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ALA and ACRL encouraged by "fair use" decision in Georgia State case

On October 17, the U.S. Court of Appeals for the Eleventh Circuit handed down an important decision in *Cambridge University Press et al.* v. *Carl V. Patton et al.* concerning the permissible "fair use" of copyrighted works in electronic reserves for academic courses. Although publishers sought to bar the uncompensated excerpting of copyrighted material for "e-reserves," the court rejected all such arguments and provided new guidance in the Eleventh Circuit for how "fair use" determinations by educators and librarians should best be made. Remanding to the lower court for further proceedings, the court ruled that fair use decisions should be based on a flexible, case-by-case analysis of the four factors of fair use rather than rigid "checklists" or "percentage-based" formulae.

Courtney Young, president of the American Library Association (ALA), responded to the ruling by issuing a statement:

"The appellate court's decision emphasizes what ALA, the Association of College & Research Libraries (ACRL) and other library associations have always supported—thoughtful analysis of fair use and a rejection of highly restrictive fair use guidelines promoted by many publishers. Critically, this decision confirms the importance of flexible limitations on publisher's rights, such as fair use. Additionally, the appeals court's decision offers important guidance for reevaluating the lower courts' ruling. The court agreed that the non-profit educational nature of the e-reserves service is inherently fair, and that that teachers' and students' needs should be the real measure of any limits on fair use, not any rigid mathematical model. Importantly, the court also acknowledged that educators' use of copyrighted material would be unlikely to harm publishers financially when schools aren't offered the chance to license excerpts of copyrighted work.

"Moving forward, educational institutions can continue to operate their e-reserve services because the appeals court rejected the publishers' efforts to undermine those e-reserve services. Nonetheless, institutions inside and outside the appeals court's jurisdiction—which includes Georgia, Florida and Alabama—may wish to evaluate and ultimately fine tune their services to align with the appeals court's guidance. In addition, institutions that employ checklists should ensure that the checklists are not applied mechanically."

In 2008, publishers Cambridge, Oxford University Press, and SAGE Publishers sued Georgia State University for copyright infringement. The publishers argued that the university's use of copyright-protected materials in course e-reserves without a license was

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Published by the ALA Intellectual Freedom Committee,
Martin Garnar, Chair

in this issue

READ BANNED BOOKS

targets of the censor

books

periodicals

opera

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Huppenthal is out in Arizona

One of the leaders behind legislation banning a Mexican-American Studies curriculum from Arizona classrooms won't be in charge of the state's school system anymore.

In a campaign marred by the discovery that he had been hiding behind pseudonyms to make offensive comments online, Arizona Superintendent of Public Instruction John Huppenthal lost his reelection bid August 26 in Arizona's GOP primary.

Within his party, Huppenthal had faced backlash over his prior support of Common Core standards. The winner of the primary election, Diane Douglas, strongly opposed the standards, painting them as federal overreach and likening them to the education version of "Obamacare" on her campaign website.

Huppenthal's reelection campaign hit a major roadblock when it was revealed in June that he had been leaving comments on political blogs under the pseudonyms "Falcon9" and "Thucydides" containing remarks that many viewed as offensive. In an apparent swipe against the mother tongue of many of his constituents, Huppenthal refused to capitalize the word "Spanish" in one of the comments.

"We all need to stomp out balkanization. No spanish radio stations, no spanish billboards, no spanish tv stations, no spanish newspapers. This is America, speak English," he wrote. He also called people who use food stamps "lazy pigs."

After getting caught, he apologized at a news conference before breaking into tears and abruptly walking away from the podium.

Phoenix independent Luis Cardenas Camacho told the *Arizona Republic* that the comments had influenced his decision to vote against Huppenthal. "He needs to focus on education for children, and we have a high population of different ethnicities in our school system," Cardenas Camacho said. "For him to be that biased toward somebody, it's just not appropriate."

Huppenthal leaves a legacy for Latino students who make up a majority of many of the state's school districts. As a state senator, Huppenthal spearheaded legislation to ban courses targeted toward specific ethnicities, that promote "ethnic solidarity," or that advocate the "overthrow of the government," which passed in 2010. The bill was aimed at a controversial Mexican-American Studies curriculum developed in Tucson public schools that conservatives accused of causing resentment toward whites.

Teachers denied those charges and pointed to research showing the courses had bolstered student achievement and classroom engagement. The courses encouraged students to think critically about controversial issues like race and immigration, and used books routinely assigned at the university level, like Paulo Freire's *Pedagogy of the Oppressed* or Richard Delgado's *Critical Race Theory*.

Elected to head the Arizona public school system in 2010, Huppenthal commissioned an independent audit of the courses upon taking office. Though the audit praised the curriculum's focus on critical thinking and recommended expanding the courses, Huppenthal ordered Tucson Unified School District to suspend them or face the loss of 10 percent of the district's funding—some $14 million annually.

The district then banned seven books from classrooms that had been used as part of the curriculum, arguing that they had been named in a lawsuit challenging HB 2281. The school board voted to lift the restrictions on the books last year.

In 2012, Huppenthal said in an interview that he was considering eliminating Mexican-American Studies from the state's higher education system as well. "I think that's where this toxic thing starts from, the universities," Huppenthal said at the time.

Since 2010, Hispanics have accounted for a majority of Arizona students from kindergarten to second grade, according to a 2013 report by the Arizona Minority Education Policy Analysis Center. Reported in: huffingtonpost.com, August 26. □

ALA protests Adobe data breach

The American Library Association (ALA) has decried confirmed reader data breaches by Adobe and called for immediate corrective action to encrypt and protect reader information. The plain text transmission of reader data over the Internet that was first reported October 7 presumably stretches back as far as the release of Adobe Digital Editions (ADE) 4.0 in early September. The ADE e-book reader application is used by thousands of libraries and many tens of thousands of e-book readers around the globe.

"People expect and deserve that their reading activities remain private, and libraries closely guard the confidentiality of library users' records," said ALA President Courtney Young. "The unencrypted online transmission of library reader data is not only egregious, it sidesteps state laws around the country that protect the privacy of library reading records. Further, this affects more than library users; it is a gross privacy violation for ALL users of Adobe Digital Editions 4."

A recent blog post from the Library and Information Technology Association (LITA), a division of the ALA, outlines many of the technical, legal and ethical concerns within the library community.

In response to ALA's request for information, Adobe reported they "expect an update to be available no later than the week of October 20" in terms of transmission of reader data. Adobe also stated in their communication to ALA:

"Adobe Digital Editions allows users to view and manage eBooks and other digital publications across their preferred reading devices—whether they purchase or borrow them. All information collected from the user is collected

for purposes such as license validation and to facilitate the implementation of different licensing models by publishers and distributors. Additionally, Adobe Digital Editions is designed to collect this information solely for eBooks opened in Adobe Digital Editions or stored in the Adobe Digital Editions library directory, and not for any other eBook on the user's computer. User privacy is very important to Adobe, and all data collection in Adobe Digital Editions is in line with the end user license agreement and the Adobe Privacy Policy."

Beyond the data transmission issue, ALA also is concerned about the possible over-collection and unnecessary retention of sensitive user data. Are all of the data elements collected necessary for product functionality? Is such sensitive user data deleted soon after the need for operational purposes is fulfilled? These issues and guidance are outlined in ALA's policy statements and tools created by the ALA Office for Intellectual Freedom such as the Privacy Toolkit and the Choose Privacy Week website.

"ALA, and we hope the user and vendor community, will continue these inquiries and conversations—and not just for Adobe Digital Editions—to help ensure that only data necessary for user functionality are collected, are properly protected, are deleted as soon as possible, and licensing terms are as clear and transparent as possible," Young added. "With leadership from the Digital Content Working Group (DCWG) and the Intellectual Freedom Committee, ALA will continue investigating possible violations of applicable federal or state laws on commerce/trade and privacy, as well as establishing best practices to protect reader privacy and secure the best possible licensing terms for libraries and the general public."

In a blog post, Barbara Jones, Director of ALA's Office for Intellectual Freedom, added: "The ethical issues are clear: it is the responsibility of librarians to establish policies to prevent any threat to privacy posed by new technologies. Libraries need to ensure that contracts and licenses reflect their policies and legal obligations concerning user privacy and confidentiality. Whenever a third party has access to personally identifiable information (PII), the agreements need to address appropriate restrictions on the use, aggregation, dissemination, and sale of that information, particularly information about minors. In circumstances in which there is a risk that PII may be disclosed, the library should warn its users."

"The legal issues are murkier," Jones continued. "The majority of state library confidentiality records require libraries to prevent disclosure of library users' records to third parties in the absence of user consent or a court order or other legal process compelling disclosure. But these laws often do not govern the behavior of third party vendors entrusted with library users' information. Both Missouri and California have tried to address this by amending their library confidentiality laws to extend the duty to protect library user records to vendors. Ultimately, however, the library must be responsible for assuring the privacy and confidentiality of their users' records." Reported in: *ALA News*, October 13; *OIF Blog*, October 13. □

"I ♥ Boobies" lawsuit settled

Nearly four years of litigation has ended after the Easton (Pennsylvania) Area School District agreed to pay $385,000 to attorneys who represented two students who fought the district for the right to wear breast cancer awareness bracelets.

