



## GOVERNMENT Washington, DC

On April 27, 2020, in the matter of *Georgia et al. v. Public.Resource.Org, Inc.*, the **United States Supreme Court** upheld the right of a non-profit organization, Public.Resource.Org (PRO), to freely share the official law code of Georgia. The state had claimed to own the copyright, per code 17 U. S. C. §102(a), for the Official Code of Georgia Annotated, and therefore sued the organization for publishing it online. The right to publish other legally significant public documents will be helped by the precedent set by this significant ruling.

“Officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties,” wrote Chief Justice John Roberts in an opinion that was joined by four other justices on the nine-member court.

Everyone involved in the case agreed that copyright protection does not apply to the text of state statutes. However, the state of Georgia argued that the annotations, which are produced by a division of LexisNexis under a work-for-hire contract with the state, are protected by copyright. Those annotations provide supplemental information about the law, including summaries of judicial opinions, information about legislative history, and citations to relevant law review articles.

Because the state does not publish any other type of official report, the copyright status of the annotated code matters. Anyone can obtain an unofficial version of state law for free from LexisNexis’ website, but its terms of service explicitly indicate that it might be inaccurate. The company also prohibits users from scraping the site’s content or using it commercially. To receive the official, up-to-date version

of Georgia state law, users must pay LexisNexis hundreds of dollars for a code of the official version, which includes annotations.

PRO defied Georgia’s rules and published the entire code, including annotations, on its website. The group argued that as an official document of the state legislature, it could not be protected by copyright. The state sued and won at the trial court level. The 11th Circuit Court of Appeals reversed that ruling and sided with the nonprofit. In a daring move, PRO urged the Supreme Court to review the case, even though doing so could reverse their appellate win, because they wanted to set a nationwide precedent.

The nonprofit’s wager just barely paid off. Five justices agreed with PRO’s argument that Georgia’s official code was in the public domain. Four justices dissented and would have allowed the state to copyright portions of its official legal code.

In an opinion written by Chief Justice John Roberts, the high court held that the key factor was who had written the materials. Although most of the annotations were initially drafted by LexisNexis personnel, the state’s legislative council held final authority over the document’s contents.

Four justices dissented, writing two dissenting opinions. Clarence Thomas, in an opinion joined by fellow conservative Sam Alito and largely joined by liberal Stephen Breyer, argued that the courts were stretching century-old precedents too far. The old rulings had been clear that laws themselves couldn’t be copyrighted, Thomas argued, but hadn’t been so clear about when copyright should apply to related materials that do not have the force of law.

Thomas pointed out that twenty-two other states have used arrangements comparable to Georgia’s

to publish their own state laws. Georgia—as well as many other states—grants a company like LexisNexis a monopoly right to publish the official annotated state code. In exchange, LexisNexis spends significant amounts of money to produce the annotations. This saves states from spending taxpayer dollars to directly fund the annotation process.

These rulings will force states to rethink this approach—either paying for the annotations or discontinuing annotations altogether. Thomas argued that it would be better for the high court to leave the status quo in place and let Congress alter copyright law if it did not approve of states claiming copyright over the nonbinding portions of state legal codes.

A second dissent by liberal Ruth Bader Ginsburg—also signed by Breyer—took a different tack. She argued that the law only denied copyright protection to works produced by a legislature in the course of its official duties. But she argued that the process of annotating existing laws is inherently separate from the process of enacting laws in the first place.

“Annotating begins only after lawmaking ends,” Ginsburg argued. Hence, she argued that it didn’t make sense to treat annotations the same way as the text of a statute itself.

However, one potential problem with the dissenters’ approach is that it could have created a legal minefield for people wanting to republish the public domain portions of official documents. If Ginsburg and Thomas had gotten their way, Georgia’s official annotated code would continue to be a mixture of copyrighted and public domain works. That would have forced anyone who wanted to republish state law to perform the laborious task of deleting the copyrighted parts first. The practical impact would be to raise the cost of providing the public



with copies of official legal documents like the Georgia code.

The Supreme Court majority rejected the dissenters' narrow interpretations of past precedents. Instead, they held that any works produced by the legislature are excluded from copyright protection, whether they're directly connected to the legislative process or not—and whether or not they are legally binding.

Reported by: Ars Technica, April 27, 2020.

## Washington, DC

The **US Supreme Court** on May 29, 2020, declined to block California Governor Gavin Newsom's executive order placing numerical restrictions on all gatherings to combat the spread of the highly infectious coronavirus causing COVID-19, which a church had claimed were a violation of its First Amendment rights to free exercise of religion. In ***South Bay United Pentecostal Church v. Newsom***, the court did not issue any opinion on the case itself, but denied the church's application for emergency injunction relief. Previously, the Ninth Circuit panel and the district judge had similarly denied the church's motion for a preliminary injunction.

Chief Justice John Roberts, who joined the majority in rejecting the emergency application, wrote,

Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only

dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

Justice Brett Kavanaugh wrote a dissenting opinion, joined by Justices Clarence Thomas and Neil Gorsuch, concluding that the California order did not treat the religious institutions the same as "comparable secular businesses" such as grocery stores. Kavanaugh argued that due to this differential treatment, strict scrutiny should apply, and California had not advanced a sufficiently compelling reason to treat religious gatherings differently.

Reported in: *Constitutional Law Prof Blog*, May 30, 2020.

## Washington, DC

Michael Pack, appointed by President Donald Trump and confirmed in 2020 as chief executive officer of the US Agency for Global Media (USAGM), is being sued in **US District Court for the District of Columbia** by the Open Technology Fund (OTF) and OTF board members he fired, who claim that Pack's actions are politically motivated and put the OTF's mission at risk. OTF is ostensibly nonpartisan. Its mission is to help people in authoritarian countries circumvent internet censorship from their governments.

Pack survived a contentious confirmation battle to lead the USAGM, which oversees federally funded news outlets like Voice of America (VOA) and Radio Liberty/Radio Free Europe. It also oversees OTF.

President Trump objected to some of VOA's reporting on the coronavirus and said Pack is doing "a great job" in shaking up the leadership of the USAGM's entities.

"It is hard to conceive of a more serious breach of the organizations'

legally protected independence than the wholesale decapitation of their leadership by an ideologically-oriented maker of political films, installed by the President for the stated purpose of altering the organizations' content," the lawsuit says.

