APPEALS COURT RULING AFFIRMS FIRST AMENDMENT PROTECTION FOR ABHORRENT, RACIST LANGUAGE IN CERTAIN SITUATIONS

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Although some state and local governments are looking for ways to prohibit abusive, highly offensive speech that is directed toward someone, the First Amendment still protects that speech, unless it is designed to provoke a violent response from a particular person. That's according to a recent ruling from the United States Fourth Circuit Court of Appeals in *United States v. Bartow*, 2021 WL 1877821 (4th Cir. May 11, 2021), in which the court weighed the defendant's free speech rights against a Virginia statute criminalizing abusive language that is reasonably calculated to provoke a violent response.

Virginia has a criminal statute that makes such speech a "Class 3 misdemeanor" if it is, "under circumstances reasonably calculated to provoke a breach of the peace." In *Bartow*, the defendant, a retired Air Force Lieutenant Colonel, was convicted of violating that statute when he engaged in a heated exchange with patrons and store personnel at the Quantico Marine Corps Exchange. During the exchange, the defendant objected to being greeted with "Good morning, may I help you?" and being called "Sir." At one point in the exchange, a "civilian explained to [the defendant] that 'the reason that [employees at the Exchange] say 'sir' or 'ma'am' is because you are purchasing merchandise on a military installation.' [The defendant] then said: 'If I called her a [n-word], would she still say good morning?'" At that point, the defendant was escorted from the store and arrested by base personnel.

The defendant was convicted after a bench trial before a United States Magistrate Judge and fined $500. The District Court Judge affirmed his conviction. The defendant then appealed to the Fourth Circuit Court of Appeals.

The Court began its analysis by reciting the well-established principle that there are certain categories of speech that can be restricted consistent with the First Amendment, including obscenity, defamation, fighting words, fraud, incitement, and speech integral to criminal conduct. The appeal focused on "fighting words." "Fighting words" were originally defined "as words that 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). But over time, the "inflict injury prong" was dropped and "[n]ow, the Government may only criminally prosecute as a 'fighting word' speech that is 'shown likely to produce a clear and present danger of a serious

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substantive evil that rises far above public inconvenience, annoyance, or unrest.'" *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)). And finally, the Supreme Court has made it clear that the "fighting words" must be a direct, in person, insult. *Texas v. Johnson*, 491 U.S. 397, 409 (1989).

Applying these factors to the defendant's case, the Appellate Court held that the language used was abusive under any definition. The appeal turned, however, on the Government's burden to prove to whom the challenged language was individually addressed and that "the language was likely to provoke an immediate violent reaction by that person, or a reasonable person in their position." The Court noted that the African American individuals to whom the epithet was directed did not react violently and no testimony was offered by the Government to indicate a violent response was a potential outcome of the subject of the language. While vacating the conviction, the Court noted: "Over the decades, the Court has repeatedly determined that the First Amendment places considerable limits on the criminalization of speech. We must abide those limits, even if that means, as it does here, that shameful speech escapes criminal sanction."

Takeaway. No matter how disgusting, vile, or abhorrent language is, if it does not meet the narrowly tailored definition of "fighting words", it cannot be criminalized. To be criminal, the language must be in person, directed at a particular individual or individuals, and likely to provoke an immediate, violent response by that individual or those individuals, or a reasonable person in their position. The United States Supreme Court has not affirmed a "fighting words" conviction since *Chaplinsky* in 1942, but states continue to criminalize such speech and a number of defendants have been convicted under such statutes in recent years. *See e.g. State v. Liebenguth*, No. 20145, —— Conn. ——, —— A.3d ——, 2020 WL 5094669 (Conn. Aug. 27, 2020).

For any question you have regarding whether this recent decision impacts any of your organization's activities, please contact Ryan Cummings (716.848.1665) or Aaron Saykin (716.848.1345).