴⁰

Plaintiff, a police officer, was enlisted by a fellow officer to assist the FBI with its probe into alleged police department corruption. At the

28. *Id.* at 1296.

29. *Id.* at 1298.

30. *Id.* at 1297.

31. *Id.* (citing *Gattis v. Brice*, 136 F.3d 724, 727 (11th Cir. 1998)).

32. *Id.* at 1298.

33. *Id.* at 1297.

34. *Id.* at 1298.

35. 304 F.3d 1144 (11th Cir. 2002).

36. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

37. 304 F.3d at 1157.

38. *Id.* at 1156.

39. *Id.* at 1158.

40. *Id.* at 1165.

same time, plaintiff was subpoenaed for a deposition in a lawsuit against the police department. At the deposition, plaintiff testified critically about the police department. Three days later, plaintiff was transferred to the midnight shift of road patrol. This transfer did not affect plaintiff's rank or salary, but his new shift was less prestigious and came with fewer benefits. Moreover, plaintiff was enlisted by the local police union representative to support candidates in city council elections who were dedicated to removing the police chief. After the police chief learned of the plan, plaintiff was placed on paid administrative leave. Alleging harassment, plaintiff resigned and sued the city instead of seeking either administrative remedies or grieving his claims.⁴¹

The district court granted the city's motion for summary judgment on all counts except the Title VII⁴² retaliation claim and the § 1983⁴³ First Amendment claim. The jury awarded plaintiff \$2,000 on his Title VII retaliation claim and \$450,000 on his First Amendment claim. The district court also found that the city offered unconditional reinstatement to plaintiff, and the court ordered the city to assign plaintiff as commander of the detective bureau.⁴⁴

On appeal, the Eleventh Circuit first addressed the Title VII retaliation claim in which plaintiff must establish "that (1) [he] engaged in . . . statutorily protected expression; (2) [he] suffered an adverse employment action,"⁴⁵ and (3) the two events are causally related.⁴⁶ Crediting the police chief's testimony that he was unaware of plaintiff's critical testimony in the deposition, the court concluded that no reasonable jury could find that the police chief transferred plaintiff in retaliation for his deposition testimony.⁴⁷ "The coincidence in timing [was] simply not enough."⁴⁸ For these reasons, the court reversed both the judgment and the award of damages on the Title VII retaliation claim.⁴⁹

Turning to plaintiff's First Amendment claim, the Eleventh Circuit set out the four-part *Pickering* test. First, the court determined whether the employee's speech was on a matter of public concern by looking at the content, form, and context of the speech.⁵⁰ While conceding that speech

41. *Id.* at 1147-49, 1151-52.

42. 42 U.S.C. § 2000e-3(a) (2000).

43. 42 U.S.C. § 1983.

44. *Id.* at 1153.

45. *Id.* at 1155 (quoting 42 U.S.C. § 2000e-3(a)).

46. *Id.*

47. *Id.* at 1156.

48. *Id.*

49. *Id.*

50. *Id.* at 1157.

concerning public corruption and mismanagement might be a matter of public concern, the court concluded that plaintiff's role in the scheme to oust the entire police administration and put himself in charge was not protected by the First Amendment.⁵¹ Even assuming that plaintiff's speech touched on a matter of public concern, the court concluded that plaintiff failed the second part of the *Pickering* test: balancing the employee's right to engage in protected expression against the employer's interest in promoting the efficiency of the workplace.⁵² In reaching this conclusion, the court stressed the "heightened need for order, loyalty, morale and harmony" in a police department.⁵³ The potential of plaintiff's scheme to cause havoc in the department was sufficient to "tip the *Pickering* balance in favor of the [c]ity."⁵⁴

Moreover, the court continued, plaintiff "failed at the fourth stage, the 'but-for' causation stage."⁵⁵ Regardless of whether plaintiff engaged in protected political speech, he would have been placed on administrative leave for his role in the takeover scheme.⁵⁶ Plaintiff crossed the line by seeking to overthrow his superiors and by sharing his plan with civilians.⁵⁷ For these reasons, the court reversed both the judgment and the award of damages on plaintiff's First Amendment claim.⁵⁸

Finally, the court addressed the validity of the city's unconditional offer of reinstatement.⁵⁹ Rejecting the district court's contractual analysis of the offer, the court made it clear that reinstatement was conditioned on plaintiff ultimately prevailing on his claims.⁶⁰ The city offered reinstatement merely as a way of tolling its liability for damages.⁶¹ Thus, the court reversed the final judgment awarding reinstatement.⁶²

In *Mangieri v. DCH Healthcare Authority*,⁶³ the Eleventh Circuit reviewed a state agency's nonrenewal of a contract with a physician who provided anesthesia services at a state hospital.⁶⁴ The agency's failure

51. *Id.* at 1158.

52. *Id.* at 1159.

53. *Id.* (quoting *Hansen v. Soldenwagner*, 19 F.3d 573, 577 (11th Cir. 1994)).

54. *Id.*

55. *Id.*

56. *Id.* at 1160.

57. *Id.*

58. *Id.* at 1161.

59. *Id.* at 1162.

60. *Id.* at 1164-65.

61. *Id.* at 1165.

62. *Id.* at 1166.

63. 304 F.3d 1072 (11th Cir. 2002).

