

FIRST AMENDMENT—FREEDOM OF SPEECH—VIEWPOINT BASED RESTRICTIONS ON COMMERCIAL FILMMAKING, REGARDLESS OF THE FORUM, VIOLATE THE FIRST AMENDMENT—*Amato v. Wilentz*, 753 F. Supp. 543 (D.N.J. 1990).

The United States District Court for the District of New Jersey granted a declaratory judgment proclaiming that the first amendment prohibited New Jersey Supreme Court Chief Justice Robert N. Wilentz from censoring commercial filmmaking within New Jersey courthouses simply because the Chief Justice deemed the speech offensive. *Amato v. Wilentz*, 753 F. Supp. 543, 562 (D.N.J. 1990). In doing so, the court recognized that the cornerstone of the first amendment is that expressive speech cannot be regulated by the state "merely because public officials disapprove [of] the speaker's views." *Id.* at 554 (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result)).

In April 1990, Warner Brothers ("Warner"), a film production company, requested permission from Chief Justice Wilentz to film a scene for the movie "Bonfire of the Vanities" at the Old Essex County Courthouse. *Id.* at 545. After reviewing the content of the scene, the Chief Justice found it to be "innocuous" and, therefore, approved the request. *Id.* Subsequently, Warner made another request to use a courthouse in either Ocean or Somerset County to film a climactic scene of the movie. *Id.* After reviewing the content of the second scene, the Chief Justice denied the request stating that the scene "could cause justifiable offense to any black person, and . . . upon learning that the scene had been shot in a New Jersey courthouse—with the express permission of the Chief Justice—any black person would have justifiable cause to question the sensitivity of the New Jersey judiciary . . ." *Id.* (emphasis in original).

In May 1990, having been denied access in Ocean and Somerset Counties, Warner requested use of the Old Essex County Courthouse ("Courthouse") and entered into an agreement with the Essex County Executive to utilize the Courthouse. *Id.* at 546. Chief Justice Wilentz made a public statement which, in essence, stated that the advantage of using the Courthouse, namely the \$250,000 fee, was "outweighed by the risk of identifying New Jersey's court system with a portrayal which will erode the confidence of black citizens in our system of justice." *Id.* (citation omitted). The Chief Justice did, however, grant Warner's fourth request to use the Courthouse provided that Warner edit the Courthouse scene, filming the portions the Chief Justice deemed offensive at another venue. *Id.* at 546-47.

Challenging Chief Justice Wilentz's censorship of the film, the

County of Essex and the Essex County Executive sought injunctive and declaratory relief, in addition to compensatory damages under 42 U.S.C. § 1983, claiming that Chief Justice Wilentz "acted under color of state law . . . to deprive Warner of rights secured by the First Amendment of the United States Constitution." *Id.* at 545 (citations omitted).

Following the initiation of a this action in the federal district court, Chief Justice Wilentz appointed the Martin Committee to review the use of New Jersey courthouses for commercial filming. *Id.* at 547. The Martin Committee recommended "that the judiciary should not be involved in content review of film applications" and further recommended that the use of a disclaimer could effectively preserve the "public confidence in judicial impartiality." *Id.* The Chief Justice, however, rejected the Committee's recommendations and, subsequently, appointed a new panel to review all future film requests. *Id.*

The district court held that Chief Justice Wilentz's actions constituted viewpoint based restrictions on commercial filmmaking and thus violated the first amendment. *Id.* at 560. The court concluded, however, that the Chief Justice was excused from liability under qualified good faith immunity. *Id.* at 562.

Before confronting whether the Chief Justice's actions violated the first amendment, however, the district court addressed the standing and mootness issues raised. Under the principle of standing, Judge Politan stated that a plaintiff must demonstrate, at the very minimum, that he "has suffered 'some threatened or actual injury'" which is redressable by the court. *Id.* at 549 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1974) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973))). The court noted, however, that its jurisdiction was limited by "prudential" considerations; specifically, that a plaintiff may not vicariously assert the legal rights of another, and the harm must be to the plaintiff, not merely the general populace. *Id.* (citations omitted). Judge Politan acknowledged the substantial loss of revenue to the County of Essex and determined that the plaintiffs clearly demonstrated a concrete injury. *Id.* at 549-50. Furthermore, the court found that the County of Essex was, in fact, the proper party to litigate the dispute given (1) the county's loss of revenue, (2) the likelihood that a film company would "seek another venue rather than challenge the constitutionality" of the disputed action, and (3) the danger of chilling free speech. *Id.* at 549-51. Conscious of the most significant factor of standing—the danger of chilling free speech—the court summarily dismissed Chief Justice Wilentz's suggestion that filmmaking is a less protected form of speech. *Id.* at 550-51. On the contrary, the court determined that films are of great importance to American culture, citing the social and political debate that is engendered. *Id.* at 551.

