



SUPREME COURT

The US Supreme Court on June 27, 2019 issued a 5–4 ruling in *Department of Commerce v. New York*, temporarily blocking the US Commerce Department from adding a citizenship question to the 2020 Census. In response, American Library Association (ALA) President Wanda Brown made the following statement:

The American Library Association agrees that there is a “substantial mismatch” between the Commerce Secretary’s decision and the rationale he provided for adding a citizenship question to the 2020 Census. We welcome the Supreme Court’s decision to at least temporarily block the addition of the question. ALA has consistently opposed the addition of the question on the 2020 census form, as most recently argued in ALA’s *amicus curiae* brief in this case.

ALA will continue to work in coalition with civil and human rights organizations to carefully review the implications of the case and actively advocate for a fair, accurate, and inclusive census.

The Supreme Court action came after the Trump Administration appealed a decision in US District Court in Manhattan that Commerce Secretary Wilbur L. Ross Jr. broke federal rules when he ordered the citizenship question added to the Census. [See JIFP, *Spring 2019*, page 58.]

The Census Bureau itself had estimated that at least 630,000 households would refuse to fill out the 2020 questionnaire if such a question were included. This would result in an undercount of the population in states with a high percentage of immigrants, and thus reduce those states’ representation in Congress and the Electoral College, and reduce funding for federal programs in those states, for

the following ten years. Reported in: *American Libraries*, June 27, 2019.

The Supreme Court on June 24, 2019 struck down a provision of federal trademark law that had denied registration for “immoral or scandalous” trademarks, as an overbroad regulation that limited free speech based on the viewpoint expressed.

In *Iancu v. Brunetti*, the court ruled against the US Patent and Trademark Office’s rejection of Erik Brunetti’s application for a trademark for his clothing line named FUCT. The name obviously bears close resemblance to a profanity.

The Trademark Office said “FUCT” violated the law because it was “a total vulgar” and “extremely offensive” name. Brunetti sued on First Amendment grounds.

The court ruled in his favor for at least two reasons. First, the provision permitting the rejection of marks as “immoral” allowed the government to engage in what is known as viewpoint discrimination. This violates the principle that the government should not favor certain viewpoints and disfavor other viewpoints.

Justice Elena Kagan in her majority opinion wrote that the viewpoint bias was “facial” [obvious on its face] and thus “results in viewpoint-discriminatory applications.”

Justice Samuel Alito was even blunter in his concurring opinion: “Viewpoint discrimination is poison to a free society.”

The court also relied on the principle that when a law sweeps more broadly than is needed to accomplish its purpose, and prohibits speech that ought to be protected, the law is overbroad.

As Justice Kagan explained: “There are a great many immoral and scandalous ideas in the world (even more than there are swearwords) and the

Lanham Act (the federal trademark law) covers them all. It therefore violates the First Amendment.” Reported in: supremecourt.gov, June 24, 2019; *Freedom Forum*, July 3.

Carpenter v. United States expanded Fourth Amendment privacy protections in the digital age, by requiring the police to obtain a warrant before obtaining cellphone location history from a phone company. The Supreme Court issued its ruling on June 22, 2018, but the case was back in the news a year later.

Timothy Carpenter, the appellant in the Supreme Court case, had been convicted of a series of federal offenses, including robbery and gun-related charges. But prosecutors won the case and secured a 116-year prison sentence against him with the help of cell-site location information that the Supreme Court later said was unlawfully obtained.

Unlike other types of criminal cases decided by the Supreme Court, which may result in a reversed conviction or a new chance to prove one’s innocence, successful challenges to government searches and seizures routinely seek suppression of the tainted evidence. Under what’s called the exclusionary rule, any evidence obtained in violation of the Constitution cannot be used at trial.

The Supreme Court remanded the case back to the appellate court.

On June 11, 2019, the US Court of Appeals for the Sixth Circuit ruled that at the time FBI agents obtained the cell phone evidence, the Supreme Court had not yet ruled, so the agents believed the search warrant they issued to the phone company was legal. Under the “good faith” exception to Fourth Amendment, the evidence did not need to be suppressed. Thus, the trial court’s decision stands, and Carpenter remains sentenced to



116 years in prison, even though he won in the Supreme Court.

The American Civil Liberty Union's Nathan Wessler, who argued and won the *Carpenter* case before the Supreme Court, said the development of the law may suffer in the long term, as lower courts excuse violations while refusing to expand privacy rights.

"When courts dodge the Fourth Amendment question and rule just on 'good faith,' it leaves the public and police without clear guidance about what the Fourth Amendment means and how it should apply to novel but important digital-age intrusions," Wessler wrote in an email.

Orin Kerr, a Fourth Amendment expert who has unsuccessfully challenged the good-faith exception before the Supreme Court, reasoned that the Supreme Court justices may feel more comfortable ruling for expanded civil liberties, so long as they don't also have to let the bad guy go free. Still, the current system is far from just. "Supreme Court cases should mean something," Kerr said in an email. "The Supreme Court is supposed to decide a person's case, not just settle the rules for everyone else." Reported in: supremecourt.gov/opinions, June 22, 2018; opn.ca6.uscourts.gov/opinions, June 11, 2019; *New York Times*, June 13, 2019.

In a cable TV case that may have implications for social media, the Supreme Court on June 17, 2019 ruled in *Manhattan Community Access Corp. v. Halleck* that a nonprofit entity running public access channels isn't bound by the First Amendment as government-run channels would be.

The case centered around a Manhattan-based nonprofit tasked by New York City with operating public access channels in the area. The organization disciplined two producers

after a film led to complaints, which the producers argued was a violation of their First Amendment speech rights. The case turned on whether the nonprofit was a "state actor" running a platform governed by First Amendment constraints.

In a split 5–4 ruling decision written by Justice Brett Kavanaugh, the conservative wing of the court ruled that the First Amendment constraints didn't apply to the nonprofit, which they considered a private entity. Providing a forum for speech wasn't enough to become a government actor, the justices ruled.

The liberal justices on the court dissented. As Justice Sonia Sotomayor wrote, the nonprofit "stepped into the City's shoes and thus qualifies as a state actor, subject to the First Amendment like any other."

None of the justices' opinions in the case mention the internet nor social media, but potential implications were seen before the Supreme Court heard the case. The Electronic Frontier Foundation, which submitted an *amicus* brief, wrote: "A broadly written opinion, adopting a low threshold for governmental involvement, could threaten the First Amendment rights of platform operators to curate content, and could give the government power to dictate content moderation rules and control what platforms can and can't publish."

Likewise, the Internet Association, a trade group, said in 2018 that such a decision could mean the internet "will become less attractive, less safe and less welcoming to the average user."

The decision to limit the scope of the First Amendment in this cable TV case seems to limit the chances that private companies will be punished for attempts to monitor content on the social media platforms they operate. Reported in: eff.org, December

12, 2018; supremecourt.gov/opinions, June 17, 2019; *The Verge*, June 17.

The Supreme Court's ruling on May 28, 2019 in *Nieves v. Bartlett* gives law enforcement officers significant protection from people who want to sue and claim they were arrested in retaliation for something they said or wrote. The justices said that because the officers had probable cause to arrest Alaska resident Russell Bartlett, his lawsuit fails.

