# Memo

**To:** William Whitson, City Manager, Flagler Beach

**From:** Patrick Brackins, Esq.; Drew Smith, Esq.

**Date:** June 24, 2021

**Re:** Political Protests and Signs in Veteran's Park

City Officials have recently received several inquiries, public outcry, and requests regarding what can be done with respect to certain political protests in Veteran's Park where signs, slogans and speech are utilized containing foul, profane and/or offensive language. One such example given was a sign containing a well-known expletive, which read: "F#$% Biden."

We were asked to provide a memorandum covering First Amendment concerns. While we provide that analysis, including the widely-known United States Supreme Court's authority directly on point, we must begin by stating the basic notion that governmentally proscribed "[v]iewpoint discrimination is poison to a free society." *Iancu v. Brunetti*, 139 S.Ct. 2294, 2302 (2019), J. Alito, concurring.[1] Whatever passions arise, the City must keep in mind that the First Amendment's protections from state or government action abridging the freedom of expression have always been intended and applied to protect those expressions that many or most citizens

[1] Justice Alito's full statement is instructive:

> But in many countries with constitutions or legal traditions that claim to protect freedom of speech, serious viewpoint discrimination is now tolerated, and such discrimination has become increasingly prevalent in this country. At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination.

*Id.* at 2302-03.

find offensive. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).[2] Moreover, it is well-settled that the constitution protects criticism of the government and government officials. *New York Times v. Sullivan*, 376 U.S. 254, 273-76 (1964).

**A. *Cohen v. California*, 403 U.S. 15 (1971).**

Specifically, with respect to a sign or placard which reads "F#$% Biden," there is a binding United States Supreme Court case directly on point. It has been the law of the land in this context for four decades. In *Cohen v. California*, 403 U.S. 15, 16-17 (1971), Paul Robert Cohen was arrested and convicted for "'maliciously and willfully disturb[ing] the peace or quiet . . . by offensive conduct'" for wearing a jacket bearing the words "F#$% the Draft" into a California courthouse. *Id.* Women and children were present and viewed Mr. Cohen's jacket. The conviction was based solely upon "the asserted offensiveness of the words Cohen used to convey his message to the public." *Id.* at 18. In short order, the Supreme Court overturned the conviction as violating the First Amendment. *Id.* at 15-26.

Despite the use of what many consider to be a particularly offensive swear word, which the Court called a "scurrilous epithet" (*id.* at 14), the Court unequivocally stated that "[t]his is not . . . an obscenity case," because obscenity deals only with expressions which "must be, in some significant way, erotic." *Id.* at 9 (emphasis added and citing *Roth v. United States*, 354 U.S. 476 (1957)). It simply was not plausible that anyone could associate the manner in which the expletive was used as relating to anything erotic. *Id.* Thus, whatever an individual or the community at large's views of this four-letter word are, it is not a legal obscenity in this context.

The Court also rejected the notion that the use of the expletive in this context constitutes "fighting words" which have far less protection under the First Amendment. "Fighting words" are those expressions or "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction." *Id.* at 10. The Court found that "[w]hile the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not directed to the person of the hearer." *Id.* In other words, "F#$% the Draft" or "F#$% Biden" is not personally directed at any particular person within earshot and "[n]o individual actually or likely

[2] Indeed, the First Amendment was a direct reaction to the common law of sedition in England, which made it a crime to criticize the government even, perhaps especially, if the criticism was true. *See* Erwin Chemerinsky, *Constitutional Law – Principles and Policies*, 2d ed. (2002). Thus, protection of political expression is the foundation of the First Amendment.

to be present could reasonably have regarded the words . . . as a direct personal insult." *Id.* at 10. Thus, this is not a case about "fighting words."

Addressing this specific epithet, the Court concluded:

> For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

*Id.* at 19. The Court found that the use of the word "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well." *Id.*[3] This means that "'one of the prerogatives of American citizenship is the right to criticize public [persons] and measures – and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.'" *Id.* at 20 (quoting *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)). Thus, the Court held that the government "may not . . . make the simple public display here involved of this single four-letter expletive a criminal offense." *Id.* at 26.[4]

Though *Cohen* seems to have settled this matter, at least with respect to the particular expletive at issue, courts and communities across our nation understandably continue to grapple with this issue. As this memorandum is drafted, the United States Supreme Court issued its latest decision on the "F-word." In *Mahanoy Area School Dist. v. B.L.*, No. 20-255, 2021 U.S. LEXIS 3395 (June 23, 2021), the Court considered whether a school district's suspension of a cheerleader for posting the following on Snapchat violated the First Amendment: "F#$% school f#$% softball f#$% cheer f#$% everything."