The suit claims that the Open Technology Fund has more independence than VOA and other organizations under USAGM, which should keep Pack out of personnel decisions at OTF. The suit concedes that the International Broadcasting Act gives the CEO of USAGM the power to name officers and directors of VOA, Radio Free Europe, Radio Free Asia, and the Middle East Broadcasting Networks. However, the lawsuit says, "Open Technology Fund was not one of the entities specifically 'authorized' by the Act."

Reported in: [www.foxnews.com](http://www.foxnews.com), June 24, 2020.

## Jefferson City, Missouri

On March 31, 2020, the **Supreme Court of Missouri** dealt a blow to a controversial 2018 labor law that restricts public employees' right to picket.

In a unanimous decision issued in the matter of ***Rebecca Karney and Johnny Miller v. The Department of Labor and Industrial Relations and Todd Smith and Darryl Forte and Jackson County, Missouri***, the Supreme Court upheld a lower court ruling that struck down the picketing restriction. The statute in question requires that labor agreements between unions and public bodies prohibit any kind of picketing. But this prohibition is "unconstitutionally broad" and would violate public employees' freedom of speech, Judge Zel Fischer wrote in his opinion.

Previous court rulings have recognized that public employees' speech "on matters of public concern" can



only be restricted if it would interfere with the efficient delivery of public services, Fischer wrote.

“A perfect example of this unobtrusive speech is before this Court today,” he wrote.

The plaintiffs in the case are dispatchers in the Jackson County Sheriff’s Office, members of Local 6360 of the Communications Workers of America. The union’s previous labor agreement, which expired in December 2018, did not prohibit picketing.

According to arguments the plaintiffs filed with the court, while negotiating a new contract, the dispatchers picketed the sheriff’s office to draw attention to their pay.

Fischer wrote that this was an example of constitutionally protected speech by public employees. The dispatchers didn’t strike, walk off the job, or request that people boycott the sheriff’s office. The picketing was done on the dispatchers’ own time, he wrote.

“The picket was also openly aided by officers in the department who came outside to bring the protesters coffee,” Fischer wrote.

However, the decision does not change restrictions on public employees’ right to strike. The 2018 law requires that labor agreements forbid public sector employees from striking. Fischer’s decision notes that this is “well-settled doctrine” in Missouri, citing a 2007 ruling as precedent. The picketing language struck down by the court was enacted as part of a 2018 law that opponents argued would undermine public sector unions.

Reported by: *St. Louis Post-Dispatch*, April 1, 2020.

## Washington, DC

Black Lives Matter sued President Donald Trump and his administration on June 4, 2020, alleging that their civil rights and First Amendment rights were violated when peaceful

protesters were forced out of Lafayette Square so Trump could take a photo in front of a nearby church. In *Black Lives Matter D.C. v. Trump* in **US District Court for the District of Columbia**, the Washington, DC, chapter of the activist organization filed the suit along with the American Civil Liberties Union (ACLU), alleging that the administration violated their First and Fourth Amendment rights, which protect the right to protest and protect against unreasonable search and seizure.

Authorities fired flash-bang shells, tear gas, smoke canisters, pepper balls, and rubber bullets into the crowd, the suit said. US Park Police have disputed that their officers used tear gas. The square was cleared just moments before Trump left the White House and walked to St. John’s Episcopal Church, where he posed for a photo with a Bible.

The lawsuit also claims that the administration conspired to deprive them of their civil rights and protections. “The conspiracy targeted Plaintiffs’ protected First Amendment activities because Defendants held animus towards Plaintiffs’ viewpoints,” the lawsuit said. “The violent actions of the conspirators directly and unlawfully interfered with these activities.”

Black Lives Matter and the ACLU are asking for an injunction to stop the administration from continuing to use force against protesters.

“Defendants’ actions to shut down the Lafayette Square demonstration is the manifestation of the very despotism against which the First Amendment was intended to protect,” the suit said.

Reported in: NBC News, June 4, 2020.

## LIBRARIES

### Kansas City, Missouri

On January 30, 2020, US District Judge Beth Phillips of the **Western District of Missouri** ruled in favor of off-duty police detective Brent Parsons who arrested Jeremy Rothe-Kushel, who then sued the detective as well as thirteen others over the incident. *Jeremy Rothe-Kushel v. Jewish Community Foundation of Greater Kansas City* was filed by Rothe-Kushel after his highly publicized expulsion from a Kansas City library public event on May 9, 2016. The incident attracted national headlines.

Rothe-Kushel, a documentary filmmaker from Lawrence, Kansas, claimed his First and Fourth Amendment rights were violated after he was physically restrained following a lecture at the library’s Plaza branch by American diplomat and former Middle East envoy Dennis Ross on May 9.

The Jewish Community Foundation and the Truman Library Institute organized the lecture about President Harry Truman’s recognition of the state of Israel. There was heightened security at the event because of the shootings in April 2014 that left three people dead at the Jewish Community Center and Village Shalom in Overland Park, Kansas.

During a post-lecture question-and-answer session, Rothe-Kushel asked Ross a long, rambling question referring to what he said was a history of state-sponsored terrorism by Israel and the United States. Ross responded and Rothe-Kushel began arguing with him. Blair Hawkins, director of security for the Jewish Federation of Greater Kansas City and the person in charge of security for the event, then tried to physically remove Rothe-Kushel from the microphone.

Video of the incident shows Hawkins grabbing Rothe-Kushel’s arm, telling him, “You’re done,” then



attempting to remove him from the microphone. As a second person approaches the microphone to ask a question, Rothe-Kushel is seen continuing to yell.

After an off-duty officer hired for the event asked for his identification and he refused to give it, Rothe-Kushel was arrested. Steven Woolfolk, the library's director of programming and marketing, was also arrested after he attempted to intervene and block Rothe-Kushel's removal. Woolfolk was charged with obstruction, interfering with an arrest, and assaulting a police officer, but in September 2017 a Kansas City Municipal Court judge acquitted him of all three charges.

The actions taken by the officers sparked outrage among civil libertarians and were condemned by the library's executive director at the time, R. Crosby Kemper III, who said the officers had overreacted.

Rothe-Kushel's lawsuit named fourteen defendants, including officials of the Jewish Community Foundation and the Truman Library Institute; Hawkins and the other off-duty police officers involved in the incident; Kansas City Chief of Police Rick Smith; and members of the Kansas City Board of Police Commissioners, including the Kansas City mayor at the time, Sly James.

Later, Rothe-Kushel voluntarily dismissed his lawsuit against the members of the police board and the off-duty officers, except for Brent Parsons, the detective who arrested him.