Sara Mullen, associate director of the American Civil Liberties Union of Pennsylvania, said the district agreed to pay $150,000 within 30 days, $100,000 by Jan. 1, 2015, and $135,000 by July 1 in the settlement agreement.

"We already won the students' right to wear the bracelets," said Mary Catherine Roper, the lead attorney for the case. "This is the kind of thing we'd of course rather settle than litigate because this isn't what we're mainly here for."

"The big picture is that what this case did was really clarify students' rights to talk about important issues in school without the administration second guessing what language they're using," she said.

The September 29 settlement came after middle school students Brianna Hawk and Kayla Martinez and their parents filed a complaint in November 2010 in federal court, which alleged the Easton Area School District violated the students' free expression rights when it banned the Keep A Breast Foundation's "I ♥ Boobies!" bracelets.

The students said their principal gave them an in-school suspension and barred them from school dances for thirty days when they continued to wear the bracelets. The suit, which did not seek damages, asked the judge to lift the ban on the bracelets and allow the students to attend school events.

In April 2011, Circuit Court Judge D. Brooks Smith ruled that the bracelets were protected expression under the First Amendment and issued a preliminary injunction that allowed the students to wear the bracelets. The ruling said the bracelets were not "lewd" or "vulgar," as the district had argued. The judge also ruled that school censorship isn't justified simply because students' speech "has the potential to offend." The district appealed the injunction.

Roper and John E. Freund III, an attorney for the district, argued the case before the U.S. Court of Appeals for the Third Circuit in February 2013. In August 2013, the court agreed that the district's ban on the bracelets violated the students' speech rights.

Easton Area School District appealed to the U.S. Supreme Court, which declined to hear the case in March 2014.

"Kids talk about important things, Roper said, "and when they do, that's the kind of speech you want to encourage, not discourage." Reported in: splc.org, October 8. □

how social media silences debate

Social media, such as Twitter and Facebook, have the effect of tamping down diversity of opinion and stifling debate about public affairs. It makes people less likely to voice opinions, particularly when they think their views differ from those of their friends, according to a report published in August by researchers at Pew Research Center and Rutgers University.

The researchers also found that those who use social media regularly are more reluctant to express dissenting views in the offline world.

"People who use social media are finding new ways to engage politically, but there's a big difference between political participation and deliberation," said Keith N. Hampton, an associate professor of communication at Rutgers and an author of the study. "People are less likely to express opinions and to be exposed to the other side, and that's exposure we'd like to see in a democracy."

The researchers set out to investigate the effect of the Internet on the so-called spiral of silence, a theory that people are less likely to express their views if they believe they differ from those of their friends, family and colleagues. The Internet, many people thought, would do away with that notion because it connects more heterogeneous people and gives even minority voices a bullhorn.

Instead, the researchers found, the Internet reflects the offline world, where people have always gravitated toward like-minded friends and shied away from expressing divergent opinions.

And in some ways, the Internet has deepened that divide. It makes it easy for people to read only news and opinions from people they agree with. In many cases, people don't even make that choice for themselves. Twitter said in August that it would begin showing people tweets even from people they don't follow if enough other people they follow "favorite" them. Facebook announced it would hide stories with certain types of headlines in the news feed. Meanwhile, harassment from online bullies who attack people who express opinions has become a vexing problem for social media sites and their users.

For the study, researchers asked people about the revelations of National Security Agency surveillance by the whistle-blower Edward Snowden, a topic on which Americans were almost evenly divided. Most people surveyed said they would be willing to discuss government surveillance at dinner with family or friends, at a community meeting or at work. The only two settings where most people said they would not discuss it were Facebook and Twitter. And people who use Facebook a few times a day were half as likely as others to say they would voice an opinion about it in a real-world conversation with friends.

Yet if Facebook users thought their Facebook friends agreed with their position on the issue, they were 1.9 times more likely to join a discussion there. And people with fervent views, either in favor of or against government spying, were 2.4 times more likely to say they would join a conversation about it on Facebook. Interestingly, those with less education were more likely to speak up on Facebook, while those with more education were more likely to be silent on Facebook yet express their opinion in a group of family or friends.

The study also found that for all the discussion of social media becoming the place where people find and discuss news, most people said they got information about the N.S.A. revelations from TV and radio, while Facebook and Twitter were the least likely to be news sources. Reported in: *New York Times*, August 26. □

"Klinghoffer" opera opens to protests

At the Metropolitan Opera's first performance of John Adams's "The Death of Klinghoffer" October 19, men and women in evening attire walked through a maze of police barricades, while protesters shouted "Shame!" and "Terror is not art!" One demonstrator held aloft a white handkerchief splattered with red. Others, in wheelchairs set up for the occasion, lined Columbus Avenue.

Political figures, including former Mayor Rudolph W. Giuliani, joined a rally, several hundred strong at Lincoln Center, to denounce an opera that has become the object of a charged debate about art, anti-Semitism and politics.

But after months of escalating protests, including threats to opera officials and online harassment of the cast, "Klinghoffer" finally went on, only a few minutes late. There were cheers when David Robertson, the conductor, arrived in the pit and a few boos after the opening "Chorus of Exiled Palestinians" ended.

By the time opera ended, with a roar of cheers when Adams took the stage, there had been two major disruptions: Before the intermission, a man shouted "The murder of Klinghoffer will never be forgiven" several times before being escorted out, and during the second half, just after the character of Leon Klinghoffer was murdered, a woman cried out a vulgarity and left, accompanied by ushers.

Met officials said at intermission that the man had been arrested on charges of disorderly conduct. Peter Gelb, the Met's general manager, said then that he thought the performance was going well.

"There are obviously some people who came here to be heard, and unfortunately they're disrupting the performance, but we were prepared for worse, I think," he said. "And, of course, we're only halfway through. The thing is, I would like everyone to relax and be able to perform and for the audience to be able to enjoy it."

"Klinghoffer," considered a masterpiece by some critics, has long aroused passions, simply because of its subject matter: the murder of Leon Klinghoffer, an American Jewish passenger in a wheelchair, by members of the Palestine

Liberation Front during the 1985 hijacking of the Achille Lauro cruise ship.

But the 1991 opera arrived at the Met at a moment when many Jews are anguished by anti-Semitic episodes in Europe and reactions to the conflict this summer in Gaza. It also ignited what sounded at times like a revival of the culture wars of the 1990s, in which works of art became fodder for intense political debate.

Giuliani, a Republican, joined protesters outside the opera house on Monday evening, charging that the work offered "a distorted view of history," while the current mayor, Bill de Blasio, a Democrat, earlier in the day defended the Met's right to perform it. He said Giuliani "had a history of challenging cultural institutions when he disagreed with their content."

"I don't think that's the American way," the mayor said at a news conference in Queens, referring to Giuliani's efforts as mayor in 1999 to stop funding the Brooklyn Museum of Art after it mounted an exhibition that Giuliani deemed offensive. "I think the American way is to respect freedom of speech. Simple as that."

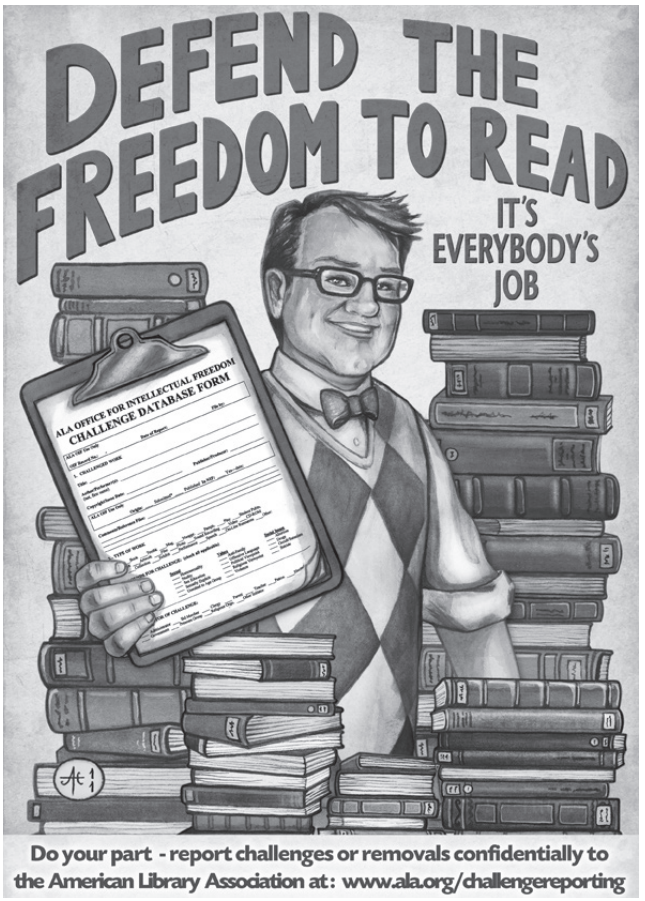
Giuliani, who said he had intervened in Brooklyn because he did not believe public money should have been used to pay for the exhibition, said that unlike some of the other protesters, he was not calling for the production to be canceled, and he called for peaceful protests. Unlike many of the opera's critics, he has listened to it and read the libretto.

"The Met, and those who decide to go see this production, have every right to do so, and it would be hypocritical and anti-American for us to interfere with that and to stop that," he said at the rally. "They have that right. But we also have a right, just as strong and just as compelling, to point out the historical inaccuracy and the historical damage this contributed to."

