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Two Years of the First Amendment in the United States Court of Appeals: The 2007 and 2008 Yin and Yang over Speech and Punishment

BRUCE S. ROGOW†

I. INTRODUCTION

My mother (and maybe yours) often told me to ignore nasty things that may be said by others. She used this adage: “Sticks and stones may break your bones, but names will never hurt you.” While well meaning, the advice was bad as a matter of fact and (although I did not know it then) as a matter of law. One can recover from physical cuts and bruises, but the psychological and emotional damage that words inflict are much longer lasting, and the retribution that may be visited on a speaker can be harsh.

From school-yard bullies to college peers and professors; from parents, siblings, and relatives to employers and co-workers; from prisoners and their custodians, what people say to or about one another can give rise to legal actions of various stripes. But for First Amendment purposes, there must be governmental action. So when my children complained of my efforts to censor their speech or punish them for bad language, I explained to them the difference between state actions and private (Dad) actions, and why that difference allowed me to do what a governmental action might not be able to do: impose sanctions based upon what was said.

When I canvassed two years of the First Amendment decisions of the United States Court of Appeals for the Eleventh Circuit, I was surprised to see that the vast majority of the First Amendment cases were not religious freedom cases or classic protest cases: They were *retaliation* cases—government institutions allegedly taking action against individuals for what they said. Fifty-two of the 116 Eleventh Circuit cases retrieved by a Westlaw query covering January 2007 through mid-January 2009 involved those kinds of claims. Educational officials and city and county governments or their officials were accused of firing or

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demoting employees because of what they said. Prisoners complained of retribution by jail or prison employees because of complaints made regarding jail conditions.

To me, this marked an interesting development: Approximately forty-five percent of the 2007–2008 First Amendment cases evolved from losing one's employment or privileges because of what one says. I was not unaware of the First Amendment principles condemning governmental retribution for protected speech, but the fact that such cases had become a near majority of the Eleventh Circuit's First Amendment docket was unexpected.

The days of sticks and stones being wielded against those invoking their right to speak or demonstrate on broad policy matters have now been replaced by more individual disputes. The Eleventh Circuit Court of Appeals, born of the old Fifth Circuit Court of Appeals and its historic protection of civil rights against institutional southern racism, well-chronicled in Jack Bass's *Unlikely Heroes*,¹ has become a court confronted with more personal First Amendment cases. They are no less important, especially in an economic and political time when good and honest government is essential to the nation's well being, and job security and fair treatment of prisoners is on the minds of many citizens. Against that backdrop, I turn to what I found and what it means, at least to me. By focusing on this genre of cases, one learns a little about the law and a lot about the life of those who labor or are confined in governmental entities.

II. THE DATA

The Eleventh Circuit's appellate jurisdiction covers Florida, Georgia, and Alabama. Here is a macro picture of the fifty-two retaliation cases from those states.

A. Florida

Ten of the twenty-three retaliation cases involved correctional officials.² Six of the retaliation cases were against municipal governments. The City of Miami was a defendant in two of the cases; the City of

1. JACK BASS, *UNLIKELY HEROES* (1981).

2. See *Douglas v. Yates*, 535 F.3d 1316, 1318–19 (11th Cir. 2008); *Smith v. Villapando*, 286 F. App'x 682, 683 (11th Cir. 2008); *Robinson v. Boyd*, 276 F. App'x 909, 909–10 (11th Cir. 2008); *Smith v. Fla. Dep't of Corr.*, No. 07-13752, 2008 WL 781824, at *1 (11th Cir. Mar. 25, 2008) (per curiam); *Frazier v. McDonough*, 264 F. App'x 812, 814 (11th Cir. 2008); *Rowan v. Harris*, No. 07-11620, 2008 WL 54877, at *1 (11th Cir. Jan. 4, 2008) (per curiam); *Smith v. Sec'y for the Dep't of Corr.*, 252 F. App'x 301, 302 (11th Cir. 2007); *Hasemeier v. Shepard*, 252 F. App'x 282, 283–84 (11th Cir. 2007); *Brown v. Mache*, 233 F. App'x 940, 941 (11th Cir. 2007); *Pittman v. Tucker*, 213 F. App'x 867, 868 (11th Cir. 2007).

Miami Beach, the City of Lake Worth, the City of Coral Springs, and Islamorada, Village of Islands, were each named in the four other municipal government cases.³ On the educational front, three school boards (Osceola County, Polk County, and Palm Beach County) were defendants, as were two post-secondary institutions: Florida International University and Miami-Dade Community College.⁴ One action involved county officials—the Collier County Commission⁵—and another was a suit against the State Attorney for Miami-Dade County.⁶

B. Georgia

Eight correctional-officer cases led the parade in Georgia.⁷ Four counties or their county officials were defendants (Fulton, Henry, Chatham, and Augusta-Richmond),⁸ as was one county office of a state agency.⁹ Three school boards (Forsyth, Richmond, and Putnam County boards)¹⁰ and two post-secondary institutions and their officers (Georgia University System Board of Regents and Savannah State University) were also sued.¹¹ The City of Atlanta and the City of Dawsonville were the two municipal governments that were named as defendants in retaliation cases.¹² Eight prisoner retaliation cases rounded out the Georgia

3. See *Brillinger v. City of Lake Worth*, No. 08-10020, 2008 WL 3864383, at *1 (11th Cir. Aug. 21, 2008) (per curiam); *Bates v. Islamorada*, 243 F. App'x 494, 495 (11th Cir. 2007); *DA Mortgage, Inc. v. City of Miami Beach*, 486 F.3d 1254, 1258 (11th Cir. 2007); *Rodin v. City of Coral Springs*, 229 F. App'x 849, 851 (11th Cir. 2007).

4. See *Meredith v. Sch. Bd.*, 260 F. App'x 214, 214 (11th Cir. 2007); *D'Angelo v. Sch. Bd.*, 497 F.3d 1203, 1206 (11th Cir. 2007); *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1292 (11th Cir. 2007); *Sherrod v. Palm Beach County Sch. Dist.*, 237 F. App'x 423, 424 (11th Cir. 2007); *Vila v. Padrón*, 484 F.3d 1334, 1335 (11th Cir. 2007).

