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Constitutional Civil Rights

by John Sanchez*

I. INTRODUCTION

The 2000 survey period was an active year for constitutional civil rights litigation in the Eleventh Circuit. All eighteen cases examine thorny issues arising under the First Amendment. Thirteen cases address free speech issues while five cases touch on religion. Two cases deal with zoning ordinances that regulate adult businesses. Two cases address the constitutionality of zoning ordinances that regulate nude dancing. Two apply the test in Central Hudson Gas & Electric Corp. v. Public Service Commission ("Central Hudson")1 for regulating commercial speech. Two cases analyze the law of prior restraints when it comes to licensing access to traditional public fora. Four cases apply the balancing test announced in Pickering v. Board of Education2 for assessing public employee speech. One case involves a citizen's right to videotape police activity. Turning to the religious clauses of the First Amendment, three cases involve the Establishment Clause while the final two cases address free exercise issues.

II. FIRST AMENDMENT

A. Free Speech

1. Regulating Adult Businesses. In Ward v. County of Orange,3 the Eleventh Circuit addressed the constitutionality of a county's adult entertainment code.4 The court of appeals concluded that the ordinance

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3. 217 F.3d 1350 (11th Cir. 2000).
4. Id. at 1352.
was a valid time, place, or manner regulation thereby affirming the
district court's decision that the ordinance was facially constitutional.\(^5\) However, the court of appeals remanded the case with instructions that
the district court determine whether the owner's as-applied challenges
were ripe for review.\(^6\)

In \textit{Ward} customers at plaintiff's "swimsuit club" can buy "Sweetheart
Party Packages" that give them access to nonalcoholic beverages and
slow dances with performers. Plaintiff had never applied for an adult
entertainment license, and consequently, several performers and a
manager were arrested for violations of the county's Adult Entertain-
ment Code. Plaintiff sued the county, claiming the code was unconstitu-
tional on its face and as applied. The district court granted summary
judgment to the county on the facial challenges and concluded that
plaintiff's as-applied challenges were not ripe.\(^7\) On appeal the Eleventh
Circuit reviewed the zoning ordinance under the "time, place, or manner"
standard spelled out by the Supreme Court in \textit{City of Renton v. Playtime
Theatres, Inc.}\(^8\) Under this standard a zoning ordinance is valid if it is
"designed to serve a substantial government interest and allows for
reasonable alternative avenues of communication."\(^9\) The Eleventh
Circuit concluded that the City had a substantial interest in combating
the harmful secondary effects of adult businesses, such as crimes, public
health, and safety problems.\(^10\) The court found in favor of the City and
denied plaintiff's facial challenge even though the City relied on studies
conducted by other cities and did not undertake its own study.\(^11\)

The court also considered which party bore the burden of proving
plaintiff's business was an adult entertainment establishment subject to
licensing.\(^12\) Relying on the Supreme Court's rulings in \textit{Freedman v.
Maryland}\(^13\) and \textit{FW/PBS, Inc. v. Dallas},\(^14\) the court held that appli-
cants must be protected by two procedural safeguards: (1) Any restraint
prior to judicial review may only be put in place for a short term during
which the status quo must be maintained, and (2) the final judicial
decision must be prompt.\(^15\) However, a city may require the license

\(^5\) \textit{Id.} at 1356.
\(^6\) \textit{Id.}
\(^7\) \textit{Id.} at 1352-53.
\(^8\) 475 U.S. 41 (1986).
\(^9\) \textit{Id.} at 50.
\(^10\) 217 F.3d at 1353.
\(^11\) \textit{Id.}
\(^12\) \textit{Id.} at 1354-55.
\(^15\) 217 F.3d at 1354.
applicant to bear the burden of proving that it is engaging in protected activity.\textsuperscript{16}

Finally, the court addressed whether plaintiff's as-applied challenge was ripe because plaintiff never applied for a license.\textsuperscript{17} The court ruled that the ripeness issue turned on whether plaintiff could have secured from the zoning board a ruling that plaintiff in fact needed a license.\textsuperscript{18} The court remanded the case to the district court for a determination of this issue.\textsuperscript{19} As for the overbreadth and vagueness challenges, the court affirmed the district court's grant of summary judgment to the City on these claims.

In \textit{David Vincent, Inc. v. Broward County},\textsuperscript{20} the Eleventh Circuit ruled on whether plaintiffs' former bid for a preliminary injunction of a licensing ordinance in state court foreclosed them from seeking an injunction in federal court and whether the zoning ordinance was constitutional.\textsuperscript{21} The court reversed the district court's ruling that plaintiffs' failed state court bid barred a later claim for a permanent injunction and affirmed the lower court's ruling that the ordinance was constitutional, both facially and as applied.\textsuperscript{22}

In 1993 Broward County, Florida adopted a licensing and zoning ordinance for adult businesses that substantially reduced the number of suitable sites in the county for such establishments. Plaintiffs sued in state court. Subsequently, defendants removed the case to federal court, but plaintiffs successfully remanded. The state trial court denied (and the state court of appeals affirmed) plaintiffs' request for a preliminary injunction, but the trial court never reached the merits of the case nor the issue of permanent injunction. Plaintiffs then dismissed their state court claim for a permanent injunction and filed suit in federal court, challenging the constitutionality of the ordinance and seeking a permanent injunction. The federal district court granted summary judgment to the county on the licensing issue based on preclusion grounds. As for plaintiffs' facial challenge, the district court concentrated on whether the ordinance left a sufficient number of sites for adult businesses to satisfy the First Amendment's requirement that time, place, and manner restrictions leave adequate avenues for adult expression. The district court concluded that seven to nine sites

\begin{footnotesize}
\textsuperscript{16} \textit{Id.} at 1355.
\textsuperscript{17} \textit{Id.} at 1356.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.} at 1355-56.
\textsuperscript{20} 200 F.3d 1325 (11th Cir. 2000).
\textsuperscript{21} \textit{Id.} at 1330.
\textsuperscript{22} \textit{Id.} at 1337.
\end{footnotesize}
available for adult businesses amounted to adequate opportunity for adult expression in the county.\textsuperscript{23}

The Eleventh Circuit reversed the district court's preclusion ruling, holding plaintiffs' preliminary injunction proceeding in state court did not afford them an opportunity to litigate their permanent injunction claims, as the only issue before the state court was whether plaintiffs made a case for a preliminary injunction, not whether the county's ordinance was in fact constitutional.\textsuperscript{24} For this reason the circuit court concluded that neither claim preclusion, issue preclusion, nor notions of federalism warranted foreclosing plaintiffs' claim for a permanent injunction of the county's licensing ordinance.\textsuperscript{25}