Justice Ruth Bader Ginsburg attended the opera, Met officials said.

Jeffrey S. Wiesenfeld, who was the rally's master of ceremonies, said he did not expect protesters to react inappropriately. "But you can't be responsible when the Metropolitan Opera advocates terrorism and incites violence—you can't know what will happen," he said. "And anything that happens, that has besmirched this Metropolitan Opera, and besmirched Lincoln Center, is to be laid at the foot of Peter Gelb."

One protester at the rally, Hilary Barr, 55, a pediatric nurse from Westchester County, said she believed the opera made excuses for terrorism. "By putting this on a stage in the middle of Manhattan, the message is, 'Go out, murder someone, be a terrorist and we'll write a play about you,'" she said.



Some people held a counterdemonstration. James Saslow, 66, a professor of theater history at Queens College, had a sign: "A work of art about a subject is not a work in favor of that subject."

The opera, and the Met, were also defended by some artistic figures. "It is not only permissible for the Met to do this piece—it's required for the Met to do the piece," Oskar Eustis, the artistic director of the Public Theater, said in an interview. "It is a powerful and important opera."

The protests were initially led by several smaller Jewish groups and conservative religious organizations. The larger Anti-Defamation League brokered a compromise with the Met, which pleased few on either side, in which plans to show the opera to a wider audience in movie theaters were dropped, but the New York production would otherwise go on. Leaders in the more liberal Reform Judaism movement have condemned the opera, but did not call for its cancellation. Reported in: *New York Times*, October 20. □

censorship dateline

libraries

Rancho Cucamonga, California

A Riverside schools committee has banned the book *The Fault in Our Stars* from its middle schools after a parent challenged the teen love story as inappropriate for that age group.

Following a parent's similar complaint over a Pulitzer Prize-winning novel in Cucamonga School District, the Rancho Cucamonga Middle School library reopened to students September 21 following a book audit launched by the controversy.

On September 20, Unified School District's book reconsideration committee voted 6-1 to pull all three copies of John Green's 2012 novel from library shelves at Frank Augustus Miller Middle School and not to allow other schools to buy or accept the book as a donation. The book will be allowed at high school libraries, said committee chairwoman Christine Allen, librarian at Arlington High School, where the meeting was held.

The vote was taken after parent Karen Krueger made her case to the committee and asked its members—teachers, parents, a principal, librarian and instructional services specialist—to remove the book or make it available for checkout only with parental consent. Krueger said she didn't want to "come off as a prude" or block anyone's freedom to read. But she questioned whether the book should be available at the middle school library because the subject matter involves teens dying of cancer who use crude language and have sex.

"I just didn't think it was appropriate for an 11-, 12-, 13-year-old to read," she said. "I was really shocked it was in a middle school."

Some committee members agreed. "I still don't think 12- and 13-year-olds need to read about a 16- and a 17-year-old having sex," said STEM Academy teacher and committee member Jennifer Higgins.

Parent and committee member Julie Boyes, who voted against banning the book, said she thought Green was trying to show what a dying 16-year-old girl might go through, such as being angry and choosing to have sex because she didn't know if she'd live to 17.

Students went to the library and requested the *New York Times* bestseller near the end of the last school year, shortly before the drama was released in June as a PG-13 movie. The book's arrival was announced over the PA system and many kids read it, said Krueger, who has a twin girl and boy now in eighth grade there.

Krueger complained about the book to the principal in May after her daughter brought the novel home. The principal said the book must go through the district's formal reconsideration process.

Since 1988, 37 books, including this one, have been challenged in the district. Until September only one—Robert Cormier's 1974 novel *The Chocolate War*—had been banned, and that was in 1996. That book includes sex, profanity and violence by members of a secret school society.

Green's book is rated as suitable for "young adults," which Allen said is sometimes defined as 12 through 18. District officials "strive" to choose age-appropriate reading materials as well as books students find interesting to encourage kids to read, Allen said.

Arlington principal and committee member Betsy Schmechel questioned whether students could handle reading about terminally ill teens. "The thing that kept hitting me like a tidal wave was these kids dealing with their own mortality, and how difficult that might be for an 11-year-old or 12-year-old reading this book," she said, later adding she thinks the review process worked. "If you have a process in place like this, then you have a way for anyone to be heard."

Cucamonga School District officials closed the Rancho Cucamonga Middle School library after a parent, Isabel Casas Gallegos, complained a day earlier about inappropriate sexual content in John Updike's 1981 Pulitzer Prize-winning work, *Rabbit is Rich*.

No other books were removed when Principal Bruce LaVallee and the assistant superintendent of educational services reviewed the entire collection through an online library book system. The donated book was pulled without going through the district's normal review process because Superintendent Janet Temkin agreed the content was inappropriate for the age group.

"A committee was not necessary because the content of the book is not suitable for the age level of the students at the middle school," she wrote in an email. Reported in: *Riverside Press-Enterprise*, September 22.

Cleveland, Texas

A pastor in Cleveland, Texas, wants what he calls "demonic" books pulled from the shelves of the public library. Pastor Phillip Missick of King of Saints Tabernacle, a Messianic church, filed a complaint with Austin Memorial Library, Cleveland's public library, asking that many fiction books on vampires, demons and the supernatural be purged. He says he was stunned to find the young adult section full of books like *Blood Promise*, *Twilight*, and the *Vampire Knight* series.

"This is dark. There's a sexual element. You have creatures that aren't human. I think it's dangerous for our kids," said Missick.

Library Director, Mary Cohn responded to Missick's complaint, as well as to a petition he had signed by a handful of local pastors. She noted only five percent of all the 1,500 titles in the teen section deal with occult, vampires and the supernatural, and then spoke to the mission of a public library saying materials should not be chosen or removed because of partisan or doctrinal disapproval.

City Manager Kelly McDonald said they are taking Missick's complaint seriously and preparing a report for the city council to review. Missick believes teens should have parental approval to check out such books. Library policy requires parental consent for minors to get a library card.

"I understand they have the right to these books, but I also have a right to complain about them," said Missick. Reported in: abc13.com, August 22.

schools

Jefferson County, Colorado

Jefferson County high school students held another protest against the school board's proposal to review the new AP U.S. History curriculum on October 11, despite the board's decision to include students in the process. Students and parents rallied in a Littleton park to protest the board's push to make the course more patriotic. They said that the school board's move to put students and teachers on the review board for the course wasn't enough.

In September, the Jefferson County school board proposed a committee to review the new AP U.S. curriculum and ensure that course materials "present positive aspects of the United States and its heritage" and do not "encourage or condone civil disorder, social strife or disregard of the law." This prompted major student protests and walk-outs.

On September 22, hundreds of students from high schools across the Jefferson County school district, the second largest in Colorado, streamed out of school and along busy thoroughfares, waving signs and championing the value of learning about the fractious and tumultuous chapters of American history.

"It's gotten bad," said Griffin Guttormsson, a junior at Arvada High School who wants to become a teacher and spent the school day soliciting honks from passing cars. "The school board is insane. You can't erase our history. It's not patriotic. It's stupid."

The student walkout came after a bitter school board election last year and months of acrimony over charter schools, teacher pay, kindergarten expansion and, now, the proposed review committee, which would evaluate Advanced Placement United States history and elementary school health classes.

The teachers' union, whose members forced two high schools to close by calling in sick, has been in continual conflict with the new board; the board, in turn, has drawn praise from Americans for Prosperity-Colorado, a conservative group affiliated with the Koch family foundations. In April, Dustin Zvonek, the group's director, wrote in an op-ed that the board's election was an "exciting and hopeful moment for the county and the school district."

After two weeks of student protests and a fierce backlash across Colorado and beyond, however, the Jefferson County School Board backed away from the proposal to teach students the "benefits of the free enterprise system, respect for authority and respect for individual rights," while avoiding lessons that condoned "civil disorder, social strife or disregard of the law." But the board did vote 3-to-2 to reorganize its curriculum-review committee to include students, teachers and board-appointed community members.

The Jefferson County schools superintendent, Dan McMinimee, who suggested the compromise, said it represented the "middle ground" in a fevered debate that pitted the board's three conservative members against students, parents, the teachers' union and other critics who opposed the effort to steer lessons toward the "positive aspects of the United States and its heritage." The board members who supported the proposal said they did not want to censor or distort history.

But the compromise allayed few critics. On October 3, hundreds of parents and students lined the streets in the Jefferson County School District to criticize the board's actions as the latest in a series of divisive moves.

Parents and students have said that the board ignored dissenting voices and that the majority voted in haste, overruling the other two members when they said they needed more time to review the proposal. Parents said they were concerned that the curriculum-review committee's members would be appointed by, and answerable to, the board.

"That still opens the door for the board to mess with curriculum," said Jonna Levine, a parent and co-founder of the group Support JeffCo Kids. "It starts with AP history. What comes next? Stop and think about the books in AP lit they could monkey around with."

Some called for the board's three conservative members, who were elected last November over a slate of three union-backed candidates, to resign. Others proposed recalling them.

"They have lost my trust," Amanda Stevens, whose children are in elementary school in the district, said in an email.

"I have not seen actions that reassure me they will govern with students' learning as their top and singular focus."

