NEWS FROM THE BENCH

SUPREME COURT

The US Supreme Court on October 15, 2019, rejected an appeal by a student who said her First Amendment religious freedom was violated when a high school class made her learn about Islam.

In ***Wood v. Arnold***, the US Court of Appeals for the Fourth Circuit had ruled against Caleigh Wood's claim that a world history class she took during the 2014-15 school year at La Plata High School in Charles County, Maryland, had compelled her to profess a belief in Islam. The class included a unit comparing some of the world's religions. A fill-in-the-blank assignment required students to write a central belief of Islam, "There is no god but *Allah* and Muhammad is the *messenger* of Allah."

Showing that you know what Muslims believe is not the same as professing that you share that belief. The appellate court said that, in context, the coursework materials that bothered Wood did not violate her First Amendment rights. By declining to hear her appeal, the Supreme Court allowed the Fourth Circuit ruling to stand. Reported in: *Bloomberg Law,* October 15, 2019.

The American Civil Liberties Union (ACLU) in December 2019 asked the Supreme Court to review a decision by the US Court of Appeals for the Fifth Circuit in a lawsuit, ***Mckesson v. Doe***, that activists and legal scholars fear could have wide-reaching consequences for protest organizers across the country.

A police officer, who was hit in the head by a rock thrown at a 2016 demonstration in Louisiana, sued prominent Black Lives Matter organizer DeRay Mckesson, on the premise that Mckesson should have foreseen the possibility of violence at the protest and should be held accountable for it. Mckesson did not throw the rock nor tell anyone else to throw it.

The case initially was tossed by a federal judge, citing a Supreme Court decision widely interpreted as a shield for protesters sued for damages they didn't directly cause. But a three-judge panel with the appellate court ruled in August that a jury should be allowed to hear the case and issue a verdict on Mckesson's alleged negligence.

The ACLU argues that allowing the case to proceed in the face of civil rights protections long guaranteed to protesters could pave the way for similar lawsuits and have a chilling effect on protest organizers nationwide.

"If this is allowed to stand, anybody can show up and throw a rock at a protest to bankrupt a movement they disagree with," said Ben Wizner, director of the ACLU's Speech, Privacy and Technology Project. "People know when they step into the street that they might have to spend some hours in jail or pay a fine. But if they might have to pay a multimillion-dollar civil judgment—that's something they're not prepared for, and can't possibly be expected to prepare for."

In July 2016, Mckesson, a Black Lives Matter activist best known for leading marches in his signature blue vest, led hundreds of people in a march onto a busy Louisiana highway in protest over the death of Alton Sterling, a black man whose shooting by two police officers was captured on video. Police arrested several demonstrators, including Mckesson.

One police officer, identified in court documents as John Doe, suffered injuries to his teeth, jaw, and brain after a demonstrator threw a rock and hit the officer in the head, court documents state. The rock thrower was never identified. Instead, the officer sued Mckesson, who had become a recognizable face in the Black Lives Matter movement.

The suit does not allege that Mckesson encouraged someone to throw a rock or to commit a violent act, but says Mckesson led a protest that gave someone else the opportunity to attack the officer. According to the lawsuit, Mckesson knew there was a chance someone in the crowd could become violent at the demonstration.

Fifth Circuit Judge E. Grady Jolly wrote in the court's decision allowing the case to proceed to a trial that "Mckesson is liable in negligence for organizing and leading the Baton Rouge demonstration to illegally occupy a highway" and that the lower court had "erred in dismissing the suit on First Amendment grounds."

The federal judge who originally had dismissed the case cited the landmark 1982 Supreme Court decision *NAACP v. Claiborne Hardware Co.*, which created a precedent for blocking lawsuits against protesters because, the Supreme Court ruled, lawsuits could be wielded by the government as a weapon against protesters that would effectively suppress free-speech rights.

The right to protest is among the liberties enshrined in the First Amendment. Violence at protests, however, is not a protected form of speech—and protesters can, and have, been criminally charged for violent acts.

But for decades, courts have ruled against attempts to sue protest organizers for the acts of others.

In this instance, the Fifth Circuit ruled, Mckesson could be held to account because he had led people onto a state highway, breaking the law and opening up the possibility of violence.

"The vast majority of people in the aggregate are peaceful at protests, but there is always a risk of violence," said

Tabatha Abu El-Haj, a law professor at Drexel University. "If the masses really come out in force, there's a risk of revolution. And that risk is what is supposed to drive governmental responsiveness to concerns raised at these demonstrations. . . . That risk of violence is actually critical to why people pay attention."

The ACLU's argument hinges on the fear that until the Supreme Court intervenes, the appellate court's decision could be cited in future decisions. It will be weeks before the Supreme Court decides whether to hear Mckesson's case. Reported in: *Washington Post,* December 13, 2019.

LIBRARIES

Orange City, Iowa

When Paul Dorr burned four LGBTQ-themed children's library books [*See* JIFP*, Summer 2019, p. 25*], he was not simply exercising his First Amendment right to express his religious objections to the books, but was committing a crime. He was found guilty of fifth degree criminal mischief on August 6, 2019, in ***Iowa v. Dorr*** in **Sioux County District Court**.

In a written statement after the trial, Dorr said he burned the books to exercise his freedom of speech and faith. "My motive was to honor the Triune God in whom my faith resides and to protect the children of Orange City from being seduced into a life of sin and misery," Dorr said in his statement.

Dorr, a resident of Ocheyedan in northwest Iowa, runs the Christian group "Rescue The Perishing." He was fined $65 (the minimum for his misdemeanor charge) plus a 35 percent criminal penalty surcharge and court costs. Sioux County Attorney Thomas Kunstle, who represented the state of Iowa, requested Dorr be fined the maximum penalty of $625, a 35 percent surcharge, and court costs for destroying the library's property. The books were "damaged beyond use," according to the criminal charge.

On October 19, 2018, Dorr burned four children's books with lesbian, gay, and bisexual themes that he had checked out from the Orange City Public Library. He posted a video of himself burning the books, and the video went viral on social media.

In the following weeks, the library received between 800 to 1,000 book donations (including copies of the books Dorr burned), and more than $3,700. Reported in: Iowa Public Radio, August 6, 2019.

SCHOOLS

Birmingham, Alabama

Public school officials at Childersburg Middle School in Talladega County, Alabama, did not violate the First Amendment when they punished a student for writing "Trump 2016" on his homeroom teacher's whiteboard, according to the **US District Court for the Northern District of Alabama** in ***T.S. v. Talladega County Board of Education***. The district court emphasized that the punishment did not relate to any particular political viewpoint.

The controversy occurred around the time of the presidential election of 2016. Assistant Principal Michael Bynum heard reports of disruptions at other schools over the election. He also heard a report that students at his school were "wound up in the halls and were very loud and rowdy in the halls."

As a result, Bynum announced a new school rule forbidding any discussion of the election during school except for history classes. T.S., an eighth-grade student, went into his homeroom teacher's classroom and wrote "Trump 2016" on her whiteboard. He then argued with about fifteen other students, many of whom objected to the message.

Because of this act, Bynum paddled T.S. Later, T.S. filed a federal lawsuit, alleging a violation of his First Amendment free-speech rights and rights to due process. Regarding the First Amendment claim, Judge Annemarie Carney Axon ruled that school officials were entitled to qualified immunity—a doctrine that protects government officials from liability unless they violate clearly established constitutional rights.