Bartlett was arrested in 2014 at Arctic Man, an annual, weeklong winter sports festival that Chief Justice John Roberts described as "an event known for both extreme sports and extreme alcohol consumption." Bartlett was arrested for disorderly conduct and resisting arrest after exchanging words with two troopers investigating underage drinking during the event. Officers said they arrested Bartlett because he initiated a physical confrontation by standing close to one of the troopers and speaking in a loud voice.

The charges against Bartlett were ultimately dismissed, but Bartlett sued, claiming his arrest was retaliation for comments he made to the officers.

The court rejected Bartlett's argument, and stated, "The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim." Roberts wrote that if Bartlett's arguments were to prevail, "policing certain events like an unruly protest would pose overwhelming litigation risks. . . . Any inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation."

Yet Roberts' opinion added that having the legal right having to make an arrest (i.e., "probable cause") will not protect police from all lawsuits. In a situation where officers generally



would not arrest someone despite having probable cause, the arrested person should be able to sue. Otherwise, as stated in a prior Supreme Court case known as *Lozman* that Roberts quoted, there is “a risk that some police officers may exploit the arrest power as a means of suppressing speech.”

The justices gave the example of a person who has been complaining about police conduct who is arrested for jaywalking, which rarely results in an arrest. The justices said in a case like that, if the person can prove that he was arrested when other jaywalkers had not been, he could move forward with a retaliatory arrest lawsuit.

One of Bartlett’s attorneys, Kerri Barsh, said she was disappointed with the outcome for her client. Yet she said she was pleased the court acknowledged there was at least a narrow category of cases where the fact that probable cause exists doesn’t close the door to lawsuits. “The facts mean a lot in these cases,” she said.

Bartlett had been supported by numerous First Amendment and media organizations, including the Associated Press. Reported in: supremecourt.gov/opinion, May 28, 2019; Associated Press, May 28.

The US Supreme Court on April 22, 2019 granted review in two consolidated cases, *Bostock v. Clayton County, Ga.*, and *Altitude Express Inc. v. Zarda*, that raise the question of whether the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 encompasses sexual orientation.

The court also granted review in *R.G & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, which the justices said raises this question: “Whether Title VII prohibits discrimination against transgender people based on (1) their

status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.” In *Price Waterhouse*, the Supreme Court was divided in 1989, but had suggested that an employer’s reliance on sex stereotypes could be evidence of impermissible sex discrimination under Title VII.

These cases are expected to be heard during the Supreme Court’s October 2019 term. Reported in: *Education Week*, April 22, 2019.

LIBRARIES Orange City, Iowa

Paul Robert Dorr burned four children’s books with LGBTQ (lesbian, gay, bisexual, transgender, queer) themes that he checked out from the Orange City Public Library on October 19, 2018 [see JIFP, *Fall-Winter 2018*, page 18], but says the First Amendment is on his side in the criminal case against him, *Iowa v. Dorr*, in **Iowa District Court of Sioux County**.

He pled not guilty to one count of fifth-degree criminal mischief—a simple misdemeanor—for publicly burning the library books: *Two Boys Kissing* by David Levithan, *This Day in June* (about a Gay Pride parade) by Gayle E. Pitman, *Morris Micklewhite and the Tangerine Dress* by Christine Baldacchino, and *Families, Families, Families* (a picture book showing many kinds of nontraditional families) by Suzanne Lang. He said the books promote “the trans-gender agenda” and violate Christian teachings.

Representing himself in the criminal case, he filed a motion calling for the charges to be dropped on the basis of “selective prosecution” in violation of his First Amendment and equal protection rights. He claimed that other patrons who lost or destroyed library books have not been prosecuted, but prosecutors “threw the book at him” because he posted his

book-burning protest on social media. According to his motion, “the government’s action in thus singling him out was based on an impermissible motive such as race, religion or the exercise of his constitutional rights.”

Sioux County District Court Magistrate Lisa Mazurek on July 8 ruled against Dorr’s motion to dismiss. “His actions involved the intentional destruction of the library materials that he had checked out,” Mazurek said. “There is no evidence to indicate that any other library patrons who failed to return their library materials intended to destroy those materials or even whether they did destroy them.”

She said he failed to prove that the message he was sending in his protest was the reason he was charged with a crime. The message being sent to him, she added, is “that he cannot burn books that do not belong to him.”

A jury trial in the case has been scheduled for August 6, 2019. Reported in: KIWA Radio, June 10, 2019; *N’West Iowa Review/nwestiowa.com*, June 16, July 9; Associated Press, July 10.

SCHOOLS Hartford, Connecticut

A family is suing a private college preparatory school, claiming it expelled a high school sophomore because of his “politically incorrect views.” In *Mancini V. Cheshire Academy*, filed in **State of Connecticut Superior Court** on April 15, 2019, the family of Michael Mancini alleges in the complaint that the Cheshire Academy suspended Michael for five days and then expelled him from the school after his father launched a website detailing the issue.

The complaint says several incidents led to Michael’s suspension, including a discussion in English class of William Shakespeare’s *Twelfth Night*, in which the character Viola



cross-dresses as a male. Michael disagreed with some classmates who claimed Shakespeare was portraying transgender individuals in a positive light, saying that during the time the play was written (1601-1602) society would never partake in that activity.

The complaint says Michael was then verbally attacked by two of his classmates and asked by the teacher to explain himself afterward.

Cheshire Academy, which was founded in 1794, is the state's oldest boarding school.

The Mancini family is seeking an injunction to have Michael reinstated at the school as well as unspecified monetary damages.

School officials told the Cheshire Academy community in a letter signed by school head Julie Anderson that a student had been expelled following "a fair process," the *New Haven Register* reported. "Contrary to what you may have read, our decision was not based on an opposition to political dialogue. We will take steps to defend the good name and reputation of CA, and will continue to work with legal counsel through this unfortunate episode."

The letter didn't reveal the student's name. Reported in: *Epoch Times*, April 22, 2019.

Atlanta, Georgia

The First Amendment protects high school students who exercise their free speech rights to call for their principal to be fired, the **US District Court for the Northern District of Georgia, Atlanta Division**, ruled in *K.B. v. DeKalb County School District* on May 1, 2019.

K.B., a student at Chamblee Charter High School in DeKalb County, became concerned about the performance of controversial principal Rebecca Braaten, and he and his

family signed an online petition calling for Braaten to be reassigned.

On October 1, 2018, K.B. designed stickers with Braaten's professional headshot photograph and the words "Fire Braaten" overlaid on a waving United States flag "to express his political views on the controversy regarding the principal." Court records indicate that K.B. placed a sticker on his phone case and openly displayed it at school. K.B. printed "no more than thirty-six" stickers and handed some to other students who requested them. K.B. was not aware of any stickers placed on school property and did not see his stickers displayed on anything other than students' own personal property.

School authorities concluded "that K.B. had violated the code of conduct rules regarding 'disrespectfulness' and 'creating a disturbance.'" They suspended him for a week, later reduced to a one-day in-school suspension.

The school argued that, as a matter of law, "schools may discipline students for insubordination and open displays of disrespect or contempt for school employees."

But the court rejected this argument, concluding that (1) this legal reasoning applies only to vulgar speech, and not to all expression of "disrespect or contempt for school employees," and (2) the First Amendment applies in schools, unless there is a real showing of likely substantial disruption—such disruption can't categorically be assumed just because speech calls for a principal to be fired.

The court concluded that the school violated K.B.'s First Amendment rights, unless the school could show that the speech was indeed likely to substantially disrupt school activities. The case can go forward, to see if the factfinder decides whether the substantial disruption standard is met.