For two hours the previous night, dozens of parents, students and community members spoke about how the schools lay at the heart of this quilt of suburban towns west of Denver. Families whose children graduated years ago still show up at Friday night football games. Parents live-stream school board meetings at home. Graduates move back to raise their children here.

As board members looked on, students and parents stood up to deride the idea of sanitizing history or tilting curriculum to suit a particular political view. They also criticized board members for suggesting that the teachers' union and other critics had been using the students as pawns.

"We know what we stand for and what we want," Ashlyn Maher, a senior, told the board. "It is our education that is at stake."

"What's next?" asked Jackson Curtiss, another student. "Are you going to choose science? Are you going to take down English?"

Civil liberties groups and several prominent Democrats in Colorado cheered the students on. Senator Mark Udall and Representative Ed Perlmutter issued supportive statements and urged the board to hear out the students. Representative Jared Polis, a Democrat from Boulder, sent Twitter messages under the hashtag #JeffCoSchoolBoardHistory, which offered up humorously whitewashed versions of American history.

"A lot of those words were more specific and more pointed than they have to be," Board President Ken Witt said. He said that the school board was responsible for making decisions about curriculum and that the review committee would give a wider spectrum of parents and community members the power to examine what was taught in schools. He said that some had made censorship allegations "to incite and upset the student population."

The demonstrations lasted an entire week and involved thousands of students at the majority of the county's schools. Students waved signs declaring, "It's world history, not white history," and talked about Cesar Chavez and the Rev. Dr. Martin Luther King Jr. Leaders of the walkout urged others to stay out of the streets and not to curse, and sympathetic parents brought poster board, magic markers and bottles of water.

Almost from the outset, the three conservative newcomers to the five-person board clashed with the two others, and a steady stream of 3-to-2 votes came to represent the sharp divisions on the board and in the community. Critics of the new majority have assailed the board for hiring its own lawyer, calling it a needless expense, and accused them of conducting school business outside of public meetings.

In February, the district's superintendent, Cindy Stevenson, announced during a packed, emotional meeting that she was leaving after 12 years because the board did not trust or respect her. Her replacement, an assistant superintendent from Douglas County, prompted more accusations that the new majority in Jefferson County was trying to steer the district far to the right.

"We've had conservatives on our board before," said Michele Patterson, the president of the district's parent-teacher association. "They were wonderful. These people, they're not interested in balance or compromise. They have a political agenda that they're intent on pushing through."

Witt rejected the criticism, saying he was dedicated to improving student achievement, giving equal footing to charter-school students and rewarding educators for doing their jobs well. "I would rather be able to do those things without conflict, but at the end of the day, it's very important that we align with those goals," he said.

In March 2010, a similar debate roiled the Texas Board of Education as its members voted overwhelmingly to adopt a social studies curriculum that heralded American capitalism and ensured that students would learn about the conservative movement's rise in the 1980s.

In Colorado, students said the protests had been organized over the weekend on Facebook groups after they read about the teacher sick day.

Leighanne Grey, a senior at Arvada High School, said that after second period, a student ran through the halls yelling, "The protest is still on!" and she and scores of her classmates got up and left. She said that learning about history, strife and all, had given her a clearer understanding of the country.

"As we grow up, you always hear that America's the greatest, the land of the free and the home of the brave," she said. "For all the good things we've done, we've done some terrible things. It's important to learn about those things, or we're doomed to repeat the past."

The College Board's new framework for the AP U.S. History exam has sparked backlash among conservatives who claim the history presented in the test is "revisionist" and unpatriotic.

The Republican National Committee called the framework a "radically revisionist view of American history that emphasizes negative aspects of our nation's history while omitting or minimizing positive aspects." Tennessee lawmakers urged the state board of education to review the framework and materials. "There are many concerns with the new [AP U.S. history] framework, not the least of which is that it pushes a revisionist interpretation of historical facts," said Senate Education Committee Chairwoman Dolores Gresham. "The items listed as required knowledge have some inclusions which are agenda-driven, while leaving out basic facts that are very important to our nation's history."

Texas moved to require its high school AP students to learn only state-mandated curriculum—not be taught to the national test. The Texas Board of Education approved a measure declaring that the history curriculum its members set trumps that covered by the AP history course created for

classrooms nationwide. Board Member Ken Mercer, a San Antonio Republican, called for Texas to delay implementation of the new AP test in the state. But since the board has no jurisdiction over a national test, members compromised with last week's measure. In 2013, about 47,500 Texas high school students took the AP History exam, and about 18,600 earned college credit. AP History students this year will still take the new exam, but will prepare for it by studying Texas-sanctioned curriculum.

The College Board on September 28 expressed support for the Colorado high school students. "The College Board's Advanced Placement Program supports the actions taken by students in Jefferson County, Colorado to protest a school board member's request to censor aspects of the AP U.S. History course," the company said in a statement.

"These students recognize that the social order can—and sometimes must—be disrupted in the pursuit of liberty and justice. Civil disorder and social strife are at the patriotic heart of American history—from the Boston Tea Party to the American Revolution to the Civil Rights Movement. And these events and ideas are essential within the study of a college-level, AP U.S. History course.

"As vital context for the courageous voices of the students in Colorado, the AP community, our member institutions and the American people can rest assured: If a school or district censors essential concepts from an Advanced Placement course, that course can no longer bear the 'AP' designation," College Board said in the statement.

On October 1, the James Grossman, Executive Director of the American Historical Association, wrote to Witt and the school board, in which he said, "We are concerned that the Jefferson County School Board's proposals for board review of the curriculum framework are inspired more by politics than a commitment to rigorous and professional history education. At the same time we are deeply impressed by the enthusiasm of your students. To see students standing up for the integrity of their education, and in particular for the quality of historical thinking and teaching that takes place in their classrooms is refreshing—and quite frankly impressive." Reported in: *New York Times*, September 23, October 3; *Denver Post*, September 22: academeblog.org, September 25; talkingpointsmemo.com, September 28, October 12; historians.org, October 2.

Highland Park, Texas

Highland Park High School students were told to put down their books in September. *The Art of Racing in the Rain*—the book they were reading in a 10th-grade English class—was suspended from the school district's approved book list. The novel about a race car driver grieving the loss of his wife includes a sex scene that made some parents uncomfortable.

It was among seven books suspended after parents challenged their content because of sex scenes and references to rape, abuse and abortion. In emails and at meetings, parents said high school students should not be exposed to some of the hardships and controversies of adulthood.

More than 100 people packed a school board meeting. Parents and grandparents brought books flagged with sticky notes. They read excerpts of sex scenes, references to homosexuality, a description of a girl's abduction and a passage that criticized capitalism. They sent hundreds of emails to district officials.

Superintendent Dawson Orr and high school principal Walter Kelly informed parents September 20 that the seven books will be reviewed by committees of parents, teachers and students. Orr said the process may take several months.

The seven suspended books are *The Art of Racing in the Rain*, by Garth Stein; *The Working Poor: Invisible in America*, by David K. Shipler; *Siddhartha*, by Hermann Hesse; *The Absolutely True Diary of a Part-Time Indian*, by Sherman Alexie; *An Abundance of Katherines*, by John Green; *The Glass Castle: A Memoir*, by Jeanette Walls; and *Song of Solomon*, by Toni Morrison.

"I made the decision—given the volume and the tenor and just the continual escalation of this issue—that we would pause, take the time to go ahead and create the reconsideration committees and do the work," Orr said.

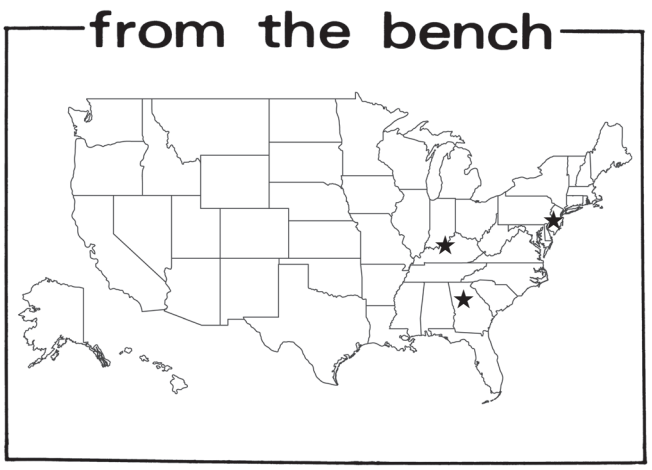
Orr received a lot of criticism for banning the books. Many parents joined efforts to reverse his action. There were many concerns about how removing the books would effect the standing of AP classes with the College Board. And parents demanded that their children have the freedom to read books that were chosen by professionally educated teachers. In a later September 29 email to parents, Orr openly took responsibility, explained his reasoning, and apologized for his misstep. While the superintendent has reinstated those books to the reading list, there is still much discussion about district policy, book selection, and permission slips.

According to the district's Department of Curriculum and Instruction, parent permission slips should be sent home for all books that meet the following criteria:

- Books that currently are being challenged by Highland Park School District parents
- Books that are on the American Library Association's Top 10 Challenged Book List by Year—going back 10 years
- Books that have been indicated by the local HPHS literary selection committee as needing a permission slip

This is where the ALA Office for Intellectual Freedom has stepped in. OIF Director Barbara Jones submitted a letter to the school board, superintendent, and principal expressing concern at the use of permission forms and particularly at the use of ALA's annual Top Ten Most

(continued on page 174)



U.S. Supreme Court

The Supreme Court returned to work October 5 to face a rich and varied docket, including cases on First Amendment rights in the digital age, religious freedom behind bars and the status of Jerusalem. Those cases are colorful and consequential, but there are much bigger ones on the horizon.

