



CHURCH AND STATE Washington, DC

In *Our Lady of Guadalupe School v. Morrissey-Berru*, together with *St. James School v. Biel*, the **United States Supreme Court** ruled in a 7-2 vote on July 8, 2020, that US civil rights laws barring discrimination on the job do not apply to most lay teachers at religious elementary schools.

The case was brought by two fifth-grade teachers after they were dismissed by their parochial schools in California. Agnes Morrissey-Berru claimed age discrimination and Kristen Biel said she was fired after notifying her superior she would need time off due to a breast cancer diagnosis—a firing, that if true, would violate the Americans with Disabilities Act.

The schools refuted the allegations, but argued that irrespectively, federal employment laws do not apply to their teachers because all are required to teach religious content for 40 minutes per day.

The Supreme Court agreed.

Writing on behalf of the seven-justice majority, Justice Samuel Alito said “state interference” in religious education would violate the free exercise of religion guaranteed by the First Amendment.

“The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission,” Alito wrote.

As the court saw it, federal courts are not allowed to settle employment disputes involving teachers in cases like these, because the religious schools are making “internal management decisions” that are “essential to the institution’s religious mission.”

The July 8 decision expanded that exception to include teachers who lacked religious titles and training, potentially stripping fair employment protections from many of the roughly 149,000 teachers at religious elementary schools, where they frequently teach religion alongside other subjects.

Justice Alito pointed out that the Archdiocese of Los Angeles, where both of the fired teachers in these cases worked, considers all its teachers catechists “responsible for the faith formation of the students in their charge each day” and expects teachers to infuse Catholic values “through all subject areas.”

The ruling leaving lay teachers without antidiscrimination protections was one of three major decisions in recent weeks that rebalance the law when it comes to the separation of church and state.

For much of the 20th century, the Supreme Court’s legal opinions enforced a strict separation between church and state. But as the court has grown more conservative in the last two decades, it has increasingly altered that stance. Now the justices tend to focus their opinions on protecting the free exercise of religion and requiring greater accommodations by the government of religious activity.

Justice Sonia Sotomayor, who was educated at parochial schools, wrote the dissent for herself and Justice Ruth Bader Ginsburg, calling the decision “profoundly unfair” for “permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs,” even as the court has “lamented a perceived ‘discrimination against religion’” in recent opinions.

Sotomayor pointed to specific provisions that Congress wrote into the nation’s antidiscrimination laws so that churches, synagogues, mosques,

and other houses of worship could choose their ministers, rabbis, imams, and other religious leaders without interference from the government.

In expanding those exceptions beyond their “historic narrowness,” Sotomayor said, the court majority has leveled a “constitutional broadside” at hundreds of thousands of employees who work not just at religious schools but also religious hospitals, charities, and universities.

Justice Thomas wrote separately for himself and Justice Neil Gorsuch to say that courts shouldn’t second-guess when religious organizations earnestly claim that their employees are carrying out the religious mission of the organization and are thus “ministerial” and exempted from fair employment protections.

Reported by: NPR, *All Things Considered*, July 8, 2020.

Washington, DC

In the matter of *Chike Uzuegbunam and Joseph Bradford v. Stanley C. Preczewski, et al.*, the **US Supreme Court** agreed to review a suit from two former college students who said they were prohibited from proselytizing their Christian faith by a now-rescinded campus policy that they claimed violated their right to free speech.

Campus police stopped petitioner Chike Uzuegbunam twice while he was trying to proselytize. One instance occurred outside of the school’s designated speech zones, while another occurred within. The case alleges that petitioner Joseph Bradford “self-censored” after hearing of Uzuegbunam’s plight. Campus free speech policies have garnered legal and other scrutiny, especially involving instances of students who have articulated conservative views.

The case will be heard next term. The justices this term were faced with



the argument that nominal damages for past constitutional violations—awarded when there’s been wrongdoing without financial harm—can’t be mooted by the wrongdoer’s own actions.

In *New York State Rifle and Pistol Association, Inc., et al., v. City of New York, New York, et al.* on Writ of Certiorari to the US Court of Appeals for the Second Circuit, the high court reviewed a New York City law limiting where gun owners could take their guns. After the city—and the state—changed the law, the court nixed the case as moot in April 2020.

But Justice Samuel Alito, joined by Justices Clarence Thomas and Neil Gorsuch, lamented that the court in that case let the city off the hook by allowing it to “manufacture mootness” to avoid an adverse ruling.

It is “widely recognized that a claim for nominal damages precludes mootness,” Alito wrote.

The justices were urged to take the campus speech dispute from a broad group of interests filing amicus—or friend of the court—briefs.

Catholic, Jewish, and Muslim groups teamed with the American Humanist Association and the Koch-backed Americans For Prosperity Foundation in urging the justices to overturn the US Court of Appeals for the Eleventh Circuit. They argued that its outlier ruling risks suppressing minority views on campus and fails to hold public officials accountable.

Reported by: Bloomberg Law, July 9, 2020; The New York Times, August 17, 2020.

SCHOOLS Mahoney City, Pennsylvania

A high school student filed a lawsuit after she was kicked off the cheerleading team for cursing the team on Snapchat. American Civil Liberties

Union (ACLU) Pennsylvania Senior Staff Attorney Sara Rose tried the case against the school district.

On June 30, 2020, in the **US Court of Appeals for the Third Circuit, *B.L. v. Mahanoy Area School District***, the court ruled that students are afforded the same rights as everyone else when they are not in school and can’t be punished by their schools for any off-campus speech, including online, that is not related to school. This ruling covers students in Pennsylvania, Delaware, and New Jersey, which are covered by the Third Circuit. Mahanoy Area School District’s attorney Michael Levin said that he plans to discuss filing an appeal to the Supreme Court with the district.

According to an ACLU press release, B.L. posted the snap she was punished for over the weekend while at a convenience store. The school suspended her from the team based on their belief that the post was “negative,” “disrespectful,” and “demeaning.”

“I think [this ruling] is the most student speech-protective decision in the country right now,” Rose said. “When you censor students in school when they’re just learning about their rights, they aren’t going to know how to fight for their rights out of school. So, we were very pleased with the decisions the Third Circuit made.”

Reported by: The Student Press Law Center, July 16, 2020.

Richmond, Virginia

In the matter of *Gavin Grimm v. Gloucester County School Board*, a federal appeals court held in the long-running case of transgender student Gavin Grimm that the school district violated the equal-protection clause and Title IX when he was barred from the boys’ restroom while enrolled at his Richmond, Virginia, high school.

