



US SUPREME COURT

During oral arguments in *Timothy Carpenter v. United States* on November 29, a majority of Supreme Court justices appeared ready to place new limits on the ability of investigators to track the location of cell phone users.

Carpenter was convicted of masterminding a series of armed robberies (ironically, stealing new smart phones) in Ohio and Michigan. Officials investigating the case sought records from cell phone providers for 16 different phone numbers, including Carpenter's. In so doing, they relied upon the Stored Communication Act. This 1986 law allows phone companies to disclose records when the government can establish "specific and articulate facts showing that there are reasonable grounds to believe" the records "are relevant and material to an ongoing criminal investigation." Such a request, without benefit of a search warrant, allowed the government to obtain Carpenter's historical cell-site records, indicating which cell towers his cell phone was connected with while in use. Through those records, investigators were able to determine that Carpenter's cell phone connected with cell towers in the vicinity of a number of different robberies.

Following his arrest, Carpenter sought to suppress the cell phone/cell tower evidence collected without a warrant, arguing the records should be suppressed because they had been obtained in violation of the Fourth Amendment. The trial court denied his request, and the US Court of Appeals for the Sixth Circuit affirmed. Carpenter was convicted on eleven of twelve charges and sentenced to almost 116 years in prison.

Before the Supreme Court, Carpenter asserts that disclosure of his cell phone records was a "search" requiring a warrant.

Two Supreme Court cases from the 1970s are at the center of arguments tendered by the parties to this case. In *United States v. Miller* (1976), the court held that seizure of bank records without a warrant did not violate the Fourth Amendment because those records contained "only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." In *Smith v. Maryland*, (1979), the court found no Fourth Amendment violation when a phone company installed a device to record phone numbers a robbery suspect called from his home when so requested by police who failed to have a warrant. These decisions are often referred to as "third-party doctrine," standing for the proposition that the Fourth Amendment fails to protect records or information voluntarily shared with someone or something else.

One of the central issues for the Supreme Court in *Carpenter* is whether or not the third-party doctrine applies in the same manner to cell phones, the technology for which was not even available at the time of the *Miller* and *Smith* decisions. Justice Sonya Sotomayor recently suggested in *United States v. Jones* (2012) that it should not. She wrote that the third-party doctrine is "ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks" (concurring in a unanimous decision finding that evidence obtained by warrantless use of GPS device on an automobile violated the Fourth Amendment).

A unanimous court in *Riley v. California* (2014) found the warrantless search and seizure of a cell phone's digital contents during an arrest to be unconstitutional. In so ruling, Chief Justice John Roberts found that cell phones are "based on technology

nearly inconceivable just a few decades ago" and that they "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."

During oral argument in *Carpenter*, justices both conservative and liberal voiced reservations about the warrantless invasion of cell phone user locations.

Justice Sotomayor expressed concern over such an invasion of privacy by commenting, "Most Americans, I think, still want to avoid Big Brother."

Justice Department lawyer Michael Dreeker attempted to sway the justices by claiming cell phone owners voluntarily give up any claim of privacy when they contract with cell phone companies, knowing the companies will keep records of their calls.

Chief Justice Roberts, however, questioned this argument asserting, "You really don't have a choice these days if you want to have a cell phone."

The Supreme Court will grapple with whether or not access to information regarding where a particular cell phone has been is analogous to the kind of "detailed personal facts" available on the phone itself. Whatever the result, the court's ruling should continue to advise on the interaction between constitutional limitations and the technological advances of the past few decades. Reported in: *National Law Review*, January 2.

The Supreme Court on November 27 declined without comment to hear an appeal of *American Humanist Association v. Birdville Independent School District*, a case about prayers before school board meetings. This leaves continuing uncertainty over the constitutionality of the practice.

In this prayer case, a former student from the Birdville, Texas, district



and the Washington-based humanists' group sought review of a decision by the US Court of Appeals for the 5th Circuit, in New Orleans, which upheld the district's policy of permitting students to lead prayers before board meetings.

The appeals court had said in its March decision that the key question was "whether this case is essentially more a legislative-prayer case or a school-prayer matter."

In 2014, the Supreme Court upheld a New York state town's practice of opening its municipal meetings with prayers. Justice Anthony M. Kennedy wrote for the court in *Town of Greece v. Galloway* that the town does not violate the First Amendment's prohibition of government establishment of religion by having a prayer "that comports with our tradition and does not coerce participation by nonadherents."

The key question since that decision has been whether school boards that open their meetings with prayers are just like general municipal bodies such as town councils and county boards, or whether their involvement as part of the educational process, with students frequently present at such meetings, make school boards similar to schools, implicating a separate line of church-state decisions.

The 5th Circuit court held that Birdville's practices fell under the *Town of Greece* line of cases allowing legislative prayers.

"The BISD board is a deliberative body, charged with overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other tasks that are undeniably legislative," the court said. "In no respect is it less a deliberative legislative body than was the town board in *Galloway*."

