

# 2015

Annual Update

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## *Freedom of Speech in the United States* seventh edition

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This update summarizes the free speech decisions of the U.S. Supreme Court for the 2014–2015 term, as well as several pertinent lower court decisions. The complete text of this update, links to the cases discussed, and a library of landmark free speech decisions can be found on the book's web site:

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

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

### U.S. Supreme Court

**Case:** *Elonis v. United States*, 135 S. Ct. 2001, 2015 U.S. LEXIS 3719 (June 1, 2015); the appellate court decision is *United States v. Elonis*, 730 F.3d 321, 2013 U.S. App. LEXIS 19316 (3d Cir. Pa., 2013).

**Subject:** A “reasonable person” standard is not sufficient to support a conviction under a federal law that makes it a crime to transmit in interstate commerce “any communication containing any threat . . . to injure the person of another.”

**Summary of Decision:** After his wife of seven years left him, Anthony Douglas Elonis (under the pseudonym “Tone Dougie”) used Facebook to post self-styled rap lyrics containing violent threats against his wife, his coworkers, a kindergarten class, and law enforcement officials. Throughout his posts, Elonis interspersed disclaimers stating that his lyrics were fictitious, that they did not depict real persons, and that he was exercising his freedom of speech as protected by the First Amendment. At one point, Elonis justified his behavior as follows: “I’m doing this for me. My writing is therapeutic.”

Worried about the threats, Elonis’s former employer reported the posts to the Federal Bureau of Investigation (FBI), which began monitoring Elonis’s Facebook activity. Elonis was eventually arrested and charged with five counts of violating 18 U.S. Code Sec. 875(c), a 1939 law that makes it a crime to transmit in interstate commerce “any communication containing any threat . . . to injure the person of another.” (After being visited by the FBI, Elonis posted a menacing entry on his page titled “Little Agent Lady.”)

Elonis’s attorney asked the court to instruct jurors that the government was required to prove that the defendant intended to communicate a “true threat.” The trial judge disagreed, instructing jurors that all the prosecution needed to prove was that Elonis “intentionally made the communication, not that he intended to make a threat.” Under this instruction, jurors could convict Elonis if a “reasonable person” would view his statements “as a serious expression of an intention to inflict bodily injury or take the life of an individual.”

Applying the standard set out by the judge, the jury convicted Elonis on four of five charges. Elonis appealed, arguing that the jury should have been instructed that he could not be convicted unless it was established that he intended his posts as threats. The Third Circuit rejected Elonis’s appeal, arguing that the law requires only that there had been the intent to communicate words that the defendant understands, and that a reasonable person would view the words as a threat.

Elonis appealed and the Supreme Court granted certiorari. On an 8-1 decision, the Supreme Court reversed Elonis’s conviction. Chief Justice John Roberts wrote for a seven-justice majority. Justice Samuel Alito, Jr., wrote an opinion concurring in part and dissenting in part. Justice Clarence Thomas filed the lone dissenting opinion.

Writing for the majority, Chief Justice Roberts held that a conviction for threats required more than a consideration of how the posts would be understood by a reasonable person. “Federal criminal liability,” the chief justice wrote, “does not turn solely on the results of an act without considering the defendant’s mental state.” To warrant a conviction, he said, “wrongdoing must be conscious to the criminal.”

Justice Roberts did not, however, set out a standard for assessing the defendant’s mental state. More specifically, his opinion did not state whether the consciousness requirement

could be satisfied by a show of recklessness, or whether a higher standard of intent would be required. In passing, he simply noted the Court might someday need to rule on whether “recklessness suffices for liability” under 18 U.S.C. Sec. 875.

Justice Alito shared the majority’s concern about the jury instruction, but he believed that the defendant’s reckless behavior was sufficient to justify a conviction. In other words, he agreed with the majority’s critique of the reasonable person standard. He would, however, have upheld Elonis’s conviction because his Facebook postings were reckless.

In his dissenting opinion, Justice Thomas faulted the majority for not establishing a clear standard for assessing threats. “Given the majority’s ostensible concern for protecting innocent actors,” he argued, “one would have expected it to announce a clear rule—any clear rule. Its failure to do so reveals the fractured foundation upon which today’s decision rests.” To avoid this uncertainty, Justice Thomas would have applied the general intent standard used by the lower court and upheld Elonis’s conviction.

