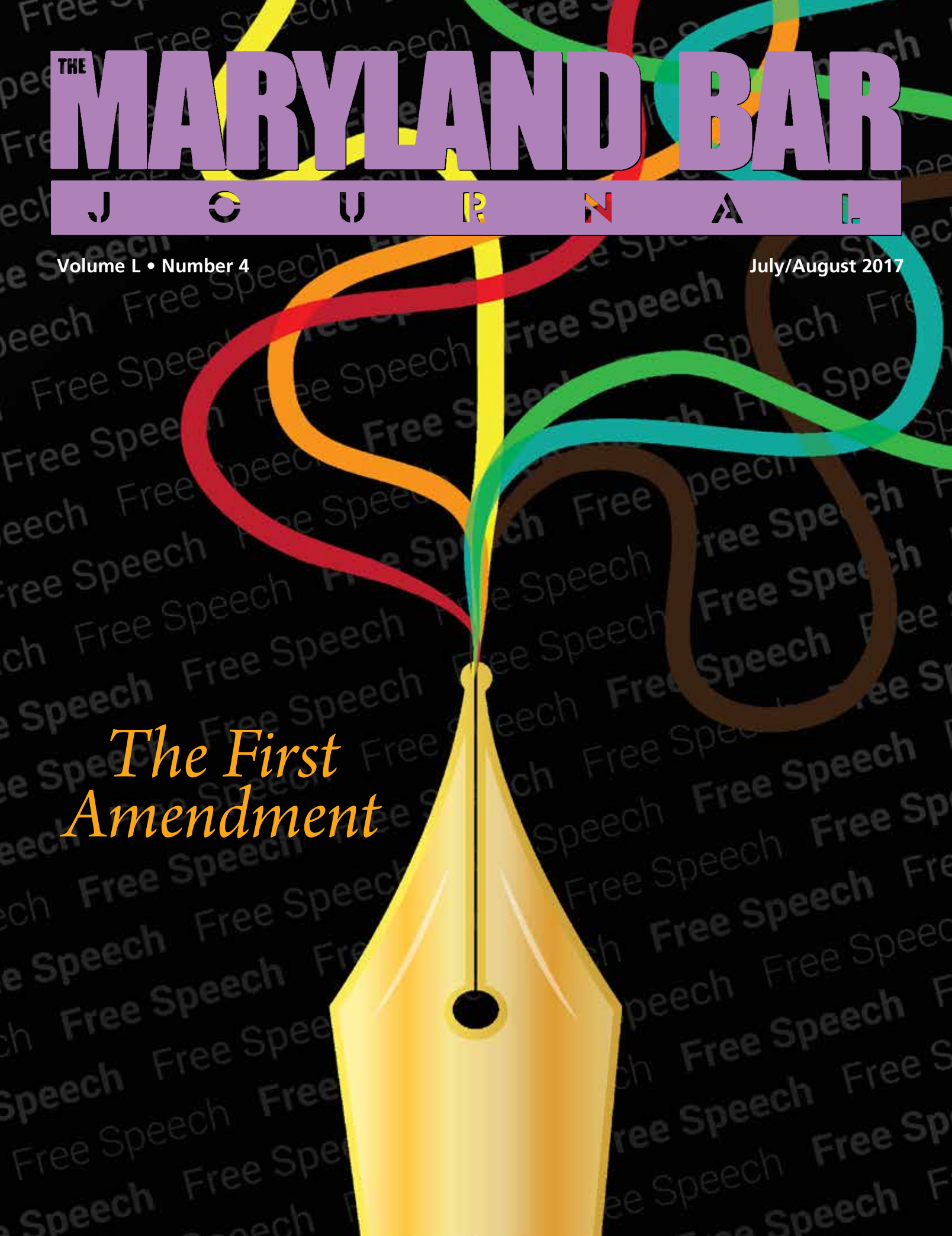
THE MARYLAND BAR JOURNAL

Volume L • Number 4

July/August 2017

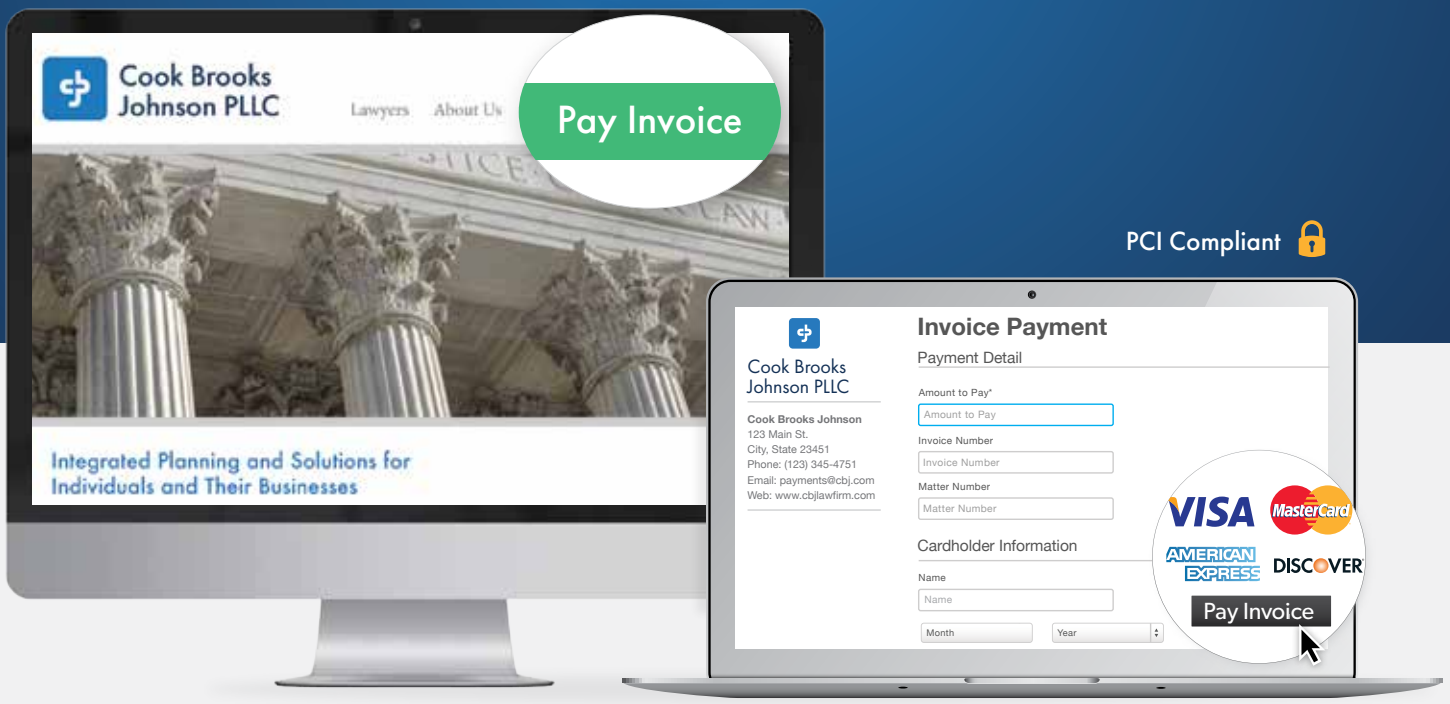


The First Amendment

LawPay®

AN AFFINIPAY SOLUTION

MSBA Proud Member Benefit Provider



THE EXPERTS IN LEGAL PAYMENTS

The proven payment solution for lawyers.

Managing payments and growing revenue for over 35,000 law firms in the US, LawPay is the only payment solution offered as a member benefit through the ABA. Developed specifically for law firms, LawPay guarantees complete separation of earned and unearned fees, giving you the confidence and peace of mind that your credit card transactions are handled the right way.

LawPay.com/MSBA | 866.376.0950

THE MARYLAND BAR JOURNAL

Volume L • Number 4
July/August 2017

"The First Amendment"

Features

Departments

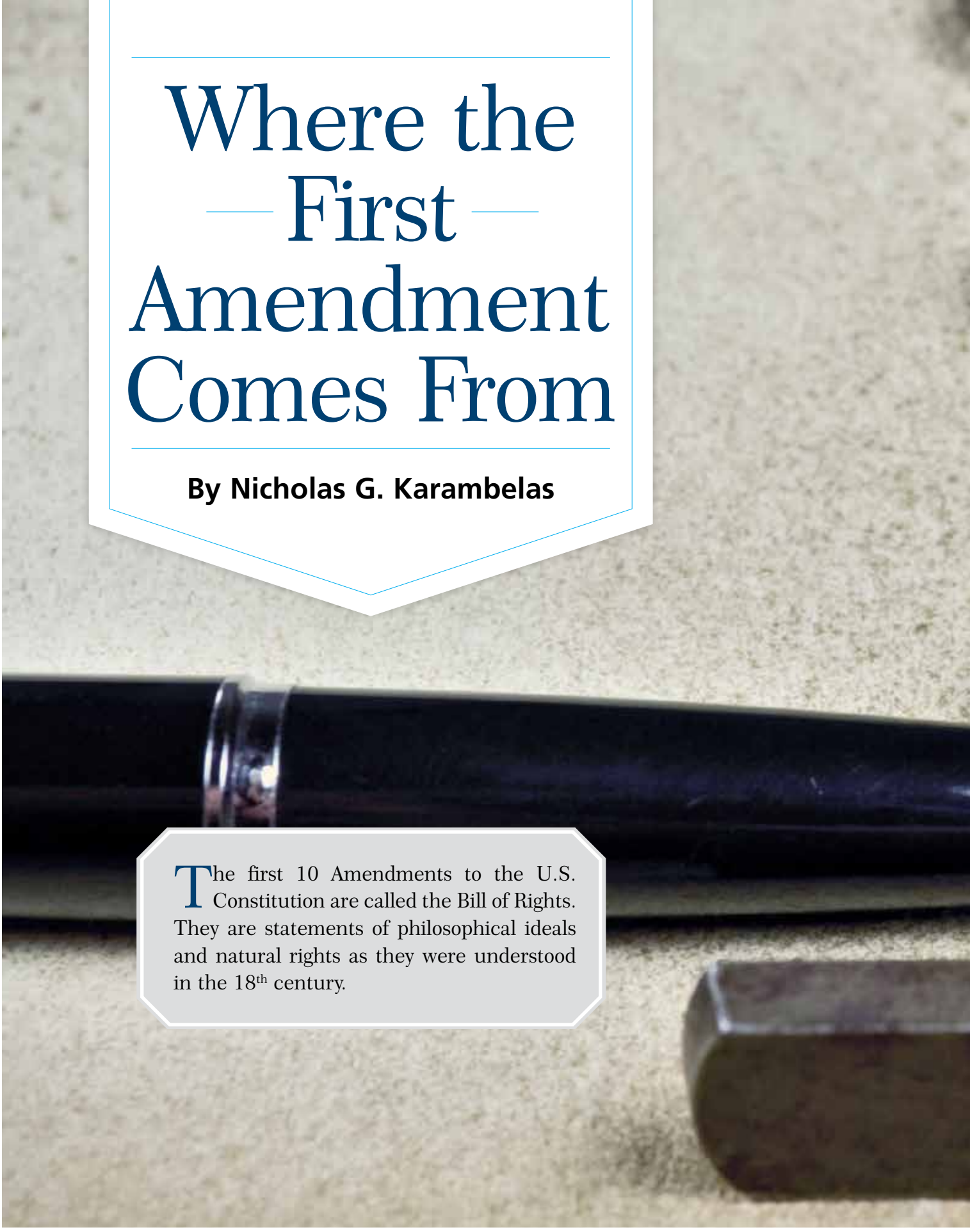
Published bimonthly by the Maryland State Bar Association, Inc.
The Maryland Bar Center
520 W. Fayette St.
Baltimore, Maryland 21201
Telephone: (410) 685-7878
(800) 492-1964
Website: www.msba.org
Executive Director: Victor L. Velazquez
Editor: W. Patrick Tandy
Assistant to the Editor: Lisa Muscara
Design: Jason Quick
Advertising Sales: Network Media Partners
Subscriptions: MSBA members receive THE MARYLAND BAR JOURNAL as $20 of their dues payment goes to publication. Others, $42 per year.
POSTMASTER: Send address change to THE MARYLAND BAR JOURNAL 520 W. Fayette St. Baltimore, MD 21201

The Maryland Bar Journal welcomes articles on topics of interest to Maryland attorneys. All manuscripts must be original work, submitted for approval by the Special Committee on Editorial Advisory, and must conform to the Journal style guidelines, which are available from the MSBA headquarters. The Special Committee reserves the right to reject any manuscript submitted for publication.

Advertising: Advertising rates will be furnished upon request. All advertising is subject to approval by the Editorial Advisory Board.

Where the First Amendment Comes From

By Nicholas G. Karambelas



The first 10 Amendments to the U.S. Constitution are called the Bill of Rights. They are statements of philosophical ideals and natural rights as they were understood in the 18th century.

Each Amendment has a history borne out of experience and shaped by the prevailing political and social context. The drafters did not originate concepts behind the Amendments, but they did know and understand their sources. Most of them accepted the proposition that men, but not women or persons in servitude or bondage, are born free and that freedom derives from their Creator or nature but not from an earthly sovereign. This concept is the basis of the Declaration of Independence, the constitutions, and declarations of the colonies, and ultimately the U.S. Constitution. It is set forth in the First Amendment, which states that "Congress shall make no law .... abridging the freedom of speech or the press." Congress was not directed to create these freedoms. They already existed and pre-dated Congress. The First Amendment admonishes Congress not to intrude upon these already existing rights.

Once mankind gathered into society, it needed a sovereign. According to John Locke, people had to determine how much freedom to cede to the sovereign so that society can function. The nature and extent of this cession of freedom is set forth in written laws, and institutions are created to enforce those laws. The offices of attorney and judge developed to apply the laws and manage the institutions. The sovereign was just and effective only so long as people accepted that the sovereign was legitimate.

This acceptance took different forms. Some people believed the sovereign was legitimate only if it was a god or chosen by a god who had an inconceivable power to confer on the sovereign the authority to make and enforce laws for society. Other people believed that the sovereign was legitimate only if its authority was voluntarily conferred on it by the power of the people. Other people believed that

no sovereign was necessary and could never be legitimate. History is the ebb and flow of human attempts and failures to reconcile these competing concepts of sovereignty.

Beginning with the era to which historians refer as the Age of Enlightenment in the West, the course of this ebb and flow changed forever. The change was caused by two almost simultaneous technological advances: the movable printing press and the rudder. The printing press enabled competing ideas and sacred texts to be recorded for posterity and circulated quickly and broadly. The rudder enabled seagoing vessels to travel around the world, thus creating international commerce. It was the confluence of these two advances at about the same time that caused the change. The rudder created wealth, which liberated a class of people from being preoccupied only with subsistence and enabled them to think. The printing press enabled them to write and disseminate ideas.

The First American Revolution: The English Civil War

The English Civil War (1642-1649) was the result of the competition of the concepts gone to an extreme. The causes are complicated and are rooted deep in English history. The effects remain controversial to this day. Fundamentally, the war pitted the Parliament, in the person of Oliver Cromwell, against the monarchy, in the person of King Charles I. It also pitted the Puritan Reformation against the Church of England and the Catholic Church. The Parliament asserted that power derived from the people, whatever their religious beliefs. The sovereign had only that authority which the people conferred on the sovereign. The monarchy asserted that the authority of the sovereign was granted only by the power of God.

Unlike other periods in history, the Parliament and the monarchy could not reconcile their competing assertions. This competition exploded into a devastating civil war. As in most civil wars, loyalties shifted, there was dissension in the ranks of each side, and families and friends were split.

Because of the printing press, people could disseminate pamphlets supporting their side and demonizing the other side or even demonizing their own side. Some historians believe that this "pamphleteering", as it was called, fueled the civil war. The

English Civil War was probably the first time in the history that paper was used as an implement of war. Control of the presses, which enabled control of the pamphleteers, was considered almost as essential to victory as was success on the battlefield.

Throughout the 1620s and 1630s, the Church of England implemented a licensing scheme for restraining freedom of press. The purpose was to suppress the dissemination of the religious views of the Puritans. The Puritans opposed the restraint, not for reasons of freedom of expression and religion but because it frustrated their ability to convert adherents to their religion and cause. The monarchy caused restraint to be lifted probably because it determined that no restraint on publishing may better serve its cause. As the civil war intensified in 1640-1643, the Parliament enacted its own licensing law which required that printing presses and printers be licensed by and overseen by a committee of Parliament. This committee performed the function of a censor through a practice which came to be known as prior restraint.

