NEWS FROM THE BENCH

SUPREME COURT

The US Supreme Court in January agreed to hear a case that could determine to what extent "scandalous" speech is protected under the First Amendment. In ***Iancu v. Brunetti,*** Erik Brunetti claims he has been unconstitutionally denied a federal trademark for his outlaw streetwear label, "Fuct."

Brunetti says he has been attempting to trademark Fuct since the mid-1990s. A Truman-era statute called the Lanham Act gives the US Patent and Trademark Office (USPTO) the power to refuse "immoral" or "scandalous" trademark applications. Brunetti's trademark application has been repeatedly denied through numerous appeals, but in 2017, the Supreme Court struck down a clause of the Lanham Act that denied federal trademark protection to disparaging marks, in a unanimous decision *in Matal V. Tam*.

This boosted Brucetti's fight to get trademark protection against fake Fuct product that pops up across the internet.

Brucetti and attorney John Sommer won a 3-0 victory in the federal appeals court in Washington, DC, which ruled that though the Fuct trademark is indeed "scandalous," the Scandalous Clause is unconstitutional. The appeals court stated, "The First Amendment... protects private expression, even private expression which is offensive to a substantial composite of the general public."

Petitioner Andrei Iancu is the director of the USPTO.

Brunetti said, "Free speech is at stake, and all speech is free speech. It cannot be selective. The moment you start shutting people down because you disagree with them or it hurts your feelings, that's when we start going down a very slippery slope." Reported in: *GQ,* January 30, 2019.

LIBRARIES

Centennial, Colorado

A parent group agreed to drop its lawsuit that had accused Colorado libraries of giving children easy access to pornography through EBSCO research databases. The case, ***Pornography is Not Education v. EBSCO and Colorado Library Consortium*** was dismissed "with prejudice" on February 27 in the **District Court of Arapahoe County, Colorado,** meaning the group can't sue again based on the same claims.

The parent group, which had legal representation from the conservative Thomas More Society, had filed the suit in October. Previously, it had pressured some local school libraries to remove EBSCO, and one of them—the Cherry Creek School District in suburban Denver—cancelled its contract with EBSCO shortly before the lawsuit was filed.

Kathleen McEvoy, vice president of communications at EBSCO, said the company is pleased the lawsuit was dismissed. The databases don't include pornography, she said, though they may allow access to information that some people deem sensitive.

A statement from the Thomas More Society said the parents still believe that EBSCO knowingly provided children access to pornography and that the Colorado Library Consortium (CLiC) aided the company, but they didn't want to risk paying the defendants' legal fees if a judge ruled against them. It also said EBSCO had modified its practices in response to the lawsuit.

CLiC was included in the lawsuit because it provides resources to libraries across the state, including access to EBSCO and other databases. Jim Duncan, CLiC's executive director, said pressure by the parents resulted in Cherry Creek students losing access to "several thousand" magazines, newspapers, and electronic resources they could use for school research.

Duncan also said the consortium spent about $35,000 defending the lawsuit—enough to supply a small library with new materials for seven years. "Money and time spent on legal defense in this frivolous lawsuit could have been better used to support schools, libraries and our communities," he said in a written statement.

EBSCO's McEvoy said in a written statement, "We are always mindful of issues around censorship and always remain neutral on topics. Since viewpoints differ around the globe, EBSCO enables individual libraries and school districts to control the content they provide to students and makes it possible for customers to remove titles from their EBSCO databases." Reported in: *Denver Post,* March 8, 2019.

Lafayette, Louisiana

A lawsuit filed to stop Lafayette Public Library's Drag Queen Story Time event was formally dismissed in **US District Court for the Western District of Louisiana, Lafayette Division,** on January 31. In ***Guidry v. Elberson*,** the court declared that the out-of-state Christian organizations that filed suit had no standing.

The ruling said named plaintiffs Chris Sevier and others failed to show "dollars-and-cents" injury from the library's Drag Queen Story Time, as they live out of state and don't pay local property taxes.

Sevier has filed dozens of suits on LGBTQ+ issues across the country, including same-sex marriage, transgender rights, etc. His cases typically argue the LGBTQ+ community is in effect a faith ideology. Thus, he claims, any government interaction like issuing marriage licenses or promoting a drag queen storytime is tantamount to state sponsorship of a

religion, and therefore a violation of the First Amendment's establishment clause.

