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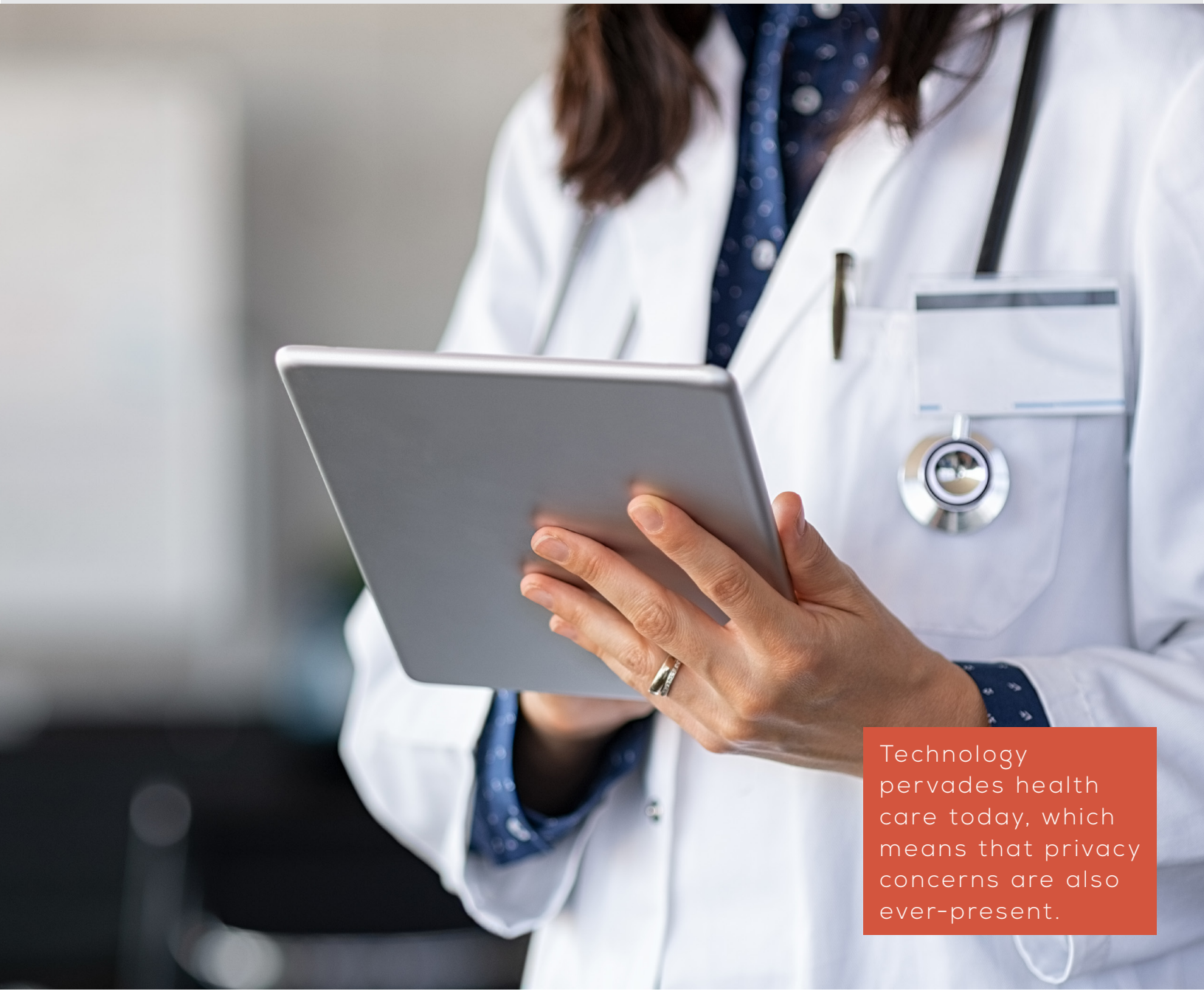

Technology pervades health care today, which means that privacy concerns are also ever-present.

INSIDE

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"HEALTH INFORMATION IS SOME OF THE MOST INTIMATE INFORMATION THERE IS, AND PATIENTS' RIGHT TO PRIVACY AND THE SECURITY OF THEIR DATA MUST BE PRESERVED, NO MATTER WHAT THE TECHNOLOGY."

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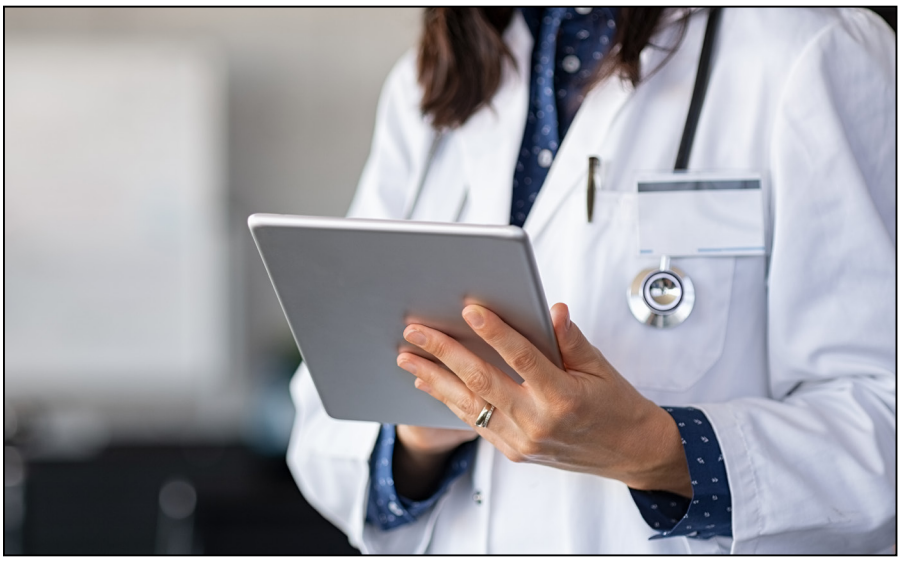
_ In this summer issue of *JIFP*, the commentaries focus on privacy and remark on people's relationship with digital platforms during the COVID-19 pandemic. This issue's cover of a doctor holding a digital tablet demonstrates that, during the COVID-19 pandemic, the use of telehealth increased exponentially. In "HIPAA and Telehealth: Protecting Health Information in a Digital World," author Melissa Kovac examines the Healthcare Information Portability and Accountability Act (HIPPA), from its enaction in 1996, to where it stands today with the popularity of telehealth and electronic health records. Kovac notes that telehealth services can be convenient and cost-effective, while also vulnerable to privacy and security breaches. "Health information is some of the most intimate information there is," writes Kovac, "and patients' right to privacy and the security of their data must be preserved, no matter what the technology." In the commentary "Extending Privacy Harms Toward a Non-Economic Perspective," authors Christopher Muhawe and Masooda Bashir explore data breach cases in the US courts and the requirement that victims must prove they have suffered an "injury in fact." The authors suggest a new approach that addresses privacy harms without having to prove economically quantifiable harm.



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COMMENTARY

Extending Privacy Harms Toward a Non-Economic Perspective

Authors _ Christopher Muhawe (cmuhawe2@illinois.edu), University of Illinois, College of Law, and **Masooda Bashir** (mnb@illinois.edu), University of Illinois at Urbana Champaign, School of Information Sciences

Addressing data breach harms has become a great challenge in the administration of privacy law in the United States. Several data breach cases have been dismissed by US courts because the victims cannot prove cognizable harm. The current US legal system emphasizes that data breach victims must prove that they have suffered an "injury in fact," which means that the injury suffered must be concrete and particularized. Data breach harms are futuristic and hard-to-quantify, reasons for which they may not fit in the "injury in fact" requirement. Furthermore, victims of data violations have attempted to plead economic loss to prove the harm suffered, but with no success. This article suggests a new approach that aims at addressing privacy harms without necessarily proving economically quantifiable harm.

With recent advancements in communication technologies, the digital realm has dramatically changed our daily lives and how we communicate with each other. Following the COVID-19 pandemic stay-at-home orders, reliance on digital platforms and communication has reached an all-time high and has influenced most human activities throughout the world. In the developed and privileged parts of the world, we started attending virtual classes, virtual doctors' visits, virtual weddings, and virtual funerals in the comfort of our homes (Kessel et al. 2021). The virtual world has seemingly become a new normal, and this has resulted in a fusion of our private and professional lives.

This dependence on digital realms also means that both private and public organizations collect massive amounts of personal data, and this has presented both opportunities and challenges (Sun et al. 2020). The virtual world thrives on data as its fuel (Luca and Bazerman 2020). Private and public organizations have become strongrooms of massive sensitive private data, including names, dates of birth, social security numbers, religious affiliations,

political party affiliations, banking histories, location data, shopping histories, home addresses—the list is endless (Matsakis 2019). As the appetite to collect has grown, data misuse and data breaches have also increased (Ponemon Institute 2020). Examples of data violations are unauthorized access to an individual's electronic health records, stolen social security numbers, and misuses of addresses, biometric data, and phone numbers (Matsakis 2019).

However, the majority of data misuse and data breach legal cases in the United States have been unsuccessful (Citron and Solove 2021) or dismissed under the current legal system, as claimants have failed to prove injury resulting from privacy violations. Data breach cases are often dismissed for lack of "injury in fact" sufficient to support a finding of cognizable harms (Citron 2010; 2016).

Faced with the challenge of satisfying the "injury-in-fact" requirement, US courts have attempted to use the traditional economic injury perspective to look at privacy harms. Litigants of privacy harms have often found themselves trying to fabricate harms to prove that they have suffered an economic loss (Fisher 2013). This approach has yielded no positive results. Most victims of privacy violations do not experience clear and instant pecuniary or reputational harms, which makes it difficult to prove the economic loss requirement (Citron 2010). The traditional economic perspective (Martecchni 2016) under the law denies victims of privacy violations a chance of recovering damages as the harms mostly attach in the future and are hard to quantify.