In an 8-1 decision, the Court held the suspension violated the First Amendment. The Court expressly found that B.L.'s repeated use of the particular expletive "while crude, did not amount to fighting words" and "was not obscene as this Court has understood that term." *Mahanoy Sch. Dist.*, 2021 U.S. LEXIS 3395 at *16 (citing *Cohen*, 403 U.S. at 19-20). *See also Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (First Amendment protects "even hurtful speech on public issues to ensure that we do not stifle public debate."). Put simply, B.L.'s use of the expletive off school

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[3] Discussing *Cohen* in 2019, Justice Breyer reflected that "profanity is still properly understood as protected First Amendment content," and "[t]he essence of *Cohen's* discussion is that profanity can serve to tweak (or amplify) the viewpoint that a message expresses, such that it can be hard to disentangle the profanity from the underlying message – without the profanity, the message is not quite the same." *Brunetti*, 139 S. Ct. at 2315 (2019), J. Breyer concurring in part, dissenting in part.

[4] The Court's reasoning has been consistently followed in subsequent decades, including the overturning of a trademark statute used to prohibit the trademark "FUCT". *See Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

grounds "encompassed a message, an expression of B.L.'s irritation with, and criticism of, the school and cheerleading communities," and, therefore, "the school's interest in teaching good manners is not sufficient . . . to overcome B.L.'s interest in free expression." 2021 LEXIS 3395 at *18-19.

**B. Traditional Public Forums.**

Whenever presented with a First Amendment issue concerning the freedom of expression or speech, one of the first steps in the analysis is to determine where the expression is occurring and what have the courts said about the particular forum. Here, we are dealing with a public park and/or public sidewalks. These places are considered traditional public forums and "[i]n such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions are 'content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added). Any other restrictions, "such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Id.* Thus, requiring a permit for any gathering of over 100 individuals in a public park may be permissible because it is a reasonable time, place and manner restriction and has nothing to do with the content or viewpoint of the group. While a regulation generally banning protests in Veteran's Park would violate the First Amendment because there is no plausible compelling governmental interest in prohibiting protests in a traditional public forum like a city park. Similarly, a regulation generally prohibiting the use of profanity in a public park or on public sidewalks would also violate the First Amendment. On the other hand, general regulations such as codes of conduct during public meetings likely do not violate the First Amendment because there is a compelling governmental interest in conducting its meetings without unreasonable interruptions and in maintaining decorum.

**C. Matters of Public Concern.**

Speech or expression on matters of public concern "occup[y] the highest rung of the hierarchy of First Amendment values, and [are] entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). Expression "deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is the subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Id.* at 181 (internal quotations and citations omitted). There is no question that anything remotely related to the president, our former president, elections, or our federal government is a matter of public concern. Accordingly, any attempt to regulate such expression would have to be supported by a compelling governmental interest to avoid violating the First Amendment. The viewpoint or

content of the expression is legally irrelevant when dealing with matters of public concern, and if the viewpoint or content is the basis for the regulation it is almost certainly a violation.

**D. Fighting Words – the Law and Reality.**

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Supreme Court introduced the term "fighting words" into the law. It held that "fighting words," words which by their very utterance inflict injury or tend to incite an immediate breach of the peace, have little protection under the First Amendment. The Court upheld the conviction of a Jehovah's Witness who pointed at a listener in the public square and said: "You are a God damned racketeer" and "a damned Fascist and the whole of Rochester are Fascists or agents of Fascists." While *Chaplinsky* is a landmark case and creates an exception to First Amendment protections, the most important point for the City to understand is that since 1942 the United States Supreme Court has not upheld a single fighting words conviction. Instead, with cases like *Cohen*, the Court has continually narrowed the scope of "fighting words" to such an extent that it arguably no longer has much if any practical application. For example, in *Street v. New York*, 394 U.S. 576, 592 (1969), the Court stated that there are few real "fighting words," and many forms of speech or expression that some find to be inherently inflammatory are not fighting words. Thus, flag burning, is protected expression. Moreover, political speech, even profanity laced political speech, directed to the president, a former president or the federal government occurring in a public park within Flagler Beach, Florida, would not constitute fighting words because it is not directed at a particular listener.

It is highly doubtful that a line can be drawn through governmental regulation that would meet First Amendment scrutiny. Instead, the line is crossed when the peace is actually broken through assault, battery or mutual combat, and our state criminal statutes provide the appropriate remedies for those actions. For example, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the City passed an ordinance prohibiting the placement of symbols, objects, characterizations, or graffiti, including burning crosses and Nazi swastikas on public or private property if the person knows or has reason to know that it will cause anger, alarm or resentment on the basis of race, color, creed, religion or gender. In a 9-0 opinion, the Supreme Court held the ordinance unconstitutional. If swastikas or burning crosses do not constitute "fighting words," it is difficult if not impossible to identify for the City what does. Accordingly, it is recommended that any proposed regulation not be based any conclusion that the subject matter constitutes "fighting words."

**E. Conclusion.**

While content or viewpoint neutral regulations which impose only reasonable time, place and manner restrictions on traditional public forums like public parks and public sidewalks may be considered so long as they are narrowly tailored, serve a compelling governmental interest,

and which allow for viable alternative forms of communication, any other regulations related to the recent public tumult would likely violate well-established and binding First Amendment law.