5. See *Thampi v. Collier County Bd. of Comm'rs*, 273 F. App'x 836, 836 (11th Cir. 2008).

6. See *Khan v. Fernandez-Rundle*, 287 F. App'x 50, 50 (11th Cir. 2007).

7. See *Shaw v. Cowart*, No. 07-14884, 2008 WL 4888479, at *1 (11th Cir. Nov. 13, 2008) (per curiam); *Turner v. Burnside*, 541 F.3d 1077, 1080 (11th Cir. 2008); *Hicks v. Ferrero (Hicks II)*, 285 F. App'x 585, 586 (11th Cir. 2008); *Martinez v. Minnis*, 257 F. App'x 261, 262–63 (11th Cir. 2007); *Dickerson v. Donald*, 252 F. App'x 277, 279 (11th Cir. 2007); *Taylor v. Nix*, 240 F. App'x 830, 832 (11th Cir. 2007); *Hicks v. Ferrero*, 241 F. App'x 595, 596–97 (11th Cir. 2007); *Thomas v. Warner*, 237 F. App'x 435, 436 (11th Cir. 2007).

8. See *Bennett v. Chatham County Sheriff Dep't*, No. 08-12083, 2008 WL 4787139, at *1 (11th Cir. Nov. 4, 2008) (per curiam); *Schuster v. Henry County*, 281 F. App'x 868, 869 (11th Cir. 2008); *Akins v. Fulton County*, 278 F. App'x 964, 965 (11th Cir. 2008); *Collier v. Bd. of Tax Assessors*, 244 F. App'x 265, 267 (11th Cir. 2007).

9. See *Boyce v. Andrew*, 510 F.3d 1333, 1340 & n.9 (11th Cir. 2007) (per curiam).

10. See *Wilbourne v. Forsyth County Sch. Dist.*, No. 08-12094, 2009 WL 19345, at *1 (11th Cir. Jan. 5, 2009) (per curiam); *Myles v. Richmond County Bd. of Educ.*, 267 F. App'x 898, 899 (11th Cir. 2008); *Dennis v. Putnam County Bd. of Educ.*, 260 F. App'x 171, 173 (11th Cir. 2007).

11. See *Stokes v. Savannah State Univ.*, 291 F. App'x 931, 932 (11th Cir. 2008); *Abreu-Velez v. Bd. of Regents of the Univ. Sys. of Ga.*, 248 F. App'x 116, 117 (11th Cir. 2007).

12. See *Rioux v. City of Atlanta*, 520 F.3d 1269, 1273 (11th Cir. 2008) (Altonaga, J.); *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1240 (11th Cir. 2007) (per curiam).

picture.¹³

C. Alabama

There were only two correctional-facility cases in the Alabama four-case retaliation group.¹⁴ Only one city was sued: Phenix City, Alabama.¹⁵ And Auburn University at Montgomery was the only educational institution accused of retaliating for the exercise of free-speech rights.¹⁶

One caveat accompanies the data: Many of the cases included other allegations of governmental misconduct like race, sex, or disability discrimination. But all of the cases included speech-retaliation claims. So, either as a primary claim or as an alternative to another claim, each of the plaintiffs in these cases assented that he or she was punished in some way for something that each had said.

III. THE LAW ON PUBLIC EMPLOYEE RETALIATION

The fountainhead for speech-retaliation claims against public officials is the 1968 decision in *Pickering v. Board of Education*, which made it clear that an employer could not fire a public employee because the employee exercised his or her right to freedom of speech.¹⁷ But the right to be free from retaliation was subject to a balancing test: The employee had to be speaking as a citizen about a matter of "public concern," and that had to be balanced against the interests of the employer "in promoting the efficiency of the public services it performs through its employees."¹⁸ The Supreme Court explained in *Connick v. Myers* that speaking "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest" did not qualify for protection under *Pickering*.¹⁹

From those cases evolved a threshold test: Was the employee's speech on a matter of public concern? That is, was the employee speaking "primarily in the employee's role as citizen, or primarily in the role

13. See *Shaw v. Cowart*, No. 07-14884, 2008 WL 4888479, at *1 (11th Cir. Nov. 13, 2008) (per curiam); *Turner v. Burnside*, 541 F.3d 1077, 1080 (11th Cir. 2008); *Hicks v. Ferrero (Hicks II)*, 285 F. App'x 585, 586 (11th Cir. 2008); *Martinez v. Minnis*, 257 F. App'x 261, 262-63 (11th Cir. 2007); *Dickerson v. Donald*, 252 F. App'x 277, 279 (11th Cir. 2007); *Taylor v. Nix*, 240 F. App'x 830, 832 (11th Cir. 2007); *Hicks v. Ferrero*, 241 F. App'x 595, 596-97 (11th Cir. 2007); *Thomas v. Warner*, 237 F. App'x 435, 436 (11th Cir. 2007).

14. See *Smith v. Mosley*, 532 F.3d 1270, 1271-72 (11th Cir. 2008); *Phillips v. Irvin*, 222 F. App'x 928, 928 (11th Cir. 2007).

15. See *Davis v. Phenix City*, 296 F. App'x 759, 760 (11th Cir. 2008).

16. See *Shortz v. Auburn Univ. at Montgomery*, 274 F. App'x 859, 859 (11th Cir. 2008).

17. 391 U.S. 563, 574 (1968).

18. *Id.* at 568.

19. 461 U.S. 138, 147 (1983).

of employee”?²⁰ The 2006 Supreme Court decision in *Garcetti v. Ceballos* emphasized that the initial *Pickering/Connick* inquiry required a court to focus on the citizen/employee issue and held that Ceballos, a Los Angeles deputy district attorney, was speaking as an employee when he wrote a memorandum critical of an investigation and recommended dismissal of a case.²¹ The Court stated, “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²²

That Supreme Court’s compelled adjustment—the threshold emphasis of citizen or employee—was acknowledged by the Eleventh Circuit in *Battle v. Board of Regents*,²³ and its effect on the court’s public employee cases has been devastating to plaintiffs. Because so many of the Eleventh Circuit’s cases in this area are from Florida, I use the Florida collection to demonstrate the problem for plaintiffs.

