Freedom of Speech in the United States

eighth edition

Thomas L. Tedford
The University of North Carolina at Greensboro

Dale A. Herbeck
Northeastern University

Annual Update — Autumn 2021

This update summarizes the free speech decisions issued by the U.S. Supreme Court during the 2020–2021 term, as well as related developments. The justices issued consequential decisions dealing with student speech, intellectual property, and disclosure of the names and addresses of donors to nonprofit organizations, but held over two cases that raise free speech questions until the 2021–2022 term. The Court denied certiorari in a defamation case that challenged the "actual malice" rule, but two justices voted to hear it. As is often the case, in several cases the justices left important issues unresolved.

In October 2020, the first month of the new Supreme Court term, President Trump nominated and the Senate confirmed Amy Coney Barrett to fill the opening created by the death of Ruth Bader Ginsburg. This appointment was significant, as it shifted the Court's ideological balance toward the conservatives and led to calls for adding justices or limiting the length of a Supreme Court appointment.

On November 3, 2020, Americans went to the polls to elect a new president. On January 6, 2021, angry protestors marched on the Capitol building and attempted to block the certification of the election results.

Some commentators feared that the growing political divisions within the country would be reflected in a series of Supreme Court decisions on ideological lines. For the most part, this did not happen; in fact, several significant decisions had majorities that included both liberal and conservative justices. These decisions do not necessarily forecast smooth sailing next year, however. The justices have already agreed to hear controversial cases involving abortion, gun rights, and religious liberty during the 2021–2022 term.

The complete text of this update and a library of landmark free speech decisions can be found on the website for the book:

http://www.tedford-herbeck-free-speech.com

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Looking to the Future

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Chapter 3: Political Heresy: Sedition in the United States since 1917

Protests on January 6, 2021

On January 6, 2021, then-President Donald Trump gave a speech to a crowd of his supporters who had gathered at the Ellipse, a 52-acre park near the White House and within walking distance of the U.S. Capitol Building in Washington, D.C. In his 70-minute address, Trump claimed that "our election victory" had been "stolen by emboldened radical left Democrats" and the "fake news media." He implored the audience to "stop the steal," and promised "to lay out just some of the evidence proving that we won this election and we won it by a landslide." He added, "This was not a close election."

After reciting a long list of grievances, Trump said, "It is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you, we're going to walk down . . . and we're going to cheer on our brave senators and congressmen and women, and we're probably not going to be cheering so much for some of them." In concluding his speech, Trump reiterated his call for action, "So we are going to walk down Pennsylvania Avenue . . . and we are going to the Capitol."

Immediately after the speech, thousands of Trump supporters marched towards the Capitol Building. The crowd breached the security perimeter, occupied the building, and forced legislators who had gathered to certify the presidential election to flee for their safety. Later that day, the National Guard reinforced the Capitol Police, authorities cleared the building, and Congress certified the results of the 2020 election.

The House of Representatives impeached President Trump for "incitement of insurrection." In his defense, the president's lawyers denied that he had incited the crowd to engage in destructive behavior. Citing *Brandenburg v. Ohio,* a 1969 decision establishing the modern standard for incitement, they argued that his address was entitled to First Amendment protection.

In *Brandenburg,* the Supreme Court had unanimously upheld a challenge to an Ohio syndicalism law that prohibited advocating violence to force political change. Clarence Brandenburg, a member of the Ku Klux Klan, had been convicted of violating the law for a speech at a KKK rally and sentenced to a year in jail. He appealed his conviction, arguing that his speech was protected by the First Amendment. The Court held that although

Brandenburg's speech might be offensive, it was not "directed at inciting or producing imminent lawless action" or "likely to incite or produce such action." Under the three-part test set out by the Court, suppressing advocacy of a criminal offense required that (1) the speaker intended for a crime to be committed, (2) the crime advocated was imminent, and (3) the crime was likely to occur.

When the Supreme Court applied its new test to Brandenburg's case, the justices held that his speech was worthy of protection under the First Amendment. Although Brandenburg's speech threatened action, he did not advocate a specific crime. "We're not a revengent organization," he said. "But if our president, our Congress, our Supreme Court continues to suppress the White, Caucasian race, it's possible that there might have to be some revengence taken." Brandenburg's threat was conditional, contingent on actions beyond the crowd's control. Even if he had advocated specific acts, no criminal activities were imminent. A wooden cross was burned during the rally, but that was the extent of the crowd's activities. Finally, and perhaps most significantly, the small crowd gathered in the Ohio field to hear Brandenburg's speech dispersed immediately afterward.

