2018 YEAR IN REVIEW

SIGNIFICANT DECISIONS IN 2018

U.S. SUPREME COURT CIVIL RIGHTS/CONSTITUTIONAL LAW UPDATE

By Frank Valenzuela and Caroline Sileo

***Carpenter v. United States*, 585 U.S. __ (June 22, 2018)**

The government conducts a Fourth Amendment search when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements, and, therefore, a warrant supported by probable cause is required to obtain the data.

Based on information from an arrested suspect, authorities applied for orders under the Stored Communications Act to obtain information, including time-stamped location points, from cell phone providers for several suspects, including Carpenter. Based in part on the location information and on Carpenter's being present in the area where four of the robberies took place he was charged and convicted.

Keeping in mind the Founding bases for prohibiting unreasonable searches, the Court considered the application of the Fourth Amendment to innovations in surveillance tools. "As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to 'assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" The Court also noted that in *Riley*, it held that police needed a warrant to access the contents of a cell phone

This case is at the intersection of two lines of precedents. One line concerns a person's expectation of privacy in his physical location and movements, and the other line of cases concerns the information that a person voluntarily gives to others. "Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology…or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell-site location information]. The location information obtained from Carpenter's wireless carriers was the product of a search."

***National Institute of Family and Life Advocates v. Becerra*, 585 U.S. __ (June 26, 2018)**

A state's law that requires (1) licensed crisis pregnancy centers to notify women that the state provides free or low-cost services, including abortions, and give them a phone number to call, and (2) unlicensed crisis regency centers to notify women that the state has not licensed the clinics to provide medical services violate the Free Speech clause of the First Amendment. The

plaintiff was likely to prevail on its First Amendment claim.

Crisis pregnancy centers are "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." "'[U]nfortunately,' the author of the FACT Act stated, 'there are nearly 200 licensed and unlicensed' crisis pregnancy centers in California." The centers "'aim to discourage and prevent women from seeking abortions.'" "The author of the FACT Act observed that crisis pregnancy centers 'are commonly affiliated with, or run by organizations whose stated goal' is to oppose abortion—including 'the National Institute of Family and Life Advocates,' one of the petitioners here." "To address this perceived problem," the Act imposes two notice requirements, one for licensed facilities and one for unlicensed facilities.

"If a clinic is a licensed covered facility, the FACT Act requires it to disseminate a government-drafted notice on site. The notice states that 'California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].' This notice must be posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in. The notice must be in English and any additional languages identified by state law. In some counties, that means the notice must be spelled out in 13 different languages."

"Unlicensed covered facilities must provide a government drafted notice stating that '[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.' This notice must be provided on site and in all advertising materials. Onsite, the notice must be posted 'conspicuously' at the entrance of the facility and in at least one waiting area. It must be 'at least 8.5 inches by 11 inches and written in no less than 48-point type.' In advertisements, the notice must be in the same size or larger font than the surrounding text, or otherwise set off in a way that draws attention to it. Like the licensed notice, the unlicensed notice must be in English and any additional languages specified by state law. Its stated purpose is to ensure 'that pregnant women in California know when they are getting medical care from licensed professionals.'"

Concerning the notice requirement for the licensed facilities, the Court found it to be a content based restriction on speech and, therefore, subject to strict scrutiny review. In its reasoning, the Court declined, in this case, to recognize "professional speech" as a distinct category of speech for which there diminished constitutional protection, and found that the law regulates speech as speech. The Court also noted that the Court has protected professionals against content-based restrictions on speech.

Regardless, the Court reasoned that the law could not survive intermediate scrutiny. Assuming that the stated interest, to provide low-income women information about state-sponsored services, the Court found that the licensed notice is not sufficiently drawn to achieve it because it was wildly underinclusive.

Concerning the notice requirements for unlicensed facilities, the Court noted that its

precedent require disclosure requirements to remedy potentially real harms, not those that are purely hypothetical. The Court found that California did not demonstrate any justification beyond what is purely hypothetical. Even if a non-hypothetical justification had been demonstrated, the Act unduly burdened protected speech. "The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest. It requires covered facilities to post California's precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers," allowing speech by some speakers but not by others.

"The application of the unlicensed notice to advertisements demonstrates just how burdensome it is. The notice applies to all 'print and digital advertising materials' by an unlicensed covered facility. These materials must include a government-drafted statement that '[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.' An unlicensed facility must call attention to the notice, instead of its own message, by some method such as larger text or contrasting type or color. This scripted language must be posted in English and as many other languages as California chooses to require. As California conceded at oral argument, a billboard for an unlicensed facility that says 'Choose Life' would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages. In this way, the unlicensed notice drowns out the facility's own message. More likely, the 'detail required' by the unlicensed notice 'effectively rules out' the possibility of having such a billboard in the first place."

For these reasons, the plaintiff was likely to prevail on their First Amendment claim.

***Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. __ (June 27, 2018)**

It is a violation of the Free Speech clause of the First Amendment for a state to require public employees to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities, by compelling them to subsidize private speech on matters of substantial public concern.

Illinois law required non-union members to pay an "agency fee" to the union because only unions in Illinois are allowed to engage in collective bargaining with employers. The governor of Illinois filed a lawsuit challenging the constitutionality of the statute. The governor argued that the statute violates the First Amendment because it compels employees who disapprove of unions or their positions to contribute money to them. Ultimately, the district court dismissed the claim, and the Seventh Circuit affirmed the dismissal for the same reason.

Despite its previous precedent, the Supreme Court held that Illinois's statute requiring "agency fees" from nonconsenting public sector employees violated the First Amendment. The Court recognized that it had previously upheld a similar law in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). In *Janus*, the Court overrules *Abood* because fundamental free speech rights are at stake, and *Abood* was poorly reasoned, *Abood* led to practical problems and abuse, and *Abood* is inconsistent with other First Amendment cases and recent decisions.

The Court further concluded that the statute's requirement that individuals endorse positions or ideas that they disagree with defies the principals of the First Amendment. Even if the Court analyzed the statute under a more permissive standard than strict scrutiny, the statutory scheme would still fail pass muster. The Court also rejected newly asserted state interests, which were supporting bargaining with a sufficiently funded agents and increasing workforce efficiency because unions could be effective without agency fees. As such, the Court held that states and public-sector unions' could no longer collect agency fees or other forms of payment nor attempt to collect such payments without the employee's consent. For these reasons, the Court reversed and remanded.