IV. PUBLIC EMPLOYEES ARE HARD PRESSED NOW TO WIN A RETALIATION CASE

The *Garcetti* holding that “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen”²⁴ has been the death knell for a legion of Eleventh Circuit plaintiffs. A Florida assistant state attorney who allegedly refused his superiors’ command to lie to a judge and was fired lost because his truthful “in-court statements ‘owe[d] [their] existence’ to his role as a government lawyer,”²⁵ and therefore he “was not speaking as a citizen but as an assistant state attorney” and was “not entitled to protection under the First Amendment.”²⁶

A Collier County employee complained that he was fired for “criticizing waste and gross mismanagement of public funds, resources and projects in Collier County,” and, because the speech “pertained to official job-related matters,” there was no First Amendment claim.²⁷ The School Board of Polk County did not violate a fired principal’s First

20. *Morris v. Crow*, 142 F.3d 1379, 1382 (11th Cir. 1998) (per curiam) (citing *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993)).

21. 547 U.S. 410, 413, 421 (2006).

22. *Id.* at 421.

23. 468 F.3d 755 (11th Cir. 2006).

24. 547 U.S. at 421–22.

25. *Khan v. Fernandez-Rundle*, 287 F. App’x 50, 52 (11th Cir. 2007) (alterations in original).

26. *Id.*

27. *Thampi v. Collier County Bd. of Comm’rs*, 273 F. App’x 836, 836 (11th Cir. 2008).

Amendment rights because his “efforts to convert Kathleen High to charter status [were not undertaken] as a citizen.”²⁸ An Osceola County teacher’s contract was not renewed, but her “speech was not protected speech because her speech did not involve a matter of public concern but constituted mere gossip or rumors” emanating from a discussion with another elementary school teacher.²⁹

A Miami-Dade Community College vice president’s criticism of illegal or unethical conduct by the College president and other officials did not prevent the nonrenewal of her contract because “all of her communications related to the College and were under her jurisdiction and authority as the Vice President of External Affairs. . . . These statements fall squarely within her official job duties and are not protected by the First Amendment.”³⁰ Thus, the majority of these cases are lost on the first leg of the inquiry—employees complaining about matters in their workplace.

But there are ways to thread the private/public concern needle. A ten-year voluntary firefighter, displeased with the plan of the City of Coral Springs to have the fire department staffed by both paid and volunteer firefighters, met with city officials to discuss his concerns and was terminated as a volunteer fireman.³¹ He spoke on behalf of the Coral Springs Volunteer Firefighters Association and communicated with the Coral Springs City Fire Chief, City Manager, and the City Commission.³² The court of appeals reversed the trial-court summary judgment that had been entered against the firefighter.

Rodin also advised the public officials that fire trucks and air hoses used by volunteer firefighters had allegedly been vandalized. We have held that allegations of misconduct in the provision of emergency services are a matter of public concern. Rodin’s comments in this regard were directly relevant both to the safety of the firefighters and to their ability to provide effective fire services.

Rodin’s comments about funding and training in the fire department were also matters of public concern. He criticized expenditures on badges, a car for Haupt, and out-of-state firefighters as wasteful. We have previously held criticism of a public institution’s funding decisions to be on a matter of public concern. Rodin also claimed at the March 13 meeting that volunteer firefighters were not receiving enough training. Whether firefighters are receiving adequate training

28. *D’Angelo v. Sch. Bd.*, 497 F.3d 1203, 1210 (11th Cir. 2007).

29. *Meredith v. Sch. Bd.*, 260 F. App’x 214, 214 (11th Cir. 2007).

30. *Vila v. Padrón*, 484 F.3d 1334, 1339 (11th Cir. 2007) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006)).

31. *Rodin v. City of Coral Springs*, 229 F. App’x 849, 850–51 (11th Cir. 2007).

32. *Id.*

is also clearly a matter of public concern.³³

The court recognized that some of Rodin's comments "were arguably relevant only to the private interests of the volunteer firefighters," but that did not preclude a First Amendment claim because *Connick* made clear that public and private concerns can still qualify for protection.³⁴ The *Rodin* court looked to the fact that there was a "then-current public debate," that Rodin was speaking as a representative of an organization of volunteer firefighters,³⁵ that he would not personally benefit from any of the proposals that he made, and that his statements "were motivated in significant part by the public interest: specifically, a desire to improve the fire department."³⁶

In *Rodin*, the court emphasized the importance of "context" (the circumstances leading to the speech) and the type of dissemination (public or private) utilized by the speaker to convey his or her speech. Public dissemination, or the lack of it, can be significant, but the court recognized that "the fact that a statement of public concern is made in private can actually *support* the employee speaker."³⁷

Because the public concern/private interest assessment is the threshold that must be crossed before a court assesses the remaining *Pickering*-driven factors—whether the First Amendment speech interest outweighs the employer's interest in prohibiting the speech to promote efficiency, whether the speech played a substantial part in the decision to take adverse employment action against the employee, and whether the employer "would have reached the same decision . . . even in the absence of the protected conduct"³⁸—it is the critical area of inquiry. The other factors are intensely factual, but the public concern/private interest determination turns on how the employee presents and handles the grievance or complaint that results in the adverse employment action.

Looking at the retaliation cases over the past two years reveals several themes. First, given the enormous number of public employees, the number of First Amendment retaliation complaints is relatively low. Second, the Florida cases seem to be bunched in South Florida. Whether that is because public employees in South Florida are more aggressively outspoken or litigious or whether their governmental employers are thinner skinned and less willing to endure criticism, is anyone's guess. But it

33. *Id.* at 853 (citations omitted).

34. *Id.*

35. *Id.* at 854.

36. *Id.* at 855.

37. *Id.* at 856 n.6 (citing *Rankin v. McPherson*, 483 U.S. 378 (1987)).

38. *Anderson v. Burke County*, 239 F.3d 1216, 1219 (11th Cir. 2001) (*per curiam*) (alteration in original).

is clear that the major hurdle for public employees is avoiding the *Garcetti* syndrome, and the most effective defense for public employers is casting the employee's complaints into the private, not public, concern category. Since the vast majority of complaints and criticisms will arise within the context of the employee's job, the First Amendment edge goes to the employers. The court has not been off base in its review of these public-employee cases, and its decisions reflect the reality of the public-employer workplace, where employees' complaints are triggered by personal disputes, not matters of public concern.