64. *Id.* at 1075.

to renew the contract was allegedly in retaliation for the physician speaking out about matters of public concern.⁶⁵ The court vacated and remanded the district court's grant of summary judgment in favor of the state agency,⁶⁶ ruling that the absence of an automatic renewal clause did not foreclose the nonrenewal of that contract from amounting to a "termination" of an ongoing business relationship, which is safeguarded from retaliation under the First Amendment.⁶⁷

Plaintiff, owner of an anesthesiology firm, entered into a three-year contract with a state hospital for the exclusive right to provide anesthesia services. During the term of the contract, plaintiff criticized the state hospital's efforts to move inpatient medical and surgical cases to another hospital. Soon after, the hospital complained about the quality of plaintiff's anesthesia services and notified him of its intent not to renew his contract at the end of 1998. Nevertheless, the state hospital awarded plaintiff a one-year contract for anesthesia services for 1999. During 1999, plaintiff continued to criticize the hospital, and the hospital continued to hear complaints about the quality of plaintiff's services. Anesthesia services for 2000 were awarded to another provider, and plaintiff sued, alleging that the nonrenewal of his contract was in retaliation for exercising his First Amendment free speech rights. The district court granted the hospital's motion for summary judgment, concluding that allowing a contract to expire did not amount to terminating an existing business relationship.⁶⁸

On appeal, the Eleventh Circuit began by citing a recent Supreme Court decision in which the Court held that government contractors are protected by the First Amendment from dismissal in retaliation for speaking out on matters of public concern.⁶⁹ The instant case, the court made clear, did not turn on the absence of an automatic renewal provision in plaintiff's contract.⁷⁰ In this regard, by not renewing plaintiff's contract, the hospital terminated an ongoing business relationship with plaintiff.⁷¹ The state contractor need not have a property interest in the renewal of his contract to establish free speech

65. *Id.* at 1073-74.

66. *Id.* at 1076.

67. *Id.*

68. *Id.* at 1073-74.

69. *Id.* at 1075 n.7 (citing *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714-15 (1996)).

70. *Id.* at 1076.

71. *Id.* at 1075.

claims.⁷² By contrast, a disappointed bidder or applicant for a new governmental contract is not entitled to First Amendment protections.⁷³

3. Judicial Candidate Speech. In *Weaver v. Bonner*,⁷⁴ the Eleventh Circuit addressed the constitutionality of a state's code of judicial conduct regulating public statements by judicial candidates. The court ruled that (1) the restriction on judicial candidate speech was overbroad in violation of the First Amendment;⁷⁵ (2) judicial candidate speech receives the same protection as speech by legislative and executive candidates;⁷⁶ (3) the rule against judicial candidates personally seeking campaign contributions or personally enlisting public support violates the First Amendment; (4) the cease and desist request amounted to an unlawful prior restraint on protected speech;⁷⁷ (5) qualified immunity relieved individual defendants of civil damages liability;⁷⁸ and (6) no extraordinary circumstances warranted a special election.⁷⁹

Canon 7(B)(1)(d) of the Georgia Code of Judicial Conduct bars judicial candidates from making public statements that the candidate knows or should know are false, fraudulent, misleading, or deceptive.⁸⁰ Canon 7(B)(2) bars judicial candidates from personally soliciting campaign funds or garnering endorsements.⁸¹ During his unsuccessful 1998 campaign for election to the Georgia Supreme Court, plaintiff circulated a brochure tarring an incumbent justice's views on same-sex marriage, conventional morality, and capital punishment. In response, the Judicial Qualifications Committee ("JQC") notified plaintiff that statements in the brochure were false, misleading, and deceptive in violation of Canon 7(B)(1)(d) and issued a cease and desist request. Plaintiff toned down his critique in a revised brochure and aired a television advertisement raising the same specific criticisms. The JQC ruled that the TV ad violated its earlier cease and desist request and issued a public statement accusing plaintiff of engaging in unethical, unfair, false, and intentionally deceptive campaign practices. The JQC then turned the matter over to the state bar for possible disciplinary action.⁸²

72. *Id.*

73. *Id.* at 1076.

74. 309 F.3d 1312 (11th Cir. 2002).

75. *Id.* at 1319.

76. *Id.* at 1321.

77. *Id.* at 1323.

78. *Id.* at 1324.

79. *Id.* at 1325.

80. GA. CODE OF JUDICIAL CONDUCT, Canon 7(B)(1)(d) (1983).

81. GA. CODE OF JUDICIAL CONDUCT, Canon 7(B)(2).

82. 309 F.3d at 1316-17.

Plaintiff sued the members of the special committee and the director of the JQC in both their individual and official capacities. Plaintiff alleged that Canons 7(B)(1)(d) and 7(B)(2) and Rule 27 violated the First Amendment and sued for injunctive relief, damages, and a special election. After discovery, plaintiff added the State Bar of Georgia as a defendant. The district court granted the individual defendants qualified immunity from damages liability, denied defendants' motion for dismissal, and rejected plaintiff's call for a special election.⁸³ On the merits, the district court ruled that Canon 7(B)(1)(d) was facially unconstitutional given its chilling effect on political speech and its overbreadth in barring "false statements of fact made without knowledge or reckless disregard of falsity."⁸⁴ By contrast, the district court concluded that Canon 7(B)(2) and Rule 27 were narrowly tailored to serve Georgia's compelling need to sustain the integrity and independence of its judiciary.⁸⁵