The second issue the circuit court addressed was plaintiffs' facial challenge to the county's ordinance.\textsuperscript{26} Relying on precedent the court ruled that the ordinance was constitutional on its face, despite the fact that the ordinance made no provision for allowing adult businesses with community approval to locate outside of areas designated for their use and the fact that geographic and demographic changes in the county left far fewer potential sites for adult businesses.\textsuperscript{27}

In analyzing plaintiffs' as-applied challenge to the ordinance, the circuit court invoked the secondary effects doctrine, concluding the ordinance was a content-neutral time, place, and manner regulation that should be sustained as long as it is narrowly tailored to further a substantial governmental interest and it allows for reasonable alternative avenues of communication.\textsuperscript{28} In reviewing the district court's calculation of the number of sites available for adult businesses, the Eleventh Circuit followed a few general rules: (1) The economic feasibility of relocating to a site is largely irrelevant; (2) the fact that some development is needed before a site is suitable for an adult business does not render it, per se, unavailable; and (3) the First Amendment does not dwell on restraints that are not imposed by government itself or by the physical characteristics of the potential sites.\textsuperscript{29} Applying these rules the court concluded that the district court did not err in finding seven to nine sites available for adult use in the county was a sufficient number.\textsuperscript{30} Finally, the court turned to whether

\textsuperscript{23} Id. at 1328-29.
\textsuperscript{24} Id. at 1330-32.
\textsuperscript{25} Id. at 1332.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 1332-33.
\textsuperscript{28} Id. at 1333-37.
\textsuperscript{29} Id. at 1333-35.
\textsuperscript{30} Id. at 1335.
seven to nine sites leaves reasonable avenues for communicating the businesses' protected expression. Noting that the district court could have been more specific in defining what factors are relevant in determining the adequacy of available sites, the Eleventh Circuit concluded the district court's reasoning was sound.

2. Regulating Nude Dancing. In Wise Enterprises, Inc. v. Unified Government of Athens-Clarke County, the Eleventh Circuit addressed the constitutionality of a county's adult entertainment ordinance. The court affirmed the district court's decision to grant summary judgment to the county, concluding (1) that the ordinance was content-neutral, thus triggering intermediate scrutiny; (2) that the ordinance barring businesses from serving alcohol and providing adult entertainment at the same site did not run afoul of the First Amendment; and (3) that the ordinance's refusal to grant adult entertainment business licenses to establishments located in the central business district did not violate the First Amendment.

Plaintiffs operated adult entertainment establishments featuring nude barroom dancing while providing alcoholic drinks. After the county amended its zoning ordinance, barring adult businesses from serving alcohol, plaintiffs sued the county. On appeal from the district court's grant of summary judgment, the Eleventh Circuit, relying on the standard set out by the Supreme Court in City of Erie v. Pap's A.M., decided that the district court was correct in adopting the intermediate scrutiny test for assessing whether the county's ordinances were content-neutral. Once again relying on the secondary effects doctrine, the court concluded that the ordinances were unrelated to the suppression of free expression. Moreover, the ordinance was narrowly tailored given that it did not ban all nude dancing, only nude dancing mixed with alcohol. Finally, the court concluded the ordinance provision that excluded adult businesses from the Central Business District was also a content-neutral, time, place, and manner regulation.

31. Id. at 1335-37.
32. Id. at 1336-37.
33. 217 F.3d 1360 (11th Cir. 2000).
34. Id. at 1362.
35. Id. at 1362-65.
36. Id. at 1362.
38. 217 F.3d at 1363-64.
39. Id. at 1364.
40. Id. at 1365.
41. Id.
In Artistic Entertainment, Inc. v. City of Warner Robins, the Eleventh Circuit addressed the constitutionality of a city's adult business ordinance and its alcoholic beverage ordinance. While affirming the district court's ruling that the ordinance was not unconstitutionally vague, the court reversed the district court's conclusion that the ordinance did not amount to a prior restraint in violation of the First Amendment.

The Eleventh Circuit adopted the test in United States v. O'Brien to assess the government's regulation of adult entertainment. Relying on circuit precedent, the court ruled that a prohibition on the sale of alcohol at adult businesses is content-neutral. Turning to the "secondary effects" prong, the court concluded the city council had sufficient evidence for finding that banning the sale and consumption of alcohol by adult businesses would curb crime and other social ills associated with adult businesses.

Plaintiffs claimed the ordinance's exemption for mainstream or traditional theaters was unconstitutionally vague. Specifically, plaintiffs contended the ordinance's percentile standard, under which businesses must secure a license if more than twenty percent of their performances feature specified sexual content, was vague. The court determined the exemption's "80/20" standard afforded sufficient notice to business owners and served as an adequate restraint on arbitrary enforcement.

Finally, the court addressed whether the ordinance amounted to a prior restraint on expression because it did not specify an adequate time limit for the city's review of license applications. Again relying on circuit precedent, the court concluded the ordinance did amount to a prior restraint because it was silent on the applicant's right to begin running his business if the city fails to act on his application. In light of this failure to guarantee an adult business owner the right to begin expressive activities within a brief, fixed time frame, the ordinance was facially violative of the First Amendment.

42. 223 F.3d 1306 (11th Cir. 2000).
43. Id. at 1308.
44. Id. at 1311.
46. 223 F.3d at 1308-09.
47. Id. at 1309.
48. Id.
49. Id. at 1309-10.
50. Id. at 1310.
51. Id. at 1310-11.
52. Id.
53. Id. at 1311.
3. Regulating Commercial Speech. In *Mason v. Florida Bar*, the Eleventh Circuit reviewed the constitutionality of the Florida State Bar's rule barring self-laudatory advertisements, as applied to an attorney who was forced to include a disclaimer when he advertised. The disclaimer was intended to alert readers that he had earned the highest rating from a national legal directory. The Eleventh Circuit affirmed the district court's holding that the rule barring self-laudatory advertisements was not unconstitutionally vague; however, it reversed the district court's conclusion that the required disclaimer was constitutional.

