NEWS FROM THE BENCH

SUPREME COURT

A ninth-grade Pennsylvania student's profane articulation of her disappointment in not making the varsity cheerleading squad on Snapchat will be a decisive moment in determining the extent of students' First Amendment speech rights when ***Mahanoy Area School District v. B.L.*** is heard before the Supreme Court.

This is unlikely the result the then-fourteen-year-old anticipated when she wrote "Fuck school Fuck softball. Fuck cheer. Fuck Everything," back in 2017. One of her friends took a screencapture of this Snapchat message and shared it with her mother, who is a coach at the school.

The image was subsequently shared with school administrators, resulting in the student's suspension from cheerleading for a year.

The student sued the district in response and the case wound up before the US Court of Appeals for the Third Circuit. They ruled in her favor, finding that the First Amendment did not allow public schools to punish students for speech acts made off school grounds.

The school district appealed the case to the US Supreme Court, asserting that this question "has become even more urgent as COVID-19 has forced schools to operate online." A supporting brief from the Pennsylvania School Boards Association argued that the Third Circuit's ruling was too broad and protected all off-campus speech, limiting public schools' capacity to address cyberbullying and racist threats made on social media if the student is off-campus when posting them.

On January 8, 2021, the Supreme Court agreed to hear the case.

The American Civil Liberties Union (ACLU) is representing the student, now seventeen years old. In a statement, they asserted she was protected by the First Amendment when she articulated a "colorful expression of frustration, made in an ephemeral Snapchat on her personal social media, on a weekend, off campus, containing no threat or harassment or mention of her school, and that did not cause or threaten any disruption of her school."

In 1969, the Supreme Court ruled public schools can regulate speech only when it materially and substantially disrupts the work and discipline of the school. This was in the case of *Tinker v. Des Moines Independent Community School District*, pertaining to the suspension of students wearing black armbands in protest of the Vietnam War.

In the only other pertinent Supreme Court ruling, students' First Amendment rights on campus were rolled back from *Tinker* with the narrowly split 2007 ruling in *Morse v. Frederick*. This case resulted from a student's ten-day suspension for unfurling a fourteen-foot banner proclaiming "Bong Hits 4 Jesus" across from school property.

There, Chief Justice Roberts wrote for the majority that, "It was reasonable for [the principal] to conclude that the banner promoted illegal drug use—and that failing to act would send a powerful message to the students in her charge."

In dissent, Justice John Paul Stevens said, "This case began with a silly nonsensical banner, ends with the court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, so long as someone could perceive that speech to contain a latent pro-drug message."

The Second, Fourth, Fifth, Eighth, and Ninth Circuit courts as well as the Pennsylvania Supreme Court agreed that *Tinker* applies to "off-campus speech that has a close nexus to the school environment." The Third Circuit was the first US Court of Appeals to deviate from this principle.

Reported in: *New York Times*, June 26, 2007; December 28, 2020; CNN, June 26, 2007; *Mahanoy Area School District v. B.L.*, No. 20-255, pending before the Supreme Court; *ABA Journal*, January 11, 2021.

The Supreme Court sided with prominent Black Lives Matter (BLM) activist DeRay McKesson in the case ***DeRay McKesson v. John Doe,*** overturning an appeals court decision which allowed him to be sued by a police officer injured by an unknown assailant during a protest McKesson organized.

The officer, identified as John Doe in the suit, was struck by a piece of rock allegedly thrown by a protester. The suit against McKesson was grounded in the claim that he "should have known . . . violence would result" from organizing a protest. The officer also sued BLM, but that suit was dismissed as one cannot sue a social movement.

The incident took place in Baton Rouge following the 2016 shooting death of Alton Sterling by a White police officer. The American Civil Liberties Union (ACLU) represented McKesson.

Their legal director, David Cole, said that allowing the appeals court decision to stand "would have [had] a tremendous chilling effect on the First Amendment right to protest."

The unsigned opinion from the Supreme Court said, "The Fifth Circuit should not have ventured into so uncertain an area of tort law—one laden with value judgments and fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court."