Because the trial judge had used the wrong standard to instruct the jury, Chief Justice Roberts remanded the case back to the Third Circuit for further proceedings. It now falls on the lower court to set the appropriate standard and to determine what should happen to Elonis. Commenting on this ambiguous result, the *Wall Street Journal* lamented the fact that the court had “avoided new pronouncements in the Internet age.”

Under closer scrutiny, however, the Supreme Court’s decision might be considered a modest victory for free speech. Chief Justice Roberts’s opinion, if nothing else, holds that traditional free speech doctrine extends to online communication and the social media. By rejecting the negligence standard, the majority opinion makes it harder to convict speakers under the true threats doctrine.

## U.S. Supreme Court

**Case:** *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2015 U.S. LEXIS 4063 (June 18, 2015); the appellate court decision is *Texas Division, Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 2014 U.S. App. LEXIS 13507 (5th Cir. Tex., 2014).

**Subject:** The state of Texas’s refusal to issue a specialty license plate featuring a Confederate flag does not violate the First Amendment.

**Summary of Decision:** In *Wooley v. Maynard* (1977; text, p. 69), the Supreme Court held that residents of New Hampshire could not be compelled to display the New Hampshire state motto, “Live Free or Die,” on their license plates. The residents, George Maynard and his wife, were members of the Jehovah’s Witnesses. They objected to displaying the motto on their car as it was inconsistent with their religious beliefs. In deciding the case, the Supreme Court ruled that New Hampshire could not require private citizens to display the state’s preferred message. The justices were silent, however, on the question of whether the state had the authority to forbid a message that citizens might want to display on their license plates. The Supreme Court answered that question in *Walker v. Sons of Confederate Veterans* (SCV).

Any motor vehicle operating on Texas roads is required to display a valid license plate. To satisfy this requirement, Texas offers motorists a choice of three different plates: (1) a general license plate (bearing a graphic of the state and the slogan “The Lone Star State”), (2) a selection of specialty license plates (containing the word “Texas” and a

special design prepared by the state), or (3) a vanity license plate that bears a particular alphanumeric pattern (such as “BOB” or “TEXPL8”).

Specialty plates can be created in various ways. In some instances, the state legislature has directed the development of specialty plates. For example, it adopted statutes authorizing a plate that says “Keep Texas Beautiful” and another plate that features an image of the World Trade Center (which was destroyed by an act of terrorism on September 11, 2001). In addition, an individual or an organization can propose a specialty plate bearing a slogan and an image. If the Texas Department of Motor Vehicles Board (the Board) approves the design, the specialty plate will be available to vehicle owners for an additional fee.

In 2009, the SCV applied for a specialty plate bearing the organization’s name across the bottom of the plate. On the left side of the plate was a square Confederate battle flag framed by the words “Sons of Confederate Veterans 1896.” A faint Confederate battle flag also appeared in the background on the lower half of the plate. Like the other specialty plates, the word “Texas” and a small silhouette of the state ran across the top of the proposed design. The license number appeared in the middle of the plate.

The Board invited public comment and held a hearing on SCV’s proposal. After reviewing the public’s feedback, the board unanimously voted against issuing the proposed license plate because of the image of the flag. In a statement explaining its decision, the Board noted, “a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.”

In 2012, the SCV filed a lawsuit against the Board arguing that the decision to deny the specialty plate violated the Free Speech Clause of the First Amendment. The district court sided with the Board, but on appeal, a divided panel of the Court of Appeals for the Fifth Circuit reversed. A majority of the Fifth Circuit reasoned that specialty license plates are private speech and that the Board, in refusing the SCV’s application, engaged in unconstitutional viewpoint discrimination. The dissenting judge argued that the specialty plates were a form of government speech, the content of which could be controlled by the state. The Board appealed to the U.S. Supreme Court.