Axon determined that T.S.'s claim must be analyzed under the US Supreme Court's First Amendment decision, *Tinker v. Des Moines Independent Community School District* (1969). Under the *Tinker* standard, public school officials can censor student speech if they can reasonably forecast that the student speech will cause a substantial disruption of school activities or invade the rights of others.

Judge Axon noted that Bynum "faced reports of actual disruption that the election caused in other schools and at Childersburg Middle School." The judge also noted that the policy did not single out any particular political viewpoint.

As a result, the judge ruled that Bynum and other school officials were entitled to qualified immunity, which protects government officials from liability unless they violated clearly established constitutional law principles. Reported in: freedomforuminstitute.org, August 13, 2019.

Denver, Colorado

Victory Preparatory Academy (VPA), a charter school in Colorado, violated the First Amendment by requiring students to stand, salute the flag, and recite the school pledge, and by punishing students and parents for protesting about the overly authoritarian

atmosphere and rigid discipline at the school. In ***Flores v. Victory Preparatory Academy***, the **US District Court for the District of Colorado** recognized that students retain free-speech rights at school and refused to dismiss their lawsuit.

The dispute arose in September 2017, when the school held an assembly in the gym. During assemblies, students were expected to stand, salute the flag, and recite the school pledge. Several students sat down and did not recite the school pledge. The school's chief executive officer, Ron Jajdelski, then ordered the protesting students back to the gymnasium. He became frustrated and sent the entire student body home.

Officials expelled one student, known in court papers as V.S., for talking about the protest on Facebook and for sharing a post by another student that Jajdelski "could suck the student's left nut." They expelled another student for posting messages about the protest and encouraging other students to participate. Then school officials banned Mary and Joel Flores, parents of a student at the school, for filming part of the protest at school.

These individuals and others sued the school officials, advancing a number of First Amendment claims.

First, students have a First Amendment right not to recite the school pledge, as a form of peaceful protest, as the US Supreme Court recognized in *West Virginia Board of Education v. Barnette* (1943).

Furthermore, the Supreme Court recognized that students have a right to express themselves through silent passive political speech of the students, when it upheld students' black armband protests in *Tinker v. Des Moines Independent Community School District* (1969).

VPA officials argued that the recitation of the school pledge was a form of school-sponsored speech and subject to the more deferential standard for school officials from the US Supreme Court's decision *Hazelwood School District v. Kuhlmeier* (1988), allowing school censorship if it is related to reasonable educational purposes.

In September 2019, Judge Raymond P. Moore ruled against VPA. "Refusing to stand and recite the school pledge is an archetypal example of a 'silent, passive expression of opinion' that is protected under *Tinker*," he wrote.

The judge also denied Jajdelski qualified immunity—a doctrine that often shields government officials from liability unless they violate clearly established constitutional law. Here, Jajdelski violated clear constitutional law, punishing students for refusing to recite a pledge. That is the essence of unconstitutionally compelling speech in violation of the First Amendment.

Judge Moore also found that the parents who were banned from campus stated a plausible retaliation claim. He noted "it was beyond dispute that plaintiffs Mary and Joel Flores had a clearly established right to publicly criticize VPA without facing retaliation." Reported in: freedomforumintstitute.org, September 17, 2019.

Newport News, Virginia

The **US District Court for the Eastern District of Virginia, Newport News Division** ruled in ***Grimm v. Gloucester County School Board*** that the Gloucester County (Virginia) School Board violated transgender student Gavin Grimm's rights under Title IX and the equal-protection clause of the US Constitution with its policy that barred students from using restrooms corresponding with their gender identity.

"There is no question that the board's policy discriminates against transgender students on the basis of their gender non-conformity," US District Judge Arenda L. Wright Allen of Norfolk, Va., wrote in a decision on August 9, 2019. "Under the policy, all students except for transgender students may use restrooms corresponding with their gender identity. Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go."

The school board's policy limited male and female locker rooms and restrooms to the "corresponding biological genders" and said students with gender identity issues would be offered "an alternative appropriate private facility."

Grimm, who is now a twenty-year-old college student, has seen his case go up and down the judicial ladder, and it might again be appealed to a higher court. The US Supreme Court had agreed in 2016 to use the case to decide whether courts should defer to Obama-era guidance calling on schools to allow transgender students to use facilities corresponding to their gender identity.

When President Donald Trump's administration withdrew that guidance in 2017, the case returned to lower courts on the more fundamental question of whether Title IX of the Education Amendments of 1972, which bars sex discrimination in federally funded schools, covers transgender students.

Wright ruled on that important threshold issue in Grimm's case in 2018, holding that claims of discrimination on the basis of transgender status may be brought under a gender-stereotyping theory covered by Title IX.

In the new decision Wright granted summary judgment to Grimm. "The board's assertion that Mr. Grimm has suffered no harm as a result of its policy is strikingly unconvincing," the judge said. "Mr. Grimm broke down sobbing at school because there was no restroom he could access comfortably."

Wright said that the school board continues to harm Grimm by refusing to update his school records to reflect his male identity. "Whenever Mr. Grimm has to provide a copy of his transcript to another entity, such as a new school or employer, he must show them a document that negates his male identity and marks him different from other boys."

Wright issued a permanent injunction declaring that the policy violated Title IX and the 14th Amendment's equal-protection clause. The injunction awards Grimm $1 in nominal damages, but also orders the board to change his school records to reflect the male designation on his updated birth certificate. Reported in: *Education Week,* August 11, 2019.

COLLEGES AND UNIVERSITIES

Cincinnati, Ohio

The bias-response team at the University of Michigan at Ann Arbor, designed to help students who feel they have been harassed or bullied, uses "implicit threat of punishment and intimidation to quell speech," a three-judge panel of **US Court of Appeals for the Sixth Circuit** in Cincinnati ruled in late September 2019. In ***Speech First v. Schlissel,*** the appellate court sent the case back to the US District Court that had earlier supported Michigan's right to refer students to its bias-response team. The university argued that the team is not a disciplinary body and that its role is to support and educate students who agree to participate, but the Court of Appeals vacated that judgment.

Speech First, a membership association based in Washington, DC, that advocates for free speech on college campuses, sued the university in 2018, seeking to force it to discontinue its bias-response team. It also challenged the university's student disciplinary code, which prohibits harassment and bullying in ways Speech First says are overly broad and potentially discriminatory.

"As used, these concepts capture staggering amounts of protected speech and expression, given that Michigan defines harassment as 'unwanted negative attention perceived as intimidating, demeaning, or bothersome to an individual,'" Speech First wrote in announcing the lawsuit.

Shortly after the lawsuit was filed, Michigan changed the definitions of the terms "bullying" and "harassment" to match Michigan law, which Speech First does not object to. The new definition for "harassment," for instance, is "conduct directed toward a person that includes repeated or continuing unconsented contact that would cause a reasonable individual to suffer substantial emotional distress and that actually causes the person to suffer substantial emotional distress. Harassing does not include constitutionally protected activity or conduct that serves a legitimate purpose."

The lawsuit accelerated a review of the university's speech policies that was already underway to ensure they were consistent with the First Amendment, the university said.