In their high court appeal, the former student, Isaiah Smith, and the humanists' group said the federal appeals

courts were split on whether school board prayers should be viewed the same as prayers in state legislatures and town councils.

"This case presents a recurring question of exceptional constitutional importance, affecting millions of students nationwide, that is ripe for this court's review," said the appeal.

The challengers say the school district allowed students to lead "invocations" at its meetings from 1997 to 2015. That year, the school board changed the policy to one of "student expression," but made clear that students chosen for the task could still deliver a prayer. In practice, most students have delivered prayers or religious poems, court papers say.

In a brief urging the justices not to take the case, the 24,000-student Birdville school district argued that the 5th Circuit court was correct, and that school board meetings are not the same as school events such as graduation ceremonies and football games where the Supreme Court has struck down clergy- or student-led prayers.

"Although school boards deliberate and adopt policies that govern their school district, board meetings are not student-centered activities like graduation and football games," the district's brief said. "Prayer to open a school board meeting which is brief, solemn and respectful in tone, and which does not proselytize or denigrate other beliefs or non-beliefs fits within the historical tradition of legislative prayer."

The justices declined the appeal after it had appeared on their conference list just one time. Reported in: *Education Week*, November 27.

The Supreme Court on November 27 refused to take up *Moore v. Bryant*, a black Mississippi man's challenge to his state's flag, which incorporates the Confederate battle flag, and his

challenge to state laws that require the flag to be "displayed in close proximity" to public schools.

In the Mississippi case, the justices declined without comment to hear the appeal of Carlos E. Moore, an African-American lawyer and a descendant of slaves, whose lawsuit under the 14th Amendment's equal-protection clause challenged the design of the flag and another state law that students be taught "proper respect" for it.

"The message in Mississippi's flag has always been one of racial hostility and insult and it is pervasive and unavoidable by both children and adults," said the appeal by Moore's lawyer. "The state's continued expression of its message of racial disparagement sends a message to African-American citizens of Mississippi that they are second-class citizens."

Both a federal district court and the US Court of Appeals for the 5th Circuit, in New Orleans, held that both Moore and his 6-year-old daughter lacked legal standing to challenge the state flag.

Moore's appeal to the Supreme Court was pending in August when the violent clashes in Charlottesville, Virginia, fueled renewed debate over Confederate symbols and memorials. In late August, after that event, the high court sought a response from the state of Mississippi to Moore's appeal, an indication that the case had drawn the interest of at least one justice.

In their response, state officials did not explicitly defend the Mississippi flag, which was adopted in 1894, or the laws about its display at schools. But they say the lower courts correctly ruled that the Moores suffered no real injuries from their exposure to the flag.

"If [Moore] has standing here, virtually any litigant could challenge any government action display, monument, or speech he or she views as



offensive,” the state’s brief says. “Equal protection would go from being a prohibition on the denial of equal treatment to an embargo on being offended.”

Meanwhile, Moore drew friend-of-the-court briefs on his side by several groups, including the Congressional Black Caucus and the Southern Poverty Law Center.

“The Confederate battle flag is a divisive and harmful symbol of racism that some governments nonetheless continue to embrace,” says the brief signed by 48 members of the CBC. “Ending government endorsements of racism is essential to our nation’s continued progress toward ending racism itself.” Reported in: *Education Week*, November 27.

SCHOOLS Tucson, Arizona

A federal judge in the **US District Court for Arizona** has blocked an Arizona state law that led to the shuttering of a popular Mexican-American history course in the Tucson Unified School District.

In *González et al. v. Douglas*, Judge Wallace Tashima on December 27 declared the law unconstitutional, putting an end to state education officials’ efforts to restrict ethnic studies programs, or to require district officials to provide information about what is being taught in the classes.

Tashima said in the injunction that the ban was “not for a legitimate educational purpose, but for an invidious discriminatory racial purpose, and a politically partisan purpose.”

In 2013, Tashima had largely upheld the controversial law, which aimed to bar courses that “promote resentment against a race or class of people or advocate ethnic solidarity.” Tashima at that time said the law was not passed with discriminatory intent, but did admit to seeing some “red flags.”

“Although some aspects of the record may be viewed to spark suspicion that the Latino population has been improperly targeted, on the whole, the evidence indicates that defendants targeted the MAS [Mexican American Studies] program, not Latino students, teachers, or community members who supported or participated in the program,” the judge said in 2013.

But in 2015, a federal appeals court in San Francisco ordered the case back to the Arizona district court to determine if the ban was enacted with racist intent. Finally, this past August, Tashima ruled the ban did have discriminatory intent.

The rise in ethnic studies course offerings in K-12 schools came about, in part, as a response to the ban on the Mexican-American course in Tucson public schools. The program, which teaches the contributions of Mexican Americans, was first launched in 1998 and later expanded under the district’s desegregation plan. More than 60 percent of Tucson’s enrollment is of Mexican or other Hispanic descent.