A panel of the **US Court of Appeals for the Fourth Circuit** also ruled 2-1 that the Gloucester County district violated Grimm’s rights by refusing to amend his school records after Grimm, who was assigned female at birth, had chest reconstruction surgery and the state amended his birth certificate to “male.”

“At the heart of this appeal is whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender,” US Fourth Circuit Judge Henry F. Floyd wrote for the majority in upholding a series of decisions in favor of Grimm in 2018 and 2019. “We join a growing consensus of courts in holding that the answer is resoundingly yes.”

The Fourth Circuit panel became the second federal appeals court to rule in August 2020 that transgender students’ rights under Title IX of the Education Amendments of 1972 are supported by the US Supreme Court’s June decision that federal employment discrimination law covers transgender workers. A panel of the US Court of Appeals for the Eleventh Circuit, in Atlanta, ruled 2-1 on August 7, 2020, that a Florida district violated Title IX and the equal-protection clause when it barred a transgender male student from using the restroom consistent with his gender identity. In the new decision, the Fourth Circuit majority agreed that the recent Supreme Court decision bolstered Grimm’s case.

“After the Supreme Court’s recent decision in *Bostock v. Clayton County* . . . , we have little difficulty holding that a bathroom policy precluding Grimm from using the boys’ restrooms discriminated against him ‘on the basis of sex’” Floyd wrote.

The Gloucester County board’s policy “excluded Grimm from the



boys' restrooms 'on the basis of sex'" and therefore violated Title IX, the judge said.

Analyzing the case under the 14th Amendment's guarantee of equal protection, the court said the board's policy of requiring transgender students to use either a single-stall restroom or a restroom matching their "biological gender" was not significantly related to its goal of protecting students' privacy.

"The insubstantiality of the board's fears has been borne out in school districts across the country, including other school districts in Virginia," Floyd said. "Nearly half of Virginia's public-school students attend schools prohibiting discrimination or harassment based on gender identity." The majority cited friend-of-the-court briefs filed in support of Grimm by numerous school groups.

Gloucester County "ignores the growing number of school districts across the country who are successfully allowing transgender students such as Grimm to use the bathroom matching their gender identity, without incident," Floyd said.

Grimm is now a 21-year-old college student, and the Fourth Circuit rejected the board's arguments that his claims regarding the bathroom policy were moot. Because Grimm had amended his original lawsuit to seek nominal damages, his case was still a live controversy, the appeals court said. The court also held that the board's refusal to update Grimm's records violated both equal protection and Title IX.

"The board based its decision not to update Grimm's school records on his sex—specifically, his sex as listed on his original birth certificate, and as it presupposed him to be," Floyd said. "This decision harmed Grimm because when he applies to four-year universities, he will be asked for a

transcript with a sex marker that is incorrect and does not match his other documentation. And this discrimination is unlawful because it treats him worse than other similarly situated students, whose records reflect their correct sex."

Judge Paul V. Niemeyer dissented, saying that "Title IX and its regulations explicitly authorize the policy followed by [Gloucester County] High School."

"At bottom, Gloucester High School reasonably provided separate restrooms for its male and female students and accommodated transgender students by also providing unisex restrooms that any student could use," Niemeyer said. "The law requires no more of it."

The new member of the panel for this latest appeal in the Grimm case was Judge James A. Wynn Jr., who had made it pretty clear at oral arguments in May that he was inclined to support the student. In a concurrence to the opinion, Wynn said the Gloucester County board's policy seemed to favor an "alternative appropriate private facility" for transgender students. Such facilities were akin to "separate but equal" schools and restrooms for Black and White students, said Wynn, who is Black.

"I see little distinction between the message sent to Black children denied equal treatment in education under the doctrine of 'separate but equal' and transgender children relegated to the 'alternative appropriate private facilities' provided for by the board's policy," Wynn said.

Floyd concluded the majority opinion by noting that many schools have implemented "trans-inclusive policies" without incident, and that adults have been the biggest opponents of such policies, not students.

"The proudest moments of the federal judiciary have been when

we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past," Floyd said. "How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community. It is time to move forward."

Reported by: Education Week, August 26, 2020

COLLEGES AND UNIVERSITIES San Diego, California

The University of California San Diego settled a First Amendment lawsuit with a student-run satirical publication on September 8, 2020, which legal experts say secured significant protections for student journalists against financial censorship.

The Koala v. Khosla, et al. case in the **US District Court for the Southern District of California** stemmed from a controversial November 2015 article from *The Koala*, a satirical newspaper on campus. The student government voted to defund every media outlet at the university two days later, clearly targeting the paper known for publishing articles with racist, homophobic, Islamophobic, and anti-Semitic slurs and language.

The settlement affirmed critical protections against a different form of censorship, said David Loy, Legal Director of the American Civil Liberties Union of San Diego and Imperial Counties.

"It's the next frontier of censorship on campus, where sophisticated administrators know they can't openly retaliate or censor controversial speech or speech to which they object, so they look for a way to do it that's superficially neutral," Loy said.

According to the settlement documents, the school agreed to pay *The*



Koala \$12,500, covering roughly four years of operating expenses for the newspaper. It also cemented the publication's funding for close to a decade.

While *The Koala's* content is not of good taste and far from journalistic standards, Loy said, the student government clearly violated First Amendment rights of students and their publication. Withholding funding in direct retaliation for exercising free speech rights isn't new to college campuses, though rarely do these cases end up in court.

"This is one of the few cases that have really addressed the issue of cutting off the financial lifeline of the press . . . strangling the financial lifeline is every bit as dangerous as directly censoring it," Loy said. "I think that's why this is an important precedent to send a message to administrators that they can't get away with censorship just by dressing it up in nicer clothes."

The Student Press Law Center (SPLC) filed an amicus brief on behalf of *The Koala*, which played a key role in a federal court ruling that led to the settlement. SPLC Staff Attorney Sommer Ingram Dean said the court upheld fundamental rights of student journalists.

"The conclusion of this ongoing fight between the university and *The Koala* cements the fact that public school officials cannot censor student media through funding cuts or other punitive measures based solely on the content of the publication, whether it is offensive or not," Dean said.

Loy said that young journalists should be shielded from all forms of censorship as they gain experience in the field. Across the United States, student journalists play vital roles in local news coverage and often find themselves subject to administration, direct, or self-censorship.

"The lifeblood of the student press is the ability to report the news without fear or favor," Loy said. "The stakes in this case went way beyond this particular case on this particular campus."