Plaintiff, a criminal defense attorney, asked for an ethics advisory opinion about his yellow pages advertisement that asserts that he is "'AV' Rated, the Highest Rating Martindale-Hubbell National Law Directory." The Florida Bar's opinion was that the advertisement violated a state bar rule against self-laudatory statements unless the ad included a "full explanation as to the meaning of the [Martindale-Hubbell] AV rating and how the publication chooses the participating attorneys." Moreover, the disclaimer must warn "that the ratings and participation are based 'exclusively on ... opinions expressed by ... confidential sources' and that these publications do not undertake to rate all Florida attorneys." Plaintiff sued alleging that the Bar's opinion violated the First Amendment and that Rule 4-7.2(j) was void for vagueness under the Due Process Clause of the Fifth and Fourteenth Amendments. The district court found in favor of the Bar and sustained Rule 4-7.2(j) against plaintiff's constitutional challenges.

The Eleventh Circuit relied upon the four-part test for assessing government regulation of commercial speech originally framed by the Supreme Court in *Central Hudson*. Under this test a state may regulate commercial speech that is not false, deceptive, or misleading only if the regulation "directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." Conceding that plaintiff's advertisement was truthful,
the court turned to the second prong, whether the state's interests in limiting the speech are substantial. The Bar asserted three interests as substantial government interests: (1) an interest in ensuring that attorney advertisements are not misleading; (2) an interest in furthering the public's access to useful information to aid them in evaluating attorneys; and (3) an interest in encouraging attorney rating services to use objective criteria. While the court concluded the first two interests were substantial, it failed to see the value in the distinction drawn by the third interest between objective and subjective criteria, so it rejected the Bar's third asserted substantial interest. Turning to the third prong, whether the state's regulation mitigates the asserted harm in a direct and effective manner, the court concluded the Bar is not relieved of its burden to identify a genuine threat of danger merely because it requires a disclaimer rather than a total ban on plaintiff's speech. In light of this glaring omission in the record of an identifiable harm, the regulation flunked the third prong of Central Hudson, and the court saw no reason to address the final prong.

Plaintiff also claimed the term “self-laudatory” contained in Rule 4-7.2(j) is unconstitutionally vague. While the court granted the rule was somewhat ambiguous, it affirmed that part of the district court's judgment on the void-for-vagueness challenge, concluding that “the Rule's language is plain and would adequately put Bar members on notice that merely self-referential and laudatory statements or statements describing the quality of their legal services are prohibited.”

In Jim Gall Auctioneers, Inc. v. City of Coral Gables, the Eleventh Circuit addressed a constitutional challenge to a city's ban on commercial auctions and their advertising in residential areas. The court affirmed the district court's grant of summary judgment to the City, determining the City's ban on commercial auctions and their advertising in residential areas did not infringe on plaintiff's commercial speech rights under the First Amendment.

Plaintiff is a for-profit corporation that auctions real and personal property in Florida. After a large three-day auction held at a private

64. 208 F.3d at 956.
65. Id. at 955-56.
66. Id. at 956.
67. Id. at 956-58.
68. Id. at 958.
69. Id.
70. Id. at 959.
71. 210 F.3d 1331 (11th Cir. 2000).
72. Id. at 1332.
73. Id. at 1333-34.
residence, the City issued three citations to plaintiff for "conducting business from a residence" in violation of a city zoning regulation that bars nonresidential use. Moreover, the City issued four citations to plaintiff for "advertising in a residential area" in violation of the zoning code. While suit was initially brought in state court, it was later removed to federal court, which ruled in favor of the City, concluding the City's ban on commercial auctions in residential areas was narrowly tailored to achieve the City's substantial interest in promoting neighborhood aesthetics and tranquility.\textsuperscript{74}

The Eleventh Circuit, while conceding plaintiff's advertising was clearly commercial speech, said it was arguable whether conducting an auction was also considered commercial speech or merely commercial activity subject to time, place, and manner analysis.\textsuperscript{75} In the end it did not matter because even assuming both were commercial speech, the regulation satisfied the \textit{Central Hudson} test for assessing the validity of government regulation of commercial speech.\textsuperscript{76} Agreeing with the district court that the City has a substantial interest in maintaining the aesthetics and tranquility of its residential neighborhoods, the court also agreed with the lower court that the regulation was narrowly tailored to achieve those goals.\textsuperscript{77}

\textbf{4. Regulating Speech on Traditional Public Fora.} In \textit{Cannabis Action Network, Inc. v. City of Gainesville},\textsuperscript{78} the Eleventh Circuit addressed whether a city's sound ordinance and its amended version of its street-closing ordinance amounted to prior restraints in violation of the First Amendment.\textsuperscript{79} Affirming in part and reversing in part, the circuit court ruled (1) that the district court's decision to grant an extension of the deadline for filing a notice of appeal was not an abuse of its discretion; (2) that the sound ordinance did amount to a prior restraint on speech; (3) that the sound ordinance was facially unconstitutional given its failure to pin down any time within which the city manager had to grant or deny a sound amplification permit; and (4) that the street closing ordinance was also unconstitutional on its face because the City bore no burden of initiating judicial proceedings.\textsuperscript{80}

\begin{itemize}
  \item \textsuperscript{74} Id. at 1331-32.
  \item \textsuperscript{75} Id. at 1332.
  \item \textsuperscript{76} Id. at 1332-33.
  \item \textsuperscript{77} Id. at 1333.
  \item \textsuperscript{78} 231 F.3d 761 (11th Cir. 2000).
  \item \textsuperscript{79} Id. at 763-66.
  \item \textsuperscript{80} Id. at 766-76.
\end{itemize}
Plaintiff, a group of political activists who challenge laws against the possession and distribution of marijuana, often held political rallies in public parks. Plaintiff applied for permits from the City in preparation for its annual rally. After the city manager denied the permit requests, plaintiff sued in federal district court seeking declaratory and injunctive relief. The district court enjoined the City from enforcing one of its permit laws, concluding there was a substantial likelihood that the law violated the First Amendment. Ultimately, the court ordered the City to issue all three permits sought by plaintiff. 81

On appeal the Eleventh Circuit addressed two issues: (1) whether the district court abused its discretion in granting plaintiff an extension to file a notice of appeal; and (2) whether the City's sound ordinance and street-closing ordinance amount to prior restraints on free speech on the ground that they do not include procedural safeguards. 82 In reviewing the appeal extension issue, the court applied a four-factor test 83 set out by the Supreme Court in Pioneer Investment Services Co. v. Brunswick Associates, LP. 84 Courts should “tak[e] account of all relevant circumstances surrounding the party’s omission,” including “the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” 85 Applying these factors the circuit court concluded the district court did not abuse its discretion in granting plaintiff an appeal extension. 86