Since the ban was first enacted, more and more educators across the country have advocated for offering courses that present the history of communities of color as one way to engage diverse student bodies. The school board in Bridgeport, Connecticut, unanimously approved a requirement in October to make ethnic studies a high school graduation requirement, making the district one of just a few in the country that have raised ethnic studies courses above the status of an elective.

Studies show that the courses provide students with several benefits. A 2016 study out of Stanford University revealed that taking a course examining “the roles of race, nationality, and culture on identity and experience” improved grades, attendance, and graduation rates. A study by the

University of Arizona of Tucson’s controversial Mexican-American studies program showed similar positive academic benefits for students.

All eyes are now on Tucson’s school board members to see how they react to the ruling and what changes, if any, they will make as a result. Reported in: *Education Week*, December 28.

San Pasqual Valley, California

A federal judge in the **US District Court for Southern California** has granted a preliminary injunction blocking a California school district’s rules requiring students to stand during the National Anthem at sporting events.

The case, *V.A. v. San Pasqual Valley Unified School District et al.*, was prompted by a varsity football and basketball player at San Pasqual Valley High School, who kneeled during the anthem at two games in the fall. The student, identified as V.A., engaged in the protest to express his “personal feelings and concern about racial injustice in our country,” he said in a court declaration.

Similar protests have occurred at high schools across the country, similar to protests carried out by National Football League players this season. The high school incidents have led some districts to adopt rules against kneeling during the anthem.

V.A.’s silent protest occurred without incident at a September 29 home game, but the next week, when he took a knee during the anthem played in Mayer, Arizona, some students from Mayer High School approached V.A. after the game and threatened to “make him stand,” court papers say. Court papers also allege that the students made racial slurs and sprayed a San Pasqual High cheerleader with water.



After that game, Superintendent Rauna Fox of the San Pasqual Valley Unified School District, which borders Arizona in the very southeast corner of California, issued “initial rules” requiring students and coaches to stand during any playing of the anthem.

“Kneeling, sitting or similar forms of political protest are not permitted during athletic events at any home or away games,” the rules said. “Violations may result in removal from the team and subsequent teams during the school year.”

The district decided not to play the anthem at San Pasqual High’s subsequent final football game of the season, and it does not play the anthem at basketball games. When the anthem was played at an away basketball game on November 28, V.A. left the basketball court and waited outside.

The school board has considered a draft permanent policy, but has not taken any action.

V.A. filed a lawsuit challenging the initial rules as violating his free speech rights.

In a December 21 decision granting V.A.’s request for the preliminary injunction against the rules, US District Judge Cynthia Bashant of San Diego agreed that the rules appear to violate the First Amendment rights of students.

“The court finds that plaintiff’s kneeling during the National Anthem is speech,” Bashant wrote. “This action is closely linked to the similar, well-known protests performed throughout the country, started by former National Football League quarterback Colin Kaepernick.”

Bashant said that by kneeling, rather than standing, during the National Anthem, V.A. was expressing a similar protest to, in the student’s words, “racial injustice in our country.”

The judge said V.A.’s silent protest would be easily interpreted as his own speech and not bearing the “imprimatur” of his school. She also held that V.A.’s protest was not likely to cause substantial disruption at school, despite the reaction at Mayer High School. Bashant based most of her decision on the US Supreme Court’s landmark 1969 ruling in *Tinker v. Des Moines Independent Community School District*, which upheld students who wore black armbands to protest the Vietnam War.

“The court finds that, when applying *Tinker*, plaintiff is likely to succeed on the merits because the initial rules, as well as the proposed draft policy, are aimed at regulating students’ speech that is unlikely to cause a substantial disruption of or material interference with school activities or interfere with other students’ rights,” the judge wrote. Reported in: *Education Week*, January 2.

Palatine, Illinois, and Kenosha, Wisconsin

A federal district judge has denied a preliminary injunction to a group of students who challenged an Illinois school district’s policy of allowing a transgender student to use the restrooms and locker rooms corresponding to her gender identity. The ruling came in *Students and Parents for Privacy v. US Department of Education*, in **US District Court for Northern Illinois, Eastern Division**, on December 29.

Meanwhile, a case involving a Wisconsin school district seeking to keep a transgender boy from using the restrooms of his gender identity that has been pending at the US Supreme Court may soon be settled. *Kenosha Unified School District v. Whitaker* is a petition to appeal a decision by the **US Court of Appeals for the 7th Circuit** in Chicago.

The cases from Wisconsin and a suburban Chicago high school district are among several long-running, high-profile lawsuits around the country dealing with transgender student rights in school.

In 2015, Township High School District No. 211, based in Palatine, Illinois, agreed to allow a transgender girl identified in court papers as Student A to use the girls’ locker room only after the intervention of the US Department of Education’s Office for Civil Rights during President Barack Obama’s administration.