On a 5-to-4 decision, the Supreme Court held that the Board’s decision to deny SCV’s application did not violate the First Amendment. Writing for the majority, Justice Stephen Breyer (joined by Justices Clarence Thomas, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan) argued that license plates were a form of government speech. To substantiate this claim, Justice Breyer offered three reasons. First, the history of license plates shows they “have conveyed more than states’ names and vehicle numbers.” For example, state plates have included phrases such as “North to the Future” (Alaska), “Green Mountains” (Vermont), and “America’s Dairyland” (Wisconsin). Second, license plates “are often closely identified in the public mind with the State.” It is, after all, the state that requires vehicle owners to display license plates; moreover, the name of the issuing state is prominently displayed on the plate. Finally, the state maintains “direct control over the messages conveyed on its specialty plates.” In the case of Texas, the Board “has sole control over the design, typeface, color, and alphanumeric pattern for all license plates.”

Having established that specialty plates are a form of government speech, Justice Breyer argued that the Board could constitutionally deny SCV’s application. “As a general matter,”

Justice Breyer explained, “when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position.” The government could not function, he continued, unless it had the authority to “select the messages it wishes to convey.” To illustrate this point, Justice Breyer offered practical examples involving efforts to encourage recycling or promote vaccinations. It would be impossible for the government to promote these ends if opponents had the right to imbed messages arguing against recycling or vaccinations in the government’s speech.

In the penultimate paragraph of his decision, Justice Breyer squared the decision in *Walker* with *Wooley v. Maynard*. In *Wooley*, the Court had held that the state could not use license plates to make private vehicles into “mobile billboards” for the state’s preferred message. “And just as Texas cannot require SCV to convey the State’s ideological message,” Justice Breyer concluded, “SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.” This meant the Board could deny SCV’s specialty plate application without running afoul of the First Amendment.

Justice Samuel Alito, Jr., wrote a strongly worded dissent (joined by Chief Justice Roberts and Justices Antonin Scalia and Anthony Kennedy). The dissenters did not disagree with the majority about the government speech doctrine; rather, they disagreed with the majority’s claim that specialty license plates constituted a form of government speech. To Justice Alito, “the Court’s decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that the government finds displeasing.”

This dissent begins with a lengthy hypothetical story involving an observer standing beside a Texas highway and studying license plates. Over time, the observer would see an impressive array of specialty plates bearing the names of schools, organizations, and businesses. If the majority was correct, Justice Alito argued, each of these messages would constitute an example of government speech. To his way of thinking, this would be nonsensical, as the state is not making a statement when it allows Texas motorists to choose from “more than 350 messages, including many designs proposed by nonprofit groups or by individuals and for-profit businesses.” To illustrate some of the options, the dissent included a long list of specialty plates.

At one time, Justice Alito noted, license plates could have been considered a form of government speech. Beginning in the 1990s, however, that changed because states began to offer a choice of plates. Once it became apparent that these choices could be a significant source of revenue, Justice Alito continued, Texas realized it had “space available on millions of little mobile billboards.” When Texas began selling space to those who wanted to express an opinion on a license plate, he concluded, the state created a “limited public forum.”

The rules for government speech and limited public forums are quite different. “The First Amendment ‘does not regulate government speech,’ and therefore when government speaks, it is free to select the views that it wants to express.” By contrast, Justice Alito argued, “in the realm of private speech or expression, government regulation may not favor one speaker over another.”

Once Texas created a forum, according to his argument, the state lost the ability to pick and choose among messages. In this instance, the Board had rejected a message from a private group that wanted to post on some of the “mobile billboards” that the state had created on the grounds that some people might be offended by the Confederate battle

flag. “Messages that are proposed by private parties and placed on Texas specialty plates are private speech,” Justice Alito concluded, “not government speech. Texas cannot forbid private speech based on its viewpoint.” (NOTE: Justice Alito readily acknowledged the controversy over the flag in his opinion: “The Confederate battle flag is a controversial symbol. To the Texas Sons of Confederate Veterans, it is said to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War. To others, it symbolizes slavery, segregation, and hatred.”)

The decision in *Walker* was announced on June 18, 2015, the day after nine people were shot to death at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina. The alleged shooter, Dylann Roof, proudly displayed the Confederate battle flag in several photographs that appeared in the media. In the wake of the Charleston shooting, many have called for the removal of the flag from public places and monuments. Several states have also announced that they plan to discontinue specialty license plates featuring Confederate battle flags.

