



ACLU Files Amicus Brief Defending First Amendment Principles

State prosecution of KKK leafletter raises significant constitutional concerns

FOR IMMEDIATE RELEASE

Oct. 24, 2016

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MONTPELIER –The ACLU of Vermont has filed a “friend of the court” brief with the Vermont Supreme Court in the case of William Schenk, who was charged with disorderly conduct after he left KKK recruitment leaflets outside the homes of two Burlington women of color last year. The ACLU opposes the criminal prosecution on the grounds that the government seeks to punish Schenk based solely on the content of his speech. Allowing the prosecution to stand, the ACLU argues, would narrow First Amendment freedoms afforded to all and chill other forms of political speech.

ACLU of Vermont Staff Attorney Jay Diaz: “The Constitution does not allow the government to pick and choose which speech it will permit. Instead, it allows the community to respond to hate speech with counter-speech—and that’s exactly what happened in this case when hundreds of people turned out to oppose the hateful message of the KKK. That’s how our democracy is supposed to function, not by criminalizing the speech we despise.”

The ACLU is not involved in Schenk’s defense, and its brief to the Court specifically describes the KKK as a “despicable hate group which advocates an abhorrent ideology of white supremacy.” The ACLU’s brief advocates in favor of longstanding constitutional principles that extend First Amendment protections to inflammatory, vicious, and even hateful speech, as well as targeted leafletting.

While acknowledging that not all speech is entitled to First Amendment protection, including so-called “true threats,” the ACLU explains that Schenk’s case does not fall within that narrow exception. In particular, the ACLU argues that the State failed to produce actual evidence that Schenk intended to threaten the leaflet recipients. Without such evidence, his prosecution represents a significant infringement on well-established First Amendment rights. The ACLU’s brief cites to *Virginia v. Black*, a 2003 case in which the U.S. Supreme Court ruled it unconstitutional to prosecute someone for cross-burning absent clear evidence of intent to threaten. The same principle applies to the Schenk case, the ACLU argues.

The ACLU is also concerned that the Vermont statute under which Schenk was prosecuted impermissibly requires criminal defendants to prove their innocence and allows juries to convict

absent any evidence of actual intent to do harm. The ACLU's brief states: "Since time immemorial our justice system has recognized that defendants are innocent until proven guilty, but in this circumstance [Vermont law] turns that notion on its head."

ACLU of Vermont Executive Director, James Lyall: "To be clear, the ACLU of Vermont condemns the KKK and all that it stands for. Every day, the ACLU fights to dismantle institutional racism and discrimination in Vermont and the country at large. We will continue that work while also fighting to preserve core First Amendment freedoms, recognizing that these objectives are not at odds but are in fact mutually dependent. Our system of justice recognizes that intentional, direct threats are not deserving of constitutional protection, and nothing about this case should be taken to suggest otherwise."

Schenk pled "no contest" in May on condition that he could appeal the Chittenden criminal court's decision on his motion to dismiss the charges. He has filed an appeal with the Vermont Supreme Court. A hearing on Schenk's appeal has not yet been scheduled.

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