On appeal, the Eleventh Circuit applied strict scrutiny as the appropriate standard governing the constitutionality of regulations on core political speech.⁸⁶ As a result, the government bore the burden of showing that the regulation was narrowly tailored to serve a compelling governmental interest.⁸⁷ While conceding that Georgia's interest might be compelling, the court concluded that Canon 7(B)(1)(d) was not narrowly tailored because, by barring "false statements negligently made and true statements that [were] misleading or deceptive," Canon 7(B)(1)(d) snuffed out the "breathing space" key to protected speech.⁸⁸ The court made it clear that narrow tailoring requires that regulations on candidate speech be confined to false statements uttered with actual malice.⁸⁹ The erring candidate's political opponent can be trusted to correct false statements negligently made: More speech is favored over enforced silence.⁹⁰ Furthermore, the court reasoned that Georgia's interest in judicial impartiality was not markedly supported by Canon 7(B)(1)(d).⁹¹ Rather, it is the practice of electing judges, not candidate speech, that raises impartiality concerns.⁹²

83. *Id.* at 1317-18.

84. *Id.* at 1318.

85. *Id.*

86. *Id.* at 1319.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1320 (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

91. *Id.*

92. *Id.*

Next, the court addressed whether the standard for judicial elections should be the same as the standard set for legislative and executive elections.⁹³ Citing Supreme Court precedent,⁹⁴ the Eleventh Circuit concluded that the distinction between judicial elections and other types of elections is trivial and therefore adopted the actual malice standard governing regulations of candidate speech generally.⁹⁵

Applying strict scrutiny to Canon 7(B)(2), the regulation barring judicial candidates from personally soliciting campaign contributions or public endorsements, the court struck down the provision because it was not narrowly tailored to achieve the state's compelling interest in impartiality—a concern, the court found, stemming primarily from Georgia's decision to elect judges publicly.⁹⁶ At the same time, impartiality is compromised by the regulation's approval of a candidate's agent doing the soliciting on the candidate's behalf.⁹⁷

Similarly, the court ruled that the JQC's cease and desist request amounted to an impermissible prior restraint, which bears a strong presumption against its constitutional validity.⁹⁸ Tantamount to an injunction, the cease and desist request barred candidates from repeating verbatim past statements not yet found to be false, misleading, and deceptive.⁹⁹

The Eleventh Circuit affirmed the district court's ruling that defendants were entitled to qualified immunity given that their conduct "did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"¹⁰⁰ In other words, the court made clear, it was not obvious that a judicial canon regulating false, misleading, and deceptive remarks was overtly unconstitutional.¹⁰¹

Finally, the court rejected plaintiff's request for a special election to undo the ill effects of the JQC's prior restraint.¹⁰² Absent extraordinary circumstances, such as voter fraud or vote dilution, the court refused to overturn state election results and order a special election.¹⁰³

93. *Id.* at 1321.

94. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

95. 309 F.3d at 1321.

96. *Id.* at 1322.

97. *Id.* at 1322-23.

98. *Id.* at 1323.

99. *Id.*

100. *Id.* at 1324 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

101. *Id.*

102. *Id.* at 1325.

103. *Id.*

4. Ballot Restrictions. In *Cartwright v. Barnes*,¹⁰⁴ the Eleventh Circuit addressed the constitutionality of Georgia's electoral code requirement that nominees of political entities other than established political parties may be listed on the ballot for federal office only if they come up with petitions containing the names of five percent of eligible voters.¹⁰⁵ Affirming the district court's decision, the court of appeals concluded that: (1) the rule placed no undue burden on independent candidates for purposes of the First Amendment or the Equal Protection Clause;¹⁰⁶ and (2) the regulation amounted to a lawful procedural regulation of the manner in which candidates could qualify for ballot placement and did not create any additional qualifications for election to federal office for purposes of the Qualifications Clause.¹⁰⁷

Under Georgia law, the name of an independent candidate or a candidate of a political entity other than the established parties may be listed on the election ballot only if the candidate files a nomination petition signed by five percent of the total number of registered voters eligible to vote in the last election for the United States House of Representatives.¹⁰⁸ Plaintiffs, the Libertarian Party of Georgia and voters who pledged to vote for Libertarian Party candidates, challenged this five percent signature rule as setting up a new qualification for securing federal office in violation of the Qualifications Clause of the United States Constitution.¹⁰⁹ Plaintiffs claimed that no Libertarian Party candidate has ever been able to collect the 14,846 signatures in a single congressional district.¹¹⁰

The district court applied a two-part test to determine whether the five percent rule contravened the Qualifications Clause. The threshold inquiry was whether the rule imposed an absolute bar to candidates. Answering that question in the negative, the court then asked whether the rule disadvantaged an otherwise qualified group of candidates with the sole aim of framing added qualifications indirectly. The court concluded that it did not.¹¹¹

On appeal, in affirming the district court, the Eleventh Circuit relied chiefly on a thirty-year-old Supreme Court case,¹¹² *Jenness v. Fort-*

104. 304 F.3d 1138 (11th Cir. 2002).

105. *Id.* at 1139.

106. *Id.* at 1141, 1142.

107. *Id.* at 1144.

108. O.C.G.A. § 21-2-170(b) (Supp. 2002).

109. U.S. CONST. art. I, § 2, cl. 2.

110. 304 F.3d at 1139-40.