## Chapter 4: Defamation

### Food Libel and Ag-Gag Laws

Several states have adopted food libel laws, sometimes referred to as food disparagement or “veggie” libel laws, that allow food manufacturers or producers to sue people or groups that make disparaging comments about their food products. More recently, a handful of states have adopted so-called “ag-gag” laws, statutes that forbid undercover filming or photography at agricultural facilities. These measures share a common objective: To protect the agriculture industry from public criticism that may have significant financial consequences.

The state of Idaho adopted an ag-gag law making it illegal to secretly film animal abuse in agricultural facilities in 2015. The statute was adopted ten days after Mercy for Animals released a video showing workers beating, kicking, and jumping on cows at the Dry Creek Dairy in Hansen, Idaho. To prevent future videos, the Idaho legislature hastily enacted an “ag-gag” law that criminalized the sort of undercover investigations that exposed the activities at the Dry Creek Dairy. Under the provisions of the new law, it is illegal to hide media or political affiliations when applying for employment at a farm or requesting a tour of a feedlot. Another provision in the law makes it illegal to videotape animal abuse or safety violations at an agricultural facility without first obtaining permission. If convicted under the Idaho statute, a violator could be sentenced to a year in prison. A separate restitution provision allows an agricultural business to recover twice the economic loss suffered due to an illegal exposé.

The Animal Legal Defense Fund and a broad coalition of animal rights groups challenged the law in federal court, claiming the statute criminalized whistleblowing and violated their freedom of speech. On August 3, 2015, Federal Judge B. Lynn Winmill issued a 29-page decision in *Animal Legal Defense Fund v. Otter* (2015 U.S. Dist. LEXIS 102640), holding that the Idaho statute strikes at the “heart of important First Amendment values.” “The effect of the statute,” the judge continued, “will be to suppress speech by undercover investigators and whistleblowers concerning topics of great public importance: the safety of the public food supply, the safety of agricultural workers, the treatment and health of farm animals, and the impact of business activities on the environment.”

To assess the constitutionality of the Idaho statute, the court conducted a traditional constitutional analysis. “Generally speaking,” Judge Winmill observed, “a First Amendment challenge proceeds in three steps.” First, the court must determine whether the speech at issue is worthy of First Amendment protection. Second, the judge must determine whether the law is a content-based restriction and then decide on the appropriate standard of scrutiny. Finally, the court must determine whether the interests asserted by the state are sufficient to justify the restriction on speech.

With respect to the first step, Judge Winmill noted, “food production is not a private matter,” as “food production and safety are matters of the utmost public concern.” Moving to the second step, the judge ruled the Idaho law was content-based because it targets “undercover investigators who intend to publish videos they make through the press and seeks to suppress speech critical of animal agricultural practices.” Because the restriction was content-based, the precedent required application of a strict scrutiny standard. Finally, Judge Winmill dismissed the state’s interest in protecting private property and business, reasoning that the state had laws against trespass, fraud, and defamation. These laws, the judge noted, safeguard the property and privacy interests of the state, but do so “without infringing on free speech rights” of the animal rights activists.

The decision in *Animal Legal Defense Fund v. Otter* is important because it is the first time a federal court has ruled on the constitutionality of an ag-gag statute. Additional litigation is likely because Montana, Utah, North Dakota, Missouri, Kansas, and Iowa have similar laws. North Carolina recently adopted an ag-gag law that goes into effect in January 2016. A challenge to the Utah law is currently pending in federal court, and it is probably just a matter of time until more suits are filed. Although animal rights activists have initiated most of the challenges, the Reporters Committee for Freedom of the Press and other media organizations are also concerned because they believe ag-gag statutes limit the First Amendment rights of journalists and others concerned with food safety.

## Chapter 5: Privacy

### European Court of Justice

**Case:** *Google Spain v. AEPD and Mario Costeja González*, Case C-131/12 (May 13, 2014).

**Subject:** The European Court of Justice held that an Internet search engine operator is responsible for removing personal information appearing on web pages published by third parties.

**Summary of Decision:** *La Vanguardia*, a Spanish newspaper, published two announcements about the forced sale of property to pay outstanding tax debts in its print edition in 1998. In November 2009, one of the property owners, Mario Costeja González, contacted the newspaper to complain that a Google search of his name produced a link that led to the old announcement. González asked the newspaper to remove the posting on the grounds that the sale had happened years earlier and that the information was no longer relevant. The newspaper replied that it could not remove the posting as it had been made on the order of the Spanish Ministry of Labour and Social Affairs.