But the district was soon sued by a group of students backed by the Alliance Defending Freedom (ADF), a group based in Scottsdale, Arizona, that has taken the lead in the fight to keep transgender students from using school restrooms and locker rooms that correspond to their gender identity.

Those Illinois challengers, whose ADF-supported group is called Students and Parents for Privacy, argue that allowing transgender students into their gender-corresponding restrooms and locker rooms infringe the challengers’ right to privacy. They lost before a federal magistrate judge in 2016 when that judge recommended against the injunction they sought.

They lost again on December 29, when in US District Judge Jorge L. Alonso of Chicago adopted the recommendations of the magistrate. (The federal Education Department was dismissed as a defendant after President Donald Trump’s administration early this year withdrew Obama administration guidance that a Title IX regulation under the federal statute against sex discrimination covers bias against transgender students.)

But Alonso made clear that even though the Obama administration guidance is off the table, a number of court rulings, including one binding on him by the US Court of Appeals



for the 7th Circuit, in Chicago, have held that Title IX itself is now interpreted to prohibit a school district from treating a transgender student differently from a non-transgender student.

Alonso noted some of the privacy protections added by District 211 during the case, saying “the restrooms at issue here have privacy stalls that can be used by students seeking an additional layer of privacy, and single-use facilities are also available upon request. Given these protections, there is no meaningful risk that a student’s unclothed body need be seen by any other person.”

In a statement, ADF Senior Counsel Gary McCaleb said, “Because the court should have suspended the district’s privacy-violating policies, we will likely appeal.”

Meanwhile, one of those cases in which the 7th Circuit has taken a broad view of Title IX’s protections involves a transgender boy named Ashton Whitaker and the Kenosha, Wisconsin, Unified School District. Whitaker graduated from high school last spring, but the parties contend the case is not moot.

The Kenosha school district’s appeal of the 7th Circuit decision has been pending at the Supreme Court, with both sides having sought extensions for the filings of their briefs.

Now, in a filing with the court, the lawyer for Whitaker told the justices that the case may soon be settled.

“At this time, the parties are in advanced settlement negotiations and expect a final resolution of this case in the near future,” the lawyer, Sasha Samberg-Champion, said in the letter asking for another 30-day extension of time to file his brief for Whitaker. Samberg-Champion said the lawyer for the school district “consents to this request.”

Last term, the high court dismissed the appeal in the *Gloucester County School Board v. G.G.* case, which as it stood before the justices was based on the informal Education Department Title IX guidance that was withdrawn by the Trump administration.

Now, the latest transgender case before the justices appears unlikely to be taken up by them. Reported in: *Education Week*, January 4.

CHURCH AND STATE Bremerton, Washington

A high school football coach was speaking as a public employee when he kneeled and prayed on the field after games, and a Washington state school district did not violate his First Amendment rights when it disciplined him, the **US Court of Appeals for the 9th Circuit** in San Francisco ruled on August 23.

In *Kennedy v. Bremerton School District*, a unanimous three-judge panel of the federal appeals court said, “By kneeling and praying on the 50-yard line immediately after games,” the coach was communicating “demonstratively to students and spectators” and he “took advantage of his position to press his particular views upon the impressionable and captive minds before him.” The ruling came in the case of Joseph A. Kennedy, who was the assistant varsity football coach and chief junior varsity coach at Bremerton High School in Bremerton, Washington, in the fall of 2015 when his post-game prayers became the center of controversy. (Kennedy won support from then-candidate Donald J. Trump last fall, and from US Secretary of Housing and Urban Affairs Ben Carson.)

Kennedy says in court papers that his Christian faith calls on him to give thanks at the end of each football game for the players’ accomplishments and his opportunity to be a part

of their lives. Kennedy was sometimes joined by players for his post-game prayer, and he would sometimes give short motivational talks.

In September 2015, Bremerton district officials advised Kennedy that he could continue to give inspirational talks, but could not lead nor encourage student prayers. The superintendent informed Kennedy that he was free to pray while on the job if it did not interfere with his job responsibilities, and if it was “non-demonstrative” if students were also engaged in religious conduct.

The coach complied for several weeks but, aided by the First Liberty Institute and other lawyers, sought an accommodation from the district to continue his post-game prayers. The school district rejected his argument that his job responsibilities ended when the football game ended.

“Any reasonable observer saw a district employee, on the field only by virtue of his employment with the district, still on duty, under the bright lights of the stadium, engaged in what was clearly, given your prior public conduct, overtly religious conduct,” the district wrote to Kennedy. When the coach continued to pray at the end of two more games, the district placed him on administrative leave. Kennedy did not seek the renewal of his year-to-year contract the next season.

The coach sued the school district in 2016, arguing that his rights under the First Amendment free speech clause and the Civil Rights Act of 1964 were violated. He sought reinstatement as a coach and a ruling that he had the right to pray on the field after games.

