No. 19 –

IN THE
SUPREME COURT OF THE UNITED STATES
________ Term, 2019

JOHNATHAN MASTERS

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

One area where free speech is under significant attack is within this country's school system, where perhaps the most vulnerable class of individuals in this country – children – are under the threat of criminal prosecution and incarceration merely for vague speech that the Founding Fathers would have not considered problematic.

Specifically, Kentucky Revised Statute 161.190 criminalizes free speech in the following way:

> Whenever a teacher, classified employee, or school administrator is functioning in his capacity as an employee of a board of education of a public school system, it shall be unlawful for any person to direct speech or conduct toward the teacher, classified employee, or school administrator when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school.

In an era when being offended is traded as social capital, this statute leaves a speaker within a school, often children, vulnerable to criminal punishment for speech that is ordinarily protected and to conviction and punishment because of how hearers react to the speech.

This means two people could say the exact same thing to a teacher, with it being permissible for one and criminal for the other, solely because of how that teacher who heard the speech reacted. This means the speaker must guess what speech will lead to their imprisonment based on the possible reaction any person at a school could theoretically have when the person hears the speech.

The chilling effect of this statute poses a clear danger to speaker's First Amendment rights and inhibits discussion of difficult topics in school for fear that the speech might cause a reaction that undermines the "good order and discipline", and could lead to the speaker spending three hundred and sixty five days in a county jail. It inhibits students and parent's rights to speak to what they believe for fear that the reaction to their belief might subject them to criminal conviction and imprisonment. Just about any speech could result in incarceration because it is impossible to predict in this day and age what speech might "undermine good order and discipline." Simply, under the statute, no speech is clearly safe, thereby eviscerating the First Amendment within the school systems, which is something the Founding Fathers could not have anticipated and certainly would not have wanted to be the intended consequences of the First Amendment.

Statutes like the one at issue here will continue to arise unless this Court resolves the significant issues at hand, and the First Amendment, as it relates to schools, will be severely undermined without the Court's intervention.

The questions presented are:

1. Does criminalizing the content of free speech based solely on how a person who heard the content reacted, or interpreted the content, violate this Court's established First Amendment jurisprudence in *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), which hold that school students still possess free speech rights and that those rights cannot be governed by the yard stick of vague annoyance?

2. Does it violate the First Amendment to criminalize free speech if the content of the speech causes consternation that disrupts the "good order and discipline" of a school?

3. Even if speech that disrupts "good order and discipline" could be criminalized, is a statute that criminalizes speech if the speaker knew, or should have known, the speech would "undermine the good order and discipline of the school," unconstitutionally vague under the Court's long-standing void for vagueness doctrine when the statute does not provide a narrowing definition of "good order and discipline"?

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No. 18 -
IN THE
SUPREME COURT OF THE UNITED STATES
________ Term, 2018

JOHNATHAN MASTERS

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

Petitioner Johnathan Masters requests that this Court issue a writ of certiorari to review the Kentucky Court of Appeals decision ruling that KRS 161.190 complies with the First and Fourteenth Amendments to the United States Constitution. Petitioner asks this Court to find that Jonathan Masters has standing to contest violation of the 1st and 14th Amendments evident in this case.

Opinions Below

The Kentucky Supreme Court's decision to deny discretionary review of the Kentucky Court of Appeals decision can be found at *Johnathan Masters v. Commonwealth of Kentucky*, 2017-SC-000628 (Ky. 2018), and appears at page 1 of the appendix. The Kentucky Court of Appeals Opinion can be found at *Johnathan Masters v. Commonwealth of Kentucky*, 2015-CA-001755 (Ky. App. 2018) and appears in the appendix at pages 2-7. This Court granted an extension to file this petition in 18A – 456.

Jurisdiction

The Kentucky Supreme Court denied Master's motion for discretionary review on August 8, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Movant previously sought and was granted an extension of time to file in Petition until January 7, 2019 in 18A – 456.

Constitutional and Statutory Provisions

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> ...nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws....

Statement of the Case

Principal Keith Haynes and Appellant Johnathan Masters had a disagreement on December 16, 2014, at Cloverport Independent School in Cloverport, KY.

Mr. Masters asked Haynes to hand out some American Civics surveys he had created. The surveys were for a Masters' Degree program Mr. Masters attended. Mr. Masters testified that Haynes agreed to hand them out, and Haynes told Mr. Masters to pick them up the following day.

However, when Mr. Masters returned the following day to collect the surveys – with chocolates as a gift to thank Haynes – Haynes informed Mr. Masters that the surveys were not handed out. The two then got into an argument. According to Mr. Masters, Haynes told him that he better leave or there would be trouble. Haynes accused Mr. Masters of using profane language and challenging him to a fight outside.