But, as I show below, the First Amendment retaliation cause of action has more vitality for prisoners than employees.

V. THE FIRST AMENDMENT LAW ON PRISONER RETALIATION

Punishing a prisoner for filing a grievance concerning the conditions of his or her confinement violates the First Amendment.³⁹ The choreography for a prisoner retaliation claim is this:

An inmate raises a constitutional claim of retaliation if he establishes that the prison disciplined him for filing a grievance or lawsuit concerning the conditions of his imprisonment. To establish a claim for retaliation, the inmate must show a causal connection between his protected conduct and the harm complained of.⁴⁰

Put another way, the court has explained that the prisoner must establish that "his speech . . . was constitutionally protected; . . . that the defendant's retaliatory conduct adversely affected the protected speech; and . . . that there is a causal connection between the retaliatory actions and the adverse effect on speech."⁴¹

The Eleventh Circuit has been sensitive to prisoner retaliation claims. Most of them are brought by the prisoner acting pro se. Despite that, the prisoner cases have a high rate of success on appeal: Six of the ten reported Florida cases resulted in at least partial reversals.⁴² It's unlikely that another category of appellate cases carries a sixty percent chance of reversal. The Georgia prisoner-retaliation cases carry a lower

39. See, e.g., *Rowan v. Harris*, No. 07-11620, 2008 WL 54877, at *1 (11th Cir. Jan. 4, 2008) (per curiam).

40. *Smith v. Fla. Dep't of Corr.*, No. 07-13752, 2008 WL 781824, at *2 (11th Cir. Mar. 25, 2008) (per curiam) (citations omitted).

41. *Douglas v. Yates*, 535 F.3d 1316, 1321 (11th Cir. 2008) (quoting *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005)).

42. See *id.* at 1322; *Smith v. Villapando*, 286 F. App'x 682, 686 (11th Cir. 2008); *Fla. Dep't of Corr.*, 2008 WL 781824, at *4; *Frazier v. McDonough*, 264 F. App'x 812, 815-16 (11th Cir. 2008); *Hasemeier v. Shepard*, 252 F. App'x 282, 286 (11th Cir. 2007); *Pittman v. Tucker*, 213 F. App'x 867, 872 (11th Cir. 2007).

reversal rate—three of eight—but that too is likely a higher rate of reversal than the general appellate figure.

The prisoner cases start out on a much smaller field because the relationship between jailer and prisoner is very limited. Therefore the prisoner complaints are about conditions and the alleged retribution in the change in confinement conditions that follow a complaint. The prisoners' stories in these cases make it easier for the court to respond because the facts fall into a much narrower pattern.

VI. THE PRISONER CASES

Two of the three successful Georgia prison-retaliation cases were won by pro se inmates. Danny Hicks defeated prison officials' interlocutory appeal from the district court's denial of their qualified-immunity summary-judgment motion, with the court finding that raising Hicks's security level after he filed prison-condition grievances would violate clearly established law.⁴³ The striking facts—that Hicks had been at a minimum security level for twenty-seven years, that he had a thirteen-year "clean record," and that all the factors used post-grievance to raise his security level had already been factored into his annual minimum-security reviews—convinced the court that a reasonable prison official "should have realized at the time that he made the retaliatory decision that he was violating a clearly established constitutional right."⁴⁴

Dexter Shaw convinced the court to reverse a summary judgment when the court found that he "creat[ed] a genuine issue of material fact as to whether [his jailer] wrote [a] disciplinary report . . . and closed Shaw in his cell door in retaliation for Shaw writing a grievance and letters to prison officials about her."⁴⁵ And a case that involved whether a prison administrative remedy for a non-First Amendment claim had been pursued resulted in a major First Amendment holding "that a prison official's serious threats of substantial retaliation against an inmate for lodging or pursuing in good faith a grievance make the administrative remedy 'unavailable,' and thus lift the exhaustion requirement."⁴⁶ The importance of the decision, and its as yet undefined contours, is apparent from the court's holding that the inmate must show that "the threat is one that would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance."⁴⁷ The court then con-

43. Hicks v. Ferrero, 241 F. App'x 595, 598 (11th Cir. 2007).

44. *Id.*

45. Shaw v. Cowart, No. 07-14884, 2008 WL 4888479, at *5 (11th Cir. Nov. 13, 2008) (*per curiam*).

46. Turner v. Burnside, 541 F.3d 1077, 1085 (11th Cir. 2008).

47. *Id.*

cluded that “[t]he particulars of this standard for determining the availability of administrative remedies where a threat is alleged can be honed against the facts of future cases, with particular attention paid to the special circumstances and security needs of prisons.”⁴⁸ That invitation will, I am sure, open the door to new cases trying to fit into the presently undefined standard.

On the Florida front, a pro se prisoner gained a reversal of a district court’s sua sponte dismissals of his retaliation complaints,⁴⁹ and another pro se prisoner gained another reversal of a district court judge’s sua sponte dismissal of his retaliation complaint.⁵⁰

A third pro se litigant—a pre-trial detainee—convinced the court to reverse a summary judgment against him where his “excessive force claims . . . [were] intertwined with the retaliation claim.”⁵¹ In two other Florida cases, prisoners represented by out-of-state lawyers were successful in reversing a dismissed retaliation claim and an adverse summary judgment on a retaliation claim.⁵²

It is interesting to note that all of the Florida/Georgia reversals, except for *Douglas v. Yates*,⁵³ were on the court’s non-argument calendar. That is not surprising given the pro se cases, but it is an interesting insight into the diligence and care that the court gives to the prisoner cases. Argued or not, the court is vigilant as to First Amendment claims by prisoners.

Neither of the two Alabama cases was on the non-argument calendar, nor were they pro se, and in both cases the prisoners lost.⁵⁴ Indeed, the two public employee retaliation cases from Alabama were also unsuccessful.⁵⁵ I draw no conclusion from that zero-to-four score, but simply report it.

VII. LOOSE ENDS

A. *Schools*

Among the balance of the non-retaliation First Amendment cases were a few of special interest. None made new law, but the cases I dis-

48. *Id.*

49. *Smith v. Villapando*, 286 F. App’x 682, 685–86 (11th Cir. 2008).