The appeals court decision said that there is no guarantee that the university won't revert to its previous definitions of bias and harassment. It also said the timing of the definition changes—after the lawsuit was filed—"raises suspicions that its cessation is not genuine."

The university has decried what it calls Speech First's "false caricature" of its free-speech policies and practices. And it criticized the Trump administration for mischaracterizing its bias-response team as a disciplinary body in a statement of interest the administration filed in the case.

But a majority of the three-judge Sixth Circuit panel said that the possibility of punishment "lurks in the background" when someone is invited to meet with the response team.

"Even if an official lacks actual power to punish, the threat of punishment from a public official who appears to have punitive authority can be enough to produce an objective chill," the ruling states.

Speech First said that the university's bias-response team had investigated more than 150 reports of alleged "expressions of bias" through posters, fliers, social media, whiteboards, verbal comments, and classroom behavior since April 2017. It argued that the university's standards for speech and bias reporting are unclear and risk being applied in an arbitrary or discriminatory manner.

Speech First members enrolled at Michigan steer clear of discussing topics including immigration, identity politics, and abortion for fear they might be anonymously reported to the bias team for "offensive, biased, and/or hateful" speech, the group wrote.

A lawyer for the Foundation for Individual Rights in Education, an advocacy group that defends free speech on college campuses, said colleges in the Sixth Circuit—Kentucky, Michigan, Ohio, and Tennessee—"will have to give very careful thought to how they use bias-response teams going forward; having any punitive or coercive elements to the program—or the appearance of them—may open a school up

to a lawsuit," Marieke Tuthill Beck-Coon, director of litigation, wrote in an email.

Ryan A. Miller, an assistant professor of higher education at the University of North Carolina at Charlotte who has studied and written about bias-response teams, said such teams take on multiple roles on campus, helping assess the campus climate, referring students to support programs, and educating the campus about free-speech issues.

"Some incidents rise to the level of criminal acts and need to be referred to the appropriate authorities, but for those that don't, team members might refer students to support resources they weren't aware were available," he said. As a result of the increased scrutiny, he said, "they have become incredibly sensitive to and aware of the needs of accommodating free speech."

Hundreds of campuses have bias-response teams, and those numbers appear to be growing, Miller said. A few, though, have changed their policies or disbanded the teams in response to criticism that they inhibit free speech.

"Unfortunately, bias-response teams have come to represent lots of pre-existing stereotypes about higher education," Miller said, as bastions of liberal indoctrination where conservative views are squelched. Reported in: *Chronicle of Higher Education*, September24, 2019.

BOOK PUBLISHING
Alexandria, Virginia

The **US District Court for the Eastern District of Virginia, Alexandria Division**, in ***USA v. Snowden et al.***, ruled on December 17, 2019, that the US government can seize all the proceeds NSA leaker Edward Snowden is making from his new book, *Permanent Record*. Judge Liam O'Grady ruled that Snowden violated secrecy agreements he signed with the CIA and the NSA by publishing the book, which recounts his time at both intelligence agencies as a government contractor.

The judge pointed to the "unambiguous" language in the signed agreements, which required Snowden to first submit the book to the CIA and the NSA for approval before publication. If he failed to do so, then under the agreements, the federal government has the power to confiscate any royalties he made from divulging US secrets.

"The terms of these Secrecy Agreements are clear, and provide that he is in breach of his contracts," wrote in the ruling.

The same ruling says the US government can also confiscate any profits Snowden has made in paid speeches where he's discussed sensitive details about CIA and NSA spy activities.

Snowden's defense team had argued in court that both the CIA and the NSA never would have reviewed his book in "good faith and within a reasonable time." Snowden's defense also "asserts that this lawsuit is based upon animus towards his viewpoint and that the government is engaged in selectively enforcing the Secrecy Agreements," the ruling noted. Nevertheless, the arguments failed to convince the district judge.

Snowden's legal team is reviewing its options to challenge the judge's ruling.

Snowden's book, *Permanent Record*, was published in September 2019, and has become a *New York Times* bestseller. Reported in: pcmag.com, December 17, 2019; courtlistener .com, December 17.

INTERNET
Washington, D.C.

The US Department of Education's internet filter blocked access to the website of Public Citizen and other advocacy organizations by categorizing them as "adult/mature content," alongside porn and gambling. Public Citizen, which was founded in the early 1970s by Ralph Nader and works on such issues as campaign finance reform and consumer safety, on May 14, 2919, filed a lawsuit, ***Public Citizen v. US Department of Education***, in **US District Court for the District of Columbia**.

A previous Freedom of Information Act request failed to explain the censorship. Through its lawsuit, Public Citizen learned that the Education Department's internet filtering is managed by a company called Fortinet, which provides network and content security to companies and government entities. Fortinet's filter applied classifications for specific websites and then broader categories to those specific classifications. There was no explanation of why Fortinet decided that so-called "advocacy groups" needed to be placed under the "adult/mature" content category.

In search of a resolution, the Department of Education first informed Public Citizen that it was "whitelisting" its website so that it no longer got caught up in their security filters. When Public Citizen became more fully aware of what was happening with those filters, it sought to have Fortinet take "advocacy organization" out of the "adult/mature" content category.

The Department of Education agreed to ask Fortinet not to block advocacy groups on the Department's networks. As a result, Public Citizen announced on September 10, 2019, that it was dropping its lawsuit against the department. But even though the group is no longer bringing legal action, it said there was no way to know if other groups were also having

their websites blocked. Reported in: *Daily Beast*, September 12, 2019.

SOCIAL MEDIA

Minneapolis, Minnesota

Minnesota's law against revenge porn is unconstitutional and infringes on First Amendment rights, the **Minnesota Court of Appeals** ruled on December 23, 2019, as it reversed the conviction of a man who circulated explicit photos of a former girlfriend. In ***Minnesota v. Casillas***, the court ruled that the state law was such a broad violation of First Amendment free-speech rights that it couldn't be fixed by a ruling limiting its scope.

According to court filings, Michael Anthony Casillas used the victim's passwords to access her accounts after their relationship ended to obtain sexual photos and videos of her, then threatened to release them. She later received a screenshot from one explicit video that had been sent to forty-four recipients and posted online.

A Dakota County judge rejected defendant Casillas's First Amendment challenge to the state law and sentenced him to twenty-three months in prison.

The three-judge appeals panel called Casillas' conduct "abhorrent," and said they recognized that the nonconsensual dissemination of private sexual images can cause significant harm.

"The state legitimately seeks to punish that conduct," they wrote. "But the state cannot do so under a statute that is written too broadly and therefore violates the First Amendment."

In throwing out his conviction, Judges Michelle Larkin, Peter Reyes, and Randall Slieter said the state's revenge porn statute has the potential to cover conduct that is constitutionally protected, such as sharing images that appear in publicly accessible media with the consent of the people depicted.

Specifically, they said, the statute lacks a requirement that prosecutors prove an intent to cause harm. They said the language allows for convictions even if the defendant didn't know that the person depicted did not consent to the distribution of that image. And they said it allows convictions when the defendant didn't know that the person depicted had a reasonable expectation of privacy.