"I'm more excited about the next twelve months at the Supreme Court than about any Supreme Court term in its modern history," said Thomas C. Goldstein, who argues frequently before the court and is the publisher of Scotusblog.

In the coming weeks, the justices will most likely agree to decide whether there is a constitutional right to same-sex marriage, a question they ducked in 2013. They will also soon consider whether to hear a fresh and potent challenge to the Affordable Care Act, which barely survived its last encounter with the court in 2012. The terms that concluded with those rulings riveted the nation. Now the two issues may return to the court—together.

"This term could become the 'déjà vu all over again' term of the century," said Pratik A. Shah, a Supreme Court specialist with Akin Gump Strauss Hauer & Feld.

Chief Justice John G. Roberts Jr. is entering his tenth term, and it is one that could define the legacy of the court he leads. Should the court establish a right to same-sex marriage, it would draw comparisons to the famously liberal court led by Chief Justice Earl Warren, said David A. Strauss, a law professor at the University of Chicago.

"It is only a slight overstatement to say that the Roberts court will be to the rights of gays and lesbians what the Warren court was to the rights of African Americans," Professor Strauss said.

Petitions seeking review of decisions in the marriage and healthcare cases have already been filed. They may be joined in short order by ones on abortion and affirmative action. "The prospect that every major social issue will collide before the justices may be historic," Goldstein said.

For now, the court has agreed to hear some fifty cases, enough to fill out its argument calendar into February, including several First Amendment cases.

Elonis v. United States will require the justices to make sense of rap lyrics, a task that will almost certainly be a new experience for most of them. ("My colleagues are all enamored of opera," Justice Sonia Sotomayor said at the University of Tulsa in September, adding that opera was "not my favorite form of cultural entertainment.")

The case concerns Anthony Elonis, who adopted the rap persona Tone Dougie and posted tirades laced with violent imagery on Facebook in the form of rap lyrics after his wife left him. He was convicted under a federal law making it a crime to issue "any threat to injure the person of another," and he was sentenced to 44 months in prison.

The question in the case is whether Elonis's intent mattered, and the court's answer will affect many prosecutions for threats made using social media including Facebook, Twitter and YouTube.

On October 6, in *Holt* v. *Hobbs*, the court heard arguments about whether a Muslim prison inmate in Arkansas may grow a half-inch beard. Corrections officials there say such beards can pose a threat to security, as a place to hide contraband and as a way for escaped inmates to quickly change their appearance.

To decide the case, the court will apply a version of the legal test it used in June in the *Hobby Lobby* case, in which it ruled that some corporations could refuse to provide contraception coverage to their female workers on religious grounds.

The test, set out in federal laws, including one specifically directed at protecting prisoners' rights, requires judges to consider whether the challenged government regulation places a substantial burden on religious practices. If it does, the government must show that it had a compelling reason for the regulation and no better way to achieve it.

In its last term, the court achieved a remarkable degree of consensus, with the justices deciding two-thirds of its cases unanimously. That is unlikely to be repeated. Indeed, the court will probably also be divided on the threshold question of whether review is warranted on the two biggest issues awaiting its attention: same-sex marriage and the new challenges to the healthcare law.

The most important factor in whether the Supreme Court agrees to resolve an issue is usually whether there is a split among the federal appeals courts. But such disagreements are lacking in both sets of cases.

In the same-sex marriage cases, all of the recent federal appeals court decisions have struck down state bans on such unions. In recent remarks, Justice Ruth Bader Ginsburg

suggested that this might be a reason for the Supreme Court to move slowly.

In the new healthcare challenges, there was initially a vivid split between the federal appeals courts in Washington and in Richmond, Virginia, which in July issued conflicting decisions within hours of each other.

The appeals court in Washington, DC, ruled that the federal government could not provide insurance subsidies to people in states that had chosen not to establish the marketplaces known as exchanges. The court in Virginia took the opposite view. It said the contested phrase in the law, limiting subsidies to "an exchange established by the state," was "ambiguous and subject to multiple interpretations." That means, the court said, that the Internal Revenue Service's interpretation, allowing subsidies without regard to whether the exchange is run by a state or by the federal government, is entitled to deference.

The split between the two courts was wiped out in September when the full United States Court of Appeals for the District of Columbia Circuit vacated the July ruling and set the case for argument in December.

The Supreme Court is not required to wait. A petition seeking review of the Virginia decision has already been filed, and it takes only four votes to grant review. Four members of the court—Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas and Samuel A. Alito Jr.—made their hostility to the Affordable Care Act more than clear in their fiery joint dissent in 2012. Reported in: *New York Times*, October 4.

surveillance

Washington, D.C.

The Foreign Intelligence Surveillance Court declassified an opinion August 28, which, although highly redacted, illuminates the way at least one judge is interpreting his mandate to protect the First Amendment activities of Americans who the FBI seeks to investigate under USA PATRIOT Act Section 215.

Essentially, the question the judge, John D. Bates, confronts is when are international terrorism investigations involving Americans based "solely upon activities protected by the First Amendment to the Constitution." Judge Bates concludes that so long as an international terrorism investigation is premised on some unprotected activity, the FBI can nevertheless investigate law-abiding US persons.

In this case, the FBI is conducting an investigation to protect against international terrorism. It appears that a US person is the target of the invesigation or Section 215 order. Judge Bates finds that the target's conduct and speech suggests sympathy toward—if not support of—internation terrorism. However, all of the target's speech and conduct fall within the protections of the First Amendment. So target's own words and conduct do not meet the statutory standard for an order.

Of course, we don't know what happened to bring this law abiding American target under FBI scrutiny. It's easy to imagine that the American is in some way complicitious with the suspected terrorists' illegal acts. However, federal criminal law prohibits certain activities in preparing for or seeking to commit other crimes, including aiding and abetting, conspiracy, and solicitation. The definition of these crimes is broad, but apparently the FBI could not identify facts suggesting the American might be committing one of these crimes. Nor does it appear that Judge Bates had any reason to believe the American was associated with illegal activity. Rather, all his conduct and speech fell within the First Amendment.

Despite the absence of illegal conduct, Judge Bates allows the FBI to investigate the American. Bates concludes that he may consider related conduct of other people that illuminates the "the character (protected by the First Amendment or not) of the 'activities' that are the 'basis' of the investigation." The other party's or parties' actvities would not be protected by the First Amendment even if those people were US persons. Therefore, Judge Bates concludes that the investigation of the American is not based "solely" on First Amendment activities, but rather at least in part on the unprotected activities of others.

Under Section 215, is the question whether the *terrorism investigation* is solely premised on First Amendment activities, or whether the *investigation of the American* during the course of a terrorism investigation is solely premised on First Amendment activities? The statute suggests the latter. It says an order for production of tangible things can issue in: "an investigation . . . to protect against international terrorism, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution."

The phrase "conducted solely upon the basis of activities protected by the first amendment to the Constitution" directly follows, and should relate to, the "investigation of a United States person" and not to the more general "investigation . . . to protect against international terrorism." The statute prohibits the FBI from investigating law abiding Americans unless their own conduct fell outside of the First Amendment, regardless of the conduct of other people related to the investigation. *Just Security* contributor Jennifer Granick said most people, when they cite that statutory language, believe it means that Americans won't be subjects of terrorism investigations for the First Amendment protected things they say or do.

They would be wrong. Judge Bates' alternate interpretation allows for Americans exercising only constitutional protected rights to nevertheless be investigated under

Section 215 so long as there's an independent, constitutionally unprotected basis for the overarching terrorism investigation.

The takeaway is, Americans are being investigated for their First Amendment protected activity, so long as someone's else's related conduct is not protected, even where the relationship between the American and the other party is too attenuated to support suspicion of aiding and abetting or conspiracy.

For people who were reassured that Section 215's language would protect law abiding Americans from getting sucked into counterterrorism investigations, this is another tchotchke for your Curio Cabinet of Naïveté. But the FISC, to its credit, declassified this opinion and now Congress and the public have a chance to understand what "law" is actually being applied. Reported in: "FISC OKs Section 215 Investigations . . ." by Jennifer Granick, justsecurity.org, August 28.

social media

Atlanta, Georgia

Parents can be held liable for what their kids post on Facebook, a Georgia appellate court ruled in a decision that lawyers said marked a legal precedent on the issue of parental responsibility over their children's online activity. The Georgia Court of Appeals decided that the parents of a seventh-grade student may be negligent for failing to get their son to delete a fake Facebook profile that allegedly defamed a female classmate.

The trouble started in 2011 when, with the help of another student, the boy constructed a Facebook profile pretending to be the girl. He used a "Fat Face" app to make her look obese and posted profane and sexually explicit comments on the page depicting her as racist and promiscuous, according to court documents.

When the girl found out about it, she told her parents who then complained to the school's principal. The school punished the boy with two days of in-school suspension and alerted his parents, who grounded him for a week.

But for the next eleven months, according to the appeals court opinion, the page stayed up. It wasn't deleted until Facebook deactivated the account at the urging of the girl's parents, the opinion said. The girl's lawyer says the child's parents didn't immediately confront the boy's parents because their school refused to identify the culprit for confidentiality reasons.