A federal district court denied a preliminary injunction for Kennedy. In its August 23 decision, the 9th Circuit court panel upheld that ruling. The panel held that the key factor in the coach’s case was that he was



speaking as a public employee and not as a private citizen when he prayed on the field.

The court said Kennedy seemed intent on praying immediately after games when he would be viewed by students and spectators.

“Kennedy spoke at a school event, on school property, wearing [Bremer-ton High School]-logoed attire, while on duty as a supervisor, and in the most prominent position on the field, where he knew it was inevitable that students, parents, fans, and occasionally the media, would observe his behavior,” the court said.

The panel cited several other federal appeals court rulings that have upheld restrictions on public school coaches praying in locker rooms or after practices.

“While we recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of these occasions, such activity can promote disunity along religious lines, and risks alienating valued community members from an environment that must be open and welcoming to all,” US Circuit Judge Milan D. Smith Jr. wrote. Reported in: *Education Week*, August 24.

FREEDOM OF THE PRESS Idaho

In a blow to “ag-gag” rules intended to hobble journalistic efforts to expose animal cruelty, the **Ninth Circuit Court of Appeals** on January 4 ruled in *Animal Legal Defense Fund v. Wasden*, that parts of an Idaho statute are unconstitutional.

The 2014 law was drafted by the Idaho Dairymen’s Association, which was unhappy when video taken by an animal rights group, Mercy for Animals, revealed abominable mistreatment of dairy cows in Idaho. A person convicted of violating the law faced

up to one year in prison and a fine of up to \$5,000.

Gag laws protecting the agriculture industry from scrutiny are on the books in seven states—Kansas, North Dakota, Montana, Iowa, Utah, Missouri and North Carolina. Legal challenges are pending in Utah and North Carolina. As the Ninth Circuit explained in its decision, these laws “target undercover investigation of agricultural operations [and] broadly criminalize making misrepresentations to access an agricultural production facility as well as making audio and video recordings of the facility without the owner’s consent.”

In a 56-page ruling, US Circuit Judge M. Margaret McKeown wrote that the law violated the First Amendment because it “criminalized innocent behavior, was staggeringly overbroad, and that the purpose of the statute was, in large part, targeted at speech and investigative journalists.”

Several free-speech groups, including the Freedom to Read Foundation and the American Civil Liberties Union, joined with animal-rights groups such as the Animal Legal Defense Fund in the lawsuit to overturn the Idaho law. The court found that two key parts of the Idaho law—one prohibiting anyone from misrepresenting themselves to enter an agricultural production facility, the other banning a person from making audio or video recordings of a production facility—are unconstitutional. But the Ninth Circuit reversed the lower court, upholding the part of the Idaho law that criminalizes the act of obtaining agricultural production facility records by misrepresentation. Reported in: Associated Press, January 4; *Reason*, January 13.

PUBLIC SPEECH Syracuse, New York

The **US District Court for Northern District of New York**, in *Deferio v. City of Syracuse*, in January offered the most recent example what restrictions can (and can’t) be placed on protests held at private events in public places. As Eugene Volokh notes in his “Volokh Conspiracy” column in *Reason* magazine, private organizations often get a permit to put on events on public streets or in a public park, and open the event to the public generally. Courts generally don’t let the police eject people who go to the event to express their own political views, even when the views criticize the organization or its patrons, and even if the organization wants the speakers ejected. The police can enforce content-neutral speech restrictions, such as limits on sound amplification. And if a group gets a permit to have a closed event, which only ticketholders can attend (especially common for events in government-run convention centers, but in principle possible even in parks or on sidewalks), the organization can select who gets the tickets. But if the event is generally open to all comers, people who come to speak can’t be ejected.

Here is the court’s introduction:

“The First Amendment reflects ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open’” [*Snyder v. Phelps* (2011), quoting *New York Times Co. v. Sullivan* (1964)]. “The First Amendment offers sweeping protection that allows all manner of speech to enter the marketplace of ideas. This protection applies to loathsome and unpopular speech with the same force as it does to speech that is celebrated and widely accepted” [*Bible Believers v. Wayne County* (2016)].



“First Amendment jurisprudence is clear that the way to oppose offensive speech is by more speech, not censorship, enforced silence or eviction from legitimately occupied public space [*Gathright v. City of Portland* (2006), citing *Terminiello v. City of Chicago* (1949)].”

These principles are by no means new. *E.g.*, *Whitney v. California* (1927) (Brandeis concurring). Yet they are strangely absent from the papers submitted by defendants in defense of their actions toward plaintiff James Deferio, a Christian evangelical who regularly proselytizes at the Central New York Pride Parade and Festival. . . .

While the dispute in this case may seem parochial—defendants Sergeant Jamey Locastro and Captain Joseph Sweeny forced Plaintiff to move approximately forty feet from the north to the south side of West Kirkpatrick Street—the issues presented here affect the heart of the First Amendment’s purpose. As the Supreme Court recently stated, “Even today, [public streets and sidewalks] remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out [*McCullen v. Coakley* (2014)].”