After ruling that it had jurisdiction over this case, the Eleventh Circuit turned to plaintiff’s substantive appeal. 87 First, the court assumed the City's street-closing ordinance was a prior restraint because both parties, as well as the district court, assumed that it was. 88 Second, the court examined whether the City's restriction on the use of amplified sound amounts to a prior restraint on speech. 89 Finally, the court reviewed both ordinances and considered whether they afforded procedural safeguards required of prior restraints on speech. 90

81. Id. at 763-66.
82. Id. at 766-71.
83. Id. at 766-67.
85. 231 F.3d at 767 (quoting Pioneer, 507 U.S. at 395).
86. Id.
87. Id. at 767-68.
88. Id. at 768.
89. Id.
90. Id. at 771.
In examining plaintiff’s facial challenge to the sound ordinance, the court considered whether the ordinance vested unfettered discretion in a government agent to decide whether to grant or deny expressive conduct. While the district court relied on Ward v. Rock Against Racism, which held that ensuring proper sound quality, balanced with respect for residential neighbors, is not a prior restraint, the Eleventh Circuit stressed the difference between this case and Ward. Unlike Ward, the court insisted, this case encompassed not only the right to limit and control noise level and mix of sound, but the power of the City to deny sound amplification altogether. Relying on the closely analogous Supreme Court case of Saia v. New York, the court of appeals concluded the district court erred in finding the sound ordinance was not open to facial challenge. Therefore, the Eleventh Circuit found the sound ordinance was a prior restraint that must afford procedural safeguards.

Freedman v. Maryland framed three procedural safeguards: (1) If a permit is denied, the censor bears the burden of triggering judicial proceedings, as well as the burden of proof at trial; (2) any censorship prior to court review may be imposed only for a short, set time frame during which the status quo is preserved; and (3) there must be the guarantee of quick judicial review in case the permit is wrongly refused. The court then assessed each ordinance for evidence of at least two, if not three of the Freedman procedural safeguards. Even a quick scan of the sound ordinance revealed omission of the second Freedman standard: No time limit was set on when the city manager must grant or deny a sound amplification permit. As this safeguard is essential, the court concluded the district court’s grant of summary judgment in favor of the City must be reversed.

Turning to the street-closing ordinance, as amended, both parties agreed it satisfied the second Freedman standard. As for the other

91. Id. at 771-72.
93. 231 F.3d at 769-70.
94. Id. at 770.
95. 334 U.S. 558 (1948).
96. 231 F.3d at 770-71.
97. Id. at 771.
99. 231 F.3d at 772.
100. Id.
101. Id.
102. Id.
103. Id. at 773.
essential standard, the assurance of "prompt judicial review," the
Eleventh Circuit noted wide disagreement among courts over the
meaning of this phrase. The court left this standard unresolved in
light of its ruling on the first *Freedman* prong, the burden-shifting
procedural safeguard. The court supported its conclusion that this
safeguard was essential in this case because the noncommercial plaintiff
lacks the business incentive to go to court and because the speech at
issue is core political speech in a public forum. In light of the
ordinance's failure to assure the City would satisfy its burden of
initiating court proceedings, the Eleventh Circuit concluded the first
*Freedman* standard was lacking. Absent this safeguard, the ordi-
nance amounted to an unconstitutional prior restraint on speech. For
this reason, the court reversed the district court's grant of summary
judgment to the City on the street-closing ordinance.

In *United States v. Frandsen*, the Eleventh Circuit reviewed the
convictions of protestors arrested for demonstrating at a national park
without a permit. The circuit court reversed the district court's
decision upholding defendants' convictions, concluding (1) that a facial
challenge to some parts of the federal regulation was permissible,
without insisting defendants prove that under no circumstances could
the law be valid and (2) that the federal regulation requiring persons to
secure a permit before demonstrating in a national park amounted to an
unconstitutional prior restraint, in light of its failure to impose any real
time limits on the decision maker.

Defendants, advocates of a "clothing optional" lifestyle, were arrested
for publicly assembling at a federal park without a permit in violation
of federal law. Defendants raised a facial challenge against both the
regulation requiring them to secure a permit before protesting and the
regulation banning protesting without a permit. The magistrate judge
ruled the park was not a public forum on the ground that the govern-
ment had designated it for recreation. Therefore, the judge adopted a
reasonableness standard under which one of the regulations was
sustained. On appeal the federal district court upheld the convictions.
Neither the magistrate judge nor the district court addressed the

104. *Id.* at 773-74.
105. *Id.* at 774.
106. *Id.* at 774-75.
107. *Id.*
108. *Id.* at 775-76.
109. *Id.* at 776.
110. *Id.*
111. *Id.* at 1236, 1240.
constitutionality of the regulation barring protesting without a permit.\textsuperscript{113}

The Eleventh Circuit addressed whether defendants' convictions should be overturned on three grounds: (1) that the regulation lacked the \textit{Freedman} procedural safeguards; (2) that the regulation is overbroad and not narrowly tailored to serve a compelling government interest; and (3) that the regulation leaves unfettered discretion in the hands of the park superintendent in weighing whether to issue a permit.\textsuperscript{114} The court found it necessary to address only the first issue.\textsuperscript{115}

As a threshold matter, the court had to decide whether defendants' facial challenge was cognizable. Invoking circuit precedent, the court clearly stated that for "[a] facial challenge to be successful, [a plaintiff] 'must establish that no set of circumstances exists under which the [law] would be valid.'"\textsuperscript{116} However, this rule does not apply if the regulation amounts to a prior restraint.\textsuperscript{117} After a review of conflicting case law, the Eleventh Circuit concluded facial challenges to prior restraints on speech are actionable "without requiring the plaintiff to show that there are no conceivable set of facts where the application of the particular government regulation might or would be constitutional."\textsuperscript{118}

