



STATE *OF* JUSTICE

Dear {{FirstName or 'Friend'}},

Last month, the Ohio Supreme Court issued one of the most bizarre and confounding opinions the AFJ Action State Courts team has ever seen. In a decision that made national and international headlines and left court watchers confounded, the state's highest court decided that a man who incurred lifelong injuries after he accidentally swallowed a piece of chicken containing a sliver of bone in 2017 does not have a cause of action against the restaurant that sold him the boneless chicken wings or the meat processing company that sold the chicken to the restaurant – despite the chicken being advertised and sold as “boneless chicken wings.”

The so-called “boneless chicken wing” that permanently injured Michael Berkheimer actually contained a 1.4-inch-long sliver of bone that had been tightly folded during processing, making it undetectable as Berkheimer chewed. But he felt an obstruction in his throat after swallowing and went to the restaurant's bathroom, thinking a piece of food had entered his trachea. When he attempted to clear it by vomiting, the bone sprung open and became lodged in his esophagus, tearing a hole that allowed food particles to enter his chest cavity. The resulting infection threatened his heart and lungs and required him to endure several surgeries, two medically induced comas, a week in the intensive-care unit, and several additional weeks of hospitalization. Berkheimer continues to suffer lasting heart and lung damage, which required him to retire from his job as manager at an aeronautical company and to stop playing and coaching hockey, which he had done for more than 50 years. He still gets winded easily and often has to carry a supplemental oxygen unit.

Seeking to recover for the losses he and his family have experienced due to his injuries, Berkheimer filed a complaint against the restaurant and the chicken processor. Berkheimer just wanted a jury to hear about his ordeal and decide whether the two companies were responsible for his injuries. But two lower courts dismissed the complaint, and after Berkheimer appealed to the Ohio Supreme Court, four of the court's seven justices decided that no reasonable juror would find that anyone but Berkheimer was responsible for believing that his boneless wings were truly boneless, and ruled that he could not proceed with his claim against the companies. The ruling said that Berkheimer should have

expected that his boneless wings could have possibly contained bones, and that he was the only person responsible for the injuries he had endured.

The majority opinion held that restaurants and food processing companies cannot be held liable when food contains unexpected pieces of naturally occurring material such as pits or shells, and that people should expect chicken products to contain pieces of bone because chickens have bones. It said that customers should understand that descriptions of food that include the word “boneless” should be understood by customers as describing a cooking process, rather than a guarantee that the food does not contain bones. The dissenting opinion stated that “actually, that is exactly what people think it is,” referring to customers’ expectation that food advertised as boneless will not contain bones. “Not surprisingly, it is also what the dictionaries say — ‘boneless’ means ‘without a bone.’ The dissenting justices concluded that “the result in this case is another nail in the coffin of the American jury system,” writing that “the majority opinion makes a factual determination to ensure that a jury does not have a chance to apply something the majority opinion lacks—common sense,” and lamented that the court’s majority had made the decision without ever seeing the bone that caused Berkheimer’s injuries.

Court watchers and members of the media reacted with shock and outrage at the implications of the decision, with one describing it as “[head-scratching lunacy](#)” and, sarcastically, “[\[a\]nother proud moment for the state.](#)” Others pointed to the various standard dictionary definitions of the word “boneless” as “[without a bone](#),” “[without bones](#); with the bones removed,” and “being [without a bone](#) or bones.” Even Late Show host Stephen Colbert, who [featured the ruling on his show](#), exclaimed “then what's the point of anything?!” while discussing the ruling.