This [decision] affirms the importance of public sidewalks in the development of the marketplace of ideas and reminds state actors of the requirements they must meet in order to place restrictions on individuals’ right to speak from traditional public fora. . . .

And here are the facts, and the court’s analysis of the defendants’ argument that plaintiff’s speech was constitutionally unprotected “fighting words”:

Plaintiff is a Christian evangelical who attends public events in Syracuse and elsewhere in order to spread his religious beliefs. At the 2014 Pride Event, plaintiff held a large sign that displayed a verse from the Bible regarding “the unrighteous.” [*The full text, which the court noted elsewhere in the opinion, was*, “WARNING: Do you not know that the unrighteous shall not inherit the Kingdom of God? Do not be deceived; neither fornicators, nor idolators, nor adulterers, nor homosexuals, nor sodomites, nor thieves, nor covetous, nor drunkards, nor revilers, nor extortioners shall inherit the Kingdom of God. 1 Corinthians 6:9-10.” -*EV*] At the 2015 Pride Event, he held a different large sign that stated, “Thousands of Ex-Homosexuals Have Experienced the Life-Changing Love of Jesus Christ,” which also provided links to relevant websites. He also used a sound amplification device to propagate messages regarding sin, judgment, and redemption. . . .

Attendees at both festivals were unsurprisingly offended by plaintiff’s religious beliefs, which advocate for “homosexuals” in particular “to repent.” But “offense” is not the standard by which First Amendment protections end. In fact, “if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection” [*Hustler Magazine Inc. v. Falwell* (1988)]. “After all, much political and religious speech might be perceived as offensive to some.” [*Morse v. Frederick* (2007)] . . .

Defendants . . . [argue] that plaintiff’s speech at the 2015 Pride Event

constituted “fighting words” and is therefore not protected by the First Amendment. . . . The “fighting words” exception to the Free Speech Clause is narrow and consists of a “small class” of expressive conduct [*Texas v. Johnson* (1989)]. Fighting words “instantly ‘inflict injury or tend to incite an immediate breach of the peace’” [*Bible Believers*, quoting *Chaplinsky v. New Hampshire* (1949)]. “Offensive statements made generally to a crowd are not excluded from First Amendment protection; the insult or offense must be directed specifically at an individual” [*Bible Believers*, citing *Cohen*]. To determine whether such words are “inherently likely to provoke violent reaction” [*Williams*], the Court must use an “objective standard”—whether “it is ‘likely to provoke the average person to retaliation’” [*Bible Believers*, quoting *Street v. New York* (1969)].

First, the Court must note that defendants spend the majority of their Statement of Material Facts, and almost all of their deposition of plaintiff, cataloging plaintiff’s controversial comments regarding religion, politics, and homosexuality over the course of many years. Defendants use these facts to gesture at the disturbing argument that *all* of plaintiff’s proselytizing, potentially forevermore, constitutes “fighting words.” After citing to comments that plaintiff published on Facebook, defendants state, “While it is undisputed that religious expression is protected, plaintiff’s speech constitutes ‘fighting words,’ which by their utterance inflict injury or tend to incite an immediate breach of the peace.” Defendants make no effort to distinguish between plaintiff’s speech on Facebook, at the relevant Pride Events, or at other events that defendants catalogued. The Court hopes that this sentence was merely sloppy writing, though



defendants' focus on plaintiff's speech outside of the events at issue in this lawsuit is worrisome.

Turning to the 2015 Pride Event, about which defendants argue with more specificity, the video evidence and Captain Sweeny's deposition do not indicate that plaintiff used fighting words. Plaintiff attended the 2015 Pride Event with a large sign that stated, "Thousands of Ex-Homosexuals Have Experienced the Life-Changing Love of Jesus Christ," and provided links to relevant websites. In the limited time that he spoke from the intersection of West Kirkpatrick Street and the driveway into Inner Harbor Park, he made generally applicable statements regarding sin and religion. (E.g., "Time to repent people. You are not guaranteed tomorrow. No one is. Where's your love for God?") Such generally applicable statements cannot constitute fighting words.

Plaintiff did direct at least one insult at an individual: He called a woman a "homofascist," after she said, "Nobody talk to him. Do not feed the monkey." Given the context of their conversation, the Court must view this comment "as unpleasant but petty, and not sufficiently provocative to constitute fighting words" [Gilles]. The term "homofascist" is frequently used to accuse individuals of trying to silence those who do not support the LGBT community. By combining "homosexuality" and "fascist," the user of "homofascist" invokes the "exceedingly common—arguably hackneyed—rhetorical device" of "comparing a disliked authority figured to a fascist leader" [Williams, holding that, "as matter of law, 'comparing the manager of a recreational center to a fascist dictator . . . does not rise to the level of so-called fighting words'" (quoting *Cohen*)]. While there is no indication that the woman

who received plaintiff's insult was a traditional "authority figure," such as the deputy commissioner at issue in *Williams*, Plaintiff's comment had the same meaning in the situation he faced, since multiple people were asserting the authority allegedly provided by the City to move plaintiff across the street.