Reported by: The Student Press Law Center, September 18, 2020.

College Station, Texas

The week of August 17, 2020, The Electronic Freedom Foundation (EFF) filed suit in the matter of *People for the Ethical Treatment of Animals, Inc., v. Michael K. Young* in the **US District Court for the Southern District of Texas, Houston Division** to stop Texas A&M University from censoring comments by People for the Ethical Treatment of Animals (PETA) on the university's Facebook and YouTube pages.

Due to the COVID-19 pandemic, Texas A&M's spring commencement ceremonies were held online with broadcasts over Facebook and YouTube. Both its Facebook and YouTube pages had comment sections open to any member of the public. But administrators deleted comments that were associated with PETA's high-profile campaign against the university's muscular dystrophy experiments on golden retrievers and other dog breeds.

The First Amendment prohibits government entities from censoring comments on open online forums merely because they dislike the content of the message or disagree with the viewpoint conveyed. In addition, censoring comments based on their message or viewpoint also violates the public's First Amendment right to petition the government for redress of grievances.

This is not the first time EFF and PETA have sued Texas A&M for censoring comments online. Back

in 2018, EFF brought another First Amendment lawsuit against Texas A&M for deleting comments by PETA and its supporters about the university's dog labs from the Texas A&M Facebook page. This year the school settled with PETA, agreeing to stop deleting comments from its social media pages based on the content of the comments.

EFF stated that they are disappointed that Texas A&M has continued censoring comments by PETA's employees and supporters without respect for the legally binding settlement agreement that it signed just six months ago and hope that the federal court will make it adamantly clear to the university that its censorship cannot stand.

Reported by: Electronic Freedom Foundation (EFF), August 21, 2020.

Lexington, Kentucky

In June 2020, as many predominantly White institutions in the United States began trying to answer for their histories of racism in the wake of George Floyd's murder, the University of Kentucky in Lexington decided that it was time for a 1934 mural by Ann Rice O'Hanlon to come down.

Many have wanted to see the mural removed for years, asserting that its portrayal of violence against Black people does not belong in a space where students attend classes or participate in celebratory events, while others have countered that hiding it would amount to artistic censorship and an obscuring of Kentucky's history of slavery and racism.

Now, a lawsuit has been filed by Wendell Berry—writer, farmer, and longtime Kentuckian—to stop the University of Kentucky from removing the mural, which depicts enslaved African Americans toiling in tobacco fields and entertaining White revelers.



The vignettes are intended to illustrate Kentucky's history, but in 2015, the administration covered the work with a white cloth until a long-term plan could be decided.

In the matter of *Wendell and Tanya Berry v. University of Kentucky*, filed in the **Commonwealth of Kentucky, Franklin County Circuit Court**, Berry argued that because it was created through a government program, it is owned by the people of Kentucky and cannot be removed by the university.

The University of Kentucky's president, Eli Capilouto, acknowledged that the work was a "terrible reminder" for many African American students of their ancestors' subjugation and that it provides "a sanitized image of that history." In response to the mural, in 2018, the university commissioned and installed a contemporary painting by Black artist Karyn Olivier, who stated that removing the original mural would "censor" her piece, which she would also want to be removed.

Olivier's work, called "Witness," reproduced the likenesses of the Black and Native American people in the mural and positions them on a dome covered with gold leaf so they appear to be floating like celestial beings. The dome is in the vestibule of the building, just in front of the room where the mural covers the wall.

According to Olivier, her work replicated the Black and brown figures depicted in the mural, positioning them against a gilded background on the dome; without the context of surrounding whiteness, the figures took on new meanings. Four decorative panels beneath the dome were embellished to memorialize historically overlooked Black and native Kentuckians of great accomplishment. The piece was created to inspire reflection—on itself and the mural's

content, history, and meaning today. However, students decried it as "not enough."

As the National Coalition Against Censorship (NCAC) pointed out in a July 1, 2020, letter urging that the mural not be removed, "This is the first instance we are aware of in which the removal of a mural by a White artist will have the simultaneous effect of silencing the work of a Black artist."

Olivier stated, "My disappointment as an artist and an educator is rooted in the university's anti-intellectual stance, one that runs counter to the purpose of higher education. Where else, if not in a university setting, should our thinking, opinions and assumptions be challenged? Why this false choice between free speech or racial justice? My goal in creating 'Witness' was to posit: Is it possible to hold opposing ideas and realities in one hand? Can we harness the tough questions they raise to wade into the pain, complexity, and frightening histories of America, and consider the possibilities and resilience of black and brown people?"

Continuing, Olivier stated, "My work was not created to magically dispel or absolve the University of Kentucky from embedded, institutional white supremacy or oppression. It wasn't meant to neatly tie up the 'race problem.' The disparate emotions around O'Hanlon's mural and my work should have been met with a long-term plan and commitment to investigate and address racism on campus and beyond. The day I completed my response to the mural was the day the university's real work needed to begin. Instead, removing the mural chooses silence, erasure and avoidance over engagement, investigation, and real reconciliation. Is the hope that we'll simply *forget* our shared history?"

The NCAC urged the university to reconsider its decision to remove the mural and to instead pursue the university's original goal of engaging in the sustained, difficult, and complex conversations that can arise in contemplation of these old and new works.

Reported by: NCAC, July 1, 2020; *The Art Newspaper*, July 9, 2020; *The New York Times*, July 6, 2020; *The Washington Post*, July 10, 2020.

PUBLISHING New York

On July 28, 2020, the Internet Archive (IA) responded to a June 1, 2020, copyright infringement lawsuit filed in the **Southern District of New York** by Hachette, HarperCollins, John Wiley and Sons, and Penguin Random House and coordinated by the Association of American Publishers (AAP).

In the matter of *Hachette Book Group, Inc., et al. v. Internet Archive et al.*, the IA asserted that its long-running book scanning and lending program is intended to fulfill the role of a traditional library in the digital age and is protected by fair use.

"The Internet Archive does what libraries have always done: buy, collect, preserve, and share our common culture," reads the IA's preliminary statement, contending that its collection of roughly 1.3 million scans of mostly 20th-century, mostly out-of-print books is a good faith and legal endeavor to "mirror traditional library lending online" via a process called Controlled Digital Lending (CDL).

"Contrary to the publishers' accusations, the Internet Archive, and the hundreds of libraries and archives that support it, are not pirates or thieves," the lawsuit stated. "They are librarians, striving to serve their patrons online just as they have done



for centuries in the brick-and-mortar world. Copyright law does not stand in the way of libraries' right to lend, and patrons' right to borrow, the books that libraries own."