In determining the proper standard of judicial review for this particular prior restraint, the court had to decide whether the site of defendants' protest, a national park, was a traditional, limited, or nonpublic forum.\textsuperscript{119} Reversing the district court's decision, the Eleventh Circuit ruled that national parks are traditional public fora, triggering strict scrutiny.\textsuperscript{120} In this kind of public fora, the government is entitled to regulate the time, place, and manner of expression as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."\textsuperscript{121} Moreover, regulations must conform to the \textit{Freedman} safeguards.\textsuperscript{122} Because the court found the regulation lacked one of those procedural safeguards, the court did not resolve whether the regulation was a permissible time, place, or manner

\begin{itemize}
\item \textsuperscript{113} \textit{Id.} at 1234.
\item \textsuperscript{114} \textit{Id.} at 1234-35.
\item \textsuperscript{115} \textit{Id.} at 1235.
\item \textsuperscript{116} Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1083-84 (11th Cir. 2000) (en banc) (quoting United States v. Salerno, 481 U.S. 171, 177 (1987)).
\item \textsuperscript{117} 212 F.3d at 1236.
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.} at 1237.
\item \textsuperscript{120} \textit{Id.} at 1237-38.
\item \textsuperscript{121} \textit{Id.} at 1238 (quoting United States v. Grace, 461 U.S. 171, 177 (1983)).
\item \textsuperscript{122} \textit{Id.}
\end{itemize}
The court found the regulation failed to place any specific time limits on the decision maker. Although the regulation required the superintendent to grant a permit "without unreasonable delay," it did not afford any guidance on what qualified as "unreasonable." Under this regulation speech could be silenced by inaction. Therefore, the regulation was unconstitutional, and the court reversed defendants' convictions.

5. Public Employee Speech. In Stanley v. City of Dalton, the Eleventh Circuit employed the Pickering balancing test to decide whether a public employee, who was terminated in part in retaliation for exercising his First Amendment rights and in part for a lawful motive, had proved his case. Reversing the district court, the Eleventh Circuit ruled that the public employer was entitled to qualified immunity when the record clearly established the employer in fact was motivated, at least in part, by lawful considerations. Therefore, the court remanded the case to the district court to enter judgment for the employer on the employee's First Amendment claims.

Plaintiff, a police officer, accused the police chief of having stolen money from the evidence room. Plaintiff alleged he was retaliated against for speaking his mind. After the district court denied defendant's motion for summary judgment based on qualified immunity, the case was appealed to the Eleventh Circuit. The court set out the four parts of the test for weighing First Amendment retaliation claims: (1) whether the public employee's speech touched on a matter of public concern; (2) if so, whether the employee's First Amendment right outweighed the employer's interest in running a public workplace; (3) whether the employee's speech played a substantial part in the employer's decision to discipline the employee; and (4) if the employee establishes the preceding factors, whether the employer proved by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.

The Eleventh Circuit determined that plaintiff's speech touched on a matter of public concern and applied the following factors in deciding whether plaintiff's speech outweighed defendant's right to run the public

123. Id.
124. Id. at 1238-40.
125. Id. at 1240.
126. 219 F.3d 1280 (11th Cir. 2000).
127. Id. at 1289.
128. Id. at 1298.
129. Id. at 1283-86.
130. Id. at 1288-94.
workplace: (1) whether the speech impedes the government's ability to perform its duties efficiently; (2) the manner, time, and place of the speech; and (3) the context within which the speech occurred. The court concluded the *Pickering* balancing test tipped in plaintiff's favor because, even though unfounded accusations against superiors can be disruptive, plaintiff had some factual basis for telling state authorities that he suspected a supervisor of theft. As for the third prong of the test, the circuit court concluded the district court had correctly found that plaintiff's evidence created a jury question as to whether his protected speech was a substantial factor in defendant's employment decision.

The Eleventh Circuit was most attentive to the "but for" in the fourth prong of the First Amendment retaliation test. The court made clear it was error for the district court to conclude summarily that a finding in plaintiff's favor on the third prong compelled a finding in his favor on the fourth prong as well. Referring to the fourth prong as an affirmative defense, the court found that while defendant had shown adequate evidence to make the fourth prong a jury issue, his evidence was not strong enough to warrant judgment as a matter of law. While deception alone may amount to an adequate basis for discharging plaintiff, the court stopped short of saying that as a matter of law defendant necessarily would have done so absent plaintiff's accusing him of theft. Nevertheless, the Eleventh Circuit concluded defendant was entitled to qualified immunity because defendant's dismissal of plaintiff was objectively reasonable. Moreover, circuit precedent tilts strongly in favor of immunity: "[O]nly in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violate[s] 'clearly established' federal rights." The case was reversed and remanded to the district court to enter judgment for defendant on plaintiff's First Amendment claims.

131. *Id.* at 1289-91.
132. *Id.* at 1291.
133. *Id.* at 1292.
134. *Id.* at 1292-94.
135. *Id.* at 1292, 1294.
136. *Id.* at 1294.
137. *Id.*
138. *Id.*
139. *Id.* at 1298 (quoting Hansen v. Soldenwagner, 19 F.3d 573, 576 (11th Cir. 1994)).
140. *Id.*
Similarly, in *Maggio v. Sipple*, the Eleventh Circuit ruled the public employer was entitled to qualified immunity on the public employee's Section 1983 claim, alleging her employer retaliated against her for exercising her First Amendment rights. Reversing the district court, the Eleventh Circuit ruled the public employer was entitled to qualified immunity when the employee has failed to allege the violation of a clearly established right.

Plaintiff alleged defendant retaliated against her after she testified on behalf of her supervisor at a grievance hearing. Applying the four-part First Amendment retaliation test, the Eleventh Circuit addressed whether plaintiff's speech touched on a matter of public concern. After examining the content, form, and context of plaintiff's speech, the court concluded it was not of public concern. Plaintiff's speech, in essence, took the form of a private employee grievance. Moreover, plaintiff disclosed her concerns to official administrative bodies but not to the public. Supporting her supervisor would curry the favor of plaintiff's supervisor or improve the conditions of her employment and thus further her own personal interest. The fact that plaintiff was testifying in another employee's grievance proceeding, rather than pursuing her own grievance, does not per se prove plaintiff's speech touched on a matter of public concern. But even assuming plaintiff had shown a First Amendment violation, the court concluded, the individual defendants would be entitled to qualified immunity because the four-prong test is so fact specific that, without clear, bright-line rules, a defendant will only rarely be on notice that his behavior was unlawful. The court reversed, vacated, and remanded the case to the district court with orders to dismiss.