Ultimately, the Parliamentary forces prevailed. King Charles I was beheaded and the monarchy was eliminated. In its place, a facsimile of a republic was established. It is referred to as the Protectorate (1650-1656) of which Cromwell became Lord Protector. The Protectorate was essentially a repressive dictatorship and Cromwell was the dictator. The Protectorate lasted for six years until 1656 when Oliver Cromwell died. His son, Richard, aspired to take his place but he proved to be incompetent. In 1660, the monarchy was re-established when Charles II, heir to the crown, returned from exile. Known as the Restoration, he

WHO'S TRYING YOUR CASE?

We're not afraid of the big bad courtroom.

March 2017 Jury Verdict
$1,050,000
BALTIMORE CITY CIRCUIT COURT

April 2017 Jury Verdict
$1,122,286
HARFORD COUNTY CIRCUIT COURT

It takes a special breed of attorney to understand the intricacies of trying a jury trial. That's why clients and other attorneys have turned to the pride of Potter Burnett Law. Whether you or your client suffered from a car accident, nursing home negligence, or medical malpractice—Potter Burnett's pride of trial lawyers has the courtroom experience to confidently present your case in trial. Acclaimed trial attorneys Deborah L. Potter, Suzanne V. Burnett, and Andrew T. Burnett understand the importance of standing by your side and confidently trying cases in courts throughout the state of Maryland and Washington, DC.

Welcoming referrals in the areas of car crashes, nursing home abuse, and medical malpractice.

POTTER · BURNETT
ATTORNEYS AT LAW

Let our pride, protect yours.

POTTERBURNETTLAW.COM

CALL FOR A **FREE CONSULTATION**

301.850.7000

16701 Melford Blvd • Suite 321 • Bowie, MD 20715

Each case is different and the law firm's past record in obtaining favorable awards, judgments, or settlements in prior cases is no assurance of success in any future case.

Car Accidents • Nursing Home Negligence • Medical Malpractice and Mistakes

ascended to the throne and proceeded to punish the parliamentarians who had beheaded his father. The remnants of the parliamentary forces conceded that England must have a king. Amid fears that Charles' brother James, who was a Catholic, would establish Roman rule over England, they implored Mary, who was a Protestant and the next legitimate heir, and her husband William to take the crown. They ascended in 1688, an event known to history as the Glorious Revolution.

Some historians refer to the Glorious Revolution of 1688 as the first American Revolution. William and Mary along with Parliament enacted the English Bill of Rights. James Madison and the other founders were profoundly influenced by the English Bill of Rights. The Amendments in the U.S. Bill of Rights closely track the provisions of the English Bill of Rights. However, the objective of the American Revolution was to eliminate the monarchy as was the objective of the English Civil War. In this respect, the American Revolution had more in common with the English Civil War. The difference was in the method. Partly due to the Atlantic Ocean, the Americans did not commit regicide.

Aeropagitica (1644)

John Milton is best known as a poet for his epic *Paradise Lost* and poetry such as *Lycidas*. He was erudite, well-traveled, and learned in the ancient Hellenic and Roman classics as well as the Bible and theology. Milton implacably opposed the monarchy. While he was not a soldier, Milton supported the Parliament, although the intensity of his support fluctuated in accordance with (in)competency of the leaders.

Milton had opposed the restraints on the press imposed by Church of England. He then opposed the licensing scheme imposed by Parliament. He had a personal reason because he had been a victim of the scheme. Milton had an unfortunate domestic life. His wife came from a family which sympathized with the monarchy. She left him after a short time of marriage. They were unable to divorce, however, because divorce was available only if the marriage had not been consummated or if the ceremony had not been properly conducted. Milton published pamphlets in favor of a form of civil divorce, the last of which violated the licensing laws, Milton incurring the ire of Parliament.

In response to the approbation of Parliament for violating the licensing laws with divorce tracts, Milton wrote *Aeropagitica*. It was published under his own name in 1644, again in violation of the licensing laws. The title is based on a tract of the same name written by a 4th century B.C. Athenian philosopher, Isocrates. The Aeros Pagos was the assembly and court of ancient Athens. Three hundred male citizens of Athens met to make laws and decide cases on a hill across from the Acropolis. Today, Aeros Pagos is the name of the supreme court of Greece. By titling it *Aeropagitica*, Milton sought to identify with the ancient Athenian ideal of freedom of expression.

True to his purpose, Milton forcefully opposes any pre-publication restraint or censorship. But he carries the argument into another dimension. He argues that, not only is freedom of expression essential as moral matter, it is essential to proper functioning of society. He posits four arguments in support of this proposition. Freedom of expression:

- assures liberty of conscience (commonly defined as the freedom to follow one's religious or ethical beliefs; also referred to as "freedom of thought") which fosters self-fulfillment and happiness in people,
- is a way of recognizing and attaining truth,
- encourages active participation in the affairs of government and society, and
- maintains the delicate balance between stability and change.

Milton was not an absolutist. He would be horrified to see that *Areopagitica* is used to justify pornography or prohibit the display of religious symbols on public property. He believed that; once a work was in the public domain, it should be taken out of circulation if it was "evil or libelous." Since it would be obvious whether it was "evil or libelous," there was no need to set standards for what was "evil or libelous." Censors still had jobs.

The Protectorate hired Milton as the Secretary of Foreign Tongues. He basically conducted public relations for the Protectorate with Europe, which wanted nothing to do with either Cromwell or the Protectorate. Also, he was the publisher of the government newspaper, the purpose of which was to extol the virtues of the Protectorate. That he became troubled by the course of the Protectorate under Cromwell may explain why he left public life and spent the remainder of his years writing his great poetry.

The Agreement of the People (1649)

The *Aeropagitica* is a philosophical argument. Even though Milton never intended to deliver it as a speech,

CALL: 1-800 PROCESS

For All Your
PROCESS SERVING Needs
"WE ARE EVERYWHERE"®

or Click: 1800PROCESS.com
Info@1800PROCESS.com

Aeropagitica is structured according to rhetorical principles of Isocrates and the other ancient Athenian orators. It is a piece of advocacy like an appellate brief. However, Milton did not provide a system for guarantying and protecting freedom of expression.

John Lilburne and the Levellers proposed a system to protect the exercise of freedom of expression. The Levellers were a group of anti-monarchist men who were soldiers for the Parliament. They were political activists and should not be confused with the Diggers, who were anarchists. Lilburne was a leader of the Levellers and an author of *The Agreement of the People* as well as other tracts referred as petitions. Written in 1649 at about the time at which Charles I was beheaded, Lilburne and his associates set forth in these documents a legal and political foundation for a civil government without a monarch. The documents read like a combination of the Declaration of Independence and the U.S. Constitution. They advocated a written constitution for England which would set forth:

- rules of procedure for the conduct of business by the Parliament and a process for the election of officers,
- a form of independent judiciary,
- freedom of expression and religion,
- privilege against self-incrimination, and
- prohibition of cruel and unusual punishment

The First Amendment and the Two Johns

The freedoms in the First Amendment are meaningful today, because they are supported by a philosophical justification and a practical means for protecting them. John Milton provided the philosophical and intellectual justification, not just for freedom of the press or speech but also for the liberty of conscience. The significance of *Aeropagitica* is that it is the first coherent modern statement of the reasons why liberty of conscience must exist in society. John Lilburne provided the structure of an institution that would protect this liberty so that the freedoms could be exercised without fear.

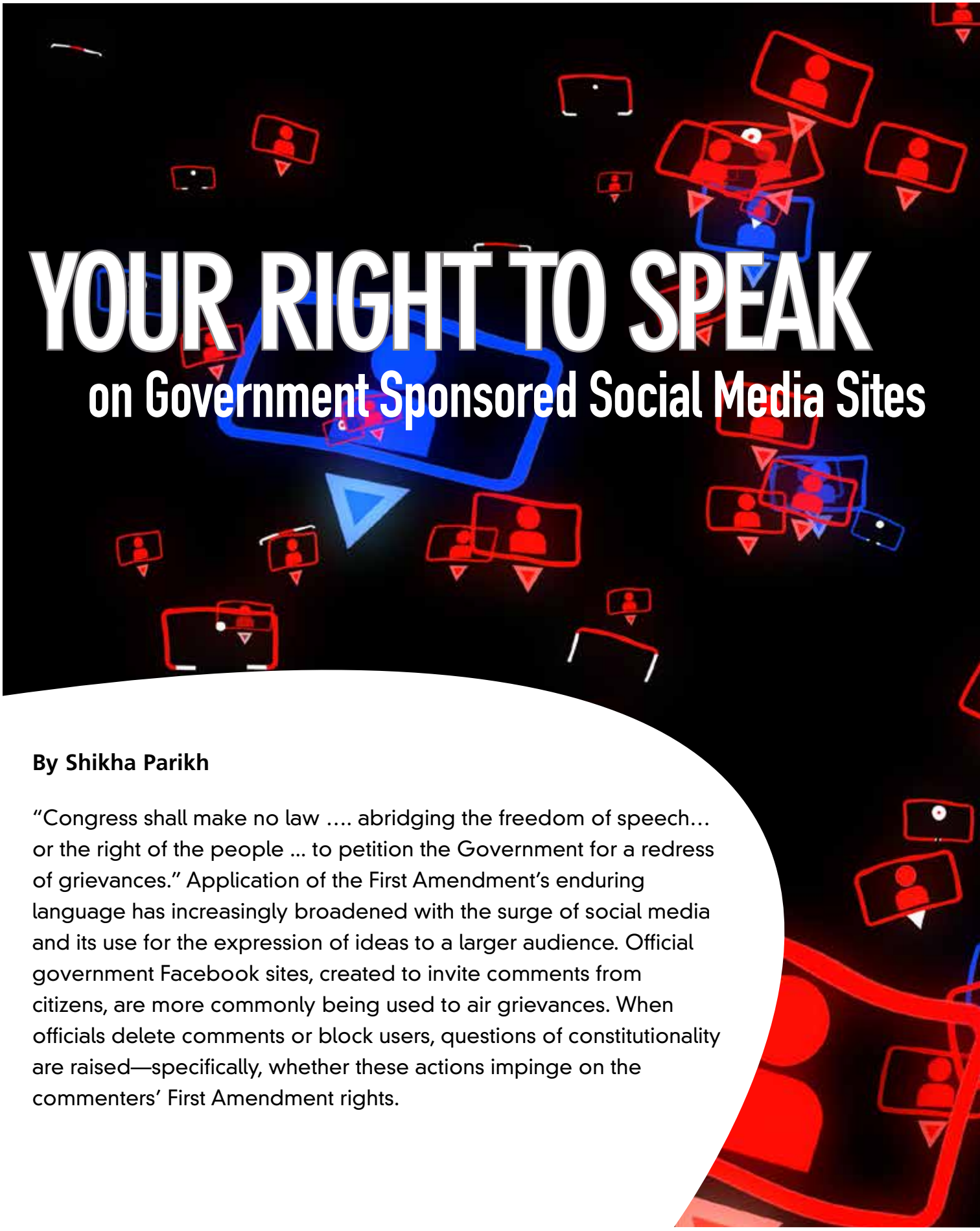
Both *Aeropagitica* and *The Agreement of the People* figured prominently in the minds of the founders and, later, the Supreme Court justices and judges. In the 125 years following *Aeropagitica* and the English Civil War, refugees from the religious wars in England fled to America. Ironically, some of them, known as the Puritans, established regimes which mandated a religious doctrine and suppressed dissent from and nonconformity with that doctrine. Other colonists imposed and perpetuated the established religions of England. The effect of these regimes was to suppress freedom of expression. The founders resolved to purge from the new nation the scourge of intolerance and guarantee the right of freedom of expression through the First Amendment.

First Amendment jurisprudence over the decades is essentially the application of the systematic philosophy of *Aeropagitica* through the institutions for which *The Agreement of the People* provided the practical foundation. Liberty of conscience is best summed up by John Milton and his inspiration, Euripides, the ancient Athenian playwright:

> "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." John Milton, *Aeropagitica*.

> "This is true liberty, when free born men, having to advise the public, may speak free...What can be more just in a State than this?" Euripides, *The Supplicants*.

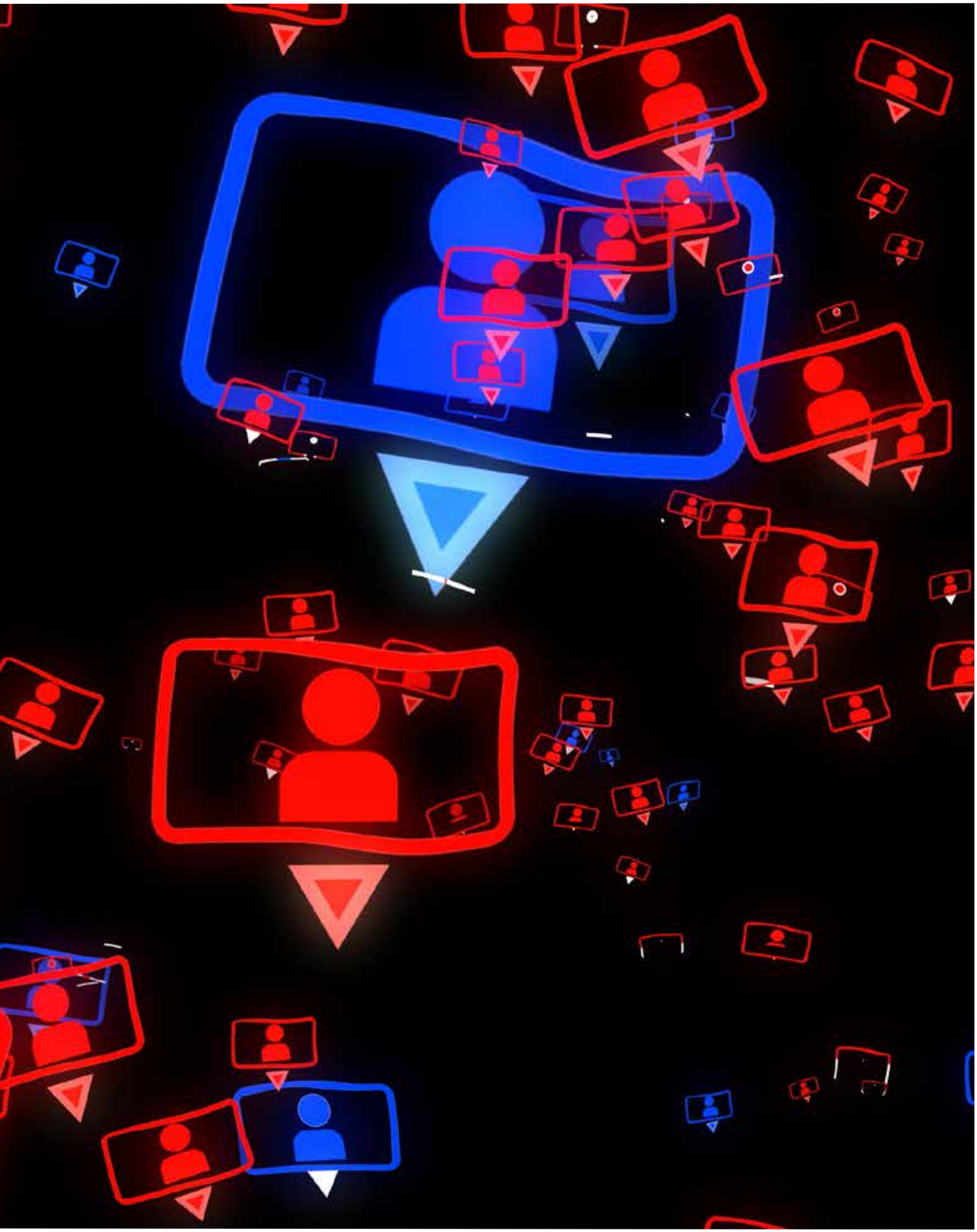
Mr. Karambelas is a partner in Sfikas & Karambelas, LLP, and practices law in the District of Columbia, Maryland and New York. He may be reached at nick@ngklaw.com.