Legal scholars disagree about whether President Trump's speech on January 6 is protected under the *Brandenburg* test. Some argue that the speech was unprotected incitement and claim that it satisfies all three parts of the test: Trump intended to interrupt the counting of electoral votes; he directed the crowd to march on the Capitol; and he knew that his followers would act on his directions that day. Kevin Francis O'Neill, a law professor at Cleveland Marshall College of Law, argued that "Trump's remarks were an incitement within the unprotected boundaries of *Brandenburg*—because he dispatched his followers directly and immediately to the Capitol, and he did so for a specific unlawful purpose: to interrupt the counting of electoral votes." Echoing this sentiment, Einer Elhauge, a law professor at Harvard Law School, concluded that the January 6 speech constituted incitement under *Brandenburg:* "Trump thus clearly incited lawless action (obstructing the operations of Congress is a crime) that was imminent (right after the speech, a short walk away). That he wanted to incite such lawless action is confirmed by reporting that for hours he watched the Capitol attack with pleasure and did not take any steps to stop it by calling out the National Guard or by urging his supporters to stand down."

Other scholars disagree, suggesting that it would be difficult to satisfy the *Brandenburg* test. Clay Calvert, the Brechner Eminent Scholar in Mass Communication at the University of Florida, claimed that it would be hard to prove unlawful incitement. He wrote, "Focusing only on Trump's rally speech, proving the intent element —the requirement that the words Trump used were directed to cause imminent violence—would be the toughest hurdle." Calvert added that Trump "never explicitly called for violence during his rally, never used a command like 'go down there and attack them.'" Trump did not, for example, instruct the crowd to storm the building, attack law enforcement officials, or disrupt the certification process. Several commentators highlighted the fact that he specifically encouraged lawful activity. His January 6 speech included a crucial qualifier: "I know that everyone here will soon be marching over to the Capitol building to *peacefully and patriotically* make your voices heard." (Emphasis added)

Before the impeachment trial (Trump's second), Trump's attorneys filed a brief with the Senate, arguing that "Mr. Trump's speech on January 6, 2021, was protected political speech, that which receives the strongest protection under the First Amendment, when the protections of free speech are at their highest." They also cited the *Brandenburg* test, arguing that "under *Brandenburg,* there is no doubt that the words upon which the article of impeachment issued

could never support a conviction, as there was plainly no advocacy of 'lawless action' and the words, as stated, can hardly be interpreted to be 'likely' to 'incite imminent' violence or lawless action." Echoing this claim, Alan Dershowitz, an emeritus professor at Harvard Law School, observed, "Nothing the president said constituted unprotected 'incitement,' as narrowly defined by the Supreme Court over nearly a century of decisions. His volatile words plainly fell on the side of political 'advocacy,' which is protected speech."

Chapter 5: Defamation

U.S. Supreme Court

Case: *Berisha v. Lawson,* 141 S.Ct. 2424 (cert. denied July 2, 2021).

Subject: Should the Supreme Court overrule the "actual malice" requirement imposed on public figures in defamation actions?

Summary of Decision: Shkëlzen Berisha is a businessman and lawyer who resides in the Republic of Albania. He has never been a candidate for public office, but he is the son of the former president and prime minister of Albania and has participated in debates on matters of concern in his home country. Berisha sued author Guy Lawson and publisher Simon & Schuster for defamation based on Lawson's portrayal of him in *Arms and the Dudes: How Three Stoners from Miami Beach Became the Most Unlikely Gunrunners in History.* (The book was a commercial success. Lawson sold the movie rights to Warner Brothers, who made it into a feature film titled *War Dogs.*)

The "dudes" identified in the book title worked for AEY, Inc., which bids on arms procurement contracts that the U.S. military posts online. In 2006, AEY won a $300 million contract to provide AK-47 ammunition to equip Afghan security forces. To satisfy the contract, the company planned to buy ammunition at a discount from Albania's Military Export-Import Company, a state-owned business responsible for disposing of weapons left over from the Cold War. When they inspected the ammunition, "the dudes" realized that it bore Chinese markings—a significant problem because it was illegal for U.S. companies to sell Chinese-made munitions.

Much of the book recounts the difficulties that AEY had in trying to repackage the ammunition to obscure its source and circumvent the law. Although Berisha is a peripheral player in the book, he objected to passages claiming that he was involved in corrupt arms dealings, that he was part of the Albanian mafia, and that he received illegal kickbacks. Arguing that these passages "demonstrate malice, egregious defamation, and grave insult," he sought a court order requiring that the disparaging references be removed from the book. He also demanded $60 million in compensatory damages and additional punitive damages.

A federal district court dismissed the lawsuit in December 2018, concluding that Berisha was a "public figure" in Albania due to "his proximity to power, his access to the media and his alleged presence at the center of multiple corruption findings." As a public figure, he was required to prove "actual malice," under the Supreme Court's decision in *New York Times v. Sullivan* (1964). Accordingly, the district court held, Berisha would need to prove that the author (Lawson) or the publisher (Simon & Schuster) knew that the statements were false or had published them with reckless disregard for the truth. The court concluded, "Plaintiff [Berisha] has failed to show that Defendants 'actually entertained serious doubts as to the veracity of the[ir] published account, or [were] highly aware that the account was probably false.'"

