



SUPREME COURT

In *Mahanoy Area School District v. B.L. (20-255)* the Supreme Court sanctioned the right of students to flip the bird and drop f-bombs off campus. At the end of her freshman year, after not making the varsity cheerleading squad, Brandi Levy vented her spleen in a Snapchat post. It consisted of a photo of her and a friend raising their middle fingers with the caption: “Fuck school fuck softball fuck cheer fuck everything.” She then sent another post with an upside-down smiley-face emoji.

The post was made on a Saturday afternoon in a convenience store parking lot and was sent from a personal cell phone to a private circle of friends. When a screen capture of Levy’s post was shared with school administrators, they suspended her from junior varsity cheerleading for a year. Levy and her parents then filed a lawsuit against the school.

Both a federal district court and the Third Circuit Court of Appeals court ruled in Levy’s favor. The school district appealed the decision to the Supreme Court. On June 23, 2021, the court ruled 8-1 that public school officials lacked the authority to discipline Levy for her off-campus post and violated her First Amendment rights by doing so.

Justice Stephen Breyer wrote the majority opinion, finding that: schools generally do not act “in loco parentis” with regards to off-campus speech. He added that “the school itself has an interest in protecting a student’s unpopular expression, especially when the expression takes place off campus,” because “America’s public schools are the nurseries of democracy.”

The decision also protected parents’ right to discipline their children for their off-campus speech. Breyer wrote that “there is no reason to believe B.L.’s parents had delegated to school

officials their own control of B.L.’s behavior at the Cocoa Hut.”

The Supreme Court concluded there was nothing that would place B.L.’s speech outside the protections of the First Amendment. Her post was not obscene and did not contain fighting words, by the Court’s own definitions.

The opinion affirmed that even flippant speech is protected under the First Amendment as “sometimes it is necessary to protect the superfluous in order to preserve the necessary.”

Notably, this opinion extended the protections the Supreme Court established in the 1969 case *Tinker V. Des Moines School District* (393 U.S. 503) to off-campus speech.

In *Tinker*, the court ruled that school officials can discipline student speech only if they can show it was likely to cause a substantial disruption of school activities or impair the rights of others. Such disruption must exist in fact and not rely on “undifferentiated fear or apprehension of disturbance.”

Justice Alito stated in his concurring opinion that, “If today’s decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory.”

Justice Clarence Thomas was the lone dissenter, standing by his belief that public school students do not have free-speech rights inside schools and that First Amendment rights held by students do not limit schools from disciplining them. In his dissent, he suggested he would reverse *Tinker* if he could.

Thomas argued that the “authority of schools over off-campus speech may be greater when students participate in extracurricular programs, [because] students like B.L. who are

active in extracurricular programs have a greater potential, by virtue of their participation, to harm those programs.”

Thomas also argued that location was a fluid concept when applied to social media, since social media posts made off-campus could be read at school. Subsequently, he posits schools “often will have *more* authority, not less, to discipline students who transmit speech through social media.”

Justice Samuel Alito wrote separately, addressing Justice Thomas’s dissent. In his opinion, he wrote that “courts should be ‘skeptical’ about the constitutionality of the regulation of off-premises speech.”

Alito affirmed that “public school students, like all other Americans, have the right to express ‘unpopular’ ideas on public issues, even when those ideas are expressed in language that some find ‘inappropriate’ or ‘hurtful.’”

Justice Breyer noted that schools have an interest in preventing “substantial disruption of learning-related activities [and in] the protection of those who make up [the] school community.” However, the legality of disciplining students for off-campus cyberbullying and harassment fell outside of the scope of this case, so those areas of student free-speech remain ambiguous.

Reported in: NPR, June 24, 2021; New York Times, June 23, 2021; JD Supra, June 30, 2021, and June 24, 2021; Freedom Forum, June 30, 2021.

On June 28, the Supreme Court left the 4th US Circuit Court of Appeal’s decision in place, allowing transgender students to use the bathroom corresponding to their gender identity throughout the court’s jurisdiction of Maryland, North Carolina, South Carolina, and West Virginia.



In 2015, Gavin Grimm, a transgender male who was then a high school student, sued the Gloucester County School Board arguing their policy violated Title IX and the Equal Protection Clause.

As part of Grimm's medical treatment for severe gender dysphoria, Grimm and his mother notified school administrators of his male gender identity. They received permission for Grimm to use the boys' restroom, but the school board withdrew that permission less than two months later.

In a statement, Grimm said, "I am glad that my years-long fight to have my school see me for who I am is over. Being forced to use the nurse's room, a private bathroom, and the girl's room was humiliating for me, and having to go to out-of-the-way bathrooms severely interfered with my education. Trans youth deserve to use the bathroom in peace without being humiliated and stigmatized by their own school boards and elected officials."