Judge Phillips found in favor of Parsons given that he had probable cause to arrest Rothe-Kushel for trespassing and for refusing to provide his identification.

Though Phillips also found that Rothe-Kushel had a First Amendment right to ask Ross questions, she said that right was not limitless: "He could not ask so many questions that other

audience members were deprived of the opportunity, and he had no right to argue with Ambassador Ross."

On his claims of conspiracy to violate his civil rights, false arrest, and conspiracy under state law, Phillips found against Rothe-Kushel. Rothe-Kushel declined to say whether he had reached settlements with any of the defendants.

Fred Slough, another attorney representing Rothe-Kushel, said it was "a serious wrong" for Rothe-Kushel to have been removed and arrested. He said Rothe-Kushel would have complied with a request to leave the library.

"Instead he was grabbed and manhandled in the middle of an exchange with the Ambassador that was not a disturbance, except in the sense that some in the audience audibly disagreed with its content," Slough said via email. "The law does not allow such a 'heckler's veto' of free speech."

Reported by: KCUR 90.3 (NPR), January 31, 2020; Associated Press, February 11, 2020; *Kansas City Star*, February 12, 2020.

### Greenville County, North Carolina

The Greenville County Library System has paid a \$30,000 settlement to a former librarian, Jonathan Newton, who said he was fired for facilitating a Drag Queen Story Hour event in February 2019. The wrongful termination lawsuit, *Newton v. James*, was filed in April 2020 in the **Greenville County, North Carolina, Court of Common Pleas**, and was dismissed on June 3, 2020, according to court records.

According to the lawsuit, a group named Mom's Liberal Happy Hour SC had applied for space at the Five Forks branch in Simpsonville, South Carolina, to host a story hour in which drag queens would read to

children, and Newton claims that the library's executive director, Beverly James, and the Greenville County Council decided to stop it. (See JIFP, *Spring 2019*, page 68.) Both James and Greenville County were named as defendants in the suit.

The story hour eventually did take place, but Newton claimed he was then forced out of his job of seventeen years for "insubordination" and for "defending other people's civil liberties."

The suit cited the American Library Association's (ALA) *Library Bill of Rights* that states that libraries that make meeting rooms available to the public should make them available on an equitable basis, "regardless of the beliefs or affiliations of individuals or groups requesting their use."

Just a week before he says he was forced to resign, Newton was named the recipient of the American Library Association's 2020 Gordon M. Conable Award, which "honors a public library staff member, a library trustee, or a public library that has demonstrated a commitment to intellectual freedom and the Library Bill of Rights."

The ALA said Newton was chosen because he "upheld the decision to allow a community group to book meeting space in the library to host a Drag Queen Story Hour despite backlash from members of the public." Reported in: NBC News, April 10, 2020; *Greenville Journal*, August 12.

### MUSEUMS Raleigh, North Carolina

On March 23, 2020, the **United States Supreme Court** ruled that a state government infringing on someone's copyright doesn't have to worry about getting sued. The high court held that federalism outmaneuvers copyright law, effectively giving states a free pass.





*Allen et al. v. Cooper, Governor of North Carolina, et al.* pitted Frederick Allen, a North Carolina videographer, against the state of North Carolina, the legal owner of a famous shipwreck, the *Queen Anne's Revenge*, which was the flagship of legendary pirate Blackbeard until it ran aground off the coast of North Carolina in 1718. The wreck was discovered in 1996 by a company that obtained a contract from the state to do recovery work. The company hired Allen to document those efforts with photos and videos.

Allen spent more than a decade documenting the recovery operation, retaining copyright protection for his work. However, the state published some of his photos on its website without obtaining permission. Ultimately, the state paid Allen \$15,000. Then the state published his work online a second time without permission and Allen sued.

The state argued that Allen's lawsuit should be dismissed under the principle of sovereign immunity. A series of Supreme Court rulings has severely limited the ability of individuals to sue state governments since the 1990s.

A relevant precedent set by a 1999 Supreme Court ruling, which was decided by a close 5-4 vote, stated that individuals couldn't sue states for *patent* infringement. Given the close association between copyright and patent law, it wasn't much of a leap for the Supreme Court to hold that the same logic applies to copyright lawsuits.

So, does this ruling mean that states have a blank check to start violating copyright law? In the short term, the answer seems to be yes. While states are technically immune from copyright lawsuits, the practical implications of this ruling appear limited. And, if some state does routinely

violate copyright law, Congress could pass a new law allowing private lawsuits.

Passed after the Civil War, the 14th Amendment gives Congress the power to protect individuals against states violating their rights. Allen argued that it gave Congress the power to protect people against copyright infringement by states. That's exactly what Congress was trying to do when it passed a law in 1990 specifically giving individuals the power to sue states for copyright infringement.

However, the Supreme Court ruled that this 1990 law did not pass muster under the 14th Amendment. One reason was that Congress failed to establish a systematic problem with states violating individuals' copyrights. Before passing the law, a study commissioned by Congress found only about a dozen examples of states violating copyright law. In the court's view, this paltry evidence of state infringement meant that it was not a serious enough problem to justify impinging on state sovereignty.

But, if state copyright infringement became a widespread problem, then the analysis might change. In a world where states are routinely and deliberately violating individuals' copyrights, a law allowing private lawsuits against states could be justified under the 14th Amendment.

Reported by: Ars Technica, March 24, 2020.

## SCHOOLS Portland, Oregon

On February 12, 2020, in the matter of *Parents for Privacy, et al. v. William P. Barr et al.*, the **United States Court of Appeals for the Ninth Circuit** ruled in favor of an Oregon school district's policy allowing transgender students to use the bathroom that aligns with their gender identity.

A group of parents and students sued to challenge the policy, arguing that it violated their constitutional rights to privacy and that the policy itself was discriminatory.

"It is clear that this case touches on deeply personal issues about which many have strong feelings and beliefs," the panel wrote. "We agree with the district court and hold that there is no 14th Amendment fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth. We also hold that a policy that treats all students equally does not discriminate based on sex."

The plaintiffs had equated the school's policy to past cases in which the government had intruded on people's bodily privacy. They argued that high school students have "the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex," a right "implicit in the concept of ordered liberty." The district court that heard the case disagreed. The cases the plaintiffs cited involved more egregious government intrusions, such as arbitrary strip searches. "The potential threat that a high school student might see or be seen by someone of the opposite biological sex while either are undressing or performing bodily functions in a restroom, shower, or locker room does not give rise to a constitutional violation," the district court wrote.