In publicizing the lawsuit, executives at the AAP portrayed the IA's scanning and lending of library books as an attempt "to bludgeon the legal framework that governs copyright investments and transactions in the modern world" and compared its efforts to the "largest known book pirate sites in the world." In a supporting statement, Authors Guild President Douglas Preston said the IA's program was "no different than heaving a brick through a grocery store window and handing out the food—and then congratulating itself for providing a public service."

CDL practices have agitated authors and publisher groups for years. In late March 2020 those conflicts reached boiling point when the IA unilaterally announced its now-closed National Emergency Library initiative, which temporarily removed the restrictions for accessing its scans of books because of the COVID-19 outbreak.

In its lawsuit, the publishers proclaim that they are not suing the IA over "the occasional transmission of a title under appropriately limited circumstances, nor about anything permissioned, or in the public domain," but rather over the IA's "purposeful collection of truckloads of in-copyright books to scan, reproduce, and then distribute digital bootleg versions online."

In its 28-page response, the IA's lawyers denied many of the claims and characterizations made in the publishers' lawsuit.

"The Internet Archive has made careful efforts to ensure its uses are lawful," the lawyers stated, contending that its CDL program is "sheltered

by the fair use doctrine" and "buttressed" by traditional library practices and protections. "Specifically, the project serves the public interest in preservation, access and research—all classic fair use purposes. Every book in the collection has already been published and most are out of print. Patrons can borrow and read entire volumes, to be sure, but that is what it means to check a book out from a library. As for its effect on the market for the works in question, the books have already been bought and paid for by the libraries that own them. The public derives tremendous benefit from the program, and rights holders will gain nothing if the public is deprived of this resource."

Under CDL, the IA and other libraries make and lend out digital scans of physical books in their collections. For non-public domain titles, IA lawyers say the site functions like a traditional library: only one person can borrow a scanned copy at a time, the scans are DRM-protected, and the corresponding print book from which the scan is derived is taken out of circulation while the scan is on loan to maintain a one-to-one "own-to-loan" basis. In addition, the IA says it removes scans from the collection at the request of the copyright holder, pointing out that all of the 127 books listed as infringing in an appendix to the publishers' suit have been removed.

The IA's response to the lawsuit came days after a July 22, 2020, Zoom press conference during which IA's founder Brewster Kahle urged the publishers to drop the lawsuit and settle the dispute in the boardroom rather than in the courtroom.

"With this suit, the publishers are saying in the digital world, [libraries] cannot buy books anymore. We can only license them, and under their terms. We can only preserve them in

ways that they have granted explicit permission for, and only for as long as they've given permission. And we cannot lend what we've paid for, because we don't own it. It's not the rule of law, it is the rule of license. It doesn't make sense," Kahle said. "We say that libraries have the right to buy books and preserve them and lend them even in the digital world."

John McKay, a spokesperson for the AAP, dismissed Kahle's proposal to talk things out. "[The Internet Archive's] infringements, which are extensive and well-documented, are now appropriately before the court," said John McKay in a statement.

Reported by: Bangor Daily News, July 7, 2020.

FILM AND MEDIA Los Angeles, California

In the **US District Court Central District of California, Western Division, Los Angeles Disney Enterprises, Inc., et al. v. TTKN Enterprises, LLC, et al.** case, the streaming service Crystal Clear Media was sued by a group of entertainment powerhouses including Disney Enterprises, Netflix Studios, and Paramount Pictures for purportedly infringing upon their copyrights.

Per the lawsuit, Florida-based Crystal Clear Media illegally offers copyrighted movies and television programs online. It provides unauthorized access to Hollywood blockbusters, including *Frozen II*, *The Amazing Spider-Man*, and *Despicable Me 3*, for a fee.

The streaming platform deliberately masks its video-on-demand service by using public facing labels such as *Virtual Reality Gaming*, which lead users to the protected works. Crystal Clear Media and its resellers advertise customer subscription packages ranging from \$15 to \$40 per month.



The entertainment companies stated that at the time Crystal Clear Media was offering more than 14,000 movies and more than 3,000 TV series for on-demand viewing, as well as live television, streamed at the same time as the legitimate broadcaster. This programming included ESPN, NBCSN, and other popular channels. The entertainment group maintained that streaming services, such as Crystal Clear Media, which engage in “mass infringement,” harm the industry by sidestepping the paid licenses that the law requires.

“The result is television and movie content streamed over the internet in a manner that directly competes with and undermines authorized cable and internet streaming services,” lawyers for the entertainment companies wrote.

The companies also accused Crystal Clear Media of unfairly competing with their own video-on-demand services, including Hulu, Netflix, and Amazon Prime.

Reported by: Bloomberg Law, August 13, 2020.

New York

In the case *Neil Young v. Donald J. Trump et al.*, legendary rocker Neil Young sued Donald Trump’s presidential campaign in the US District Court Southern District of New York for copyright infringement for using two of his songs at numerous rallies and political events.

The songs, *Rockin’ in the Free World* and *Devil’s Sidewalk*, were played at the July 20, 2020, rally in Tulsa, Oklahoma. Young claims that the campaign used his songs without a license and despite him “continuously and publicly” objecting to the use of his songs by Trump since *Rockin’ in the Free World* was played when Trump launched his 2016 presidential bid in June 2015.

Young seeks statutory damages for what he described as the willful infringement of his copyrights as well as an injunction barring the campaign for using these two songs “or any other musical compositions” that he owns.

The suit presents a number of interesting questions. First and foremost, is the campaign’s use of Young’s compositions covered by a blanket license from one of the performing rights organizations (ASCAP or BMI)? Venues such as arenas, convention centers, and hotels usually have blanket licenses that permit the use of recorded music, but these licenses often exclude uses at events organized by third parties, such as political campaigns. This would require the campaign to obtain its own license to use the music in ASCAP or BMI’s catalog.

Moreover, both ASCAP and BMI permit songwriters to exclude their music from use in political campaigns. It seems likely that Young invoked his right to such an exclusion, though that is not clear from the legal filing. Indeed, the complaint is so devoid of detail that it comes close to falling short of the pleading standard in the Second Circuit for copyright infringement cases.

The complaint does not specify whether either of the songs was subject to an ASCAP or BMI license or whether Young took advantage of his right to exclude the songs from use for political purposes. It is not clear whether the lack of detail in the complaint is deliberate, designed to see whether such a minimal effort will convince the campaign to stop using Young’s songs, or whether Young intends to amend the complaint if the case proceeds.

