



U.S. SUPREME COURT

The U.S. Supreme Court on November 14 declined to hear the appeal of a group of Kansas parents and students who object on religious grounds to the state's adoption of the Next Generation Science Standards.

The group alleged in a lawsuit against the Kansas state education department that the standards, developed by twenty-six states based on a framework published by the National Research Council, address religious questions by removing a "theistic" viewpoint and creating a "non-theistic worldview" in science instruction in the public schools.

The lawsuit by a group called Citizens for Objective Public Education said that in addressing questions such as "where do we come from?" the Next Generation standards rely on an "orthodoxy called Methodological Naturalism or Scientific Materialism and a variety of other deceptive methods to lead impressionable children, beginning in kindergarten, to answer the questions with only materialistic/atheistic answers," as the group said in its Supreme Court appeal.

The group argued that Kansas's 2013 adoption of science standards based on the Next Generation Science Standards and the National Research Council's framework constituted an unconstitutional government establishment of religion and also violated the First Amendment free exercise of religion rights of the families.

A federal district court held in 2014 that the group and its members lacked standing to bring the suit because the alleged injuries were abstract.

In an April decision, a three-judge panel of the U.S. Court of Appeals for the Tenth Circuit, in Denver, unanimously upheld the district court and rejected COPE's theories of legal injury.

"COPE does not offer any facts to support the conclusion that the Standards condemn any religion or send a message of endorsement," the Tenth Circuit court said. "And any fear of biased instruction is premised on COPE's predictions of school districts' responses to the Standards—an attempt by COPE to recast a future injury as a present one."

The U.S. Supreme Court asked Kansas to respond to COPE's appeal, and the state stressed that curriculum decisions remain a matter for local school districts.

"Although Kansas law requires the state board of education to establish curriculum standards, locally elected school boards remain free to determine their own curricula," said the brief filed by Kansas Attorney General Derek Schmidt. He added that COPE had not alleged that any children involved in the suit attended school districts where the science standards had been implemented. Reported in: *Education Week*, November 14.

At a lively Supreme Court argument January 10, the justices considered how the First Amendment applies to credit card fees.

The case was the latest battle in a continuing dispute between some merchants, who want to avoid fees charged by credit card companies by steering customers toward cash, and credit card companies, which seek to make the fees invisible to consumers.

The New York law at issue in the case, similar to ones in nine other states, bars merchants from imposing surcharges when their customers use credit cards. Discounts for using cash, on the other hand, are permitted.

That distinction runs afoul of the First Amendment, said Deepak Gupta, a lawyer for several merchants challenging the law.

"This case is about whether the state may criminalize truthful speech

that merchants believe is their most effective way of communicating the hidden cost of credit cards to their customers," Gupta said. Credit card companies charge a so-called swipe fee, often ranging from two to three percent of the transaction, to merchants who accept their cards.

The justices' view of the case seemed to turn on where they stood in a rolling debate at the court about how the First Amendment applies to laws regulating economic matters, an issue that generally divides the justices along ideological lines.

Some of the more liberal justices said that the law was an unexceptional and permissible economic regulation. "What this statute says is, you can't impose a surcharge," Justice Stephen G. Breyer said. "Very well, you can't. What's that got to do with speech?"

"If you look at this statute," Gupta conceded, "it doesn't scream First Amendment."

"But this is a regime," he added, "that says you are allowed to call it a surcharge, you just can't call it a discount."

Some of the more conservative justices saw a threat to free speech. "They are forcing the merchant to speak in a particular way," Justice Samuel A. Alito Jr. said.

Justice Anthony M. Kennedy seemed to agree. "It's a matter of how the pricing structure is communicated in the speech," he said.

Steven C. Wu, a lawyer for the state, said it was free to require merchants not to exceed an announced price. "The First Amendment doesn't prohibit the state from using a previously conveyed price as a baseline for a price regulation," he said.

Much of the argument concerned a semantic and psychological puzzle. As an economic matter, the prohibited surcharges and permitted discounts are identical. But as a matter



of behavioral science, people resist the former and embrace the latter.

“A discount and a surcharge are the same thing economically,” Justice Breyer said. “But we live in a world in which not everyone is an economist.”