He teamed up with Warriors for Christ, a West Virginia-based Christian ministry, to sue the Lafayette Public Library and Lafayette Consolidated Government, with Library Director Teresa Elberson and Mayor-President Joel Robideaux named as defendants.

After one of the early hearings in the case, the library had issued a temporary ban on room bookings for private, drag queen-related events. This prompted the American Civil Liberties Union (ACLU) to intervene in favor of drag queen storytimes in libraries. The ACLU argued that the ban was overly broad and infringed on First Amendment rights.

Magistrate Judge Patrick Hanna held an in-chambers conversation, seeking an out-of-court resolution on the ACLU's intervention. Prior to the dismissal of Servier's lawsuit, the library and local government agreed to throw out the controversial room reservation form that included the ban. In effect, they agreed with the ACLU that the ban restricted free speech.

Yet Sevier sees himself as the one defending First Amendment rights. He sees libraries as violating the First Amendment's separation of church and state, but doesn't see drag queens as having a First Amendment right to free speech.

"By bringing this lawsuit, we are unapologetically and firmly defending the civil rights movement led by pastor Martin Luther King," Sevier told News 15 in 2018. Reported in: News 15, September 19; *The Current,* January 10, January 31, 2019.

Houston, Texas

On January 3, the **US District Court for the Southern District of Texas, Houston Division,** dismissed the lawsuit filed by Chris Sevier and the Warriors for Christ organization that sought to halt the Houston Public Library's sponsorship or hosting of a Drag Queen Story Time. In ***Christopher et al. v. Lawson,*** the court based its decision on two grounds:

1. The court lacks subject-matter jurisdiction because the plaintiffs failed to establish legal standing to sue; the plaintiffs cannot show that that they suffered an actual "injury in fact" caused by the defendants' conduct that can be redressed under the law. The plaintiffs failed to show that they saw the actual DQST event while using the library; and failed to demonstrate that they are resident taxpayers or that the Library spent more than a de minimis amount on the presentation of the "Drag Queen Storytime." Additionally, many of the injuries they allege ("libeled, harassed, targeted, and ostracized online and in person") are not traceable to the defendants' conduct.
2. Even if the court had subject-matter jurisdiction, the complaint fails to state an Establishment Clause claim under the First Amendment. Even accepting plaintiffs' allegation that secular humanism could be a religion for Establishment Clause purposes, the plaintiffs fail to allege any facts or basis showing that "Drag Queen Storytime" is a religious activity. There is no allegation that a reader discussed secular humanism at the event, or that any story the Library selected invoked secular humanism or any religion at all.

Plaintiffs will likely move for reconsideration or exercise their right to appeal to the Fifth Circuit Court of Appeals. Reported in: KHOU-TV, January 3; US Court SD Texas-Houston, January 3, 2019.

SCHOOLS

Richmond, Virginia

A history lesson on "The Muslim World" at a public high school does not violate the Constitutional separation of church and state, a three-judge panel of the **US Court of Appeals for the Fourth Circuit** ruled on February 11 in ***Wood v. Arnold.*** Upholding an earlier District Court decision, Judge Barbara Milano Keenan, joined by Judges Pamela Harris and James A. Wynn Jr., wrote that school officials in southern Maryland had not violated a student's First Amendment rights, because the curriculum did not endorse a particular religion nor force her to profess any belief.

As a high school junior, Caleigh Wood refused to complete a lesson that she said forced her to embrace Islam in conflict with her Christian faith. Wood's attorney, Richard Thompson, argued that the lesson endorsed Islam, denigrated Christianity, and amounted to "forced speech of a young Christian girl." Thompson, president of the Thomas More Law Center, a national Christian nonprofit law firm, said "This is unequal treatment of Christianity by the school system."

The appellate court disagreed, writing, "School authorities, not the courts, are charged with the responsibility of deciding what speech is appropriate in the classroom. Academic freedom would not long survive in an environment in which courts micromanage school curricula and parse singular statements made by teachers."

Attorney Andrew Scott, who represents the defendant school officials from Charles County, Maryland, said the ruling sends an important message to school officials throughout the state affirming their discretion to teach about religion. "Religion is an integral part of history. You can't ignore it," he said. "The key is to teach it from a secular perspective—and not to proselytize."

The disputed lesson lasted five days in a year-long course at La Plata High School. Wood and her parents objected to two aspects of the unit that touched on politics, geography, and culture.