In addition, the economic loss rule provides that a plaintiff cannot recover in court without demonstrating a personal or property injury to which such losses attach (*Four Directions Air, Inc. v. United States* 2007). With the nature of privacy harms, this hurdle is insurmountable to overcome as is. We believe that the current legal approach in addressing privacy harms is inadequate and narrow, as well as predisposed to further abstraction given the unique nature of privacy violations.

Furthermore, this approach is devoid of the realities that are presented by the negative and long-lasting effects of a privacy violation (Johnson 2005). Hence, viewing privacy harms from a purely economic perspective negates the fact that data breaches may result in harms that are difficult to measure and quantify. It also runs counter to the functions of individual privacy, which are the promotion of liberty, selfhood, autonomy; the promotion of human social relations; and the furtherance of the existence of a free society (Gavison 1980). At the same time, the functions of privacy influence self-determination, and there is no economic value that can be placed on self-determination.

Therefore we propose that the US law should evolve to address these computer-enabled harms without necessarily requiring victims to prove the traditional economic harm. Our proposal recommends that data holders stand in a privileged position and should be vested with a duty to take utmost care in securing data (Solove and Citron 2018).

Breach of this duty should be addressed as a privacy violation without necessarily proving an economically quantifiable injury to the victims of data violations. We premise this approach on the fact that private and public entities stand in a privileged position of technical know-how and with vast resources of collecting, storing, and processing data for which they should provide adequate security (Kesan and Hayes 2019). In addition, these entities have access to our most personal and private information, and therefore an expectation of good stewardship of such data would be a socially responsible duty (Rosenbaum 2010). Thus we propose that the law should evolve to embrace a new approach with a view of holding the data-steward entities responsible for the utmost protection of the data subjects' data. To this extent, a cause of action/claim would be presented as

1. The data holder (defendant) has a duty to protect data in their custody.
2. If this duty has been violated by the data holder resulting in a violation of the data subject's privacy; then
3. the data holder is liable for neglect of their duty, and the defendant need not prove any economic harm resulting from a breach of this duty.

Otherwise, we will have increasing instances where data collectors will intentionally or negligently use deficient data protection measures that expose data subjects' information to potential breaches, yet the data collectors are not held accountable. For example, in the case of *FTC v. Wyndham Worldwide Corp.* (2015), Wyndham failed on the basics of protecting clients' data when it stored its customers' credit card information in clear readable text rather than using encryption and used default user names and easily guessed passwords for access to servers, among other failures. This resulted in a data breach that aided access to more than 619,000 customer accounts' unencrypted data.

We propose that the US courts should recognize a legal duty to adequately secure the data subjects' information,

and failure to do so should translate into a violation of the data subjects' privacy. This approach will enable courts to shift from a position of addressing data harms from only an economic perspective, because not all privacy harms can be expressed in economic terms.

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COMMENTARY

HIPAA and Telehealth

Protecting Health Information in a Digital World

Author _ Melissa Kovac (melissa.kovac@terumobct.com), Terumo Blood and Cell Technologies

In 1996, the Healthcare Information Portability and Accountability Act (HIPAA) was enacted to protect the privacy and security of patients' protected health information. Since then, technology has taken health information far beyond paper medical records and grainy faxes. As telehealth, in the forms of electronic health records, virtual visits, apps, and wearable devices, has increased in popularity, HIPAA clearly is no longer sufficient to guarantee the privacy of the health information it was enacted to protect. Updates to HIPAA are necessary, and those updates should be made with future technological advancements in mind.

Telehealth, broadly defined as healthcare provided via telecommunication and digital technologies, has in recent years been promoted as a way to increase access to healthcare services for rural, under-resourced, and underserved populations (Enlund 2020, 1–2). Telehealth services range from simple administrative patient portals and convenient apps to telephone and video visits with otherwise inaccessible specialists (US Department of Health and Human Services [HHS], n.d.). When available, it offers patients greater control and can be a convenient, time-saving, and cost-effective way to obtain medical care. Unfortunately, it also puts protected health information (PHI) at risk and is vulnerable to privacy and security breaches (Gajarawala 2021, 218–19).

In the United States, the vanguard of electronic healthcare information privacy regulation is the Healthcare Information Portability and Accountability Act of 1996 (HIPAA). HIPAA guarantees that individuals' PHI is kept private and secure as it travels to and from patients, healthcare providers, insurance companies, and approved business associates (HHS 2013). Patients have a right to access their PHI, and it may not be shared with others without the patient's explicit permission, with few exceptions. Protected health information includes medical records, reports of conversations about patient care, and insurance and billing information (HHS 2020a).

There have, not surprisingly, been violations of the patient confidentiality and information security

guaranteed by HIPAA—messages left with the wrong person, PHI shared by healthcare providers outside of work, lax risk analysis and management, outright theft—and penalties have included job loss, fines, and criminal prosecution (Tariq 2020). A 2019 review of breaches affecting more than five hundred patients in the United States found that 53 percent of breaches were "attributable to internal mistakes or neglect" while 47 percent of breaches were from external sources and primarily the result of hacking or other IT incidents (Jiang 2019, 266).

HIPAA, however, was only the first step on the road to protecting electronic PHI, and that first step was taken twenty-five years ago. Banerjee explains:

> When HIPAA was enacted, healthcare service provider's medical record documents were the primary, if not the only, sources of health information. This is the reason why non-healthcare entities were not included in the purview of the law. However, increased penetration of technologies capable of generating PHI, the lack of laws to protect user data from [non-covered entities], and the increasing diversity of non-healthcare providers with access to such information, have together increased the risks of consumer data breaches and misuse. (Banerjee 2018, 7)

Subsequent federal legislation has "failed to address the new privacy and security challenges presented by the digitization of health information" (Theodos 2021, para. 7). Notably, these new technologies function outside the purview of HHS and are not required to protect health information (Theodos 2021). According to Rosenbloom (2019), "advances in technology, diffusion of health IT across diverse sectors of health care, [and] patients' expectations," such as immediate availability of information and apps on mobile devices, contribute to compromises in privacy (1118, 1115). Many apps neither transmit data over a secure connection nor encrypt it, and they may legally sell to data brokers what would in other contexts be PHI (Galvin 2020, 36).

Wearable devices are also of concern. Wearables measure and report physiological and behavioral information as varied as heart rate, amount of sweat, and seizure activity, but that data does not belong to the user; rather, it belongs to the companies that manufacture the devices and store the data (Theodos 2021). Unfortunately, most people who use the devices are unaware of that. In one study, while 70 percent of respondents said confidentiality was important, only 28 percent reported that they were familiar with how their devices protected their privacy, and only 24 percent were familiar with how their devices transmitted and stored their data (Cilliers 2020, 4–5).

The incremental growth in the use of telehealth, particularly virtual visits, was upended in 2020. To limit the transmission of COVID-19, healthcare providers instituted virtual visits, either by phone or by video. Concerns about privacy were quickly acknowledged by HHS. In February 2020, the department announced that despite the pandemic, HIPAA privacy and security rules would for the most part remain in effect (Bassan 2020, 2). However, only a month later and with the goal of encouraging the use of telehealth, HHS changed course and issued a Notification of Enforcement Discretion that relaxed HIPAA rules (Bassan 2020, 5; Mortell 2020, 390). The relaxed standards apply to technologies that "include video-conferencing, the internet, asynchronous imaging, streaming media, landline, and wireless communications" (Bassan 2020, 5). HHS specifically stated that a healthcare provider may use technologies that "may not fully comply with the requirements of the HIPAA rules," if the provider makes a good faith effort to keep patient data private. Included among these technologies are FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, and Skype (HHS 2021). As of June 2021, the Notification of Enforcement Discretion has no expiration date (HHS 2020b).

The use of telehealth has increased exponentially during the COVID-19 pandemic; in some hospital systems, the use increased by thousands of percent (Ramaswamy 2020, 1). As Bassan writes, "Given the implementation of the technology during the pandemic, it is unlikely that the use of telehealth would disappear after the pandemic" (Bassan 2020, 11). Perhaps most importantly for the future of telemedicine, outpatients were significantly more satisfied with virtual visits during the pandemic than they were with in-person visits prior to it (Ramaswamy 2020, 5); even before COVID-19, one study showed that while fewer than 4 percent of people had had a video visit with a healthcare provider, almost 50 percent were willing to do so (Fischer 2020, 5).

The use of wearable devices is also increasing: in 2020, 29.8 percent of Americans reported using an electronic wearable device to track health or activity, compared with 26.7 percent in 2019 (US National Cancer Institute 2020). According to a recent Gallup poll, 32 percent of Americans have at some point tracked health data using an app (McCarthy 2019). HIPAA, even with its privacy and security rules in place, is not a sufficient guarantor of healthcare information privacy and should be updated to better align "individual access to health data with the current

realities of electronic medical records and the expectations of modern, engaged patients" (Rosenbloom 2019, 1118).

It is unreasonable to expect that patients will understand—or even read—complicated privacy statements. Bassan suggests that HHS institute regulations like those in the California Consumer Privacy Act: companies must disclose what information they're collecting, what they're doing with it, and whether they're selling it to third parties, and patients should have access to all collected information and the opportunity to opt out of sharing (Bassan 2020, 9). All healthcare providers should invest in cybersecurity and build videoconferencing products that include "security features such as encryption and may offer additional configuration settings that can be standardized for the entire organization, such as requiring a waiting room with every teleconference" (Jalali 2021, 672). HHS should also extend HIPAA's existing rules to noncovered entities, wearable devices, and apps (Rosenbloom 2019, 1116). Banerjee recommends that HHS create "a 'watchdog' unit that is charged with identifying and monitoring types of new behavioral data that can be captured by wearable technology," determining whether that data is identifiable, and, if necessary, adding it to HIPAA's catalog of technologies that can be used to identify a specific patient (Banerjee 2018, 7).

Telehealth products and services will undoubtably proliferate and mature over the next twenty-five years, much as they have in the twenty-five years since HIPAA was first enacted. Any new laws, regulations, and government and industry cooperative agreements must be developed with that growth in mind. Health information is some of the most intimate information there is, and patients' right to privacy and the security of their data must be preserved, no matter what the technology.