Eric J. Feigin, a lawyer for the federal government, said the New York law would not violate the First Amendment if it barred a deli from saying that it charges credit card users a little more. The hypothetical example came from a brief in the case, which posed the question of whether it would violate the law to charge \$10 for a pastrami sandwich, adding a 20-cent surcharge for using a credit card.

Chief Justice John G. Roberts Jr. said that position was patronizing. “You’re saying that the American people are too dumb to understand that if you say ten dollars plus a twenty-cent surcharge,” he said, “they can’t figure out that that’s ten dollars and twenty cents.”

The New York law, enacted in 1984, makes it a crime to impose a surcharge for the use of credit cards. The law was for many years almost irrelevant, as credit card companies imposed similar rules in their merchant contracts.

But credit card companies started to back away from those restrictions as part of class-action settlements that continue to be litigated. Not long after, several New York merchants sued to challenge the law on First Amendment grounds.

One of them, *Expressions Hair Design*—one of the five plaintiffs in the Supreme Court case—said that it wants to tell its customers that it charges 3 percent more for using a credit card but fears criminal prosecution.

“It really is a freedom of speech issue,” said Valerie Bandurchin, an owner of the hair salon, who attended the arguments. She said the salon had

taken down a sign announcing a surcharge but would put it back up if her side won. While it was in place, she said, customers took the fee in stride. “We’re not dealing with thousands of dollars here,” she said. “It’s small amounts of money. When they realized the surcharge was two dollars or such, they didn’t seem to care.”

Justice Breyer, returning to a theme that has engaged him in recent years, said he was alarmed that the court could use the First Amendment to strike down ordinary economic regulations. He said he feared a return to the era of *Lochner v. New York*, referring to a 1905 decision that overturned a work-hours law in New York and has become shorthand for improper interference with matters by legislatures.

Justice Breyer said he would have voted against the law had he been a legislator. But he added that judges should leave such matters to elected lawmakers. “The fact that you have the questions you’ve had, and both sides of the bench have had such trouble with this, is strong evidence that the court should stay out of this under normal First Amendment standards,” he told Wu.

The eight-member court, fearing a deadlock, may look for a narrow way to decide the case, *Expressions Hair Design v. Schneiderman*. One alternative, proposed by Justice Alito, would be to ask New York’s highest court for a definitive interpretation of the state law. Reported in: *New York Times*, January 10.

In 2011, Simon Tam tried to register *The Slants*, the name of his rock band, as a trademark—a word, name, or symbol used to identify a product and to identify its source. Tam had named his band *The Slants* to bring attention to discrimination against Asian Americans, but the U.S. Patent and Trademark Office rejected

his application. They explained that a provision of the 1946 Lanham Act bars the government from approving trademarks that contain “matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols.”

The U.S. Court of Appeals for the Federal Circuit reversed. It agreed that the mark *Tam* was seeking to register was “disparaging,” but it concluded that the Lanham Act’s ban on the registration of disparaging marks violates the Constitution. The Supreme Court agreed to weigh in last year, and after nearly an hour of oral argument January 18 in the case of *Lee v. Tam* it seemed poised to agree with the lower court. That could be good news for the Washington Redskins, whose case is now on hold in the U.S. Court of Appeals for the Fourth Circuit after the NFL team’s trademarks were cancelled in 2014.

Arguing on behalf of the federal government, Deputy Solicitor General Malcolm Stewart emphasized that the Lanham Act’s disparagement bar does not limit the ability of the mark’s owner to use the mark or express himself. Instead, he contended, the disparagement provision is merely a “reasonable limit on access to a government program.”

Stewart was quickly peppered by a barrage of questions from virtually all of the justices. Chief Justice John Roberts told Stewart that he was “concerned that your government program argument is circular.” When the holder of a mark complains that the government is not registering that mark because it is disparaging, Roberts observed, the government’s response is that it runs a program that doesn’t register disparaging marks. “It doesn’t seem to me to advance the argument,” Roberts said.

When Stewart responded that trademark law imposes several



different restrictions on the registration of trademarks “that really couldn’t be placed on speech itself,” Justice Stephen Breyer joined the fray. Those other restrictions, Breyer observed, are related to “the ultimate purpose” of a trademark: identifying the source of a product. How is the bar on disparagement—which, he noted, would allow you to say something nice about a minority group but not something disparaging—serve that purpose?