Young sued only for copyright infringement and did not attempt to claim that the campaign

was suggesting that he endorsed or approved of Trump or his campaign under the federal Lanham Act or state law protections against false suggestions of authorization or association. Young (or his lawyers) may have recognized that such a claim would be difficult to win, could require expensive and difficult-to-obtain consumer perception evidence to establish a likelihood of confusion, and might run into some First Amendment concerns.

Young also did not bring a claim for infringement of his right of publicity (i.e., use of his voice or indicia of his persona for commercial purposes), a theoretical claim that might be tenable in certain jurisdictions. Young is a California resident, and the New York federal court would look to California law (which is broader than New York’s) to see if such a claim would lie.

Reported by: Shoot Magazine, August 13, 2020.

INTERNET Los Angeles, California

Tech company VidAngel, which had touted itself as a family-friendly streaming service, is asking a federal appellate court to reverse a jury’s decision requiring the company to pay four movie studios \$62.4 million for piracy.

In papers filed this week with the **Ninth Circuit Court of Appeals**, VidAngel says the damages award is so high it violates the company’s right to due process of law.

The filing is the latest development in a battle dating to 2016, when Disney, Warner Bros, and 20th Century Fox sued VidAngel for allegedly infringing copyright by streaming programs without a license. Originally filed in the **US District Court Central District of California Western Division**, the suit names



Disney Enterprises, Inc.; Lucasfilm Ltd., LLC; Twentieth Century Fox Film Corporation; and Warner Bros. Entertainment, Inc. v. VidAngel, Inc.

VidAngel's \$1-per-movie streaming service allowed users to censor nudity or violence from videos. The company purchased DVDs like *The Martian* and *Star Wars: The Force Awakens* and then streamed them from its own servers without obtaining licenses from the studios.

The tech company based in Provo, Utah, "sold" movie streams to consumers for \$20 but allowed them to sell back the movies for \$19 in credit.

VidAngel said it provided customers with a "filtering tool" that allowed users to edit out objectionable portions of movies.

The company argued that its service was protected by the Family Movie Act, a 2005 law intended to allow parents to censor movies by stripping them of inappropriate material. The Family Movie Act provides that copyright infringement laws don't apply to technology that mutes or hides "limited portions of audio or video content" from an authorized copy of the movie.

US District Court Judge Andre Birotte Jr. in Los Angeles initially rejected VidAngel's argument in 2017, when he enjoined the company from operating its streaming-and-filtering service.

VidAngel appealed that move to the Ninth Circuit, which also ruled against the company. That court said VidAngel's interpretation of the Family Movie Act law "would create a giant loophole in copyright law." In March of 2019, Birotte rejected VidAngel's other defenses—including that its service was protected by fair use principles—and awarded the studios summary judgment on their copyright claims. Several months

later, a jury awarded the studios \$62.4 million in damages.

VidAngel now argues that figure should be vacated because it's more than 20 times the estimated \$3 million revenue it received from filtering any of the studios' movies.

"The awards against VidAngel are completely out of kilter with the statute's purposes and the jury obviously did not consider them in any meaningful way," the company writes in its appellate papers.

VidAngel also raises other arguments, including that Birotte should have allowed a jury to decide whether VidAngel's service was a fair use.

"VidAngel used plaintiffs' works for a legitimate purpose: namely, to provide a technology authorized and encouraged by the [Family Movie Act]," the company writes.

"A reasonable jury could have found VidAngel's use was fair," it adds.

Reported in: Digital News Daily, August 13, 2020.

Augusta, Maine

On July 7, 2020, Judge Lance Walker of the **US District Court in Maine** ruled in the matter of *Aca Connects—America's Communications Association, et al. v. Aaron Frey* that Maine's pioneering and strict internet privacy law is not preempted by federal law.

However, Judge Walker said he did not have enough evidence in front of him to decide whether the law unfairly regulates commercial speech to dismiss it outright. But his criticism of the plaintiffs' arguments may not bode well for them in the long run.

Four industry associations representing internet service providers sued the state in February 2020 to prevent the law, which is believed to be one of the strictest in the country, from taking effect on July 1, 2020. The "opt-in" law prevents providers from

using, disclosing, selling, or permitting access to personal information without a customer's permission.

Judge Walker compared the providers' request to *Harold and the Purple Crayon*, a 1955 children's book whose main character is a boy who can create his own world by drawing it. He said their argument that federal privacy laws preempt the state law is "attempting to create a conflict where none exists."

Maine Attorney General Aaron Frey called the ruling a "huge victory" and said he was confident the law would withstand further scrutiny. The Internet and Television Association—one of the plaintiffs in the suit—said it disagreed with the ruling and that consumers deserved uniform privacy protections across the internet.

The law, sponsored by Senator Shenna Bellows, D-Manchester, faced opposition from national trade groups and the Maine State Chamber of Commerce. It was meant to reinstate rules implemented under former Democratic President Barack Obama that were repealed in 2017 by a Republican-led Congress. Walker was appointed to his post in 2018 by former President Donald Trump, a Republican.

Earlier in 2020, Maine won another broadband court ruling when a federal court judge ruled that a law requiring cable operators to extend service to areas with at least 15 homes per square mile as well as to place public-access channels near local broadcasting stations was intended to protect customers and was in accordance with the state's regulatory powers.

Reported by: Bangor Daily News, July 7, 2020.

Washington, DC

In the case of the *Woodhull Freedom Foundation, et al. v. The United*



***States of America and William P. Barr*, in the US District Court for the District of Columbia,**

the plaintiffs contend that the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) violates the First and Fifth Amendments and the Constitution's prohibition against ex post facto laws and are working to have the law overturned.

The plaintiffs are represented by The Electronic Freedom Foundation (EFF) and Daphne Keller at the Stanford Cyber Law Center, as well as lawyers from Davis Wright Tremaine and the Walters Law Group.

FOSTA achieved widespread internet censorship by making three major changes in law:

First, FOSTA makes it a federal crime for any website owner to "promote" or "facilitate" prostitution without defining what either word means. Organizations doing educational, health, and safety-related work fear that prosecutors may interpret advocacy on behalf of sex workers as the "promotion" of prostitution. Thus, the plaintiffs are reluctant to exercise their First Amendment rights for fear of being prosecuted or sued.