Rep. John Lesch, a St. Paul Democrat and chief author of the 2016 law, called on Attorney General Keith Ellison and Dakota County Attorney James Backstrom to appeal the ruling to the Minnesota Supreme Court. He said similar laws have withstood constitutional challenges elsewhere, most recently in Illinois in October.

Ellison said his office was reviewing its options. Reported in: Associated Press, December 23, 2019.

Kansas City, Missouri

In ***Campbell v. Reisch*** in the **US District for the Western District of Missouri**, Judge Brian Wimes found that a state representative violated the First Amendment rights of a constituent when she blocked him from commenting on her tweet on Twitter.

Judge Wimes largely agreed with another court's reasoning in a similar case, *Knight First Amendment v. Trump*, in which the Second Circuit found that President Trump violated the First Amendment rights of those he blocked on Twitter. Judge Wimes found that the plaintiff's speech was on a matter of public concern; Campbell was disputing a criticism by Representative Cheri Toalson Reisch arising from Reisch's criticism of her political opponent. Further, Judge Wimes ruled that the "interactive space" on the Twitter account is a designated public forum. Reisch's blocking of the plaintiff because he disagreed with her was viewpoint discrimination prohibited by the First Amendment.

Judge Wimes' opinion considers the "color of state law" requirement under 42 USC. §1983, like the state action requirement, met under this "fact intensive" analysis. The judge stated that the defendant controlled the interactive space of her twitter account in her "capacity as a state legislator." Further, she had "launched her Twitter account alongside her political campaign"; her "handle references her elected district, and her Twitter account links to her campaign webpage." Plus, the "image associated with Defendant's Twitter account is a photo of her on the state house floor," and finally she "used the Twitter account to tweet about her work as a public official."

Along with a case about a county legislator on Facebook in *Davison v. Randall (& Loudoun County)* decided by the Fourth Circuit, this opinion seems to be part of a trend of courts finding that elected officials cannot "curate" the comment sections on their social media posts. Reported in: *Constitutional Law Prof Blog*, August 19, 2019.

Houston, Texas

A new Facebook feature that lets users clear their browser history was temporarily blocked by the **334th State District Court of Harris County** in Texas over concerns that it would also allow sex traffickers to cover their tracks, in ***Doe v. Facebook Inc.*** The plaintiff is a woman who claims in her lawsuit that the company didn't do enough to save her from being trafficked after meeting predators on the social network as a teenager.

On August 22, 2019, Judge Tanya Garrison granted the plaintiff's

motion to hit Facebook with a temporary restraining order. Despite this, on January 29, 2020, Facebook officially introduced the "Off-Facebook Activity" privacy tool and promoted it with a blog post by founder and CEO Mark Zuckerberg. That same day, Judge Garrison ordered Facebook to take down the tool. Facebook then requested an emergency appeal with the 14th State Court of Appeals in Houston.

Facebook contends it is protected under Section 230 of the Communications Decency Act, a part of that law that shields the operators of online services from liability due to content posted by users.

The two sides met on February 6, 2020, in San Francisco for the deposition of a Facebook executive. The deposition apparently satisfied Annie McAdams, the attorney who won the temporary restraining order, because on February 7 she filed an unopposed motion to dissolve the temporary restraining order and dropped motions related to it. The Off-Facebook Activity tool is no longer threatened by court action in Harris County.

The privacy tool allows users to separate their internet browsing history from their personal profiles. It's being promoted as a financial sacrifice that will hurt Facebook's bottom line while improving user privacy. It had previously been launched in Ireland, Spain, and South Korea.

Facebook has said it doesn't allow human trafficking on its network and that it works closely with anti-trafficking organizations.

The litigation in Houston is the first in the nation seeking to hold companies liable for the behavior of third parties on their web platforms after Congress carved out an exemption to the Communications Decency Act for sex trafficking in 2018.

Reported in: *Bloomberg*, August 22, 2019; *Houston Chronicle,* February 6, 2020, February 7.

Seattle, Washington

Prager University, a nonprofit headed by radio host Dennis Prager that produces conservative videos, claims that YouTube is suppressing many of its videos because of their conservative content. In opening oral arguments on August 27, 2019, in ***Prager University v. Google*** before the **US Ninth Circuit Court of Appeals** in Seattle, Prager challenges YouTube, a subsidiary of Google, for labeling more than one hundred PragerU videos as "dangerous" or "derogatory."

PragerU's lawsuit maintains that the organization's videos have been restricted, not because they are explicit, vulgar, or obscene in nature, or inappropriate for children in any way, but rather because they promote conservative ideas.

In a news release, Prager stated, "Companies like Google/YouTube, Facebook and Twitter have come under increasing scrutiny in recent months amid numerous allegations they have wielded their near-monopoly status with respect to the publication and dissemination of information online to silence those with conservative viewpoints. The lawsuit has placed PragerU at the center of a heated, national debate about free speech on the internet and carries with it profound implications for the First Amendment."

YouTube has restricted approximately 20 percent of the nonprofit's videos, meaning that those clips cannot be viewed by the 1.5 percent of users who opt not to see adult material. The tagged videos include "Are 1 in 5 Women Raped at College?" and "Why Isn't Communism as Hated as Nazism?"

PragerU's suit says that YouTube is essentially a "public forum" that should be subject to government intervention.

But that line of thinking "flies in the face" of nearly every First Amendment precedent, which is that it curtails the power of the *government*, not private actors, says Jane Bambauer, a professor of law at the University of Arizona. Companies, "no matter how powerful we think they are," are thus excluded from that particular type of government meddling.

Attorneys for Google argued that a win for PragerU would have deleterious effects on the internet. For one, companies would lose their right to remove pornography and abusive content, which Section 230 of the Communications Decency Act expressly allows them to scrub as they see fit. But they see a more frightening consequence as well: platforms such as their own would have the incentive to abandon current claims of political neutrality to avoid similar lawsuits, and would thus be likely to censor *more* content—not less. Reported in: prageru.com, August 27, 2019; reason.com, September 2.

FREE SPEECH

Chicago, Illinois

Four Wheaton College students, who believe it is their duty to share the word of God with others, are suing the City of Chicago for a policy restricting them to limited free speech zones in its downtown Millennium Park. On September 18, 2019, they filed ***Swart et al. v. Chicago*** in **US District Court for the Northern District of Illinois**, asking the court to declare the Millennium Park rules defining free speech areas invalid and to stop the city from enforcing rules that, they claim, improperly restrict freedom of speech in a traditional public forum and infringe on

the students' right to exercise their religion.

In April 2019, the Department of Cultural Affairs and Special Events, which runs Millennium Park, updated rules for the park. One new rule divided the park into eleven "rooms," or sections, and prohibited "the making of speeches and passing out of written communications" in ten of the eleven sections, according to the city's website. The rules also ban "conduct that objectively interferes" with visitors' ability to enjoy the park's artistic displays, impairs pedestrian traffic, and disrupts the views of art.

Under the rules, people are only authorized to give speeches and hand out information in Wrigley Square in the northwest corner of the park.

The plaintiffs' attorney, John Mauck, said the lawsuit is about more than his clients' rights, but also "the right of the public to receive literature and receive speeches. The public park and sidewalks are the traditional places, and the only places where you can freely communicate, and now they want to take that away," he said.