The Ninth Circuit agreed. Additionally, the panel said, "the 14th Amendment does not provide a fundamental parental right to determine the bathroom policies of the public schools to which parents may send their children."

In dismissing the plaintiffs' overly broad characterization of privacy rights, the court added, "this conclusion is supported by the fact that the Student Safety Plan provides



alternative options and privacy protections to those who do not want to share facilities with a transgender student.”

The plaintiff students had argued that the alternatives were inconvenient and less desirable. But the court noted judicial precedent holding that when the government seeks to accommodate competing interests, like a transgender student’s well-being and that of the offended students, inconvenience and discomfort do not create privacy violations.

Reported in: *Jurist*, February 13, 2020.

### State of California

On February 20, 2020, the state of California agreed to settle a multi-year, high-profile lawsuit (*Ella T. v. State of California*) accusing the state of depriving low-income students of color of their constitutional right to a basic education by failing to teach them reading skills.

Under an agreement reached with plaintiffs in the complaint, Judge Rupert Byrdsong of the **Los Angeles County Superior Court** ruled that the state will pay \$50 million specifically to improve literacy in the seventy-five California elementary schools with the highest concentration of third-graders scoring in the bottom tier of the state’s standardized reading test. Part of the agreement requires the legislature’s approval.

According to an outline provided by Public Counsel, the pro bono firm representing the plaintiffs, the agreement requires that the state advise public schools on how to reduce disparities in the discipline of students of color.

Public Counsel celebrated Judge Rupert Byrdsong’s approval of the settlement, calling it “a historic first step forward towards affirming the

[right to literacy] for all children in California.”

In a statement, Vicky Waters, a press secretary for Governor Gavin Newsom, said, “California is committed to closing opportunity gaps by directing extra support and resources to school districts and schools that serve students who need extra help.” She noted that California rearranged its school funding formula in 2013 to target additional money for schools with a greater share of disadvantaged students and added that Newsom’s 2020–21 budget would steer \$600 million in “opportunity grants” to low-performing, high-poverty schools.

“Today’s announced settlement builds further on these proposed investments and focuses on strengthening early literacy programs, which are critical to a child’s later success in school,” Waters said.

However, while some gaps in achievement have been narrowed, the gap between Black students and their white and Asian peers has remained mostly stagnant. The slow improvement has fueled growing calls from some legislators and civil rights advocates to strengthen oversight of how school districts spend extra money intended for students who are low-income, are English language learners, and are in foster care.

Introduced in Los Angeles County Superior Court in December 2017, the lawsuit listed the California Department of Education and State Board of Education as defendants. Plaintiffs claimed it was the “first in the nation” to seek to establish access to literacy as a constitutional right.

The plaintiffs included current and former students of three California elementary schools with some of the lowest reading proficiency marks in California: La Salle Avenue Elementary in Los Angeles Unified School

District, Van Buren Elementary in Stockton Unified, and the Inglewood charter school Children of Promise Preparatory Academy. The suit sought to hold the state accountable for students’ poor literacy levels, noting that eleven of the country’s twenty-six lowest-performing large school districts are based in California.

According to the suit, Ella T., a seven-year-old Black student at La Salle Elementary when the complaint was introduced, did not receive the “intensive support” and interventions she needed by the time she left first grade still reading below kindergarten level.

There were several other students of color represented in the complaint who also were several grade levels behind in reading literacy. One Black student who attended La Salle, identified in the suit as eleven-year-old Russell W., did a book report for his 5th grade class on *The Cat in the Hat*, a book meant for much younger readers.

Reported in: *Times-Herald*, February 20, 2020.

### Charleston, South Carolina

On March 11, 2020, the **United States District Court for the District of South Carolina** entered a consent decree that declares the state’s 1988 anti-LGBTQ curriculum law unconstitutional and bars its enforcement. The court’s decree comes two weeks after a federal lawsuit was filed on behalf of a high school student organization, Gender and Sexuality Alliance, as well as the Campaign for Southern Equality and South Carolina Equality Coalition, including their members who are public school students in South Carolina. The statute prohibited any discussion of same-sex relationships in health education in public schools except in the context of sexually transmitted diseases. The lawsuit was filed by the National



Center for Lesbian Rights (NCLR) and Lambda Legal, along with private counsel Womble Bond Dickinson, Brazil & Burke, and law professor Clifford Rosky.

“I am very excited that this discriminatory law can no longer be enforced in South Carolina, and I hope we can continue to work toward a more accepting and equal state-wide community,” said Eli Bundy, a tenth grader who is the president of the Gender and Sexuality Alliance (GSA), an organization of high school students at a public magnet school in the Charleston County School District. “I know how frustrating it can feel to be told by a teacher that they can’t talk about who you are. I’m so grateful that no other South Carolina student will have to go through school feeling like they have been erased.”

The lawsuit, *Gender and Sexuality Alliance v. Spearman*, alleged that S.C. Code § 59-32-30(A)(5), a provision of the South Carolina’s 1988 Comprehensive Health Education Act, violated the Equal Protection Clause of the 14th Amendment by discriminating against students who are lesbian, gay, bisexual, transgender, and queer (LGBTQ).

The law singled out LGBTQ students for negative treatment and did not impose any comparable restriction on health education about heterosexual students. Any teacher who violated the provision was subject to dismissal. The South Carolina Attorney General had recently issued an opinion that a court would likely find the law unconstitutional. In response to a motion by the parties in the case, the court agreed the discriminatory law violated the equal protection requirement of the US Constitution and barred state officials from continuing to enforce the law.

“In South Carolina, people across the political and ideological spectrum

understand that no one should be excluded because of their LGBTQ identity. We have common ground in the shared goal of ensuring that all students are safe, respected, and supported in school,” said Kevin Hall, office managing partner at Womble Bond Dickinson based in Columbia, South Carolina. “This court order means that we can put this clearly unconstitutional thirty-two-year-old law behind us, and it marks a new day for LGBTQ students here, who can now go to school without the stigma that this law cast over them. My hat’s off to the courageous students in South Carolina who spoke out against this damaging law.”

Students in states with discriminatory curriculum laws report more hostile school climates. Data from a 2017 Gay and Lesbian Independent School Teachers Network’s (GLSEN) National School Climate Survey assessing LGBTQ middle and high school students demonstrates that South Carolina schools are not safe for most LGBTQ students; nearly 90% said they regularly heard homophobic remarks, and LGBTQ students reported that in the last year, 76% experienced verbal harassment, 34% experienced physical harassment, and 14% were physically assaulted due to their sexual orientation.