Second, FOSTA increases the potential liability for federal sex trafficking offenses by adding vague definitions and expanding the pool of enforcers, hindering free speech by nonprofits that fear million-dollar lawsuits. Now website operators and nonprofits might fear prosecution from individuals, as well as thousands of state and local prosecutors.

Third, FOSTA limits the federal immunity provided to online intercessors that host third-party speech under 47 U.S.C. § 230 ("Section 230"). This immunity has allowed for the proliferation of online services that host user-generated content, such as Craigslist, Reddit, YouTube, and Facebook. Section 230 provides for

the assurance that the internet supports diverse and divergent viewpoints, voices, and robust debate without website owners having to worry about being sued for their users' speech. The removal of Section 230 protections resulted in intermediaries shutting down entire sections or discussion boards for fear of being subject to criminal prosecution or civil suits under FOSTA.

After Congress passed FOSTA, Craigslist shut down the Therapeutic Services section of its website where Eric Koszyk, a licensed massage therapist, advertised his business. Although his business is completely legal, Craigslist further prohibited Koszyk from posting his ads anywhere else on its site because the new law created too much risk. In the two years since Craigslist removed its Therapeutic Services section, Koszyk's income has dropped to less than half of what it was before FOSTA.

Rate That Rescue, a website created in part by Alex Andrews, was also affected. The website is "a sex worker-led, public, free, community effort to help everyone share information" about organizations that aim to help sex workers leave their field or otherwise assist them. Without the protections of Section 230, in Andrews' words, the website "would not be able to function" because of the "incredible liability for the content of users' speech." Under FOSTA's new criminal provisions, Rate That Rescue's creators could face criminal liability because the website aims to make the work lives of sex workers safer and easier.

Woodhull Freedom Foundation advocates for sexual freedom as a human right, including supporting the health, safety, and protection of sex workers. Woodhull organizes a Sexual Freedom Summit in Washington, DC, with the purpose of bringing

together educators, therapists, legal and medical professionals, and advocacy leaders to strategize on ways to protect sexual freedom and health. There are workshops devoted to issues affecting sex workers, including harm reduction, disability, age, health, and personal safety. Due to COVID-19, Woodhull is livestreaming events this year. They have had to censor their ads on Facebook, as well as modify their programming on YouTube just to get past those companies' heightened moderation policies in the wake of FOSTA.

The Internet Archive, a nonprofit library that seeks to preserve digital materials, also faces increased risk because FOSTA has dramatically increased the possibility that a prosecutor or private citizen might sue it simply for archiving webpages that FOSTA would deem illegal. Such a lawsuit would be a real threat for the Archive, which is the internet's largest digital library.

Because the organization advocates for the decriminalization of sex work, Human Rights Watch is also put in danger as they could easily face prosecution for "promoting" prostitution.

After the DC Circuit Court of Appeals reversed the lower court's decision to dismiss the suit, both sides have filed motions for summary judgment. In their filings, the plaintiffs make several arguments for why FOSTA is unconstitutional.

First, they argue that FOSTA is vague and overbroad. The Supreme Court has said that if a law "fails to give ordinary people fair notice of the conduct it prohibits," it is unconstitutional. The law makes it illegal to "facilitate" or "promote" prostitution without defining what those terms mean. The result has been the censorship of speech that is protected by the First Amendment. Organizations like Woodhull, and individuals like



Andrews, are already restraining their own speech. They fear their advocacy on behalf of sex workers may constitute “promotion” or “facilitation” of prostitution.

The government has argued that it is unlikely anyone would misconstrue “promotion” or “facilitation.” But some courts interpret “facilitate” to simply mean make something easier. Thus anything that plaintiffs like Andrews or Woodhull do to make sex work safer, or make sex workers’ lives easier, could be considered illegal under FOSTA.

Second, the plaintiffs argue that FOSTA’s Section 230 exceptions violate the First Amendment. A provision of FOSTA eliminates some Section 230 immunity for intermediaries on the web, which means anybody who hosts a blog where third parties can comment, or any company like Craigslist or Reddit, can be held liable for what *users* say.

As the plaintiffs show, all the removal of Section 230 immunity really does is squelch free speech. Without the assurance that a host won’t be sued for what a commentator or poster says, those hosts simply won’t allow others to express their opinions. This is precisely what happened once FOSTA passed.

Third, the plaintiffs argued that FOSTA is not narrowly enough tailored to the government’s interest in stopping sex trafficking. Congress passed FOSTA because it was concerned about sex trafficking, with the intent of rolling back Section 230 to make it easier for victims of trafficking to sue certain websites, such as Backpage.com. The plaintiffs agree with Congress that there is a strong public interest in stopping sex trafficking. FOSTA doesn’t accomplish those goals; instead, it sweeps up a host of speech and advocacy protected by the First Amendment.

Finally, FOSTA violates what is known as “ex post facto” law. FOSTA creates new retroactive liability for conduct that occurred before Congress passed the law. During the debate over the bill, the US Department of Justice (DOJ) even admitted this issue to Congress—but the DOJ later promised to “pursu[e] only newly prosecutable criminal conduct that takes place after the bill is enacted.” The government, in essence, is saying to the courts, “We promise to do what we say the law means, not what the law clearly says.” But the DOJ cannot control the actions of thousands of local and state prosecutors—much less private citizens who may sue under FOSTA on the basis of conduct that occurred long before it became law.

Reported by: Electronic Frontier Foundation, September 17, 2020.

FREE SPEECH Greenwich, Connecticut

On August 27, 2020, in the *State of Connecticut v. David G. Liebenguth* (SC 20145), the **Connecticut Supreme Court** ruled that a Greenwich man can face criminal penalties for uttering racial slurs at a Black man in 2014, overturning a previous decision by the Appellate Court in a case centered on free speech rights. The court ruled that David Liebenguth could be charged with breach of peace for his words and conduct during an encounter with a Black parking enforcement officer in New Canaan, in which he used the word “nigger” twice, along with obscenities and a reference to the shooting death of a Black man.

The justices concluded in their opinion that the First Amendment right to free speech did not apply to Liebenguth’s conduct, and that the slurs fell under the category of

“fighting words,” which are not protected under the Constitution.

“Because the First Amendment does not shield such speech from prosecution, the state was free to use it to obtain the defendant’s conviction of breach of the peace in the second degree, which, as we have explained, is supported by the evidence,” the court ruled in a unanimous opinion written by Justice Richard N. Palmer. The attorney for Liebenguth said he believes the case “merits review” by the US Supreme Court.