111. *Id.* at 1143.

112. *Id.* at 1140.

son,¹¹³ which rejected a constitutional challenge to the same Georgia law.¹¹⁴ The interest in minimizing confusion, deception, and even obstruction of the democratic process, the Supreme Court found, warranted some threshold evidence of sizeable support before adding a political organization's candidate to the ballot.¹¹⁵ The Eleventh Circuit found that Georgia's new notarization rule and reapportioned districts did not erode *Jenness's* continuing vitality.¹¹⁶ In short, the five percent rule did not unduly burden independent candidates.¹¹⁷ Six months accorded petition circulators ample time to secure signatures.¹¹⁸ Moreover, petition circulators, by asking a voter's address, can easily determine whether the voter is eligible to sign the petition.¹¹⁹

Furthermore, under the Elections Clause, states are entitled to regulate the manner of holding elections.¹²⁰ The Eleventh Circuit concluded that requiring some measure of support before qualifying to appear on a ballot amounts to a legitimate exercise of a state's power to specify the manner in which elections are held.¹²¹ In other words, Georgia's five percent rule was deemed an election procedure and not a substantive qualification.¹²²

B. Defamation

In *Horsley v. Feldt*,¹²³ the Eleventh Circuit addressed a defamation action brought by an anti-abortion activist against pro-choice advocates for public statements linking plaintiff's Internet web site with aiding and abetting the murder of an abortion provider. As for the defamation claims against two of the defendants, the court affirmed the district court's judgment on the pleadings in their entirety.¹²⁴ As for the defamation claims against the other two defendants, the court affirmed the district court's judgment on the pleadings regarding alleged statements in a newspaper article, but reversed the district court's

113. 403 U.S. 431 (1971).

114. *Id.* at 438.

115. 304 F.3d at 1140.

116. *Id.*

117. *Id.*

118. *Id.* at 1141.

119. *Id.*

120. U.S. CONST. Art. I, § 4 cl. 1.

121. 304 F.3d at 1142.

122. *Id.* at 1143.

123. 304 F.3d 1125 (11th Cir. 2002).

124. *Id.* at 1137.

judgment on the pleadings for the claims stemming from statements allegedly made on TV.¹²⁵

Plaintiff's Internet web site, "the Nuremberg Files," listed the names of abortion providers. On the day after the murder of a doctor who performed abortions, plaintiff's web site listed, for the first time, the doctor's name with a line struck through it. That same day, defendant Feldt, president of Planned Parenthood, held a press conference at which she harshly criticized plaintiff for abetting the murder through his web site. Portions of Feldt's press conference were broadcast on CNN. Two days later, plaintiff debated defendant Gandy, the Executive Vice President of the National Organization for Women ("NOW"), on CNN. Gandy accused plaintiff of having the blood of the murdered doctor on his hands and of having incited the murder.¹²⁶

Plaintiff sued Feldt, Planned Parenthood, Gandy, and NOW, alleging they defamed him by accusing him of conspiring in the abortion provider's murder. The district court granted judgment on the pleadings in favor of defendants, concluding that Feldt's and Gandy's comments amounted to protected expressions of opinion and rhetorical hyperbole.¹²⁷

On appeal, the Eleventh Circuit reviewed Gandy's comments first, assessing rhetorical hyperbole by examining the context in which the statements were made.¹²⁸ The court concluded that the parties were trading vigorous epithets at a nonliteral level on the highly controversial topic of abortion and that no reasonable viewer came away believing plaintiff had committed a felony, only that he shared moral culpability for the abortion provider's murder.¹²⁹ The court made it clear that, taken in context, Gandy's comments amounted to loose, figurative language protected by the First Amendment.¹³⁰ Based on this finding, the court held "[t]he district court did not err in granting judgment on the pleadings."¹³¹

Turning to Feldt's comments at the press conference as reported in a newspaper article and as broadcast on CNN, the Eleventh Circuit addressed whether the district court erred in treating the newspaper article as part of defendants' amended answer.¹³² The court concluded

125. *Id.*

126. *Id.* at 1129-30.

127. *Id.* at 1130.

128. *Id.* at 1131.

129. *Id.* at 1132-33.

130. *Id.* at 1133.

131. *Id.*

132. *Id.*

that an exhibit to a pleading is part of the pleadings and can be considered on a motion for judgment on the pleadings.¹³³ The court reasoned that under the “incorporation by reference” doctrine, a document attached to a motion to dismiss and the authenticity of which is unchallenged, may be taken into account by the court without transforming the motion into one for summary judgment.¹³⁴ However, plaintiff disputed the authenticity of the CNN transcripts attached to the amended answer.¹³⁵ For this reason, the court could not consider the transcript when ruling on a motion for judgment on the pleadings.¹³⁶

Addressing the defamatory nature of the statements contained in the newspaper article, the court stressed that the article did not mention plaintiff by name or even indirectly.¹³⁷ Although the article contained hyperbolic expressions, the court concluded that the article contained no false statements of fact and was therefore not actionable.¹³⁸

By contrast, plaintiff’s statement in the CNN broadcast was ambiguous. Plaintiff said that the murdered abortion provider’s name was already crossed out, which could imply that the name was crossed out either before or after the murder.¹³⁹ In light of this ambiguity, the court refused to grant judgment on the pleadings in favor of Feldt and Planned Parenthood.¹⁴⁰ Moreover, the CNN broadcast made plaintiff’s identity easy to guess, so plaintiff’s defamation claim stemming from the CNN broadcast survived judgment on the pleadings.¹⁴¹ The court remanded the case for added proceedings in light of its opinion.¹⁴²

In *Horsley v. Rivera*,¹⁴³ the Eleventh Circuit addressed an anti-abortion activist’s defamation claim against a television talk show host who accused plaintiff of complicity in the murder of an abortion provider. Reversing the district court’s denial of defendant’s motion for judgment on the pleadings, the court of appeals ruled that the talk show host’s accusation was protected by the First Amendment as nonliteral, rhetorical hyperbole.¹⁴⁴

133. *Id.* at 1134.