"Given that the false and offensive statements remained on display, and continued to reach readers, for an additional eleven months, we conclude that a jury could find that the [parents'] negligence proximately caused some part of the injury [the girl] sustained from [the boy's] actions (and inactions)," wrote Judge John J. Ellington in the opinion, which was handed down October 10. He was joined by two other judges on the panel.

The appeals court, though, agreed with a trial court's dismissal of another part of the lawsuit that sought to hold the parents responsible for allowing the page to be posted in the first place.

Atlanta litigator Edgar S. Mangiafico Jr., who defended the boy's parents, said that the court's decision was marred by inconsistencies and that he would appeal the ruling to the Georgia Supreme Court. Mangiafico said when he was researching the question of parental liability with respect to cyberbullying, he couldn't find any case in which a court found parents negligent for failing to supervise their kids' computer use.

Natalie Woodward, an Atlanta attorney who represented the girl, said she also believed the outcome was a novel one. The ruling shows, she said, that in "certain circumstances, when what is being said about a child is untrue and once the parents know about it, then liability is triggered." Reported in: *Wall Street Journal*, October 13.

open records

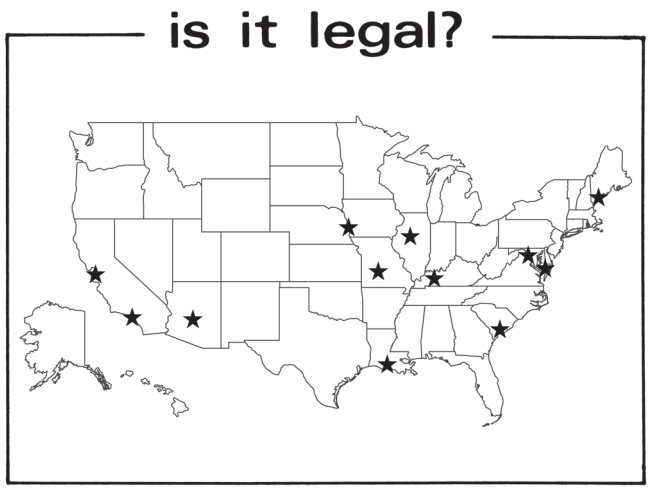
Louisville, Kentucky

On October 3, the Kentucky Court of Appeals agreed with a lower court ruling finding that University Medical Center (UMC), the entity that manages the University of Louisville Hospital, is a public agency and thus subject to Kentucky's Open Records Act. The decision was the latest step in a long running dispute between UMC and various entities, including the ACLU of Kentucky, over whether UMC had to provide copies of various public records that had been sought pursuant to the Open Records Act.

In 2011, the ACLU requested certain records from UMC regarding the then-pending merger between that entity and a Catholic healthcare provider. In refusing to provide the requested documents, UMC maintained that it was not a public agency and therefore not obliged to provide the materials. The ACLU then sought an opinion from the office of Attorney General regarding the issue, and that office concluded that UMC was a public agency. To contest the Attorney General's decision, UMC filed suit against the ACLU and other entities, including the *Courier-Journal* that had requested public records from it. Although the trial court ultimately disagreed with the Attorney General's reasoning, it nonetheless concluded that UMC is a public agency because the University of Louisville has de facto control over the appointment of members to UMC's Board of Directors.

The latest decision affirms that lower court ruling. In finding that UMC is a public agency, a unanimous decision by a three judge panel of the Court of Appeals observed that, "UofL's president can ensure no unfavorable candidate [for UMC's Board] is ever considered because he controls the Board's agenda and handpicks the members of the Nominating Committee."

Commenting on the decision, ACLU of Kentucky Executive Director Michael Aldridge stated, "This is a key victory for government transparency because it enables the public to ensure that UofL properly manages and operates a key community asset—the University of Louisville Hospital." Reported in: aclu.org, October 3. □



libraries

Washington, D.C.

On September 30, the American Library Association (ALA) called on the Federal Communications Commission (FCC) to address the fiber gap facing the majority of the nation's 16,400 public libraries and the communities they serve. ALA President Courtney Young released the following statement:

"We are encouraged by the FCC's commitment to making substantial improvements to the E-rate program and recognizing the vital roles libraries play in connecting our communities to critical online tools and resources. In our comments, we advocate strongly for increasing the number of libraries with scalable, affordable high-capacity broadband to their buildings. Nearly all public libraries now offer free public Wi-Fi access and robust digital content, and usage is growing dramatically. Given that the majority of libraries today report broadband speeds of less than 10 Mbps, we need to immediately increase broadband capacity in libraries before we come close to meeting the gigabit goal set by the FCC.

"We also call on the Commission to address the 'affordability gap' plaguing libraries that cannot afford the monthly cost for broadband services. We urge the FCC to consider ways that it can ensure that prices for high-capacity broadband are affordable no matter if it is for a special construction project or recurring costs. Of course, the fund must have sufficient funding to accommodate the proportionally higher cost for services as libraries and schools scale toward the gigabit goal.

"Additionally, we are pleased with FCC Chairman Tom Wheeler's remarks to close the fiber gap in rural areas of the country and enforce the lowest corresponding price for E-rate services. We are encouraged that the FCC chairman is highlighting the fiber gap and is looking for ways to address this inequity. All of our nation's libraries depend on affordable, scalable, high-capacity broadband in order to complete Education, jump-start Employment and Entrepreneurship, and foster individual Empowerment and Engagement, or The E's of Libraries™.

"We appreciate the opportunity to engage with FCC commissioners and staff and are pleased they are addressing the need to increase the broadband capacity to the library. We look forward to continuing our engagement at the FCC on behalf of libraries during the next phase of the E-rate modernization process." Reported in: *ALA News*, October 1.

Omaha, Nebraska

The Omaha Mayor's Office would like law enforcement officials to be able to access personal information from Omahans' library cards in emergencies, setting off a debate over patrons' privacy. Mayor Jean Stothert's chief of staff, Marty Bilek, appeared before the Omaha Public Library's board October 16 to ask for a change in the library's policy.

The request stemmed from an incident in which Metropolitan Community College police spent hours trying to identify a belligerent, drunk man at the South Omaha Library. He refused to give his name, and the only form of identification he had was a library card. But under current policy, library staff couldn't tell officers his name.

The issue pits public safety against the right to privacy, at an institution that generally holds firm on protecting the privacy of its visitors. At the meeting, several library board members expressed doubt about the proposal, questioning the need for such a change.

Library Director Gary Wasdin, in response to a board member's question, said libraries have traditionally protected their patrons' privacy. "It's a fundamental trust issue with the library," he said. "We don't question who you are, your background."

Bilek argued that names, addresses and phone numbers of patrons aren't too much to provide. He didn't ask for information on what patrons are checking out, just identifying information.

"All I'm trying to acquire is a simple name and address," Bilek said.

He said that in a hostage situation or the case of someone passed out, emergency responders need to know a person's identity as quickly as possible. Bilek cited the case at the South Omaha branch. The drunk man was harassing patrons. Metropolitan Community College police arrived, but he wouldn't give them his name.

Metro Police Chief Dave Friend said the man's unwillingness to give his name meant that officers couldn't take

him to a treatment facility. Friend said officers couldn't arrest him but didn't want to leave him at the library. He said it tied up officers for about two hours. Had the library staff been able to give officers the man's name, the incident would have been resolved much faster, Friend said.

Wasdin said most other states require libraries to keep patron information private. Nebraska state law allows, but doesn't require, libraries to keep patron information private.

Robin Clark, president of the Nebraska Library Association, said she doesn't know of any other libraries in Nebraska with a policy like the one Bilek proposed. If law enforcement officers want patron information from an Omaha library, they have to get a subpoena or search warrant.

The issue of library patron information came up after the terrorist attacks of September 11, 2001, when Congress passed the USA PATRIOT Act. That legislation granted the FBI easier access to library patrons' records, including reading habits. At the time, Nebraska and Iowa librarians expressed concerns about privacy but said they would abide by the law.

Nationally, the American Library Association code of ethics says: "We protect each library user's right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted."

Still, several library board members expressed concerns. Some questioned whether the incident at the South branch was an emergency. Board member Freddie Gray said she worried about officers using library information to conduct a background check.

"You're going to get this name and address and use it to also look up whether they have a criminal record?" she asked.

Bilek said background checks are a routine part of officers' interactions with people.

Other board members said they worry about the logistics of notifying about 300,000 patrons that their privacy rights had changed.

The board was scheduled to hold a public hearing and vote on the issue at its November meeting. Reported in: omaha.com, October 20.

schools

Dorchester County, Maryland

An eighth-grade language arts teacher has been placed on administrative leave after school officials learned he allegedly authored two books containing questionable content under a pseudonym.

According to a press release published in August by the Dorchester County, Maryland superintendent of schools, Mace's Lane middle school teacher Patrick McLaw has been placed on a leave of absence pending an ongoing investigation.

According to Dorchester superintendent Henry Wagner, the Wicomico County State's Attorney Office alerted educators that authorities are investigating the teacher, who since last year has taught language arts at the suburban Maryland school. The investigation concerns two books published by McLaw under the nom de plume "Dr. K.S. Voltaer," and one is about a fictional, futuristic school shooting that goes down in history as being the largest ever in the United States.