Liebenguth was ticketed after overstaying at a parking meter in New Canaan on August 28, 2014, and confronted the enforcement officer after finding a \$15 parking ticket on his 1999 Ford Escort, according to court documents. Liebenguth said he was targeted because he was White and told the officer to “remember what happened in Ferguson,” referring to the fatal shooting of a Black teenager by a White police officer in Missouri, before mumbling a racial slur and an expletive.

As he drove away, Liebenguth again called the town employee the offensive word in a loud voice, preceded by an obscenity, court documents said.

Liebenguth was charged with a misdemeanor count of breach of peace. In a non-jury trial in front of Superior Court Judge Alex Hernandez, he was convicted in May 2016. Liebenguth and his lawyer appealed. In a 2-1 decision, the state Appellate Court determined that as loathsome as his speech, it was constitutionally protected and thus overturned the guilty verdict. Then it was the state’s turn to file an appeal with the highest court in Connecticut. The Supreme Court reviewed the concept of “fighting words” and the use of the word “nigger” as specifically harmful.



The judges ruled that this word was particularly “assaultive” when used against a Black person, and inflicted injury by itself alone when uttered. The use of the word, the court ruled, was without Constitutional protection, “because his racist and demeaning utterances were likely to incite a violent reaction from a reasonable person.”

Liebenguth’s use of obscenities, and his confrontational physical manner that was viewed by a witness, added to the argument that his behavior was not protected by free speech, the court said. “Other language and conduct by the defendant further inflamed the situation, rendering it that much more likely to provoke a violent reaction,” Palmer wrote, and the reference to Ferguson was also termed “menacing.”

The court noted approvingly an essay by a legal scholar in 1982, that said, “Racial insults, relying as they do on the unalterable fact of the victim’s race and on the history of slavery and race discrimination in this country, have an even greater potential for harm than other insults.”

Liebenguth’s attorney, John Williams, sent the following statement via email: “I believe very strongly that the Supreme Court’s ruling in this case is contrary to the First Amendment. I also think it is impossible to draw a rational distinction between the Supreme Court’s [2013] holding that shouting the ‘C word’ at a woman store clerk is protected speech while speaking the ‘N word’ to an African-American law enforcement officer is not. Be that as it may, Attorney Norm Pattis has agreed to petition the United States Supreme Court for a writ of *certiorari* in this matter. We believe that this case merits review by the nation’s highest court.”

Liebenguth was also charged with tampering with a witness, in

connection with sending an email to the supervisor of the parking enforcement officer attempting to block testimony in the upcoming trial. The parking officer did testify. That charge also ended in a guilty verdict by the lower court trial judge, but it was not considered by the Supreme Court. The Appellate Court upheld the guilty verdict on the tampering charge.

Reported by: CTInsider, September 1, 2020.

Ann Arbor, Michigan

In the matter of *Gerber v. Herskovitz*, a federal judge in the **Eastern Michigan District Court** ruled that weekly anti-Israel protests outside of a Michigan synagogue are protected under the First Amendment.

“Peaceful protest speech such as this—on sidewalks and streets—is entitled to the highest level of constitutional protection, even if it disturbs, is offensive, and causes emotional distress,” wrote US District Judge Victoria Roberts in her 11-page order.

Every Saturday since 2003, a group of protesters has harassed congregants outside of Beth Israel Congregation and placed in front of the synagogue signs that say “Jewish Power Corrupts,” “Zionism is Racism,” and “RESIST Jewish Power,” among other statements.

The judge also wrote, “There is no allegation that the protestors prevent plaintiffs from attending sabbath services, that they block plaintiffs’ path onto the property or to the synagogue, or that the protests and signs outside affect the services inside. Plaintiffs merely allege that the defendants’ conduct causes them distress and ‘interferes’ with their enjoyment of attending religious services.”

“They fill our sidewalks with hate speech to harass our worshippers, and then claim it’s just a good public

location,” said Rabbi Nadav Caine in a statement following the ruling.

The plaintiffs in the lawsuit were Beth Israel Congregation member Marvin Gerber and Ann Arbor resident Miriam Brysk, a Holocaust survivor. Ann Arbor Mayor Christopher Taylor, protester Henry Herskovitz and his two organizations—Jewish Witnesses for Peace, and Palestinian Friends and Deir Yassin Remembered—were listed as defendants.

The protesters are in violation of the city’s existing ordinances; however, Ann Arbor has done nothing to limit the protests.

Reported by: Jewish News Syndicate, August 25, 2020.

Richmond, Virginia

On August 24, 2020, in the matter of the *United States of America v. Michael Paul Miselis* and *United States of America v. Benjamin Drake Daley*, the **Fourth US Circuit Court of Appeals** upheld the convictions of two members of a white supremacist group who admitted they punched and kicked counter demonstrators during the 2017 “Unite the Right” rally in Charlottesville, Virginia, but found that part of an anti-riot law used to prosecute them “treads too far upon constitutionally protected speech.”

In its ruling, a three-judge panel of the Richmond-based Fourth US Circuit Court of Appeals rejected a challenge to the constitutionality of the entire federal Anti-Riot Act on its face. But the court said the law violates the free speech clause of the First Amendment in some respects. The court invalidated parts of the law where it encompasses speech tending to “encourage” or “promote” a riot, as well as speech “urging” others to riot or involving mere advocacy of violence.



Congress passed the law as a rider to the Civil Rights Act of 1968 during an era of social unrest, a time the Fourth Circuit noted was “not unlike our own,” a reference to months of nationwide protests over racial injustice following the May 25, 2020, police killing of George Floyd in Minneapolis. The Fourth Circuit’s ruling is the first time a federal appellate court has found parts of the law unconstitutionally overbroad. While the court was critical of those portions, it left most of the law intact.

The ruling came in an appeal by Benjamin Drake Daley of Redondo Beach, California, and Michael Paul Miselis of Lawndale, California, two members of the Rise Above Movement, a militant white supremacist group known for having members who train in martial arts street-fighting techniques.

Daley and Miselis pleaded guilty in 2019 to conspiracy to riot in connection with several 2017 rallies, including a torch-lit march at the University of Virginia and the “Unite the Right” rally in Charlottesville and rallies in Huntington Beach and Berkeley, California. As part of their guilty pleas, the two men admitted their acts of violence were not in self-defense. Daley was sentenced to a little more than three years in prison; Miselis received more than two years. Their attorneys argued before the Fourth Circuit that the federal Anti-Riot Act is unconstitutional because it is overbroad and vague and infringes on First Amendment activities.