134. *Id.*

135. *Id.* at 1135.

136. *Id.*

137. *Id.* at 1136.

138. *Id.*

139. *Id.* at 1137.

140. *Id.*

141. *Id.*

142. *Id.*

143. 292 F.3d 695 (11th Cir. 2002).

144. *Id.* at 703.

Four days after the murder of an abortion provider, plaintiff voluntarily took part in a talk show program hosted by defendant and broadcast live on CNBC. In the course of the program, defendant said that by crossing out the murdered doctor's name on the web site as he was murdered, plaintiff was encouraging others to resort to violence.¹⁴⁵

Plaintiff sued, alleging defendant made false and malicious defamatory statements by accusing plaintiff of aiding and abetting the murder of the abortion provider. The district court denied defendant's motion for judgment on the pleadings, ruling that neither the First Amendment nor Georgia defamation law protected the comments.¹⁴⁶

On appeal, the court made it clear that a defamation claim will not stand when the alleged defamatory comment stems from nonliteral assertions of fact.¹⁴⁷ Moreover, the Supreme Court has ruled that the First Amendment protects rhetorical hyperbole that cannot fairly be read as asserting "actual facts about an individual."¹⁴⁸ Indeed, exaggeration and nonliteral expression play a crucial role in social discourse.¹⁴⁹ Reviewing the setting in which the comments were uttered, the court of appeals concluded the comments consisted of "loose, figurative language that no reasonable person" would credit as factual.¹⁵⁰ Plaintiff, in effect, was accused of moral complicity, not literally of having committed a felony. In fact, the transcript suggests that even plaintiff regarded the statements as figurative.¹⁵¹ The court determined that emotional rhetoric on a highly sensitive topic is more a reflection of outrage than an accusation of fact.¹⁵² For these reasons, the court ruled that the district court erred in denying First Amendment protection to defendant's statements.¹⁵³ The court did not decide whether the comments were equally protected as an expression of opinion grounded on fully-disclosed facts.¹⁵⁴

C. Racist Speech

In *Thomas v. Tenneco Packaging Co.*,¹⁵⁵ the Eleventh Circuit reviewed sanctions imposed on an attorney for submitting documents

145. *Id.* at 698.

146. *Id.* at 700.

147. *Id.* at 701.

148. *Id.* (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

149. *Id.*

150. *Id.* at 702.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 703.

155. 293 F.3d 1306 (11th Cir. 2002).

that painted opposing counsel as a racist. Affirming the district court decision, the court of appeals ruled that (1) the district court reasonably imposed sanctions in light of evidence that the attorney acted in bad faith,¹⁵⁶ (2) the district court had no duty to build a factual finding that the attorney herself was culpable for derogatory language in employees' and witnesses' affidavits,¹⁵⁷ and (3) the district judge's reference to the attorney's hypersensitivity to racial differences did not require the district court judge to recuse himself.¹⁵⁸

Plaintiff, an African American, filed suit against defendant alleging race discrimination after plaintiff was denied a promotion. During discovery, numerous emotional disputes arose between plaintiff's counsel and defendant's counsel. Plaintiff's counsel, Munson, complained that opposing counsel was abusive towards her client during depositions, yet Munson did not seek a protective order. The lawyers also fought over the deposition schedule for six witnesses.¹⁵⁹ After the district court granted defendant's motion for a confidentiality protective order over personnel records, Munson's petition to the Eleventh Circuit referred to opposing counsel's law firm as "the white law firm" and portrayed the discovery flare-ups in racial terms.¹⁶⁰ Moreover, Munson's mandamus petition alleged that the district court's discovery order was tainted by racial bias.¹⁶¹ The Eleventh Circuit denied Munson's petition for writ of mandamus.¹⁶²

In response to defendant's motion for summary judgment, Munson's documents included exhibits containing ad hominem attacks on opposing counsel as well as language accusing opposing counsel of racial insensitivity. In addition, witnesses' declarations, filed by Munson, were filled with inflammatory complaints about opposing counsel.¹⁶³ In response, opposing counsel sought sanctions against Munson for her pattern of "continuing abusive tactics."¹⁶⁴ The district court granted defendant's motion for summary judgment, and the Eleventh Circuit affirmed.¹⁶⁵ In addition, the district court granted Munson twenty days to show cause why sanctions should not be imposed. Munson responded by deeming the district court's Show Cause Order as

156. *Id.* at 1321.

157. *Id.* at 1326.

158. *Id.* at 1331.

159. *Id.* at 1308-09.

160. *Id.* at 1309.

161. *Id.* at 1309-10.

162. *Id.* at 1310.

163. *Id.* at 1310-14.

164. *Id.* at 1315.