50. *Frazier v. McDonough*, 264 F. App’x 812, 815 (11th Cir. 2008).

51. *Hasemeier v. Shepard*, 252 F. App’x 282, 285 (11th Cir. 2007).

52. *See Douglas v. Yates*, 535 F.3d 1316, 1321–22 (11th Cir. 2008); *Pittman v. Tucker*, 213 F. App’x 867, 870–72 (11th Cir. 2007).

53. 535 F.3d 1316.

54. *See Smith v. Mosley*, 532 F.3d 1270, 1279 (11th Cir. 2008); *Phillips v. Irvin*, 222 F. App’x 928, 929 (11th Cir. 2007).

55. *Davis v. Phenix City*, 296 F. App’x 759, 761 (11th Cir. 2008); *Shortz v. Auburn Univ. at Montgomery*, 274 F. App’x 859, 861 (11th Cir. 2008).

cuss below caught my attention because they reflect some interesting by-products of the First Amendment as seen by people offended by governmental action.

Years ago, when student protest was at its zenith, the Supreme Court opened the door to protecting student speech in *Tinker v. Des Moines Independent Community School District*, which held that wearing black armbands to protest the Vietnam war could not be punished by high-school authorities.⁵⁶ *Tinker* spawned a host of student-speech cases over the years that sought to take symbolic speech to non-political realms like choice of clothing or, in *Bar-Navon v. Brevard County School Board*, the right to wear “non-otic body piercings at school.”⁵⁷ Danielle Bar-Navon had piercings on “her tongue, nasal septum, lip, navel and chest” that, according to her, was a way of “expressing her non-conformity and wild side, an expression of her openness to new ideas and her readiness to take on challenges in life.”⁵⁸

The district court assumed that the jewelry wearing was protected by the First Amendment, but the Court of Appeals had doubts. “We question that the prohibition of jewelry in non-otic piercings on students at school who seek to make some general statement of individuality implicates First Amendment speech protections.”⁵⁹ But, even assuming some protected interest, the court concluded that “[t]he incidental restriction the non-otic pierced jewelry regulation impose[d] on expressive conduct [was] viewpoint and content-neutral on its face and as applied” and within the school board’s “legitimate educational objectives.”⁶⁰

The court’s rejection of Bar-Navon’s “expressive” conduct comes as no surprise in the wake of the Supreme Court’s recent decision in the Alaska “BONG HiTS 4 JESUS” case.⁶¹ Joseph Frederick unfurled a banner with that saying while watching the Olympic Torch Relay pass outside the school, a viewing sanctioned by the school.⁶² He was suspended, sued, lost in the district court, won in the Ninth Circuit, and lost in the Supreme Court. The case generated five opinions, with the majority holding:

[S]chools may take steps to safeguard those entrusted to their care

56. 393 U.S. 503, 514 (1969).

57. 290 F. App’x 273, 275 (11th Cir. 2008). The term “otic” relates to the ear; conversely, the term “non-otic” refers here to jewelry *not* worn on the ear. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 879 (11th ed. 2003).

58. *Bar-Navon*, 290 F. App’x at 275.

59. *Id.* at 276 (citing *Tinker*, 393 U.S. at 507–08).

60. *Id.* at 277.

61. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

62. *Id.* at 2622.

from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.⁶³

Justice Stevens, with Justices Souter and Ginsburg joining, felt the majority had too cramped a view of the facts and the law. Justice Stevens wrote:

I would hold, however, that the school's interest in protecting its students from exposure to speech 'reasonably regarded as promoting illegal drug use,' cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.

. . . .

In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This *non-sense* banner does neither . . .⁶⁴

"Nonsense" catches my attention because, in a world rife with hunger, poverty, pessimism, and misery, "BONG HiTS 4 JESUS" and "non-otic body piercings" do not seem worthy of so much attention and judicial effort. However, more serious use of judicial labor can be found in *Frazier v. Winn*,⁶⁵ a suit challenging the constitutionality of the Florida Pledge Statute.⁶⁶

The court addressed two First Amendment problems: whether requiring "civilians" to stand at attention was valid and whether requiring a written parental request to be excused was facially constitutional.

The court struck the "standing at attention" requirement because it is clearly established "[t]hat students have a constitutional right to remain seated during the Pledge."⁶⁷ However, the court found that the

63. *Id.*

64. *Id.* at 2643–44 (emphasis added) (citation omitted).

65. 535 F.3d 1279 (11th Cir. 2008), *reh'g en banc denied*, No. 06-14462, 2009 WL 166980 (11th Cir. Jan. 26, 2009).

66. The Florida Pledge Statute provided:

The pledge of allegiance to the flag . . . shall be rendered by students The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has *the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge.* When the pledge is given, *civilians must show full respect to the flag by standing at attention*, men removing the headdress, except when such headdress is worn for religious purposes

FLA. STAT. § 1003.44(1) (2007) (emphasis added).

67. *Winn*, 535 F.3d at 1282.

parental-consent requirement was not facially overbroad, pointing to the Supreme Court's requirement that an overbreadth challenge requires caution.⁶⁸ The court cited the Supreme Court's language in the seminal flag-salute-and-pledge case, *West Virginia State Board of Education v. Barnette*, in which the Court wrote, "[F]reedoms of speech . . . [is] susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."⁶⁹

The Eleventh Circuit acknowledged *Barnette*'s prohibition on government compelling students to participate in the pledge but also recognized "that a parent's right to interfere with the wishes of his child is stronger than a public school official's right to interfere on behalf of the school's own interest."⁷⁰ The court relied on the Supreme Court's decision in *Wisconsin v. Yoder*⁷¹—another major school case that allowed Amish parents to escape compulsory school attendance on free-exercise grounds—to support its position that "parents . . . hav[e] the principal role in guiding how their children will be educated on civic values."⁷² With that, the court declined to deliver an overbreadth striking of the parental-consent portion of the Pledge Statute, concluding "that the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students' freedom of speech."⁷³ The court did leave the door open to an "as applied to a specific student or a specific division of students" challenge,⁷⁴ an invitation to a suit brought by high-school students, rather than the broad brush action in *Winn*, which challenged the use of the statute across all grade levels, "kindergarten to twelfth grade."⁷⁵

Rehearing en banc was denied to *Winn* in *Frazier v. Alexandre*.⁷⁶ Judge Barkett dissented from the denial of rehearing en banc with strong language, saying that the panel decision "directly contravenes precedent that has been firmly entrenched for over 65 years, since *West Virginia State Board of Education v. Barnette*" and that the panel's characterization of conflicting parent/children constitutional rights is "wholly unpersuasive."⁷⁷ She wrote, "[T]he statute forces students whose parents are in agreement with their desires to still seek parental permission to exer-

68. *Id.* at 1285.