González then contacted Google Spain and asked that the link to the announcement be removed. Google Spain, in turn, forwarded the request to Google, Inc., its U.S. parent company, which is based in California. When Google did not remove the posting, González

filed a complaint with the Spanish Data Protection Agency asking that the newspaper and Google be ordered to remove the link to the forced sale. In July 2010, the director of the agency rejected the complaint against *La Vanguardia*, but upheld the complaint against Google and called on the search engine to remove the links so that the announcement was not accessible.

Google and Google Spain appealed. The case eventually found its way to the Court of Justice of the European Union. In a May 2014 decision, the European Court cited the European Directive on the Protection of Individuals with Regard to the Processing of Personal Data, adopted in 1995, which protected “the fundamental rights and freedoms of natural persons, and in particular their right to privacy.” Under this directive, the Court held, Google must honor a request to delete links to personal information from search results unless there was a strong public interest in maintaining the link.

In response, Google created an online form that E.U. citizens could use to request the removal of links to search results that are “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed.” During the following year, according to *The New York Times*, Google received requests to delink roughly one million web sites. Slightly more than 40 percent of those requests have been honored; the content has been removed from the appropriate European web sites. For example, Google would respond to a response from a German citizen by deleting the results in question from Google.fr and Google.de. The links would remain on Google.com, however, the U.S. version of the search engine.

In August 2015, the French data protection regulator (the Commission Nationale de l’Informatique et des Libertés, or CNIL) held that this remedy was not sufficient. To enforce the European Union’s “right to be forgotten,” CNIL ruled that objectionable content should be removed from all Google sites, including Google.com. Simply put, this would mean that the right to be forgotten in Europe would extend to the United States. Content have to be removed not only from Google.fr and Google.de, but also from the results lists produced by all Google search engines.

Peter Fleischer, Global Privacy Counsel for Google, responded, “this is a troubling development that risks serious chilling effects on the web.” If national laws are applied to an international medium, Fleischer predicted, the consequences could be ominous: “There are innumerable examples around the world where content that is declared illegal under the laws of one country, would be deemed legal in others: Thailand criminalizes some speech that is critical of its King, Turkey criminalizes some speech that is critical of Ataturk, and Russia outlaws some speech that is deemed to be ‘gay propaganda.’”

To date, Google has refused to honor CNIL’s order. The dispute appears to be headed for the European Courts. At the same time, countries in Latin American and Asia are actively considering their own delinking laws. The issue promises to be difficult because there is no easy way to apply national laws to a medium of communication that easily transcends national boundaries. At the very least, the controversy will force a broader discussion about the meaning of the right of privacy in a digital age.



## Chapter 10: Special Problems of a Free Press

### Reporter's Privilege (James Risen)

James Risen is a two-time Pulitzer Prize-winning journalist who has reported for the *New York Times*, among other newspapers. He has written on many topics, but is best known for his work on the activities of the U.S. government, most notably the Central Intelligence Agency (CIA). In one of his books about the agency, *The State of War: The Secret History of the CIA and the Bush Administration* (2006), Risen described a series of legal or potentially illegal actions undertaken by the George W. Bush Administration. The book also detailed a covert initiative, started during the Clinton Administration, that was designed to delay Iran's development of a nuclear weapon by providing disinformation such as faulty nuclear blueprints. The CIA asset involved was a former Russian scientist that the government had code named "Merlin." Instead of delaying Iran's nuclear program, Risen argued, Operation Merlin had actually provided Iran with some useful information.

Immediately after *The State of War* was released, then-Attorney General Alberto Gonzales announced the Department of Justice was actively investigating disclosures in Risen's book and in other security leaks. During the investigation, the government came to suspect that Jeffrey Sterling, a former CIA operations officer, might have leaked classified information to Risen. Among his assignments with the CIA, Sterling had been assigned to Operation Merlin from November 1998 through May 2000.

In 2008, the Department of Justice subpoenaed Risen so that federal investigators could question him about his sources. Risen successfully fought the subpoena, which expired in 2009. This did not end the matter, however, as Sterling was indicted under the Espionage Act of 1917 on December 22, 2010. In an effort to prove the case against Sterling, the Obama administration renewed the subpoena for Risen's testimony.