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NEWS FOR THE RECORD

SCHOOLS

Georgia

Legislation to remove school librarians from the review process for challenged books was passed by the Georgia Senate on March 8, 2021. The bill (SB 226) would place responsibility for removing challenged materials entirely with principals and school boards.

Under SB 226, principals (or their delegates) would have seven business days to determine if challenged materials appealed to "prurient, shameful, or morbid" interests and were "lacking in serious literary, artistic, political, or scientific value for minors." If so, they would be removed.

Parents could then appeal the decision to the school board, which would have 30 calendar days to review it.

If the school board rejected the parent's appeal, it would have 15 business days to post the challenged content (for example, the book passage, website, or film clip) on the school's website. The school would then be required to host the material for four years.

Julia Bernath, president of the Fulton County School Board, expressed concerns that the legislation would impose a "huge burden" on school districts.

Amanda Lee, a school library media specialist in the Atlanta metro area and president-elect of the Georgia Library Media Association, expressed concerns that some principals "will simply bow to the pressure of a very vocal parent or group of parents . . . and we're going to find books being banned on a much more regular basis."

The American Civil Liberties Union said in a letter sent to Governor Brian Kemp and the state House of Representatives that the bill "threatens to chill the open exchange of ideas in Georgia schools."

The Georgia Library Association and the Georgia Association of Educators also went on record opposing the bill.

Supporters of the bill appeared at legislative hearings with parents who objected to the teaching of Margaret Atwood's *The Handmaid's Tale*, which had been assigned at Roswell High School.

Noelle Kahai\4an informed the Senate Judiciary Committee that Atwood's award-winning dystopian novel was "garbage" and expressed dismay that the graphic novel adaptation makes it even more accessible to juvenile audiences.

Another parent testified that her request to ban *The Handmaid's Tale* was rejected by a panel of staff and parents that met in the school library. "Every school district is exhibiting obscene materials to minors," she said.

Bernath provided details about the book challenge process for her district and stated that the parent who objected to *The Handmaid's Tale* did not follow the process through to the end.

The bill was withdrawn from consideration by the House on March 31.

Reported in: *The Atlanta Journal-Constitution*, March 26, 2021; LegiScan, March 31, 2021.

PRIVACY

Nationwide

The American Civil Liberties Union (ACLU) and more than 40 other civil rights groups—including the American Library Association and Freedom to Read Foundation—urged President Biden to issue an executive order halting the federal government's use of facial recognition technology (FRT).

A statement issued by the organization characterized FRT as "extraordinarily dangerous to core freedoms even if it worked perfectly." Worse than this, the dangers associated with the technology are not evenly distributed.

Kate Ruane, senior legislative counsel for the ACLU, said FRT "disproportionately misidentifies people of color, women, trans people, and other marginalized groups."

The joint statement asserted that FRT enables the government "to keep a running record of every person's public movement, habit, and association." The statement also noted the chilling effect of pervasive surveillance.

"If the government can track everyone who goes to a place of worship, attends a political rally, or seeks healthcare for reproductive health or substance use, we lose our freedom to speak our minds, freely criticize the government, pray to the god we want, and access healthcare in private."

This is not merely hypothetical. The statement cited that it was being done now and without meaningful oversight.

One example included was the Detroit Police Department's purchase and integration of FRT with its networked public surveillance camera system "in secret, without public debate, legislative authorization, or regulations to protect civil rights and liberties."

In addition to requesting an executive order halting the federal government's use of FRT, the groups also requested the Biden administration's support for the Facial Recognition and Biometric Technology Moratorium Act.

Reported in: *The Hill*, February 17, 2021; ACLU, February 16, 2021.

Virginia

Governor Ralph Northam signed the Consumer Data Protection Act into law on March 2, 2021, making Virginia the second state to enact a consumer privacy bill.

When it takes effect on January 1, 2023, the law will allow Virginia residents to opt out of having their data

collected or sold, and it will give them access to view, correct, and delete the data which companies have collected about them.

Virginia's law is similar to one which went into effect in California last year, though it received much more support from the technology sector. Notably, the Consumer Data Protection Act does not allow individuals to bring lawsuits against companies for violations.

Several other states are considering similar legislation, including Washington, New Jersey, and Utah. As more states adopt such laws, pressure will increase for Congress to enact federal privacy legislation.

Privacy advocates urged Virginia lawmakers to strengthen consumer protections even further, including by adding a global opt-out browser setting to easily minimize data collection.

C.E. "Cliff" Hayes Jr., who introduced the bill, said he also wanted to propose legislation addressing privacy concerns related to artificial intelligence and facial recognition technology.

Reported in: *The Washington Post*, March 2, 2021.

SCHOOLS

Ely, Minnesota

Chad Davis, parent of an 11th grade English student, objected to the teaching of *I'm Still Here: Black Dignity in a World Made for Whiteness* at the April 12, 2021, board meeting of the Ely High School.

Austin Channing Brown's best-selling memoir details myriad ways in which institutions claiming to value diversity fall short of their principles. It also explores the role White, middle-class, evangelicalism has played in increasing racial hostility in the country.

Davis decried the book as full of "anti-White rhetoric and cancel culture all rooted in critical race theory." He called for its removal from the curriculum.

He expressed concern that the email he sent to English teacher James Lah, Principal Megan Anderson, School Superintendent Erik Erie, and the school board did not result in the book being banned.

This is the first book challenge the school has received in at least 20 years. The district does not have a policy in place to address it.

The Minnesota School Board Association advised them to adopt the association's recommended policy on textbooks and instructional materials. However, any proposed change to school district policy must be read at three consecutive school board meetings before it can be approved—a process which was not yet underway.

At the May 10 board meeting, Erie announced that the Memorial School English Department reviewed the book and the ban request.

Erie said they "will have a recommendation that will go to the 6-12 principal. The principal will make a recommendation and it will be discussed at our advisory council committee later this month."

Reported in: *The Timberjay*, April 14, 2021, and May 12, 2021.

St. Louis County, Missouri

Parents complained about the use of *Dear Martin* by Nic Stone in the "culture and identity" unit of Rockwood School District's ninth grade English classes.

Rockwood School District is headquartered in Eureka and is St. Louis County's largest public school system, serving over 22,000 students.

Dear Martin is about Justyce McAllister, a Black student attending a predominantly White preparatory high school in Atlanta. After being thrown to the ground and handcuffed by a White police officer, he attempts to make sense of life as a Black teenager today by writing letters to the spirit of Dr. Martin Luther King, Jr.

Stone said the shooting deaths of Jordan Davis and Michael Brown inspired and informed her writing.

Dear Martin was nominated for numerous awards and was included on the American Library Association's 2018 Top Ten Amazing Audiobooks for Young Adults and Top Ten Quick Picks for Reluctant Young Adult Readers lists.

The National Coalition Against Censorship stated that the book "speaks to many Black teens' experiences with racism and explores the different historical approaches to confronting racist violence, while offering words of affirmation and healing."

The school district's lesson plans contextualize the book's themes of racism and police violence through discussions on racial profiling, civil disobedience, and affirmative action.

Janet Deidrick said she was "heartsick" when listening to the audiobook and hearing what she described as an "anti-police sentiment."

Complaints from parents are part of a larger movement resisting the district's efforts to adopt a more inclusive curriculum aligned with its "educational equity resolution" and goals of "identifying conscious and unconscious biases and eliminating barriers to educational achievement."

According to Rockwood spokesperson Mary LaPak, when the district selects "literature that students can choose to read, we look for books that include people with disabilities, people of different backgrounds, and people with different life experiences. We want all children to have access to books that are reflective of themselves."

To protest this, local parents organized a forum with Republican state Representative Dottie Bailey and state Senators Andrew Koenig and Cindy O'Laughlin to discuss "what is being taught in your child's school."

Earlier this year, the district increased security at its board meetings to two or three police officers. LaPak said this was in response to the "tone of social media posts directed towards district personnel."

Rockwood Superintendent Mark Miles and District Director of Educational Equity and Diversity Brittany Hogan are both stepping down from their positions. Miles has served for two years and Hogan has served for one.

According to Geneviève Steidtmann, parent of a Rockwood seventh grader, the pushback against the curriculum is "proving the point that we need this education more than ever. . . . Stopping teachers from teaching facts and the truth is dangerous."

Missouri is one of the states that currently has a bill to ban the teaching of critical race theory in public schools passing through their legislature (HB 952).

(See "Nationwide" on page 17 for more news pertaining to efforts to ban the teaching of critical race theory.)

Reported in: *St. Louis Post-Dispatch*, April 29, 2021.

Springfield, Missouri

During a meeting of the Springfield Public Schools Board, Theresa Drussa, grandmother of a high school senior, challenged the teaching of *The Perks of Being a Wallflower* by Stephen Chbosky.

She alleged the book was "pornographic" and "contains sexual abuse, teenage sex, rape, abortion, and LSD." While she said she did not read past page 31, she argued "that was plenty." She said her desire to ban the book from the school is not "just about my grandchildren. It's about all children. It scares me to think how many girls may have been date raped because the guys read that book."

Chbosky's 1999 young adult novel is narrated by a freshman attending a high school in a Pittsburgh suburb during the early 90's. It addresses themes and issues commonly encountered during adolescence, including sexuality, drug use, rape, and mental health.

The Perks of Being a Wallflower was included on the American Library Association's (ALA) lists of Best Books for Young Adults and Best Books for Reluctant Readers in 2000.

It has also made seven appearances on ALA's Top Ten Most Challenged Books Lists (2004, 2006, 2007, 2008, 2009, 2013, and 2014).

Springfield Public Schools taught Chbosky's novel in an elective course on film and literature that is available to high school juniors and seniors. The book and the film it inspired were one of several options for the course.

Stephen Hall, chief communications cfficer for Springfield Public Schools, stated, "All options are included in the syllabus for both students and parents to review."

Hall added that "throughout history we have had a number of pieces of literature that have been controversial for various reasons. Part of what we have to do as we evaluate curriculum and make decisions is [ask ourselves,] 'How can we best prepare students at the appropriate age to be critical thinkers?' The best way to become critical thinkers, oftentimes, is to have access to a variety of literature."