An excerpt from the description of that book, *The Insurrectionist*, posted on Amazon.com reads:

"On 18 March 2902, a massacre transpired on the campus of Ocean Park High School, claiming the lives of nine hundred forty-seven individuals—the largest school massacre in the nation's history. And the entire country now begins to ask two daunting questions: How? and Why? After the federal government becomes involved, and after examining the bouquet of black roses that lies in front of the school's sign, it becomes evident that the hysteria is far from over."

Another book, 2013's *Lilith's Heir*, is described on the online retailer as a sequel to *The Insurrectionist*, and both are attributed to the writing team of "K Voltaer" and McLaw.

The superintendent's statement lacked details about the books, but Wagner wrote that McLaw has been placed on administrative leave "due to significant matters of concern brought forth by law enforcement."

"While on administrative leave, he is not allowed to come onto school property or participate in school events," the statement continued. "Mr. McLaw's teaching duties have been assigned to qualified personnel to ensure the smooth transition of students into the fall semester." Additionally, Wager wrote that an officer from the Cambridge Police Department will be at Mace's Lane middle school "for as long as we deem it necessary."

"I think that the various police agencies that we have, working in conjunction with the board have a handle on the situation and I think we're going to have a safe and happy opening day of school tomorrow," Dorchester Sheriff James Phillips said.

McLaw was recently nominated for Dorchester County's "Teacher of the Year" award but lost. The grade school teacher previously made national headlines when he helped a 14-year-old student self-publish his own e-books on Amazon.com.

According to Phillips, the Dorchester sheriff, McLaw is now banned from county properties in Dorchester and Wicomico counties, as well as the Delmar School District where he started work in 2008. Reported in: rt.com, August 26.

Buffalo, Missouri

Last May, a teenager was punished with a lengthy suspension after teachers discovered her folder which contained stories with references to marijuana use. Her father is now speaking out and appealing the school's decision.

Tom Grayhorse, father of Krystal Grayhorse, said that he was called by Buffalo High School's assistant principal

after staff found Krystal's folder containing the stories at the school and were "alarmed by the contents of the notebook."

"She wrote about making out with a boy—well, you know, she's a teenager—and also about having some pot then eating it and swallowing it at the school," said Tom Grayhorse. Tom said he has not seen his daughter's writing for himself, but was told by school officials what had been written. He also said the folder had been confiscated.

Grayhorse said that paperwork that the school sent home stated that Krystal was suspended for ten days for "possession of a controlled substance" despite no drug testing and no drugs in Krystal's possession. The original suspension spanned the rest of the school year, but the suspension was later extended to continue through January 2015.

"Her 'possession' constitutes writing something?" her father asked. "That is the alleged possession?"

Dallas County RI-1 superintendent Robin Ritchie said there is a "zero tolerance" policy regarding drug and alcohol related material, although the district's drug policy posted online provides no specific definition of paraphernalia. Ritchie said that students may be suspended up to 180 days for incidents related to drugs and alcohol.

Ritchie would not discuss the suspension of Krystal Grayhorse explicitly, but she said "If they give a ten day suspension, it comes back to me as the superintendent and then it is my decision to investigate and look back at it to see if an extended suspension is an order."

Grayhorse said he's worried that the prolonged suspension will negatively impact his daughter, especially as a prospective college student. Krystal would be attending Buffalo High School as a senior this year, but she faces a significant lack of credits. "I asked them [Buffalo High School] about alternate schooling for people that had been suspended and they said they didn't have it," said Grayhorse. Reported in: benswann.com, September 18.

Summerville, South Carolina

In another case of school officials adhering to excessive zero tolerance policies, a student from South Carolina was suspended and arrested by police recently after writing an imaginative story about using a gun to shoot a dinosaur.

The offender, 16-year-old Alex Stone of Summerville High School in a suburb of Charleston was in the course of completing an assignment where students were asked to write something brief about themselves, much like Facebook status updates. Stone told reporters that he found himself in hot water with teachers for being over imaginative and mentioning the word "gun."

"I killed my neighbor's pet dinosaur, and then, in the next sentence, I said I bought the gun to take care of the business," the student said.

A 65 million year gap between the story and reality didn't seem to matter to teachers who immediately suspended Stone for a week, searched his bookbag and locker—finding nothing—and then inexplicably called the police.

When the cops paid a visit to the student, he reportedly became "irate," was arrested and charged with disorderly conduct, all before the boy's parents were informed anything was going on.

"If the school would have called me and told me about the paper and asked me to come down and discussed everything and, at least, get his point-of-view on the way he meant it. I never heard from the school, never. They never called me," said the boy's mother Karen Gray.

Stone's parents were barely able to comprehend the actions of the school. "I could understand if they made him re-write it because he did have 'gun' in it. But a pet dinosaur?" Gray added. "I mean first of all, we don't have dinosaurs anymore. Second of all, he's not even old enough to buy a gun."

The student is standing his ground on the matter. "I regret it because they put it on my record, but I don't see the harm in it," Stone said. "I think there might have been a better way of putting it, but I think me writing like that, it shouldn't matter unless I put it out towards a person." Reported in: thefreethoughtproject.com, August 21.

colleges and universities

Long Beach, California

In September, California State University, with its 23 campuses and nearly 450,000 students, withdrew official recognition from InterVarsity Christian Fellowship/USA, a national group with branches on many Cal State campuses. The group had refused to eliminate a policy that required its student leaders to pledge that they were devout Christians.

Cal State officials concluded that that put InterVarsity in conflict with both state law and university rules that forbid discrimination based on, among other things, religious identity. Jews and Muslims cannot lead the group. Similarly, neither can gay students who do not disavow active sexuality.

InterVarsity has clashed in this way with a number of colleges, sometimes resulting in lawsuits—with varying outcomes—but InterVarsity and similar groups say the Cal State situation signals a turning point in the acceptance of traditionalist religious groups on campuses.

"The point of a nondiscrimination policy" in the clauses pertaining to religion "is to prevent a religious group from being stigmatized—to treat them equally because of their religious function," said Gregory L. Jao, a national field director of InterVarsity. "We are being penalized by the very policy that was intended to protect us."

InterVarsity is now barred from official events at which student groups recruit members; on some campuses, it

must pay to rent space for meetings (though some Cal State branches waive fees, or reduce them, for unofficial groups). Jao said the total annual costs could hit $30,000 on some campuses, although Michael Uhlenkamp, a university spokesman, called that figure "highly inflated."

Defenders of religious groups are consulting their lawyers and waiting to see what the full implications of the Cal State decision are. Although Cal State has tended to speak only of InterVarsity's derecognition, Sonoma State University confirmed that Athletes in Action, part of Campus Crusade for Christ International, has not met its standards for recognition. Jao and Kim Colby, senior counsel for the Christian Legal Society, said they knew of other groups that would be derecognized but declined to name them because the groups were weighing actions.

Uhlenkamp called Cal State's approach "the exact opposite" of inhibiting speech: By requiring student groups to admit all students and make them eligible for leadership roles, the university is fostering precisely the environment for debate and discussion that it should. Legally, "we feel very secure in our position on this," he said.

But according to David J. Hacker, a senior legal counsel for the Alliance Defending Freedom, which has sued on behalf of religious groups, refusing to let Christian groups require their leaders to be devout is ultimately "silly."

"We think it's also unconstitutional," he said.

Other universities have come to conclusions different from that of Cal State—some on their own, others under legal threat or by order of state legislatures. While fighting a lawsuit against a Christian fraternity, the University of Florida in 2009 backed off and added an exemption for religious groups to its antidiscrimination policy. In 2011, Ohio's General Assembly shut down a debate over the fate of the Christian Legal Society chapter at Ohio State University by guaranteeing that religious groups could use religious criteria to select leaders and members.

Among the private colleges that have derecognized religious groups that insist on statements of faith are Bowdoin College and Vanderbilt and Tufts Universities.

Campus leaders find themselves balancing two competing values while knowing they may land in hot water whatever they do. "We really value the contributions that religious groups make to our campus," said Mark Bandas, associate provost and dean of students at Vanderbilt. "Students often engage in intense moral and spiritual discussions, and they often do that in group settings."

At the same time, "we are not going to permit Vanderbilt student organizations to discriminate on the basis of sexual orientation or other protected categories."

A notably idiosyncratic Supreme Court decision in 2010, *Christian Legal Society* v. *Martinez*, might have settled the issue but did not, quite. Hastings College of the Law, a stand-alone school in the University of California system, had withdrawn recognition from the Christian Legal Society chapter because it required a statement of faith for leaders. The court ruled, 5 to 4, that Hastings was within its rights not to extend recognition to the group. But it did so on very narrow grounds.

The majority said that because Hastings had an "all comers" policy for every student group—requiring them to admit all interested students and to open leadership positions to all—there was nothing discriminatory about demanding that the Christian Legal Society abide by that ground rule. Tougher to defend, the court conceded, would have been a system that let a student Democratic group limit its leadership to Democrats but did not allow Christian Legal Society to insist that its leaders be Christian. The majority said it didn't have to examine that issue.

However, the latter situation was precisely the one in operation at Hastings, according to the furious dissenting justices. To Justice Samuel Alito, the real message of the case was: "no freedom for expression that offends prevailing standards of political correctness" on campuses.