Turning next to the mootness issue, Judge Politan explained that mootness occurs when the issues before the court are no longer "live or the parties lack a legally cognizable interest in the outcome." *Id.* at 551 (citations omitted). The court noted, however, that an important caveat to this general principle exists when the matter at hand is "capable of repetition, yet evading review." *Id.* (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1981)). To fit within this exception, the court set forth the requirements that there must be a reasonable expectation that the challenged action will recur and that there is insufficient time to fully litigate the controversy prior to the action's expiration. *Id.* (citation omitted). Applying this standard to the issue before the court, Judge Politan declared that Chief Justice Wilentz's actions were clearly capable of repetition, citing the Chief Justice's refusal to accept the recommendations of the Martin Committee which he, in fact, had appointed. *Id.* at 552. Additionally, the court determined that the Chief Justice's actions would always occur within a short time period, thereby precluding adjudication before a court could review such censorship. *Id.* Judge Politan recognized that the film industry cannot afford to wait until litigation has ended to complete the filming of a movie given the financial and time limitations of the film industry. *Id.* Accordingly, the court determined that the case was ripe for adjudication. *Id.*

Having disposed of the justiciable issues, the court then addressed the type of forum the Courthouse represented to determine the appropriate analysis. *Id.* at 552-56. The court described three types of fora: the traditional public forum, including streets and parks; the public property forum, encompassing a "designated open public forum"; and the non-public forum. *Id.* at 553. After summarily dismissing the Courthouse as not representing a traditional public forum, Judge Politan held that the Courthouse was a designated public forum, based on the traditional use and treatment of the Courthouse, i.e., the public's free access to the Courthouse and the granting of all previous applications for artistic productions. *Id.* at 555.

After determining the type of forum the Courthouse represented, Judge Politan next confronted whether Chief Justice Wilentz's actions were content or viewpoint based. *Id.* at 556-60. The court defined content-based restrictions as those referring to the subject matter of a work which, in a designated public forum, could be regulated only to achieve a compelling state interest. *Id.* at 553, 556. On the other hand, viewpoint restrictions refer "to one's opinion, judgment, or position" on a topic which, the court maintained, are "impermissible regardless of the nature of the forum." *Id.* at 553-54 (citation omitted).

Initially, Judge Politan, in dicta, addressed the Chief Justice's actions as though they were content-based, stating that the required compelling

state interest must be "overwhelming," "irresistibly mandated" and "vital to the survival of the state" in order to pass constitutional muster. *Id.* at 557. The court stated that the first amendment is not a right which only protects expression that government officials deem acceptable to their own standards and values; rather, the first amendment is designed to protect politically abrasive, and oftentimes controversial, speech. *Id.* Thus, the court concluded that Chief Justice Wilentz's perception of insensitivity toward the black community was not a sufficiently compelling state interest, nor was it narrowly tailored, so as to justify abridging the first amendment's fundamental guarantee to freedom of expression. *Id.*

Judge Politan then opined that Chief Justice Wilentz's actions were viewpoint based and, as such, unconstitutional regardless of the type of forum. *Id.* at 559. The court found that the Chief Justice's actions were based purely on his objections to Warner's presentation of the topic. *Id.* at 560. The court's holding was evinced by the Chief Justice granting "permission to Warner to film an innocuous scene," denying permission to film a riot scene, and granting "permission to film an escape [scene] so long as it did not show 'a mob of blacks rioting in the Courthouse. . . .'" *Id.* The district court, therefore, found Chief Justice Wilentz's censorship of the film to contravene the principles of the first amendment and, therefore, unconstitutional. *Id.*