In accordance with their policy, a committee made up of the principal, two teachers, and a librarian will review the book and consider Drussa's request to remove it from the curriculum.

Other possible outcomes include limiting its use, requiring a permission slip or parental consent to read it, or simply retaining it without restriction.

No deadline was set for the committee to make their determination.

Reported in: KY3, March 30, 2021.

La Vista, Nebraska

After a parent complained about the book *Something Happened in Our Town: A Child's Story About Racial Injustice*, Papillion-La Vista Schools Superintendent Andrew Rikli offered an apology to the police and publicly disparaged his staff. He pulled the book and the read-aloud video of it from the schools.

Jared Wagenknecht, vice president of the Papillion-La Vista Education Association (PLEA), defended both the curriculum and its teachers at the April 12 board meeting of the Papillion-La Vista School.

The book by Marianne Celano, Marietta Collins, and Ann Hazzard follows a White family and a Black family as they discuss the police shooting of a Black man in their community. It aims to "answer children's questions about such traumatic events and to help children identify and counter racial injustice in their own lives."

Wagenknecht said that PLEA "stands in strong support of educators who engage their students in courageous conversations about racism and social justice. The problem is not the material in question. The problem is continuing to ignore the very real issues of racism and injustice. It is also concerning that teachers were immediately blamed."

He explained that the content was provided to teachers in accordance with district policy by a group of "instructional coaches and administrators" tasked with engaging "students in conversations about race equity and injustices."

Wagenknecht observed the district didn't follow its policies for dealing with challenged materials, noting the following oversights: failure to consult with teachers, not providing alternative materials, and not requesting a review board.

"Instead, the district gave unilateral veto power to one particular community group. This set a dangerous precedent," said Wagenknecht.

Elizabeth von Nagy, a Papillion-La Vista High School librarian, spoke about the book's authors, accolades, and merits.

Von Nagy beseeched the board members to speak with the district's Black students. "I urge you to ask them if the district's response was palpable and supportive, especially given the district's focus on equity and diversity this school year."

A resident identifying himself as a "concerned citizen" spoke up to call the book "race propaganda."

Superintendent Rikli again apologized for the book and defended banning it. "We are not a school district that believes that it is our role to share negative perceptions with our students about law enforcement."

Wagenknecht observed that the worst consequences of the district's response are the missed opportunities for discussion and questions. "Our students deserve to be engaged. It is our job to help students process and make sense of the world that they have inherited."

Reported in: *Omaha World-Herald*, April 14, 2021; WOWT, April 8, 2021, and April 12, 2021.

Austin, Texas

The Eanes Independent School District (ISD) in Austin, Texas, stopped teaching Kyle Lukoff's picture book *Call Me Max* after receiving parent complaints.

Lukoff's book tells the story of a young transgender boy discovering his identity. Lukoff is transgender and a former elementary school librarian in addition to being an award-winning children's author.

The book was part of a list of suggested diverse books circulated by a district teacher and had not been adopted through the district's curriculum review process.

Call Me Max was the only title on the list whose teaching was prohibited. Parents also called for the termination of the teacher who read it aloud in the classroom.

The school district's Chief Learning Officer, Susan Fambrough, sent an email to all parents stating, "Counselors were made available to support students and the school administration worked with families to provide an explanation and reassurances."

Lukoff responded with a public letter to Fambrough in which he stated: "I spent eight years as an elementary school librarian, and am familiar with the situations where so many resources are expended to ensure the wellbeing of students and families--after the Sandy Hook shooting, for example, or after a death in the school, or some other crisis."

Lukoff asked, "Do you believe that a read-aloud about a transgender child is an equivalent trauma? How do you think transgender people in your community feel having their identities treated like a disaster?"

Other parents and transgender advocates strongly criticized the ISD's response.

"It tells them that they must be invisible, that they can't talk about who they are, that they are unworthy," said Jo Ivester, whose transgender son attended Eanes schools from kindergarten through graduation. She added that reading *Call Me Max* would have been life-changing for her son.

A transgender student who graduated from the ISD in 2020 told *Today*, "One of the reasons I never came out as trans at school is because I knew the school wouldn't protect me if I needed protecting. This whole situation is sending that same message to every trans kid in the district today."

The National Coalition Against Censorship (NCAC) sent a letter to the Eanes ISD Board of Trustees stating, "The singling out of this one book from the list and banning it for the viewpoint it expresses, raises serious constitutional concerns."

The statement continued, "Since the District assigns many books in which cisgendered individuals are presented, the removal of *Call Me Max* suggests that the District has engaged in censorship, which violates the First Amendment."

Furthermore, NCAC compelled the ISD's Board to "publicly state that the teacher did not commit a terminable offense, nor any offense at all, and will not be disciplined for his or her good faith effort to comply with the District's stated devotion to diversity, equity, and inclusion."

Reported in: *Today*, March 12, 2021; *School Library Journal*, March 17, 2021; National Coalition Against Censorship, March 30, 2021.

Leander, Texas

Numerous books were pulled from the shelves of Leander Independent School District (ISD) high schools following a raucous meeting in which a woman dropped a dildo on the table in front of the school board members.

The challenged books were used in non-mandatory, student-led book clubs. District leaders say the titles were selected to encourage independent reading by including a variety of topics, voices, and cultures.

An email from the district stated that reading lists were not vetted in their typical fashion. The selection process took place in the spring and summer of 2020 and was done remotely due to the pandemic. As a result, recommendations and online reviews were relied upon more heavily than usual.

One book parents specifically challenged during the February 25, 2021, board meeting was *In the Dream House* by Carmen Maria Machado. Machado's award-winning memoir is about her struggles to survive domestic violence and escape an abusive lesbian relationship.

"Material that has intense themes, that's what literature is," Machado said. "Suggesting that students reading a book that will help them think about relationships and how those can look, suggesting that that's child abuse, is deranged and homophobic."

"You cannot prevent your children from being gay. You cannot prevent your children from being in relationships. You cannot prevent your children from going out into the world and living the life they want to live. I would hope that [parents] would value their kids and their kids' lives, health, and safety over their squeamishness," said Machado.

Lori Hines, who dropped the dildo during the board meeting, said the school should adhere to a "solid, traditional curriculum." She continued, "In all these book clubs, there's no classic literature. When I say classic, I am including anything from the antiquities to *To Kill a Mockingbird*."

Another parent challenged the book *None of the Above* by I.W. Gregorio, a novel about a teenage intersex girl whose secret is revealed to her entire school.

The mother objected to Gregario's book because it discussed "gender fluidity and gender reassignment surgery" and, in her opinion, had "anti-Christian themes."

Jacqueline Woodson's novel *Red at the Bone* was also specifically challenged by parents at the meeting. One parent characterized it as "erotica for teens."

Stephani Bercu, a parent of both an eighth and a tenth grader, said reading passages from these books at board meetings misrepresents texts with complex themes.

"I have no problem with someone keeping their kid from reading a book on the list," Bercu said. "You always have the option of talking to the teacher to find another alternative."

However, Bercu viewed removing options from the reading lists as indefensible, as then "they are trying to take the choice away from my child."

Lorena Germán, who taught English at Headwaters School in Austin, spoke out against a proposal to require parental permission to read book club titles.

"We're going to ask for permission forms for some books and not others? That's a form of censorship. And we've seen that the books that have the worst luck with censorship are books . . . about LGBTQ [lesbian, gay, bisexual, transgender, queer/questioning] topics," said Germán.

The Citizen's Curriculum Advisory Committee (CCAC) was tasked with vetting all 140 student-choice book club selections. CCAC consists of more than 70 parents, educators, counselors, librarians, instructional coaches, principals, and assistant principals.

While many titles are yet to be reviewed by CCAC, the following titles had been removed from the curriculum or suspended pending further review as of April 21:

Removed:

- *Kiss Number 8* by Colleen AF Venable
- *Laura Dean Keeps Breaking Up with Me* by Mariko Tamaki
- *Shirley Jackson's The Lottery: The Authorized Graphic Adaptation* by Miles Hyman
- *The Handmaid's Tale: The Graphic Novel* by Margaret Atwood
- *V for Vendetta* by Alan Moore
- *Y: The Last Man: Book One* by Brian K. Vaughan

Suspended pending further review:

- *In the Dream House* by Carmen Maria Machado
- *None of the Above* by I.W. Gregorio
- *Red at the Bone* by Jacqueline Woodson
- *Beneath a Meth Moon: An Elegy* by Jacqueline Woodson
- *Out of Darkness* by Ashley Hope Pérez
- *The Nowhere Girls* by Amy Reed
- *How I Resist* by Maureen Johnson, editor
- *I Am Not Your Perfect Mexican Daughter* by Erika Sánchez
- *What We Saw* by Aaron Hartzler
- *My Friend Dahmer* by Derf Backderf
- *Speak: The Graphic Novel* by Laurie Halse Anderson

Virtually all of the banned titles focus on characters or have authors who are women; Black, Indigenous, and People of Color (BIPOC); or lesbian, gay, bisexual, transgender, queer/questioning, intersex, and asexual (LGBTQIA+) themes.

Board member Jim MacKay said he wants to see an itemization of what sexual content is acceptable and unacceptable in classroom material.

Aaron Johnson, another board member, unilaterally defended book bans. "We use an Internet content filter to protect our students and staff every day. In my mind, this is no different. We should have an effective filter for literature."

Many people recognized the benefits of exploring challenging topics by discussing literary works within an educational framework guided by teachers and librarians.

Bercu said, "We pay our curriculum people and our English teachers because that's their expertise and that's their knowledge. If we are not trusting our qualified paid professionals, then why are we paying them?"

"It breaks my heart that we're just muting those voices," said Stephanie Martin, a Leander ISD teacher. "What are we saying to our kids? 'No, those stories don't matter. They're being taken away from you.'"

Twenty authors of books removed or suspended from the Leander ISD book club curriculum sent an open

letter to school district officials on April 21, 2021.

They affirmed that including "own voices" LGBTQIA+ and BIPOC works in the curriculum is "both morally necessary and educationally beneficial."