Justice Elena Kagan then stepped in. Government programs, she noted, generally can’t distinguish between different kinds of speech on the basis of the viewpoints expressed in that speech. But why, she asked, isn’t the disparagement bar a “fairly classic case of viewpoint discrimination?”

Justice Samuel Alito suggested that the government was “stretching the concept of a government program past the breaking point.” The government provides many kinds of services to the public, he noted, such as fire protection. But the government can’t say that it will only provide those services to some groups, Alito concluded.

Justice Ruth Ginsburg chimed in to voice yet another “large concern”: that the disparagement provision is too vague. Referring to a list provided to the justices that identifies things that were or were not trademarked, she observed that the word “Hebe” appeared on both sides of the list. It was “okay in one application,” she pointed out, but not in another. Stewart’s answer—that the Patent and Trademark office receives 300,000 trademark applications every year, so that it’s “not surprising that there will be some potential inconsistency”—didn’t seem to mollify either Ginsburg or Sotomayor, who queried whether Stewart’s answer wasn’t just “another way to say it’s not clear enough to get it right.”

Arguing for Simon Tam, the lead singer of The Slants, attorney John Connell took a firm stance from which he refused to budge. When Justice Anthony Kennedy characterized his position as being that the “First Amendment protects absolutely outrageous speech insofar as trademarks are concerned,” Connell agreed that the statement was “correct.”

Sotomayor saw the scenario as different from most First Amendment contexts. Tam and his band, she pointed out, can still call themselves The Slants, advertise themselves as The Slants, and sign contracts. They just can’t stop someone else from trying to use the same trademark. But even then, she continued, they would still have recourse because they can sue under other causes of action. Their speech, she concluded, “is not being burdened in any traditional way.”

Connell responded that Tam “is denied the benefits of legal protections that are necessary for him to compete in the marketplace with another band.” That answer, as well as Connell’s responses to the other justices’ questions, did not necessarily satisfy the justices, but his strategy of declining to give an inch may well prove effective in the end. Even if the justices saw flaws and inconsistencies in his arguments, they seemed to regard Tam’s position as preferable to the statute (and the government’s defense of it). Reported in: *ScotusBlog*, January 19.

Another First Amendment case the high court has agreed to hear is *Trinity Lutheran Church of Columbia v. Pauley*. This case doesn’t concern free speech, but instead deals with the First Amendment in the religious context. The case involves recycled tires and a Missouri grant program that provides shredded recycled tire pieces to soften playgrounds. The dispute is this: Trinity Lutheran argues that its

constitutional rights are being violated by being excluded from the grant program. The church says its members have a right to exercise religion while at the same time being treated the same as others.

Missouri counters that the state has done nothing to interfere with the church’s ability to worship or run its church child daycare program. Missouri’s constitution prohibits state funds from going “directly or indirectly, in aid of any church, sect, or denomination of religion.” And Missouri also said that the First Amendment prohibits government from making laws that “prohibit” the free exercise of religion. But Missouri also says it is free to enact laws that “frustrate” religion.

Many groups watching this case suggest that a ruling in favor of Missouri could jeopardize government funding for a wide array of faith-based social services, including soup kitchens and even battered women’s shelters. The justices have not announced a hearing date. Reported in: *arstechnica.com*, January 10.

One more First Amendment case before the high court also touches on religion. *Brown v. Buhman* concerns a polygamous Mormon family from Utah on TLC’s *Sister Wives* reality TV show. The family sued Utah over the state’s anti-polygamy law, and a federal judge struck down portions of the law that made “cohabitat[ing] with another person” illegal if they weren’t legally married. But a federal appeals court ruled that, because the state and local county said they would not prosecute—even after police opened an investigation once the show aired—the case was therefore “moot” and should not have been decided by the lower courts.

But on appeal to the Supreme Court, the *Sister Wives* family wants that federal appeals court’s decision



overturned. They say a lawsuit can't simply go away because the government adopted a nonenforcement policy during the pendency of litigation—a nonenforcement policy that is not even enforceable.

“At its core, this case concerns whether a Utah statute that bans married persons from engaging in voluntary cohabitation with other persons is unconstitutional—either as a violation of Petitioners’ sexual privacy rights protected by this Court’s decision in *Lawrence v. Texas*, [which overturned anti-gay sodomy laws] or their religious liberty rights protected by the First Amendment,” according to the family’s petition to the justices. The petition adds that “this constitutional question is currently blocked from continuing on the merits.” Reported in: *arstechnica.com*, January 10.