YOUR RIGHT TO SPEAK
on Government Sponsored Social Media Sites

By Shikha Parikh

"Congress shall make no law …. abridging the freedom of speech… or the right of the people … to petition the Government for a redress of grievances." Application of the First Amendment's enduring language has increasingly broadened with the surge of social media and its use for the expression of ideas to a larger audience. Official government Facebook sites, created to invite comments from citizens, are more commonly being used to air grievances. When officials delete comments or block users, questions of constitutionality are raised—specifically, whether these actions impinge on the commenters' First Amendment rights.



In February, the administration for Maryland Governor Larry Hogan faced criticism from First Amendment advocates when comments were deleted and 450 users were blocked from Governor Hogan's official Facebook page. Many of the comments deleted pertained to criticism of Governor Hogan's efforts to refrain from taking a position on President Donald Trump's first Executive Order on immigration. A Hogan administration spokesman defended these actions, stating that the comments deleted were vulgar, racist, and sometimes violent. After urging from the American Civil Liberties Union of Maryland, Governor Hogan's office reinstated several users.

Traditional, Designated and Nonpublic Forums

In the spirit of the First Amendment, the government has historically permitted forums devoted to assembly and debate. The scope of speech allowed and the extent to which the government can limit it depends on whether the forum is considered a traditional, a designated or a nonpublic forum. Traditional public forums, such as streets, parks, and sidewalks, "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Education Association v. Perry Local Educators,* 460 U.S. 37, 45 (1983). In these "quintessential" public forums, the government may prohibit activity only when it is necessary to serve a compelling state interest that is narrowly tailored, or may enact regulations of the time, place, and manner of expression which are content neutral, and leave open alternative channels of communication. *Id.*

A designated public forum is a forum of expression which the State has created or opened for use by the

public as a place for expressive activity, and expression in a designated public forum may be regulated to the extent permitted for traditional public forums. *Id.*, 45-46. Typical designated public forums include municipal meeting rooms or student meeting rooms, which are designated to discuss certain topics. The concept of a designated public forum was extended beyond the physical to the "metaphysical" in *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), where the Supreme Court held that a university newspaper was a designated public forum and, despite it not being a physical space, was protected under the First Amendment.

A nonpublic forum was defined by the *Perry* court as public property which is not, by tradition or designation, a forum for public communication. "The State may reserve the forum for its intended purposes, communicative or otherwise, so long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry, 46.*

Government Social Media Sites – Likely Designated Public Forums

Government-sponsored social media sites that provide citizens the opportunity to comment or interact on the site arguably fall within the designated public forum category. The Supreme Court has noted that traditional public forums are those "historically" used for public expression. Designated public forums are found to exist when the government has a clear intent to open the forum to the public for expression, but the government has the discretion to limit access to certain types of speakers or

limit the use of facilities to certain topics. A Facebook page set up by a government entity that invites comments and debate from users is consistent with the government's intent to set up a communicative public forum, and, therefore, a designated public forum.

Permitted Restrictions on Speech

Certain speech may be limited by the government, regardless of the type of forum. The Supreme Court has determined that the government may limit certain kinds of speech, which are sometimes considered "nonspeech", such as fighting words, obscene speech, threats of violence, child pornography, and commercial speech.

Fighting Words

In *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), the Court held that "fighting words," which "by their very utterance, inflict injury or tend to incite an immediate breach of the peace" and are defined as "what men of common intelligence would understand would be words likely to cause an average addressee to fight," could be regulated by the State when its purpose was to avoid a breach of the peace and its regulations are narrowly drawn.

Obscene Speech

The Supreme Court held in *Miller v. California*, 413 U.S. 15 (1973), that obscene speech could be limited by the government. Obscene speech was defined by the *Miller* court with a three-pronged test: (1) the average person, applying contemporary community standards, would find the speech, taken as a whole, appeals to the prurient interest; (2) the work must depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable obscenity law; and (3) the work, taken as a whole, must lack serious literary, artistic, political or scientific value.

True Threats

In *Virginia v. Black*, 538 U.S. 343 (2003), the Court stated that true threats, defined as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," were a form of speech that could be permissibly regulated by the government. *Black*, 344. The speaker need not actually intend to carry out the threat. *Id.* True threats are distinguishable from political hyperbole, which is protected political expression.

Child Pornography

In *New York v. Ferber*, 458 U.S. 747 (1982), the Supreme Court held that child pornography was a form of expression that the government could regulate, due to the state's interest in protecting children.

Commercial Speech

Commercial speech that concerns illegal activity or commercial speech that is false or misleading is unprotected speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). More recently, in *United States v. Williams*, 553 U.S. 285 (2008), the Court held that a federal law that criminalized the pandering of child pornography was a permissible regulation of free speech, as the speech advertised illegal activity.

Free Speech in the Social Media Era

Government officials have been criticized for deleting comments from official Facebook sites because, generally, only those comments that are dissenting are removed. Government officials argue that the regulation of their sites is necessary to avoid vulgar, violent, racist, or irrelevant commentary. Speech that falls within the nonspeech categories listed *supra* will probably be permissibly limited by government officials. Generally, courts' analysis on this issue has indicated that, because official government Facebook sites are designated public forums, government entities may delimit the nature of the speech posted on their site with stated social media use policies, but the application of these policies cannot be used to limit speech that contributes to the public debate.

The Value of Speech, Even if Unpopular

The Supreme Court has made it abundantly clear that speech that some may consider inappropriate or unpopular is nonetheless protected speech. In *Cohen v. California,* 403 U.S. 15 (1971), the Court held that the phrase "F*** the Draft", which was displayed on a jacket and worn in the corridors of a courthouse, was protected speech that could not be limited by the government because it contributed to a political debate. The Court held that the words were not fighting words nor obscene speech, and an observer could simply "avert their eyes" to avoid the expression. Emphasizing the importance of permitting this kind of speech, and the necessity of free expression for the development of society, the Court stated:

> The usual rule [is] that governmental bodies may not prescribe the form or content of individual expression… The constitutional

right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests…. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Cohen, 403 U.S. 24, 25 (internal citations omitted).

Speech on Social Media Websites in the Fourth Circuit

In *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016), two police officers made comments on their personal Facebook pages regarding their police department's promotion practices and were put on probation for violating the department's social networking policy, which prohibits negative comments about the department. The Court of Appeals for the Fourth Circuit noted that "social networking sites like Facebook have… emerged as a hub for sharing information and opinions with one's larger community." *Liverman*, 408. Recognizing the importance of Facebook comments and their contribution to debate regarding an issue of public concern, the Fourth Circuit found it

significant that Facebook was used as the form of communication by the officers, because Facebook "is a dynamic medium through which users can interact and share … opinions with members of their community." *Id.* at 409-410. The Fourth Circuit analogized Facebook comments to "writing a letter to a local newspaper," stating that "publicly posting on social media suggests an intent to communicate to the public or to advance a political or social point of view …." *Id.*, 410, *citing Borough of Duryea v. Guarnieri,* 564 U.S. 379 (2011).

The Fourth Circuit went on to reject the City's contention that the comments had to be considered separately, because it did not have the "license to ignore the portions of the communication that touch on a matter of public concern" and "had to view the statements "as a single expression of speech to be considered in its entirety." *Id* (internal citations omitted). The court noted the public importance of comments and how they prompted "interactive discussions through a series of posts and comments" and their contribution to the public dialogue, and thus had to be read "in conjunction as part of a single conversation." *Id.*

More recently decided in the Fourth Circuit is *Grutzmacher v. Howard County*, No. 15-2066, 2017 WL 1049473 (4th Cir. 2017), where Grutzmacher, a battalion chief in the fire department who posted derogatory and political comments on his Facebook pages and "liked" others, and was terminated for violating the department social media policy. The Fourth Circuit more closely examined whether "likes" on a Facebook page could be considered speech contributing to a matter of public concern. "Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community… [and the] 'public-concern inquiry centers on whether the public or the community is likely to be truly concerned with or interested in the particular expression.'" *Grutzmacher,* 6, *quoting Kirby v. City of Elizabeth City,* 388 F.3d 440 (4th Cir. 2004). The Fourth Circuit attributed Facebook "likes" to speech that could relate to a matter of public interest, stating that "[c]licking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement….That a user may use a single mouse click to produce that message ... instead of typing the same message with several individual key strokes is of no constitutional significance," *Id.*, citing *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).

Liverman and Grutzmacher dealt with the termination of public employees based on comments they posted on their personal Facebook sites, but two recently decided U.S. District Court cases deal with the deletion of comments made by concerned citizens on government-sponsored Facebook sites. In *Davison v. Loudoun Cnty. Bd. of Supervisors (Davison I)*, 1:16cv932, 2017 WL 58294 (E.D.Va. Jan. 4, 2017), the U.S. District Court for the Eastern District of Virginia held that the official website of the Loudoun County Board of Supervisors was a limited public forum, and that speech utilizing Facebook is subject to the same First Amendment protections as any other speech. *Davison I*, 5. Davison, a Loudoun County resident, posted comments on the Board's Facebook page; some of his comments were deleted, and he ultimately was blocked from posting further comments. Per the District Court's analysis, the Board's "Social Media Comments Policy," which governed the subject matter of permissible comments and encouraged the submission of questions, comments or concerns, created a limited public forum. Relying on *Rosenberger*, the District Court noted that a "state policy facilitating speech creates a metaphysical forum," and, quoting *Perry,* 460 U.S. at 71, n.7, the court reiterated that "a limited public forum is 'created for a limited purpose such as use by certain groups... or for the discussion of certain subjects.'" *Davison I*, 6. The District Court rejected the Board's argument that its policy gave it the right to moderate comments, stating "[o]nce it has opened a limited forum ... the State must respect the lawful boundaries it has itself set." *Davison I*, 7, citing *Rosenberger*, 515 U.S. at 829.

In *Davison v. Plowman (Davison II)*, 1:16cv180, 2017 WL 105984 (E.D.Va. Jan. 10, 2017), the District Court visited a related matter, where Davison's comment on another county website, which had the same Social Media Comments Policy, was deleted. For reasons similar to those explained in *Davison I,* the District Court held that the website constituted a limited public forum, and left for trial the issue of whether Davison violated the social media policy and whether the deletion of his comments and the blocking of him as a user from making further comments violated the First Amendment.

Other Jurisdictions

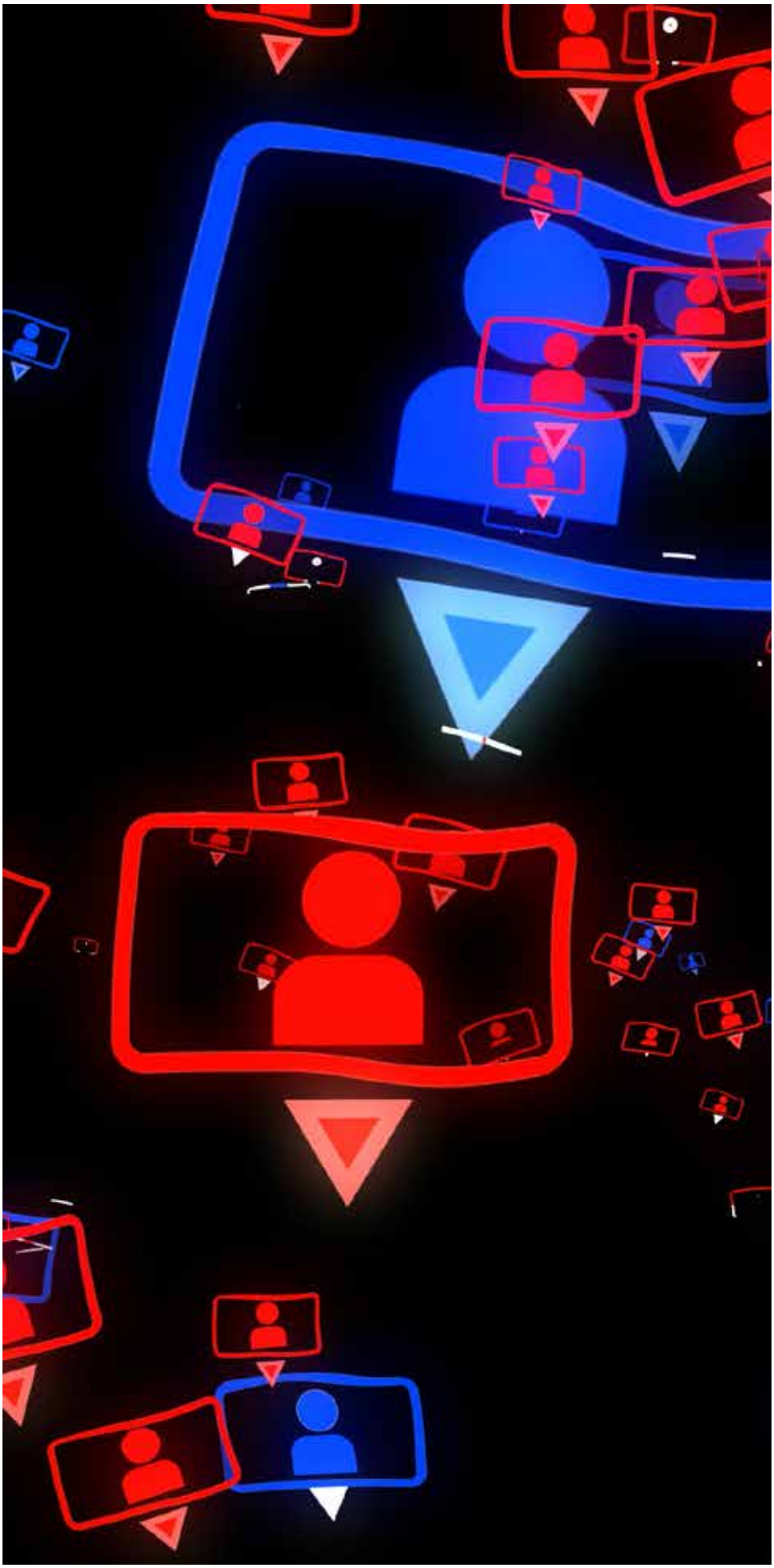
Courts around the country are reviewing cases involving government regulation of social media forums, and three notable cases resulted in settlements with First Amendment con-