McKesson, who rose to prominence during protests in Ferguson, Missouri, after the shooting death of Michael Brown by a White police officer, said in a statement that the Supreme Court correctly "recognizes that holding me liable for organizing a protest because an unidentifiable person threw a rock raises First Amendment concerns." Associate Justice Amy Coney Barrett did not participate in the case. Associate Justice Clarence Thomas was the sole dissenter.

Reported in: *USA Today*, November 2, 2020; CNBC, November 2, 2020.

FREE SPEECH

Santa Cruz, California

Shortly after taking office on January 20, 2021, President Biden revoked Executive Order (EO) 13950, a late Trump-era EO prohibiting federal agencies, grant recipients, and contractors from endorsing "divisive race and gender concepts" through diversity and inclusion training. (See "Censorship Dateline: Colleges and Universities," for more news on EO 13950.)

Prior to Biden's action, a federal judge had imposed a preliminary injunction on December 22, 2020, barring the federal government from taking any action intended to effectuate or enforce the provisions of EO 13950 against contractors, grant recipients, sub-contractors, and sub-grantees.

The plaintiffs' motion in ***Santa Cruz Lesbian and Gay Community Center, et al., v Donald J. Trump, et al.* (US District Court for the Northern District of California)**, asserted that the EO "impermissibly chills the exercise of . . . constitutionally protected speech based on the content and viewpoint of their speech" and violates the Due Process clause of the Fifth Amendment because it fails to provide adequate notice of the "the conduct it purports to prohibit."

The Court agreed that "restrictions on the freedom of federal contractors to deliver diversity training and advocacy addressing racism and discrimination to their own employees and service providers using funds unrelated to the federal contract is a violation of First Amendment rights; and conditioning the continued receipt of federal grant funds on grantees' agreement to not promote 'divisive concepts' as defined by the federal government even though the grant program is unrelated to such divisive concepts is a violation of grantees' First Amendment rights."

The Court also agreed "that the vagueness of the prohibited conduct inhibits the exercise of Plaintiffs' freedom of expression" and that the federal government's own interpretation of the scope of the prohibited conduct creates even more uncertainty.

In accordance with Biden's revocation, all federal agencies are directed to suspend, revise, or revoke actions arising from EO 13950, including actions to terminate or restrict contracts or grants pursuant to EO 13950 by March 21, 2021.

Reported in: *Politico*, September 10, 2020; *USA Today*, September 27, 2020; *Government Executive*, September 28, 2020; *Triple Pundit*, September 30, 2020; *JDSupra*, January 22, 2021.

NET NEUTRALITY

On September 29, 2020, the the Federal Communications Commission (FCC) withdrew their appeal of ***The New York Times Company, et al., v The Federal Communications Commission* (US District Court for the Southern District of New York)**, allowing a long-stalled Freedom of Information Act (FOIA) response regarding their appeal of net neutrality rules to proceed.

Back in June of 2017, the FCC held a public-comment process (as required by law) about their proposed repeal of net neutrality rules classifying internet service providers (ISPs) as common carriers.

The 21.8 million comments received were used to inform then-FCC Chairman Ajit Pai's December 2017 repeal of federal net neutrality rules.

However, based on research and analysis conducted by the New York Attorney General's (NY AG) Office, an estimated 9.5 million of the comments were made using stolen identities, including some from deceased individuals. The NY AG's Office also found that around 450,000 comments came from Russian email addresses.

A study done by Emprata revealed that more than 7.75 million comments were made using fake email addresses, 9.93 million responses consisted of duplicate comments listing the same physical and email addresses, and 1.72 million comments listed home addresses outside the United States. Emprata's findings substantiated previous reports that the comment process was undermined by spambots.

Ryan Singel conducted a study of unique/personalized comments and found that 99.7 percent of those opposed the FCC's repeal of net neutrality rules, suggesting that authentic domestic responses did not actually support the action taken by the FCC.

To further investigate the scope of fraud and foreign interference committed in the FCC's public comment process, the *New York Times* submitted FOIA requests for metadata from the comments, including IP addresses, time stamps, and user-agent headers from their Application Programming Interface (API) proxy server log.