165. *Id.* at 1316.

harassment of a civil rights attorney.¹⁶⁶ Imposing sanctions on Munson, the district court found Munson's unfounded accusations of racism tantamount to "fighting words."¹⁶⁷ Invoking its inherent power to discipline errant attorneys, the district court formally "rebuked and censured Munson," warning that any future documents filed by her containing offensive language would be voided without leave to amend.¹⁶⁸

Munson appealed, challenging both the sanction's order and the order denying her recusal motion.¹⁶⁹ Addressing the propriety of sanctions in this case, the Eleventh Circuit made it clear that a court must make a finding of bad faith.¹⁷⁰ Given that Munson's documents flowed with rude, demeaning comments about opposing counsel's physical traits and demeanor and contained thinly veiled physical threats and an overt racial slur, the court concluded that the district court did not abuse its discretion by sanctioning Munson under its inherent power.¹⁷¹ In short, the court found bad faith because Munson's inflammatory language "serve[d] no purpose other than to harass and intimidate opposing counsel" in violation of basic rules of professional conduct and several ethics provisions.¹⁷² Even if opposing counsel's behavior toward plaintiff and plaintiff's witnesses was racist, Munson should have sought a protective order instead of slinging insults.¹⁷³

The court also rejected Munson's assertion that the district court should have held an evidentiary hearing to determine whether Munson should be held responsible for intemperate language employed by plaintiff and some of the witnesses.¹⁷⁴ An attorney, the court noted, has a duty to "exercise independent professional judgment" and cannot silently acquiesce to litigation tactics that contravene fundamental professional norms.¹⁷⁵

Finally, the court addressed whether the district court judge abused his discretion by refusing to recuse himself when challenged as racially biased.¹⁷⁶ Recusal is proper, the court noted, only when a judge's remarks reflect pervasive bias, but "[m]ere 'friction between the court

166. *Id.* at 1315-17.

167. *Id.* at 1317.

168. *Id.* at 1318.

169. *Id.* at 1319.

170. *Id.* at 1320.

171. *Id.* at 1321.

172. *Id.* at 1322-23.

173. *Id.* at 1325.

174. *Id.* at 1326.

175. *Id.* at 1327 (quoting Ga. Code of Prof'l Responsibility, Canon 5 (1999)).

176. *Id.* at 1329.

and counsel” falls short of this standard.¹⁷⁷ The district court judge’s emphatic tone simply expressed his impatience with Munson’s unprofessional conduct.¹⁷⁸ Moreover, the judge’s other actions evinced his objectivity and neutrality in handling this case.¹⁷⁹ For example, the judge levied a fairly weak sanction: a censure and a reprimand. Also, the judge displayed objectivity by denying defendant’s motion for attorney fees.¹⁸⁰ Because the district court judge remained impartial in the face of Munson’s insulting conduct, the Eleventh Circuit rejected Munson’s claim that the judge abused his discretion in refusing to recuse himself.¹⁸¹

III. FREE PRESS

In *Tyne v. Time Warner Entertainment Co.*,¹⁸² the United States District Court for the Middle District of Florida addressed invasion of privacy claims brought against movie producers and distributors over the release of *The Perfect Storm*, a motion picture based on the lives of plaintiffs’ parents.¹⁸³ Granting defendants’ motion for summary judgment, the district court held that (1) the motion picture steered clear of the statute barring the unauthorized commercial appropriation of names or likenesses,¹⁸⁴ (2) defendants committed no false light invasion of privacy,¹⁸⁵ and (3) there was no public disclosure of private facts.¹⁸⁶

In 1991, the *Andrea Gail* disappeared amid a severe storm at sea. This story formed the basis of a best-selling book, *The Perfect Storm*, which was later translated onto the screen. Plaintiffs, the surviving children and spouse of the captain and a crewman aboard the *Andrea Gail*, brought two statutory invasion of privacy claims involving commercial appropriation of names or likenesses¹⁸⁷ and two common law invasion of privacy torts: false light invasion of privacy and public disclosure of private facts.¹⁸⁸

177. *Id.* (quoting *Hamm v. Bd. of Regents*, 708 F.2d 647, 651 (11th Cir. 1983)).

178. *Id.* at 1330.

179. *Id.*

180. *Id.*

181. *Id.* at 1331.

182. 204 F. Supp. 2d 1338 (M.D. Fla. 2002).

183. *Id.* at 1339.

184. *Id.* at 1342.

185. *Id.* at 1343.

186. *Id.* at 1344.

187. FLA. STAT. ch. 540.08 (2002).

188. 204 F. Supp. 2d at 1339.