In its ruling, the court considered the school's broad world history curriculum rather than examining each potentially problematic statement. If judges found violations "every time that a student or parent thought that a single statement by a teacher either advanced or disapproved of a religion, instruction in our public schools 'would be reduced to the lowest common denominator,' " Keenan wrote in her 18-page opinion.

Wood was also required to complete a worksheet on the growth of Islam, the "beliefs and practices," and the links between Islam, Judaism, and Christianity. A fill-in-the-blank section included the statement: "There is no god but Allah and Muhammad is the messenger of Allah," a portion of an Islamic declaration of faith known as the *shahada*.

The court found that the assignment involving the *shahada* was meant to assess whether students understood the "beliefs and practices" of Muslims. The task was factual, and students "were not required to memorize the shahada, to recite it, or even to write the complete statement of faith," according to the ruling.

Charles County Schools Superintendent Kimberly A. Hill said after the ruling, "We don't teach religion. What we are teaching is world history. . . . It isn't any kind of indoctrination for anyone."

Thompson said he would seek review of the three-judge-panel ruling, either by the full appeals court or the Supreme Court. Reported in: *Washington Post*, February 13, 2019.

COLLEGES AND UNIVERSITIES

Harrison, New York

The State University of New York [SUNY] and the Westchester County District Attorney may have violated a student's First Amendment rights when they arrested him and charged him with a hate crime. The D.A.'s office announced on December 11 "Gunnar Hassard was arraigned in Harrison Town Court for Aggravated Harassment in the First Degree, a class E felony, for hanging posters with Nazi symbolism in areas of the campus" of SUNY's Purchase College.

Hassard, a student at the college, hung multiple posters, which incorporated a swastika and symbols of Nazi Germany, on and near the Humanities Building. New York State University Police arrested Hassard.

The complaint states that the defendant posted multiple flyers on the campus "frequented and utilized by members of the Jewish community . . . causing alarm, fear and annoyance to the members of the campus community during the Jewish holiday of Hanukkah."

The case raises numerous First Amendment issues, according to attorney Eugene Volokh, author of "The Volokh Conspiracy" blog on reason.com. Volokh wrote, "As readers might gather, I have only contempt for neo-Nazis. But the statutory provision to which the D.A.'s office is referring, NY Penal Law 240.31, is unconstitutional."

The law covers anyone who "etches paints, draws upon or otherwise places a swastika, commonly exhibited as the emblem of Nazi Germany, on any building . . . without express permission of the owner or operator of such building or real property."

Volokh stated that this law "impermissibly singles out a particular message based on its content and even its viewpoint, which is unconstitutional under *R.A.V. v. City of St. Paul* (1992) (and *Virginia v. Black* (2003))."

Volokh added:

> Swastikas are constitutionally protected, just as are hammers and sickles or burning crosses or images of Chairman Mao or other symbols of murderous regimes and ideologies. Public speech intended to "harass, annoy . . . or alarm" groups of people (whether Jews or conservative Christians or blacks or whites) is constitutionally protected. Posting things on other people's buildings isn't protected, but the law can't single out the posting of particular viewpoints for special punishment. And true threats of violence are unprotected, but the statute isn't limited to them, and I've seen no evidence of a specific true threat here.

It is also possible that the student was not endorsing the Nazi ideology displayed on the posters. The message on the posters was "Don't be stupid, be a smarty/Come and join the Nazi party," a line from Mel Brooks' comedy *The Producers,* which makes fun of Nazis. According to Volokh, "this suggests that this might have been a joke gone awry by Hassard, who is apparently involved in theater; but . . . the prosecution is unconstitutional in any event." Reported in: weschesterda.net. December 11, 2018; Reason.com, December 12, 2018.

SOCIAL MEDIA

Sacramento, California

The American Civil Liberties Union filed a lawsuit against Sacramento County Sheriff Scott Jones for blocking Black Lives Matter (BLM) Sacramento leaders from posting comments on the sheriff's official Facebook page, alleging he violated their First Amendment rights.

The suit, ***Faison et al. v. Jones,*** filed January 30 in **US District Court of the Eastern District of California** in Sacramento, alleges Jones deleted comments from BLM leaders Tanya Faison and Sonia Lewis on October 31 and November 5 when they responded to a post on the sheriff's page. His post expressed his opinion on the ongoing debate over the level of oversight the Office of the Inspector General should have over Jones' department.