Mauck said the restrictions are particularly problematic because the sculpture Cloud Gate, commonly known as the Bean, is one of the locations that is off limits. "The Bean is one of the highest tourist attractions in the United States . . . that's where you want to get your message out," he said.

He added that all speech, not just evangelism, is affected. Reported in: *Chicago Sun-Times*, September 18, 2019; *Chicago Tribune*, September 19.

Richmond, Virginia

The city of Baltimore cannot use the settlement of lawsuits as "hush money" to prevent plaintiffs from exercising their First Amendment rights, declared the **US Court of Appeals for the Fourth Circuit** in its opinion in ***Overbey v. Mayor & City Council of Baltimore***.

Writing for the majority, Judge Henry Floyd noted that the Baltimore Police Department has inserted non-disparagement clauses in 95 percent of its settlement agreements, including one with Ashley Overbey. She had sued the city for being arrested in her home when she called 911 to report a burglary, resulting in a settlement of $63,000, complete with the usual non-disparagement provision.

The *Baltimore Sun* newspaper reported on the settlement as it went before a city agency for approval and published a negative comment about Overbey from the city solicitor. This reporting prompted some anonymous online comments, to which Overbey responded online. The city decided that Overbey's online comments violated the non-disparagement clause and thus remitted only half of the settlement amount, retaining $31,500 as "liquidated damages."

The court found that the settlement agreement called for Overbey to waive her First Amendment rights (rejecting the City's argument that the First Amendment was not implicated by refraining from speaking), and further held that the waiver was "outweighed by a relevant public policy that would be harmed" by forcing Overbey to remain silent.

The city argued that half of Overbey's settlement sum was earmarked for her silence, and that it would be unfair for Overbey to collect that half of her money when she was not, in fact, silent. "When the second half of Overbey's settlement sum is viewed in this light," according to the court's opinion, "it is difficult to see what distinguishes it from hush money. Needless to say, this does not work in the City's favor. We have never ratified the government's purchase of a potential critic's silence merely because it would be unfair to deprive the government of the full value of its hush money. We are not eager to get into that business now."

The ruling thus reversed the district judge's grant of summary judgment to the city. The appellate court held that "the non-disparagement clause in Overbey's settlement agreement amounts to a waiver of her First Amendment rights and that strong public interests rooted in the First Amendment make it unenforceable and void."

The court also considered the First Amendment claim of the other plaintiff, *Baltimore Brew*, a local news website, which the district judge had dismissed for lack of standing. The court held that *Brew* had standing based on its allegations that the city's pervasive use of non-disparagement clauses "impedes the ability of the press generally and *Baltimore Brew* specifically, to fully carry out the important role the press plays in informing the public about government actions." The court stressed that its conclusion was based on the allegations in the complaint and that the evidentiary record should be developed by the district judge.

Dissenting, recent appointee to the bench Judge Marvin Quattlebaum stated that since Overbey entered into the settlement agreement voluntarily—a question the majority stated it need not resolve given its conclusion regarding public interest—the courts should enforce it. Quattlebaum argued that the city has an interest in the certainty of its contract and is entitled to have the non-disparagement clause enforced. In a footnote, the dissenting judge found the "hush money" by the majority as "harsh words," suggesting that a better view is that the plaintiff "cannot have her cake and eat it too."

Reported in: *Constitutional Law Prof Blog,* July 12, 2019.

PRISONS

Phoenix, Arizona

In early November 2019, Judge Roslyn Silver of **US District Court for Arizona** gave the Arizona Department of Corrections ninety days to define "bright-line" rules regarding permissible inmate reading material. The directive stems from a 2015 lawsuit, ***Prison Legal News v. Ryan***, filed when prison officials didn't deliver four issues of the monthly journal to its inmate subscribers because the content in those issues was deemed "sexually explicit."

Prisoner rights advocates say the judge's decision underscores the indeterminate manner in which jails and prisons prohibit or grant what incarcerated people can read.

In March 2014, copies of *Prison Legal News* weren't delivered to the 97 inmate subscribers in Arizona because some articles described nonconsensual sexual contact between guards and prisoners, according to court documents. The censorship was due to a policy that prohibits sending prisoners "sexually explicit material," with no exception for publications that discussed sexual interactions in a factual or legal manner.

The policy was overly broad and the standard too vague to be consistently followed, said David Fathi, director of the American Civil Liberties Union's National Prison Project, who has represented *Prison Legal News* in past cases.

"You saw in the Arizona case that staff were told to use common sense and good judgment. That's a recipe for arbitrary or inconsistent decision-making," he said.

Fathi said the judge's order is a big improvement, but adding a training on the new policy would be best practice.

Restricting what inmates can read is a decentralized process that can happen on the state or federal level, said Nazgol Ghandnoosh, senior research analyst for the Sentencing Project.

Sexually explicit bans can include biology books and even literary works appropriate for high school students.

Silver's order could change the previous issues that were part of the original policy.

In her order, Silver wrote that the Arizona Department of Corrections and the state must change its mail policy from allowing agency employees and agents to use their own discretion in determining what's banned and establish consistency in excluding sexually explicit material.

The department now has to deliver the previously censored issues of the magazine to its subscribers within thirty days of the order.

Under Silver's directive, the state of Arizona and its corrections department can no longer violate prisoners' First Amendment rights, which include the right to read—something that also impacts non-incarcerated people once prisoners are released, Fathi said.

"Do we want people who have exercised their minds in prisons? Do we want people who improved their ability to read and think? Or do we want people who have been completely cut off?" he said. "I think the answer is clear." Reported in: prison legalnews.org, November 6, 2019; *Washington Post*, November 12.

New York, New York

The censorship of books at New York City's Rikers Island prison is so entrenched that correction officers have been arresting visitors who bring books to detainees, accusing the visitors of soaking the pages with synthetic marijuana, according to a lawsuit, ***Camacho et al. v. City of New York***, filed on December 3, 2019, in the **US District Court for the Southern District of New York**.

The plaintiffs are five New Yorkers who tried to bring books to inmates of the Rikers Island. They are suing the City of New York and some prison guards for false arrest. They claim correction officers accused them of soaking the books they brought in with a liquid form of the drug K2.

Each of the five visitors was arrested and held for hours, then charged with felonies, which were later all dismissed, said their lawyer, Julia P. Kuan of Romano and Kuan PLLC. Even after the charges were dropped, they were banned from later visiting inmates. The detainees they were trying to see were also barred from contact visits, Kuan said.

The lawsuit claims that correction officers "embarked on a campaign" of arresting visitors who brought books to people detained in the city jails. The lawsuit seeks class action status, claiming there may be dozens of other people similarly arrested for bringing in books.

"We know there are others out there," said Kuan. "It's outrageous and unconstitutional that the Department of Correction would target innocent visitors to Rikers Island and falsely arrest and prosecute them simply because they brought a book to jail."

The lawsuit specifically names nine correction officers and mentions as many as thirty other potential defendants. It does not identify a dollar amount, but seeks punitive and compensatory damages. Reported in: *New York Daily News*, December 4, 2019.

Richmond, Virginia

A Virginia prison inmate, Uhuru Baraka Rowe, has filed a lawsuit against prison officials, claiming they censored his writings, violating his

First and Fourteenth Amendment rights. In ***Rowe v. Clark et al.***, in **US District Court for the Eastern District of Virginia, Richmond Division**, his attorney, Jeff Fogel, said two essays about poor prison conditions were censored prior to their release.