The letter states:

> We believe that there is zero reason that any of the books that have been targeted for removal in Leander cannot be discussed in the classroom in age-appropriate ways. In fact, it is the very role of teachers and librarians to make those determinations and to guide students in their learning and exploration, including through subject matter that may require thoughtful conversation and engagement.
>
> In all, we are deeply concerned that this entire episode risks sending a dangerous message to students: that the best way to confront ideas or literature with which one disagrees is to prohibit or silence it, rather than finding other, constructive ways to engage with it.

The letter concludes, "We believe in the capacity of these and all books to expand the reader's frame of reference—challenging them to confront new ideas and allowing them to explore other perspectives. We are sending this letter to you today not simply to stand up for our own books, but to stand against censorship in our schools. We call on you to resist this misguided effort to ban books and graphic novels, and to revoke any current bans and suspensions for the dignity and equality of all."

The letter can be viewed in its entirety on PEN America's website.

Reported in: KXAN, March 3, 2021; KVUE, March 8, 2021, and April 6, 2021; *Austin American-Statesman*, March 9, 2021; *Community Impact Newspaper*, March 29, 2021, and April 21, 2021; PEN America, April 21, 2021.

Richardson, Texas

During the April 5, 2021, board meeting of the Richardson Independent School District (ISD), parents objected that lesbian, gay, bisexual, transgender, queer/questioning, intersex, and asexual (LGBTQIA+) materials were added to the library catalog.

Some parents argued that students should not be allowed to read about gender identity or transgender issues and that including such books in the catalog makes them too easy to find.

Superintendent Jeannie Stone issued a statement that books related to gender identity and LGBTQIA+ topics have been present in Richardson ISD libraries for years and that they recently added more age-appropriate books on gender identity as part of ongoing inclusiveness efforts.

Stephanie Tyroch, mother of two Richardson students, felt the ISD should provide education solely on reading, writing, and mathematics. She said social and political issues should only be taught at home.

Parent Kelli Vaughn-Hebert praised the ISD for making inclusive materials available to kids. She said that their kids spend a majority of their day around diverse classmates and should be taught how to respect and appreciate students with different backgrounds.

Resident Barndi Dawson observed that children's books allow students to approach discussions on sensitive topics. "We may not have the same belief system, but we all want what is best for our children, and resource options allow all of us to choose reading materials that meet our own family's needs," said Dawson.

Julie Briggs, director of library and information technology for Richardson ISD, said that the district's Equity Council recently discussed the books and decided to keep them in elementary libraries.

Briggs said that research suggests the longer transgender chilren are not recognized by the gender they identify with, the more profound and long-lasting the negative consequences they experience will be. These consequences may include drug misuse, degraded mental health, and suicide.

"Together we can ensure that all students can find books that are a good fit for them and their own families," Briggs said. She added that the same policies that allow for LGBTQIA+ materials to be represented in their libraries also allow books about God to be included.

The board could take no action regarding books, curriculum, or the library's collection policy at the meeting, as the discussion emerged organically and was not on the agenda.

Reported in: *The Dallas Morning News*, April 7, 2021.

Murray, Utah

Murray City School District (MCSD) suspended their Equity Book Bundle Program and Equity Council after a third-grader brought a copy of Kyle Lukoff's picture book *Call Me Max* to school.

The student who owned the book wanted to share it with his class, so he asked his teacher to read it. Parents complained because the book was about a transgender child.

Call Me Max was not part of the Equity Book Bundle Program, had not been selected by the Equity Council, and was not in any of the school districts' libraries. The programs were suspended anyway as they had become synonymous with the MCSD's effort to teach about diversity.

Of the 38 books included in the Equity Book Bundle Program, only two were about the lesbian, gay, bisexual, transgender, queer/questioning, intersex, and asexual (LGBTQIA+) community: *Pride: The Story of Harvey Milk and the Rainbow Flag* by Rob Sanders, for fifth graders, and *Rainbow Revolutionaries: 50 LGBTQ+ People Who Made History* by Sarah Prager, for sixth graders.

The primary focus of the Equity Council and book program was to help address race and racism by introducing students to authors who are Black, Indigenous, and People of Color (BIPOC).

MCSD's suspension of this program during Black History Month proved controversial. In response to community complaints, MCSD spokesperson Dave Perry called the timing "purely coincidental."

Other community members voiced their dismay that MCSD suspended their equity programs over an unrelated event in an effort to placate transphobic parents.

"I feel it sends a terrible message to the LGBTQ+ community to pause this council for an incident that has nothing to do with them," said Murray City District 1 Councilmember Kat Martinez.

One parent wrote to the MCSD board that "These teachings in public schools are vital to increasing awareness and putting an end to bullying, depression, and suicide."

Lukoff is transgender and a former elementary school librarian, as well as an award-winning children's author. He wrote *Call Me Max* for a kindergarten through third grade audience.

"I try to write books about trans kids that don't reinforce misogyny and gender binaries or the concept that your body or being trans is a problem," Lukoff said.

Lukoff believes it is important for young people to see transgender characters, since transgender people are part of the community.

"It's only a problem if you think that being transgender is itself wrong," Lukoff said. "That's something the parent then has to work through."

According to MCSD officials, there is no timetable regarding when the Equity Book Bundle Program and Equity Council will be reinstated.

Reported in: *The Salt Lake Tribune*, February 11, 2021; ABC4 News, February 12, 2021.

Nationwide

Bills banning the teaching of the 1619 Project curriculum were introduced earlier this year by Republican state legislators in Arkansas, Idaho, Iowa, Mississippi, Missouri, and South Dakota.

The 1619 Project consists of a series of essays published in *The New York Times Magazine* and an accompanying curriculum created by the Pulitzer Center. They explore the role of slavery and racial discrimination in the nation's history, including as the root of many contemporary social problems.

Since its publication in 2019, the 1619 Project has been taught in all 50 states. Reporter Nikole Hannah-Jones led the project and won a Pulitzer for her contributions.

Hannah-Jones' introductory essay to the 1619 Project concludes: "I wish, now, that I could go back to the younger me and tell her that her people's ancestry started here, on these lands, and to go boldly, proudly, draw the stars and those stripes of the American flag. We were told once, by virtue of our bondage, that we could never be American. But it was by virtue of our bondage that we became the most American of all."

The bills that would ban this landmark work from schools are all identical to or closely modeled upon legislation proposed by US Senator Tom Cotton in July of 2020. Cotton is a Republican representing Arkansas.

Cleopatra Warren, a high school economics and history teacher at Coretta Scott King Young Women's Leadership Academy in Atlanta, said the proposed legislation was "reminiscent of slave codes, Black codes, and Jim Crow laws which forbade Blacks from reading, writing, or learning about their history."

Stephanie P. Jones, assistant professor of education at Grinnell College, observed that these attempted bans are part of a long history.

"This type of mishandling of curriculum has been in place since the US public schools have been in place," said Jones. "They were not designed to educate Black children and they were not designed to educate White children to be critical of anything related to the foundations of this country."

Mark Schulte, education director for the Pulitzer Center, asked: "How can students understand the unrest of 2020 without understanding the country's difficult history?"

Similar legislation in Arizona that banned Mexican-American studies was deemed unconstitutional in 2017 when a US District Court judge ruled it was enacted for racial and political reasons.

Stefanie Wager, president of the National Council for the Social Studies, said banning curricula is "kind of like banning books. When you're trying to ban an idea, it never works out well."

Wager added that, "The work of historians, the work of social studies teachers, is engaging students in uncovering that evidence, and challenging and weighing that evidence. To try to squash that, or stop that in any way, is not the mark of a quality social studies educator."

Hannah-Jones wrote that, "Attempting to control what teachers

can teach in the name of patriotism is seeking indoctrination not education. Education should open minds, not close them."

The bills to ban the 1619 Project curriculum from schools in Arkansas, Mississippi, and South Dakota failed or were withdrawn.

The Missouri (HB 952) and Iowa (HF 222) bills continue to move forward. The ACLU of Iowa said in a statement that HF 222 "is an incredibly harmful government attempt at censorship, with the goal of shutting down ideas and preventing students from being exposed to an important discussion on the impact and legacy of slavery in our country."

Idaho's governor, Brad Little, signed H377 into law on April 28, 2021, banning critical race theory, including the 1619 Project, from being taught in public schools, charter schools, and institutions of higher education.

Reported in: *Education Week*, February 3, 2021; KCRG, February 11, 2021; *PEW Stateline*, February 26, 2021; *The Washington Post*, April 7, 2021; *The Guardian*, May 6, 2021.

LIBRARIES

Lafayette, Louisiana

The Lafayette Public Library Board voted 5-2 to reject receipt of a $2,700 grant from the Louisiana Endowment for the Humanities (LEH). The grant would have funded two discussion facilitators and the purchase of books as part of LEH's "Who Gets to Vote?" library reading and book discussion program.

According to the grant application, the LEH series "is intended to engage members of the general public in conversations on the history of voting—and efforts to suppress the vote—in the United States."

The library board rejected the grant for not representing "both sides" of the issue of voter suppression.

State Senator Gerald Boudreaux called the board's actions "incomprehensible" in a statement proclaiming that "the other side falls in the category of 'Jim Crow Laws' and the 'KKK.'"

Library Director Teresa Elberson retired in response to the board's action, abruptly ending her 38-year career at the library.

American Library Association President Julius C. Jefferson and United for Libraries President David Paige sent a joint letter to the members of the Lafayette Public Library Board urging them to reconsider their vote and update their policies and procedures regarding programming.

The discussion would have focused on two books: *Bending Toward Justice* by Gary May and *Vanguard: How Black Women Broke Barriers, Won the Vote, and Insisted on Equality for All* by Martha S. Jones.

Theodore Foster is an assistant professor of African American history at the University of Louisiana at Lafayette and author of the discussion guide for one of the books LEH selected as part of the grant. Foster was to be one of the discussion leaders for the library.

University of Louisiana at Lafayette President Joseph Savoie described Foster as "a dynamic and thoughtful scholar of Black life, culture, and politics in our nation. That he is qualified to facilitate this discussion and provide context to it is without question."