SCHOOLS Leesburg, Florida

A federal appeals court on December 6 reinstated a lawsuit filed by a gay-straight alliance that was denied recognition at a Florida middle school.

A three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit, in Atlanta, held that Florida middle schools qualified as “secondary schools” under the federal Equal Access Act, which requires such secondary schools receiving federal funds to give extracurricular clubs equal access to school resources.

The panel also overturned other rationales cited by a federal district court for throwing out the challenge of the Carver Middle School Gay-Straight Alliance in the Lake County school district in central Florida, and it sent the revived case back to the district court.

The panel opinion was written by Judge William H. Pryor Jr., a judicial conservative who was on President Donald Trump’s list of twenty-one

potential U.S. Supreme Court nominees.

“We conclude that ‘secondary education,’ under Florida law, means at least ‘courses through which a person receives high school credit that leads to the award of a high school diploma,’” Pryor said, citing a provision of state law. “Carver Middle School provides courses through which students can obtain high school credit. The Equal Access Act applies to Carver Middle School.”

The case stemmed from efforts by students at Carver Middle School, in Leesburg, to form a gay-straight alliance club as early as the 2011–12 school year. That year, the school principal denied the application, court papers say. The next school year, a new principal referred the request to the Lake County school board, which in 2013 adopted a policy that required middle school clubs to be curriculum-related and be “limited to organizations that strengthen and promote critical thinking, business skills, athletic skills, and performing/visual arts.”

During the 2013–14 school year, a student identified as H.F. submitted an application for the gay-straight alliance, which included a teacher’s sponsorship and goals that included “to promote critical thinking by discussing how to address bullying and other issues confronting students at Carver Middle School.”

The application was rejected by a district official as deficient because it made no attempt to explain how the club would promote critical thinking. The district administrator returned the application to the middle school principal and said it might be approved if it was resubmitted with more information on critical thinking.

Instead, the alliance and H.F. sued the district under the Equal Access

Act. A federal district court ruled for the school district on several procedural grounds as well as on the rationale that the Equal Access Act did not apply because under Florida law, secondary schools refer to high schools.

In its December 6 decision in *Carver Middle School Gay-Straight Alliance v. School Board of Lake County*, the Eleventh Circuit court panel reversed the district court on both the procedural issues and the Equal Access Act.

Pryor acknowledged that Florida statutes used the term “secondary school” inconsistently. But he concluded that the critical term in the federal statute was “secondary education,” and that term under Florida law “means providing courses through which students can obtain high school credit.”

And because Carver Middle provides such courses, the Equal Access Act applies, he said.

The decision sent the case back to federal district court, which will determine whether the gay-straight alliance has standing as an organization to pursue the suit since H.F. is no longer a student at Carver Middle School. Reported in: *Education Week*, December 6.

Brunswick, Georgia

A Glynn County man won’t be prosecuted for a confrontation with a school bus driver after the Georgia Supreme Court ruled that the law under which he is charged is unconstitutional.

Michael Antonio West was charged in early 2015 under a law that makes it a crime to upbraid, insult, or abuse a public school teacher, administrator, or bus driver in the presence of a student at a school or on a bus. West, who has two children in elementary school, was upset that his children were being bullied aboard the bus by



the driver's grandchildren, said his lawyer, Jason Clark.

Clark said that West met the rural bus at the stop north of Brunswick to tell the driver that her grandchildren had spit in his children's faces, Clark said. It started badly with driver saying, in effect, "You get off my bus. That's a \$500 fine," and threatening to call police, Clark said.

West responded in kind with, "I'm calling the law on you for cruelty to children," for allowing the bullying, Clark said.

West didn't follow through, but the bus driver apparently complained back at the bus barn.

"Four or five months later, they pick him up on a warrant," Clark said.

A video tape showed that neither the driver nor West used any profanity or vulgarities, but West was nonetheless charged and faced a maximum \$500 fine.

Clark said that he objected in Glynn County State Court to his client being charged with a misdemeanor under a statute that violated First Amendment protections of free speech. The trial judge, Orion Douglas, denied that objection but gave Clark permission to make an immediate appeal to the high court.