69. 319 U.S. 624, 639 (1943).

70. *Winn*, 535 F.3d at 1285.

71. 406 U.S. 205 (1972).

72. *Winn*, 535 F.3d at 1285.

73. *Id.*

74. *Id.* at 1286.

75. *Id.* at 1281.

76. No. 06-14462, 2009 WL 166980, at *1 (11th Cir. Jan. 26, 2009).

77. *Id.* (Barkett, J., dissenting).

cise a right that *Barnette* has already established they have.”⁷⁸

School rules also were in play in *Boim v. Fulton County School District*.⁷⁹ There, citing a “climate of increasing school violence,”⁸⁰ the Eleventh Circuit found no First Amendment problem with disciplining a student who wrote in her notebook of “taking a gun to her sixth period classroom and shooting her teacher in front of other students” and then giving the notebook to another student⁸¹: “Rachel created an appreciable risk of disrupting [Roswell High School] in a way that, regrettably is not a matter of mere speculation or paranoia.”⁸²

Thus, the school-board cases reflect an interesting mix of individual idiosyncratic claims of First Amendment violations and more classic concerns. The decisions reflect sensitive and thoughtful analyses and deference to concerns of school officials, but it is interesting to compare Justice Thomas’s anti-*Tinker* tirade in *Morse v. Frederick*⁸³ with Justice Stevens’s dissent in that case to glean an insight into the competing values.

Justice Thomas wrote, “In light of the history of American public education, it cannot seriously be suggested that the First Amendment ‘freedom of speech’ encompasses a student’s right to speak in public schools. Early public schools gave total control to teachers, who expected obedience and respect from students.”⁸⁴ Meanwhile, Justice Stevens wrote, “[T]he Court’s ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high-school students.”⁸⁵ No doubt Judge Barkett would be in the Justice Stevens camp, given her dissent in *Alexandre*.

It is apparent that there is a great space in the middle of these two viewpoints that will be filled by appellate-court decisions relating to student/school board disputes. But a question that remains for me is where are the parents in these cases? Body piercings at school or dream sequences of school murder incorporated into a school notebook deserve parental sanctions, not parental support for First Amendment litigation. Nevertheless, the good news is that the instances are rare, and the fact that so few of these cases have appeared in the Eleventh Circuit in the past two years reflects, I think, that schools, students, and the First Amendment are generally at peace.

78. *Id.* at *5 n.11.

79. 494 F.3d 978 (11th Cir. 2007).

80. *Id.* at 984.

81. *Id.* at 983.

82. *Id.* at 985.

83. 127 S. Ct. 2618 (2007).

84. *Id.* at 2635–36.

85. *Id.* at 2649.

B. *Fools*

Gerardo Tapanes led the Coast Guard on a twenty-three-nautical-mile chase, and the fact that he “signaled an obscene hand gesture (his middle finger)” was considered by the district court in sentencing him to sixty months.⁸⁶ On appeal, he asserted (for the first time) a First Amendment argument, but the court held that “[t]he district court did not plainly err by considering Tapanes’s obscene gesture during the sentencing phase.”⁸⁷ So, while “giving the finger” may be a form of expression,⁸⁸ it is neither smart, nor constitutionally off limits in the context of criminal sentencing.

The court rightly affirmed Tapanes’s sentence.

C. *Rules*

In *Pelphrey v. Cobb County*, county taxpayers sued officials of two county commissions who allowed “volunteer leaders of different religions, on a rotating basis, to offer invocations with a variety of religious expressions.”⁸⁹ The prayers were led by a cross-section of clergy—Christian, Jewish, Islamic, Unitarian, Universalism—and included references to Jesus, Allah, God of Abraham, Isaac, and Jacob and Mohammed, but the plaintiffs argued “that the Establishment Clause permits only nonsectarian prayers for the meetings of the commissions.”⁹⁰

The difficulty of drawing a sectarian/nonsectarian line stemmed from competing views of *Marsh v. Chambers*, in which the Supreme Court wrote, “The content of the prayer is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”⁹¹ The taxpayers read *Marsh* as allowing only nonsectarian prayers, but the Eleventh Circuit panel disagreed, pointing to *Marsh*’s admonition against parsing “the content of a particular prayer.”⁹² The panel was puzzled by the taxpayers’ effort to define the divine/non-divine:

We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the taxpayers

86. *United States v. Tapanes*, 284 F. App’x 617, 618 (11th Cir. 2008).

87. *Id.* at 620.

88. The Romans favored the gesture, calling it *digitus impudicus*, and Rahm Emanuel, President Obama’s Chief of Staff, who cut off his middle finger while working at Arby’s, has said this: “Of all the fingers to lose! I could not express myself for months.” Karmic Knowledge, <http://karmicknowledge.com> (Nov. 8, 2008).

89. 547 F.3d 1263, 1266 (11th Cir. 2008).

90. *Id.*

91. 463 U.S. 783, 794–95 (1983).

92. *Pelphrey*, 547 F.3d at 1272 (quoting *Marsh*, 463 U.S. at 795).

have been opaque in explaining that standard. Even the individual taxpayers cannot agree on which expressions are "sectarian." Bats, one of the taxpayers, testified that prohibition of "sectarian" references would preclude the use of "father," "Allah," and "Zoraster" but would allow "God" and "Jehovah." Selman, another taxpayer, testified, "[Y]ou can't say Jesus, . . . Jehovah, . . . [or] Wicca" Selman also deemed "lord or father" impermissible.