The Eleventh Circuit Court of Appeals affirmed the district court's decision in September 2020. Writing for a unanimous three-judge panel, Judge Diarmuid F. O'Scannlain explained, "The purposes underlying the public figure doctrine apply unequivocally to Berisha: He was widely known to the public, he had been publicly linked to a number of high-profile scandals of public interest, he availed himself of privileged access to the Albanian media in an effort to present his side of the story, and he was in close proximity to those in power." Like the district court, the Eleventh Circuit concluded there was insufficient evidence to prove that "Lawson held serious doubts about the truth of the book's portrayal of Berisha as involved in the AEY scheme."

Berisha appealed to the U.S. Supreme Court, but the justices denied his writ of certiorari on a 7-2 decision, effectively ending the lawsuit. The two dissenting votes, which Justices Clarence Thomas and Neil Gorsuch cast, are noteworthy because these justices argued that the Supreme Court should reconsider the actual malice rule as it applies to public figures.

This was not the first time that Justice Thomas criticized the *Sullivan* decision. In *McKee v. Cosby* (2019), a defamation case that the justices declined to hear, he filed a concurring opinion that voiced concerns about Sullivan and the rulings extending the decision, claiming they were "policy-driven decisions masquerading as constitutional law." Because "the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits," Justice Thomas argued, "then neither should we." In his dissenting opinion in *Berisha,* he reiterated that position, stating that "the proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires."

During Gorsuch's confirmation hearings in 2017, Senator Amy Klobuchar asked him about the actual malice rule. Although he was reticent when asked about other precedents, Gorsuch was quick to affirm the *Sullivan* decision. "That's been the law of the land for, gosh, 50, 60, years," he said. While on the federal appeals court, Judge Gorsuch consistently applied this actual malice standard. His dissent in *Berisha,* therefore, was both unexpected and potentially significant.

In his dissenting opinion in *Berisha,* Justice Gorsuch offered a new critique of Sullivan. The Thomas dissent was grounded in a historical argument about the framers' intent, but Justice Gorsuch was responding to the problem of misinformation in an era in which social media is pervasive. "What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable," Justice Gorsuch wrote. "If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?" He did not attempt to answer this question in his opinion. However, he said "the Court would profit from returning its attention, whether in this case or another, to a field so vital to the 'safe deposit' of our liberties."

In his dissent, Justice Gorsuch also quoted from a 1993 book review by Justice Elena Kagan, then an assistant professor at the University of Chicago Law School. In reviewing Anthony Lewis's book, *Make No Law: The Sullivan Case and the First Amendment,* Professor Kagan had observed that "to the extent *Sullivan* decreases the threat of libel litigation, it promotes not only true but also false statements of fact—statements that may themselves

distort public debate." She warned that "in this way, the legal standard adopted in *Sullivan* may cut against the very values underlying the decision."

Justice Kagan did not join Justice Gorsuch's dissent in *Berisha,* but her book review raised questions, at least to Justice Gorsuch, about whether she might be willing to revisit the landmark decision in *New York Times v. Sullivan.* When asked about the book review in her 2010 confirmation hearing, Kagan drew a sharp distinction between elected public officials and private persons involuntarily dragged into the spotlight. "The question that I was asking," she explained, "was whether the balance had been struck appropriately in that sort of case, where the values of the First Amendment in uninhibited political speech are not so much evident, and where the personal harm can be great."

The Supreme Court has not heard a press freedom case in 20 years, but Justices Thomas's and Gorsuch's dissenting opinions, combined with Professor Kagan's book review, suggest there might be interest in revisiting *New York Times v. Sullivan.* The justices might not overturn the decision, but they could soften the protection provided by the actual malice rule to allay some of the concerns that Justice Gorsuch identified. Anyone interested in freedom of speech should pay particular attention to developments in this area.

Chapter 12: Institutional Constraints: Freedom of Speech in the Schools, the Military, and Prisons

U.S. Supreme Court

Case: *B.L. v. Mahanoy Area School District,* 141 S.Ct. 2038, 2021 WL 2557069 (decided June 23, 2021).

Subject: Does the First Amendment prohibit public school officials from punishing a student for off-campus speech?

Summary of Decision: In the landmark decision *Tinker v. Des Moines Independent Community School District* (1969), the U.S. Supreme Court held that neither students nor teachers "shed their constitutional right to freedom of speech or expression at the schoolhouse gate." In the five decades that followed, the Court ruled on student speech cases involving a sexually suggestive nominating speech, a banner that might have encouraged illegal drug use, and the censorship of a newspaper published by a high school journalism class. Although the justices have resolved various questions related to on-campus student speech over the years, they have also declined to hear several cases that dealt with off-campus speech. Absent a controlling precedent, school officials and lower courts have struggled to deal with issues raised by off-campus expression, especially speech on social media.