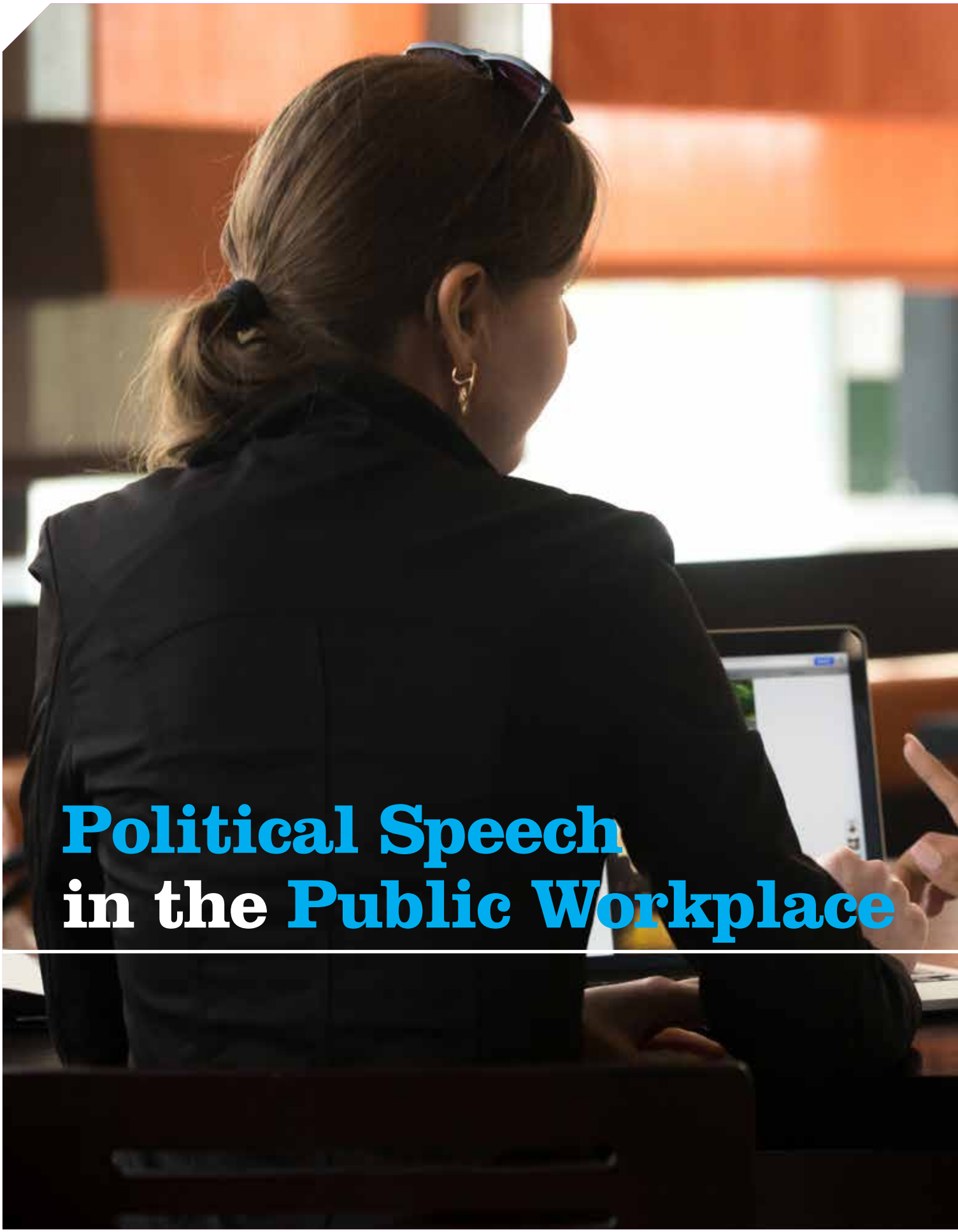
siderations. In *Quick v. City of Beech Grove*, No. 16-1709 (S.D. Ind. 2016), Plaintiff's posts to the Beech Grove Police Department's Facebook page were deleted. The department agreed to create a new social media use policy, and no longer block users nor delete comments except after three warnings. In *Karras v. Gore*, No. 14-2564 (S.D. Cal. Jan. 5, 2015), Plaintiff's posts to the San Diego Sheriff's Department's Facebook page were deleted. The City of San Diego agreed to pay his attorneys fees. In *Hawaii Defense Foundation v. City and County of Honolulu*, No. 12-00469 (D. Haw. Jun. 19, 2014), Plaintiff's posts to the Honolulu Police Department's Facebook page were removed. The Defendant City agreed to work with the ACLU to develop a policy governing public postings on their Facebook page.

Conclusion

Government-sponsored social media sites that invite public commentary are recognized by our courts as critical to the advancement of public debate, a cornerstone of the First Amendment and the progress of our society. Because these websites are designated public forums, government entities are permitted to determine the scope of the nature of the debate on their websites with usage policies. However, our courts have made it clear that the application of these policies are subject to the rigors of the First Amendment, and future regulation of commentary on social media sites will be reviewed under the strictest constitutional standards.

Ms. Parikh is managing attorney at Paradigm Law, P.L.C. based in Herndon, Virginia. Juliane Smith, who serves as Of Counsel at Paradigm Law, P.L.C., contributed to this article.





Political Speech in the Public Workplace

By Joseph M. Creed

A police dispatcher at a public university in Wisconsin recently claimed she was fired from her job because she expressed support for President Donald Trump's travel ban. Several months ago, two public school teachers in Georgia said they were terminated because they expressed anti-immigration sentiments on social media. In today's fraught political environment, many Americans are expressing strongly-held political views at their places of employment or on social media platforms that are accessible to co-workers and supervisors. The workplace can and does become a forum for political expression and debate.

Although private employers have broad discretion to limit speech in the workplace, government entities are subject to the First Amendment (and Maryland's counterpart, Article 40 of the Declaration of Rights). The United States Supreme Court recognized, "a citizen who works for the government is nonetheless a citizen." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). The state cannot use a citizen's public employment to punish her for exercising her right to free speech. On the other hand, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Id.* at 418. The purpose of this article is to give an overview of the boundaries of public employees' constitutional rights to engage in political speech in the workplace.

The Right of Public Employees to Speak on Matters of Public Concern

The Supreme Court has held that a public employee's speech is constitutionally protected if the speech addresses a matter of "public concern" and the employee is speaking as a citizen, rather than in his or her official role as a government employee.

The scope of what is considered to be of "public concern" is quite broad. In *Rankin v. McPherson*, 483 U.S. 378 (1987), Ardith McPherson, a county deputy constable commented on the assassination attempt of President Reagan, stating: "if they go for him again, I hope they get him," and was terminated for her remark. The trial court ruled that McPherson's speech was not constitutionally protected. The U.S. Court of Appeals for the Fifth Circuit reversed, holding that the speech is protected, and the Supreme Court agreed, ruling that McPherson's statement was protected by the First Amendment. The Court held that her comment was not a legitimate threat on the life of the President, but amounted to political expression on a matter of public concern—the life and death of the President of the United States. The Court was unconcerned with the controversial nature of McPherson's statement: "The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id*. at 387. The salient question for First Amendment protection is whether a statement "may be fairly characterized as constituting speech on a matter of public concern." *Id*. at 384 (internal quotation marks omitted).

The scope of the "public concern" standard is broad, but not unlimited. In *Hawkins v. Dep't of Pub. Safety & Corr. Servs.*, 325 Md. 621, 633, 602 A.2d 712, 718 (1992), the Maryland Court of Appeals held that a correctional officer's statement to a bank teller, "Hitler should have gotten rid of all you Jews," was not constitutionally-protected speech. The Court concluded that the officer's comment did not address a matter of public concern: "Clearly, Hawkins was not attempting to stimulate a dialogue on the Holocaust. He was giving vent to his anger, and, relying on his fallible ability to identify persons of Jewish heritage, he used speech as a weapon to abuse the teller who had inconvenienced him." *Id*. at 634, 602 A.2d at 717-18.

If an employee's speech addresses matters of only private interest—which are not of interest to the community generally—it is not constitutionally protected. In *Connick v. Myers*, 461 U.S. 138 (1983), Sheila Myers, an assistant district attorney in Louisiana who was disgruntled by her transfer to a different department, circulated a questionnaire among her fellow assistant district attorneys addressing a number of issues within their department. She was terminated the same day. In considering whether the questionnaire was protected by the First Amendment, the Supreme Court clarified that a public employee's speech that "cannot be fairly considered as relating to any matter of political, social, or other concern to the community," is not protected by the First Amendment. *Id*. at 146.

The *Connick* Court explained that a public employee's speech must be considered in context, and based on the entirety of the factual record. Most of the issues raised in Myers' questionnaire—the level of confidence in certain supervisors, morale in the office, the need for a grievance procedure—were not of public concern to the community. Significantly, the Court rejected the notion that all matters in a government workplace are necessarily of public concern. The Court determined that only one issue raised in Myers' questionnaire—whether assistant district attorneys felt pressured to work in particular political campaigns—addressed a matter of public concern. The Court concluded that because Myers' questionnaire "touched upon matters of public concern in only a most limited sense," and her supervisor reasonably believed that the questionnaire as a whole would have a disruptive effect in the office, her termination "did not offend the First Amendment." *Id*. at 154.

Even if a public employee's speech addresses a matter of public concern, it is constitutionally protected only if the employee is speaking as a citizen, rather than pursuant to his or her official duties as a govern-

ment employee. The Supreme Court applied this distinction in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). There, Richard Ceballos, a deputy district attorney in Los Angeles, submitted a memorandum to his supervisors expressing his opinion that a police affidavit used to obtain a search warrant contained misrepresentations. He was also called by the defense to testify about the matter in a preliminary hearing. He alleged that after he voiced his concerns, the DA's office subjected him to retaliatory employment actions, including reassignment and denial of a promotion. The court concluded that Ceballos's memorandum was not protected by the First Amendment because he wrote it as part of his official duties. As the court explained: "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. (Note that an employee who is disciplined for reporting illegality, gross mismanagement, gross waste of funds, abuse of authority, or a danger to public health or safety might have a claim for whistleblower retaliation. *See* 5 U.S.C. § 2302.)

Thus, the test for First Amendment protection is whether the employee is speaking as a citizen on a matter of public concern. The Supreme Court has observed that "matters concerning government policies that are of interest to the public at large" is "a subject on which public employees are uniquely qualified to comment." *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 80 (2004). "Speech about government policies . . . is a paradigmatic matter of public concern." *Davis v. Billington*, 681 F.3d 377, 399 (D.C. Cir. 2012) (internal quotation marks omitted). Likewise, "the performance of government officials" has been called a matter "of great public concern." *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 995 (5th Cir. 1992). And "the advocacy of a particular candidate for public office is the type of core political speech the First Amendment was designed to protect." *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996). Pure political expression—such as voicing an opinion on President Trump's travel ban or immigration policies—is almost certainly speech on a matter of public concern.

Balancing the Right to Free Speech With the State's Interests as an Employer

Even if a public employee is speaking as a citizen on a matter of public concern, the First Amendment allows some restrictions on that speech. In *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 568 (1968), the Supreme Court held that in deciding free speech claims by public employees, courts must balance "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." In balancing these factors, courts must consider not only the content of the employee's speech, but the circumstances and context as a whole.

In applying the *Pickering* balancing test, the Fourth Circuit Court of Appeals considers nine factors:

> [W]hether a public employee's speech (1) impaired the maintenance of discipline by supervi-

sors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the institution; (6) undermined the mission of the institution; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the institution; and (9) abused the authority and public accountability that the employee's role entailed.
Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 317 (4th Cir. 2006).

A recent case illustrates the court's application of these factors. In *Grutzmacher v. Howard Cty.*, 851 F.3d 332 (4th Cir. 2017), Kevin Buker, a Battalion Chief with the Howard County Department of Fire and Rescue Services, posted the following on his Facebook page: "My aide had an outstanding idea .. lets all kill someone with a liberal ... then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal ... its almost poetic ..." *Id*. at

338. Mark Grutzmacher, a county volunteer paramedic, replied: "But.... was it an 'assult liberal'? Gotta pick a fat one, those are the 'high capacity' ones. Oh ... pick a black one, those are more 'scary'. Sorry had to perfect on a cool idea!" *Id.* Buker "liked" the Grutzmacher's comment and replied: "Lmfao! Too cool Mark Grutzmacher!" *Id.*

The Fourth Circuit held that Buker and Grutzmacher's comments constituted commentary on gun control legislation and therefore addressed matters of public concern. The court concluded, however, that their interest in free speech was outweighed by Howard County's interest in maintaining a disciplined workplace. The court noted that the Facebook comments interfered with and impaired Department operations and discipline, as they incited numerous discussions and led to complaints by three African-American employees about the racial aspect of the comments. The comments interfered with Buker's ability to perform his job as Battalion Chief because they led to questions about his fitness to manage and supervise others and his ability to enforce Department policies. The court further concluded that the Facebook comments threatened community trust, which was vital to the role of the Department in county government. In addition, the court determined that Buker's Facebook communications were disrespectful and insubordinate to his superiors, and disregarded the chain of command in the Department. Based on these factors, the court ruled that Howard County's interests as an employer outweighed Buker's right to express his political views in the manner he did.

The *Pickering* balancing test applies to cases—such as *Grutzmacher*—in which a government employer disciplines an employee for engaging in protected speech. A slightly different test applies to cases in which a statute or regulation prohibits protected speech before it occurs. In *United States v. NTEU*, 513 U.S. 454, 468 (1995), the Supreme Court held that if a statute or regulation "chills potential speech before it happens," "the Government's burden is greater" than it would be in a case of post-speech discipline under the *Pickering* analysis. In the case of a prior restraint, the government "must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government." *Id*.

The Fourth Circuit applied this test to a police department's restrictive social media policy in *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016). In that case, police officers posted messages on Facebook criticizing the department for—in their view—promoting younger officers to dangerous positions before they had enough training and experience. In doing so, they violated the department's social media policy, which prohibited "[n]egative comments on the internal operations of the Bureau." *Id.* at 404. The Fourth Circuit determined that the policy was so broad as to constitute a prior restraint on constitutionally protected speech. After weighing the *NTEU* factors, the court concluded that the department failed to meet its burden in that "the speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restrictions on officers' freedom to debate matters of public concern." *Id.* at 408-09.

Grutzmacher and *Liverman* are two recent examples in which the courts attempted to balance a public employee's First Amendment rights against the interests of the government as an employer. The *Pickering* and *NTEU* balancing tests are inherently fact-specific. The outcome of these balancing tests will depend on the speech at issue, the context, and the specific factual circumstances of each workplace.

Free Speech Rights of Elected Officials

Garcetti and *Pickering* involved government employees who were not elected officials. Federal courts are split on the question of whether the *Garcetti* and *Pickering* doctrines apply to elected officials. Some courts have held that they do. *See Hartman v. Register*, 2007 WL 915193, 2007 U.S. Dist. LEXIS 21175 (S.D. Ohio, Mar. 26, 2007); *Hogan v. Twp. of Haddon*, 2006 WL 3490353, 2006 U.S. Dist. LEXIS 87200 (D.N.J., Dec. 1, 2006). But the majority of courts that have addressed the issue have concluded that *Garcetti* and *Pickering* are inapplicable to elected officials. *See Rangra v. Brown*, 566 F.3d 515, 523 (5th Cir. 2009), *dismissed as moot on rehearing en banc*, 584 F.3d 206 (5th Cir. 2009); *Jenevein v. Willing*, 493 F.3d 551, 558 (5th Cir. 2007); *Werkheiser v. Pocono Twp.*, 210 F. Supp. 3d 633, 640 (M.D. Pa. 2016) (collecting cases). These courts instead apply strict scrutiny to any regulation of the speech of elected officials, under which the regulation must be narrowly tailored to achieve a compelling government interest in order to satisfy the First Amendment. *Jenevein*, 493 F.3d at 558.

The Fourth Circuit has not yet addressed this issue. In a recent case, the United States District Court for the District of Maryland dismissed a complaint brought by Allen Dyer, a former Howard County Board of Education member, against the State Board of Education, challenging his removal from the Board as a violation of his First Amendment rights. *Dyer v. Md. State Bd. of Educ.*, 187 F. Supp. 3d 599, 604 (D. Md. 2016). The State Board had removed Dyer from the County Board for, among other things, disclosing a memorandum by the Howard County Public School System's general counsel, leaking materials relating to an ongoing investigation, and unilaterally directing Howard County Public School System personnel. Dyer claimed that his actions and speech were protected by the First Amendment.

In dismissing Dyer's First Amendment claim, the court applied *Garcetti* and *Pickering*. Under *Garcetti*, the court held that Dyer's speech was in his official capacity and therefore was not constitutionally protected. *Id.* at 620-21. Under *Pickering*, the court held that Dyer's interests were outweighed by the county's interest in maintaining an efficient and functional school board. *Id.* at 621-22. The court recognized that "there is some disagreement over the application of *Garcetti* to speech by elected officials (versus nonelected government employees)," and also noted that "[t]he Fourth Circuit has not yet had occasion to address this matter." *Id.* at 621 n.34. The court concluded: "to the extent that an elected official's political speech pursuant to his official duties might be entitled to some First Amendment protection, the Court seriously doubts that such protection would extend to the conduct giving rise to Plaintiff's removal from office in this case." *Id.*

It remains unclear, in this circuit at least, whether the *Garcetti* and *Pickering* doctrines apply to elected officials. But there appear to be good reasons to treat the speech of elected officials differently from that of unelected government employees. As one court observed:

> [T]he notion that speech pursuant to a public employee's "official duties" is afforded no protection under the First Amendment would have odd results if applied to elected officials because speaking on political issues would appear to be part of an elected official's "official duties," and therefore, unprotected. But protection of such speech is the manifest function of the First Amendment.
>
> *Werkheiser*, 210 F. Supp. 3d at 639-40 (internal quotation marks omitted).

Federal Statutory Limitation on Political Activity in the Workplace

The rights of federal employees to engage in political expression in the workplace are restricted by the Hatch Act. Among other things, the Hatch Act prohibits federal, executive branch employees from engaging in any "political activity" if the employee is: (a) on duty, (b) in a federal building, (c) wearing a federal uniform or official insignia, or (d) using a government vehicle. 5 U.S.C. § 7324. Federal courts have upheld this provision of the Hatch Act as a constitutional limitation on the right of political expression in the workplace. See *Burrus v. Vegliante*, 336 F.3d 82, 91 (2d Cir. 2003).