When Gavin sued in 2015, the Obama Justice Department filed a "statement of interest" accusing the school board of violating Title IX, which prohibits schools from discriminating on the basis of sex.

The board appealed the decision to the Supreme Court. In 2017, before they could hear the case, the Trump administration withdrew the Obama-era guidance and the Supreme Court wiped away the decision by the 4th Circuit.

In 2019, Judge Arenda Wright Allen of the District Court for Eastern Virginia ruled in Grimm's favor, instructing the school board to pay his court costs and update his records to indicate he is male.

"The perpetuation of harm to a child stemming from unconstitutional conduct cannot be allowed to stand," said Judge Allen. "These

acknowledgments are made in the hopes of making a positive difference to Mr. Grimm and to the everyday lives of our children who rely upon us to protect them compassionately and in ways that more perfectly respect the dignity of every person."

The school board appealed this decision and the case returned to the 4th Circuit Court of Appeals as **Grimm v. Gloucester County School Board (no. 19-1952)**.

The 4th Circuit again ruled in Grimm's favor, this time citing the Supreme Court's 2020 decision that Title VII of the Civil Rights Act bars discrimination based on sex, including claims of gender identity and sexual orientation.

The Supreme Court's decision not to review the lower court's opinion means public school students in states covered by the 4th Circuit, the 7th Circuit, and the 11th Circuit can use the bathroom corresponding to their gender identity.

The issue is unsettled in other states and could potentially make its way back to the Supreme Court.

On July 9, US District Court Judge Aleta Trauger granted a preliminary injunction against a Tennessee bathroom law, in a case that seems destined for the 6th Circuit Court of Appeals. Had the law gone into effect, it would have required businesses to post signs if they allow transgender people to use the bathrooms corresponding to their gender identity.

Reported in: ACLU, June 28, 2021; CNN, June 28, 2021; August 26, 2020; and August 9, 2019; NBC News, July 9, 2021.

The US Supreme Court declined an appeal from Berronelle Stutzman, a Washington-based florist who refused to sell flowers to a same-sex couple for their wedding. The Court did not issue an opinion.

The Washington Supreme Court ruled against Ms. Stutzman in 2017, finding that she had violated a state anti-discrimination law through her refusal to sell goods to the couple.

Their ruling amplified statements from the couple, Robert Ingersoll and Curt Freed, that the "case [was] no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches."

After the Supreme Court decided the case **Masterpiece Cakeshop v. Colorado Civil Rights Commission (16-111)** in 2018, Stutzman's case was remanded back to Washington for review.

In *Masterpiece Cakeshop*, the Supreme Court ruled narrowly in favor of a cakeshop whose owner refused to bake a cake for a same-sex couple. Their ruling did not address concerns of discrimination against the same-sex couple, but was adjudicated based on "religious hostility on the part of the State itself" towards the cakeshop owner.

Upon reviewing the case, the Washington Supreme Court found that no religious bias had factored into their prior decision and again ruled for Ingersoll and Freed in 2019.

In their ruling, they stated Stutzman had no constitutional right to ignore state law prohibiting public businesses from discriminating based on sexual orientation. Stutzman once again appealed the case.

In response to the US Supreme Court rejecting the appeal, the American Civil Liberties Union released a statement saying, "No one should walk into a store and have to wonder whether they will be turned away because of who they are. Preventing that kind of humiliation and hurt is exactly why we have nondiscrimination laws."

Reported in: Jurist, July 5, 2021, and June 4, 2018.



CIVIL RIGHTS Arkansas

On May 25, the American Civil Liberties Union (ACLU) sued the state of Arkansas to block a law banning doctors from providing gender reassignment surgeries, puberty blockers, or cross-hormone therapy to transgender youth.

In April, Arkansas lawmakers overrode Governor Asa Hutchinson's veto of the law by meeting the required simple majority in both the House and Senate. On vetoing the bill, Hutchinson said if it "becomes law, we are creating new standards of legislative interference with physicians and parents as they deal with some of the most complex and sensitive matters dealing with young people."

The ACLU is representing four transgender adolescents and their families and two doctors in the lawsuit. The injunction prevents the law from going into force until the case is adjudicated.

"Transgender children in crisis shouldn't have to turn to the courts to ensure that they can get the health care that their doctors and parents agree they need. But that's the reality that anti-LGBTQ [lesbian, gay, bisexual, transgender, and queer/ questioning] forces have created as part of their campaign of attacks on transgender youth," said the ACLU in a statement.

US District Judge Jay Moody, who granted the injunction, said "To pull this care midstream from these patients, or minors, would cause irreparable harm."