This case involved B.L., a student who used Snapchat, a social media application that allows students to send private messages. As a freshman, B.L. had earned a place on the junior varsity cheerleading team at Mahanoy Area High School in Mahanoy, Pennsylvania. She hoped to make the varsity team during her sophomore year, but was once again placed on the junior varsity team. The snub, coupled with other disappointments in her life, triggered an intemperate response. On the weekend, standing outside the Cocoa Hut, a local convenience store, B.L. used her smartphone to post a snap with a picture of herself and another student with their middle fingers raised. The text "fuck school fuck softball fuck cheer fuck everything" was superimposed on the image. B.L. then added a second snap: "Love how me and [another student] get told we need a year of jv before we make varsity but that doesn't matter to anyone

else?" The snaps, which expire after being viewed, were visible to B.L.'s 250 Snapchat friends, most of whom attended the Mahanoy Area High School.

Several students complained. A cheerleading team member forwarded a screenshot of the snaps to one of the coaches. After reviewing the snaps and consulting the principal, the coaches suspended B.L. for violating the school's cheerleading rules. These rules, which B.L. had signed, required cheerleaders to "have respect for [their] school, coaches, . . . [and] other cheerleaders"; to avoid "foul language and inappropriate gestures"; and to refrain from sharing "negative information regarding cheerleading, cheerleaders, or coaches . . . on the internet." As punishment, the coaches suspended B.L. from the cheerleading team for her sophomore year. B.L. apologized, but school officials denied her appeal and upheld her suspension.

B.L. and her parents sued the Mahanoy Area School District (MASD) in federal court. Among other things, B.L. claimed that her suspension violated the First Amendment, that the school's rules were overbroad and viewpoint discriminatory, and that the rules were unconstitutionally vague. Citing *Tinker v. Des Moines Independent School District,* a federal district court and the Third Circuit Court of Appeals ruled in favor of B.L., as there was no proof that the speech was disruptive. Although the *Tinker* decision gives school officials the power to punish disruptive student speech in a school setting, the Third Circuit held that this power does not extend to off-campus speech, which it defined as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." While B.L.'s snaps were "crude, rude, and juvenile," the Third Circuit was unwilling to give school officials the authority "to quash student expression deemed crude or offensive—which far too easily metastasizes into the power to censor valuable speech and legitimate criticism."

MASD appealed to the Supreme Court. In its writ of certiorari, the school district argued that the First Amendment does not "force schools to ignore student speech that upends the campus environment simply because that speech originated off-campus." Under the Third Circuit's decision, MASD warned, schools would lose all authority to punish off-campus expression, even if it is "closely connected to campus, seriously disrupts the school environment, and threatens or harasses other students or administrators." MASD argued that the disruption standard established in *Tinker* should be extended to cover student speech that occurs off-campus, allowing schools to maintain order and discipline.

On an 8-to-1 decision, the Supreme Court held that the First Amendment limits, but does not prohibit, regulation of off-campus speech by public school officials. To illustrate when regulation of off-campus speech might be appropriate, Justice Steven Breyer's majority opinion listed several instances in which it would be justified: "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow the rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained with school computers."

The majority was, however, unwilling to "set forth a broad, highly general First Amendment rule stating just what counts as 'off-campus' speech and whether or how ordinary First Amendment standards must give way off-campus to a school's special need to prevent, e.g., substantial disruption of learning-related activities or the protection of those who make up a school community."

Justice Breyer did identify "three features of off-campus speech" that may "distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech."

He noted that "First, a school, in relation to off-campus speech, will rarely stand *in loco parentis* . . . . Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."

Second, reviewing students' off-campus speech would turn school officials into full-time monitors responsible "for all the speech a student utters during the full 24-hour day." Courts should be skeptical of such extensive regulation, he said, as it might prevent students from engaging in certain kinds of speech. "When it comes to a political or religious speech that occurs outside school or a school program or activity," Justice Breyer continued, "the school will have a heavy burden to justify intervention."

Third, "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus." To highlight his point, Justice Breyer added, "America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.' That marketplace must include the protection of unpopular ideas, for popular ideas have less need for protection." Consequently, he concluded, "schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'"

"Taken together," Justice Breyer concluded, "these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference."

Having laid out a conceptual framework, Justice Breyer returned to the facts of the case. Although B.L. used vulgar language to criticize a school team or its coaches, the majority held that her speech was nonetheless entitled to First Amendment protection. "B.L. spoke," Justice Breyer explained, "under circumstances where the school does not stand in *loco parentis*." As such, responsibility for disciplining B.L. for the snaps belonged to her parents. Further, he found "no evidence in the record of the sort of 'substantial disruption' of a school activity or a threatened harm to the rights of others that might justify the school's action." Finally, Justice Breyer discounted the school's claim that B.L.'s speech reflected on the school. "It might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections," he concluded. "But sometimes it is necessary to protect the superfluous in order to preserve the necessary."

"Although we do not agree with the reasoning of the Third Circuit's panel majority," Justice Breyer concluded, "we nonetheless agree that the school violated B.L.'s First Amendment rights." Unlike the Third Circuit, the Supreme Court was unwilling to extend blanket protection to students for off-campus speech. However, the majority was prepared to set out three considerations that limited the power of school officials to punish students.