Neither essay contained anything that could be considered a security risk, the suit alleges, but they do contain information critical of both the Sussex II State Prison and its staff.

The suit claims that as a politically conscious prisoner, Rowe was targeted for the political content of his essays.

Fogel said that in his time as an attorney, he's been a part of more than a dozen similar cases and in every case the suits have worked out in favor of the inmates. Censorship in federal and state prisons is widespread, Fogel said, and even his own writings teaching inmates how to file their own lawsuits have been blocked.

Given the limited literacy seen among many inmates, Fogel said he finds it frustrating that prisons would try to censor both incoming literature and letters sent by inmates.

According to Fogel, prison staff is only allowed to censor or prevent the release of inmate writings that contain directions for criminal activity, escape plans, coded information, or other obvious security risks.

Among the criticisms highlighted in Rowe's essays are: poor-quality water, substandard medical care, overcrowding, misconduct by prison staff, and understaffing. The understaffing has caused the prison to go on lockdown due to insufficient security, forcing prisoners to stay in their cells for longer periods of time than usual, one essay states.

Rowe has been imprisoned for more than twenty years on a ninety-three-year sentence. According to VDOC's website, Rowe will not be released until 2076. He is not eligible for parole.

In an earlier essay Rowe wrote, which was critical of Virginia's parole system, he said he accepted a blind plea agreement in a case involving robbery and the murder of two innocent people. Barely eighteen years old at the time, Rowe said the sentencing guidelines suggested a maximum prison term of thirteen years. So far, his requests for clemency have not been approved.

Rowe is currently being held at Greensville Correctional Center in Jarratt. No hearings have been scheduled yet in the lawsuit. Reported in: *Daily Progress,* November 23, 2018, August 25, 2019.

GOVERNMENT SPEECH
San Francisco, California

The National Rifle Association (NRA) is suing the city and county of San Francisco and its Board of Supervisors over a unanimous vote to designate the NRA a domestic terrorist organization. In ***NRA v. San Francisco***, filed in **US District Court for the Northern District of California, San Francisco Division**, the pro-gun group accuses lawmakers of discrimination "based on the viewpoint of their political speech."

In a resolution on September 3, 2019, the board said San Francisco should "take every reasonable step" to limit any vendors and contractors with which it does business from also doing business with the NRA. It also said it is "urging other cities, states, and the federal government to do the same."

The NRA calls the terrorist designation a "frivolous insult"—but it adds that the lawmakers' actions also "pose a nonfrivolous constitutional threat" to the rights of free speech and association.

The NRA suit also warns against "reasonably expected chilling effects."

Accusing the San Francisco board of using "McCarthyist elements" in an attempt to silence it and carry out a political vendetta, the NRA says the resolution "would chill a person of ordinary firmness from continuing to speak against gun control, or from associating . . . with the NRA."

The resolution accuses the NRA of using its money and influence "to promote gun ownership and incite gun owners to acts of violence," adding that the group "spreads propaganda that misinforms and aims to deceive the public about the dangers of gun violence."

San Francisco's resolution, which lacks explicit enforcement tools, describes the United States as being "plagued by an epidemic of gun violence, including over 36,000 deaths, and 100,000 injuries each year." It also notes the mass shooting in July at the Gilroy Garlic Festival south of San Francisco, in which a gunman killed three people, including two children.

The measure's sponsor, Supervisor Catherine Stefani, a former prosecutor, is a leader in the group Moms Demand Action for Gun Sense in America. She said the NRA uses intimidation and threats to promote its agenda.

"When they use phrases like, 'I'll give you my gun when you pry it from my cold, dead hands' on bumper stickers, they are saying reasoned debate about public safety should be met with violence," Stefani said.

San Francisco's move against the NRA follows recent efforts in Los Angeles and New York State, where officials have sought to pressure businesses to cut ties with the group. In its lawsuit, the NRA notes, "Courts have sustained First Amendment claims in both Los Angeles and New York."

In their resolution, the San Francisco lawmakers state, "All countries have violent and hateful people, but only in America do we give them ready access to assault weapons and large-capacity magazines thanks, in large part, due to the National Rifle Association's influence." Reported in: npr.org, September 10, 2019.

PRIVACY
Phoenix, Arizona

Arizonans have a constitutional right to online privacy to keep police from snooping to find out who they are without first getting a warrant, the **Arizona Court of Appeals, Division Two**, ruled in ***Arizona v. Mixton*** in July 2019.

In what appears to be the first ruling of its kind in the state, the court said internet users have a "reasonable expectation of privacy" that the information they furnish about themselves to internet providers will be kept secret. That specifically includes who they are and their home address. That means police and government agencies need a search warrant to obtain information that reveals who is posting material, the court ruled. And getting a search warrant requires a showing of some criminal activity.

The ruling is particularly significant because federal courts have consistently ruled that once people furnish that information to a third party—in this case their internet service provider—they have given up any expectation of privacy. And that means the Fourth Amendment protections of the US Constitution against unreasonable search and seizure no longer apply, and the government no longer needs a warrant.

But appellate Judge Karl Eppich, writing for the court, said that argument won't wash in Arizona. The key is the state constitution.

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law," the provision reads. By contrast, the US Constitution has no specific right of privacy.

This case involves what essentially amounts to a "sting" operation in Pima County where a police detective investigating child exploitation placed an ad on an internet advertising forum inviting those interested in child pornography and incest to contact him. According to court records, William Mixton responded, sending images of child pornography.

The detective then got federal agents to issue an administrative subpoena to obtain Mixton's IP address, essentially a number assigned to users connected to the internet so that no two are the same. Those numbers can be either static or random.

With the IP address, the detective was able to identify Mixton's internet provider, which in turn led to his street address. At that point, with a search warrant, police seized computers with images of child pornography.

He was found guilty of twenty counts of sexual exploitation of a minor younger than fifteen and sentenced to seventeen years in prison on each, to be served consecutively.

Mixton argued that the police never should have been able to get his IP address in the first place without an actual warrant.

Judge Eppich acknowledged that Mixton has no basis for his contention under the US Constitution, as he had voluntarily provided information to his internet provider to get service. But Arizona's constitution, with its specific right of privacy, is something quite different, the judge said.

"In the internet era, the electronic storage capacity of third parties has in many cases replaced the personal desk drawer as the repository of sensitive personal and business information—information that would unquestionably be protected from warrantless government searches if on a paper desk at a home or office," Eppich wrote. "The third-party doctrine allows the government a peek at this information in a way that is the 21st century equivalent of a trip through a home to see what books and magazines the residents read, who they correspond with or call, and who they transact with and the nature of those transactions," the judge said. "We doubt that the framers of our state constitution intended the government to snoop in our private affairs without obtaining a search warrant."

Eppich specifically rejected arguments by prosecutors that internet users give up their expectation of privacy because they "voluntarily" reveal identity to get service.

"The user provides the information for the limited purpose of obtaining service," he wrote. "It is entirely reasonable for the user to expect the provider not to exceed that purpose by revealing the user's identity to authorities in a way that connect it to his or her activities on the internet."