The Hatch Act's prohibition on "political activity" is limited to activity that is "directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." 5 C.F.R. § 734.101. Thus, federal employees are barred from promoting or opposing candidates, political parties, and political groups while at work. Federal employees remain free to express opinions about public policy, current events, and other matters of public concern that do not promote or oppose a specific candidate, party, or group.

Maryland Statutory Limitation on Political Activity in the Workplace

In contrast to the Hatch Act, Maryland law (sometimes referred to as the "Anti-Hatch Act") provides that, as a general matter, state and local government employees "may freely participate in any political activity and express any political opinion." Md. Code, State Pers. & Pens. § 2-304(a)(2)(i); Local Gov't § 1-303(1). There are two exceptions to this provision: (1) employees may not "engage in political activity while on the job during working hours," or (2) "advocate the overthrow of the government by unconstitutional or violent means." State Pers. & Pens. § 2-304(c); Local Gov't § 1-304.

The Maryland Court of Appeals has held that these statutes provide Maryland state and local government employees with *greater* protection than that provided by the First Amendment and Article 40 in regard to political activity and speech outside the workplace. *Newell v. Runnels*, 407 Md. 578, 642, 967 A.2d 729, 766 (2009). In regard to political activity and expression of political opinions outside work, the Pickering balancing test does not apply to Maryland state

employees. As the Court of Appeals put it, "[t]hrough legislative grace . . . the General Assembly singled out one form of speech—participation in political activity and expression of political opinion—and gave public employees a gently fettered statutory right to engage in that form of speech." *Id.* at 642, 967 A.2d at 767. This expanded protection applies only to political activity and speech outside the workplace. Political activity while on the job during working hours is expressly prohibited.

Conclusion

Public employees—like all citizens—have a First Amendment right to express their opinions on public policies, public officials, and candidates for public office. The state may not leverage public employment as a means to restrict these rights by punishing protected speech. Yet, the government—as an employer—has a legitimate interest in maintaining an efficient workplace capable of providing public services. Under the First Amendment, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419.

Mr. Creed is a partner in the law firm of Joseph, Greenwald & Laake, P.A., in Greenbelt, Maryland. He represents public and private employees in all aspects of employment law. He may be contacted at jcreed@jgllaw.com.

THE INTERSECTION OF THE FIRST AMENDMENT AND PROFESSIONAL MISCONDUCT

By H. Mark Stichel

Several provisions of the Maryland Lawyers' Rules of Professional Conduct restrict speech. Lawyers implicitly accept the constitutionality of provisions such as Rule 1.6, which protects the confidentiality of client information, and there is no colorable argument to the contrary. Even provisions such as Rule 3.6, which governs trial publicity, are commonly accepted as being constitutional. *See, e.g., In re Morrissey*, 168 F.3d 134 (4th Cir. 1999); *see also United States v. Gray*, 189 F. Supp. 2d 279 (D. Md. 2002). There is a gray area, however, regarding whether other provisions of the Rules of Professional Conduct clash with the First Amendment.

First Amendment scholar Rodney Smolla has written about the distinction between restraints on speech like Rules 1.6 and 3.6 that directly affect the "functionality of the legal system" and others that are "grounded in the highest ideals and values of the profession" and are intended to preserve more aspirational goals such as respect for the rule of law or dignity of the legal profession. *See* Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Legal Profession*, 66 Fla. L. Rev. 961 (2014). When "regulation moves from the actual protection of functional interests to the aspirational values of the profession," Dean Smolla argues, "the First Amendment comes to bear with greater force, and many regulations restricting the speech of judges and lawyers on more ethereal grounds ought to be deemed inconsistent with the First Amendment." *Id.* at 961.

The courts do not necessarily agree. Even when core First Amendment values are at issue, the speech of lawyers and judges may not be quite as free as that of others. This article highlights a few of the gray areas that appear in recent cases.

Lawyer Advertising

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court held that lawyers have a First Amendment right to advertise. In the 40 years since *Bates*, the floodgates of lawyer advertising have opened. *See, e.g.*, Victor Li, *Ad it Up*, Vol. 103, No. 4 ABA Journal 34 (April 2017). In *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), the Supreme Court addressed a First Amendment challenge to Florida's ban on direct mail solicitation of personal injury or wrongful death clients within 30 days of an accident. The Supreme Court evaluated the ban under the commercial speech test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). Justice O'Connor, writing for the majority in a 5-4 decision, held

> This case, however, concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment. Particularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the "subordinate position" of commercial speech in the scale of First Amendment values.

Florida Bar, 515 U.S. at 634-35. Justices Kennedy, joined by Justices Stevens, Souter and Ginsburg dissented and wrote:

> It is telling that the essential thrust of all the material adduced to justify the State's interest is devoted to the reputational concerns of the Bar. . . .
>
> * * *
>
> The Court's opinion reflects a newfound and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor. This is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence.
>
> *Id.* at 641, 645.

A decade later, the Florida Supreme Court disciplined two lawyers for television commercials that used a logo of a pit bull with a spiked collar and a 1-800-PIT-BULL telephone number. The Court held:

> [T]he logo and phone number do not convey objectively relevant information about the attorneys' practice. Instead, the image and words "pit bull" are intended to convey an image about the nature of the lawyers' litigation tactics. We conclude that an advertising device that connotes combativeness and viciousness without providing accurate and objectively verifiable factual information falls outside the protection of the First Amendment.
>
> *Florida Bar v. Pape*, 918 So.2d 240, 249 (2005), *cert. denied*, 547 U.S. 1041 (2006). Whether the Court of Appeals of Maryland would come to the same conclusion is not wholly clear. In *Tracey v. Solesky*, 427 Md. 627, 50 A.3d 1075 (2012), the Court quoted extensively from *Pape* to support its holding that owners of pit bulls were to be held strictly liable for injuries caused by the dogs. The Court introduced the quotes with the comment that the attorney discipline case was "unusual" but did not disavow its holding. *Tracy*, 427 Md. at 648, 50 A.3d at 1086.

Judicial Elections

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Supreme Court held that Minnesota's prohibiting a judicial candidate from "announc[ing] his or her views on disputed legal or political issues" violated the First Amendment. In *Williams-Yulee v. Florida Bar*, ___U.S. ___, 135 S. Ct. 1656 (2015), however, the Supreme Court appeared to backtrack and held that Florida could prohibit judicial

candidates from directly soliciting campaign contributions notwithstanding the First Amendment. The case is remarkable not only for its holding, but for the way in which the Supreme Court came to its 5-4 decision. Only four justices joined fully in Chief Justice Roberts' lead opinion; Justice Ginsburg joined it in part. Justices Breyer and Ginsburg filed separate concurring opinions and there were three separate dissenting opinions. The fact that the justices could not coalesce around opposing majority and dissenting opinions illustrates the lack of clarity in this area of the law.

The Court of Appeals of Maryland also addressed a judicial election issue in 2015. *Attorney Grievance Commission of Maryland v. Stanalonis*, 445 Md. 129, 126 A.3d 6 (2015), arose out of a contested primary election for a seat on the Circuit Court for St. Mary's County. Joseph M. Stanalonis, an Assistant State's Attorney, challenged David W. Densford, a newly-appointed Circuit Court judge who had represented criminal defendants prior to his appointment. Stanalonis charged in a campaign flyer that Densford: "Opposes registration of convicted sexual predators." At issue in the case was Rule 8.2(a), which states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

In a 5-2 decision, the Court of Appeals held that Stanalonis had not violated Rule 8.2 on the facts of the case. The Court stated that although Stanalonis incorrectly inferred from his conversations with Densford that Densford was opposed to the registration of sex offenders, the hearing judge for the case found that there was a "demonstrable basis" for the inference. *Stanalonis*, 445 Md. at 145, 126 A.3d at 15. The Court concluded that it was: "not a gross deviation from the behavior of a reasonable attorney to make a statement that one has a demonstrable basis for believing, even if that belief turns out to be incorrect. *Stanalonis*, 445 Md. at 146, 126 A.3d at 16.

From a First Amendment perspective, *Stanalonis* is as significant for what it did not decide. A significant issue with respect to Rule 8.2(a) is whether "reckless disregard" for the truth is to be judged under a subjective standard or an objective standard. Rule 8.2 of the ABA Model Rules of Professional Conduct was drafted to incorporate the standards of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Garrison v. Louisiana*, 379 U.S. 64 (1964), that require actual, *subjective* malice to punish someone for speech. However, the year before *Stanalonis*, the Court of Appeals quoted with apparent approval an Indiana Supreme Court decision that said the limits on "professional speech" by attorneys are not coextensive with the limits of the First Amendment and "attorneys are expected to exercise ***reasonable objectivity*** in their statements about judicial officers." *Attorney Grievance Commission v. Frost*, 437 Md. 245, 266, 85 A.3d 264, 276 (2014) (quoting *In re Dixon*, 994 N.E.2d 1129, 1136 (Ind. 2013)) (emphasis added). In a footnote, the Court of Appeals said that because Frost defaulted, he was deemed to have admitted that the statements he made were false and, thus, because he had actual knowledge of their falsity the Court did not have to decide whether a subjective or objective standard was appropriate. *Id* at n. 11. In *Stanalonis* the Court held that it need

not decide the issue because its resolution would be the same under either standard. *Stanalonis*, 445 Md. at 144, 126 A.3d at 15.

Judicial Criticism

James Albert Frost, a member of the Maryland Bar, wrote an email to his ex-wife, stating, inter alia, a Circuit Court judge was a "lawless judge" who arranged for his "illegal arrest," a District Court judge was "a weak man and corrupt judge acting under improper and political influence," that another District Court judge and the Governor of Maryland exerted "improper" influence over members of the Montgomery County Police Department, that a State's Attorney was "crooked," and that the Attorney General of Maryland was "corrupt." Frost mailed copies of the email to several members of the Bar, one of whom filed a complaint with Bar Counsel. Frost never provided a substantive response to Bar Counsel's requests for information.

The Court of Appeals held that Frost violated Rules 8.1(b), 8.2(a), 8.4(a), (c) and (d) and disbarred him. *Frost*, 437 Md. at 270, 85 A.3d at 279. Judge McDonald concurred, in part, and dissented, in part. Judge McDonald would have suspended Frost indefinitely pursuant to Rule 8.1(b), which requires lawyers to respond to an inquiry from Bar Counsel, rather than disbar him for his email. *Frost*, 437 Md. at 272-72, 85 A.3d at 280.

Frost's failure to respond to Bar Counsel would have been sufficient to discipline him. The Court's reliance upon a one-sided record and issuance of an opinion holding that Frost's email violated several substantive provisions of the Rules of Professional Conduct raises the specter of discipline for lawyer speech that potentially is protected by the First Amendment.

Offensive Commentary

A year after *Frost* was decided, the Court of Appeals was faced with another lawyer's written communication to a family member in *Attorney Grievance Commission of Maryland v. Basinger*, 441 Md. 703, 109 A.3d 1165 (2015). Basinger had offered legal assistance to his sister-in-law after her grandson died in a motor vehicle accident. Basinger investigated the grandson's death and sent letters to third parties. Then Basinger became aware of a letter his sister-in-law had sent to an insurer denying that she had retained Basinger. Basinger responded with a series of letters.

> In his first letter, Basinger described what he had done on Keys's behalf; called Keys "A TRUE C[* *]T" who had "finally f[* * *]ed up one time too many"; accused Keys of being dishonest; and stated that, if he ever saw her again, "it [would] be too soon." In his second letter, Basinger shared what he had learned while investigating the circumstances of Keys's grandson's death; suggested that Keys perhaps was responsible for her grandson's

death; called Keys "a reprehensible human being" with "worthless progeny"; accused Keys of being lazy and dishonest; and wished Keys "only the worst from here on out."[1] On March 16, 2012, Basinger mailed to Keys a third letter, in which he accused Keys of "trying to weasel [her] way out of paying the full amount of [a funeral chapel]'s bill[,]" for her grandson's viewing and funeral.

Basinger, 441 Md. at 708, 109 A.3d at 1168.

The Court of Appeals reprimanded Basinger for violating Rule 8.4(d), which provides that it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." The Court's opinion includes the following footnote:

> In his response to the Commission's filing, Basinger contended that this Court would violate the Free Speech Clause of the First Amendment to the United States Constitution by sanctioning him for his statements. At oral argument Basinger's counsel withdrew that contention in light of *Attorney Grievance Comm'n v. Frost*, 437 Md. 245, 262, 85 A.3d 273, 264 (2014) ("Respondent's statements are not entitled to protection under the First Amendment.").
>
> *Basinger*, 441 Md. at 711 n.3, 109 A.3d at 1170 n. 3.

The Court's reference to *Frost* signals that the Court of Appeals does not believe that the First Amendment is a significant impediment to its enforcement of Rules of Professional Conduct that are based on the "ethereal grounds" discussed by Dean Smolla's article.

In 2016, the Court of Appeals denied an application for admission to the bar submitted by Otion Gjini. *See In re Gjini*, 448 Md. 524, 141 A.3d 16 (2016). The Court's denial was based upon Gjini's failure to disclose that there was a Petition to Violate Probation pending against him during the bar application process and to supplement his Bar application. The Court's decision would be unremarkable from a First Amendment perspective were it not for the Court's recounting in detail the procedural history of the character committee's proceedings.

During the investigation of Gjini's bar application, a member of the Character Committee discovered several statements that Gjini had posted to various online chatrooms on the Internet, including martial arts videos. The comments as reported in the Court of Appeals opinion were:

> "This guy is a dip****."
>
> "Yo, shut the f*** up so we can watch the video."
>
> "The both fight like hoes."
>
> "The bully kid was a p****."
>
> "That girl is hot as f***."
>
> "Who is the f***** that made this video?"
>
> "Just keep games like they are with a PS3 controller. None of this gay s***."
>
> "Straight NUTT in that b****."
>
> *Gjini*, 448 Md. at 531, 141 A.3d at 21.

The Court of Appeals justified its recounting the comments as being "consistent with its practice" of fully recounting the procedural history of the Character Committee proceedings, "including the discovery of the applicant's electronic commentary and the character committee's expressions of concern." *Gjini*, 448 Md. at 545 n. 12, 141 A.3d at 29 n.12. The Court added: "The Court's decision to deny Gjini's admission to the Bar, however, is not, in any way, premised on that commentary." Alvin Frederick and Erin Risch wrote in the November/December 2016 *Maryland Bar Journal*:

> Taken as a whole, the Court of Appeals' published Opinion [in *Gjini*] suggests that the Court found Mr. Gjini's statements not only inappropriate and offensive, but also, contrary to what should be expected of members of the Bar. It would not be surprising if in a subsequent case with slightly different facts, the Court were to determine that some discipline would be appropriate against an applicant or attorney posting such comments.
>
> Alvin I. Frederick & Erin A. Risch, *What you "Say" on Social Media May Have Consequences*, Vol. XLIX, No. 6 Md. Bar Journal 46, 50 (November 2016).

Given the Court of Appeals' treatment of speech issues in *Frost, Stanalonis, Basinger* and *Gjini*, Mr. Frederick and Ms. Risch may be correct in their prediction. Either way, the decisions of the Court of Appeals raise significant First Amendment questions. Unless and until the Court of Appeals disciplines an attorney for speech without any independent state grounds supporting the decision, such as Frost's failure to respond, there cannot be any review of the Court of Appeals' attorney-related First Amendment jurisprudence by the Supreme Court of the United States. That, combined with the Supreme Court's narrowly split decisions on attorney-related First Amendment issues, makes free speech for lawyers a very gray area. Lawyer beware.

Mr. Stichel is a Partner in the Baltimore office of the law firm of Gohn Hankey Stichel & Berlage LLP.

"We Are Slant. Who Cares? We're Proud of That": Intersection of the Lanham Act and Free Speech

By Kaitlin Corey

Learned Hand once said, the privilege as to speech "rests upon the premise that there is no proposition so uniformly acknowledged that it may not be lawfully challenged, questioned and debated." *Learned Hand, The Art and Craft of Judging: The Decisions of Judge Learned Hand* (1968).