Justice Samuel Alito filed a concurring opinion, joined by Justice Neil Gorsuch, to explain his reasoning. Although he agreed with the majority on the essential points, Justice Alito emphasized the importance of parental rights. "In our society," Justice Alito wrote, "parents, not the state, have the primary authority and duty to raise, educate, and form the character of their children." He concluded his opinion with a warning: "If today's decision teaches any lesson, it must be that the regulation of many types of off-premise speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory."

The lone dissenting vote was cast by Justice Clarence Thomas, who had previously called for overruling the *Tinker* decision. To his way of thinking, it had long been established that "a school can regulate speech when it occurs off-campus, so long as it has a proximate tendency to harm the school, its faculty or students, or its programs." Justice Thomas also made it clear in his dissent that schools "historically could discipline students in circumstances like those presented here." He also predicted the lower courts would "almost certainly be at a loss" in trying to apply the "three vague considerations" set out in Justice Breyer's majority opinion.

The Supreme Court decision in *B.L. v. Mahanoy Area School District* is significant on two counts. First, the justices affirmed the holding in *Tinker*—a consequential holding, as *B.L. v. Mahanoy Area School District* was the first victory for student speech rights in the U.S. Supreme Court in more than 50 years. Second, the justices considered whether school officials could punish students for off-campus speech on social media. Although the Supreme Court ruled in favor of the student, the justices declined to set out a broad rule covering all off-campus speech.

The Supreme Court's decision in *B.L. v. Mahanoy School District* has drawn mixed reviews. Many commentators have praised the decision, especially its strong affirmation of student speech rights. Like Justice Thomas, however, other commentators have worried about the "three features" test that Justice Breyer set out to analyze off-campus speech cases. Catherine Ross, a law professor at George Washington University, issued the following warning: "The Supreme Court's failure to define off-campus speech and to provide guidance to school administrators and lower courts about whether, when, and on what grounds schools may regulate and punish students for what they say on their own time from their own equipment, is likely to lead to much additional litigation—and to even more incidents in which schools punish off-campus expression that never reach a court."

Chapter 13: Copyright

U.S. Supreme Court

Case: *Google LLC v. Oracle America Inc.,* 141 S.Ct. 1183, 2021 WL 1240906 (decided April 5, 2021). Justice Amy Coney Barrett did not participate in this case because the oral arguments occurred before the Senate confirmed her nomination to the Supreme Court.

Subject: Does the appropriation of a software interface constitute a fair use?

Summary of Decision: Oracle America is the current copyright owner of Java, a computer programming language. Google, without permission, appropriated 11,500 lines of computer code, part of an "application programming interface" (API) that allowed devices to share information across platforms. The API allowed developers to use Java to write programs that could run across platforms, irrespective of the underlying hardware. For example, a user could "take a photo on their Apple phone, save it onto Google's cloud servers, and edit it on their Surface tablet." Sun Microsystems, Oracle America's predecessor, had marketed Java using a simple slogan, "write once, run anywhere."

After failing to reach a licensing agreement, Oracle America sued Google, arguing that APIs are original creations protected by copyright law and that Google committed copyright infringement when it used an API developed in an early version of the Android operating system. Google admitted to using Oracle America's code but claimed that it subsequently created its own software. Using Oracle America's code was not actionable copyright infringement, Google argued, because APIs are not creative works and therefore are not

eligible for copyright protection. In this instance, the code at issue was nothing more than a series of instructions written in the Java language that a computer uses to complete a task. If the API did qualify for copyright protection, Google claimed, its use would still qualify for protection under the fair use doctrine.

The lawsuit originated in 2010 in federal district court. Two juries found in favor of Google. In both instances, Oracle successfully appealed the verdict. In 2018, the U.S. Court of Appeals for the Federal Circuit held that the API could be copyrighted and that the fair use doctrine did not protect Google's use. Google appealed the decision, and the Supreme Court granted certiorari. Oral arguments were scheduled for March 2020, but because of the pandemic the case was pushed back to the term beginning in October 2020.

On a 6-2 decision, the Supreme Court ruled in favor of Google. In deciding the case, the justices declined the opportunity to definitively decide whether computer software can be copyrighted. "Given the rapidly changing technological, economic, and business-related circumstances," Justice Breyer's majority opinion explained, "[the Court] should not answer more than is necessary to resolve the parties' dispute." Instead, he noted, "We shall assume, but purely for argument's sake, that the entire Sun Java API falls within the definition of that which can be copyrighted. We shall ask instead whether Google's use of that API was a 'fair use.'"

Justice Breyer's majority opinion then considered the appropriate standard for making fair use determinations. Google argued that the Court should take a deferential approach when assessing the jury's decision on questions of fact, but the majority held that "fair use is a mixed question of law and fact." Accordingly, it was appropriate for the Court to consider both the jury's findings and the underlying facts, but the ultimate decision on whether the facts demonstrated a fair use is a legal question to be decided by judges.