Senator Boudreaux said he was working to help the University of Louisiana at Lafayette's DuPre Library secure the funding that had been intended for the Lafayette Public Library so the book discussions can still take place in the community.

The grant is part of the "Why it Matters: Civic and Electoral Participation" initiative, administered by the Federation of State Humanities Councils and funded by the Andrew W. Mellon Foundation.

Reported in: *The Acadiana Advocate*, January 29, 2021, and February 5, 2021; KLFY 10, February 2, 2021; KATC 3, February 3, 2021.

Midland County, Texas

Library Director Debbie Garza removed Pride displays at the Midland County Public Libraries' downtown and Centennial branches when some residents complained about them.

The displays featured lesbian, gay, bisexual, transgender, queer/questioning, intersex, and asexual (LGBTQIA+) books, rainbow banners, and hearts, as well as "You belong!" signs. They were set up to celebrate Pride month in June 2020 and removed after two weeks.

Garza indicated that all future displays would require her approval.

While the books that had been displayed in the children and young adult sections were written for those age groups, staff said Garza reassigned some titles to the adult section after removing the displays.

Terry Johnson said that he and other members of the library commissioners' court (the local version of a library board) received complaints but hadn't been given any presentations about the displays before they were set up.

He said, "If they want to do it again, I think that's something the court should be involved in."

Multiple employees resigned after the displays were removed.

Former library clerk Hannah Woupio, who resigned within a month of the removal, said that "the whole department was upset because even if you don't agree with it or the lifestyle, it's still censorship."

Several employees expressed concern to Garza that removing the displays violated the American Library Association's (ALA) Library Bill of Rights and said that the removal should be reported to the Office for Intellectual Freedom.

Garza responded that "if ALA or TLA [Texas Library Association] or any organization is to be contacted, such contact will be made by my office."

A former youth services employee said, "We set up the display and I will never forget seeing the faces of the teens that I worked so close with light up. A teen cried as she looked at the display. She stayed in the teen area for an hour just looking at everything, smiling."

She said the removal of the displays "was a slap in the face and [brought] a horrible realization that homophobia existed within the library administration."

When children and teens who were looking for LGBTQIA+ books asked staff what happened to the displays, and Woupio informed them they were removed by the library director, she said "you could see them die a little bit inside."

Reported in: *Houston Chronicle*, April 19, 2021.

Nationwide

Dr. Seuss Enterprises issued a statement on March 2, 2021, announcing they would cease publication of six of Dr. Seuss's children's books due to racist stereotypes that "portray people in ways that are hurtful and wrong."

The six titles withdrawn from publication were *And to Think That I Saw It on Mulberry Street, If I Ran the Zoo, McElligot's Pool, On Beyond Zebra!, Scrambled Eggs Super!,* and *The Cat's Quizzer.* The titles contain offensive depictions of African and Asian people.

Shortly after Dr. Seuss Enterprises' announcement was made regarding the racist imagery, more than half of Amazon's top 20 slots were held by Seuss titles.

The decision also left libraries in a quandary regarding what to do with their copies of the six books being withdrawn from publication.

Deborah Caldwell-Stone, director of the American Library Association's Office for Intellectual Freedom, said, "Any author, or anyone publishing books, can make choices about what is out in the world."

Caldwell-Stone noted, however, that "an author's or publisher's decision to stop publishing a book should not be grounds alone for removing a book from a library's collection."

Nationwide, librarians sought ways of resolving the tension between their commitment to intellectual freedom and the risk of exposing young children to harmful stereotypes.

A spokesperson said the "Brooklyn Public Library stands firmly against censorship so while we do not showcase books with outdated or offensive viewpoints, we do not remove them either, using them instead as a springboard for conversations about healing and moving forward."

The New York Public Library (NYPL), Denver Public Library, and Los Angeles Public Library all decided to retain copies of the six titles until they are too worn to circulate.

Angela Montefinise, senior director of communications for NYPL, said that "in the meantime, librarians, who care deeply about serving their communities and ensuring accurate and diverse representation in our collections—especially children's books—will strongly consider this information when planning storytimes, displays, and recommendations."

The District of Columbia Public Library is undertaking an internal review of the books.

Other public libraries, like those in Lake Forest, Illinois, and Marshalltown, Iowa, removed them from circulation to prevent their theft, as the discontinued titles quickly began selling for thousands of dollars in used book markets.

The Chicago Public Library is temporarily removing the six titles from circulation while it decides what to do with them.

Chicago Public Library spokesperson Patrick Molloy said, "Library staff encourage patrons of all ages to engage critically with our materials, but materials that become dated or that foster inaccurate, culturally harmful stereotypes are removed to make space for more current, comprehensive materials."

The Indianapolis Public Library is also considering removing the titles. Joe Backe, the communications director, said, "As the library pursues an improved approach to our strategic priority of racial equity, we will continue to avoid promoting or elevating these types of materials."

While the announcement made headlines around the globe, criticism of racist stereotypes and xenophobia in Dr. Seuss's work is nothing new. In addition to the offensive portrayals in his children's books, he also wrote a minstrel show and performed in blackface.

The harm ensuant from exposing children to racist portrayals is also well-documented.

According to *Education Week*, "Teachers and education researchers have long described how books that lean on stereotypes of people [of] color, or reduce their lives and experiences to a 'single story,' can lead students of color to internalize negative messages and discourage interest

in reading--while at the same time, implicitly telling White students that these stereotypes are correct and normal."

Reported in: *Chicago Sun-Times*, March 6, 2021; *Business Insider*, March 10, 2021; *Education Week*, March 2, 2021; ABC News, March 6, 2021; MSN, March 2, 2021; *Times-Republican*, March 6, 2021; *Patch*, March 22, 2021; *Indianapolis Star*, March 2, 2021.

PRISONS
Florence, Arizona

Edward Lee Jones, an inmate at the Eyman state prison in Florence, Arizona, is suing the Department of Corrections, alleging their regulations regarding access to books, CDs, and other materials are being applied in an unconstitutionally inconsistent fashion.

Easha Anand is representing Jones in *Edward Lee Jones, Jr., v. S. Slade, et al.* (20-15642) on behalf of the Roderick and Solange MacArthur Justice Center.

"In this case, the Arizona Department of Corrections confiscated a Kendrick Lamar CD ["Untitled Unmastered"] from Mr. Jones, supposedly because it promoted violence and had sexual content. Yet at the same time, inmates are allowed to watch violent TV shows like *Dexter*, read James Patterson books that describe rape, and listen to country music songs about cold-blooded murder," said Anand.

Anand said this demonstrates that the Department of Corrections is banning materials selectively, an act prohibited under the First Amendment. While Jones lost his case in the US District Court of Arizona, the 9th US Circuit Court of Appeals will allow the matter to be revisited.

The District Court ruling asserted Jones's rights were not violated as he was allowed to listen to country music as an alternative.

Anand says they will argue the prison has a broad policy which is being applied unevenly to suppress "rap music and R&B music—both of which happen to be quintessentially produced by Black artists."

In her 2019 ruling in *Prison Legal News v. Charles L Ryan, et al.* (2:15-cv-02245-ROS), Judge Roslyn Silver found the department's policy on banned media "violates the First Amendment on its face."

That case involved the department banning copies of *Prison Legal News* that contained court documents detailing correctional officers sexually assaulting inmates.

The Department of Corrections was also sued by the American Civil Liberties Union (ACLU) in 2019 for banning *Chokehold* by Paul Butler, a book calling for significant changes in the criminal justice system.

The ACLU and the Becket Fund for Religious Liberty have filed amicus briefs in support of Jones.

Reported in: *Fronteras*, February 12, 2021.

LIBRARIES
Indiana

Indiana Senate Bill 288, which would make it a level 6 felony for schools and public libraries that share "harmful material" with minors, was withdrawn before its final reading.

Schools and public libraries currently have special protection against prosecution for dissemination of obscene materials to minors under Indiana state law. The bill would have stripped those protections and removed "educational purposes" as a defense against prosecution.

The Indiana American Civil Liberties Union issued a statement in opposition to SB 288, in part because it did not clearly define what constituted "harmful material to minors."

The statement argued that "the vagueness of the statute could be used to silence protected speech on a multitude of various areas and has historically been used as a tool to ban sex education materials and materials about LGBTQ [lesbian, gay, bisexual, transgender, queer/questioning] issues from local libraries if community members and local prosecutors find it objectionable."

The bill's author, Senator Jim Tomes (Republican), has previously characterized a Drag Queen Story Hour event held at the Evansville Vanderburgh Public Library as "immoral" and "inappropriate" for young children.

Senator Fady Qaddoura (Democrat) voted against the bill. "When you talk about biology classes and showing the human anatomy and other types of educational material, I feel that we are shooting ourselves, literally, in the foot on this issue by censoring what libraries and educational institutions should be able to use to educate our kids."

Tomes withdrew the bill as it lacked sufficient support in the Republican caucus, but indicated he will bring the bill back. He said: "The bill is still going to be the same. The goal will still be the same. I'm not going to back down from that."

If the text of the bill is not tacked on as an amendment to another bill, the next opportunity for it to be introduced will be in the 2022 legislative session.

Reported in: *TheStatehouseFile.com*, February 24, 2021.

SCHOOLS
Pittsburgh, Pennsylvania

Several parents anonymously informed local news sites that they planned to protest Angie Thomas's novel *The Hate U Give* at the March 17 school board meeting of the North Allegheny High School.

The planned protest was widely reported, including on WPXI and in *The Uproar*, the North Allegheny Senior High School news site. In response, students and parents came out in force to defend the teaching of Thomas's acclaimed novel.

When she heard of the planned protest, Angie Thomas tweeted: "I wish people were more upset about police brutality than they are about curse words."

The Hate U Give is a young adult novel narrated by a Black teenager who witnesses a White police officer shoot and kill an unarmed Black man during a traffic stop. It was added to the ninth grade English curriculum in 2019, replacing *To Kill a Mockingbird*.