Mr. Masters told the jury he only used harsh language and said what he said after Haynes threatened him by saying that he better leave or there would be trouble. Mr. Masters also believed Haynes insulted his dignity. Mr. Masters admitted saying to Haynes that they, "could just take a step outside" and then used some language that indicated that Mr. Masters would have been victorious in a physical altercation. Haynes denied saying that, "there would be trouble." Mr. Masters left and did not return to the school.

Mr. Masters believed the entire argument lasted a minute or less.

Haynes, during cross examination, admitted that he never felt that Mr. Masters was going to attack him in the office or lunge at him.

After Mr. Masters left, Haynes put the school on a "soft lock-down." Haynes detailed the soft lock-down procedures, which included making sure all doors are locked and notifying the teachers about the individual. The soft lockdown did not appear to end educational instruction, or the time the students left for home. Haynes described this 'soft lockdown' as "simply a precautionary measure." Later, Haynes contacted the Breckinridge County Attorney's office and swore out a complaint against Mr. Masters. On December 16, 2014, Mr. Masters was charged with Abuse of a Teacher under KRS 161.190, a Class A misdemeanor.

The jury convicted Mr. Masters of Abuse of a Teacher. He was sentenced to pay a fine of $500.

Mr. Masters appealed the District Court's ruling to the Breckinridge Circuit Court. The Circuit Court affirmed the District Court. Mr. Masters moved the Kentucky Court of Appeals to grant Discretionary Review. The Kentucky Court of Appeals heard the case, but affirmed the conviction and the constitutionality of KRS 161.190. Mr. Masters moved the Kentucky Supreme Court to hear that case. The Kentucky Supreme Court denied Mr. Master's motion for Discretionary Review.

How the federal question was raised and decided.

Mr. Masters filed a motion to dismiss the case based on the unconstitutionality of KRS 161.190. He argued that the statute was unconstitutional based on its vague and overbroad language, and it infringed upon his First Amendment right to free speech. The trial court overruled the motion. Mr. Masters renewed the motion at trial; again it was overruled by the trial court.

On appeal in the Kentucky Court of Appeals, Mr. Masters argued that the statute offends due process because its language is too vague to notify a person of ordinary intelligence when it is applicable. Mr. Masters argued that the statute is overly broad because it criminalizes speech and conduct protected by the First Amendment. Mr. Masters also argued the statute was also unlawfully applied against him.

The Kentucky Court of Appeals rendered an opinion that affirmed the constitutionality of KRS 161.190 in all arguments. Mr. Masters moved the Kentucky Supreme Court for review, but that Court declined to address the case.

Reasons for Granting the Writ:

KRS 161.190 punishes speakers based on the reaction of the hearer and fails to define the requisite level of dissatisfaction needed to charge someone criminally by failing to define the key terms in the statute and results in a statute that is both unconstitutionally vague and overbroad.

KRS 161.190 sets a dangerous precedent that states can enact statutes that essentially punish statements based on the reaction of the hearer of those statements. This statute stands in stark contrast to this Court's precedent. It allows certain hearers of speech to determine, by their reaction, whether or not the speaker may spend the next three-hundred and sixty-five days in a county detention center.

KRS 161.190 defines the Class A misdemeanor offense of abuse of a teacher as follows:

> Whenever a teacher or school administrator is functioning in his capacity as an employee of a board of education of a public school system, it shall be unlawful for any person to direct speech or conduct toward the teacher or school administrator when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school. KRS 161.190.

KRS 161.190 is unconstitutional for several reasons. First, the statute is unconstitutionally vague, because it imposes substantial punishment without defining any of the terms used to constitute a possible violation. An ordinary person of ordinary intelligence would not, with any certainty, be able to define where the line of permissible behavior stops and impermissible behavior begins.

The statute imposes several duties on speakers that force speakers to engage in guesswork before speaking. The statute requires that the speaker know he is

talking to a teacher or administrator and somehow be able to predict the reaction of the hearer to protected speech, and that the result of that speech will be disorder in the school. And, it should be noted that the restrictions also apply – as exampled by this case – to all citizens talking to teachers and administrators. The restriction is not limited to student speakers. School employees are not a unique class of citizens immune from criticism.

Second, the statute is unconstitutionally overbroad, because it punishes protected speech. Protected speech, which is not intended to threaten, such as knocking on a door or cheering for a team, or disagreeing with a school administrator, is prohibited under this statute if it causes anything the school regards as "disruptive."