In *Rice-Lamar v. City of Ft. Lauderdale*, the Eleventh Circuit reviewed the dismissal of a city's affirmative action specialist who alleged in part that she was terminated in retaliation for exercising her First Amendment rights. The court affirmed the district court's grant of summary judgment to the City, concluding in part that

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141. 211 F.3d 1346 (11th Cir. 2000).
142. *Id.* at 1355.
143. *Id.*
144. *Id.* at 1349.
145. *Id.* at 1350-54.
146. *Id.* at 1354.
147. *Id.* at 1353.
148. *Id.* at 1354.
149. *Id.* at 1355.
150. 232 F.3d 836 (11th Cir. 2000).
151. *Id.* at 837-40.
plaintiff's dismissal due to her refusal to modify a personal commentary that she incorporated into her affirmative action report to the city council did not amount to a violation of her free speech rights under the First Amendment.\(^{152}\)

Plaintiff's superiors had grave reservations about some of the personal commentary contained in her official report because it was critical of the City's affirmative action efforts. When asked to make changes before the report was distributed to the city commission, plaintiff refused and was dismissed after having an opportunity to be heard.\(^{153}\) Applying the four-part First Amendment retaliation test, the Eleventh Circuit assumed that plaintiff's speech touched on a matter of public concern but concluded that her First Amendment right was outweighed in the second part of the test by the City's interests.\(^{154}\) The court made clear that the "burden of caution employees bear regarding speech vary with the extent of authority and/or public accountability that employee's role entails."\(^{155}\) Here, the city's interest in shaping an official document that was consistent with the city's expectations took precedence.\(^{156}\) While plaintiff may have seen herself as a crusader for her personal vision of social justice, her refusal to change the report amounted to insubordination.\(^{157}\) In the court's view, plaintiff was not entitled to refuse to perform a lawful task well within the scope of her duties.\(^{158}\) In effect plaintiff had tried to control the content of her employer's speech.\(^{159}\) Because plaintiff's case failed the second prong of the test, the court concluded plaintiff's First Amendment retaliation claim had no merit.\(^{160}\)

In Oladeinde v. City of Birmingham,\(^{161}\) the Eleventh Circuit reviewed the propriety of a jury award of damages and injunctive relief to police officers who alleged they had been discriminated against for exercising their First Amendment rights.\(^{162}\) Reversing the district court's order granting Sergeant Oladeinde's motion for injunctive relief

\(^{152}\) Id. at 843-44.
\(^{153}\) Id. at 838-39.
\(^{154}\) Id. at 841-42.
\(^{155}\) Id. at 841.
\(^{156}\) Id. at 842.
\(^{157}\) Id.
\(^{158}\) Id.
\(^{159}\) Id.
\(^{160}\) Id.
\(^{161}\) 230 F.3d 1275 (11th Cir. 2000).
\(^{162}\) Id. at 1279.
and ordering the city to promote her, the circuit court concluded that plaintiff's speech was not protected under the First Amendment.\textsuperscript{163}

Plaintiff blew the whistle on police officers suspected of tampering with jail records involving the arrest of the mayor's daughter. Later, plaintiff was denied a promotion. For this reason and others, plaintiff accused defendant of retaliation.\textsuperscript{164} In applying the four-part First Amendment retaliation test, the Eleventh Circuit concluded it was clearly a matter of public concern that a police chief and members of his department would tamper with public records to cover up the criminal conduct of a family member of the highest elected official of a city.\textsuperscript{165} Turning to the second prong of the test, the court stressed the "special concerns of quasi-military organizations such as police departments."\textsuperscript{166} These entities have a "heightened need for order, loyalty, morale and harmony."\textsuperscript{167} Therefore, there is a stronger governmental interest in regulating the speech of police officers than for other public employees.\textsuperscript{168} Here, plaintiff's speech was disruptive to the efficient operation of the department.\textsuperscript{169} For this reason, defendants were entitled to qualified immunity as a matter of law.\textsuperscript{170} Local government is only liable if constitutional torts result from an official government policy, the acts of an official fairly deemed to represent government policy, or a custom or practice so entrenched and clearcut that it assumes the force of law.\textsuperscript{171} Because plaintiff's claim failed, the district court erred in granting plaintiff injunctive relief.\textsuperscript{172}

6. Right to Gather Information. In \textit{Smith v. City of Cumming},\textsuperscript{173} the Eleventh Circuit reviewed claims that a city's police force had harassed plaintiffs and that one of the plaintiffs had been prevented from videotaping police behavior in violation of the First Amendment.\textsuperscript{174} In affirming the district court's grant of summary judgment to the City and its police chief, the circuit court concluded that while plaintiffs enjoyed a First Amendment right, subject to reasonable time,

\begin{itemize}
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.} at 1279-83.
\item \textsuperscript{165} \textit{Id.} at 1291.
\item \textsuperscript{166} \textit{Id.} at 1293 (quoting \textit{Hansen}, 19 F.3d at 577).
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.}
\item \textsuperscript{170} \textit{Id.} at 1294.
\item \textsuperscript{171} \textit{Id.} at 1295.
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} 212 F.3d 1332 (11th Cir. 2000).
\item \textsuperscript{174} \textit{Id.} at 1332-33.
\end{itemize}
manner, and place limits, to videotape police activity, plaintiffs fell short of establishing that they were in fact prevented from exercising that right. 176

While the district court had ruled that no First Amendment right was involved by the facts in this case, the Eleventh Circuit made clear that the First Amendment protects the right to gather information about what public officials do on public property and to record matters of public interest. 178 Although the district court erred in its finding that no First Amendment issue was involved, the circuit court nevertheless affirmed the lower court's ruling because plaintiffs had not shown that defendants' acts violated their First Amendment right to record matters of public interest. 177

B. Freedom of Religion

1. Non-Establishment Clause. In Chandler v. Siegelman, 176 the Eleventh Circuit addressed the constitutionality of an Alabama statute allowing nonsectarian, nonproselytizing student-initiated prayer at school-related events. 179 In reversing the district court's issuance of a permanent injunction against the statute's enforcement, the circuit court concluded (1) that the injunction that barred the school district from allowing any prayer in a public setting at any school event was overbroad and (2) that the school district may not ban truly student-initiated religious speech, nor impose time, place, and manner restrictions on that speech that surpass those put on students' secular speech. 180

Before ruling on this case, the Supreme Court issued its ruling in Santa Fe Independent School District v. Doe ("Santa Fe"), 181 condemning student-led invocations on school property at school-sponsored, school-related events. 182 The Supreme Court then remanded this case to the Eleventh Circuit for further consideration in light of Santa Fe. 183 Ultimately, the Eleventh Circuit concluded that this case was not in conflict with the ruling in Santa Fe and took pains to explain how this