Reported by: Lambda Legal, March 11, 2020.

### West Bloomfield, Michigan

On April 23, 2020, a federal appeals court stated that in reviving a lawsuit against the state of Michigan, students at underperforming Detroit public schools have a constitutional right to literacy. The court sent the case, *Gary B., Jessie K., Christopher R., Isaias R., Esmeralda V., Paul M., & Jaime R. v. Gretchen Whitmer et al.*, back to a federal judge in Detroit who had dismissed a lawsuit against state officials.

The 2016 lawsuit alleged that the city’s public schools were in “slum-like conditions” and “functionally incapable of delivering access to literacy.”

In a 2-1 decision from the **United States Sixth Circuit Court of Appeals**, judges Eric Clay and Jane Stranch said that a basic minimum education should be recognized as a fundamental right.

The ruling came on the same day that groups announced a \$23 million effort to provide computer tablets and high-speed internet to 51,000 students in the Detroit Public Schools Community District.

The lawsuit had named Governor Rick Snyder, the state school board, and others. When Governor Gretchen Whitmer was elected in 2018, she replaced Snyder as a defendant.

Carter Phillips, a co-counsel with Los Angeles-based Public Counsel, who represents the students named in the lawsuit, said, “The court in Cincinnati took a bold step today in recognizing a fundamental constitutional right of access to literacy and in doing so has given hope to the school children in Detroit who were so neglected for so long.”

In 2018, US District Judge Stephen Murphy III had dismissed the lawsuit, asserting the US Constitution doesn’t guarantee a fundamental right to literacy.

“If I sat in the state Legislature or on the local school board, I would work diligently to investigate and remedy the serious problems that the plaintiffs assert,” appeals court Judge Eric Murphy said in a dissent, adding that the constitution doesn’t give courts “roving power to redress every social and economic ill.”

Detroit Mayor Mike Duggan was pleased with the majority decision.

“Literacy is something every child should have a fair chance to attain. We



hope instead of filing another appeal, the parties sit down and focus on how to make literacy available to every child in Michigan,” Duggan said.

Governor Whitmer’s office said it was reviewing the opinion. State attorneys had argued that the state doesn’t control Detroit schools and can’t be sued, although the district was run for years by managers appointed by governors. It’s not known if the state will ask the full Sixth Circuit to take a fresh look at the case.

“The governor has a strong record on education and has always believed we have a responsibility to teach every child to read,” said Whitmer spokesperson Tiffany Brown.

Reported by: AP News, April 23, 2020.

## SOCIAL MEDIA New York, New York

In the matter of *Knight First Amendment Institute, et al. v. Donald Trump, Daniel Scarino, and Sarah Huckabee Sanders*, the entire **United States Court of Appeals for the Second Circuit** for the state of New York denied the Trump administration’s request to revisit an earlier holding that Trump violated the First Amendment by blocking individual Twitter users who were critical of the president or his policies.

“Excluding people from an otherwise public forum such as this by blocking those who express views critical of a public official is, we concluded, unconstitutional,” wrote Judge Barrington D. Parker.

“Twitter is not just an official channel of communication for the President; it is his most important channel of communication,” concluded the judge in a decision with implications for how elected officials throughout the country can use social media platforms to communicate with constituents.

Two judges nominated to the bench by Trump disagreed with the decision and would have reconsidered the earlier ruling.

“The First Amendment’s guarantee of free speech does not include a right to post on other people’s personal social media accounts, even if those other people happen to be public officials,” Judge Michael H. Park wrote in a dissent, joined by Judge Richard J. Sullivan.

Allowing the court’s decision to stand, he wrote, will lead to the social media pages of public officials being “overrun with harassment, trolling, and hate speech, which officials will be powerless to filter.”

Park and Sullivan were the only two of the nine judges who agreed with the Trump administration’s view, announcing they would have revisited the earlier decision.

The decision on March 23, 2020, leaves in place a unanimous three-judge panel ruling from July 2019. The court held that because the president uses his Twitter account to conduct official government business, he cannot exclude voices or viewpoints with which he disagrees.

The court’s initial ruling addressed solely the interactive spaces on Twitter for replies and comments, and only applies to accounts used to conduct official business. The judges did not decide whether elected officials violate the Constitution by blocking users from private accounts.

The Knight First Amendment Institute at Columbia University filed the lawsuit in 2017 on behalf of seven people blocked from the president’s account. Katie Fallow, one of their attorneys, said in a statement that the court’s action affirms that the First Amendment “bars the President from blocking users from his account simply because he dislikes or disagrees with their tweets.”

“This case should send a clear message to other public officials tempted to block critics from social media accounts used for official purposes,” she said.

The Justice Department is reviewing the ruling, a spokesperson said.

Reported in: *Washington Post*, March 23, 2020.

## Washington, DC

A federal appeals court rejected claims that tech giants Twitter, Facebook, Apple, and Alphabet’s Google conspired to suppress conservative viewpoints online.

On May 27, 2020, the **United States Court of Appeals for the District of Columbia Circuit** affirmed the dismissal in the matter of *Freedom Watch Inc. et al. v. Google Inc. et al.*, filed by the nonprofit group Freedom Watch and the right-wing YouTube personality Laura Loomer, who accused the companies of violating antitrust laws and the First Amendment in a coordinated political plot.

A three-judge panel ruled, in a decision only four pages long, that the organization didn’t provide enough evidence of an antitrust violation and that the companies aren’t state entities that can violate free speech rights.

“In general, the First Amendment ‘prohibits only governmental abridgment of speech,’” the judges wrote, quoting a previous decision.

Larry Klayman, a lawyer for both Freedom Watch and Loomer, one of the plaintiffs, said in an interview that he’d file a petition to have the case reheard by an enlarged, “en banc” panel of the court’s judges and take the case to the Supreme Court, if necessary. He said he believes the court chose to issue its decision as a response to President Donald Trump’s threat to regulate or shutter social media companies for their alleged anticonservative bias.





The brief decision gave “short shrift” to an important social issue, said Klayman.

Of the three judges on the appellate panel, two were appointed by Republican presidents and one by a Democrat. Trevor McFadden, the district court judge who dismissed the case, was appointed by Trump.

The companies said in a joint brief in March 2020 that courts had repeatedly rejected claims that operating a widely used forum for speech by others “is a public function that amounts to state action.” Subjecting private companies to First Amendment requirements would chill efforts to police pornography and cyberbullying, they said.