Parents, students, administrators and teachers may disagree with each other in schools from time to time. People can get angry with government officials of all stripes. In America, we are allowed to be angry, and to express that anger, so long as our conduct is non-violent. The most central proposition of the First Amendment is that citizens may express their displeasure with government action or inaction.

As this Court noted decades ago, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). This statute strips students, teachers, parents and visitors of their protected First Amendment rights when they speak to a teacher or administrator, as a speaker

must fear that doing so may upset the hearers of that speech, and if the offense is great enough, it could subject that speaker to criminal sanctions.

KRS 161.190 eviscerates citizens' First Amendment rights by criminalizing protected speech that – according to no defined standard – interferes with the good order and discipline of the school. It criminalizes protected speech based on the possible reaction of the hearer. The statute imposes this criminality not only on students within a school, but on all persons speaking to school administrators or employees.

Kentucky actually possesses a statute that allows those that engage in conduct that is violent, tumultuous, or threatening to be prosecuted. KRS 525.060. This statute also punishes those that make unreasonable noise. *Id.* A person violating this statute is still subjected to the possibility of incarceration; up to ninety (90) days. However, Disorderly Conduct Second Degree does not punish the content of speech, or the reaction to that speech, only that conduct of the speaker or actor.

In short, KRS 161.190 is unconstitutionally vague and overbroad, both on its face and as applied to Mr. Masters, violating the First and Fourteenth Amendment of the United States Constitution.

A. KRS 161.190 is unconstitutionally vague because it fails to give a person of ordinary intelligence "fair notice".

The terms of KRS 161.190 are not defined, thus failing "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss,* 347 U.S. 612 (1954). This Court has said that "no

man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id* at 617.

The current version of the statute fails constitutional muster because a normal person could not understand what conduct the statute proscribes. The statute requires the speaker to know that a teacher or administrator is functioning in his official capacity, that the speech will have some impact on the hearer, and that the impact on the hearer of the speech will cause some disorder or undermine discipline. To guess wrong on any of these questions could lead to criminal charges and possibly twelve months in jail. For example, a motorist directing speech at a bus driver for recklessly driving could be charged with a crime and spend time in jail.

This Court has condemned this idea of criminalizing speech based on the reaction of the hearer. In *Terminiello*, the Court heard a case where a speaker held a convention and thousands protested it. *Terminiello v. City of Chicago*, 337 U.S. 1, 3 (1949). "The crowd outside was angry and turbulent." *Id.* The speaker "...vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare." *Id.* The speaker was charged with "breach of the peace" which the trial court defined as "'misbehavior which violates the public peace and decorum'; and that the 'misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.'" *Id.*

This Court reversed and found the ordinance unconstitutional. As the Court eloquently wrote:

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups. *Terminiello* at 4–5(internal citations omitted).

KRS 161.190, due to its vagueness, can be an unwitting tool to suppress unpopular views, as a speaker – student, parent or ordinary citizen – may suppress articulating an unpopular viewpoint to a teacher or school employee out of fear that the reaction to that view might subject the speaker to criminal sanctions.

KRS 161.190 places the burden on the person talking to a school official to predict what speech the employee will find to be offensive or inflammatory, that the result will be disruption, and what level of disruption could occur. For example, if a teacher was upset by a discussion of an impending election over lunch and subsequently felt unable to complete their in class duties, would the person who brought up the topic be subject to prosecution? The vague terms in the statute, unsupported by definitions, leave any speaker to guess what speech might cause this level of disruption in a hearer.

This Court was confronted with a similar situation in *Coates v. City of Cincinnati,* 402 U.S. 611 (1971). "...Coates was a student involved in a demonstration and the other appellants were pickets involved in a labor dispute." *Id* at 612. The ordinance in question in *Coates* made it illegal "...for 'three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by.'" *Id.* at 611. This Court struck down this ordinance, noting, "[c]onduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.'" *Id.* at 614, citing *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926).

KRS 161.190 is unconstitutional for the same reason. In *Coates,* speakers were proscribed from speech if it would annoy other parties. They had to guess if their speech was offensive.[1] The same problem happens in KRS 161.190 as it requires the

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[1] The Court in Coates was clear that the problem was not that the city was trying to prohibit something it could not prohibit, but that their method of doing so was so broad and non-specific as to trample on protected liberties:

> It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. *Gregory v. Chicago,* 394 U.S. 111, 118 (Black, J., concurring). It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.

speaker to know what impact the speech will have on the hearer, and that the impact of that speech on the hearer will cause disorder.