Having set the standard, Justice Breyer engaged in a detailed analysis of the four factors that the Copyright Act of 1976 sets out for making a fair use determination: (1) the "purpose and character of the use," including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the "nature of the copyrighted work"; (3) the "amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and (4) "the effect of the use upon the potential market for or value of the copyrighted work." In this instance, Justice Breyer concluded that all four factors favored a fair use finding.

The majority opinion began with the second factor, the nature of the copyrighted work. This subtle change in the order of factors is telling, as it is essential to the framing of the fair use analysis. To Justice Breyer, the analysis of the nature of the work required the Court to distinguish between two different types of computer code: declaring code and implementing code. To understand the difference, it might help to think of a book. The declaring code is the title page, the table of contents, and the like. This is distinguished from the implementing code, which includes the text that develops the characters and the storyline. In this instance, Justice Breyer found that Google copied declaring code. The distinction matters, he continued, because the Court has "emphasized the need to 'recognize that some works are closer to the core of [copyright] than others.'" He concluded that "Declaring code is, if copyrightable at all, further than are most computer programs (such as the implementing code) from the core of the copyright. That fact diminishes the fear . . . that application of 'fair use' here would seriously undermine the general copyright protection that Congress provided for computer programs. And it means that this factor, 'the nature of the copyrighted work,' points in the direction of fair use."

The next factor, purpose and character, considers whether the work "adds something new, with a further purpose or different character, altering the copyrighted work" in a transformative way. For example, 2 Live Crew's parody of "Oh, Pretty Woman," a song written by Roy Orbison, was ruled a fair use because it created an entirely new piece of music. "To the extent that Google used parts of the Sun Java API to create a new platform that could be readily used by programmers," Justice Breyer concluded, "its use was consistent with that creative 'process' that is the basic constitutional objective of copyright itself."

The third factor, amount and substantiality of the portion used, also favors Google. The 11,500 lines that were appropriated constituted less than 0.4% of the 2.86 million lines of the API. Instead of focusing on the amount copied, Justice Breyer suggested, "the better way to look at the numbers is to take into account the several million lines that Google did not copy." Viewed from this perspective, the amount of code taken was small and clearly "tethered to a valid, and transformative, purpose."

The final factor, the effect on the market, is often the most important in making a fair use determination. In this case, however, it was difficult for the Supreme Court to assess the harm to the actual or potential markets for Java, at least partly because the Android software that Google marketed was not a substitute for Java. Another issue to consider was "the public benefits the copying will likely produce." "To allow enforcement of Oracle's copyright here," Justice Breyer warned, "would risk harm to the public" because it would limit creativity. "Oracle alone would hold the key," he wrote. "The result could well prove highly profitable to Oracle (or other firms holding a copyright in computer interfaces). But those profits could well flow from creative improvements, new applications, and new uses developed by users who have learned to work with that interface. To that extent, the lock would interfere with, not further, copyright's basic creativity objectives."

Although the majority held that Google's taking was fair use, Justice Breyer carefully limited the holding. "We do not overturn or modify our earlier cases involving fair use—cases, for example, that involve 'knockoff' products, journalistic writings, and parodies." The decision was limited to this case, in which "Google reimplemented a user interface, taking only what was need to allow users to put their accrued talents to work in a new and transformative program."

Justice Clarence Thomas filed a dissenting opinion that Justice Samuel Alito joined. He faulted the majority for avoiding the main issue that the case raised: whether computer code is worthy of copyright protection. "By skipping over the copyrightability question," Justice Thomas argued, "the majority disregards half the relevant statutory text and distorts its fair-use analysis."

Unlike the majority, Justice Thomas did not sidestep the principal question. He noted that "the Copyright Act expressly protects computer code" and defined a computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." This definition, Justice Thomas continued, "clearly covers declaring code—sets of statements that indirectly perform computer functions by triggering prewritten implementing code."

Justice Thomas also came to a different conclusion on the fair use analysis. Although the majority found that all four factors favored Google, he concluded that "three of the four statutory fair-use factors weigh decidedly against Google. The nature of the copyrighted work—the sole factor possibly favoring Google—cannot by itself support a determination of

fair use because holding otherwise would improperly override Congress' determination that declaring code is copyrightable."

The Supreme Court decision in *Google LLC v. Oracle America Inc.* has produced mixed reviews. Many commentators had feared that a decision in favor of Oracle America would chill software development. Because the Court ruled in favor of Google, these commentators predict the decision will encourage less expensive versions of existing software. Critics of the decision have warned that it might discourage development of new languages and platforms. By declining to decide whether computer software was eligible for copyright protection, the Court left issues unresolved, likely guaranteeing more fair use cases.