Risen once again challenged the subpoena, and a federal judge quashed it. In July 2013, the Fourth Circuit Court of Appeals reinstated the subpoena on a 2 to 1 decision and held that Risen could be compelled to testify at Sterling's trial. "So long as the subpoena is issued in good faith and is based on a legitimate need of law enforcement," the Fourth Circuit concluded, "the government need not make any special showing to obtain evidence of criminal conduct from a reporter in a criminal proceeding." Risen sought relief from the Supreme Court, but in a one-line order issued on June 2, 2014, the justices denied certiorari and declined to hear Risen's appeal.

While Risen was challenging the government's subpoena, then-Attorney General Eric Holder announced a change in policy. The Department of Justice issued new guidelines to federal prosecutors, governing when reporters should be compelled to testify. Under the new guidelines, federal prosecutors must get approval from the attorney general's office before seeking a subpoena that would compel a journalist to release confidential information.

In January 2015, the federal government called Risen as a witness in a hearing about Sterling. From the witness stand, Risen said he would not reveal his sources or offer any details about where he gathered information. Under orders from Attorney General Holder, prosecutors did not insist that Risen reveal his sources. Had they pushed the issue, and had Risen refused to testify, the judge could have held the reporter in contempt and sent him to jail or imposed a hefty fine.

"Mr. Risen's under-oath testimony has now laid to rest any doubt concerning whether he will ever disclose his source or sources for Chapter 9 of *State of War* (or, for that matter,

anything else he's written). He will not," prosecutors wrote in court filings. "As a result, the government does not intend to call him as a witness at trial."

Even without Risen's testimony, Sterling was convicted by a federal jury of nine criminal counts for leaking classified information to the *New York Times* reporter, detailing the CIA's attempt to disrupt Iran's nuclear program. On May 11, 2015, Sterling was sentenced to three and a half years in prison by U.S. District Judge Leonie Brinkema. When imposing the sentence, Judge Brinkema said there was "no more critical secret" than the identity of a CIA operative such as Merlin.

## Federal Shield Law

Following the Supreme Court's 1972 decision in *Branzburg v. Hayes* (text, pp. 244–245), many media professionals urged Congress to pass a federal journalists' privilege law—often described as a "shield law"—to protect reporters. Although these efforts failed, a series of high-profile cases reinvigorated the debate (text, pp. 270–272). A shield law bill passed the House of Representatives by a wide margin in October 2007, but a Republican filibuster effectively killed the measure in the Senate. Then—Attorney General Michael Mukasey had warned that President Bush would probably veto the bill if it did pass.

The election of Barack Obama energized supporters of a federal shield law, as candidate Obama had publicly stated that he supported such legislation. New shield law bills were introduced in both houses of Congress. These efforts lost momentum, however, after Edward Snowden leaked classified information about the National Security Agency. Opponents of the proposed legislation seized on the threat to national security and warned that leakers such as Snowden might try to claim that they were journalists or reporters entitled to protection under the shield law from court-ordered subpoenas.

One particularly difficult issue involves the definition of a journalist. Some legislators would limit protection to paid employees of recognized media outlets. Such a definition excludes individuals such as Snowden who occasionally post content on the Internet. To deter future disclosures, other legislators have argued that there should be a special exception for the release of information that threatens national security.

While Congress tries to sort out these issues, Representative Alan Grayson (D-Fla.) tried a different approach. In June 2015, he inserted language into the "Commerce, Justice, Science, and Related Agencies Appropriations Act," which passed the House of the Representatives on a 225-183 vote. Grayson's one-sentence amendment declared "None of the funds made available by this Act may be used to compel a person to testify about information or sources that the person states in a motion to quash the subpoena that he has obtained as a journalist or reporter and that he regards as confidential."

Grayson's amendment is interesting because it broadly defines those eligible for protection. Instead of limiting protection to those employed by media organizations, Grayson claims his language defines journalism as an act. In other words, bloggers or concerned citizens would be entitled to protection from government subpoenas, even if they did not work for media outlets. It is not certain how Grayson's amendment will fare in the Senate. Similar language was included in an appropriations bill that passed the House in 2014. That language did not, however, survive the reconciliation process: the shield provision was deleted before the House of Representatives adopted the final appropriations bill.