The instant statute fails constitutional muster as being overly vague. It fails to give a citizen notice of what type of conduct is proscribed. Therefore, KRS 161.190 violates the First and Fourteenth Amendments to the U.S. Constitution.

B. KRS 161.190's language is overly broad because it criminalizes speech and conduct that should be protected by the First Amendment.

The statute's overbreadth violates the First and Fourteenth Amendments to the U.S. Constitution. The statutory language is so ambiguous that it "criminalizes not only unprotected expression but expression protected by the First Amendment." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 397 (1992). Potentially, a parent could violate this statute by knocking on a classroom door and "disrupting" a class that is in session.

This says nothing of addressing certain hot-button issues debated in the normal political discourse. What if a parent, another teacher or a student disagrees with one teacher's science lesson and offers a religious explanation and this causes disorder in the classroom or unrest in the school? People know such topics are hotly debated, and should know that such debate may lead to strong feelings, and that such strong feelings could lead to disorder in the classroom. Are differing points of view to be avoided because they may cause consternation? Should parents, teachers, citizens and students fear discussing tough subjects in school because they could be criminally

Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

charged if they know the statements could lead to the undermining of good order and discipline?

The statute could criminalize honest, non-violent, disagreements between parents and teachers, citizens and school administrators, as well as students and teachers, despite the Kentucky Court of Appeals opinion. Take for example a parent and a teacher siting down to discuss a student's progress. If a parent becomes visibly and verbally upset because the teacher is recommending a course of action that the parent disagrees with then it might cause the teacher to feel uncomfortable continuing the conference. Thus the parent's legitimate distress at a situation involving their child could violate KRS 161.190 even if the parent completely refrains from threatening the teacher.

This statute also could criminalize even the most benign forms of speech. What if a parent, or a teacher or a student says to a teacher in class that Santa isn't real and the children hear? This could be distressing for some students of tender age, and thus undermine the good order and discipline of the school, thus subjecting the person saying such things to twelve months in the county detention center. Likewise, even a discussion in a classroom about certain literature from America's past, such as "To Kill a Mocking Bird" or "The Adventures of Tom Sawyer" where the issue of slavery is discussed could lead to a heated debate, and ultimately discussion that could undermine the good order and discipline of the school. Are such topics to be avoided because of the possible reaction to them?

Because this statute "may deter the legitimate exercise of First Amendment rights" by its loose construction and overly broad liability, it should be held unconstitutional for chilling speech which would otherwise be protected under the aforementioned constitutional provisions. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). As this statute can punish a defendant "criminally for the use of words alone", it must be "carefully drawn or authoritatively construed to punish only unprotected speech". *Gooding v. Wilson,* 405 U.S. 518, 522 (1972). This statute swallows up protected speech and gives no reasonable person any idea what speech might be criminal.

This is especially true because the statute depends on the reaction of the person hearing the speech by requiring that the speaker to, "...know[] or should know that the speech or conduct will disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school." KRS 161.190. It requires the speaker to anticipate the reaction to the speech and how the reaction of that speech could spread before the speech is uttered. This could include huge swathes of protected speech, as indeed, sometimes protected speech may be unpleasant to digest. It was the same general idea at issue in the *Coates* decision that this Court condemned. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

This statue's overbreadth creates a protected class of government officials that are unfettered by speech protected by the First Amendment uttered from the mouths of ordinary citizens. It is impossible to predict an administrator or teacher's reaction to constitutionally protected speech, and one administrator might not react the same

way another administrator would react. A motorist yelling at a school bus driver for driving erratically might encounter a bus driver that simply ignores the criticism, or a bus driver that seeks revenge by stopping the bus and calling the police, thus interfering with the bus driver's assigned school function. If a speaker truly stepped over the line into conduct that created a disorder, then that conduct is still punishable in Kentucky under KRS 525.060, Disorderly Conduct in the Second Degree.

As this statute punishes speech protected by the First and Fourteenth Amendment, it is overly broad and must be declared unconstitutional.

C. Based upon the facts in the instant case, KRS 161.190 was also unconstitutionally applied against the Defendant.

Under the facts alleged at Mr. Master's trial, the statute was unconstitutionally applied to him. A statute may be challenged as unconstitutional on the basis that it is invalid on its face or as applied to a particular set of facts. *U.S. v. Eichman*, 496 U.S. 310, 312 (1990). Unconstitutional as applied means that a defendant "contends that the application of the statute in the particular context in which he has acted... [is] unconstitutional." *Ada v. Guam Soc. of Obstetricians and Gynecologists*, 506 U.S. 1011 (1992). At trial, Haynes stated that he saw no students in the office when the statements were made. He also stated that the nearest classroom was "at least twenty yards away."