Mark Bennett, a Texas lawyer who specializes in First Amendment cases, joined Clark as co-counsel and argued the case before the Georgia Supreme Court. The high court unanimously found the statute overly broad because it did not forbid speech that "might be boisterous or disruptive" but instead prohibited only speech directed at public school officials that could be perceived as negative or unfavorable.

Although the law may have a legitimate application, it criminalizes a substantial amount of speech protected under the constitution, the court ruled.

The law is among those that schools include in their student behavioral code and handbooks. The law applies, however, only to nonstudents.

The court also ruled that the Georgia General Assembly has enacted other laws prohibiting disruptive content on school grounds that are content neutral. Reported in: *Florida Times-Union*, October 31.

Killeen, Texas

A state judge has ordered a Texas school district to permit a school staff member's door display featuring the main religious message from the classic TV special "A Charlie Brown Christmas."

In a case that attracted nationwide attention, Judge Jack Jones of the 146th Judicial District in Bell County, Texas, issued a temporary restraining order that prohibits the Killeen Independent School District from refusing to allow the display of a poster that featured words from the special about the meaning of Christmas.

The case involves a Christmas display put up by Dedra Shannon, who is described in court papers as a "clinic aide" at Patterson Middle School in Killeen. On December 5, Shannon decorated the door of the school nurse's office with a customized poster based on "Charlie Brown Christmas" that highlights an essential scene from the thirty-minute special, which first aired in the 1960s.

The poster reads, "'For unto you is born this day in the City of David a Savior which is Christ the Lord' . . . That's what Christmas is all about Charlie Brown.' Linus."

The phrase is from a longer soliloquy delivered by Linus during the special about the true meaning of Christmas that is adapted from the Bible's Gospel according to Luke. On December 7, Principal Kara Trevino asked Shannon to remove the poster

or delete the quote, citing concerns about "the separation of church and state" and the possibility it could offend non-Christians, court papers say.

The Killeen school board on December 9 issued a statement supporting the principal's actions. The statement referred to a 2013 Texas statute, known as "the Merry Christmas law," which is designed to encourage public schools to teach about religious holidays and to allow teachers and students to use greetings such as "Merry Christmas," but which also requires that holiday displays not adhere to a specific religion.

On December 13, it debated the issue further and voted 6-1 to ask administrators to study holiday displays, but also to encourage school staff members "to use, to the fullest extent allowed by law, the name Jesus, the name God, and anything about our Christian religion."

The motion called for no further action that would allow Shannon to restore her poster. That prompted the school aide to sue the Killeen district and administrators, citing her right to free speech and free exercise of religion under the Texas constitution.

Shannon, backed by a group called Texas Values, argued in court papers that the Linus quote on her poster did not encourage anyone to adhere to Christianity in violation of the Merry Christmas law.

Shannon was also backed by Texas Attorney General Ken Paxton, who filed a brief in Jones's court that said "contrary to the decision of [the Killeen district], the inclusion of Bible verses or religious messages on student or teacher-sponsored holiday decorations does not violate Texas law. To the contrary, Texas law prohibits KISD from expressing hostility toward religious messages, and it also specifically encourages school districts



to take a more inclusive approach to religious and secular celebrations.”

Paxton said the school district was muddling the distinction between government and private speech, and that Shannon’s poster did not constitute government speech.

In issuing a temporary restraining order against the school district on December 15, the judge did not accept several sweeping statements proposed by Shannon’s lawyers. Instead, he wrote that the defendants were restrained from prohibiting Shannon from “displaying the poster that was previously on her door with the

addition of the words ‘Ms. Shannon’s Christmas Message’ in letters as large as the other letters.”

In a statement, the Killeen school district said, “Christmas and winter celebrations and messages are important to our community. The board’s actions taken on Tuesday directing district administration to develop guidelines for employees underscore the board’s commitment to this effort. Despite these efforts we found ourselves in court this afternoon.”

The district noted the judge’s requirement that Shannon add lettering

to her poster indicating that it was her Christmas message.

“We believe that directing the individual to include the additional text better complies with state and federal law,” the district’s statement adds. “We support this decision.”

In a statement issued by Texas Values, Shannon said, “I am so thankful that the court ruled in my favor and that Killeen ISD’s efforts to ban my Charlie Brown Christmas poster have failed. I was thankful to put my poster back up today.” Reported in: *Education Week*, December 16.