

Ibney, J., delivered the opinion of the Court, in which IAmATinman, CuriositySMBC, bsddc, Reagan0, and joined. RestrepoMU and JJEagleHawk concurred in judgement only.

I. Introduction

In September 2019, the assembly of the State of Lincoln passed R.015 the Nationalist Rebuke Act. The Nationalist Rebuke Act, which is classified as an “act” rather than resolution presumably so that its acronym could also be "NRA", 1) declares the National Rifle Association of America (hereinafter "NRA"), a domestic terrorist organization, 2) encourages the state of Lincoln to cut ties with the NRA, and 3) encourages all other jurisdictions throughout the United States to follow suit. This act was followed by an Executive Order by then Governor LeavenSilva_42 which proceeded to stop all business with the NRA or NRA affiliated agencies, as well as establish a list of such businesses which do affiliate through the Bureau of Criminal Investigation. On appeal to the Lincoln Supreme Court, the Executive Order was struck down, while the Resolution was upheld under Government Speech Doctrine.

Earlier this year, the Sierran Supreme Court was met with an almost exact challenge to such a resolution. That court found that San Francisco Resolution No. 190841 was void in that it engaged in viewpoint discrimination by creating a "chilling" effect on the populace through coercing the population into believing that they would be met with reprisal as a result of engaging with the NRA. Lincoln has sustained what Sierra has struck down.

The Lincoln Supreme Court has thus created a "house divided" (contrary to its namesake) and we are tasked with determining whether or not R.015 The Nationalist Rebuke Act violates the First Amendment of the United States Constitution. Because the court below did not consider whether the Nationalist Rebuke Act creates a “chilling” effect, we vacate its judgment and remand for the Supreme Court of Lincoln to reconsider the case.

II. Government Speech and Chilling Effects

In the immortal words of Jedi Master Qui Gon Jinn, "[t]he ability to speak does not make you intelligent."¹ Our Founding Fathers affirmed within our Constitution the right to speech and expression through the First Amendment. To that extent, time and time again this Court has upheld the right of the Government itself to engage in speech so long as it does not infringe on

¹ George Lucas, *Star Wars Episode I - The Phantom Menace* (1999; Los Angeles: 20th Century Fox), Film.

the populace's protected rights.² This right is affirmed even if what is being stated is incorrect, and is also affirmed for the greatest expression of the people's voice: The Legislature.

In *Pleasant Grove, Utah v. Summum*, 555 U.S. 460 (2009), the court found that the government was protected under Government Speech doctrine and not subject to strict scrutiny. In that case it was not viewpoint discrimination to not include "Summum" Monuments in a public park which displayed privately donated monuments of the Ten Commandments. Because it was donated through private means and was there to enhance the display, it was determined to not be cause for concern and the placing of such monuments was upheld. However, "[t]his does not mean that there are no restraints on government speech." *Id.* In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), a government agency created a list of books which was considered "objectionable" and forwarded it to sellers with the implied possibility of criminal prosecution. The court found that this was tantamount to viewpoint discrimination as it applied government pressure through the use of threats of prosecution. In short, it created a "chilling" effect.

A. Determining the Temperature

When considering whether or not an action by the government creates a chilling effect, it is important to understand exactly what constitutes a chilling effect. In *Bantam Books*, the court took particular issue with the Commission's use of "informal sanctions" to target what they determined to be content of objectionable character.

"People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them[.] [...] The Commission's notices, phrased virtually as orders [...] in fact stopped the circulation of the listed publications *ex proprio vigore*. It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice when they plainly serve as instruments of regulation independent of the laws against obscenity." 372 U. S. 68-69

Within the analysis of *Bantam Books*, it is apparent that the government's intention was to restrict normally protected activities through the use of threats and orders. Though these had no legal backing, they effectively convinced a reasonable person that their business may be subject to legal action if they did not comply. Whether that action came or not, it did not matter. It was simply a subject of the government using its authority to coerce the business into believing they may be subject to legal troubles.³

² *Wooley v. Maynard*, 430 U.S. 705 (1977).

³ Though the warnings could be ignored, it is typical of otherwise law-abiding businesses to not wish to bring about any action which may lead them to trouble with the law. It was observed within the facts of *Bantam Books* that the actions of the commission were effective in their goal of discouraging sales because no one wished to stick their head out to be first struck.

Thus, to determine if a government has created a chilling effect, we must ask whether the government has used actions that amount to coercion or threats of coercion to cause a population to refrain from partaking in constitutionally protected speech.

B. Defrosting Effect(ivity)

In determining the government's intentions, we must look at the resolution itself, and at the cases surrounding this action. The resolution itself begins by declaring the NRA a "domestic terrorist organization", before urging the government to cut all ties with the organization, as well as urging other jurisdictions to do the same. The Domestic Terrorist Organization has specific meaning under 18 U.S. Code § 2331 (5), but has no meaning within the State of Lincoln itself.⁴

As a result of the call from the assembly to cut all ties with the NRA, the Governor of Lincoln did just that. In *Executive Order 36*, the governor both cut all business with the NRA and any person or company affiliating with them, and instructed the Bureau of Criminal Investigations to begin compiling a list of such affiliates. The court struck down the Executive Order as viewpoint discrimination, however, in a sister case, chose to uphold the resolution as government speech. In this action, the lower court erred in judgement.