Seventy years of case law was challenged, questioned and debated by Simon Tam, the leader of an Asian-American dance-rock band called "The Slants." Tam, who is Asian himself, selected the name "The Slants" for his band to take ownership of what is a common Asian insult and re-direct it in a positive way. Tam remarked, "We are slant. Who cares? We're proud of that." Despite the positive use of the term, Tam's application to register a trademark for THE SLANTS was rejected by the Trademark Trial and Appeal Board (the "TTAB") because the term SLANTS was considered to be disparaging to persons of Asian descent.

On June 19, 2017, in a unanimous 8-0 decision, the U.S. Supreme Court struck down the Lanham Act's ban on registration of trademarks that it considers to be disparaging. The Supreme Court held that the disparagement provision of the Lanham Act discriminates based on viewpoint and therefore violates the First Amendment's Free Speech Clause.

Prior to the recent Supreme Court's decision, pursuant to § 2(a) of the Lanham Act, the United States Patent and Trademark Office (the "USPTO") could refuse registration of any trademark that may "disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." A disparaging mark is one which "dishonors by comparison with what is inferior, slights, deprecates, degrades, or affects or injures by unjust comparison." *In re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014). In determining whether a mark is disparaging, the USPTO would consider: (1) the likely meaning of the mark; and (2) if that meaning is found to refer to an identifiable group, whether it is disparaging to a substantial composite (not necessarily a majority) of the group in the context of contemporary attitudes. Trademark Manual of Examining Procedure § 1203.03(b)(i) (Jan. 2015 ed.); *Geller*, 751 F.3d at 1358.

Tam appealed the TTAB's refusal to register his mark to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit initially affirmed the TTAB's findings but one week later an *en banc* court reversed itself. Applying strict scrutiny, the Federal Circuit held that the Lanham Act's ban on registration of disparaging trademarks violates the First Amendment by discriminating based on viewpoint. *In re Tam*, 808 F.3d 1321, 1328 (Fed. Cir. 2015), *as corrected* (Feb. 11, 2016), *cert. granted sub nom., Lee v. Tam,* 137 S. Ct. 30 (2016). The government appealed the Federal Circuit's decision to the Supreme Court. Oral argument took place on January 18, 2017 and on June 19, 2017 the Supreme Court affirmed the Federal Circuit's decision in *Matal v. Tam*.

This is not the first time the disparagement provision of the Lanham Act and the First Amendment have intersected – or collided. The Washington Redskins and Native Americans fought this same battle. The TTAB cancelled numerous REDSKINS registrations on the grounds that the marks were disparaging to Native Americans. On July 8, 2015, just six months prior to the *In re Tam* decision, the U.S. District Court for the Eastern District of Virginia, held in *Pro-Football v. Blackhorse,* that the Lanham Act's disparagement provision *does not* violate the First Amendment. 112 F.Supp.3d 439 (2015). The Supreme Court's decision in *Matal v. Tam* is certainly a win for the Redskins as well, who are currently awaiting a decision from the U.S. Court of Appeals for the Fourth Circuit – which has been stayed pending the Supreme Court's decision.

Section 2(a) of the Lanham Act Violates the First Amendment

At oral argument, Tam's lawyer, John Connell, said if Tam sought to register THE PROUD ASIANS, "we would not be here today." Section 2(a) allows registration of a positive trademark but not a derogatory trademark. The First Amendment protects speech from content based discrimination, which includes laws that are aimed to suppress particular views. *Matal v. Tam* 2017 WL 2621315 at *21, *see also*, *Reed v. Town of Gilbert,* 135 S.Ct. 2218, 2230 (2015); *Rosenberger v. Rector and Visitors of the Univ. of Va.,* 515 U.S. 819, 829 (1995). Viewpoint discrimination is "the regulation of speech based on the…opinion or perspective of the speaker." *Reed,* 135 S. Ct. at 2230. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829. Viewpoint-based burdens on speech raise "the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

Tam argued that § 2(a) imposes a significant viewpoint-based restriction on speech by denying, what the government determines to be a "disparaging mark," the benefits of trademark registration. In other words, as recognized by Justice Breyer and several other Justices, § 2(a) permits you to, "say something nice about a minor-

ity group, but you can't say something bad about them."

The government argued that § 2(a) is a viewpoint neutral provision because it equally denies registration of trademarks that it finds to be disparaging. *Matal v. Tam*, 2017 WL 2621315 at *22. But, "[t]his misses the point," Justice Alito wrote, "[t]o prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so." *Id.*

At oral argument, Justice Kennedy pressed Connell, "you want us to say that trademark law is just like a public park" where people can say whatever they want. Connell agreed. Justice Kagan quipped that "can't be right," due to all the other content-based prohibitions that trademark law has, such as prohibiting registration of marks that are likely to cause confusion, are generic, or functional. Connell correctly distinguished those restrictions as viewpoint-neutral and further advancing the commercial objectives of the Lanham Act. The Supreme Court acknowledged the government's interest in preventing speech that expresses ideas that are offensive and § 2(a) reflects the government's disapproval of those offensive messages. *Id.* at *4. However, as Justice Alito wrote, "[g]iving offense is a viewpoint" and expressing ideas that offend "strikes at the heart of the First Amendment." *Id.* at *18-19.

Does the First Amendment Even Apply?

The Slants were not the first to challenge § 2(a) on constitutional grounds. Courts have previously held that the clause did not violate the First Amendment because it did not prevent actual use of an offensive trademark – only registration of the mark. However, speech is not only restricted when the government prohibits speech but also when the government *burdens* speech even indirectly. As Justice Alito pointed out in the Supreme Court's opinion, federal registration "confers important legal rights and benefits on trademark owners who register their marks." *B & B Hardware v. Hargis Industries, Inc.*, 135 S. Ct. 1293, 1317 (2015). As such, these valuable benefits create a disincentive for mark owners to adopt a mark that the government will deem to be disparaging. Jeffrey

Lefstin, *Does the First Amendment Bar Cancellation of Redskins?* 52 Stan. L.Rev. 665, 678 (2000) ("[I]t is clear that section 2(a) of the Lanham Act, by denying the valuable registration right to scandalous or disparaging trademarks, imposes a financial disincentive to the use of such marks in commercial communication.")

Faced with a potential unconstitutional restriction on speech, the government made several arguments that § 2(a) does not implicate the First Amendment in the first place, making it unnecessary to reach the First Amendment issue.

First, the government argued that trademark registration is government speech, and the government can refuse trademark registrations without implicating the First Amendment. Second, the government argued that § 2(a) is not a restriction on speech, but a permissible limitation on a government subsidy program. Third, the government proposed that the constitutionality of § 2(a) should be a governed by a new "government program doctrine". All three arguments were met with resistance by the Justices at oral argument and were unanimously rejected by the U.S. Supreme Court.

1. Government Speech

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). The government argued that trademark registration is government speech, not private speech, and therefore exempt from reach of the Free Speech Clause.

The government took the position that trademark registration and the rights that come with registration, such as the right to use the ® symbol, the mark's placement on the Principal Register, and the issuance of a certificate of registration, amount to government speech. The government's logic is that the benefits of registration convert the underlying speech from private speech to government speech. As such, the government would be permitted to prohibit the trademark registration of any work deemed to be disparaging to others.

At oral argument, Justice Ginsburg posed the question to Connell, "doesn't the government have some interest in disassociating itself from racial ethnic slurs?" as it did in *Walker v. Texas Div., Sons of Confederate Veterans* decision. 135 S. Ct. 2239 (2015). In *Walker*, the U.S. Supreme Court concluded that specialty license plates were government speech, even though a state law allowed groups, organizations and individuals to request certain designs. *Id.* at 2244. Connell explained that the government's reliance on *Walker* was misplaced because unlike state license plates, trademark registration "is not a government ID, issued on government property, controlled by the government as to design and content and so on…it's exactly the opposite." In *Walker*, the license plates were owned by Texas, issued through a government licensing program and displayed "Texas" on the license plates which

the Supreme Court determined as an intent to convey to the public that the State endorsed that message. Here, unlike *Walker*, the government does not own the trademark designs or the goods to which a trademark is affixed, and it does not endorse the marks that it registers. In fact, the government itself maintains that "the act of registration is not a government imprimatur or pronouncement that the mark is a 'good' one…." *In re Old Glory Condom Corp.*, 26 U.S.P.Q. 2d 1216, 1219-20 n.3 (T.T.A.B. Mar. 3, 1993).

The Supreme Court held that the act of registering a trademark does not transform private speech into government speech and to conclude otherwise "would constitute a huge and dangerous extension of the government-speech doctrine." *Matal v. Tam*, 2017 WL 2621315, at *14. Simply put, "[t]rademarks are private, not government, speech." *Id.* at *15.

2. Government Subsidy Program

The government also argued that § 2(a) is not a restriction on speech, but merely the government limiting the terms under which one may participate in the trademark registration program. The government relies on *Rust v. Sullivan*, in which the Court upheld a restriction prohibiting doctors employed by federally funded clinics from discussing abortion with their patients. 500 U.S. 173 (1991). In *Rust*, the Court held that pursuant to the Spending Clause of the U.S. Constitution "when the Government appropriates public funds to establish a program it is entitled to define the limits of the program." *Id.* at 194. *Rust* allows the government to engage in viewpoint discrimination when it uses private parties to express the government's message or instances in which the government is the speaker. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

Here, however, the government is not the speaker, and the government does not use trademark owners "to transmit specific information pertaining to its own program." *Id.* at 541. Furthermore, the Court has "never extended the subsidy doctrine to situations not involving financial benefits." *Autor v. Pritzker*, 740 F. 3d 176, 183 (D.C. Cir. 2014). The Supreme Court found the government's argument to be unpersuasive; the cases the government relied on involved cash subsidies or the equivalent whereas here, the USPTO does not pay parties seeking registration of the mark. "Quite to the contrary" Justice Alito wrote, "[a]n applicant for registration must pay the PTO a filing fee… ." *Matal*, 2017 WL 2621315 at *15. The Supreme Court acknowledged that trademark registration provides valuable non-monetary benefits attributable to the resources extended by the government to register the marks, but that argument was of no merit as "nearly every government service requires the expenditure of government funds." *Id.* at *2. As Justice Alito stated at oral argument, the government was "stretching the concept of a government program past the breaking point."

3. **Government-Program Doctrine**

The Supreme Court also rejected the government's proposal to create a government-program doctrine to review disparaging trademarks, which would permit certain content or viewpoint-based restrictions.

The Supreme Court held that viewpoint discrimination is still forbidden in instances where the government creates a limited public forum for private speech. Because there is viewpoint discrimination, the Court rendered the government's proposal for a government-program doctrine, moot.

Are Trademarks Commercial Speech?

Relying on the *Central Hudson* test, the government argued that the § 2(a) is commercial speech, not expressive speech and should be reviewed under intermediate scrutiny. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Under *Central Hudson*, a restriction of speech must serve "a substantial interest," and it must be "narrowly drawn." *Id.* at 564-565.

The government argues that the purpose of trademarks is to promote fair interstate commerce, whereas Tam contends that trademarks have expressive components. *Matel*, 2017 WL 2621315 at *18. The Supreme Court held that even if challenges to the Lanham Act were decided utilizing the *Central Hudson* test, § 2(a) fails both prongs. Interestingly, Justice Alito expressly left unanswered the question of whether *Central Hudson* is the appropriate test for deciding free speech challenges to the Lanham Act. *Matel*, 2017 WL 2621315 at *19.

Conclusion

And now, because of a rock band and a "bad word", we are free to take advantage of the many benefits provided under federal trademark registration – regardless of whether our chosen mark is positive or negative. As Justice Alito wrote, "[s]peech may not be banned on the ground that it expresses ideas that offend."

Ms. Corey is an attorney at Astrachan Gunst Thomas, P.C.

The Butcher, The Baker, The Candlestick Maker: When Non-Discrimination Principles Collide with Religious Freedom

By Ayesha Khan

This country and its courts have long struggled with the issue of when and whether religious individuals and organizations should be exempted from legal requirements. One of the most well-known decisions on the topic is *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the U.S. Supreme Court held that the Amish religious order was entitled to an exemption from a mandatory-schooling requirement.

On occasion, the political right and left have agreed on the legal rules governing religious exemptions. For example, both sides of the aisle came together to enact the federal Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (2012), which prohibits the federal government from imposing a burden on religious practice absent a compelling interest in doing so. Other exemptions, however, have proven more controversial.

The development that has truly taken the gloves off is society's increasing acceptance of gay couples' entitlement to enter into civil commitments and legally recognized marriages. Both before and after the Supreme Court ruled in *Obergefell v. Hodges*, 135 S. Ct. 2583 (2015), that gay couples have a constitutional right to marry, various states and municipalities enacted provisions prohibiting public accommodations from discriminating against customers on the basis of their sexual orientation. These statutes and ordinances have raised many questions in the wake of *Obergefell*: Must a wedding photographer offer his or her services to gay couples? How about innkeepers, florists, and bakers who offer their services to straight couples making plans to walk down the aisle?

With some notable exceptions, the courts have largely held that these and other business owners have no legal right to disregard anti-discrimination provisions. That trend began when the New Mexico Supreme Court rejected a commercial photographer's argument that, because her business involved an expressive art form, her free-speech and free-exercise rights entitled her to violate a public-accommodations statute by refusing to photograph a lesbian couple's wedding. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 63 (N.M. 2013). Elane Photography argued that, in the course of its business, it creates and edits photographs to tell a positive story about each wedding it photographs. It asserted that by photographing a gay couple's wedding or commitment ceremony, it would be conveying the message that such occasions deserve celebration and approval. Elane Photography argued that it did not want to be complicit in conveying that message. *See Id. at* 65.

The New Mexico Supreme Court rejected Elane Photography's arguments. In the Court's view, the application of the public-accommodations statute to the photographer did not violate the Free Speech Clause because photographing a wedding does not send a message of affirmation of the wedding itself. Reasonable observers will know that wedding photographers are hired by paying customers and that the photographer may not share the "happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom)." *Id.* at 69-70.

The court contrasted photographing a wedding with displaying "Live Free or Die" on one's license plate, which one cannot be forced to do (*see Wooley v. Maynard*, 430 U.S. 705, 717 (1977)), and reciting the Pledge of Allegiance, which likewise cannot be required (*see West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). In the court's view, the latter two circumstances involve the endorsement of a specific message; the photographer, in contrast, is not required to recite or display any particular message. *See* 309 P.3d at 64.

The New Mexico Supreme Court reasoned that the photographer's position was similar to the law schools' position in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52-53 (2006), which involved a federal law that made universities' federal funding contingent on their giving military recruiters access to the same university resources that were given to nonmilitary recruiters. Because schools sent emails and distributed flyers for non-military recruiters, the statute required that they do the same for military recruiters. *Id.* at 60. The schools argued that this requirement violated their free-speech and free-association rights. *Id.* at 53. The High Court disagreed, observing that the ostensibly compelled speech was incidental to the law's regulation of conduct, and that making conduct illegal does not curtail freedom of speech or press merely because the conduct is in part "initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

The New Mexico Supreme Court relied on *Rumsfeld* to conclude that any burden on Elane Photography's speech was incidental to the public-accommodations statute's regulation of conduct, namely, the provision of equal service to gay couples. 309 P.3d at 65. And, as in *Rumsfeld*, Elane Photography was free to disavow, implicitly or explicitly, any messages that it believed the photographs to convey. It could, for example, post a disclaimer on its website or in its advertising that the owners oppose marriage between gay couples but that they serve this population simply to comply with applicable anti-discrimination laws. *See Id.* at 70.

The court rejected Elane Photography's free-exercise argument on the ground that the public-accommodations statute was targeted at sexual-orientation discrimination rather than at religious exercise. *See id.* at 73-76. This holding drew on the Supreme Court's controversial holding

in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), that neutral laws of general applicability—*i.e.*, laws that were not enacted with the purpose of impeding religious practice and that apply with equal force to religious and nonreligious actors—do not run afoul of the Free Exercise Clause even if they impose a substantial burden on religious practice. (The U.S. Congress reacted to the ruling in *Employment Division* by enacting RFRA, but the U.S. Supreme Court subsequently invalidated RFRA insofar as it applied to the states. *See City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).)