175. Id. at 1333.
176. Id.
177. Id.
178. 230 F.3d 1313 (11th Cir. 2000).
179. Id. at 1314.
180. Id. at 1317.
182. Id. at 310, 317.
183. 230 F.3d at 1314.
case can be squared with *Santa Fe* so that the district court had some
guidance when it reframed its injunction.\(^{184}\)

The Eleventh Circuit began its analysis by pointing out that *Santa Fe*
did not eliminate the distinction between state speech and private
speech in a public school setting: There is still room for some religious
speech even in public schools after *Santa Fe*.\(^{185}\) Remove the school
sponsorship, and the prayer is private.\(^{186}\) "So long as the prayer is
genuinely student-initiated, and not the product of any school policy
which actively or surreptitiously encourages it, the speech is private and
it is protected[.]."\(^{187}\) The Establishment Clause permits a policy that
tolerates religion as long as it does not endorse it.\(^{188}\)

In reviewing the language of the permanent injunction issued by the
district court, the Eleventh Circuit made clear that it may "neither
prohibit genuinely student-initiated religious speech, nor apply
restrictions on the time, place, and manner of that speech which exceed
those placed on students’ secular speech."\(^{189}\) The court remanded the
case to the district court in order for it to reframe its permanent
injunction.\(^{190}\)

In *Adler v. Duval County School Board*,\(^{191}\) the Eleventh Circuit twice
reviewed whether a school district’s policy of allowing graduating
students to vote on whether to conduct unfettered student-led messages
at graduation ceremonies violated the Establishment Clause of the First
Amendment.\(^{192}\) In the first decision, the court reversed the district
court’s conclusion that the practice did not violate the Establishment
Clause.\(^{193}\) However, upon rehearing the case en banc, the court
affirmed the district court, concluding that the policy did not violate the
Establishment Clause.\(^{194}\) This decision was issued before the Supreme
Court handed down its ruling in *Santa Fe*, a case that goes to the heart
of the issue in *Adler*.\(^{195}\)

The Duval County school system had a longstanding policy of
permitting a graduating student, elected by classmates, to deliver an

\(^{184}\) Id.
\(^{185}\) Id. at 1316.
\(^{186}\) Id.
\(^{187}\) Id. at 1317.
\(^{188}\) Id.
\(^{189}\) Id.
\(^{190}\) Id.
\(^{191}\) 206 F.3d 1070 (11th Cir. 2000).
\(^{192}\) Id. at 1071.
\(^{193}\) Id. at 1073.
\(^{194}\) Id. at 1091.
\(^{195}\) Id. at 1079 n.7.
unfettered message of his or her choice at the beginning and/or closing of graduation ceremonies. In 1992 the Supreme Court ruled in *Lee v. Weisman* that a school board policy of inviting a minister, rabbi, or member of the clergy to deliver a nonsectarian prayer at graduation violated the Establishment Clause. Later, in response to letters from students and members of the community, the Duval County superintendent considered allowing student-initiated, student-led prayer during the graduation ceremony. Under this revised policy, student speakers delivered some form of religious message at ten of seventeen high school graduation ceremonies. In response, several Duval County public school students sued the school system alleging that even student-initiated and student-led prayer amounted to a violation of the Establishment Clause and of the Free Exercise Clause. The district court granted summary judgment in favor of the school system. On appeal the Eleventh Circuit concluded the case was moot given that the students had all graduated.

In May 1998 plaintiffs filed this case against the school system, essentially alleging the same constitutional violations. Again, the district court granted summary judgment in favor of the school board. The Eleventh Circuit reversed the district court's judgment and remanded for further proceedings. On June 3, 1999, the circuit court vacated this ruling and granted rehearing en banc.

The Eleventh Circuit's opinion began by admitting that separating private student prayer from state-sponsored prayer is a difficult task. As an aid in this line-drawing, the court relied upon both *Lemon v. Kurtzman* and *Lee*. The court distinguished Duval County's practice from the one in *Lee* in that in the former neither the school system nor its agents "may ordain, direct, establish, or endorse a religious prayer or message of any kind." Moreover, not only is Duval County's policy content-neutral, but it may even be constitutionally required by the Free Speech and Free Exercise Clauses of the First Amendment.

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196. Id. at 1071-75.
198. Id. at 577.
199. 206 F.3d at 1072-73.
200. Id. at 1073.
201. Id.
202. Id.
203. Id.
204. Id. at 1074.
205. 403 U.S. 602 (1971).
206. 206 F.3d at 1076.
Amendment. In support of its views, the court cited the Equal Access Act, a federal law that bars public secondary schools that receive federal funds from denying student access to school premises on grounds of the religious content of their speech. Furthermore, in Capitol Square Review & Advisory Board v. Pinette, the Supreme Court ruled that admission of private religious groups in open forums under neutral selection criteria does not amount to state sponsorship of religion. Government neutrality, the circuit court insisted, is all the Establishment Clause requires with regard to religion.

The Eleventh Circuit rejected plaintiff's claim that the school board's majoritarian process of choosing a speaker veils the otherwise private speech of a student with the stamp of the state. This proposition of the Eleventh Circuit stands on shaky grounds in light of the Supreme Court's later ruling in Santa Fe. The Eleventh Circuit also rejected plaintiffs' coercion argument, concluding that "neither the Duval County schools nor the graduating senior classes even decide if a religious prayer or message will be delivered, let alone 'require' or 'coerce' the student audience to participate in any privately-crafted message."

Turning to the Lemon test, the Eleventh Circuit addressed three questions: (1) whether the policy has a secular purpose; (2) whether the primary effect of the policy is to advance or inhibit religion; and (3) whether the policy promotes an excessive government entanglement with religion. The court, after exhaustive analysis, concluded the school board's policy passed constitutional muster under Lemon's three prongs and affirmed the judgment of the district court.