Eppich warned against giving such broad power, saying it effectively would give the government "unfettered ability to learn the identity behind anonymous speech, even without any showing or even suspicion of unlawful activity."

And the implications, he said, are broader than that.

"The right of free association, for example, is hollow when the government can identify an association's members through subscriber information matched with particular internet activity," Eppich said. "To allow the government to obtain without a warrant information showing who a person communicates with and what websites he or she visits may reveal

a person's associations and therefore intrude on a person's right to privacy in those associations."

Judge Philip Espinosa, in his dissent, said he does not read the state constitutional protections so broadly. On one hand, he acknowledged the vast amount of data being generated through electronics, with everything from cellphones, electronic tablets, smart watches, and even modern automobiles all subject to "pervasive tracking cookies."

"Much of the resulting information is, and should be, constitutionally protected," Espinosa wrote. But he said information like an IP number should not have constitutional protection any more than, for example, a personal telephone number.

Espinosa said the information was legitimately sought by law enforcement solely to reveal the source of suspected child pornography distribution.

And Espinosa said he finds no First Amendment protections at issue, saying this case involves "criminally perverted speech" that is not constitutionally protected.

As it turns out, the appellate court upheld Mixton's conviction because the police, in the end, eventually had a warrant. Reported in: Tucson.com, July 31, 2019.

Chicago, Illinois

Vimeo is collecting and storing thousands of people's facial biometrics without their permission or knowledge, according to a lawsuit filed in mid-September 2019 in the **Circuit Court of Cook County, Illinois**.

Filed on behalf of Illinois resident Bradley Acaley, the ***Acaley v. Vimeo*** brief says "highly detailed geometric" facial maps are being collected and stored in violation of the Illinois Biometric Information Privacy Act. The law bars companies from obtaining or possessing an individual's biometric identifiers or information unless the company (1) informs the person in writing of its plans to do so, (2) states in writing the purpose and length of term for the collection and storage, (3) receives written permission from the user, and (4) publishes retention schedules and guidelines for destroying the biometric identifiers and information.

The complaint alleges Vimeo is violating the law by collecting, storing, and using the facial biometrics of thousands of unwitting individuals throughout the United States whose faces appear in photos or videos uploaded to the Magisto video-editor application. Vimeo acquired Magisto in April and claimed the editor had more than 100 million users.

"Vimeo has created, collected, and stored, in conjunction with its cloud-based Magisto service, thousands of 'face templates' (or 'face prints')—highly detailed geometric maps of the face—from thousands of Magisto users," the complaint alleges. The complaint adds: "Each face template that Vimeo extracts is unique to a particular individual, in the same way that a fingerprint or voiceprint uniquely identifies one and only one person."

Acaley subscribed to Magisto for one year, starting in December 2017, at a cost of $120. He regularly uploaded videos of himself and his family, including his minor children. He would then edit the uploaded videos or create videos from uploaded photos or videos.

Vimeo analyzed Acaley's videos and photos "by automatically locating and scanning plaintiff's face and by extracting geometric data relating to the contours of his face and the distances between his eyes, nose, and ears—data which Vimeo then used to create a unique template of plaintiff's face," the complaint alleges. Vimeo also used the data to recognize Acaley's gender, age, race, and location.

The complaint said that Acaley never received notice of this collection or storage of his biometrics and that he never provided his consent.

The company didn't own Magisto at the time Acaley used it, but Vimeo possibly assumed all legal liabilities when it acquired the video-editing service. After that question gets sorted out, the court could address the issue of cloud services using facial-recognition analysis to analyze images and videos users willingly uploaded. Reported in: arstechnica.com, September 26, 2019.

Boston, Massachusetts

In a major victory for privacy rights, the **US District Court for the District of Massachusetts** on November 12, 2019, ruled that the government's suspicionless searches of international travelers' smartphones and laptops at airports and other US ports of entry violate the Fourth Amendment. The ruling came in a lawsuit, ***Alasaad v. McAleenan***, filed by the American Civil Liberties Union (ACLU), Electronic Frontier Foundation, and ACLU of Massachusetts, on behalf of eleven travelers whose smartphones and laptops were searched without individualized suspicion at US ports of entry.

The district court order puts an end to authority asserted by Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) to search and seize travelers' devices for purposes far afield from the enforcement of immigration and customs laws. Border officers must now demonstrate individualized suspicion of contraband before they can search a traveler's device.

The number of electronic device searches at US ports of entry has

increased significantly. Last year, CBP conducted more than 33,000 searches, almost four times the number from just three years prior.

International travelers returning to the United States have reported numerous cases of improper searches in recent months. A border officer searched plaintiff Zainab Merchant's phone, despite her informing the officer that it contained privileged attorney-client communications. An immigration officer at Boston Logan Airport reportedly searched an incoming Harvard freshman's cell phone and laptop, reprimanded the student for friends' social media postings expressing views critical of the US government, and denied the student entry into the country following the search. Reported in: aclu.org, November 12, 2019.

CHURCH AND STATE
Atlanta, Georgia

In early July 2019, the **US Court of Appeals for the Eleventh Circuit** in ***Williamson v. Brevard County*** determined the practice of invocational prayer that traditionally preceded the Brevard County (Florida) Board of County Commissioners meetings "had run afoul of the Establishment Clause." Several factors led the appeals court to its ruling, but the most clear-cut was the fact that "many members of the board exercised [their] plenary discretion in plainly unconstitutional ways."

The controversy grew from the board's selection of speakers for the religious invocation at the beginning of each board meeting. From January 2010 through March 2016, all of the invocations contained monotheistic content. During that period, all but 7 of the 195 sessions began with an invocation from Christian speakers (and one Mormon "lay leader").

On behalf of the Central Florida Freethought Community (CFFC), plaintiff David Williamson sent the board two letters in 2014, requesting that secular humanists be invited to deliver an invocation. The board responded with a letter declining CFFC's request, explaining that "their proposal would not fit within the county commission's tradition." The letter elucidated how the custom "invokes guidance . . . [from] a higher authority which a substantial body of Brevard constituents believe to exist." After examining CFFC's website, the board determined CFFC does not share the "beliefs or values" for which the board created the ceremonial invocation practice.

Similar groups sent comparable requests to the board over the next year, leading the board to adopt resolution 2015-101 in July 2015. In response to the various "'godless quotes' posted on the [request-sending] organizations' sites," the resolution stipulated:

> Secular invocations and supplications from any organization whose precepts, tenets or principles espouse or promote reason, science, environmental factors, nature or ethics as guiding forces, ideologies and philosophies that should be observed in the secular business or secular decision-making process involving Brevard County employees, elected officials or decision makers including the Board of County Commissioners, fall within the current policies pertaining to public comment and must be placed on the public comment section of the secular business agenda. Pre-meeting invocations shall continue to be delivered by persons from the faith-based community in perpetuation of the board's tradition for over 40 years.

The legislative effect of this stipulation was that the board gave itself license to determine who is a "faith-based" speaker, versus speakers expressing secular "philosophies." Proceeding from those determinations, the board would then relegate some groups and beliefs to the public comment section later in the agenda, and bar them from participation in the opening invocation. In this way, the resolution actually *insisted* upon religious discrimination.