The video evidence also indicates that the vast majority of the hundreds of attendees near plaintiff ignored him. While a handful of attendees verbally accosted plaintiff, and one attendee physically assaulted plaintiff, the question is whether "the average individual" would be incited to violence by plaintiff's words. Here, it is clear that the average individual was not incited to violence by plaintiff's words.

The Court notes that Captain Sweeny—the commanding police officer at the Pride Event—never once indicated that defendants' words were likely to elicit a violent response. When asked by plaintiff's lawyer, "Was there anything about [plaintiff's] conduct that concerned you?", Captain Sweeny said, "His conduct, no." Captain Sweeny's affidavit even takes pride in the fact that "plaintiff was neither arrested nor charged with a crime, and, in fact, upon information and belief, [the Syracuse Police Department] pursued charges against [plaintiff's] assailant." Defendants do not grapple with or even acknowledge these facts in their papers, which directly contradict their argument that plaintiff's speech constituted fighting words.

In sum, plaintiff's speech at the 2015 Pride Event did not constitute fighting words, and therefore was entitled to First Amendment protection. As noted above, defendants have not seriously argued that plaintiff's speech at the 2014 Pride Event did not merit First Amendment protection. . . .

And here is the court's analysis of the defendants' argument that moving plaintiff was justified because of the Pride Event's permit:

In his deposition, Locastro [the sergeant assigned to supervise the police officers at the 2014 Pride Event] presented two reasons for demanding that plaintiff move to the south side of West Kirkpatrick Street: First, because plaintiff was in violation of CNY Pride's permit, and second, because Locastro was concerned for Plaintiff's safety. Neither of these justifications—as portrayed in the deposition and video evidence—was content-neutral.

With regard to the permit, Sergeant Locastro interpreted the permit as providing CNY Pride with the right to "close the sidewalk to anyone they view as a protester. So someone similar to [plaintiff]." When asked what was the distinction between plaintiff and the many other people near him, Locastro said, "Nobody else was holding a large anti-gay sign, standing in the middle of the sidewalk, upsetting people." Finally, in response to plaintiff's question as to whether CNY Pride "could keep anybody they want to off of that sidewalk," Locastro said, "They could, yes."

These facts are similar to those analyzed by the Sixth Circuit in *Parks v. City of Columbus* (6th Cir. 2005). There, Douglas R. Parks attended the 2002 Arts Festival in Columbus, Ohio, wearing a sign bearing a religious message. The event was free and open to the public, yet the police forced Parks to move outside the area reserved for the festival because "the event sponsor did not want him there." The Sixth Circuit held that "under these circumstances we find it difficult to conceive that Parks's removal was based on something other than the content of his speech." *Cf.*



McMahon v. City of Panama City Beach (N.D. Fla. 2016): “The City’s stated policy of unquestioning deference to the whims of the permit holder . . . at a free and open-to-the-public event is, to put it gently, troubling.”

Locastro’s second justification—plaintiff’s safety—was also content-based. It is a fundamental principle of First Amendment jurisprudence that “listeners’ reaction to speech is not a content-neutral basis for regulation” [*Forsyth County v. Nationalist Movement* (1992)]. Speakers of protected speech—even speech that is offensive to many listeners—may not be punished because their critics “might react with disorder or violence.” . . .

Defendants do not argue, as many jurisdictions in similar situations have, that Locastro’s enforcement of the permit was necessary to protect CNY Pride’s own message. . . . [*The court cites here a case that rejected such an argument, on the grounds that “there is a distinction between participating in an event and being present at the same location. Merely being present at a public event does not make one part of the organizer’s message for First Amendment purposes.”-E.V.*]

Reported in: reason.com/volokh, February 5.

TEXTING Jesup, Iowa

The Iowa Supreme Court ruled on February 2 that text messaging a photo of one’s genitals to another person is not indecent exposure under state law.

In *Iowa v. Lopez*, the court found that to meet the definition of the Iowa law as written, such an offensive display must be done in the physical presence of the offended person.

“While we acknowledge that one can be offended by a sexually explicit

image transmitted via text message, it is much easier to ‘look away’ from that image than it is to avoid an offensive in-person exposure,” the court said.

Sending an unwanted photo of one’s genitals to another adult who finds it offensive could still lead to a harassment charge, but that is a simple misdemeanor under Iowa law.

The ruling dismisses an indecent exposure charge against a 55-year-old Jesup man who stalked a woman for months after meeting her at her workplace in 2014.

Jose Willfredo Lopez continued to contact the woman although she resisted him. She eventually agreed to meet him at restaurants for food and drinks several times but asked him to stop contacting her after rejecting his offers to meet at hotels.