## Chapter 11: Constraints of Time, Place, and Manner

### U.S. Supreme Court

**Case:** *Reed v. Town of Gilbert, Arizona*, 135 S.Ct. 2218, 2015 U.S. LEXIS 4061 (June 18, 2015); the appellate court decision is *Reed v. Town of Gilbert*, 707 F.3d 1057, 2013 U.S. App. LEXIS 2715 (9th Cir. Ariz., 2013).

**Subject:** A municipal sign code restricting the size, number, location, and duration of temporary directional signs is unconstitutional.

**Summary of Decision:** Gilbert, a fast-growing town of two hundred thousand people in central Arizona, adopted a comprehensive sign code. Under this code, anyone who wanted to post an outdoor sign needed to obtain a permit. There were, however, twenty-three separate exemptions, including one for “Temporary Directional Signs Relating to a Qualifying Event.” Within the exempted categories, additional restrictions dealt with the size of the sign, how long the sign could be displayed, and whether signs could be placed on public rights of way (such as median strips along roads).

The Good News Presbyterian Church, a cash-strapped congregation consisting of thirty adults and ten children, does not have a permanent building. Led by Pastor Clyde Reed, it holds religious services in space rented from a local elementary school. To invite the community to worship, the church posted fifteen to twenty temporary directional signs before services. On two occasions, the town’s Sign Code compliance manager cited the church for violating the sign code and church signs were confiscated. When their efforts to reach an accommodation with the town proved unsuccessful, Pastor Reed and his church filed a complaint in federal court in 2007, arguing that the sign code limited its “religious speech” in violation of the First Amendment.

The original lawsuit was amended as the town liberalized the sign code. On two separate occasions, the U.S. Court of Appeals for the Ninth Circuit ruled that “Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed” and further held that the town’s “interest in regulat[ing] temporary signs are unrelated to the content of the sign.” Because the sign code was “content neutral,” the Ninth Circuit applied an intermediate scrutiny test and held that the ordinance was a legitimate “time, place, and manner” restriction that addressed valid concerns about road safety and aesthetics. With the assistance of the Alliance Defending Freedom, Pastor Reed and the Good News Presbyterian Church appealed to the Supreme Court.

In a unanimous decision, the justices held that Gilbert’s sign code was unconstitutional. Writing for the majority, Justice Clarence Thomas (joined by Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, Samuel Alito, and Sonia Sotomayor) noted that the sign code was “content based on its face.” To prove this point, Justice Thomas noted that “It defines ‘Temporary Directional Signs’ on the basis of whether a sign conveys the message of directing the public to church or some other ‘qualifying event.’ It defines ‘Political Signs’ on the basis of whether a sign’s message is ‘designed to influence the outcome of an election.’ And it defines ‘Ideological Signs’ on the basis of whether a sign ‘communicat[es] a message or ideas’ that do not fit within the Code’s other categories. It then subjects each of these categories to different restrictions.”

Even after the sign code was amended, “Temporary Directional Signs” were treated less favorably than “Ideological Signs” and “Political Signs.” Justice Thomas noted that

“temporary directional signs may be no larger than six square feet.” They could be placed on private property or on a public right of way, but “no more than four signs may be placed on a single property at any time.” Finally, and perhaps most significantly, signs “may be displayed no more than 12 hours before the ‘qualifying event’ and no more than 1 hour afterward.” (This last restriction was particularly problematic for the Good News Presbyterian Church, as it meant signs for a 9 a.m. service on Sunday morning could not be posted before 9 p.m. on Saturday night.)

Having established that Gilbert’s Sign Code was a content-based restriction on speech, Justice Thomas applied a strict scrutiny test, “which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” Neither of the interests offered by the town—preserving Gilbert’s aesthetic appeal and traffic safety—was sufficient. With respect to aesthetics, Justice Thomas noted that “temporary directional signs are ‘no greater an eyesore,’ than ideological or political ones.” So too, “the Town has offered no reason to believe that directional signs pose a greater threat to safety than to ideological signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.” In the final analysis, Justice Thomas concluded, “the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest.”