In practice, according to Eugene Volokh in "The Volokh Conspiracy" blog, such cases often settle after the motion to dismiss is denied. Reported in: *reason.com*, May 1, 2019.

Somerville, New Jersey

Unhappy with a compromise that moved the graphic novel *Fun Home: A Family Tragicomic* by Alison Bechdel from required reading to an optional choice on a list of what students may read for class in the twelfth-grade curriculum at Watchung Hills Regional High School in Warren Township [see JIFP, *Fall-Winter 2018*, page 25], some residents of the township are suing to have the book completely removed. On May 3, 2019, they filed *Gallic, et al. v. Watchung Hill Regional High School Board of Education*, in **Somerset County Superior Court**, asking for immediate removal of the book, and "to enjoin the defendants from facilitating, distributing or in any way permitting *Fun Home* from appearing or being any part of the curriculum at Watchung Hills."

The judge, Margaret Goodzeit, denied immediate relief. She said, "If the Plaintiffs were so concerned about the contents of *Fun Home*, this application could have been brought months—if not a year—sooner."

The suit says the Plaintiffs "fear if the defendants are not enjoined minors will suffer irreparable harm and that New Jersey statutes will be violated."

Fun Home chronicles the author's childhood in a family that ran a funeral home, and addresses themes of sexual orientation, gender roles, suicide, emotional abuse, dysfunctional family life, and the role of literature in understanding self and family. The book has won awards, but it also has frequently been challenged in schools and libraries.



One of the defendants, Watchung Hills Regional High School Board of Education President Peter Fallon, said the plaintiffs call the book “obscene,” but ignore that material must arouse “prurient interest” to be covered by the obscenity law. “If the plaintiffs were seriously seeking relief in this lawsuit, rather than just publicity for their opposition to the book, they would have addressed both elements” of the law, Fallon said.

Fallon’s statement indicates that none of the plaintiffs are students nor parents of students at the high school, although one was a senior there last year. Reported in: *Tap into Warren*, May 9, 2019.

COLLEGES AND UNIVERSITIES

Los Angeles, California

The Foundation for Individual Rights in Education (FIRE) sued the University of California, Los Angeles (UCLA) for failing to release a video and documents surrounding a campus speaking appearance by US Secretary of the Treasury Steven Mnuchin on February 26, 2018. In *FIRE v. University of California* filed in the Superior Court of the State of California, Los Angeles County, on March 27, 2019, FIRE stated that in the 391 days since FIRE’s initial request for records, the public university “unilaterally granted itself five extensions, obstructing FIRE and the public’s reasonable access to information.”

During Mnuchin’s appearance, several protesters were escorted from the facility, and there were five arrests. Two days later, the *Wall Street Journal* reported that Mnuchin “retracted his permission” for UCLA to release a video of his speaking appearance.

FIRE issued a public records request to UCLA on March 2, 2018, seeking any communications about

the release of the video, as well as any agreements between Mnuchin’s office and UCLA about the secretary’s appearance.

“UCLA can’t be allowed to defeat public records law by unilaterally putting off its response deadline forever,” said Adam Steinbaugh, director of FIRE’s Individual Rights Defense Program, who submitted the request on FIRE’s behalf. “This is a serious abuse of the public trust. UCLA—and public colleges across the country—must recognize that following the law isn’t a choice.”

The California Public Records Act (CPRA) requires that public institutions such as universities make copies of public records “promptly available.” FIRE’s lawsuit alleges the university failed to properly respond to its request, obstructed the production of the records, and failed to provide an estimated date of availability, all of which violate the CPRA’s requirements.

FIRE Director of Litigation Marieke Tuthill Beck-Coon said, “A university whose motto is ‘let there be light’ shouldn’t keep the public in the dark.” Reported in: *thefire.org*, March 28, 2019.

Atlanta, Georgia

Georgia Gwinnett College in Lawrenceville blocked a student, Chike Uzuegbunam, from speaking about his Christian faith during the 2016-17 school year, and the case is continuing even after the school scrapped its “free speech zone” policy. Attorneys from Alliance Defending Freedom (ADF) described the college’s two “free speech zones” as “tiny” in a lawsuit filed in December 2107, *Uzuegbunam v. Preczewski*. After the filing, the school changed its policy. With students now allowed to speak publicly in any outdoor area on campus, Judge Eleanor L. Ross of the US District

Court for the Northern District of Georgia on May 25, 2018, dismissed the case as moot.

On June 25, 2019, the ADF argued before the **11th US Circuit Court of Appeals** that the district court didn’t settle the constitutional rights aspect of the case. ADF Legal Counsel Travis Barham said in a statement, “The district court clarified what Georgia Gwinnett College refused to make clear: that its students have the right to speak in any outdoor area of campus. That’s good news,” but Barham said the court “ignored how GGC officials repeatedly censored Chike, and these officials should not get off scot-free for creating and enforcing policies that trampled students’ constitutionally protected freedoms.”

The initial case drew some national attention after US Attorney General Jeff Sessions filed a brief in support of Uzuegbunam and another student, Joseph Bradford, who also wanted to preach on campus and had joined the case as a plaintiff. Bradford is still a student at the college while Uzuegbunam has graduated.

After the district court dismissed the lawsuit, the ADF’s Barham said, “We believe the college has to make amends for the unconstitutional enforcement of its policies against our clients.” Reported in: *Atlanta Journal-Constitution*, May 14, 2019; *Gwinnett Daily Post*, June 25; Alliance Defending Freedom, July 1.

Boston, Massachusetts

A group of Jewish students failed to block a panel discussion about Palestinian rights at the University of Massachusetts-Amherst, when Judge Robert Ullmann of the **Suffolk County Superior Court** in Boston on May 2, 2019, denied their request for an injunction, two days prior to the event. Entitled “Not Backing



Down: Israel, Free Speech, and the Battle for Palestinian Human Rights,” the discussion included some speakers known for encouraging a boycott of Israel for its policies toward Palestinians.

Filing as “*John Doe 1*,” “*John Doe 2*,” and “*John Doe 3*,” the Jewish students argued that the panel was anti-Semitic and posed a threat to Jews on campus. Karen Hurvitz, the attorney representing the students, called the event a “hate fest” that would incite hostility toward supporters of Israel. Hosting the anti-Israel panel on campus would violate “numerous policies concerning non-discrimination, intolerance and inclusion,” that existed at UMass-Amherst to protect students, she argued.

UMass argued that an injunction would amount to a prior restraint on free speech.

Jewish Voice for Peace Western Mass, one of the sponsors of the event, contended that the plaintiffs’ definition of anti-Semitism is not agreed upon, even within the Jewish community.

One purpose of the panel was to argue that pro-Israel groups have tried to silence Palestinian points of view.

Judge Ullman said he couldn’t take action against the forum just because someone may say something “that fits someone’s definition of anti-Semitism.”

Rachel Weber, a lawyer for Jewish Voice for Peace, said, “We’re glad that the judge was so clear that the plaintiffs (A) hadn’t shown any evidence of any perceived harm that might happen, and (B) that this would have been a violation of the First Amendment.” Reported in: Jewish News Syndicate, April 26, 2019; Associated Press, May 2; *Daily Hampshire Gazette*, May 2.