Since 2013, *Elane Photography* has been cited by courts throughout the country in rejecting sundry wedding vendors' attempts to decline to serve gay couples. For example, a court held that the owners of a popular wedding venue in upstate New York could not ignore a state law that prohibited public accommodations from engaging in sexual-orientation discrimination. *See Gifford v. McCarthy*, 137 A.D.3d 30 (Sup. Ct. App. Div. N.Y. Jan. 14, 2016). The court relied on *Elane Photography* to hold that the state statute did not run afoul of free-speech principles because it did not compel the site's owners to endorse the marriages that they hosted; and that the statute was consistent with free-exercise principles because it was targeted at discrimination rather than at religious beliefs. *Id.* at 39-41. The New Jersey Division on Civil Rights reached the same conclusion regarding a campground pavilion. *See* Findings, Determination, and Order at 11, *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. CRT 6145-09 (N.J. Div. on Civil Rights Oct. 22, 2012).

A similar but arguably more persuasive case was presented by the owners of an art gallery who claimed that their freedoms of speech, religion, and association entitled them to refuse to rent out the venue for a gay couple's wedding because the gallery was a vehicle for the owners' artistic and religious expression. Verified Pet. at & 49, *Odgaard v. Iowa Civil Rights Comm'n*, No. CVCV046451 (Iowa Dist. Ct. Oct. 7, 2013). After the state trial court dismissed the lawsuit, the event site's owners appealed to the Iowa Supreme Court. The business owners ultimately decided, however, to settle the lawsuit by discontinuing the practice of holding weddings at their venue and agreeing to refrain from sexual-orientation discrimination in their other operations. *See* http://www.desmoinesregister.com/story/news/investigations/2015/01/28/gortz-haus-owners-decide-stop-weddings/22492677/.

Only one wedding venue's claims have met with success. The Hitching Post Wedding Chapel in Coeur d'Alene, Idaho is owned by Christian ministers who make the chapel available for wedding ceremonies that they themselves typically perform. *See Knapp v. City of Coeur d'Alene*, 172 F. Supp. 3d 1118, 1120 (D. Idaho 2016). After they filed suit seeking protection against enforcement of a public-accommodations ordinance prohibiting sexual-orientation discrimination, the city announced that it had no intention of subjecting the venue to the ordinance, which explicitly exempted "religious corporations." *See Id.* at 1126. Thereafter, the district court dismissed the vast majority of the owners' claims for lack of standing, leaving only a small portion of the case (regarding a single day on which the city's intentions were unclear) alive. *See Id.* at 1138.

Meanwhile, another wedding vendor's case has been making its way up the appellate ladder. In *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), the Washington Supreme Court rejected a florist's claim that she had free-speech, free-exercise, and free-association rights to refuse to provide flowers for a gay couple's wedding. The state Supreme Court drew on the reasoning of the New Mexico Supreme Court when it concluded that the "decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding. . . . [P]roviding flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism." *Id.* at 557. Someone who learns that a florist declined the business could just as easily attribute it to "insufficient staff" or "insufficient stock." *Id.*

The Washington Supreme Court held that the florist's free-exercise claim failed both because the statute was not enacted to target religion and because the government has a compelling interest in eradicating discrimination. *Id.* at 843, 851-52. In reaching the latter conclusion, the court dismissed the florist's argument that the couple could simply use another florist: "This case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches." *Id.* at 566 (quoting Br. of Resp'ts Ingersoll and Freed at 32). Finally, the court rejected the florist's free-association claim, reasoning that commercial enterprises that are open to the general public, unlike private clubs and organizations that are defined by particular goals and ideologies, are not expressive associations. *Id.* at 567. The organization sponsoring the florist's lawsuit has since announced its intention to seek review in the U.S. Supreme Court, *see* https://www.adflegal.org/detailspages/case-details/state-of-washington-v.-arlene-s-flowers-inc.-and-barronelle-stutzman.

Another wedding, however, beat

Arlene's Flowers to the punch. In *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), the Colorado Civil Rights Commission sought to enforce a public-accommodations statute against a baker who declined to furnish the wedding cake for a gay couple's wedding. The Colorado Court of Appeals rejected the baker's argument that Colorado's public-accommodations statute compelled speech in violation of the First Amendment by requiring the baker to "convey a celebratory message about [same-sex] marriage." *Id.* at 276. The court echoed the holding of *Elane Photography*, reasoning that "it is unlikely that the public would view Masterpiece's creation of a cake for a same-sex wedding celebration as an endorsement of [marriage between gay couples]." 370 P.3d at 286.

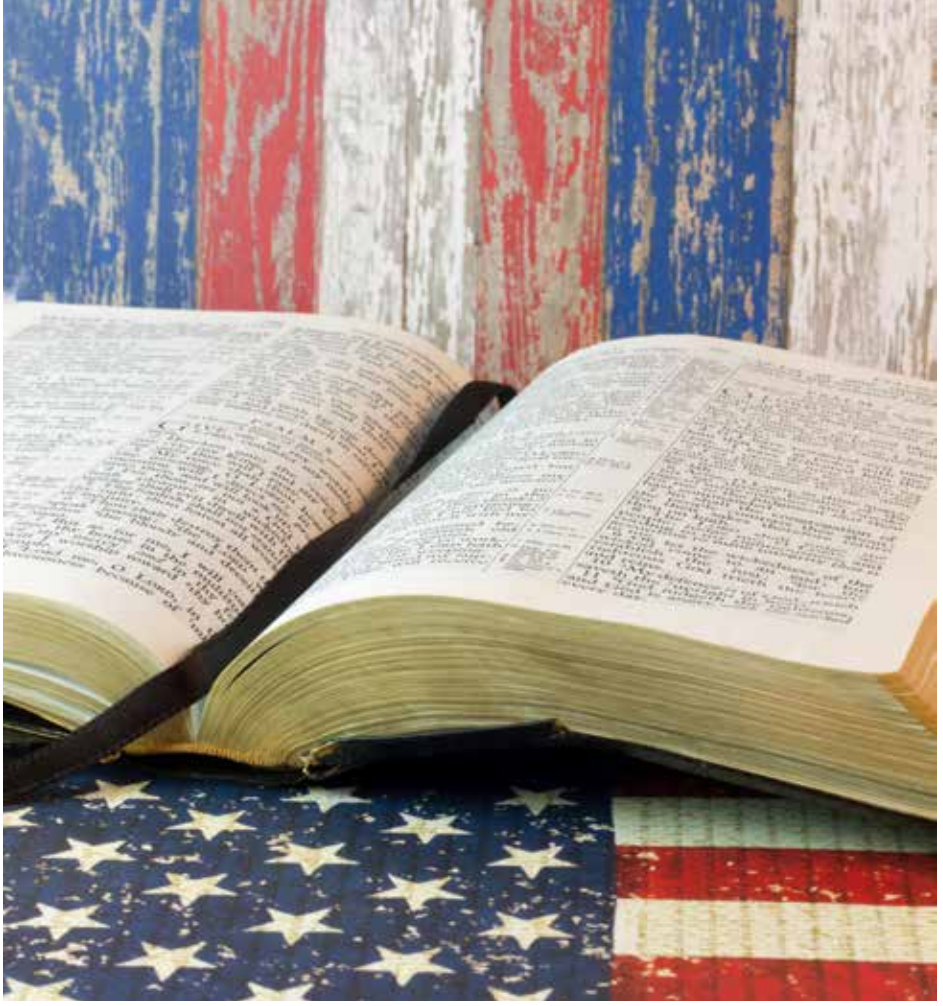
The Colorado Court of Appeals relied on *Employment Division* to reject the baker's assertion of a free-exercise right to violate the public-accommodations statute, concluding that the statute was "not designed to impede religious conduct and does not impose burdens on religious conduct not imposed on secular conduct." 370 P.3d at 292. After the Colorado Supreme Court declined to take the case, the baker filed a Petition for Certiorari with the U.S. Supreme Court. The Petition was redistributed for conference over a dozen times and then, on the last day of the Court's 2016 term, the Court granted the petition. *See* 2017 WL 2722428 (June 26, 2017).

It is unclear why the Court relisted *Masterpiece Cakeshop* so many times. Some have speculated that those Justices who favored a grant of certiorari were waiting for the arrival of our newest Justice Neil Gorsuch, who has generally favored a robust interpretation of religious freedom. Gorsuch sided with his Tenth Circuit colleagues in concluding that RFRA entitled religious owners of for-profit businesses to an exemption from Affordable Care Act regulations requiring employers to provide insurance coverage for contraceptives, a conclusion that was ultimately affirmed by the Supreme Court in a 5-4 vote. *See Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *aff'd*, 134 S. Ct. 2751 (2014). Subsequently, religious non-profit organizations challenged a related regulatory scheme, which allowed them to bow out of providing contraceptive coverage but required that they state their objection in writing so that the coverage could be provided by a third party. *See Little Sisters of the Poor v. Burwell*, 794 F.3d 1151 (10th Cir. 2015). After a panel of the 10th Circuit rejected the argument that this regime substantially burdened the non-profit organizations' religious exercise, Gorsuch joined in dissenting from a denial of rehearing en banc, contending that the regulations impermissibly interfered with the organizations' religious freedom. 799 F.3d 1315, 1317-18 (10th Cir. 2015) (Hartz, J., dissenting from denial of reh'g). That case ultimately made its way to the Supreme Court, but the High Court punted when the federal government offered a workaround. *See Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (vacating and remanding for consideration of whether coverage could be provided without requiring written notice).

In light of Gorsuch's views, his addition to the Court will likely do little to change the balance on the Court in this area; as in other contentious areas, the swing vote likely rests with Justice Kennedy, who is one of the High Court's strongest free-speech advocates. *See, e.g.*, Steven H. Shiffrin, *What's Wrong with the First Amendment* 181 (Cambridge Univ. Press 2016) (noting that Kennedy "is one of the strongest supporters of free speech on the Court"). Kennedy is also quite supportive of religious freedom, going out of his way in his concurrence in *Hobby Lobby* to proclaim that freedom of religious exercise is essential to preserving people's "dignity" and "self-definition." 134 S. Ct. at 2785. At the same time, however, Justice Kennedy has long been a champion of the LGBT community, a stature gained from the soaring prose of his majority opinions in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell*, 135 S. Ct. 2584.

These competing leanings make it difficult to predict where Kennedy would come down if the Court were to take a case in this area, but a confluence of three factors suggests that Kennedy would likely side, yet again, with the LGBT community. First, public accommodations inhabit a marketplace defined more along commercial lines than ideological ones. Businesses that serve customers primarily exist to make money, and only secondarily (if at all) to advance "political, social, economic, educational, religious, and cultural ends," thereby diminishing their entitlement to insularity and selectivity. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (holding, before Justice Kennedy joined the Court, that civic club could be required to admit women in part because admitting women would not impede the organization's ability to continue to advance public positions on issues of the day).

To be sure, in *Hobby Lobby*, 134 S. Ct. at 2770, Justice Kennedy joined the majority in rejecting the argument that, because they exist "simply to make money," for-profit organizations are not entitled to RFRA's protections. In that case, however, the company was claiming a religious-freedom right vis-à-vis employees, not customers—



which harkens to the second reason Kennedy is likely to side with the LGBT community: the issue here is about who must be served; it is not about who must do the serving. Customers, unlike business owners and employees, are generally neither responsible for, nor understood to be responsible for, the messages that a business sends. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), Kennedy joined a majority opinion holding that the Boy Scouts had a First Amendment right of expressive association to exclude gay scout leaders; but the Court emphasized that Dale was a teacher and role model for the Boy Scouts (*see Id.* at 653-56), suggesting that the Court would be less tolerant of discrimination against the someone who played no role in shaping the organization's message.

Third and most important, it is difficult to ignore the parallels between this situation and the lunch-counter and related battles of the 1950s and '60s. In 1964, the owner of the Heart of Atlanta Motel argued that the federal public-accommodations statute, Title II of the Civil Rights Act of 1964, unconstitutionally precluded him from denying rooms to "Negroes." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964). The Court saw it differently, upholding the statute on the ground that "the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Id.* at 250 (internal quotation marks omitted).

Kennedy's reputation as the "dignity" Justice (*see, e.g.*, Explaining Justice Kennedy: The Dignity Factor, http://www.npr.org/sections/thetwo-way/2013/06/27/196280855/explaining-justice-kennedy-the-dignity-factor (June 28, 2013)) would take a severe hit if he were to conclude that public accommodations have a constitutional right to rebuff gay customers, who could thereby be left in the position of having "to pick their merchants carefully, like black families driving across the South half a century ago." Robin Fretwell Wilson & Jana Singer, Same-Sex Marriage and Conscience Exemptions, Engage: J. Federalist Soc'y Prac. Groups, Sept. 2011, at 16–17 (internal quotation marks omitted). In *Obergefell*, Kennedy described his approach to balancing the tension between religious freedom and gay rights as follows:

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.

Id. at 2603. Kennedy could well see a decision upholding businesses' right to turn away gay customers as the kind of state action that would place the state's imprimatur on "an exclusion that demeans or stigmatizes." In describing society's trajectory since *Lawrence*, he observed that "[o]utlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." 135 S. Ct. at 2600. That "full promise of liberty," in Kennedy's mind—and in the mind of this article's author—likely includes the right of LGBT individuals to frequent public accommodations alongside their straight friends. We will know by June 2018 whether that is so.

Ms. Khan is a Partner with the Potomac Law Group, where she focuses on appellate litigation in state and federal courts around the country on behalf of commercial, municipal, and individual clients. She may be reached at akhan@potomaclaw.com.

DOE HUNTING:

A How-To Guide for Uncovering John Doe Defendants in Anonymous Online Defamation Suits

By Savanna L. Shuntich and Kenneth A. Vogel

Envision a car dealership named Greater Maryland Auto World, owned by a stalwart member of the community named Charles Woolworth McHuggins VI. Mr. McHuggins is an active member of the Lion's Club, a major donor to the Chesapeake Bay Foundation, an announcer for his local high school football team, and the beloved grandfather of twelve apple-cheeked grandchildren. Assume that Mr. McHuggins has a smaller competitor called "Tom's Toyota" located one state over, in Delaware. Owner Tom Smith aspires to Mr. McHuggins's level of success. Mr. Smith wants to expand to Maryland, but he is afraid that he will not be able to break into the market due to the dominance of Greater Maryland Auto World.

In a jealous rage at the continued success of Greater Maryland Auto World, Mr. Smith decides to go rogue and fund a defamation campaign against Greater Maryland Auto World and that charming pillar of the community, Charles Woolworth McHuggins VI. Mr. Smith covertly hires a web designer to create a website entitled www.CharlesMcHugginsIsTheWorst.com which claims that Mr. McHuggins underpays his workers, passes off used cars as new, and spends his free time torturing puppies, all of which are untrue. In addition Tom Smith established an email address under the name of UnhappyCarBuyer@gmail.com. Using the new email address, Mr. Smith posted negative online reviews on yelp.com about Greater Maryland Auto World.

Mr. McHuggins is understandably aghast at the contents of www.CharlesMcHugginsIsTheWorst.com. He comes to you, his long-time attorney, seeking help. He wants to sue the person responsible for the website for defamation, and he wants the website taken down. In the Internet age, this scenario is becoming common. Successfully prosecuting one of these cases presents a unique set of challenges because of the complex e-discovery required to unmask online John Does. Business lawyers may very well have clients who voice concerns about online anonymous defamatory Yelp and Amazon reviews, Twitter tweets and Facebook postings, or a standalone website (to give just a few examples).

It is impossible to recover a money judgment against a John Doe. This article explores how to find John Doe, an unknown speaker, who is anonymously voicing opinions on the Internet. Once s/he is identified, one can pursue an ordinary defamation claim. First, the article discusses threshold issues attorneys should consider before filing a John Doe lawsuit. Next, it describes the first phase of discovery, which involves, if in Federal Court, getting a court-order authorizing early discovery and writing subpoenas that comply with the federal Stored Communications Act. Finally, it will detail the second phase of discovery when subpoenas are sent to Internet Service Providers (ISPs). The Plaintiff may need to contend with the John Doe's right to remain anonymous under the First Amendment.

Initial Considerations

Initial considerations for one of these cases include the state's statute of limitations on defamation, securing e-discovery vendors, and the federal Communications Decency Act.