Although the justices were unanimous in their conclusion that the Gilbert ordinance was unconstitutional, not everyone agreed with Justice Thomas’s reasoning. In a concurring opinion, Justice Kagan (joined by Justice Ruth Bader Ginsburg and Justice Stephen Breyer) worried that Justice Thomas’s strict scrutiny analysis placed many sign ordinances in “jeopardy.” To her way of thinking, “our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one.” So, for example, in *City of Ladue v. Gilleo* (1994), another case involving a municipal sign ordinance, the Supreme Court did not apply a strict scrutiny test because the local ordinance’s overbreadth made it “unconstitutional under any standard.”

Instead of applying a strict scrutiny analysis, Justice Kagan would have followed the Court’s reasoning in *Ladue*. The Town of Gilbert, for example, “provides no reason at all for prohibiting more than four directional signs on a property while placing no limit on the number of other signs.” Along the same lines, “the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet.” Absent a reasonable basis for distinguishing between directional signs and other types of signs, Justice Kagan concluded the sign code “does not pass strict scrutiny, or intermediate scrutiny or even the laugh test.” To her way of thinking, there was “no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us.”

Although Justice Thomas and Justice Kagan ultimately agreed that the Gilbert Sign Code was unconstitutional, the reasoning used in the majority and concurring opinion matters. Under Justice Thomas’s strict scrutiny analysis, it will be much easier for an aggrieved party to challenge a municipal sign ordinance. (In her concurring opinion, Justice Kagan predicted, “This Court may soon find itself a veritable Supreme Board of Review.”) In contrast, under Justice Kagan’s overbreadth analysis, a sign ordinance might withstand constitutional scrutiny if the municipality could offer good reasons for distinguishing among different types of signs.

## Chapter 13: Copyright

### Imitation and Copyright Infringement

On March 10, 2015, a federal jury in Los Angeles held that the song “Blurred Lines,” performed by Robin Thicke in collaboration with producer Pharrell Williams and rapper Clifford Harris, Jr., infringed on “Got to Give It Up,” a 1977 song by Marvin Gaye. The jury awarded \$7.3 million in damages to Nona and Frankie, Gaye’s children. (Gaye had died in 1984.) The jury’s award was later reduced to \$5.3 million by the trial judge. The financial award is significant, but the underling reasoning might be even more consequential.

The case began in 2013 when the Gaye estate approached Thicke, Williams, and Harris and asked for compensation. To the estate, it was clear that “Blurred Lines” had both the sound and the feel of “Got to Give It Up.” Rather than paying the estate, Thicke, Williams, and Harris went to court and asked for a declaratory judgment holding that there was no copyright infringement. Finding substantial similarity between the two songs, the judge declined to issue the order (*Thicke v. Gaye*, 300 F.R.D. 120, 2014 U.S. Dist. LEXIS 62056 (S.D. N.Y. 2014)). When the parties could not reach an out-of-court settlement, the case went to trial.

Early music cases generally involved claims that the defendant had copied melodies or lyrics protected by copyright. More recently, courts have considered cases that involve songs that “sample” passages from copyrighted works. The “Blurred Lines” case is different, however, because it involves the difference between inspiration and plagiarism. While Thicke and Pharrell admitted to being inspired by Gaye’s work, they denied overtly copying Gaye’s work. The Gaye estate rejected this defense, arguing that “Blurred Lines” went beyond inspiration and constituted actionable copyright infringement.

When issuing instructions to the jury, U.S. District Court Judge John A. Kronstadt told jurors to compare the sheet music from “Blurred Lines” to “Got to Give It Up.” This meant the eight jurors focused on the chords, the melodies, and the lyrics. The jurors did not have the opportunity to listen to “Got to Give It Up,” which would have allowed them to compare the tone, feel, and intensity of the recordings.

The judge’s instructions and the jury’s decision have been roundly criticized. Many songwriters have borrowed elements of style or feel from the works of other artists. For example, it has been observed that the Rolling Stones borrowed their style from Chuck Berry. “The freedom of artists and other creators to borrow from each other is connected with the principle that ideas cannot be copyrighted,” Professor Tim Wu of the Columbia Law School has written, “a notion that is essential to free speech and artistic expression.”

This is likely to be the first round in an extended legal battle. Attorneys for Thicke and Williams have already announced plans to appeal the jury’s decision. The Gaye family members have asked the judge to enjoin further distribution of “Blurred Lines” until questions of credit and royalties can be resolved. Anyone with an interest in music or copyright law will want to stay abreast of developments in this case.