The taxpayers' counsel fared no better than his clients in providing a consistent and workable definition of sectarian expressions. In the district court, counsel for the taxpayers deemed "Heavenly Father" and "Lord" nonsectarian, even though his clients testified to the contrary. At the hearing for oral arguments before this Court, the taxpayers' counsel asserted two standards to determine when references are impermissibly "sectarian." Counsel for the taxpayers first stated, "It is sectarian when the . . . prayer has the effect of affiliating the government with one specific faith or belief," but he later described a reference as "sectarian" when it "invokes the name of a divinity . . . in which only one faith believes." Counsel had difficulty applying either standard to various religious expressions. When asked, for example, whether "King of kings" was sectarian, he replied, "King of kings may be a tough one It is arguably a reference to one God I think it is safe to conclude that it might not be sectarian."⁹³

So the panel "decline[d] this role of 'ecclesiastical arbiter,'" quoting from Justice Brennan's dissent in *Marsh*.⁹⁴ But among all the First Amendment decisions in the past two years, that declination triggered the most spirited dissent; a dissent that dissected *Marsh*, calling it an "outlier" and cautioned against using that decision "to sanction more state-sponsored prayers."⁹⁵ The dissent focused on the *Lemon v. Kurtzman*⁹⁶ Establishment Clause test—a secular purpose, neither advancing nor inhibiting religion, with no "excessive government entanglement"⁹⁷—and the fact that the commissioners' invocations of "divine guidance" was for a religious purpose, advancing religion, as well as the fact that inviting religious leaders entangled the commissions with religion.⁹⁸ Viewing *Marsh*, which upheld the Nebraska Legislature's practice of an opening prayer by a state-employed chaplain, as limited to the

93. *Id.* (alterations in original).

94. *Id.* at 1274 (quoting *Marsh*, 463 U.S. at 821 (Brennan, J., dissenting)). The use of the Brennan quote is a bit ornery, because Justice Brennan disagreed with the majority's decision to allow the Nebraska Legislature to lead off its sessions with a prayer.

95. *Id.* at 1286 (Middlebrooks, J., dissenting).

96. 403 U.S. 602 (1971).

97. *Pelphrey*, 547 F.3d at 1283 (Middlebrooks, J., dissenting) (quoting *Lemon*, 403 U.S. at 612–13).

98. *Id.*

historical acceptance of the practice in the United States Congress and state legislatures, Judge Middlebrooks noted that, “[i]n the more than 15 years since the *Lee* [*v. Weisman*] decision, neither the Supreme Court nor this Court has expanded the *Marsh* exception to include other government prayers.”⁹⁹ He warned:

On this matter of first impression, the majority has expanded the *Marsh* exception to allow prayer at the Cobb County Planning Commission and the Cobb County Commission. This expansion will allow a chorus of government prayers to resound from every “deliberative body” of every locality whose duty it is to address the secular affairs of its constituents.¹⁰⁰

Judge Middlebrooks’s references to the established law mandating “‘neutrality between . . . religion and nonreligion’”¹⁰¹ was prescient. In President Obama’s Inauguration Speech, he included “nonbelievers” in his list of religions.¹⁰² That unprecedented acknowledgment of the right to not believe echoes, in a way, Judge Middlebrooks’s Establishment Clause concerns that government and religion should not be mixed:

Adoption of the Establishment Clause was a break from ecclesiastic rule, and the commencement of the separate spheres of religion and government so as to preserve the integrity of both. The hazards that result from ecclesiastic rule, both for religion and for government, were perceived by the drafters. Those hazards can be observed today in places where the distinctions between religious and secular laws are blurred, where dissent is not tolerated, and where faith becomes a weapon to be wielded by those who seek power. In this country, pious politicians who compete for support through public professions of their own rectitude and devotion take a step toward those hazards, and religion becomes less meaningful through the hollow prayers spoken with the dual purpose of seeking a divine audience and appealing to a secular one.¹⁰³

Of course, one could say that the repeated references to God throughout the inaugural process belies the notion that the separation of God and State is as constitutionally recognized as Judge Middlebrooks believes, but his dissent is a very provocative piece.

VIII. CONCLUSION

The Eleventh Circuit is a wonderful court. It struggles with a vari-

99. *Id.* at 1285; *see also* *Lee v. Weisman*, 505 U.S. 577 (1992) (disallowing nonsectarian prayer at public school graduation).

100. *Pelphrey*, 547 F.3d at 1285 (Middlebrooks, J., dissenting).

101. *Id.* at 1289 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

102. President Barack Obama, Inaugural Address (Jan. 20, 2009), in 155 CONG. REC. S668–69 (daily ed. Jan. 20, 2009).

103. *Pelphrey*, 547 F.3d at 1290–91 (Middlebrooks, J., dissenting) (footnote omitted).

ety of cases and treats them all with respect. If there is a problem in the First Amendment area, it is that the relevant Supreme Court precedent is often the product of a fractured Supreme Court, making it difficult to easily apply that Court's principles. But that struggle is the heart of the First Amendment decision-making process, and the Eleventh Circuit has sought to follow the First Amendment as well as any Circuit.

The dissent of Judge Barkett in the denial of rehearing en banc in the Florida Pledge Statute case, and the dissent of District Judge Middlebrooks, sitting as a visiting Eleventh Circuit judge, in the Cobb County prayer case, were delightful attempts to make the court more receptive to First Amendment protections. The court's nearly unflinching willingness to protect prisoners from retaliation because they protested their conditions of confinement, was also a pleasure to see.

Will the court change over the next decade because of Democratic control of the appointment process? Possibly, but, whatever change there may be, I guarantee that the court's First Amendment caseload will present interesting issues for future readers to review.

IX. A POSTSCRIPT

After this article was submitted, the Eleventh Circuit decided *ACLU of Florida, Inc. v. Miami-Dade County School Board*, which reversed a preliminary injunction and held that the Miami-Dade County School Board could remove the book *Vamos a Cuba* from the County's elementary and middle school libraries.¹⁰⁴ The book, part of a series providing information about children's lives in other countries, was removed by the Miami-Dade School Board despite the District Materials Review Committee's vote to retain the book.¹⁰⁵ The two-to-one panel opinion surveyed the First Amendment school law, and it acknowledged and assumed the applicability of the *Board of Education v. Pico*.¹⁰⁶ "Under the *Pico* standard, the Board members violated the First Amendment if they removed *Vamos a Cuba* 'simply because they dislike[d] the ideas contained in [the] book[]' and sought its removal 'to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"¹⁰⁷

But Judge Carnes, reviewing the record de novo, disagreed with the district court's finding of a *Pico* violative motive for removing the book and concluded that the Miami-Dade School Board did not remove it for

104. 2009 WL 263122, at *53 (11th Cir. Feb. 5, 2009).