The lawsuit asserts that the law would violate the Equal Protection Clause and the Due Process Clause of the 14th Amendment and strip families of the power to make healthcare decisions for those under 18 years old.

Holly Dickson, executive director of the ACLU of Arkansas, said "This ruling sends a clear message to states

across the country that gender-affirming care is life-saving care and that we won't let politicians in Arkansas—or anywhere else—take it away."

Reported in: *The Hill*, May 25, 2021, and April 6, 2021; *Independent*, July 21, 2021.

West Virginia

On May 26, West Virginia's law prohibiting transgender girls and women from competing on sports teams for public secondary schools or state institutions of higher education was challenged in a federal lawsuit alleging it unconstitutionally "discriminates on the basis of sex and transgender status."

The American Civil Liberties Union (ACLU) of West Virginia, Lambda Legal, and Cooley LLP filed the suit on behalf of 11-year-old Becky Pepper-Jackson.

"I just want to run. I come from a family of runners," said Pepper-Jackson. "I know how hurtful a law like this is to all kids like me who just want to play sports with their classmates and I'm doing this for them. Trans kids deserve better."

The lawsuit seeks declaratory and injunctive relief to allow Pepper-Jackson "to experience the benefits of athletic participation consistent with her gender identity and without being singled out from other girls for different treatment simply because she is transgender."

West Virginia Governor Jim Justice signed the bill into law on April 28. Mississippi, Arkansas, Tennessee, and Florida have enacted similar sports bans this year.

In South Dakota, Governor Kristi Noem issued executive orders directing the Department of Education and the Board of Regents to restrict participation in girls' and women's sports to athletes who can prove their sex assigned at birth was female.

A lawsuit brought by The Human Rights Campaign is challenging Florida's law and plans to challenge those in Arkansas, Mississippi, and Tennessee in the near future. Another injunction is currently blocking a law passed in Idaho last year while another ACLU lawsuit moves through the courts.

Human Rights Campaign President Alphonso David said in a statement that "Transgender children are children. They deserve the ability to play organized sports and be part of a team, just like all children."

Reported in: *CNN*, May 27, 2021, and April 28, 2021; *Time*, June 30, 2021.

FREE SPEECH Richmond, Virginia

In *United States v. Bartow* (2021 WL 1877821), the US 4th Circuit Court of Appeals ruled on May 11th that retired Air Force officer Lieutenant Colonel Jules Bartow's use of a racial slur toward a Black store clerk did not fall under the "fighting words" exception to free speech protection.

The incident precipitating the case was a bizarre and belligerent tirade by Bartow against a Black sales associate at the Quantico Marine Corps Exchange who wished him "good morning" and another Black man who tried to intervene.

"If I had indigestion, diarrhea, or a headache, would you still address me as 'good morning'?" Bartow responded in a raised voice. Cathay Johnson-Felder, the associate, then asked "Can I help you, sir?"

Bartow replied, "I'm not a sir—I'm not a male, I'm not a female, if I had a vagina, would you still call me sir?"

An unidentified Black civilian then explained to Bartow that Johnson-Felder's use of "sir" was the standard mode of addressing customers purchasing products at military installations.



Bartow's coherence and civility continued to decline until base security personnel removed him from the store and placed him under arrest.

A US magistrate judge found Bartow had violated Virginia's abusive language statute, making him guilty of a class 3 misdemeanor, and fined him \$500. Bartow appealed his conviction.

"The ugly racial epithet used by Bartow undoubtedly constituted extremely 'abusive language,'" wrote US Circuit Judge Diana Gribbon Motz in the 14-page opinion.

Motz noted, however, that the First Amendment allows criminalization of abusive language only if the government proves the language had a "direct dependency to cause immediate acts of violence by the person to whom, individually, it was addressed."

The First Amendment allows restrictions on obscenity, defamation, "fighting words," fraud, incitement, and speech integral to criminal conduct.

The "fighting words" exception to the First Amendment was established by the 1942 Supreme Court case *Chaplinsky v. New Hampshire* (315 U.S. 568). Justice Frank Murphy wrote the decision establishing "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

The "fighting words" provision has been progressively narrowed by subsequent Supreme Court cases. The 1969 case *Brandenburg v. Ohio* (395 U.S. 444) determined that even vile epithets made by a Ku Klux Klan leader after burning a cross did not constitute fighting words as they did not

incite lawless action when they were broadcast on TV news.

"Fighting words" are now narrowly tailored to direct in-person insults "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

Motz noted that "Over the decades, the Court has repeatedly determined that the First Amendment places considerable limits on the criminalization of speech. We must abide those limits, even if that means, as it does here, that shameful speech escapes criminal sanction."

Reported in: *Courthouse News Service*, May 11, 2021; *JD Supra*, May 14, 2021.