The FCC refused to disclose this information, leading to the September 2018 lawsuit that the *New York Times* won in May 2020. Judge Schofield rejected the FCC's arguments that providing the information would violate commenters' privacy, since "every commenter was provided with a privacy notice stating, 'All information submitted, including names and addresses, will be publicly available via the Web.'"

The judge also ruled that the API proxy server log was fair game, ruling that the log falls under the "any information . . . in any format" scope of FOIA and rejecting the FCC's claim that it is "'a long unwieldy list of various data' that it should not have to search." Judge Schofield also noted that the request serves a vital public interest, as "the integrity of the notice-and-comment process is directly tied to the legitimacy of an agency's rulemaking." The FCC initially appealed this verdict, but dropped its appeal.

Reported in: *Ars Technica*, August 30, 2017; October 17, 2018; May 4, 2020; *Media Post*, September 29, 2020.

LIBRARIES

Seymour, Indiana

On January 26, 2021, American Civil Liberties Union (ACLU) of Indiana announced it filed a lawsuit against the Jackson County Public Library for issuing a lifetime ban against a sixty-eight-year-old patron who placed a poem he had written—titled "The Red Mean"—on the library's circulation desk. The poem was critical of then-President Trump and his followers.

Prior to the ban, Richard England had visited the library two to three times per week for over a decade to check out books, movies, and music. He has a limited income and cannot afford home internet.

He left the poem at the circulation desk, as the staff member he wanted to share it with wasn't there.

When he got home, there was a voicemail from the Seymour Police Department informing him that he was banned from the library for the rest of his life and would be arrested for criminal trespassing if he returned.

ACLU of Indiana senior attorney Gavin M. Rose said, "The library's action banning Mr. England from accessing materials impacts his right to receive information. In addition, the First Amendment protects people who, regardless of their views, attempt to hold the government accountable through expression."

In their news release, the ACLU of Indiana held that while the original poem was critical of then-President Trump and his followers, it was not vulgar, threatening, obscene, or otherwise inappropriate.

In addition to the constitutional concerns, banning a patron from the library for their political views directly contradicts Article V of the Library Bill of Rights, "A person's right to use a library should not be denied or abridged because of origin, age, background, or views." The library's collection development policy, approved by their board of trustees on February 17, 2009, and last revised on February 18, 2020, includes the Library Bill of Rights as well as The Freedom to Read and Freedom to View statements.

The case, ***Robert England v. Jackson County Public Library***, will be heard in the US District Court for the Southern District of Indiana New Albany Division.

Reported in: ACLU, January 26, 2021; *The Tribune*, January 27, 2021; *Indiana Public Radio*, January 28, 2021.

Gainesville, Florida

On August 27, 2020, Alix Freck filed a lawsuit against the Alachua County Library District (ACLD), alleging her former employer violated her free speech rights by demoting her after she shared a Facebook video opposed to the Black Lives Matter (BLM) movement. Freck also commented on other posts related to BLM, including those of co-workers who supported the movement.

After these posts were brought to the attention of the library district's administrative directors, they met with Freck and requested her not to post to Facebook while they sought legal advice. Library Director Shaney Livingston indicated the situation would not be mentioned in Freck's file.

Freck deleted her Facebook account in response, though she has subsequently reactivated it.

A few weeks later, Freck received a memorandum demoting her from her new position as assistant branch manager. While she'd been employed by the library district since 2012, she was still in the six-month probationary period for this position. Freck asserts she did not create the post during work hours or at the workplace.

ACLD holds that their social media directive allows them to impose disciplinary measures on an employee for posting comments that violate generally accepted professional and ethical standards.

Freck's complaint asserts that this directive is overly broad and she was disciplined for constitutionally protected speech. The jury trial of ***Freck v. Alachua County Library District et al.*** is scheduled for August 18, 2021, in the US District Court for the Northern District of Florida.

Reported in: WCJB 20, October 21, 2020; *Gainesville Sun*, October 30, 2020.