FREEDOM OF THE PRESS Baltimore, Maryland

A group of former military and intelligence officials are challenging a system of prior review that the government uses to censor millions of ex-government employees who want to write articles and books after they leave public service. Their lawsuit, *Edgar et al. v. Coats et al.*, filed on April 2, 2019, in **US District Court, Maryland District**, appears to be the first to challenge the entire pre-publication review system, rather than the handling of any particular manuscript, according to legal specialists consulted by the *New York Times*.

Originally imposed on a handful of Central Intelligence Agency officials in the 1950s, the policy now requires nearly anyone granted a security clearance to submit their writing to prior review for the rest of their lives.

The system’s ambiguous policies and vague standards puts too much discretionary power in the hands of reviewing officials, the lawsuit said.

“This far-reaching censorship system simply can’t be squared with the Constitution,” said Jameel Jaffer, executive director of the Knight First Amendment Institute at Columbia University, which is jointly representing the plaintiffs with the American Civil Liberties Union. He added: “The government has a legitimate interest in protecting bona fide national-security secrets, but this system sweeps too broadly, fails to limit the discretion of government censors and suppresses political speech that is vital to informing public debate.”

The system relies mainly on a 1980 Supreme Court ruling, *Snepp v. United States*, which permitted the CIA to seize the proceeds from a former officer who published a book without submitting it to the agency for review. The court did not hear arguments or take briefs in that case before issuing

an unsigned ruling, which dismissed the First Amendment issues in a footnote.

The legality of the censorship system is “unsettled” in part because “the practice of prior restraint by the government has grown enormously” since that case was decided, said Jack Goldsmith, a Harvard Law School professor and former Bush administration Justice Department official who has co-written several articles critical of the process.

The plaintiffs asked a judge to rule that agencies cannot enforce any obligation for individuals to submit their future writings to review boards. They took no position on whether the solution is to fix the system or make it voluntary—which would leave former intelligence and military officials and contractors free to publish without prior review if they assume the risk of being prosecuted if they divulge any dangerous secrets.

The plaintiffs include Timothy H. Edgar and Richard H. Immerman, former employees of the Office of the Director of National Intelligence; Melvin A. Goodman, a former CIA employee; Anuradha Bhagwati, a former Marine; and Mark Fallon, a former counterterrorism agent at the Naval Criminal Investigative Service. Reported in: *New York Times*, April 2, 2019.

New York, New York

The *New York Times* and the Federal Communications Commission (FCC) are arguing in **US District Court for the Southern District of New York** over whether the Freedom of Information Act requires the agency to disclose information about people who filed comments about net neutrality. In *New York Times Company et al. v. FCC*, the newspaper asked for data such as users’ IP addresses and time stamps of their comments,



to investigating potential Russian meddling in the 2017 net neutrality proceeding.

In early May 2019, the agency countered that such information would compromise commenters' privacy.

In April 2017, FCC Chairman Ajit Pai proposed revoking Obama-era net neutrality rules that kept broadband providers from blocking or throttling traffic and from charging higher fees for fast-lane service. Ajit's proposal drew a record-breaking 22 million comments, but many were submitted under fake names or by Russian bots. The precise number of fake comments is unclear, but around 450,000 came from Russian email addresses, according to the *Times*.

The *Times* argued in court papers that any risk to consumers' privacy is small, since most web users have different IP addresses now than in 2017. The newspaper also argued IP logs will reveal clues about the geographic locations of commenters—including whether they came from Russia.

But the FCC counters that not all commenters necessarily have different IP addresses now than in 2017. The agency adds IP addresses can be combined with other data in ways that pose a risk to people.

"Anyone who can link an individual commenter's name and postal address with his or her IP address and User-Agent header can commercially exploit the user's personal information for financial gain, commit identity theft, or otherwise harm the user," the agency writes. Reported in: dockets.justia.com, October 20, 2018; mediapost.com, May 6, 2019.

Alexandria, Virginia

A federal grand jury's indictment on May 23, 2019, raises questions about whether WikiLeaks founder Julian P.

Assange is a spy or a journalist. In the case of *United States v. Assange* in the **US District Court for the Eastern District of Virginia, Alexandria Division**, an 18-count superseding indictment alleges that Assange was complicit with Chelsea Manning, a former intelligence analyst in the US Army, in unlawfully obtaining and disclosing classified documents related to the national defense.

The US Justice Department described this as "one of the largest compromises of classified information in the history of the United States." The Justice Department news release includes the disclaimer that Assange is presumed innocent until and unless proven guilty in court, but the federal charges could have implications for freedom of the press.

The Freedom Forum Institute said the charges against Assange "implicate the work of journalists, which often involves talking with sources and at times possessing and publishing secret documents."

Of special concern, according to the institute, is "the government defining who is and who is not a journalist. This was the very activity that the nation's founders—who had first-hand experience with the abuses inherent in a system where the crown licensed printers and publishers—ruled out in 1791 by creating unequivocal First Amendment protection for a free press."

The institute warned, "The Assange indictment, if it stands, could dramatically change the delicate balancing act that has existed until now, in which the government sought to protect its secrets by prosecuting leakers, but did not go after reporters and news outlets that produced news reports based on leaked materials." Reported in: justice.gov, May

23, 2019; Freedom Forum Institute, June 13.

FREE SPEECH Los Angeles, California, and Charlottesville, Virginia

Judges in California and Virginia came to different conclusions about whether white supremacist rallies that lead to violence are protected by the First Amendment.

Judge Cormac J. Carney of the **US District Court for the Central District of California** on June 3, 2019 dismissed the federal charges against three alleged members of a violent white supremacist group. In *USA v. Rundo et al.*, some alleged members of the Rise Above Movement (RAM) had been accused of inciting violence at California political rallies, but Judge Carney found their actions amounted to constitutionally protected free speech.

Prosecutors said members conspired to riot by using the internet to coordinate hand-to-hand combat training, traveling to protests, and attacking demonstrators at gatherings in Huntington Beach, Berkeley, and San Bernardino. The group also posted videos to celebrate violence and recruit members.

Despite the group's "hateful and toxic ideology," the criminal statute against protests went too far in regulating free speech, the judge ruled. He said the Anti-Riot Act of 1968—most famously used to prosecute the "Chicago Eight," including Abbie Hoffman, Bobby Seale, and Tom Hayden, for conspiring to incite a riot at the 1968 Democratic National Convention—was unconstitutional in part because it criminalized advocating violence when no riot or crime was imminent. He said prosecutors cited social media posts the men made



months before and months after the rallies.

The judge threw out the charges and ordered the release of alleged RAM leader Robert Rundo and suspected member Robert Boman. Charges against Aaron Eason, who was free on bond, were also dropped.

Defense attorney John McNicholas, who represented Eason, said his client was never a member of RAM and committed no crime. He said the men thought they were doing good, going to conservative rallies to counter the anti-fascists known as Antifa who were “committing acts of violence to suppress speech they disagreed with.” He criticized prosecutors for not pursuing charges against Antifa members.

The Los Angeles decision alarmed groups that track white supremacist activity. They fear the court decision could empower RAM, which is known for espousing anti-Semitic and other racist views.

Brian Levin, director of the Center for the Study of Hate and Extremism at California State University, San Bernardino, said if members discussed a criminal plan and took steps to carry it out, their speech was not protected. “The Supreme Court has basically held that hateful speech is protected; however, violence and conspiracies are not,” Levin said. “That’s where I think the judge may have gotten this one wrong.”

Prosecutors were disappointed with the ruling, and are reviewing grounds for appeal, spokesman Ciaran McEvoy said.