If no students could hear the statements, it is unclear how the speech could "nullify or undermine the good order and discipline of the school." In fact, the only person who heard any part of Haynes's encounter with Mr. Masters was Ms. Alysia Booth, the school counselor. She stated that she heard some of the phrases uttered

and a "light thunk" (possibly the lobby door closing), and that her entire exposure to the two gentlemen's encounter was "ten or fifteen seconds". Mr. Masters had already left when she stepped out of her office.

Haynes, during cross examination, admitted that he never felt that Mr. Masters was going to attack him in that office or lunge at him. At trial, Haynes stated that he put the school on a "soft lock-down" after the incident occurred. However, without a definition of what "normal school activities" are, there is no indication that Mr. Master's statements disrupted or interfered with any applicable "school functions." Children needed an escort to bathrooms and doors were closed and locked. Even if precautions were taken following Mr. Masters and Haynes' verbal tiff, the statute fails to define the degree to which school functioning should change in order to subject a person to criminal liability.

D. The Defendant's speech and conduct, even if subjectively offensive, was still protected by the First Amendment and did not rise to the level of "fighting words".

While the Movant is alleged to have used profane language in his argument with Haynes, his speech and conduct did not rise to the level of "fighting words" and was still constitutionally protected under the First Amendment. According to *Commonwealth v. Ashcraft*, 691 S.W.2d 229, 231 (Ky. App. 1985), "words which merely offend, disgrace, anger or frustrate may not be prohibited in violation of one's right to freedom of speech" (citing *Lewis v. City of New Orleans,* 415 U.S. 130 (1974). "Fighting words", on the other hand, are "words which by their very utterance inflict

injury or tend to incite an immediate breach of the peace" and are not protected by the First Amendment. *Chaplinsky v. State of New Hampshire,* 315 U.S. 568 1942).

In *Collin v. Smith,* 578 F.2d 1197, 1203 (7th Cir.1978), the Seventh Circuit was confronted with a proposed march of white supremacists dressed in full Nazi regalia through the streets of Skokie, Illinois. The village had a large Jewish population. While the Seventh Circuit found that, "...the potential for severe psychological injury as a result of the proposed Nazi parade was conceded," *Purtell v. Mason,* 527 F.3d 615, 625 (7th Cir. 2008), "It was also conceded, however, that the march was **not likely to provoke responsive violence or immediate breaches of the peace**. Absent that tendency, we held the speech in question did not qualify as fighting words and remained constitutionally protected." *Id.* citing *Collin.* (emphasis added). In the instant case, there was nothing indicating that an immediate breach of the peace would take place. Indeed, no one threw a punch or even touched each other.

In *Purtell,* the Seventh Circuit was confronted with a unique factual situation involving a town dispute over a recreational vehicle and tombstones. Some town's people got mad at a person parking an RV at their home and forced through an ordinance banning the practice. The RV owners got angry and put up tombstones with evocative phrases showing how the persons who championed the RV ordinance died. One example:

CrysTy wAs misTy-eyed
The DAy she DieD
AXE to the HeAD ...
No DoubT She wAs DeAD.
Now There's no more comPlain'n
Even When iT's rain'n!
~ 1860 ~

Purtell v. Mason, 527 F.3d 615, 618 (7th Cir. 2008).

The Seventh Circuit concluded that the definition of "fighting words" was a very narrow exception to First Amendment rights. "It seems unlikely that speech causing emotional injury but not tending to provoke an average person to an immediate breach of the peace would qualify as fighting words, unprotected by the First Amendment and therefore capable of being regulated or punished without raising any constitutional concern." *Purtell* at 625.

Mr. Masters' conduct here is far from hosting a Nazi parade or putting up tombstones for people he dislikes. Mr. Masters' speech and conduct, while inappropriate, did not arouse any teacher or student to violence or incite an audience to breach the peace.[2] Mr. Masters made a few poorly chosen comments and was out the door in a matter of minutes. Whatever negative effect it had on Haynes was limited to his filing a criminal complaint and not resorting to violence.

Mr. Masters' speech in this instance was a brief product of frustration and protected by the First and Fourteenth Amendment to the United States Constitution.

[2] *See Cohen v. California,* 403 U.S. 15 (1971).

Reversal of the case is warranted with instructions to vacate the conviction after this Court correctly concludes that KRS 161.190 is unconstitutional.

Conclusion

Johnathan Masters requests that this Court will grant this petition for a writ of certiorari.

Respectfully submitted,

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