She obtained a no-contact order in April 2015, after Lopez entered her home twice without her permission and persistently texted and called her. Two months later he texted to her a picture of his hand around his erect penis with the message “me in my glory” and said he would visit her at home in Independence on August 1. She contacted the sheriff’s department, and a deputy arrested Lopez at her home peering through a window.

Lopez was charged with stalking and indecent exposure related to the text message photo. After conviction, a judge sentenced him to up to five years in prison for stalking. On the exposure charge he was given a year in jail and was required to serve ten years of parole or work release, at the discretion of the Iowa Department of Corrections, after his release from custody. Since the court ordered the indecent exposure charge dismissed, he will not serve the sentences for that offense.

Iowa Department of Corrections records show he is in prison for the

stalking conviction, with eligibility for release as early as this spring.

Lopez appealed his conviction, saying his attorney inadequately represented him by failing to challenge the indecent exposure conviction. The court agreed and considered the case, saying it has never before addressed whether indecent exposure can apply to electronic communication.

The court concluded that if the Iowa legislature intended electronic images to fall under the indecent exposure statute it would have said so.

The justices specified that their ruling applies only to the electronic transmission of still images and does not address video transmission through programs like Skype and FaceTime.

A spokesman for the Iowa attorney general’s office said it wasn’t immediately clear how many other similar cases may be affected by the ruling, and it will likely change the way future indecent exposure cases like this are prosecuted.

States vary in their application of indecent exposure laws.

The Missouri Court of Appeals in 2004 concluded that indecent exposure can be committed through transmission of an electronic image. The Montana Legislature in 2015 updated that state’s indecent exposure law to include electronic transmission of images.

The Maine Supreme Court found in October that a man who sent five teen-age girls images of his genitals could not be convicted of indecent conduct. Reported in: Associated Press, February 2.

FOREIGN India

The Supreme Court of India on August 25 held that the right to privacy is a fundamental right and is an integral part of the right to life and



liberty. The ruling by a nine-judge bench headed by Chief Justice J. S. Khehar will have a bearing on challenges to the validity of the Aadhaar ID scheme.

Just like the US constitution, the Indian constitution also does not contain an expressly stated right to privacy. But the US Supreme Court has interpreted several amendments to argue that such a right does exist. With its new ruling, the Supreme Court of India has likewise confirmed that it is a fundamental right under the Indian constitution. The verdict only decided the limited point of whether privacy is a fundamental right or not. Its ruling does not affect any other case automatically.

Aadhaar, the subject of this case, is a system that offers all Indian citizens a unique, numerical identification that can be used for many purposes, similar to how Social Security numbers are used in the United States. According to an Indian government website, “Aadhaar number is a 12-digit random number issued by the UIDAI Authority to the residents of India after satisfying the verification process. . . . Any individual, irrespective of age and gender, who is a resident of India, may voluntarily enroll to obtain Aadhaar number.” Because each person who enrolls must provide some biometric information

(ten fingerprints, two iris scans, and a facial photograph), Aadhaar “is unique and robust enough to eliminate duplicates and fake identities,” the government claims. One goal of the program is to provide government services without discrimination, because Aadhaar “does not profile people based on caste, religion, income, health and geography.”

Various petitioners had argued before the Indian Supreme Court that Aadhaar was an invasion of an individual’s privacy as biometric data were collected. The government argued that privacy was not a fundamental right, and it became necessary for the Supreme Court to decide whether privacy was a fundamental right or not. A nine-judge bench was formed in order to overcome conflicting precedents from previous cases that had been decided by six- and eight-judge benches.

The August 25 ruling only decides the fundamental constitutional question. Its actual impact will depend on how the Supreme Court rules in separate cases.

What did the Union government argue in the Supreme Court? The government argued that privacy was the concern of an “elite view,” and that the right to privacy was not expressly stated in the Indian constitution. The attorney general argued that

this was a deliberate omission. Additionally, the solicitor general, representing UIDAI, argued that privacy might be considered a fundamental right, but all aspects of privacy could not be put under the fundamental rights category.

Four states, West Bengal, Karnataka, Punjab, Himachal Pradesh and one Union Territory, Puducherry, have argued in the Indian Supreme Court that they support a constitutional right to privacy. The lawyer representing these states and the Union Territory argued that “the right to privacy cannot be absolute, but the court needs to strike a balance between the rights of the state and citizens on the one hand and the rights of citizens and non-state actors on the other.”

What did the petitioners argue against Aadhaar’s collection of biometric data? One of the lawyers representing the petitioners, Shyam Divan, argued “my body belongs to me; invasions of my bodily integrity can only be allowed under a totalitarian regime.” They argued that without privacy and a private life, no person could be meaningfully free. A world without privacy is a world with unchecked surveillance, and constant surveillance is antithetical to human dignity. Reported in *Business Standard* (India), August 25; uidai.gov.in/your-aadhaar.