In a similar case in Virginia that involved alleged RAM members from California who participated in violent white nationalist rallies in both states, Judge Norman Moon reached a conclusion opposite of Judge Carney’s. Four defendants from California admitted punching and kicking counter-protesters as white

nationalists led a torch-lit march at the University of Virginia and at the “Unite the Right” rally in Charlottesville in August 2017. They pleaded guilty to those charges on May 3, 2019 in *United States v. Daley et al.* in the **US District Court for the Western District of Virginia** in Charlottesville. However, for the charges based on the Anti-Riot Act, they plan to appeal on the grounds that the statute is unconstitutional because it is overbroad, vague, and infringes on protected First Amendment activities, said Lisa Lorish, assistant federal public defender in Charlottesville. She expects the appeals court will agree with Judge Carney’s reasoning.

There are plausible arguments in support of both decisions—with Judge Carney taking a broad interpretation of the law, and Judge Moon in Virginia taking a narrow one, said Eugene Volokh, a law professor at the University of California, Los Angeles. Reported in: courtlister.com, May 3, 2019; Associated Press, June 5.

Denver, Colorado

The **US Court of Appeals for Tenth Circuit** in Denver rejected the First Amendment claim of a public employee who was demoted after giving sworn testimony in a judicial proceeding involving a domestic child custody dispute between his sister-in-law and a fellow public employee. The decision in *Butler v. Board of County Commissioners for San Miguel County* on March 29, 2019 gives “inadequate protection to public employees who testify in court,” according to the Freedom Forum Institute. The decision also creates a split between different appellate circuits, and the split may require ultimate review by the US Supreme Court.

Jerud Butler works as a supervisor for the San Miguel County

(Colorado) Road and Bridge Department. He suffered a demotion after he testified in a court proceeding involving his sister-in-law and her ex-husband, who also works for the San Miguel County Road and Bridge Department. Two of Butler’s work superiors investigated his court testimony and gave him a written reprimand and demotion.

Butler then sued the two county directors who demoted him, alleging he was retaliated against for his First Amendment-protected speech. A federal district court dismissed his lawsuit, reasoning that his court testimony did not address a matter of public concern—defined generally as speech that relates to any matter of political, social, or other concern to the community.

Butler appealed the decision, arguing that the district court failed to faithfully apply the US Supreme Court’s 2014 *Lane v. Franks* decision. In that decision, the court held that Alabama college officials violated the First Amendment rights of a public employee who testified about financial malfeasance of a former college employee.

However, in a split decision by a three-judge panel, the 10th Circuit majority distinguished Butler’s case from *Lane*, reasoning that Butler merely served as a character witness for his sister-in-law, speech that deals with a “purely personal dispute.” Butler argued that his speech certainly touched on a matter of public concern because the state of Colorado has a strong interest in the welfare of children and the fair resolution of child custody matters. The 10th Circuit rejected that argument, writing that “there is no indication that this testimony was of interest or concern to the community at large.”

The majority concluded that “Butler’s specific testimony as a character



witness for his sister-in-law during a child custody hearing was not a matter of public concern.”

Judge Carlos F. Lucero dissented. “It is difficult for me to accept the proposition that society’s concern in the custody of a child can be as personal as the majority pronounces,” he wrote. “To be sure, participants in the proceeding may have personal concerns regarding the custody of a child, but the overarching public interest in the well-being of children cannot be so easily ignored.”

Judge Lucero pointed out that the Supreme Court in *Lane* emphasized the importance of “sworn testimony in a judicial proceeding. . . . Integrity of our judicial process depends on witness’ willingness to provide truthful testimony,” he wrote.

Writing for the Freedom Forum Institute, David L. Hudson Jr., a member of the Belmont University law school faculty, called the majority’s decision “misguided.” He wrote, “Judge Lucero has the better view. Sworn testimony in a judicial proceeding should be presumed to be speech on a matter of public concern. Furthermore, it is simply grossly unfair and an abuse of power to demote a public employee because he gives testimony in a court case.”

Hudson also said the decision is in conflict with other decisions in other circuits. “Hopefully,” he wrote, “this unjust decision will be reviewed either by the 10th Circuit en banc or the US Supreme Court.” Reported in: *Freedom Forum Institute*, April 23, 2019.

Rapid City, South Dakota

To protect the rights of potential protesters who want to block the Keystone XL oil pipeline, the American Civil Liberties Union (ACLU) of South Dakota filed a federal First Amendment lawsuit on March 28, 2019, in **US District Court for the**

District of South Dakota, Western Division in Rapid City. In *Dakota Rural Action, et al. v. Noem et al.* the ACLU is challenging Senate Bill 189, which Governor Kristi Noem signed into law on March 27.

The law establishes a legal avenue and funding source for the state to pursue out-of-state sources that “riot boost,” or, according to Noem, fund violent protests that aim to shut down pipeline construction. Those found guilty of breaking the law can be sent to prison for up to twenty-five years.

“No one should have to fear the government coming after them for exercising their First Amendment rights,” Courtney Bowie, ACLU-SD legal director, said in a news release. “That is exactly what the constitution protects against, and why we’re taking these laws to court. Whatever one’s views on the pipeline, the laws threaten the First Amendment rights of South Dakotans on every side of the issue.”

Governor Noem’s office said that it is confident the legislation does not violate the First Amendment. The governor and her team stand behind her pipeline legislation, which does not place restrictions on peaceful protest or peaceful assembly, a Noem spokeswoman said in an email. “Governor Noem remains committed to upholding these laws as a means to protect our people, our counties, our environment, and our state.”

In its complaint, the ACLU cites quotes by Noem and her allies that say the bill isn’t just aimed at violent protesters and rioting but also people and activity that disrupts or delays construction of the pipeline. “Preventing anti-pipeline protests that seek to end or slow the construction of the pipeline is not a valid government interest,” the complaint says.

Because SB 189 creates a “riot boosting fund” paid by those who

break the law, the law also “incentivizes” South Dakota to sue protesters and those who back them in order to compensate for security costs, the complaint says.

The lawsuit also challenges South Dakota Codified Laws 22-10-6 and 22-10-6.1, which make it illegal to encourage or solicit violence during a riot whether one is participating in it or not.

These laws are not “narrowly tailored to achieve the government interest of preventing violence,” the complaint says. They’re also redundant since South Dakota already bans riots, solicitation, unlawful assembly, disorderly conduct, blocking traffic, and ignoring law enforcement orders during riots.

The ACLU says the three laws violate the First and Fourteenth amendments by discouraging free speech and being unclear about what exact actions are considered boosting or encouraging a riot.

The plaintiffs are the Sierra Club; the Indigenous Environmental Network (IEN) Dakota Rural Action, a South Dakota group that organizes on behalf of family ranchers and farmers; and NDN Collective, a nationwide indigenous group that challenges resource extraction. Dallas Goldtooth, who heads IEN’s Keep It In the Ground campaign against fossil fuels, and Nick Tilsen, a Rapid City resident who founded NDN Collective, are also named as plaintiffs.

The ACLU is suing Noem, Attorney General Jason Ravnsborg, and Pennington County Sheriff Kevin Thom. The lawsuit named Thom because the ACLU suspects protests will take place near Rapid City, Janna Farley, ACLU spokeswoman, said in an email. Reported in: *Rapid City Journal*, March 28, 2019; courthouse-news.com, March 28.