On defendants' motion for summary judgment, the court first addressed the statutory commercial appropriation claims.¹⁸⁹ Plaintiffs alleged that defendants misappropriated plaintiffs' own likenesses without consent. Defendants argued that they did not need authorization because the film was an expressive work without a commercial advertising purpose. By contrast, plaintiffs alleged the marketing and distribution of the film amounted to a "commercial purpose" under the Florida statute.¹⁹⁰ Moreover, plaintiffs contended that the film is not entitled to First Amendment protection because it contains substantial and material falsity.¹⁹¹ Relying on an earlier case involving similar facts and legal issues, *Loft v. Fuller*,¹⁹² the court concluded that the use of decedents' and plaintiffs' names in the film did not amount to commercial trade or advertising.¹⁹³ A film "is not . . . in and of itself, a 'commercial purpose.'"¹⁹⁴ Likewise, "the promotion and advertising of the picture also do not constitute a commercial purpose."¹⁹⁵ Only if the name or likeness is used solely to promote a work that is unrelated to the targeted person will liability attach.¹⁹⁶ Absent evidence that plaintiffs' names and likenesses were enlisted "to directly promote" the film, the court found no statutory violation.¹⁹⁷ Moreover, the court noted, motion pictures are protected by the free speech and free press clauses of the First Amendment.¹⁹⁸

Plaintiffs also alleged the statute was violated because the film contains false facts.¹⁹⁹ Brushing this argument aside as a false light claim, the court ruled that the truth or falsity of events portrayed in the film is utterly divorced from the statutory issue of whether there was unauthorized publication of plaintiffs' and decedents' likenesses.²⁰⁰ For these reasons, the court granted defendants' motion for summary judgment on the statutory claims.²⁰¹

189. *Id.* at 1340.

190. FLA. STAT. ch. 540.08.

191. 204 F. Supp. 2d at 1341.

192. 408 So. 2d 619 (Fla. 4th Dist. Ct. App. 1981).

193. 204 F. Supp. 2d at 1342.

194. *Id.* at 1341.

195. *Id.*

196. *Id.* at 1342.

197. *Id.* (quoting *Loft*, 408 So. 2d at 622).

198. *Id.*

199. *Id.*

200. *Id.* at 1342-43.

201. *Id.* at 1343.

The children of the ship's captain also claimed that the film's "depiction of their father placed him in a false light."²⁰² The court pointed out, however, that relatives of a deceased person have no standing to raise common law invasion of privacy claims of the deceased person unless they have suffered an independent violation of their own privacy in the way they were portrayed in the film.²⁰³ But, the film did not depict the daughters in a false light because they conceded the factual accuracy of the scenes portraying them.²⁰⁴ Finding the film's portrayal of the daughters insufficiently egregious, the court granted defendants' motion for summary judgment on plaintiffs' false light claims.²⁰⁵

Finally, the court addressed the common law invasion of privacy claims based on public disclosure of private facts.²⁰⁶ Relying on the Restatement (Second) of Torts definition of this claim,²⁰⁷ the court found that the film did not make private facts about the plaintiffs public.²⁰⁸ While plaintiffs claimed that the film's portrayal of them is fabricated and false, the tort is premised on the assumption that the facts at issue are true.²⁰⁹ False facts must be challenged by the torts of defamation and false light, not by public disclosure of private facts.²¹⁰ The court granted defendants summary judgment on this claim as well.²¹¹

IV. FREEDOM OF RELIGION: ESTABLISHMENT CLAUSE

In *Glassroth v. Moore*,²¹² the United States District Court for the Middle District of Alabama addressed the constitutionality of a 5,280 pound granite monument engraved with the Ten Commandments installed in the rotunda of the Alabama State Judicial Building by the Chief Justice of the Alabama Supreme Court.²¹³ Declaring that the monument's installation violated the Establishment Clause of the First Amendment, the court entered judgment in favor of plaintiffs and

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. RESTATEMENT (SECOND) OF TORTS § 652D (1965).

208. 204 F. Supp. 2d at 1344.

209. *Id.*

210. *Id.*

211. *Id.*

212. 229 F. Supp. 2d 1290 (M.D. Ala. 2002).

213. *Id.*

ordered defendant to remove the monument from the governmental building within thirty days.²¹⁴

After election as Chief Justice of the Alabama Supreme Court, defendant, Judge Moore, unveiled a two-and-one-half ton monument depicting the Ten Commandments in the rotunda of the state judicial building as a symbol of “the moral foundation of law” and a reflection of “the sovereignty of God over the affairs of men.”²¹⁵ The monument is a cube three-feet wide by three-feet deep by four-feet tall, and the top is carved to depict two tablets bearing the Ten Commandments. The tablets summon the image of an open Bible resting on a podium. The sides of the monument contain selected religious quotations from the Declaration of Independence, George Mason, James Madison, and William Blackstone. One side contains the inscription “In God We Trust,” excerpts from the Alabama Constitution, and the fourth verse of the National Anthem.²¹⁶ Another side quotes from the Pledge of Allegiance and quotes James Wilson and Thomas Jefferson, illustrating that “both liberty and morality are based on God’s authority.”²¹⁷ The monument accorded the rotunda a sense of being holy and sacred, a place for prayer. Two more displays were later added to the rotunda: one plaque quoting Rev. Dr. Martin Luther King, Jr. and another quoting Frederick Douglass. These plaques were located some distance from the monument. The second display is a brass plaque engraved with the Bill of Rights. Defendant denied a request to include a monument containing Dr. King’s “I Have a Dream” speech and an atheist group’s request to install a sculpture of an atheist symbol, an atom, on grounds that both were at odds with the rotunda’s theme.²¹⁸

All three plaintiffs are attorneys who routinely practice law in Alabama courts. Each alleged that he found the monument offensive and that the monument made him feel like an outsider.²¹⁹ The court concluded that the monument’s direct negative effect on plaintiffs’ “use and enjoyment of [the rotunda was] a sufficient noneconomic injury to confer standing” under the Establishment Clause.²²⁰

In addressing the merits of plaintiffs’ Establishment Clause challenge to defendant’s installation of the monument, the court relied on the

214. *Id.* at 1319.