Statutes of limitations run quickly in defamation cases. In Maryland, the Statute of Limitations for defamation is only one year. Md. Code, Courts and Judicial Proceedings §5-105. This may not seem like a problem because the defamatory online content is always accessible and continues to cause the client harm every single day it remains online, but Federal courts in Maryland have adopted the "single publication rule." In *Hickey v. St. Martin's Press, Inc.* the District Court explained "[u]nder the 'single publication rule,' only one action for damages can be maintained as to any single publication. Under the 'multiple publication rule,' every sale or delivery of the defamatory article is viewed as a distinct publication which causes injury to the defamed person and creates a separate basis for a cause of action." 978 F.Supp. 230, 235 (D.Md. 1997). In other words, the minute that the defamatory comment, website, etc. goes live the Statute of Limitations begins to run even if the injured party does not discover the defamation for months. In Mr. McHuggins's case, the statute began to run when the website was made accessible to the public. The Maryland Court of Appeals has yet to address the issue, but to quote the federal Court in *Hickey* "[f]ollowing its review of the applicable authorities, this Court has concluded that the Court of Appeals of Maryland would adopt the single publication rule if the question were presented to it in this case."

Another thing to be mindful of is the amount of technological expertise these cases entail. Any attorney hoping to undertake an anonymous defamation case must have a good e-discovery sleuth. The average attorney knows very little about IP address logs, MAC addresses, hosting services, proxy agents, and any of the plethora of other technology these cases entail. Even comments on legitimate websites like Yelp can be made anonymously through fake registration information. This may require several rounds of subpoenas duces tecum to uncover John Doe. The right e-discovery vendor can help craft subpoenas and follow the trail of the John Does through the web.

On a final note, the Federal Communications Decency Act (CDA) limits liability in online defamation cases by protecting third party publishers of defamatory content. This law was passed in the late 1990s and has been controversial. It states in pertinent part "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. 230(c)(1). Practically, this means that you can only sue the John Doe(s), not the platform where the defamatory content appears. In the hypothetical which began this article, there was a defamatory website. This means that a company like GoDaddy would have registered the domain name for the site. A separate company might provide the hosting service for the website. The domain registrar and the hosting company are immune from liability under the CDA. Mr. McHuggins may only sue John Doe. There are various CDA reform movements afoot, but for now only the current language of the CDA is relevant. Plaintiffs generally name multiple John Does in case more than one individuals participated in the defamation. Courts are accustomed to seeing cases with captions like "McHuggins v. John Does 1-10."

Round One of Subpoenas

Most litigators deal with the discovery process on a daily basis. Litigating anonymous online defamation disputes feels backwards because typically attorneys issue discovery only after there is an identified Defendant. FRCP 26(f) requires that attorneys hold a discovery conference with opposing counsel prior to seeking discovery from any source. Without an identifiable Defendant with whom to conference, the Court must authorize early discovery under Rule 26(d) which states "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except . . . when authorized by these rules, by stipulation, or by court order." If the case is in Federal Court the plaintiff needs to file a motion requesting early discovery before anything else. There is no comparable rule in Maryland state courts.

Either with or without a court order (depending on the jurisdiction) the next step is to begin issuing *subpoenas duces tecum* to companies and individuals who may have identifying information about the John Does. Principally this means subpoenaing the technology platforms where the defamatory content appears. For example, in our hypothetical, Mr. Smith wrote a defamatory Yelp review about Mr. McHuggins. In that case he would subpoena Yelp for any and all documents pertaining to the anonymous speaker's Yelp account. For the anonymous website, subpoenas would be issued to the domain name purveyor (companies such as GoDaddy and Namecheap) and the domain hosting service (companies like DreamHost and HostGator). In seeking discovery against technology companies, defamed plaintiffs are severely limited by the Stored Communications Act. 18 U.S.C. § 2701 *et seq*. The Act places restrictions on companies in the business of offering an "electronic communication service" which Congress defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510. In response to a subpoena or other request, "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service. . . ." 18 U.S.C. § 2701 *et seq*. This limits the discoverable information from companies to non-content, such as addresses, phone numbers, email addresses, account recovery information, and IP addresses. Colloquially this is known as basic subscriber information or "BSI." It may be that the John Doe(s) used fake contact information, such as a registered address of 123 Main Street, Baltimore, MD 21218, or a false e-mail address such as TheRealCharlesMcHuggins@gmail.com or a "burner" phone. If so, the most important information one can request is the user's IP address logs.

"[A]n IP (Internet Protocol) is an address assigned by your Internet Service Provider (ISP) and is used to give your computer or other device access to the Internet." https://www.verizon.com/foryoursmallbiz/Unprotected/Common/HTML/BroadBand/BB_DynamicStatic.htm IP addresses are either static or dynamic. Most customers have a dynamic IP address. With a dynamic IP address, the internet service provider assigns a temporary IP address to its customer. It can later re-assign the IP address to another customer based on the ISP's need at any time without notifying the customer. Over time, a single customer will use many different IP addresses. This presents a problem for the IT investigator as the dynamic IP address used to post defamatory material may on one day belong to one customer, and on another day be reassigned to some innocent person who is unrelated to the defamatory posting. Static IP addresses are more expensive and never change. "For companies with secured networks, a device with a static IP address helps the network administrator open their network to the specific address, which gives you access to the company intranet. Medium and large-sized accounts, primarily business accounts, often need static IP addresses. This feature is not for everyone." https://www.verizonwireless.com/businessportals/support/faqs/DataServices/faq_static_ip.html In the case of IP addresses, the address is affiliated with the network, not an individual computer. For a fuller explication of IP addresses see https://www.eff.org/files/2016/09/22/2016.09.20_final_formatted_ip_address_white_paper.pdf

When IP address logs are provided, they may come from a number of sources of varying degrees of reliability. Maybe the perpetrator used the open wireless network at a local Starbucks to work on www.CharlesMcHugginsIsTheWorst.com? In that case, the IP address registered would be the IP address for a specific Starbucks. Any customer logging in at that same Starbucks would register the same IP address. These IP addresses help little in identifying John Doe. But if John Doe used a work computer at his office to create the website, his business might have a static IP address. This same IP address is recorded from every other employee at the company location, but it gets you closer to the culprit. Ideally you can get a static IP address linked to someone's small business or home network. This makes it fairly easy to determine the identity of John Doe. Locating dynamic IP addresses can still prove useful. ISPs keep records of whom they have assigned a particular dynamic IP address in the past. If our web hunter can track the defamer to a static IP address or previous dynamic IP address at Tom's Toyota, you know from where the web content was uploaded.

A final word of caution: Do not always expect to obtain the user's true IP address. If John Doe is tech-savvy he may be using a proxy service to cloak his true IP address. A proxy service re-routes a user's internet connection and can make his location appear to be originating from anywhere on earth. HideMyAss.com provides such a service. With enough time and financial sacrifice, it is possible to trace an IP back to the point of origin but be prepared for the possibility of a never-ending rabbit hole. In addition, if the company providing the IP address spoofing is abroad, they will not comply with subpoenas issued by American courts.

IP Addresses, Anonymous Speech, and the First Amendment

The final step in the discovery process is to subpoena the ISPs that issued the IP addresses received in response to the first round of subpoenas. Content carriers such as Facebook will only provide basic subscriber information, but the requests might still yield the contact information for the John Doe. There is an added wrinkle at this stage because "[i]ncluded within the panoply of protections that the First Amendment provides is the right of an individual to speak anonymously." *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 440 (Md. App., 2009). Courts have determined that "this protection extends to anonymous speech on the Internet." *Hard Drive Prods., Inc. v. Doe*, 892 F.Supp.2d 334, 338 (D.D.C., 2012). To win a motion to compel or fend off a motion to quash the subpoena you will need to show the court why the Plaintiff's need for the information should overcome John Doe's First Amendment rights. Courts are not in agreement as to how best to protect the First Amendment rights of anonymous online speakers. See *Sinclair v. Tubesocktedd*, 596 F.Supp. 2d 128, 132 (D.D.C., 2009). There is not sufficient space is this article to discuss the wide array of tests courts have crafted to "appropriately balances a speaker's constitutional right to anonymous Internet speech with a plaintiff's right to seek judicial redress from defamatory remarks." *Brodie*, 966 A.2d at 456. Among the best known are *Dendrite International, Inc. v. Doe* 775 A.2d 756 (App.Div. 2001) and *Doe v. Cahill*, 884, A.2d 451 (Del. 2005).

The Maryland Court of Appeals explicitly adopted the *Dendrite* test in the 2009 opinion in *Independent Newspapers, Inc. v. Brodie* authored by Judge Lynne Battaglia. 966 A.2d 432. In *Brodie*, the

Plaintiff objected to several anonymous posts on a newspaper's online message board that called his Dunkin Donuts restaurant filthy and said the establishment was "wafting" trash into the nearby river. 966 A.2d at 446, 457. The *Dendrite* standard, as articulate by the Maryland Court of Appeals, is as follows:

> "Thus, when a trial court is confronted with a defamation action in which anonymous speakers or pseudonyms are involved, it should, (1) require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, including posting a message of notification of the identity discovery request on the message board; (2) withhold action to afford the anonymous posters a reasonable opportunity to file and serve opposition to the application; (3) require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster, alleged to constitute actionable speech; (4) determine whether the complaint has set forth a *prima facie* defamation per se or per quod action against the anonymous posters; and (5), if all else is satisfied, balance the anonymous poster's First Amendment right of free speech against the *strength* of the *prima facie* case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity, prior to ordering disclosure.

The United States District Court for the District of Maryland has yet to adopt a particular standard. In *In re Subpoena of Daniel Drasin Advanced Career Technologies, Inc. v. John Does 1-10* the MD Court indicated a preference for the Dendrite standard in Civil Action No. ELH-13-1140, 8 (D. Md. 2013). The McHuggins anonymous website criticized both McHuggins's business and personal character. In *In re Subpoena of Daniel Drasin*, Maryland's U.S. District Court suggested that the Dendrite standard might not be appropriate for defamatory commercial speech because "courts typically protect anonymity in literary, religious or political speech, whereas commercial speech…'enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Id.* at 5. On the other hand, personal, religious and political free speech enjoys a higher standard of first amendment protection.

Searching for anonymous John Does takes a lot of patience and tenacity. Information received through discovery might open up new possibilities for locating the anonymous speaker. Other subpoenas will lead to dead ends. Just like there is no such thing as a perfect crime, persons who make anonymous online statements make mistakes. These mistakes create a trail of bread crumbs which will lead the diligent doe hunter back to the offender.

Ms. Shuntich and Mr. Vogel practice at Bar-Adon & Vogel, PLLC, a general business and litigation law firm in Washington, D.C., with an emphasis on real estate and construction disputes.

ETHICS DOCKET

Scope of Prohibition on Acceptance of Contingency Fees in Bankruptcy Matter Which Could Modify Effect of Order of Divorce

ETHICS DOCKET NO. 2017-05

You have requested an opinion from the Committee concerning the scope of the prohibition on contingent fees in domestic relations matters. You indicate that you represent a client, in the United States Bankruptcy Court for the District of Maryland, who is a debtor in a pending bankruptcy.

Your client is also a party in a divorce in Maryland Circuit Court, for which you have not been engaged. In that divorce, your client and the spouse reached a settlement, incorporated but not merged into a judgment of absolute divorce, prior to the filing of the bankruptcy. The relevant terms of that settlement included child support, and a use and possession order for your client's ex-spouse to remain in the former marital home for a period of years, with each spouse paying half of the mortgage and retaining a one-half ownership interest, until sold.

Your client indicates that he has been unable to meet his financial obligation to pay half of the mortgage on the marital home. You have initiated an adversarial proceeding in the Bankruptcy Court to determine the bankruptcy trustee's powers to sell the former marital home, notwithstanding the terms of the divorce settlement.

In addition, because of financial conditions, your client has sought a child support modification due to an alleged change in circumstances with the Circuit Court.

You have posed two questions of the Committee:

1. Would a fee agreement, in the bankruptcy adversary proceeding, charging a contingent fee based on successfully forcing a sale of the former marital home violate Maryland Rule of Professional Conduct 1.5(d)(1)?
2. Would a fee agreement, in the bankruptcy adversary proceeding, containing a clause providing that the contingent fee be paid if the child support is modified, even where there is no sale of the former marital home, violate Maryland Rule of Professional Conduct 1.5(d)(1)?

Preliminarily, the Committee notes that it provides no legal advice or comment with regard to the fee disclosure and approval requirements of the Bankruptcy Court or the validity of your proposed strategy. Additionally, the Committee cannot comment on the reasonableness of the fee as insufficient information has been presented to be able to address the specific requirements of other provisions of Rule 1.5, including section (a). Finally, the Committee does not, by the specific fact pattern, intend to indicate that a contingent fee in a bankruptcy matter is inappropriate.

Maryland Rule 19-301.5(d)(1) (Maryland Rule of Professional Conduct 1.5(d)(1)) generally prohibits "any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or custody of a child or upon the amount of alimony or support or property settlement, or upon the amount of an award pursuant to Md. Code, Family Law Article, §§ 8-201 through 8-213". Md. Rule 19-301.5. In Ethics Docket 1979-42, we determined that a contingent fee for a divorce was unethical. Further, we opined in Ethics Docket 1995-15 against forming a collection business to collect child support as it appeared to be an attempt to circumvent Rule 1.5(d)(1).

The propriety of contingent fees in matters arising after the entry of an order of divorce has been addressed by the Committee. See Ethics Dockets 1997-39 and 1998-07. The results are

reflected in Note 6 to Rule 1.5 which does not prohibit contingent fees for representation in collection of "post-judgment balances due under support, alimony or other financial orders." Most notably, in Ethics Docket 1997-39, the Committee determined that Rule 1.5(d)(1), in its current form, did not prohibit a contingent fee to collect on property rights determined in and arising from a divorce. The Committee noted that "the prohibition attaches to the services rendered to establish the initial determination of either alimony, support or property settlement, and the modification thereof, and not to the disposition of property already subject to either final judgment or divorce decree."

We respond to your questions in reverse order. As to your second question, the Committee has little hesitation concluding that the proposed contingent fee expressly based on a modification of child support violates, and is prohibited under, 1.5(d)(1).

As to your first question, regarding a contingent fee based on successfully procuring sale of the former marital home, we recognize that there may be circumstances where contingent fee representation in unrelated litigation could result in modification of a divorce decree, without a violation of the Rules of Professional Conduct. However, given the state of your knowledge and the strategy being pursued, we believe that the contingent representation, under the circumstances you have presented, also violates the prohibitions of Rule 1.5(d)(1).

What is most concerning about your proposed representation aimed at selling the home is your knowing acknowledgement that your representation is aimed at and primarily intended to modify the rights of the parties by extinguishing the use and possession order and the financial obligation to pay the mortgage as ordered in the divorce decree. We direct your attention to *Knott v. Knott*, 146 Md. App. 232, 248-250 (2002), wherein the Court of Special Appeals found that mortgage payments were in the nature of child support, noting that the "use and possession statute's sole purpose is for the benefit of the child or children of the family" and concluding that the mortgage payments made in connection with use and possession "should be considered child support payments." *Id*. While, on its face, the rule prohibits contingent fees "in a domestic relations matter," we believe that the collateral attack on that judgment through other judicial means, via contingent fee representation, expressing aimed at decreasing child support, falls within the purview of the Rule. In that regard, your contingent fee efforts are not within the safe harbor parameters of mere enforcement or post-judgment collection reflected in Ethics Dockets 1997-39 and 1998-07, and annotated in Note 6. Your proposed conduct would more closely resemble "the modification thereof" referenced in Ethics Docket 1997-39, and the circumvention we counseled against in Ethics Docket 1995-15.

Upcoming

Maryland Bar Journal

Agriculture Law

Sept./Oct. 2017

The Advertising Index

DUGAN BABIJ TOLLEY KOHLER LLC

Finding Answers.
Demanding Justice.

Your Partner.
An Advocate for Your Clients.

Accepting referrals in the areas of birth injury, cerebral palsy, complex medical malpractice and catastrophic personal injury litigation.

1966 Greenspring Drive
Suite 500
Timonium, Maryland 21093
Toll Free: 1.800.408.2080
Phone: 410.308.1600
Fax: 410.308.1742
www.medicalneg.com

Maryland State Bar Association, Inc.
520 West Fayette Street
Baltimore, Maryland 21201

Address Service Requested

Nonprofit Organization
U.S. Postage
PAID
Maryland Bar Journal