Austin, Texas

Texas cannot ban contractors from boycotting Israel, according to a preliminary injunction issued on April 25, 2019 by the **US District Court for the Western District of Texas, Austin Division** in *Amawi v.*

Pflugerville ISD. The court ruled that the law plainly violates the free speech guarantee of the First Amendment.

“Following similar decisions by federal courts in Kansas and Arizona, the ruling becomes the third judicial finding—out of three who have evaluated the constitutionality of such laws—to conclude that they are unconstitutional attacks on the free speech rights of Americans,” according to *The Intercept*. Such cases arise out of the Boycott, Divestment and Sanctions [BDS] movement that seeks to pressure the government of Israel to modify its policies regarding Palestinians, and efforts by supporters of Israel to weaken the BDS movement and discredit it as anti-Semitic.

The plaintiff is Bahia Amawi. Her contract to work as an elementary school speech pathologist in Austin, Texas, was not renewed, due to her refusal to sign an oath certifying that she does not participate in any boycotts of Israel. The oath was required under a new law enacted with almost no dissent by the Texas State Legislature in May 2017. When Governor Greg Abbott signed the bill into law, he proclaimed: “Any anti-Israel policy is an anti-Texas policy.”

The governor’s attitude, along with the virtually unanimous pro-Israel sentiment in the Texas State Legislature, was cited by US District Court Judge Robert Pitman as evidence of why the pro-Israel oath violates the free speech guarantees of the US Constitution’s First Amendment. He quoted a 1943 US Supreme Court decision, *West Virginia State Board of Ed v. Barnette*: “If there is any fixed

star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

Judge Pitman emphasized that the law was not merely “government speech” in defense of Israel, but rather a classic embodiment of what the First Amendment was designed to prevent: punishment imposed on those who disagree with the majority’s political opinions on contested political topics. The attack on free speech, his ruling said, was manifest from the text of the law itself.

Much of the court’s reasoning relied upon the 1982 US Supreme Court decision in *NAACP v. Claiborne Hardware Co.*, which rejected attempts by the state of Mississippi to hold state NAACP leaders liable for losses suffered by stores during NAACP boycotts. Judge Pitman summarized *Claiborne*: “The desire to not purchase certain products is distinctly protected in the context of a political boycott,” and nobody can be punished for the “consequences” of protected First Amendment activities, including theories that their speech “inspired” or “incited” others to take action. In sum, said the court, “plaintiffs’ BDS boycotts are speech protected by the First Amendment.”

According to *The Intercept*, “What makes this ruling particularly important, aside from the fact that it comes from one of the largest states in the country, is that it completely rejected the most common (and most toxic) justification for these laws: that it is not designed to suppress speech or activism against Israel but rather to combat discrimination (namely, anti-Semitism or discrimination against Israelis).”

The Intercept added, “Such laws are indisputably designed to outlaw and punish political activism that lies at the heart of the First Amendment’s free speech guarantee. . . . These three rulings from federal courts in Kansas, Arizona, and now Texas technically apply only to the specific districts in which these courts sit. But they give clear judicial momentum to an ultimate finding that these still-proliferating laws are direct infringements of the core rights guaranteed by the US Constitution.” Reported in: *The Intercept*, April 26, 2019.

SOCIAL MEDIA New Orleans, Louisiana

The **Fifth Circuit Court of Appeals** in New Orleans ruled in mid-April 2019 that the official Facebook page of the Hunt County Sheriff’s Office (HCSO) was a public forum; that the office’s posting rules were based on the viewpoint of the poster, in violation of the First Amendment; and that the rules constituted official county policy. The ruling in *Robinson v. Hunt County, Texas* reverses a lower court’s denial of a preliminary injunction and remands the case for further proceedings. (Thus, the case is not yet settled, although the appeals court ruling answers many of the legal questions.)

The Facebook page declared, “We welcome your input and POSITIVE comments regarding the Hunt County Sheriff’s Office.” It also stated, “We encourage you to submit comments, but please note that this is NOT a public forum.”

On January 18, 2017, the HCSO Facebook account posted this message:

We find it suspicious that the day after a North Texas Police Office is murdered we have received several anti-police calls in the office as well



as people trying to degrade or insult police officers on this page. ANY post filled with foul language, hate speech of all types and comments that are considered inappropriate will be removed and the user banned. There are a lot of families on this page and it is for everyone and therefore we monitor it extremely closely. Thank you for your understanding.

Deanna J. Robinson and others posted on the page criticizing the policy as a violation of the First Amendment. Robinson's post was removed, and she was banned from the page. She sued individual officers and the county and moved for a preliminary injunction. The district court denied the injunction and later dismissed the case for failure to state a claim.

The Fifth Circuit reversed the decision, holding that she sufficiently pleaded a constitutional violation, because the defendants' actions constituted viewpoint discrimination in violation of the First Amendment. The court said that the Facebook page was a public forum, and it didn't matter which kind (designated or limited), because either way viewpoint-based discrimination is impermissible.

The circuit court held that the policy constituted official policy (for purposes of Robinson's Section 1983 claim against the county), because Robinson "has plausibly alleged that Hunt County had an explicit policy of viewpoint discrimination on the HCSO Facebook page," through the sheriff's official control of the page. Reported in: *Constitutional Law Prof Blog*, April 20, 2019.

Upper Marlboro, Maryland

Racist memes on a cellphone and a racist Facebook page can be used as evidence in the trial of a white man charged with murder and a hate crime

in a black student's fatal stabbing on the University of Maryland's campus, a judge in the **Circuit Court for Prince George's County, Maryland** ruled on June 5.

In the criminal case against **Sean Urbanski**, defense attorneys argued jurors should not see evidence that the twenty-four-year-old liked a Facebook page called "Alt-Reich: Nation," and had at least six photographs of racist memes on his phone. Urbanski's lawyers argued the material is inflammatory, irrelevant, and inadmissible, with no connection between the content and the killing.

Prince George's County prosecutors said the racist content found on Urbanski's cellphone points to a motive for the killing, indicating he stabbed Bowie State University student Richard Collins III because he was black. "These photographs show that the defendant has a bias against black people," said deputy state's attorney Jason Abbott. "These photos show violence against black people."

Defense attorney William Brennan argued, "Possessing racially insensitive material is not against the law. It is protected by the First Amendment." Citing a *New York Times* story that suggested the Facebook page was created as a parody, he said it does not prove what was in Urbanski's mind.

But Circuit Court Judge Lawrence Hill Jr. denied the defense's request to exclude the evidence from a trial scheduled to start in late July.

"There are some (memes), or a few, that do suggest some level of violence," the judge said. "It will not be unfairly prejudicial for the state to use this evidence."

Urbanski is charged with first-degree murder and a hate crime in the May 2017 killing of Collins, twenty-three, who was visiting friends at the University of Maryland's

College Park campus when he was stabbed to death at a bus stop.

Judge Hill also refused to throw out the hate crime charge. The judge rejected defense lawyers' argument that the racist material extracted from Urbanski's cellphone and the deleted Facebook page are protected speech under the First Amendment.

"Every person has a right of freedom of speech," Hill said. "The defendant is not here for a violation of freedom of speech."

Wired.com said cases such as this are "forcing courts to grapple with new questions about the relative significance of a Facebook post, a 'Like,' a follow, a tweet. . . . Courts will have to carefully decide how much weight they can really put on a person's online allegiances and whether mere membership in such a hateful online group constitutes evidence of intent to commit a hate crime."