215. *Id.* at 1294.

216. *Id.* at 1294-95.

217. *Id.* at 1295.

218. *Id.* at 1295-97.

219. *Id.* at 1293.

220. *Id.* at 1297 (quoting *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1105 (11th Cir. 1983)).

three-part test spelled out by the Supreme Court in *Lemon v. Kurtzman*.²²¹ Under *Lemon*, a practice “must have a secular legislative purpose.”²²² Even though the monument reflected the “moral foundation of law,” the court concluded that its nonsecular purpose was self-evident.²²³ While conceding that the Ten Commandments have a secular meaning as well, the court distinguished this case from displays in which the Ten Commandments were located in a secular context and in which their secular nature was manifest and dominant.²²⁴ For example, if the Ten Commandments and the Bill of Rights were displayed side-by-side with equal prominence, the display might pass constitutional muster.²²⁵ Not only did the monument in this case fail the secular purpose prong of *Lemon*, but it also went beyond religious endorsement to the point of proselytization and coercion.²²⁶

Turning to the second prong of the *Lemon* test, the court made it clear that it was self-evident that the monument’s primary effect advances religion.²²⁷ The court framed the effect test as an objective one: “whether a reasonable observer would perceive the practice in question as endorsing religion.”²²⁸ In this regard, the court adopted Justice O’Connor’s view that a reasonable observer “must be deemed aware of the history and context of the community and forum in which the religious display appears.”²²⁹ The court concluded that a reasonable observer would perceive the monument’s primary effect as an endorsement of religion.²³⁰ Therefore, the monument, viewed either by itself or in the context of its history, placement, and location has the primary effect of endorsing religion, thereby failing the second prong of the *Lemon* test.²³¹

A practice that fails the *Lemon* test, however, may still pass constitutional scrutiny if it constitutes such a historical practice that it is analogous to legislative prayer, which was sustained by the Supreme Court in *Marsh v. Chambers*.²³² Defendant argued that the monu-

221. *Id.* at 1299; 403 U.S. 602, 612-13 (1971).

222. 229 F. Supp. 2d at 1299 (quoting *Lemon*, 403 U.S. at 612-13).

223. *Id.*

224. *Id.* at 1300.

225. *Id.* at 1301.

226. *Id.* at 1302.

227. *Id.*

228. *Id.*

229. *Id.* (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O’Connor, J., concurring in part and concurring in the judgment)).

230. *Id.* at 1304.

231. *Id.*

232. 463 U.S. 783, 786 (1983).

ment's recognition of God, like the legislative prayer sustained in *Marsh*, constitutes part of our heritage.²³³ Rejecting defendant's argument as flawed, the court pointed out the yawning gap between "an obtrusive year-round religious display" and the ceremonial acknowledgment of God on money or in legislative prayer.²³⁴ In short, governmental displays of the Ten Commandments, installed with the aim of proselytizing and bearing a religious effect, are not "deeply embedded in the history and tradition of this country."²³⁵ For this reason, the court concluded that the monument did not fit within "the *Marsh* exception to the *Lemon* test."²³⁶

Defendant further alleged that his own reading of the bond between God and the state is embodied by the First Amendment.²³⁷ While conceding "that, as a matter of conscience, [plaintiff] may believe that the Judeo-Christian God [reigns] over the state,"²³⁸ the court rejected defendant's legal grasp of the proper relation between God and the state: "It is from the people, and not God, that the state [derives] its powers."²³⁹ Far from framing the idea of a Judeo-Christian God as the sovereign head of the country, the First Amendment regards all religions as equal and, moreover, "recognizes the equality of religion and non-religion."²⁴⁰ Defendant's concept of God's role in the state is tantamount to enshrining a theocracy.²⁴¹ The court was unwilling to implicitly overrule a number of Supreme Court decisions to accept plaintiff's definition of religion.²⁴²

Next, defendant alleged the First Amendment did not govern this case because no "law" was at issue.²⁴³ Rejecting this claim, the court regarded placement of the monument as having the force of law: It was placed in a public building by a state official acting in his official state role under authority vested in him by state law.²⁴⁴

233. 229 F. Supp. 2d at 1307.

234. *Id.* (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part and dissenting in part)).

235. *Id.* at 1308 (quoting *Marsh*, 463 U.S. at 786).

236. *Id.*

237. *Id.* at 1309.

238. *Id.* at 1310.

239. *Id.* at 1311.

240. *Id.*

241. *Id.* at 1312.

242. *Id.* at 1313.

243. *Id.* at 1314.

244. *Id.* at 1315.

Finally, defendant alleged that plaintiffs had confused his motive with his purpose in installing the monument.²⁴⁵ While conceding that precedent affords some support for separating purpose and motive, the court made it clear that the difference diminishes when a single person, as opposed to a group, is responsible for the targeted practice.²⁴⁶ Ultimately, the court chose not to settle this dispute, relying instead on defendant's unveiling speech, his trial testimony, and his trial exhibits as evidence that he erected the monument with an improper purpose.²⁴⁷ In conclusion, the court entered a declaration that the monument violated the Establishment Clause and granted defendant thirty days to remove it.²⁴⁸

245. *Id.*

246. *Id.* at 1315-16.

247. *Id.* at 1316-17.

248. *Id.* at 1319.