Jones allegedly blocked Faison and Lewis from commenting on any future posts, the lawsuit said. Faison said she's still blocked from Jones' Facebook page.

"Facebook is one of the only places where we can engage with the sheriff and his supporters," she said. "Expressing our views is part of our role as residents of Sacramento."

Sean Riordan, a senior staff attorney for the ACLU, said Jones "censored" Faison and Lewis on his official Facebook page because of the "content of their speech."

"Sheriff Jones has attempted to stifle the voices of the leaders of Black Lives Matter Sacramento," Riordan said. "This is impermissible censorship that violates both the state and federal constitutions."

The suit is seeking an unspecified amount of damages and an injunction requiring Jones to unblock Faison and Lewis from his official social media accounts. Reported in: *Sacramento Bee,* January 30, 2019.

Frankfort, Kentucky

Kentucky Governor Matt Bevin's efforts to control his Facebook and Twitter accounts remain in court as the American Civil Liberties Union of Kentucky seeks to force him to stop blocking citizens who are critical of him.

A year ago, on March 30, 2018, in ***Morgan et al. v. Bevin,*** US District Judge Gregory F. Van Tatenhove of the **US District Court for the Eastern District of Kentucky, Central Division,** in Frankfort, denied the ACLU's request for a preliminary injunction, ruling the ACLU was not likely to win the case. (*See JIFP, Spring 2018, page 40.*)

As the case continues, another judge sided with the ACLU on one aspect of the case. On December 3, Federal Magistrate Edward B. Atkins granted the ACLU's request to compel Bevin to turn over screenshots of blocked users' comments. He also ordered Bevin to disclose text and email messages about his social media policy, and a list of keywords he uses to hide comments on Facebook. Judge Atkins denied the ACLU's request to have Bevin testify.

In another development, Kentucky Attorney General Andy Beshear said the governor's office violated state open records law by refusing to release the keywords it uses to filter comments from its Facebook page. Beshear, a Democrat, issued his opinion against Gov. Bevin, a Republican, on December 17.

The attorney general's opinion has the force of law unless it is overturned in court. The governor's office said it will challenge the opinion.

In the lawsuit, the ACLU is representing Mary Hargis of Morehead and Drew Morgan of Louisville, who say the administration's decision to block them violates their constitutional rights to free speech.

Bevin uses Facebook and Twitter frequently to communicate his views and news about his administration, which he says allows him to speak directly to Kentuckians. The *Louisville Courier-Journal* reported that Bevin has blocked hundreds of people from the social media accounts.

The ACLU's legal director, William Sharp, said in a news release about its lawsuit that the "First Amendment does not allow the government to exclude speakers from a public forum because it disagrees with their viewpoint."

The governor's lawyers have asked the court to treat the governor's presence on Facebook and Twitter not as a public forum but as personal accounts. The Bevin administration said it welcomes comments from all users on social media as long as they remain civil, but reserves the right to block people who post objectionable comments.

As for the keywords sought by the ACLU, Matthew F. Kuhn, a deputy general counsel for Bevin, argued that public disclosure of terms it used to filter comments would allow people to learn how to bypass them. Kuhn claimed the Facebook page would have to be constantly monitored "lest it be overrun with profane, obscene or clearly off-topic comments."

The attorney general's opinion said such reasons did not "constitute clear and convincing evidence to justify" keeping the keywords secret.

In a summary of several similar cases of public officials with social media accounts across the United States, *Quartz* wrote, "Facebook itself is a private company, and can censor speech as it pleases. But in the US, officials blocking constituents is a violation of their First Amendment right to freedom of expression, and deleting their public statements is a form of government censorship, lawyers

argue." Reported in: *Courier-Journal,* December 4, December 18, 2018; *Quartz,* December 13, 2018.

Richmond, Virginia

A county official who blocked a critic from her Facebook page violated the First Amendment, the **US Court of Appeals for the Fourth Circuit** in Richmond affirmed in ***Davison v. Randall.*** According to the Knight First Amendment Institute, this January 7 decision is the first time an appellate court has addressed whether the First Amendment applies to social media accounts run by public officials.

The Knight Institute, based at Columbia University, argued the appeal on behalf of Brian Davison, a Virginia resident who had been temporarily banned from the Facebook page of the chair of the Loudoun County Board of Supervisors.