Neil Richards, a professor of First Amendment and privacy law at Washington University School of Law, told wired.com, "We don't want to permit a system in which merely reading something or associating with other people can be used as strong evidence that you hold the views of the people you hang out with or the things you read." Reported in: wired.com, May 23, 2017; Associated Press, June 5, 2019.

New York, New York

President Trump has been violating the Constitution by blocking people from following his Twitter account because they criticized or mocked him, a three-judge panel on the **US Court of Appeals for the Second Circuit**, in New York, ruled unanimously on July 9, 2019.

Because Trump uses Twitter to conduct government business, the judges wrote, he cannot exclude some Americans whose views he dislikes



from reading his posts, nor block them from engaging in conversations in the replies to them.

The ruling may help define what the First Amendment means in a time when political expression increasingly takes place online. It is also a time, Judge Barrington D. Parker wrote, when government conduct is subject to a “wide-open, robust debate” that “generates a level of passion and intensity the likes of which have rarely been seen.”

The First Amendment prohibits an official who uses a social media account for government purposes from excluding people from an “otherwise open online dialogue” because they say things that the official finds objectionable, Judge Parker wrote.

“This debate, as uncomfortable and as unpleasant as it frequently may be, is nonetheless a good thing,” the judge wrote. “In resolving this appeal, we remind the litigants and the public that if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less.”

The Justice Department said officials had not yet decided whether to appeal to the full appeals court or the Supreme Court. “We are disappointed with the court’s decision and are exploring possible next steps,” said Kelly Laco, a department spokeswoman. “As we argued, President Trump’s decision to block users from his personal Twitter account does not violate the First Amendment.”

But Jameel Jaffer, the director of the Knight First Amendment Institute at Columbia University, which represented a group of Twitter users who were blocked by Trump and filed the lawsuit, praised the ruling. He said that public officials’ social-media accounts are among the most

significant forums for the public to discuss government policy.

Trump’s Twitter account, @realDonaldTrump, has nearly 62 million followers, and he often uses it to make policy pronouncements and communicate with the public, driving the news of the day. His posts routinely generate tens of thousands of replies, as people respond to the original tweet and to each other’s replies.

The lawsuit argued that Trump’s account amounted to a public forum—a “digital town hall”—so his decision to selectively block people from participating in that forum because he did not like what they said amounted to unconstitutional discrimination based on their viewpoints.

Trump’s legal team argued, among other things, that he operated the account merely in a personal capacity, and so had the right to block whomever he wanted for any reason—including because users annoyed him by criticizing or mocking him.

But the appeals court upheld a May 2018 decision by a Federal District Court judge that also found Trump’s practice of blocking his critics from his Twitter account to be unconstitutional. Reported in: *New York Times*, July 9, 2019.

PUBLIC TRANSIT ADS New York, New York

Asking why New York City’s subway accepts advertisements depicting erectile dysfunction, bare buttocks, inflatable plastic breasts, and condoms, but is refusing ads for women’s sex toys, a female-owned startup company filed suit against New York City’s transit authority (MTA) on June 18, 2019, in **US District Court, Southern District of New York**. The case, *Dame Products v. Metropolitan Transit Authority et al.*, “adds another chapter to the female founder-led ongoing

battle to access advertising platforms that consistently reject and censor female sexual wellness oriented businesses,” according to *Forbes* magazine.

Dame Products cofounders Alexandra Fine and Janet Lieberman said they spent months working with Outfront, the agency that revises advertising proposals for the MTA.

Dame’s legal team seeks damages for the MTA’s violations of Dame’s rights to free speech, due process, and equal protection under the First and Fourteenth Amendments of the United States Constitution, declarations that the Authority’s conduct was unlawful and improper, and an injunction requiring the MTA to approve and display Dame’s advertisements.

The MTA rejected the ad campaign on the basis of “updated guidelines” banning “sexually oriented” advertising. Dame promises to “close the pleasure gap” for women by selling “toys, for sex.”

The complaint faulted the MTA for deciding to “privilege male interests” through irrational, arbitrary advertising choices that violate the US Constitution’s First Amendment guaranteeing free speech. It said MTA chose to allow ads from bedding company Brooklinen featuring sexual double entendres, and a travel booker urging travelers to “Get Wet (on the beach, not from the guy next to you).”

Dame said the MTA even allowed an ad sponsored by the city’s health department for “Kyng”-sized condoms.

MTA spokesman Maxwell Young said in a statement that the agency is “constitutionally entitled to draw reasonable content-based distinctions” among ads, including by banning ads for sex toys, and that its ad policy “in no way” discriminates based on gender or viewpoint. He said the MTA intends to defend against the lawsuit.



In the formal complaint, the plaintiff details the MTA's continued approval of male-centric companies who "reap the tremendous financial benefit and prestige of advertisement space on the MTA's well-trafficked property."

The complaint also points to the discriminatory nature of the MTA's advertising choices, "and its fundamental misunderstanding of Dame's products, which have transformed the sexual health and wellness of more than 100,000 consumers." Dame cites research by medical professionals who found vibrators and other sex toys and tools to be beneficial to a variety of conditions, such as arousal difficulties and sexual discomfort caused by pelvic pain.

There is "nothing titillating" about Dame's ads, Richard Emery, a lawyer for Dame, told Reuters in an interview.

The MTA told CNN, "The MTA's FAQs about its advertising policy clearly states that advertisements for sex toys or devices for any gender are not permitted, and advertising for FDA approved medication—for either gender—is permitted."

New York City's subway in 2017 carried about 5.58 million riders on an average weekday and 1.73 billion riders overall. Reported in: *Forbes*, June 18, 2019; Reuters, June 18.

PRIVACY Washington, D.C.

Facebook is facing scrutiny and at least one lawsuit over whether it failed to safeguard the personal data of its users. The attorney general for the District of Columbia filed a suit entitled *District of Columbia v. Facebook* on December 19, 2018, in **Superior Court of the District of Columbia, Civil Division**.

On June 28, 2019, the court rejected Facebook's second attempt

to stop the lawsuit, and the case will now proceed to the discovery phase, according to DC Attorney General Karl Racine.

The company's "lax oversight and misleading privacy settings" allowed UK political consultancy Cambridge Analytica to gain access to the personal information of Facebook users without their permission, according to the attorney general's office. In March 2018, revelations surfaced that Cambridge Analytica, which had ties to Donald Trump's presidential campaign, had improperly gained access to the data of up to 87 million Facebook users.

The lawsuit accuses Facebook of violating DC's consumer protection law.

A Facebook spokesperson told CNET that protecting its users' data and privacy is "a top priority. . . . We know we have more work to do. However, we do not believe this suit has any merit and will continue to defend ourselves vigorously."

The US Federal Trade Commission also kicked off an investigation of Facebook [see page 37].

In addition, the New York attorney general's office is investigating Facebook over the harvesting of email contacts of about 1.5 million users without their consent. Facebook confirmed in April 2019 that it collected the email contacts of its users, but said it wasn't deliberate. Reported in: oag.dc.gov, December 19, 2018; cnet.com, December 19, 2018, June 28, 2019.

Boston, Massachusetts

Nearly two years after suing the federal government for its warrantless and suspicionless searches of phones and laptops at airports and other US ports of entry, the American Civil Liberties Union (ACLU) and the Electronic Frontier Foundation on

April 30, 2019, filed a motion for summary judgment "to prevent such searches and confiscations in the future, and to expunge the information the government has retained from past searches."