Lastly, the court entertained Chief Justice Wilentz's claim of immunity. *Id.* at 560. The court determined that, although neither the eleventh amendment nor judicial immunity barred this action, *id.* at 561, the Chief Justice was immune under qualified good faith immunity. *Id.* at 562. The reasoning underlying the court's holding included, first, that eleventh amendment immunity is not applicable when an official is acting in his personal capacity and recovery is to be derived from personal assets. *Id.* at 560 (citation omitted). Thus, Judge Politan enunciated that eleventh amendment immunity was not applicable here inasmuch as Chief Justice Wilentz was acting in his personal capacity as "administrative head of the courts." *Id.* at 560-61. Second, the court stated that although the defendant in this case is a judge, judicial immunity is not automatically mandated. *Id.* at 561. Rather, underlying judicial immunity is the concept that administrative decisions, although vital to a court's function, are not *per se* judicial acts, thereby permitting recovery under § 1983. *Id.* (citing *Forrester v. White*, 484 U.S. 219, 227 (1987)). Finally, as to qualified good faith immunity, Judge Politan asserted that this case was replete with "grey areas" wherein the Chief Justice could not have reasonably anticipated that his actions would violate any "clearly established statutory or constitutional rights." *Id.* at 562 (citations omitted). In fact, Judge Politan asserted that this case was

not founded on the simple proposition that "viewpoint discrimination is unconstitutional." *Id.* Instead, this case was surrounded by "unchartered constitutional waters" and, as such, Judge Politan declared, qualified good faith immunity shielded Chief Justice Wilentz from liability. *Id.*

In addressing the remedies available, the court held that since the first amendment was indeed violated, a declaratory judgment would issue. *Id.* However, the court found injunctive relief inappropriate because irreparable injury had not been established. *Id.* Moreover, noting that an injunction must be narrowly drawn to redress the harm, Judge Politan decided that it would be a burdensome task for the court to fashion such a remedy. *Id.* Concluding, Judge Politan maintained that since this case sets precedent, any similar violation in the future would give rise to monetary relief. *Id.*

Analysis

The court correctly recognized the constitutional parameters of the first amendment, but failed, however, to protect those fundamental boundaries that it so keenly acknowledged, by exempting Chief Justice Wilentz from liability. Judge Politan stated that "no man is above the law," . . . and that the court had an "obligation to apply the law uniformly," *id.* at 563, regardless of Chief Justice Wilentz's position. Unfortunately, Judge Politan did not fulfill his self-proclaimed duty.

The court devoted a large portion of its opinion documenting the well established distinction between content and viewpoint based restrictions and held that "[v]iewpoint discrimination . . . is impermissible regardless of the nature of the forum." *Id.* at 553-54 (quoting *Student Coalition for Peace v. Lower Merion School*, 776 F.2d 431, 437 (3d Cir. 1985) (citing *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985))); see also *Niemotko*, 340 U.S. at 268 (Frankfurter, J., concurring in result). Despite the court's lengthy discussion of these well established principles, Judge Politan absolved the Chief Justice from liability under qualified good faith immunity, stating that such immunity applies when "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful." *Wilentz*, 753 F. Supp. at 562 (quoting *Harlow*, 457 U.S. at 818).

It is difficult to understand how the court could outline these well established first amendment principles only to subsequently declare that the Chief Justice was treading on "unchartered constitutional waters," *id.*, thus finding that a chief justice of a state supreme court could not have reasonably known the legal import of his actions. Chief Justice Wilentz

utilized unfettered discretion to restrict the use of the Courthouse for those scenes in the film he found offensive. In Judge Politan's own words, "[s]uch censorship is offensive to the principles of the First Amendment and unconstitutional." *Id.* at 560.

To maintain that this case "cannot simply be reduced to the principle that viewpoint discrimination is unconstitutional," and that its facts are unique and therefore evade "clearly established law," is merely legal fiction. *Id.* at 562. The *Wilentz* decision exemplifies an artful work of judicial statesmanship. The court successfully walked a legal tightrope by declaring that the plaintiffs' rights were indeed violated, but then balked at its responsibility to redress their injury. Thus, the court demonstrated more deference to Chief Justice Wilentz's position than to the principles guaranteed by the first amendment.

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Editorial Note: Judge Politan, in an unpublished letter opinion dated March 27, 1991, ordered Chief Justice Wilentz to pay \$41,133 in attorney's fees which resulted from litigation involving this suit.