The ruling "confirms that the First Amendment prohibits government censorship on new communications platforms," said Katie Fallow, senior staff attorney at the Knight Institute, who argued the case on appeal. "Public officials, who increasingly use social media accounts as public forums to foster speech and debate among their constituents, have no greater license to suppress dissent online than they do offline."

Brian Davison filed a First Amendment lawsuit in 2016, after Board of Supervisors Chair Phyllis Randall blocked him for posting comments that criticized members of the county school board. Davison won that lawsuit, with the trial court ruling that Randall had unconstitutionally barred him from her Facebook page based on viewpoint. Randall appealed to the Fourth Circuit Court of Appeals, which heard oral arguments in the case in September 2018.

In its opinion, the court of appeals affirmed the trial court's ruling that aspects of Randall's Facebook page "bear the hallmarks of a public forum" and that her decision to ban Davison constituted "black-letter viewpoint discrimination."

Other cases on whether the First Amendment applies to social media accounts run by government officials have not yet been decided at the appellate level. In May 2018, a federal trial court in New York held in a case brought by the Knight Institute that President Trump violated the First Amendment by blocking critics from his Twitter account (*see JIFP, Spring 2018, page 40*). The Trump administration has appealed that decision, and the case is currently pending before the US Court of Appeals for the Second Circuit.

"The First Amendment forecloses government officials from suppressing speech on the basis of viewpoint," said Jameel Jaffer, the Knight Institute's executive director. "With so many public officials using social media as a means of communicating with their constituents, the Fourth Circuit's thoughtful ruling will undoubtedly have broad impact." Reported in: Knight First Amendment Institute, January 7, 2019.

PRIVACY

New York, New York

The **US District Court** in Manhattan blocked the Commerce Department from adding a question on American citizenship to the 2020 census. In ***State of New York et al. v. US Department of Commerce,*** Judge Jesse M. Furman sided with groups arguing against a citizenship question on the census. The Census Bureau itself estimated in an analysis in January 2018 that at least 630,000 households would refuse to fill out the 2020 questionnaire if such a question were included.

The upcoming census count will determine which states gain or lose seats in the House of Representatives when redistricting begins in 2021. When the Trump administration announced last year it was adding a citizenship question to the census, opponents argued the results would undercount noncitizens and legal immigrants—who tend to live in places that vote Democratic—and shift political power to Republican areas.

The ruling said that Wilbur L. Ross Jr., the commerce secretary, broke federal rules when he ordered the citizenship question added to the census. Judge Furman said Ross cherry-picked facts to support his views, ignored or twisted contrary evidence, and hid deliberations from Census Bureau experts.

The Trump administration's next move is unclear. Government lawyers could appeal the ruling or seek a stay in the United States Court of Appeals for the Second Circuit—or go straight to the Supreme Court and ask justices to intervene. Reported in: *New York Times,* January 15, 2019.

SEXUAL HARRASSMENT ALLEGATIONS

Los Angeles, California

Jay Asher, author of the best-selling young adult novel *Thirteen Reasons Why*, suffered career setbacks after he was accused of sexual misconduct in 2018. His literary agency dropped him, speaking engagements and book signings evaporated, some bookstores removed his novels from their shelves, and the Society of Children's Book Writers and Illustrators announced that he had violated the professional organization's anti-harassment policy.

Asher, who denied the allegations, has filed a lawsuit against the Society of Children's Book Writers and Illustrators and the group's executive director, Lin Oliver, claiming that Ms. Oliver and the organization

made false and defamatory statements about him that torpedoed his career and caused financial harm and intentional emotional distress. The case, ***Asher v. SCBWI,*** filed in **California Superior Court** in Los Angeles, seeks a jury trial and unspecified financial damages.

In the lawsuit, Mr. Asher claims that Ms. Oliver and her organization never properly investigated the complaints against him and ignored exonerating evidence.

Publishers, booksellers, and agents have wrestled with how to handle anonymous allegations against authors when the accusations are hard to confirm, and with whether it's appropriate to rehabilitate the careers of those accused. Children's book publishers in particular have reacted swiftly to harassment allegations against authors, given their books' impressionable audiences and their reliance on teachers and librarians, who might be reluctant to support the work of authors accused of inappropriate behavior.

But so far, few accused authors have vigorously fought allegations publicly or sought financial damages for lost earnings. Reported in: *New York Times,* January 25, 2019.