Since the filing of the suit, *Alasaad, et al. v. McAleenan, et al.*, in **US District Court for the District of Massachusetts**, in September 2017, US Customs and Border Protection (CBP) and US Immigration and Customs Enforcement (ICE) have had to turn over documents and evidence about the searches and explain their policies under oath. The ACLU says this has produced enough evidence for the court to declare the searches to be violations the First and Fourth Amendments of the US Constitution without proceeding to a trial.

An ACLU statement said:

The information we uncovered through our lawsuit shows that CBP and ICE are asserting near-unfettered authority to search and seize travelers' devices at the border, for purposes far afield from the enforcement of immigration and customs laws. The agencies' policies allow officers to search devices for general law enforcement purposes, such as investigating and enforcing bankruptcy, environmental, and consumer protection laws. The agencies also say that they can search and seize devices for the purpose of compiling "risk assessments" or to advance pre-existing investigations. The policies even allow officers to consider requests from other government agencies to search specific travelers' devices.

CBP and ICE also say they can search a traveler's electronic devices to find information about someone else. That means they can search a US citizen's devices to probe whether that person's family or friends may



be undocumented; the devices of a journalist or scholar with foreign sources who may be of interest to the US government; or the devices of a traveler who is the business partner or colleague of someone under investigation.

Both agencies allow officers to retain information from travelers' electronic devices and share it with other government entities, including state, local, and foreign law enforcement agencies. "Let's get one thing clear: The government cannot use the pretext of the 'border' to make an end run around the Constitution," the ACLU stated.

The suit contends that the Fourth Amendment protects against unreasonable searches and seizures, including at the border. Border agents have authority to search for contraband or illegal items, but mobile electronic devices are different. The ACLU argues that "they contain far more personal and revealing information than could be gleaned from a thorough search of a person's home," and a home may not legally be searched without a warrant.

The ACLU says the searches also violate the First Amendment. "People will self-censor and avoid expressing dissent if they know that returning to the United States means that border officers can read and retain what they say privately, or see what topics they searched online. Similarly, journalists will avoid reporting on issues that the US government may have an interest in, or that may place them in contact with sensitive sources."

The plaintiffs are ten US citizens and one lawful permanent resident whose phones and laptops were searched while returning to the United States.

Their experiences demonstrate the intrusiveness of device searches. For instance, Zainab Merchant and

Nadia Alasaad both wear headscarves in public for religious reasons, and their smartphones contained photos of themselves without headscarves that are not meant to be seen by strangers. Officers searched the phones nonetheless.

On another occasion, a border officer searched Merchant's phone even though she repeatedly told the officer that it contained attorney-client privileged communications.

Isma'il Kushkush, a journalist, worried that repeated searches of his electronic devices meant he was being targeted because of his reporting. He questioned whether to continue covering issues overseas.

"Crossing the US border shouldn't mean facing the prospect of turning over years of emails, photos, location data, medical and financial information, browsing history, or other personal information on our mobile devices," according to the ACLU statement. "That's why we're asking a federal court to rule that border agencies must do what any other law enforcement agency would have to do in order to search electronic devices: get a warrant." Reported in: aclu.org, April 30, 2019.

Harrisburg, Pennsylvania
School bus surveillance videos in two Pennsylvania cases can be released to the public under the state's Right to Know Law (RTKL) and are not "education records" subject to the confidentiality restrictions of the Family Educational Rights and Privacy Act (FERPA), according to the **Commonwealth Court of Pennsylvania**.

In *Easton Area Sch. Dist. v. Miller*, the court ruled on July 20, 2018, that a video that depicted a school teacher roughly disciplining a student directly related to the teacher, not the students, so the students, their

families, and the school could not keep them private. In *Central Dauphin School District v. Hawkins*, the court decided on December 10, 2018, that a recorded confrontation between a student and a parent of another student was not an "education record" of the student under FERPA because it was not directly related to the student nor maintained by the District.

In both cases, a school district had denied a RTKL request for video from a school bus security camera, on the grounds that under FERPA the videos were education records of the students depicted.

FERPA cuts off federal funds to any school district that permits the release of education records (or personally identifiable information from those records) without the consent of the students' parents. Under FERPA, education records are defined as materials that: (1) contain information directly related to a student; and (2) are maintained by a school district. A record must meet both parts of the definition to qualify as an education record.

In the *Miller* case, the court focused on FERPA's definition that protected records are "directly related" to a student. The court held that the video depicting the teacher abusing the student was only tangentially related to the student.

In the *Hawkins* case, the court focused on whether the video was "maintained" by the school district. The Commonwealth judges cited a 2002 US Supreme Court decision in *Owalso ISD v. Falvo* that said maintaining a record means keeping it in a filing cabinet in a records room at the school, or on a permanent secure database that is subject to a maintenance protocol. In *Hawkins*, the court found that the video was not "maintained" by the district because the district did not have a maintenance



protocol for school bus videos and that such videos were not permanently maintained.

Though the Commonwealth Court narrowed the FERPA exception in the *Miller* and *Hawkins* decisions, the court did not hold that every school bus video is a public record. Some school bus videos are subject to the protections of FERPA.

Moreover, the Commonwealth Court asserted that both decisions are consistent with guidance issued by Department of Education on its website. This guidance provides that a surveillance video showing two students fighting that is used as part of a disciplinary action is “directly related” to the students who are disciplined. With respect to the “maintenance” requirement, a photo or video that shows two students fighting which is maintained in the students’ disciplinary records is “maintained” by the District under FERPA.

Thus, according to a summary of the cases in *JD Supra*, a school district should always consult its lawyers before releasing a video involving a student pursuant to a RTKL request, because determining whether a video is an education record of a student can be a difficult, fact-sensitive

determination. Reported in: *JD Supra*, April 29, 2019.

AGENCY ACTIONS

[EDITOR’S NOTE: Some government rulings do not come from a bench in the judicial branch of the government, but from agencies of the executive branch.]

Washington, D.C., and Menlo Park, California

The Federal Trade Commission (FTC) is negotiating a settlement with Facebook to strengthen the social media company’s privacy practices, two sources told the *New York Times*. In addition, Facebook is preparing for the possibility that the FTC may impose a fine of up to \$5 million—the highest ever levied by the United States against a technology company. And *Politico* reports that another option under consideration at the FTC, in addition to financial penalties, is to hold Facebook’s owner, Mark Zuckerberg, personally liable.

The *Times* reported that as negotiations with the FTC continue, Facebook has offered to create an independent privacy committee (that would include members of Facebook’s board of directors) to protect users’ data, and it agreed to an external assessor

who would be appointed by the company and the FTC. The negotiations have been underway for months over claims that Facebook violated a 2011 privacy consent decree.

The negotiations are being conducted behind closed doors. Representatives from Facebook and the FTC declined to comment for the media.

A \$5 billion penalty would be far higher than the FTC’s current record against a tech company. The agency fined Google \$22.5 million in 2012 for misleading users about how some of its tools were tracking users.

Yet even \$5 billion would be a small percentage of the company’s annual revenue, which was \$56 billion—and growing. Facebook said that its revenue in the first quarter of 2019 increased 26 percent from a year earlier.

Some privacy advocates have said they would like the FTC to limit Facebook’s ability to share data with business partners, or require it to take more measures to inform consumers when and how it collects data. Such requirements are not expected to be in the settlement, sources told the *Times*. Reported in: *New York Times*, May 1, 2019; *Politico*, July 3.