“Private property owners, no matter their social importance, are not the government and are not subject to the constitutional constraints that limit governmental regulation of speech,” the companies said.

The case is one of several filed by conservatives which link social media bans to the market dominance of big tech companies. The suit blamed an illegal conspiracy by the companies for a “complete halt” of Freedom Watch’s organizational growth and Loomer’s thirty-day ban from multiple social media platforms after she said Representative Ilhan Omar, a Democrat from Minnesota, favors Sharia law and is “anti-Jewish.”

The DC Circuit’s decision comes only after two unlikely allies weighed in on behalf of Freedom Watch and Loomer, asking the court not to affirm the dismissal of the suit without a full proceeding. The District of Columbia’s government and the Lawyers’ Committee for Civil Rights Under Law filed briefs challenging the trial judge’s conclusion that the DC Human Rights Act of 1977 doesn’t ban discrimination online.

Reported in: *Bloomberg*, May 27, 2020.

## Washington, DC

President Donald Trump’s executive order targeting social media companies was challenged in **US District Court for the District of Columbia** on June 2, 2020, in *Center for Democracy and Technology v. Trump*. The Center for Democracy and Technology (CDT), a non-profit group, claims Trump’s order, issued on May 28, violates free speech protections guaranteed by the First Amendment.

Trump’s order asked federal regulators to look at provisions contained in Section 230 of the 1996 Communications Decency Act that insulate social media companies including Twitter and Facebook from liability for content posted by users. The Center for Democracy and Technology’s suit claims the order is an unconstitutional retaliation against Twitter and that it seeks to discourage other companies and individuals from disagreeing with the government.

The order followed on the heels of Twitter’s decision to add fact-check labels to two of Trump’s tweets. Twitter also restricted a post by the president suggesting that protesters who engaged in looting would be met with violence. Legal observers have said Trump lacks the power to modify Section 230 by executive order.

CDT argues that the order violates the First Amendment and asked the court to block government officials from following the order.

Reported in: *Bloomberg Law*, June 2, 2020.

## New York, New York

In the matter of *Stephanie Sinclair v. Ziff Davis LLC and Mashable, Inc.*, a federal judge in the **United States District Court Southern District of New York** has ruled that the tech news site Mashable did not violate copyright law when it embedded an

Instagram photo from photojournalist Stephanie Sinclair in an article.

James Grimmelmann, a copyright law expert at Cornell University, told Ars Technica that the ruling will provide a firmer legal footing for sites that embed third-party content. “It gives you a very clear basis for throwing out most of these cases quickly.”

The dispute began when Mashable published an article in 2016 highlighting ten female photojournalists whose work focuses on social justice. Mashable included Sinclair among the ten featured photographers and initially offered her \$50 for the rights to one of her photos. When Sinclair declined, Mashable embedded the photo from Sinclair’s official Instagram account instead. Sinclair sued, arguing that Mashable had infringed her copyright.

In the past, this kind of legal dispute has revolved around a doctrine called the server test. It focuses on the fact that a publication using a photo-embed code never stores the photo on its own servers or transmits it to the user. Instead, the embed code tells the user’s browser how to download the photo directly from another site (in this case Instagram). Most courts have held that this fact means the publisher (in this case, Mashable) cannot be liable for direct copyright infringement since it didn’t distribute or display the photo to users.

But not all courts have bought into this logic. In a bombshell ruling in 2018, another New York federal judge held that several news sites had infringed copyright when they embedded a photo of football player Tom Brady in stories. The judge concluded that the technical details of how the photo reached the user’s browser should not overshadow the fact that news websites were causing the photo to appear on users’ browsers without permission from copyright holders.



So rather than relying on the now-shaky server test, Mashable's defense lawyers took a different approach. They argued that Sinclair had granted a license to Instagram to use her photo when she uploaded it. And Instagram's terms of service state that it has the right to sublicense photos to others. Mashable argued that included users of Instagram's embedding service, such as Mashable.

To Judge Kimba Wood that argument was persuasive. While Sinclair didn't directly license her photo to Mashable, Wood wrote, she "granted Instagram the right to sublicense the photograph, and Instagram validly exercised that right by granting Mashable a sublicense to display the photograph."

In a ruling that neatly sidesteps the complexities and uncertainties of the server test, it is not even mentioned in Wood's opinion. The courts may or may not ultimately uphold the server test. But even if the test fails, Judge Wood's ruling provides an alternate defense for people embedding content from third-party websites.

This new legal principle draws a sharp distinction where the server test left things muddled: situations where someone other than the copyright owner uploaded an image or video. The server test said that someone embedding such an unauthorized social media post would not be a direct copyright infringer, but they could still be liable under complicated doctrines of indirect copyright liability.

Judge Wood's licensing-based reasoning draws, on the other hand, a clear line between authorized and unauthorized social media uploads. Embedding social media posts authorized by copyright holders is unambiguously legal under Wood's reasoning, while the same logic provides no defense to someone who embeds an unauthorized image.

This means that all media organizations would be well-advised to train reporters to be mindful of the source of social media posts they want to embed. Media organizations are on safe legal ground if they embed social media images posted by their legitimate copyright holders. But they should be cautious about embedding images posted by third parties not connected to the copyright holder, in which case they'd be wholly reliant on the server test to justify their actions.

The licensing-based legal theory significantly limits how embedded images can be used. Like any Instagram user, Sinclair can choose to disable Mashable's use by marking her Instagram post private. She may have exercised this option as her photo no longer appears in Mashable's article.

That license is limited to the use of Instagram's embedding tool. If Mashable wants to use Sinclair's photo for other purposes, it would need to negotiate a separate license.

Reported by: Ars Technica, April 15, 2020.

## ARTWORK Miami, Florida

The American Civil Liberties Union (ACLU) of Florida is suing the city of Miami Beach, Mayor Dan Gelber, and City Manager Jimmy Morales over the removal of a painting memorializing Raymond Herisse, a Haitian American who was fatally shot by Miami Beach police in 2011. The case, *McGriff et al. v. Miami Beach*, was filed on June 23, 2020, in **US District Court for the Southern District of Florida, Miami Division** in Miami on behalf of the artist Rodney Jackson and the curators Octavia Yearwood and Jared McGriff. It argues that Gelber and Morales violated their First Amendment rights.

Herisse was shot while driving during Miami Beach's Urban Beach

Weekend, an event largely attended by Black communities that have seen aggressive police enforcement. He was shot 16 times as police fired 116 bullets.