“To be sure, the Anti-Riot Act has a plainly legitimate sweep. The statute validly proscribes not only efforts to engage in such unprotected speech as inciting, instigating, and organizing a riot, but also such unprotected conduct as participating in, carrying on, and committing acts of violence in furtherance of a riot, as well as aiding

and abetting any person engaged in such conduct,” Judge Albert Diaz wrote in the 3-0 opinion.

“Yet, the Anti-Riot Act nonetheless sweeps up a substantial amount of protected advocacy,” Diaz wrote.

The court said it upheld the convictions of Miselis and Daley because their conduct falls squarely under conduct prohibited by the law, including committing acts of violence in furtherance of a riot and participating in a riot.

Raymond Tarlton, an attorney for Miselis, and Assistant Federal Public Defender Lisa Lorish, who represents Daley, said the Fourth Circuit’s ruling “has particular significance” because the Department of Justice has used the law to prosecute some demonstrators who have participated in protests since Floyd’s killing.

“We are nonetheless disappointed that the Court decided to sever only parts of the statute instead of striking it down in its entirety,” said the attorneys via email. They declined to say whether they will appeal the ruling, but said they are “evaluating potential next steps.”

Reported in: *The StarTribune*, August 24, 2020.

Panama City Beach, Florida

On August 27, 2020, Judge T. Kent Wetherell II of the **US District Court for the Northern District of Florida** in *Thompson Jr v. City of Panama City Beach* ruled that Panama City Beach (PCB) did not violate local talk show host Burnie Thompson’s First Amendment rights.

According to a Panama City Beach press release, the lawsuit stemmed from allegations that PCB officials retaliated against Burnie Thompson because of “his critical news reporting,” adding that “over a two-day trial, . . . Wetherell II found that

although some officials may have treated Thompson with personal animosity, that treatment did not violate Thompson’s constitutional rights.”

The primary reason that Thompson filed the lawsuit was a 2017 ordinance passed by the then-seated PCB city council that allowed only PCB residents to comment on non-agenda items at the end of each meeting. Thompson, who lives in a nearby, unincorporated area of Bay County, believed this was a personal shot against him.

“Not only did I feel like that the federal judge . . . said so,” Thompson said, “the judge said, in his findings, that the city did pass [the resolution, and] that their motivation was to stop me from making public comments.” The resolution has since been altered to allow anyone to comment toward the beginning of each city council meeting.

Although the court may have found that some actions were taken out of malice, it ruled that there weren’t any constitutional violations because the resolution applied to all nonresidents and not just Thompson, he added.

“I’m disappointed that the judge found in my favor on matters of fact but found no legal remedy because he said actions didn’t rise to a constitutional violation,” Thompson wrote in a text. “I’m proud of my efforts. I continue to learn a lot and this decision won’t slow me down at all.”

Reported in: *Panama City News Herald*, August 30, 2020.

PRIVACY Washington, DC

On September 2, 2020, a federal appeals court ruled that a controversial government surveillance program that had collected millions of Americans’ phone records violated the law—and that claims made by FBI



and other national security officials in defense of the program were inaccurate. This addressed several consolidated court cases: *United States of America v. Basaaly Saeed Moalin*; *United States of America v. Mohamed Mohamed Mohamud*; *United States of America v. Issa Doreh*; and *United States of America v. Ahmed Nasir Taalil Mohamud*.

The three-judge panel ruling from the **US Court of Appeals for the Ninth Circuit** will not have much of an immediate effect on the program it criticizes, given that the record-gathering effort ended in 2015 and was replaced by an alternative method for searching phone records, which was also eventually shut down.

The judges also ruled that government prosecutors must tell criminal defendants when it plans to use evidence gathered or derived from surveillance done overseas. It was not immediately clear how significantly that part of the ruling might impact the Justice Department, because the use of such material in criminal investigations has always been closely guarded.

The ruling also stands as another judicial rebuke of intelligence officials who defended the bulk phone records program after former National Security Agency (NSA) contractor Edward Snowden revealed key details of its workings in 2013.

Even as the judges rejected some of the government's broader arguments, they unanimously upheld the convictions at the center of the case—against Basaaly Moalin and three others guilty of conspiring to send money to al-Shabab, a Somali terrorist group.

That case, and the long-running battles over privacy and security, grew from the federal government's

push to detect and prevent terrorist attacks after 9/11. Under Section 215 of the PATRIOT Act, the NSA gathered millions of Americans' phone records—not the content of calls, but the records of who called whom, and for how long—to build a database that could then be searched by counterterrorism investigators. Then Snowden shared documents that showed in greater detail how the program worked, generating fresh debate about whether the government was violating privacy rights in conducting the war on terrorism.

At that time, officials with the FBI and other intelligence agencies defended the Section 215 program as essential to preventing attacks and said it contributed to uncovering the case of the four Somali Americans who sent, or conspired to send, money to al-Shabab.

Then-FBI Deputy Director Sean Joyce told Congress that if not for the information from the phone-records program, the bureau “would not have been able to reopen” the investigation, leading to the arrests.

After reviewing classified records, the court wrote in a 59-page ruling that the phone surveillance program was not so essential to the case and thus, the convictions should be tossed out.

“To the extent public statements of government officials created a contrary impression, that impression is inconsistent with the contents of the classified record,” the judges wrote.

Patrick Toomey, an American Civil Liberties Union attorney, said the ruling “makes [it] clear that intelligence officials misled Congress and the public about the value of this mass surveillance program,” and he called the

judges' decision “a victory for privacy rights.”

The court also rejected the Justice Department's argument that the call records were properly obtained because they were relevant to a terrorism investigation.

That argument, they wrote, “depends on an after-the-fact determination of relevance: once the government had collected a massive amount of call records, it was able to find one that was relevant to a counterterrorism investigation.” The problem, the judges wrote, is that the Foreign Intelligence Surveillance Act “required the government to make a showing of relevance to a particular authorized investigation before collecting the records.”

Therefore, the judges found, “the telephony metadata collection program exceeded the scope of Congress's authorization” and therefore violated the law.

The ruling is the second time a federal appeals court has found a bulk phone records program illegal. In 2015, a federal appeals court in New York issued a scathing opinion finding the program had wrongly gathered a “staggering” amount of information about Americans in an effort to conduct “sweeping surveillance.”

That same year, Congress ended the program, replacing it with a system in which phone companies kept such records and provided information about specific numbers when presented with a court order. However, that replacement program was regarded as so difficult and unconstructive that it was essentially shelved in late 2018.

Reported in: *Washington Post*, September 4, 2020.