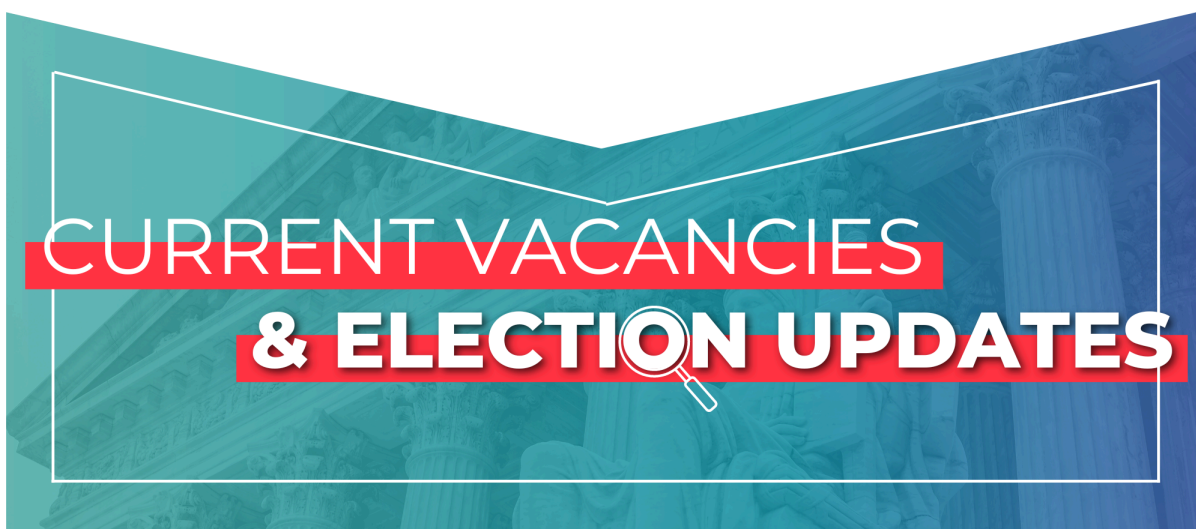
While headlines that reported the ruling sounded silly and generated a media circus, the implications of the ruling and its possible impacts on food labeling are serious and potentially dangerous. The ruling could generate future litigation arguing about the definitions of various labels such as “nonalcoholic” or free of substances containing gluten, lactose, or other allergens. Should people who purchase “boneless” chicken wings at grocery stores or restaurants in Ohio shred them with a knife and fork before eating them to ensure they don’t contain pieces of bone? Will health insurance companies refuse to cover injuries sustained by Ohioans who incur injuries from accidentally swallowing pieces of pits or shells in their cherry or pecan pie, or bones in their “boneless” chicken wings? Will food processing companies lower their standards now that they know they can’t be held liable for any injuries caused by their negligence? The court may have hoped to clarify a question with its ruling, but it created many more.

Following the outrage caused by the ruling, Berkheimer's attorneys [asked the court to reconsider](#) its decision. The justices will issue a response to the request [here](#), hopefully sometime in September.

ETHICS UPDATE



In Arizona, Justices Clint Bolick and Kathryn King recused themselves from hearing a case that may determine whether they will be required to run in future retention elections, and Bolick also recused himself from hearing a challenge to ballot language that will summarize a reproductive freedom ballot proposal involving his wife, an Arizona state senator. Also, the New Hampshire Supreme Court placed a justice on administrative leave with no explanation. Learn more [here](#).



VACANCIES

In vacancy news, Connecticut Supreme Court Chief Justice Richard Robinson is set to retire in September; Indiana Supreme Court Chief Justice Loretta Rush is seeking a third term as chief justice; and after the Alaska Judicial Council closed applications on July 24, the council began its screening and public vetting process.

ELECTIONS



In our **Elections update**, Louisiana's supreme court election was cancelled after Leslie Ricard Chambers and Judge Marcus Hunter were ruled ineligible to seek the office by the Louisiana Supreme Court itself, leaving Judge John Michael Guidry unopposed; Michigan's major political parties held nominating conventions to choose which candidates for the state's supreme court will appear on general election ballot this November; and Tennessee Supreme Court Justice Dwight Tarwater was retained by voters.

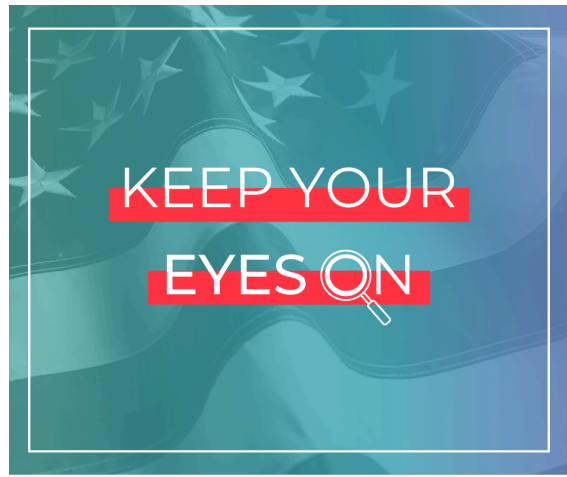
Read all about the latest in state supreme court **vacancies and elections updates** [here!](#)

LOOKING AHEAD



States shaped access to justice, civil forfeiture laws, consumer and environmental protections, and civil rights this month. Key rulings include the Wisconsin and Washington state supreme courts ruling against Amazon and in favor of workers and consumers; proposed reproductive rights amendments ordered to appear on ballots in Montana and Arizona and other major reproductive rights rulings; and an opinion by the South Carolina Supreme Court that has revived the state's death penalty statute. [Learn about important rulings from state supreme courts around the nation here!](#)

State courts will hear oral arguments shaping access to ballot initiatives; changing nearly 40-year-old judicial districts; regulating gun control between states; and determining which candidates will appear on the November ballots. Texas courts are trying to improve access to justice in the state. [Learn about the latest news on all things state supreme courts here!](#)



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Alliance for Justice Action Campaign
11 Dupont Circle NW
Suite #500
Washington, DC 20036
United States