Chapter 14: Access

U.S. Supreme Court

Case: *Americans for Prosperity Foundation v. Bonta,* 141 S.Ct. 2373, 2021 WL 2690268 (decided July 1, 2021). This case was originally filed as *Americans for Prosperity v. Becerra.* The case became *Americans for Prosperity v. Bonta* after Rob Bonta replaced Xavier Becerra as attorney general of California. Xavier Becerra resigned the post to serve as secretary of the Department of Health and Human Services in the Biden administration.

Subject: Does a California law requiring charities and nonprofits to disclose the names and addresses of major donors violate the First Amendment?

Summary of Decision: California law required charities, as part of their annual registrations with the state, to provide the state with the names and addresses of any donor who contributed more than $5,000 a year. To comply with the law, any charity or nonprofit doing business in the state was required to submit a copy of its IRS Form 990, including a Schedule B form that included the information about the donors, to the California attorney general's office. The state argued that this information was necessary to prevent charity fraud (fraud by entities who falsely claim to be charities to solicit contributions).

In 2014, two conservative advocacy groups, the Americans for Prosperity Foundation and the Thomas More Law Center, challenged the constitutionality of the California disclosure requirement in federal court. Disclosures of their Schedule B information, the groups argued, would discourage contributions and invite reprisals against their donors. The district court agreed, holding there was little evidence to prove that the attorney general's office used the Schedule B information to detect fraud. The court further held that the disclosure requirements burdened donors' associational rights and that California could not guarantee the confidentiality of a donor's information. The district court ruled the law unconstitutional and, accordingly, issued an order permanently enjoining the California attorney general from collecting donor information.

The Ninth Circuit Court of Appeals reversed on appeal, holding that the law served a legitimate state interest because the Schedule B information promoted investigative efficiency and effectiveness, and that disclosure of this information did not meaningfully burden donors' associational rights. When the Ninth Circuit denied an en banc hearing request, the groups appealed to the Supreme Court, which agreed to hear the case.

The Supreme Court reversed the Ninth Circuit and remanded the case for further proceedings, thus ruling that the district court was correct in enjoining the California attorney general from collecting the Schedule B forms. Although the vote was 6 to 3, a strong majority,

the justices issued four separate opinions. Chief Justice John Roberts delivered the plurality opinion, which was joined by Justices Brett Kavanaugh and Amy Coney Barrett. Justice Samuel Alito filed an opinion, concurring in part, that Justice Neil Gorsuch joined. Justice Clarence Thomas also filed an opinion, concurring in part. Justice Sonia Sotomayor authored a dissenting opinion that Justices Stephen Breyer and Elena Kagan joined.

The decision was splintered because the justices disagreed on the appropriate constitutional standard. In his plurality opinion, Chief Justice Roberts rejected the plaintiff's claim that the most stringent test, known as "strict scrutiny," should be applied to the California law. To withstand a strict scrutiny analysis, the legislature must have passed the law to further a "compelling government interest" and the law must be narrowly tailored to achieve that interest. In this case, the Chief Justice argued that courts should apply an "exacting scrutiny" standard that looks for a "substantial relation between the disclosure requirement and a sufficiently important government interest." He went on to emphasize that the "exacting scrutiny" standard does not mean that the disclosure requirements had to be the least restrictive means to achieve the government interest, so long as the law is narrowly tailored. In this instance, the disclosure requirements would need to be closely drawn to target charitable fraud.

Having established the appropriate standard for review, Chief Justice Roberts acknowledged that "California had an important interest in preventing wrongdoing by charities," but added that there was a "dramatic mismatch" between the donor disclosure requirement and the state's interest. Although most of the 60,000 charities that do business in California were required to submit Schedule B, the state did not use these forms to initiate fraud investigations. Instead, the forms were only consulted after a complaint was filed and the state initiated an investigation. Consequently, the Chief Justice concluded, "California's interest is less in investigating fraud and more in ease of administration." Rather than requiring all charities to submit Schedule B, the state could simply ask the charities under investigation to provide information about their donors.

In his concurring opinion, Justice Alito agreed that the California law was unconstitutional, but he did not agree with the majority's reasoning. More specifically, he disagreed with the majority's claim that previous cases "have broadly resolved the question in favor of exacting scrutiny." However, he said, it did not matter what standard the Supreme Court applied; the disclosure requirements were unconstitutional.

In his concurring opinion, Justice Thomas also agreed that the California law was unconstitutional. He would, however, have applied the strict scrutiny standard to strike down the disclosure requirements.

In her dissenting opinion, Justice Sotomayor focused on whether "strict scrutiny" or "exacting scrutiny" was the appropriate standard for judicial review of the California law. In previous cases, she argued, the Court had required plaintiffs to "demonstrate an actual First Amendment burden before demanding that a law be narrowly tailored." Although Justice Sotomayor acknowledged that donors might reasonably fear reprisals if their identifies were disclosed, she argued that this concern did not justify striking down the California law in its entirety. The majority decision, she concluded, "marks reporting and disclosure requirements with a bull's-eye. Regulated entities who wish to avoid their obligations can do so by vaguely waving toward First Amendment 'privacy concerns.' It does not matter if not a single individual risks experiencing a single reprisal from disclosure, or if the vast majority of those affected would happily comply."