The Hate U Give appeared on the American Library Association's Top 10 Most Challenged Books lists for 2017, 2018, and 2020. It has been challenged for including profanity, drug use, sexual references, and "was thought to promote an anti-police message."

Thomas's book has also won numerous awards, including a 2018 Michael L. Printz Award, three Goodreads Choice Awards, the 2018 William C. Morris Award for best debut book for teens, the 2018 Indies Choice Award for Young Adult Book of the Year, and it was a 2018 Coretta Scott King Book Award honoree.

At the beginning of the unit in which Thomas's novel was taught, parents received communication regarding the novel's themes, situations, and language, as well as the school's "commitment to addressing the content of the book in a professional and appropriate way."

Families had the option to opt out and read another book, but none did so, according to Brandi Smith, the public relations and communications specialist for the district.

The five speakers who defended the book at the board meeting all read passages from it. Student Lamees Subeir also observed that there are "very few issues about Black struggle in the curriculum outside of slavery."

"Please do not remove this book from the curriculum because it might be sensitive," Subeir urged the board. "Sensitive just means that people do not want to talk about it."

Another student, Avery Neely, argued that the book illustrates the urban/suburban divide, as its narrator lives in a poor and predominantly Black neighborhood, but attends a mostly White suburban preparatory school.

"What is the role of an educator if not to make sense of the world for the students?" Neely asked.

Parent Melinda Weddes said that the novel "opens the door to conversations about racism," adding that, "It is important in a predominantly White district to educate students about racism."

North Allegheny students also defended the book in their online student newspaper, *The Uproar*, where Sam Podnar stated, "I know that the

complaints were officially about drug use and language, but I think that it is the underlying discomfort with the ideas of police brutality and racism discussed in the book."

Zoë Tracey said, "The resistance [to the book] is so clearly a reflection of the inability of our community to acknowledge the unsettling situations Black Americans go through."

None of the parents who indicated they would protest the book at the meeting did so. In fact, no one attending the meeting spoke out against the book. *The Hate U Give* remains part of the North Allegheny High School's 9th grade curriculum.

Reported in: *Pittsburgh Post-Gazette*, March 25, 2021; *The Uproar*, March 11, 2021.

NEWS FROM THE BENCH

SUPREME COURT

In ***Google LLC v. Oracle America, Inc. (No. 18-956)***, the Supreme Court ruled 6-2 that Google's copying lines of code from the Java SE Application Programming Interface (API) was fair use resulting in new and transformative work.

The case revolves around 11,500 lines of code from the Java API. Google copied the code in 2005 to allow programmers familiar with Java to easily write programs for their Android Operating System (OS).

An API acts as a bridge between systems, programming languages, and/or hardware. APIs simplify software development by allowing for code reuse and the leveraging of developers' existing skills onto new platforms.

After acquiring Java in 2010, Oracle sued Google for having distributed a new implementation of the Java APIs as part of the Android OS. In the initial case, Judge William Alsup ruled in favor of Google, determining that APIs could not be copyrighted under US law.

In 2014, the US Court of Appeals for the Federal Circuit overturned the original verdict, but left the question of fair use open.

When the matter was again brought before him in the US District Court in 2016, Judge Alsup ruled Google's copying of the Java APIs constituted fair use.

Oracle appealed again and Alsup's ruling was again overturned by the US Court of Appeals for the Federal Circuit in 2018. Google then appealed to the Supreme Court.

Justice Stephen Breyer wrote the opinion for the Court, stating that the purpose of copyright law is to both protect new products and innovations yet also "stimulate creativity for public illumination."

Breyer wrote that the use Google made of the API code from Java was "consistent with the creative 'progress' that is the basic constitutional objective of copyright itself."

One factor the Court considered when making their fair use determination was the amount of code copied, roughly 0.4% of the 2.86 million lines of code comprising the Java API.

They also considered the nature of the code that was copied. Google used the familiar declaratory structure of Java, with the intention of making it easy for programmers and developers to write for their platform.

The Court noted that the API code Google copied was pervaded with uncopyrightable ideas, such as general task division and organization. They also acknowledged that Android was a new creative expression.

The Court also found that the Android OS did not harm the actual or potential markets for Java SE, as the smartphone market is distinct from the personal desktop and laptop computer market serving as Java's primary market.

When Sun's former CEO was asked directly if Sun's failure to build a smartphone resulted from Google's development of Android, he answered that it did not.

Matt Tait, chief operating officer of Corellium, said, "The decision means a lot for software compatibility. I can write platform software that other peoples' programs can run on, without worrying."

Brandon Howell wrote on *Internet and Social Media* that while the Supreme Court's "opinion allows for wide use of APIs and declaring code in other applications . . . to enable the transfer of long learned skills to a new environment and reuse of old code," questions remain around the fair use of copying APIs generally. For instance, it remains untested if this ruling would apply to a closed API or only to open and freely usable APIs like Java.

Justices Clarence Thomas and Samuel Alito dissented. Justice Amy Coney Barrett did not participate in the case as she had not been sworn in when the case was argued in October 2020.

Reported in: *The Hill*, April 5, 2021; NPR, April 5, 2021; *CNET*, May 9, 2014; *Ars Technica*, May 26, 2016; *JDSupra*, April 9, 2021, April 19, 2021, May 28, 2021; *Internet and Social Media*, May 4, 2021.

In ***Uzuegbunam et al. v. Preczewski et al. (19-968)***, the Supreme Court ruled 8-1 that requesting a nominal sum satisfied the Constitution's requirement that federal courts decide only actual cases or controversies in cases.

Chike Uzuegbunam is an evangelical Christian who reserved time at one of Gwinnett College's "free speech expression areas" to evangelize.

In 2016, after receiving complaints regarding Uzuegbunam's pontifications, a campus officer informed him that his approach to speaking in the "free speech" zone qualified as disorderly conduct. The officer told Uzuegbunam that he was restricted to distributing literature and having one-on-one conversations. Uzuegbunam sued the college in response.

In ***Uzuegbunam v. Preczewski (1:16-cv-04658)***, Gwinnett College argued the case was moot as it had revised its policy to allow speech across the campus. The court ruled in their favor and Uzuegbunam appealed.

The US Court of Appeals for the 11th Circuit affirmed the ruling of mootness in ***Uzuegbunam v. Preczewski (18-12676)***. Undaunted, Uzuegbunam again appealed and the

Supreme Court agreed to hear the case.

The Supreme Court overturned the mootness ruling, finding that the college's withdrawal of their speech policy did not let them off the hook for harms done while it was in place. They also addressed whether nominal damages constituted sufficient harm for a legal proceeding.

During the proceedings, Justice Elena Kagan evoked "the most famous nominal damages case I know of in recent times, which is the Taylor Swift sexual assault case," in which Swift sued a radio host who groped her, seeking $1 in nominal damages.

"I'm not really interested in your money," Justice Kagan said, summarizing Swift's thinking. "I just want a dollar and that dollar is going to represent something both to me and to the world of women who have experienced what I've experienced."

In the majority opinion, Justice Thomas wrote that, "Despite being small, nominal damages are certainly concrete," and that the merits of a case are not determined by a dollar amount.

Chief Justice John G. Roberts, Jr., was the lone dissenter, writing that this decision would lower the bar for trial and turn "judges into advice columnists" who will have to give opinions "whenever a plaintiff tacks on a request for a dollar."

The ruling did not make any determination regarding the campus's prior use of extremely limited "free speech expression areas," nor did it actually award the $1 in damages to Uzuegbunam. Their ruling merely allowed his lawsuit to proceed.

Reported in: *The New York Times*, March 8, 2021; *FindLaw*, March 9, 2021.

The US Supreme Court rejected an appeal by conspiracy theorist Alex Jones without comment. The *Infowars* host was fighting a Connecticut court sanction in a defamation lawsuit brought by relatives of victims of the Sandy Hook Elementary School shooting and an FBI agent who responded to the shooting.

The shooting claimed the life of twenty first-graders and six educators. The families and the FBI agent are suing Jones and his show over his claims that the massacre was a hoax.

Jones's hoax conspiracy resulted in family members of the victims being subjected to harassment and death threats from Jones' followers.

The sanctions against Jones came in response to violations of numerous orders to turn over documents to the families' lawyers and to Jones's protracted tirade singling out one of the lawyers.

On his webshow, Jones held up a photo of Christopher Mattei, an attorney representing the families, and screamed "You're trying to set me up with child porn!"

Jones pounded his fist on Mattei's picture, continuing, "$1 million to put your head on a pike. $1 million, bitch. I'm gonna get your ass. . . . The bounty is out, bitches. They're going to get your ass, you little dirtbag. One million, bitch. It's out on yo ass."

His tantrum spanned a roughly twenty minute-segment and was peppered with admonitions from his lawyer advising him to stop talking. Mattei's name and photo frequently filled the screen as Jones raved about the bounty.

The Connecticut Supreme Court previously stated the sanctions against Jones did not run afoul of the First Amendment because they were imposed on speech constituting an "imminent and likely threat to the administration of justice" and "language evoking threats of physical harm is not tolerable."

Joshua Koskoff, a lawyer for the Sandy Hook families, said, "The families are eager to resume their case and to hold Mr. Jones and his financial network accountable for their actions. From the beginning, our goal has been to prevent future victims of mass shootings from being preyed on by opportunists."

The lawsuit against Jones alleges he has made tens of millions of dollars a year by employing false narratives and that he has "persistently perpetuated a monstrous, unspeakable lie: that the Sandy Hook shooting was staged, and that the families who lost loved ones that day are actors who faked their relatives' deaths."

Reported in: *NBC News*, April 5, 2021.

FREE SPEECH

The US Court of Appeals for the First Circuit upheld First Amendment protections for individuals to secretly audio record on-duty police officers in public spaces in the case ***Martin, et al. v. Rollins (19-1629)***.

In their ruling, the First Circuit affirmed the district court's 2019 judgment that Massachusetts' anti-eavesdropping or "wiretap law" (Mass. G.L. c. 272, Sec 99) unconstitutionally criminalized this right to record the police.

The First Circuit held that recording on-duty police officers, even secretly, is a protected newsgathering activity serving "the very same interest in promoting public awareness of the conduct of law enforcement--with all the accountability that the provision of such information promotes."