When determining the existence of a "chilling" effect, a court must observe the totality of the circumstances and come to a conclusion on whether or not the government engaged in coercion .Relevant evidence in this case includes the very act of declaring the NRA a "domestic terrorist organization." So too are the unveiled threats of cutting ties -- and the actual attempt to cut such ties -- with all affiliated businesses.

Additionally, as noted by the Sierran Supreme Court, "it is well established that 'constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against First Amendment rights.' *Laird v. Tatum*, 408 U.S. 1, 11 (1972)."⁵ An action by the government need not engage in actual consequences or even allege them for it to be subject to "chilling" effect analysis. It must simply unjustly coerce or threaten a population for the exercise of protected speech. The Lincoln Supreme Court failed to consider whether a chilling effect was created by the Nationalist Rebuke Act, instead concluding that the resolution was governmental speech. That was erroneous. Government speech is not protected to the extent it creates a chilling effect based on the content of speech or viewpoint expressed by a speaker.

⁴ Respondents themselves even pointed out that this section may even be void as it is beyond the powers of the Assembly to do such. See Respondent's Brief on the Merits.

⁵ *In re San Francisco Resolution No. 190841*, Case №20-01 (Sierra 2020).

We also note that the court below reasoned that “While it is clear that the Legislature disapproves of the NRA and its activities, it has yet to place any burden on the NRA for its protected speech activity. No state agency is prohibited from dealing with the NRA, despite its unfortunate new moniker.” That was equally wrong. First, the Governor initially tried to do exactly what the resolution encouraged meaning a real burden was put in place on the NRA. Second, it is incorrect to reason that *actual* coercion must occur to violate the First Amendment. All that must be shown is a chilling effect.

Thus, the reasoning of the Lincoln Supreme Court is incomplete. We vacate its judgment because it failed to consider whether the resolution created a chilling effect on speech.

III. Scrutinizing Scrutiny

If a government action creates a chilling effect based on content or a viewpoint expressed, it must survive strict scrutiny. Traditionally, content-based restrictions must survive strict scrutiny, whereas, content-neutral restrictions must survive intermediate scrutiny.⁶ Neither Respondent or Petitioner make any note of what standard of scrutiny should be observed, so thus it is up to the court to determine the best applicable method. We hold that if the court below finds a chilling effect as we have explained above, it should apply strict scrutiny to the resolution.

A. Not Subject to Neutrality, Based Upon Viewpoint

Generally, content-neutral restrictions must be both viewpoint neutral, in that it does not discriminate against a particular set of beliefs or views and instead encompasses all viewpoints related to the subject, and subject matter neutral, in that it does not discriminate against the subjects which are restricted. Simply, it must not pick and choose the ideas which are allowed or discouraged.⁷

We caution that even though strict scrutiny may apply, that is not fatal to government action. If the government shows a compelling interest and narrow tailoring, the government action may be maintained. *See Robert Carey v. Dixie Inn, LLC*, 101 M.S.Ct. 112 (2019) (finding narrow tailoring of a public accommodations statute serving the compelling interest of eliminating discrimination); *Williams-Yulee v. The Florida Bar*, 575 US __ (2015) (finding narrow tailoring of an election statute regulating a judicial candidate’s speech).

But if an action is over or underinclusive, that is typically fatal to the government action. *See Assorted Homosexuals of Sierra v. United States Food and Drug Administration*, Case No 20–02 101 M.S.Ct. 115 (2020). We also stress that the compelling interest at issue must be legitimate. For example, if the court below finds the resolution was intended to embarrass the

⁶ *Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622 (1994).

⁷ *Perry Educ. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983).

NRA for their political advocacy and imply that those who associate with them will be punished, neither interest would be legitimate. The government is constitutionally prohibited from attempting to silence those with whom it disagrees.

IV. Conclusion

The Sierran Supreme Court found that it was necessary prior to their conclusion to give a word of warning in regards to the possible onslaught of attempts to strike down otherwise valid resolutions for creating a chilling effect. We do not find it necessary to create a full section for such, but do find it necessary to agree that the circumstances which merit a resolution's classification as creating a "chilling" effect are few and far between. It is only when government action goes beyond expressing a viewpoint and instead attempts to coerce or threaten other viewpoints that a non-binding resolution should be struck down.

The actions of the legislature in this case arguably create a "chilling" effect on the speech of the NRA, as well as the ability of others to associate with the NRA. The court below did not consider this possibility. That failure was erroneous meaning the decision below cannot stand. Our instructions to the Lincoln Supreme Court are to evaluate whether the resolution creates a chilling effect, and if so, whether the resolution survives strict scrutiny.

The judgment of the Lincoln Supreme Court is **VACATED AND REMANDED** to the lower court for a decision not inconsistent with this opinion.

It is so ordered.