The US Supreme Court dealt with a similar case in *Marsh v. Chambers* (1983). The court in *Marsh* considered it significant that "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom" since the founding of the country. The Supreme Court allowed religious invocations as long as this was not an unconstitutional exploitation of the invocational prayer practice for the purpose of advancing a specific religious agenda.

The difference between *Williamson* and *Marsh* is that the Brevard County commissioners explicitly used their authority to discriminate against religious views they found unfavorable. What is more, the Eleventh Circuit needed only to read the text of Resolution 2015-101, which literally listed particular philosophical and religious beliefs and persuasions the commissioners meant to exclude from participation.

Accordingly, the Eleventh Circuit ruled the Brevard County Board of County Commissioners' invocation speaker selection practice unconstitutional. Reported in: freedomforum institute.org, September 18, 2019.

EQUAL PROTECTION VS. RELIGIOUS FREEDOM
Phoenix, Arizona

An **Arizona Supreme Court** ruling on September 16, 2019, agreed with arguments from the Trump administration ranking claims of "religious

freedom" above gay rights. In ***Brush & Nib Studio v. Phoenix,*** the Arizona court held that a Phoenix-based company that makes customized wedding invitations has the legal right to reject a gay couple as customers.

Even though Phoenix has a local law that prohibits discrimination against the LGBTQ community, the court ruled that the religious convictions of the business owners exempted them from the obligation to treat all customers equally. According to the court, designing wedding invitations is a creative act; to compel the owners to design an invitation against their will violates their rights both to freedom of religion and freedom of speech.

The opinion treats the business owners—two women—as a beleaguered minority. Their "beliefs about same-sex marriage may seem old-fashioned, or even offensive to some," the court wrote. "But the guarantees of free speech and freedom of religion are not only for those who are deemed sufficiently enlightened, advanced, or progressive. They are for everyone."

Legal analyst Jeffrey Toobin, writing in the *New Yorker*, declared, "This, to put it charitably, is nonsense. The owners of Brush & Nib are free to believe anything they want. What they should not be allowed to do is to use those beliefs to run a business that is open to the general public but closed to gay people."

Toobin added that religious people and business owners for decades have argued that their beliefs entitle them to exemptions from the rules. For example, in 1982, the Supreme Court rejected an attempt by an Amish business owner in Pennsylvania to avoid paying his share of his employees' Social Security taxes, because his community believed in helping their own and not accepting assistance from the state. "Every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs," Chief Justice Warren Burger wrote in his opinion. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." Reported in: *New Yorker*, September 19, 2019.

NET NEUTRALITY
Washington, D.C.

The **US Court of Appeals for the District of Columbia Circuit** on October 1, 2019, upheld the Federal Communications Commission's (FCC) repeal of net neutrality rules, but said the FCC cannot preempt all state net neutrality laws. In ***Mozilla v. FCC***, in the judges said, "First, the Court concludes that the Commission has not shown legal authority to issue its Preemption Directive, which would have barred states from imposing any rule or requirement that the Commission 'repealed or decided to refrain from imposing' in the Order or that is 'more stringent than the Order.'" The FCC "ignored binding precedent" when making its preemption order, and "that failure is fatal" to the preemption, the judges wrote.

The ruling does not prevent the FCC from trying to preempt state laws on a case-by-case basis. But the FCC can't preempt all state net neutrality laws in one fell swoop, judges ruled. Each preemption of a state law must involve "fact-intensive inquiries," so the FCC would have to conduct a preemption analysis of each one. "Without the facts of any alleged conflict [between state and federal rules] before us, we cannot begin to make a conflict-preemption assessment in this case, let alone a categorical determination that any and all forms of state regulation of intrastate broadband would inevitably conflict with the 2018 Order," the judges wrote.

This is a win for California and other states that passed their own net neutrality laws after the FCC repeal. California agreed to delay enforcement of its net neutrality law until after litigation is fully resolved, so the state likely won't enforce the law just yet. But after appeals in the FCC case are exhausted, California and other states may enforce net neutrality rules that prohibit internet service providers from blocking or throttling lawful internet traffic and from prioritizing traffic in exchange for payment.

The District of Columbia judges remanded portions of the repeal order to the FCC, saying that the agency has to do more justification of the net neutrality repeal. But importantly, the judges remanded the repeal to the FCC without vacating it, and said that the FCC's opponents' objections are "unconvincing for the most part." While the judges vacated the FCC's preemption of state laws, the FCC decision to deregulate broadband at the federal level and eliminate net neutrality rules remains in effect.

The decision was made with a 2-1 vote by a three-judge panel at the US Court of Appeals for the District of Columbia Circuit. All three judges agreed that the FCC can repeal its own net neutrality rules, but Senior Circuit Judge Stephen Williams dissented from the decision to vacate the preemption of state laws. The decision could be appealed to the full Court of Appeals and eventually to the Supreme Court.

On remand, the FCC must address three problems with the net neutrality repeal. Specifically, judges wrote that the FCC "failed to examine the

implications of its decisions for public safety" and failed to "sufficiently explain what reclassification will mean for regulation of pole attachments." The FCC also did not address opponents' concerns about the effect deregulation will have on the FCC's Lifeline program that subsidizes phone and internet access for low-income Americans, judges wrote.

But the judges did not dispute the FCC's decision to classify broadband as an information service instead of a telecommunications service. Classifying broadband as an information service essentially deregulated the industry and helped the FCC repeal the core net neutrality rules. The judges said that the FCC decision to reclassify broadband was "a reasonable policy choice."

Led by a Trump appointee, the FCC voted to reclassify broadband and eliminate net neutrality rules in December 2017, leading to the rules coming off the books in June 2018.

The FCC repeal was challenged in court by a coalition of state attorneys general, consumer advocacy groups, and tech companies such as Mozilla and Vimeo. Oral arguments were held in February 2019.

Mozilla said it may appeal the ruling. "Our fight to preserve net neutrality as a fundamental digital right is far from over," Mozilla Chief Legal Officer Amy Keating said in a statement. "We are encouraged to see the Court free states to enact net neutrality rules that protect consumers. We are considering our next steps in the litigation around the FCC's 2018 order." Reported in: arstechnica.com, October 1, 2019.

CAMPAIGN FINANCING
Portland, Oregon

The **US Court of Appeals for the Ninth Circuit** ruled on August 13, 2019, in ***National Association for Gun Rights, Inc. v. Mangan*** that Montana's electioneering disclosure requirements did not violate the First Amendment. The ruling keeps the requirements in place, but the case is one of several new First Amendment challenges to campaign finance laws designed to spur the new Supreme Court to limit how government may regulate money in politics.

The case arose when the National Association for Gun Rights (NAGR) sought to spend more than $250 on an "electioneering communication." Montana law requires that any such organization register as a political committee. And such registration, in turn, subjects the group to requirements to disclose expenditures.

The NAGR argued that the state's definition of electioneering communication was facially overbroad and unconstitutional as applied to it. In particular, the NAGR said that the First Amendment permits states to require disclosure only of express advocacy for or against a specific candidate, not the kind of general information that it sought to distribute.

The Ninth Circuit rejected the challenge. The court said that disclosure requirements are valid, even as to non-express-advocacy communications, because, under "exacting scrutiny," they are designed to promote the state's interests in transparency and discouraging circumvention of its electioneering laws. Reported in: *Constitutional Law Prof Blog*, August 13, 2019.