In Gellington v. Christian Methodist Episcopal Church, Inc., the Eleventh Circuit addressed whether either the Free Exercise or Establishment Clause of the First Amendment protected a church from being sued for employment discrimination by its clergy. In affirming
the district court, the circuit court concluded that the ministerial exception prevented plaintiff from suing his former church employer.\textsuperscript{219}

Plaintiff, an ordained minister of the Christian Methodist Episcopal Church, aided another minister in preparing an official complaint of sexual harassment by a superior to the church elders. In response, plaintiff was reassigned to a distant church at a lower salary. Rather than complying, plaintiff resigned and brought this claim, alleging retaliatory and constructive discharge. The district court granted the church's summary judgment, and plaintiff appealed.\textsuperscript{220}

The Eleventh Circuit began its analysis by reiterating that Title VII, the federal law banning employment discrimination, does not govern the employment relationship between a church and its ministers (known as the ministerial exception).\textsuperscript{221} The question for the court, however, was whether the Supreme Court's ruling in \textit{Employment Division, Department of Human Resources v. Smith},\textsuperscript{222} that religious beliefs do not excuse obedience to a law of general application, had eroded the ministerial exception to the point that the First Amendment does not bar application of Title VII, a neutral law of general application, to the church-minister employment relationship even if doing so burdens the free exercise of religion.\textsuperscript{223} Agreeing with sister circuit caselaw concluding that the ministerial exception to Title VII survives \textit{Smith}, the Eleventh Circuit reasoned that \textit{Smith} addressed only one type of government infringement on free exercise—an individual's ability to practice his or her religious beliefs.\textsuperscript{224} The Court in \textit{Smith} did not address the type of free exercise infringement under review here— meddling with a church's ability to choose and control its own clergy.\textsuperscript{225} Moreover, because the ministerial exception does not rely on strict scrutiny, the Court's rejection in \textit{Smith} of heightened scrutiny does not undercut the ministerial exception either.\textsuperscript{226} Invoking the third prong of the \textit{Lemon} test, the circuit court buttressed its conclusion by making clear that regulating the relationship between a church and its clergy would amount to excessive government entanglement with religion in violation of the Establishment Clause.\textsuperscript{227}

\begin{itemize}
\item[219.] \textit{Id.} at 1301.
\item[220.] \textit{Id}.
\item[221.] \textit{Id}.
\item[222.] 494 U.S. 872 (1990).
\item[223.] 203 F.3d at 1302.
\item[224.] \textit{Id}. at 1303.
\item[225.] \textit{Id}.
\item[226.] \textit{Id}. at 1304.
\item[227.] \textit{Id}. (quoting \textit{Lemon}, 403 U.S. at 613).
\end{itemize}
2. Free Exercise Clause. In Hakim v. Hicks, the Eleventh Circuit reviewed whether a Florida state prison policy of refusing to allow Muslim inmates who had legally changed their names to be identified by both names violated their free exercise rights under the First Amendment. In affirming the district court's ruling ordering the state prison to recognize the dual names of Muslim inmates on their prison identification cards, the court concluded (1) that the prison's policy violated the Muslim inmates' free exercise rights and (2) that the district court did not abuse its discretion in turning down the prison's motion for relief from its judgment.

While in prison plaintiff converted to Islam and legally changed his name to Rasikh Abdul Hakim. He sought to force the prison to follow a dual-name policy on incoming and outgoing mail, on his prisoner identification card, and on those prison services secured by using the card. Compliance with plaintiff's requests, the prison argued, required "a laborious process to obtain notary services in a legal name without possessing an identification card in that name."

On appeal the Eleventh Circuit began by addressing the proper standard of judicial review to apply to free exercise claims. Relying on Supreme Court precedent, the court invoked a deferential standard for assessing whether a prison regulation violates an inmate's free exercise rights. Under this standard any infringement is actionable only if the regulation is unreasonable. Reviewing other federal cases on the subject, the court concluded that the weight of authority limits the scope of inmates' free exercise rights to use religious names in prison. For this reason, the Eleventh Circuit concluded the district court did not err in ruling that the prison's policy was unreasonable. Under this ruling the prison was ordered to put in place a dual-name policy by "adding a legal (statutory) religious name, through an 'a/k/a' designation, to an inmate's identification card" after notice and proof of the name change.

228. 223 F.3d 1244 (11th Cir. 2000).
229. Id. at 1246.
230. Id. at 1252.
231. Id. at 1246-47.
232. Id. at 1247.
233. Id.
234. Id.
235. Id.
236. Id. at 1248.
237. Id. at 1249.
238. Id.
In response to this order, the prison placed a label on the reverse side of plaintiff's identification card, claiming that the front of the identification card lacked space for both names. The district court ruled that this solution did not comply with the court's order. On appeal the Eleventh Circuit reversed the district court, concluding that the prison's policy of placing a second name on the reverse side of the identification card was reasonable, but the court directed the prison to permit plaintiff to obtain all related prison services under the dual-name policy. In a concurring opinion, one judge asserted that placing plaintiff's religious name on the back of the identification card violated his free exercise rights.

In Gibson v. Babbitt, the Eleventh Circuit took up the question whether a federal agency's denial of five bald or golden eagle feathers to a Native American who was not a member of a federally recognized Indian tribe was a violation of the Free Exercise Clause. Affirming the district court, the circuit court ruled that confining the religious use exemption under the Bald and Golden Eagle Protection Act to Indians who belonged to federally recognized tribes did not amount to either a constitutional or statutory free exercise violation.

Plaintiff applied to the federal Fish and Wildlife Service for five bald or golden eagle feathers for use in religious rituals. The agency denied this request on grounds that plaintiff did not belong to a federally recognized Indian tribe and so did not qualify for the feathers under the Bald and Golden Eagle Protection Act. Plaintiff sued alleging violations of the Free Exercise Clause and of the Religious Freedom Restoration Act ("RFRA"). The district court denied plaintiff's claims under RFRA and did not address his free exercise claim.

On appeal the Eleventh Circuit invoked strict scrutiny as the proper standard for assessing violations of RFRA. Under strict scrutiny the burden is on the government to produce compelling reasons for its action. The Government argued three compelling interests: (1) the preservation of two endangered species of eagles; (2) the preservation of two endangered species of eagles; (3) the preservation of...
Native American religions; and (3) the duty owed by the federal
government to fulfill treaty commitments to federally recognized Indian
tribes. Affirming the district court, the Eleventh Circuit concluded
the Government had met its burden under RFRA of establishing at least
one compelling government interest for its action (fulfilling its treaty
obligations with federally recognized Indian tribes). The court then
turned to the question of whether the regulation was the least restrictive
means of furthering the government's treaty obligations with the
federally recognized Indian tribes. In recognition of the limited
supply of bald and golden eagle feathers and the sizeable pool of
individuals who might otherwise qualify, the court of appeals agreed
with the district court that the regulation was the least restrictive
means of furthering the compelling governmental interest. Applying
the same test to plaintiff's free exercise claim, the court denied plaintiff's
constitutional claim as well.

250. Id.
251. Id.
252. Id.
253. Id.
254. Id. at 1258-59.