The painting of Herisse was displayed in an exhibition on Lincoln Road forming part of *Reframe Miami Beach*, a series of art installations focused on works dealing with race and racial justice issues, commissioned by the city in 2019 to coincide with Memorial Day Weekend. The curators say the painting was quickly removed after it was installed and that Morales threatened to shut down the entire exhibition if the painting was not removed.

The complaint notes Gelber's public comments on his decision to support the removal of the work. The mayor said the work "was a commission work for us." He added that Morales "said 'I don't like it' and 'I don't want it,' and I frankly supported that decision."

The civil rights lawyer Alan Levine, who is working on the suit, said, "The defendants will say that we don't have to fund art that we don't want, that it's our dime and we shouldn't have to pay for it, but the truth is that it's not their dime, it's the public's dime." He added, "It's perfectly clear that public money cannot be subject to whether or not public officials approve of someone's point of view."

Reported in: *The Art Newspaper*, June 23, 2020.

## FREEDOM OF THE PRESS Minneapolis, Minnesota

The American Civil Liberties Union of Minnesota (ACLU-MN) filed a class-action lawsuit June 3, 2020, on behalf of journalists who have been targeted and attacked while covering the protests that began after George Floyd was killed in Minneapolis police custody.



The lawsuit, *Goyette v. Arradondo* in US District Court for the District of Minnesota, seeks a temporary restraining order and a permanent injunction to stop law enforcement from attacking and targeting journalists. It names the City of Minneapolis, Police Chief Medaria Arradondo, police union head Lt. Bob Kroll, the Minnesota Department of Public Safety Commissioner John Harrington, and Minnesota State Patrol Colonel Matthew Langer as defendants. The lead plaintiff is journalist Jared Goyette, who, according to the ACLU, was documenting protesters' attempts to shield and help an injured Black man when police fired a projectile at Goyette's face.

"Law enforcement is using violence and threats to deter the media from vigorously reporting on demonstrations and the conduct of police in public places," said ACLU-MN legal director Teresa Nelson in a statement. "We depend on a free press to hold the police and government accountable for its actions, especially at a time like this when police have brutally murdered one of our community members, and we must ensure that justice is done. Our community, especially people of color, already have a hard time trusting police and government. Targeting journalists erodes that public trust even further."

The lawsuit states that Minneapolis police have a history of unconstitutional actions against journalists. It also criticizes government leadership: "Ostensible leaders of our law enforcement agencies have been unable to curb this unlawful violence. Governor Walz and others have repeatedly issued statements apologizing for the violence against reporters and the unlawful arrests. But these statements, and whatever behind-the-scenes actions have

accompanied them, have proven toothless."

Reported in: *The Wrap*, June 3, 2020.

## PRIVACY Indiana

The **Indiana Supreme Court** on June 23, 2020, ruled that a woman accused of stalking has a Constitutional right to refuse to unlock her iPhone. In *Seo v. Indiana*, the court held that the Fifth Amendment's rule against self-incrimination protected Katelyn Seo from giving the police access to potentially incriminating data on her phone.

Lower courts are divided about this issue because the relevant Supreme Court precedents all predate the smartphone era. To understand the two competing theories, Timothy B. Lee, a senior reporter at *Ars Technica*, compared the situation to a pre-digital technology.

Suppose that police believe that a suspect has incriminating documents stored in a wall safe and they ask a judge to compel the suspect to open the safe. The constitutionality of this order depends on what the police know.

If the government can't show that the suspect knows the combination—perhaps the suspect claims the safe actually belongs to a roommate or business partner—then all courts agree that forcing the suspect to try to open it would be unconstitutional. This is because the act of opening the safe functions as an admission that the suspect owns the safe and the documents inside of it. This fact could be incriminating independent of the contents of any documents found inside the safe.

On the other hand, if the government can show that the suspect knows both the password and

which specific documents are in the safe—perhaps because the suspect described the safe's contents during an interrogation—then all courts agree that the suspect can be forced to open the safe. That's because the Fifth Amendment is a right against self-incriminating *testimony*, not the production of incriminating *documents*.

But what if the state can show the suspect knows the combination but doesn't know which documents are in the safe? Here the courts are split.

One theory holds that only the act of opening the safe is testimonial. Once the safe is open, the safe contains whatever documents it contains. The police get the information in the documents directly from the documents, the same as they would if they'd found them lying on the suspect's desk. So the contents of the documents are not compelled testimony.

The other theory—the one endorsed by Indiana's Supreme Court this week—holds that it matters whether the police know which documents they're looking for. If the police are looking for specific documents that they know are in the safe, then there may be no Fifth Amendment problem. But if the request is more of a fishing expedition, then it's barred by the Fifth Amendment, since the act of opening the safe gives the police access to information they wouldn't have otherwise. Some courts have found this argument particularly compelling due to the vast amount of information on modern smartphones.

Indiana's Supreme Court argues that by unlocking her phone, Seo would be giving prosecutors access to files they didn't know existed and might not be able to access any other way.

"Even if we assume the State has shown that Seo knows the password



to her smartphone, the State has failed to demonstrate that any particular files on the device exist or that she possessed those files,” Indiana’s Supreme Court held. “Detective Inglis simply confirmed that he would be fishing for ‘incriminating evidence’ from the device.”

Reported in: *Ars Technica*, June 24, 2020.

## Detroit, Michigan

On June 24, 2020, the American Civil Liberties Union (ACLU) of Michigan filed a complaint against the Detroit Police Department asking that police stop using facial recognition software in investigations.

Civil rights experts say Robert Williams is the first documented example in the United States of someone being wrongfully arrested in which police admitted that facial recognition technology prompted the arrest. The false hit came in a database search conducted by Michigan State Police in a crime lab at the request of the Detroit Police Department, according to charging documents reviewed by NPR.

The police in Detroit were trying to figure out who stole five watches from a Shinola retail store. Investigators pulled a security video that had recorded the incident. Detectives zoomed in on the grainy footage and ran the person who appeared to be the suspect through facial recognition software.

A hit came back: Robert Julian-Borchak Williams, age forty-two, of Farmington Hills, Michigan, about twenty-five miles northwest of Detroit. On January 9, 2020, police arrested him while he stood on his front lawn in front of his wife and two daughters, ages two and five, who cried as they watched their father being placed in the patrol car.

Williams was led to an interrogation room, and police put three photos in front of him: two photos taken from the surveillance camera in the store and a photo of Williams’s state-issued driver’s license.