The court's opinion stated that recording provides one avenue of "informing the public about how the police are conducting themselves, whether by documenting their heroism, dispelling claims of their misconduct, or facilitating the public's ability

to hold them to account for their wrongdoing."

The Electronic Frontier Foundation, who filed an amicus brief in the case, pointed out that "the ability to *secretly* audio record on-duty police officers is especially important given that many officers retaliate against civilians who openly record them."

The court was not persuaded by the argument that the law served to protect the privacy of civilians speaking with or near police officers, asserting that "an individual's privacy interests are hardly at their zenith in speaking audibly in a public space within earshot of a police officer."

Federal appellate courts in the Third, Fifth, Seventh, Ninth, and Eleventh Circuits have also upheld the right to record on-duty police officers.

Reported in: EFF, April 5, 2021.

Kentucky

The US Court of Appeals found a Kentucky law distinguishing between on-site and off-site advertising to be unconstitutional on its face.

The case, ***L.D. Management Company v. Gray (20-5547)***, revolved around a billboard advertisement for the Lion's Den Adult Superstore which was displayed on a tractor-trailer parked on a neighboring property at Exit 251.

According to the court's February 16 opinion, Lion's Den sells "books, magazines, and other items not worth belaboring." The billboard read "Lion's Den Adult Superstore Exit Now."

When this billboard came to the attention of the Kentucky Department of Transportation, they ordered Lion's Den to remove it.

Kentucky's "billboard" law imposes special requirements on roadside billboards advertising off-site activities which did not apply to billboards advertising on-site activities.

The case was previously tried at the US District Court for the Western District of Kentucky at Louisville (no. 3:18-cv-00722). The district court prohibited the Commonwealth from enforcing its law.

The US Court of Appeals ruled that since the law restricted billboard advertisements based on their content, it violated the First Amendment, upholding the district court's verdict.

The finding was in keeping with prior rulings, including *Reagan National Advertising of Austin, Inc. v. City of Austin (19-50354)*.

Reported in: *Courthouse News Service*, February 16, 2021.

Madison, WI

The Animal Legal Defense Fund (ALDF) sued the University of Wisconsin-Madison (UW-Madison) for blocking former student Madeline Krasno from commenting on their official social media accounts.

Krasno worked as a primate caretaker for approximately two years at the university's Harlow Center for Biological Psychology.

She alleges the university scrubbed critical comments about their animal research practices from their social media accounts in violation of her First Amendment rights.

Krasno said she encountered animal abuse first-hand in the lab and urged the university to stop its monkey studies through comments posted on their official Instagram and Facebook accounts.

In spring of 2020, the US Department of Agriculture fined UW-Madison $74,000 for twenty-eight violations of federal animal research standards dating back to 2015. These included numerous Animal Welfare Act violations involving primates, corroborating Krasno's claims.

The ALDF argues that by blocking Krasno's criticisms from view, the university is preventing Krasno from participating in discussions on designated public forums.

"Whistleblowers have a right to share their first-hand experiences, so the public can intervene and comment on the way tax-dollars are spent," said Stephen Wells, executive director of ALDF.

According to a report published on April 22, 2020, by the Foundation for Individual Rights in Education, UW-Madison was not blocking any users on Facebook or Twitter at that time. Krasno said they began blocking her in September of 2020.

While the university's campus policies on free speech herald their "long history of vigorous debate on controversial topics," their social media policy holds that they "have the right to remove any content for any reason."

The case, ***Krasno v. Board of Regents of University of Wisconsin et al. (civil action no. 21-99)*** is being adjudicated in the **US District Court for the Western District of Wisconsin**.

Reported in: *Wisconsin State Journal*, February 15, 2021; Animal Legal Defense Fund, February 9, 2021; *The FIRE*, February 19, 2021.

COPYRIGHT

The **US Court of Appeals for the Second Circuit** ruled that Andy Warhol's 1984 series of 16 silkscreen prints and pencil illustrations of Prince do not qualify as transformative works of art under the fair use doctrine.

The photograph of Prince which Warhol worked from was taken by Lynn Goldsmith in 1981. Condé Nast licensed the then-unpublished photo as an illustration reference. Warhol created an image from it for the article

"Purple Fame," which appeared in the November 1984 issue of *Vanity Fair.*

Vanity Fair licensed 12 images from Warhol's Prince series to accompany a memorial article on Prince in 2016. When they did, the Andy Warhol Foundation preemptively sued Goldsmith, seeking to establish that these additional prints' creation and licensure was fair use.

In 2019, US District Judge John G. Koetl ruled in their favor, finding that Warhol's boldly-colored print and signature silk-screening process transformed the photo of a vulnerable and uncomfortable looking man into an "iconic, larger-than-life figure."

In overturning his ruling, the Second Circuit said that a work had to add "something new, with a further purpose or different character, altering the first with new expression, meaning or message" in order to be considered transformative.

The Second Circuit did not consider "the bare assertion of a 'higher or different artistic use'" to be sufficient, indicating instead that derivative works are transformative only when they "obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created."

According to Erin Connors writing for *JDSupra*, this ruling constitutes a narrowing of the fair use doctrine which was at its broadest when the Second Circuit held in 2013 that a work was transformative if it possessed "a different character" and "new aesthetics with creative and communicative results," even if it did not comment on the original work.

In the opinion for ***The Andy Warhol Foundation for the Visual Arts, Inc., v. Goldsmith (19-2420)***, Judge Gerald Lynch seemed to assert this past ruling bordered on all-encompassing. Lynch stated that the secondary work must rather be "fundamentally different and new."

Lynch wrote, "Whether a work is transformative cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic—or for that matter, a judge—draws from the work. Were it otherwise, the law may well recognize any alteration as transformative."

The Court also ruled that the distinctiveness of the secondary artist's style should not factor into a fair use analysis, as that would "create a celebrity-plagiarist privilege."

"The imposition of another artist's style on the primary work" does not suffice to render a work transformative. Famous artists still need to license the originals on which their work is based no matter how recognizable their style may be.

In their ruling, the Court also seemed to narrow what might constitute fair use by expanding the considerations for how a derivative work affects the original's value.

Despite finding that the markets for the Goldsmith photograph and the Warhol prints did not meaningfully overlap, the Court determined Warhol's prints threatened Goldsmith's actual or potential licensing revenue, as both depictions of Prince have been licensed to accompany articles.

In a prepared statement, Goldsmith said, "Four years ago, the Andy Warhol Foundation sued me to obtain a ruling that it could use my photograph without asking my permission or paying me anything for my work. I fought this suit to protect not only my own rights, but the rights of all photographers and visual artists to make a living by licensing their creative work."

Reported in: *Courthouse News Service*, March 26, 2021, and September 15, 2020; *JDSupra*, April 7, 2021, and May 7, 2021.

LIBRARIES

Can political groups undermine the library board election process so only candidates willing to ban lesbian, gay, bisexual, transgender, queer/questioning, intersex, and asexual (LGBTQIA+) materials get elected?

Candidates for the governing board of the Community Library Network in Idaho were asked about censorship and book banning as part of their qualifications for endorsement by the Kootenai County Republican Central Committee (KCRCC).

The library board governs seven libraries in Athol, Rathdrum, Hayden, Spirit Lake, Post Falls, Harrison, and Pinehurst, as well as a local bookmobile. The combined budget of the library network is roughly $7 million.

According to their website, KCRCC is "the official vehicle for building and shaping the Idaho Republican Party at the county level."

"They read to me from a book . . . that was apparently from one of the libraries that describes something about transgender and gay activity. They were obviously uncomfortable," recalled Robert Fish, a board member who was running for re-election.

In response, he told them that, "The library is not in the business of censorship. We don't censor books. We don't censor any of our materials. The reason libraries exist is to provide information for anything to anybody that has an interest in it. We don't try to decide what people can read and talk about."

Fish also referred them to the library's materials selection policy and to the American Library Association's "Freedom to Read Statement" and "Library Bill of Rights."

Fish is a lifelong Republican and the current director of the Pachyderm Club of North Idaho. He was elected to the San Diego and Los Angeles County Republican Central Committees. He was also previously a trustee of the Community Library District in Coeur d'Alene.

KCRCC did not endorse his candidacy and according to Fish, this was because of how he answered their questions regarding censorship of LGBTQIA+ materials.

Cynthia Reyburn, another candidate, also said KCRCC questioned her about books pertaining to the LGBTQIA+ community. She said they asked her, "Are you in favor of these and if you were elected, would you support these materials in our libraries or our schools?"

In response, she stated libraries should have "materials that may make readers uncomfortable" and that libraries shouldn't focus on one perspective.

Reyburn was so taken aback by the line of questioning from the KCRCC, she withdrew from candidacy after their interview. Reyburn is also a lifelong Republican.

Michele Veale has served on the library board for 22 years. She said of herself "I'm not a politician, I'm a library advocate."

When asked about censorship, Veale said "No single person, or special interest group, gets to decide what everyone else has access to. That's the opposite of what a library does." KCRCC did not endorse her, either.

Neither Fish nor Veale was re-elected. Vanessa Robinson and Rachelle Ottosen, the two candidates endorsed by KCRCC, were elected to the board in their stead.

Fish and Veale indicated they would continue to support the library however they could. "I can't even tell you how much time I've spent working for the library, and I don't intend to stop," said Veale.

Incoming board member Robinson said she'd work to "market objectionable books away from the libraries' younger visitors," in tacit support of KCRCC's alleged agenda of censoring titles with LGBTQIA+ content.

Ottosen said "I don't think the public libraries need to be an extension of scriptural knowledge only, but they sure shouldn't be forcing taxpayer funding of satanic agendas that lead to the destruction of our nation."

Reported in: *Idaho Statesman*, April 14, 2021; KTVB, April 22, 2021; *Coeur d'Alene/Post Falls Press*, May 19, 2021; *The Spokesman-Review*, May 8, 2021.

TARGETS OF THE CENSOR

SUMMER 2021

BOOKS

CDS

PROGRAMS

PROJECTS