105. *Id.* at *2-3.

106. 457 U.S. 853 (1982).

107. *ACLU of Fla.*, 2009 WL 263122, at *27 (alterations in original) (quoting *Pico*, 457 U.S. at 872 (plurality opinion)).

political orthodoxy reasons. The panel opinion concluded that the Miami-Dade School Board was motivated by inaccuracies in the book: "The consistency throughout the process of the inaccuracy complaints and the consistency of the explanations of the Board members who voted to remove the book evidence that the Board's motive was what it stated—that the book was ordered removed from school libraries because it is full of factual errors."¹⁰⁸

The Court credited the Board's explanation and devoted a large section of the opinion to detailing the inaccuracies that had been asserted by those supporting removal of the book, coming to this conclusion: "The Board removed from its own school libraries a book that the Board had purchased for those libraries with Board funds. It did not prohibit anyone else from owning, possessing, or reading the book."¹⁰⁹ Therefore, "[t]he overwrought rhetoric about book banning has no place here."¹¹⁰

Judge Wilson, dissenting, disagreed: "The greater weight of the credible evidence supports the district court's finding 'that the majority of the Miami-Dade County School Board members intended by their removal of the book to deny schoolchildren access to ideas or points-of-view with which the school officials disagreed, and that this intent was the decisive factor in their removal decision.'"¹¹¹ Judge Wilson carefully responded to Judge Carnes's majority opinion, deconstructing his analysis of inaccuracies and motivation, and pointing to *Cuban Museum of Arts & Culture, Inc. v. City of Miami*¹¹² as precedent that reflected the strong feelings of the Cuban community, leading to censorship.¹¹³

The *ACLU of Florida* decision is extraordinary in many ways. Appellate reversal of a preliminary injunction is a rare event. Judge Carnes extensive use of the reasons given by the Miami-Dade School Board members in the debate over removing the book is a wonderful example of how to marshal facts to support a legal argument, and his opinion vigorously disagrees with Judge Wilson's view that the book was "banned."¹¹⁴ So reading this opinion provides one with an unusual

108. *Id.* at *34.

109. *Id.* at 40.

110. *Id.*

111. *Id.* at *57 (Wilson, J., dissenting).

112. 766 F. Supp. 1121 (S.D. Fla. 1991). In *Cuban Museum*, 766 F. Supp. 1121, the City of Miami sought to close a museum because the museum had shown art by artists who had not denounced Fidel Castro.

113. *ACLU of Fla.*, 2009 WL 263122, at *65.

114. Compare *id.* at *40 (Carnes, J.) ("[T]he book was not being banned. . . . The book could still be found in public libraries in the area, and it was available for purchase from any of several online book sellers."), with *id.* at *61 (Wilson, J., dissenting) ("The record provides palpable support for the district court's conclusion that School Board members banned that book not

opportunity to witness a high-level legal discussion over how to interpret and apply the First Amendment in a highly charged debate.

And that last part—the highly charged debate—is the most interesting part of the case for me. Whoever was advising the Miami-Dade County School Board did a wonderful job in making sure that the public record comments of the school board members focused on “inaccuracies” in the book and not on the anti-Castro fervor that has regularly colored local governmental decision-making in Miami-Dade County. The *Cuban Museum* case was one example. There have been others. The Miami-Dade County no-business-with-Cuba affidavit was struck down in *Miami Light Project v. Miami-Dade County*.¹¹⁵ An attempt by the city to charge “security fees” to Cuban musical performers was enjoined and damages awarded in another case.¹¹⁶ The list of governmental actions based on antipathy to anything that smacks of approval of the present Cuban regime is long. But the Miami-Dade School Board navigated away from the usual course of events by making a record that allowed the majority of the panel to make a finding that avoided the *Pico* pitfall.

Judge Wilson, and United States District Judge Alan Gold, who found the evidence of political motivation to be overwhelming saw through the facade. That there were inaccuracies in *Vamos a Cuba* is probably true, but every book in every school library has inaccuracies, especially when the test for inaccuracy can be colored by subjective views of history, past and present. Thus, if inaccuracy were the test, our school library bookshelves would likely be barren.

The panel decision in the *Vamos a Cuba* case was a triumph of law over truth. The decision reaffirmed what every good lawyer knows: Facts and law can be mustered to support a result deemed desirable. Judge Carnes did a masterful job using a record that provided him with the means to uphold the school board. Judge Wilson did a masterful job of taking apart that record. Judge Gold did a masterful job of recognizing the facts of life in Miami-Dade County vis-à-vis Castro’s Cuba. The school board and its counsel did a masterful job in making a record that provided a means to avoid *Pico*. Everyone was brilliant. But the First Amendment was sacrificed on the altar of all that legal brilliance.

Whether one says “banned” or “removed”; whether there were “inaccuracies” or not; whether one believes in free speech or not; *Vamos a Cuba* was a cause célèbre because, in Miami-Dade County, Cuba

because of inaccuracies per se but because the book failed to make a negative political statement about contemporary Cuba.”).

115. 97 F. Supp. 2d 1174, 1181 (2000).

116. Press Release, ACLU of Fla., City of Miami Refunds Security Fees Charged at 1999 Los Van Van Concert (Apr. 15, 2004), available at http://www.aclufla.org/news_events/index.cfm?action=viewRelease&emailAlertID=71.

touches the heart and minds of the populace in ways that no other country can match. Inaccuracies in a book about Indonesia would never have caused the same public furor and would never have led to an Eleventh Circuit opinion. Rehearing en banc has been sought, and that petition is pending at the time this article was published.¹¹⁷

117. A petition for rehearing en banc was filed by the American Civil Liberties Union on February 25, 2009.