Some commentators believe the Court's decision in this case will make it easier for groups to challenge disclosure requirements on constitutional grounds. More than 300 groups filed amicus briefs supporting the challenge to the California law on First Amendment grounds. "Far from representing uniquely sensitive causes," the majority opinion observed, "these organizations span the ideological spectrum, and indeed the full range of human endeavors."

Although this is not a campaign finance case, critics fear the decision will change how courts assess the constitutionality of disclosure laws. Absent strong disclosure laws, they fear more money will flow into nonprofit organizations, which can include political campaigns. Senator Sheldon Whitehouse, a leading advocate of campaign finance reform, ominously warned, "We are now on a clear path to enshrining a constitutional right to anonymous spending in our democracy, and securing an upper hand for dark-money influence in perpetuity."

Anyone interested in campaign finance should look for future developments, as several states have laws like the California statute that the Supreme Court struck down. The *Americans for Prosperity Foundation v. Bonta* decision also has implications for laws regulating contributions to political campaigns, such as the For the People Act currently pending in Congress.

Looking to the Future

The Supreme Court held over two cases for oral argument during the 2021–2022 term.

The first, *City of Austin, Texas v. Reagan National Advertising Inc.,* involves a challenge to the city's sign code, which distinguishes between on-premise signs (which may be electronic digital signs) and off-premise signs (which may not be digital). Prohibiting off-premise electronic advertising is not unique to Austin, as many Texas communities restrict digital billboards for aesthetic and safety reasons.

When Reagan National Advertising, a company that owns and operates commercial and noncommercial billboards, applied to digitize 84 off-premise billboards, the city invoked the code and denied the application. The company sued the city in state court in 2017, arguing that Austin's code unconstitutionally distinguished between on-premise and off-premise signs. A federal district court ruled in favor of the City of Austin and upheld the sign ordinance. Reagan National Advertising appealed to the Fifth Circuit, which reversed the lower court decision. The Fifth Circuit held that Austin's sign code was content-based because it distinguished between on-premise and off-premise signs. Accordingly, the code needed to pass a strict scrutiny standard, which required the city to demonstrate that its ordinance furthered a "compelling government interest" and that the regulation was narrowly tailored to serve that interest. In this instance, the Fifth Circuit held that the city failed to prove that off-premise signs created more visual blight or posed more of a threat to public safety than on-premise signs would. The City of Austin appealed the decision. The Supreme Court has granted certiorari.

To assess the constitutionality of the statute, the Supreme Court will likely need to revisit *Reed v. Town of Gilbert (2015).* In that case, the justices struck down a Gilbert, Arizona, ordinance that restricted the size, number, duration, and location of certain types of signs. Under the terms of the Gilbert ordinance, there were far more restrictions on "Temporary Directional Signs Related to a Qualifying Event" than on "Ideological Signs" or "Political Signs." Because the restrictions differentiated between signs based on content, the justices

applied a strict scrutiny test and struck down the Gilbert ordinance. Although aesthetics and traffic safety were compelling government interests, the Court held that the Town of Gilbert offered no reason to believe that temporary directional signs posed a greater threat than ideological or political signs. In its writ of certiorari, the City of Austin tried to distinguish its ordinance from the ordinance in Reed, arguing that "nothing in Austin's on-premise/off-premise distinction implicates or is concerned with the topic discussed on a billboard or the message being conveyed."

The second case that the Supreme Court held over, *Houston Community College System v. Wilson* (2020), involves the elected board of a community college. The controversy started when David Wilson, a conservative Republican, was elected to serve on the board of trustees of the Houston Community College System (HCCS). His five-year (2013 to 2018) term on the board was marked by controversy. The other trustees eventually voted to censure him for his persistent criticism of the board and other inappropriate behavior. Wilson responded by suing the HCCS, alleging he was being punished for exercising the freedom of speech guaranteed by the First Amendment. A federal district court ruled for HCCS, but the Fifth Circuit of Appeals reversed the decision and allowed the case to continue. "The Supreme Court has long stressed the importance of allowing elected officials to speak on matters of public concern," the Fifth Circuit declared. "A reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim."

The Fifth Circuit's decision conflicts with holdings in other appellate courts. Other circuits have generally treated censure votes as a form of government speech entitled to constitutional protection. For example, the Tenth Circuit Court of Appeals found that a vote to censure a trustee expressed the board's view in *Phelan v. Laramie County Community College Board of Trustees* (2000). To resolve the split between the circuits, the Supreme Court will need to decide whether censure votes condemning board members are a threat to free speech that chills expression or are, themselves, a form of free speech worthy of First Amendment protection. This case takes on added significance, as the number of censure votes in legislative bodies has increased in recent years due to the polarization of American politics.