“When I look at the picture of the guy, I just see a big Black guy. I don’t see a resemblance. I don’t think he looks like me at all,” Williams said in an interview with NPR. “I picked it up and held it to my face and told him, ‘I hope you don’t think all Black people look alike,’” Williams said.

Williams was detained for thirty hours and then released on bail until a court hearing on the case, his lawyers say.

At the probable cause hearing, a Wayne County prosecutor announced that the charges against Williams were being dropped due to insufficient evidence. According to the ACLU’s complaint, the “prosecutor announced that the charges against Mr. Williams were being dropped ‘without prejudice.’ In other words, the DPD and the prosecutors were reserving the right to harass Mr. Williams and his family again.”

The pursuit of Williams as a possible suspect came despite repeated claims by him and his lawyers that the match generated by artificial intelligence was faulty. The alleged suspect in the security camera image was wearing a red St. Louis Cardinals hat. Williams, a Detroit native, said he would under no circumstances be wearing that hat.

“They never even asked him any questions before arresting him. They never asked him if he had an alibi. They never asked if he had a red Cardinals hat. They never asked him where he was that day,” said lawyer Phil Mayor with the ACLU of Michigan.

In a statement to NPR, the Detroit Police Department said after

the Williams case, the department enacted new rules. Now, only still photos, not security footage, can be used for facial recognition. And it is now used only in the case of violent crimes.

“Facial recognition software is an investigative tool that is used to generate leads only. Additional investigative work, corroborating evidence and probable cause are required before an arrest can be made,” Detroit Police Department Sgt. Nicole Kirkwood said in a statement.

Victoria Burton-Harris, Williams’s lawyer, said in an interview that she is skeptical that investigators used the facial recognition software as only one of several possible leads. “When that technology picked my client’s face out, from there, it framed and informed everything that officers did subsequently,” Burton-Harris said.

Academic and government studies have demonstrated that facial recognition systems misidentify people of color more often than white people.

Reported in [npr.org](http://npr.org), June 24, 2020.

## COLLEGES AND UNIVERSITIES Scottsdale, Arizona

A lawsuit filed on June 2, 2020, charges Scottsdale Community College (SCC) and one of its professors for teaching material that it says condemns Islam. In *Sabra v. Maricopa Community College District in US District Court for the District of Arizona*, a student and the Arizona chapter of the Council for American-Islamic Relations (CAIR) ask that SCC and professor Nicholas Damask stop teaching the materials in question until they “do not have the primary effect of disapproving of Islam.”

Before suing, the student, Mohamed Sabra, posted three quiz



questions from a world politics class to social media last month. The ensuing online criticism prompted the college's interim President Christina Haines to apologize for the "inaccurate" and "inappropriate" questions.

Haines said Damask would apologize to the student and remove the questions from his curriculum, but Damask pushed back, saying he had no intention of apologizing and that his academic freedom was being threatened.

The chancellor of Maricopa Community College District, of which SCC is a part, stepped in and said the questions posted on social media were taken out of context and fell within the scope of the course.

After school officials sent the professor a prewritten apology letter to sign, Damask reached out to the Foundation for Individual Rights in Education (FIRE) saying his job and academic freedom were threatened.

FIRE wrote a letter to the college about its attempt to force Damask to change his course content and issue an apology. FIRE seeks to defend academic freedom, whether for students or faculty.

"SCC's actions in response to Damask are irreconcilable with its constitutional and statutory obligations as a public institution of higher education," the letter read. "SCC cannot abandon its obligations under the First Amendment and Arizona law."

But Sabra said attorneys aren't arguing against lively discussion and debate on college campuses or even that the motivations of Islamic terrorists can't be discussed in classes. Rather, academic freedom cannot be used to cloak anti-Muslim speech and make broad generalizations about the Muslim faith, Sabra said.

Sabra was enrolled in Damask's online world politics course, which featured lessons on Islamic terrorism.

According to the lawsuit, Damask repeatedly condemned Islam as a religion that definitively teaches terrorism.

Screenshots posted by Sabra show that the quiz included statements such as "contemporary terrorism is Islamic" and "terrorism is justified within the context of Jihad in Islam." The quiz also asserted that Islamic terrorists strive to emulate the Prophet Muhammed.

The lawsuit says that Sabra answered the questions based on how Muslims practice their religion, but the answers were marked as incorrect.

"Mr. Sabra was forced to make a decision; either disavow his religion or be punished by getting the answers wrong on the quiz," the lawsuit says.

The court dismissed the lawsuit on August 18, 2020. According to the decision, "the teaching's primary purpose was not the inhibition of religion. The offending component was only a part of one-sixth of the course and taught in the context of explaining terrorism."

Damask was scheduled to teach this course again in a summer semester course beginning June 8, according to the lawsuit.

Reported in: [www.azcentral.com](http://www.azcentral.com), June 3, 2020; [www.thefire.org](http://www.thefire.org), August 18.

## INTERNATIONAL Paris, France

The **French Constitutional Council**, a top court that reviews legislation to ensure it complies with the French constitution, on June 18, 2020, struck down critical provisions of a law passed by France's parliament in May 2020 to combat online hate speech, dealing a severe blow to the government's effort to police internet content.

In a statement explaining its *Decision no. 2020-801 DC*, titled "*Loi*

*Visant à Lutter Contre les Contenus Haineux sur Internet*," the court said that some key provisions of the law "infringe upon the exercise of freedom of expression and communication in a way that is not necessary, suitable, and proportionate." The law, which was supported by President Emmanuel Macron's government and sponsored by his party, created an obligation for online platforms to take down hateful content flagged by users within twenty-four hours. If the platforms failed to do so, they risked fines of up to 1.25 million euros, or about \$1.4 million.

The Constitutional Council noted that the measure put the onus for analyzing content solely on tech platforms without the involvement of a judge, within a very short time frame, and with the threat of hefty penalties. The court said this created an incentive for risk-averse platforms to indiscriminately remove flagged content, whether or not it was clearly hate speech.

The court also struck down a part of the law that obligated tech platforms to remove—within one hour—content flagged by the authorities as child pornography or terrorist propaganda, arguing that the extremely short time frame and lack of independent review of the content also violated freedom of expression.

Only minor measures in the law, such as the creation of an official online hate speech watchdog, still stand.

Strong anti-hate speech laws already exist in France, often with criminal penalties, but supporters of the new law had argued that those rules, instituted before the emergence of social media platforms, held little sway online.

Reported in: *New York Times*, June 18, 2020.