Appeals courts are split on whether campuses with more-conventional nondiscrimination policies can refuse recognition to religious groups. In 2011 the U.S. Court of Appeals for the Ninth Circuit upheld Cal State's right to require a Christian fraternity and sorority to open their leadership to everyone. Cal State is banking on that decision, plus Martinez.

The Seventh Circuit, on the other hand, said in 2006 that the Christian Legal Society chapter at Southern Illinois University School of Law had the right to require that its leaders be devout Christians, and to exclude homosexuals; to do otherwise, the court said, would trample the group's right to express its views.

Given the split, "the Supreme Court will probably step in again," said Hacker, of the Alliance Defending Freedom, although there are no clear test cases making their way through the courts. United Educators, which offers risk-management advice to administrators, has emphasized the narrowness of the *Martinez* decision to its clients. "We would suggest that an 'all comers' policy is a sound approach that has successfully withstood challenge," said Constance Neary, vice president for risk management.

Cal State changed its policy in 2011 to an all-comers approach and insists that InterVarsity would not meet the standards of the older, more straightforward antidiscrimination policy. But fraternities and sororities are exempted from the all-comers approach, under Title IX, and supporters of InterVarsity see that as a vulnerable inconsistency.

Adding to the recent furor over derecognition was a recent opinion piece in *Christianity Today*, by a former InterVarsity staff member at Vanderbilt. Titled "The Wrong Kind of Christian," it revisits that university's decision three years ago to withdraw recognition of InterVarsity and some other campus groups. Tish Harrison Warren imagined, she wrote, that the religious groups that wound up

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schools

Chatham, Illinois

A request to delete a graphic novel from the Glenwood High School reading list was unanimously denied at a Ball-Chatham School Board meeting September 29. A Glenwood High parent submitted a complaint earlier in the month to principal Jim Lee regarding *Persepolis: The Story of a Childhood*.

The book tells the story of a young girl growing up in Iran during the Islamic revolution of 1979 and the reintroduction of a religious state. The graphic novel has been praised for teaching students about diversity and different points of view, but it also contains intense language, images and themes.

"Reading controversial material does not hurt students or corrupt them," Lee told the board.

The parent, Mike Housewirth, questioned why the teacher would assign a book of this context about Muslims on September 11. He also condemned the images of dismembered bodies and a guard using urine as a form of torture.

"If my son had drawn a picture like that at school, he would have been expelled," Housewirth argued. "Would we want our children to be re-creating some of these things at school?" Housewirth said his son is mature enough to read the book, but he found the overall tone appalling.

Lee explained that the students do more than "just read a book." They're given the opportunity to use the material to develop their own opinions. "This is the world our students live in, and our students need to understand the reality of it," he said, noting that the book has been used in middle school classrooms outside of the district and has received numerous awards specifically targeted for young adult literature.

A committee formed to review the novel agreed the book meets Common Core standards and is appropriate for a senior-level English class.

Superintendent Carrie Hruby said that due to the sensitive nature of the book, in the future parents will be notified of the content prior to the assignment. Parents and students uncomfortable with the material will have the option for an alternative assignment. Reported in: *State Journal-Register*, September 29.

Waukesha, Wisconsin

Another Waukesha parent tried to have books banned from the school district. But again, a school panel, composed of school officials and teachers, unanimously denied the request at a meeting August 20.

Karen Tessman, a parent of a Waukesha West High School student, filed a complaint in July to have *The Kite Runner* and *Chinese Handcuffs* removed due to the "extreme violence" she said is depicted in each book.

Khaled Hosseini's *The Kite Runner*, which was No. 1 on the *New York Times* bestseller list, is part of the district's curriculum, having been previously approved by the district in 2006. But the district's Consideration Committee, a subcommittee of the School Board, still took up the complaint. *Chinese Handcuffs*, a 1989 young adult novel written by Chris Crutcher, is not part of the district's curriculum but is housed in school libraries.

Tessman said at the meeting that the books are "desensitizing" students to violence." They don't need this kind of violence brought into their lives," Tessman said. Tessman said after the meeting she plans on filing an appeal with the School Board.

Tessman's complaint came a month after Ellen Cox, a mother of a Waukesha South High School student, filed a complaint with the school district to have the 2005 John Green young adult novel *Looking for Alaska* banned from the district. The Consideration Committee unanimously denied Cox's request at a meeting in July. Cox has filed her appeal with the superintendent's office.

Waukesha West Principal David LaBorde, who heads the Consideration Committee, said students always have the choice of opting out of a required book and choosing another one.

Tessman said her student plans on doing that this school year for *The Kite Runner*, a book that will now be taught in 10th grade English. It was previously part of the 11th grade curriculum.

Waukesha North teacher Mary Ann Krause, who has taught English in the district for 26 years, said this was the first time books in the district have been challenged like this. Krause said she was part of the committee that wrote the curriculum that *The Kite Runner* is part of, which

includes novels that highlight tradition and revolution and tradition and change of cultures.

"This book is a linchpin for that course," Krause said. "It is an incredibly powerful novel in the classroom and fundamental to our curriculum. This is one book that the students read carefully and maturely. Just the discussions are incredible that it develops and encourages."

While members of the Consideration Committee said they agreed that parts of *Chinese Handcuffs* were unsettling and disturbing, Krause said it becomes a "slippery slope" of banning books or denying access.

"Slopes slip both ways in that if we remove this book, what's the next book that we remove, what's the next book after that," Krause said. "Our democracy is founded on access to information." Reported in: *Waukesha Now*, August 20.

student press

Fond du Lac, Wisconsin

Fond du Lac High School's student news organization will return to business as usual this academic year with new guidelines, after a prior review policy caused friction between administrators and student journalists in the previous school year.

In March, former Principal Jon Wiltzius created the Fond du Lac High School Publications Editorial Guidelines for the *Cardinal Columns* after student journalists ran stories on topics ranging from sexual assault to students' rights to not stand for the Pledge of Allegiance. The previous guidelines allowed Wiltzius to review any school-sponsored publications before they could be printed or published, which would have allowed the principal to censor any content he saw as inappropriate.

But after an internal committee recommended revised guidelines approved by the Fond du Lac Board of Education, *Cardinal Columns* will operate under guidelines that place more control of in the hands of the student editors and their adviser.

"Student editors, journalists and staff have the right to report and editorialize on events, ideas and issues in the school community, nation and world, even though these may be unpopular or controversial," according to the new guidelines.

The guidelines require the adviser—print journalism, broadcast journalism and film studies teacher Matt Smith—to prohibit students from publishing material he finds in his "professional judgement" to be "obscene, vulgar, profane, libelous, inconsistent with the educational goals of the district," among other requirements.

The new guidelines also include how *Cardinal Columns* should cover controversial issues, decide when it is proper to publish profanity and even how to address potential errors in published materials. When concerning ethical decision-making, the guidelines say "the final decision about how to handle the material will be made by the editor(s)-in-chief in consultation with the adviser."

Fond du Lac High School also has a new principal, Michelle Hagen, going into the school year along with the new guidelines.

Wiltzius approached the content he found questionable in the spring semester based on the precedent set by *Hazelwood School District et al.* v. *Kuhlmeier et al.*, which allows principals to censor school-sponsored publications for any "valid educational purpose." *Hazelwood* diminished student journalists' protection from the Court's earlier precedent, *Tinker* v. *Des Moines Independent Community School District*, which allows students to exercise their First Amendment rights as long as they do not create a substantial distraction to the learning environment. Reported in: splc.org, September 4. □

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a violation of the copyright law. Previously, in May 2012, Judge Orinda Evans of the U.S. District Court ruled in favor of the university in a lengthy 350-page decision that reviewed the 99 alleged infringements, finding all but five infringements to be fair uses.

The appeals court reversed that decision. In a 129-page decision, a unanimous three-judge panel sent the case back to the U.S. District Court in Atlanta for further consideration. It also vacated Judge Evans's decision to award injunctive relief and legal costs and fees to the university.

The appeals-court judges took a close look at the reasoning behind Judge Evans's conclusions and how she had applied the four factors commonly used to gauge fair use. (Those factors are the nature of the use, the nature of the work being used, how much of it is used, and whether that use might affect the market for the work.)

The appellate panel concluded that the lower court's decision had relied on "legally flawed methodology" in weighing all four factors equally, and that it had misapplied two of them. (One of the three appeals-court judges, C. Roger Vinson, issued a separate but concurring opinion in which he took issue with his colleagues' application of the fair-use factors but agreed with them that the lower court's decision should be reversed.)

The judges also didn't like the baseline Judge Evans had set for how much content could be safely posted without violating copyright: 10 percent or one chapter of a copyrighted work. They wrote: "The District Court should have analyzed each instance of alleged copying individually, considering the quantity and quality of the material

taken—whether the material taken constituted the heart of the work—and whether that taking was excessive in light of the educational purpose of the use" and whether it might eat into the potential market for that work.

The appeals court, however, emphasized that the educational use of copyrighted material "provides a broader public benefit" that can favor a fair-use defense, even if the use isn't "transformative" (a parody, say). And the decision dismissed what are known as the Classroom Guidelines, which date to 1976, along with cases from the age of photocopied coursepacks, as binding authorities in a digital-era case like this one.

Rather than strike a decisive blow against fair use, the legal concept that places some limits on the rights of copyright holders, the appeals court instead issued a stern warning against quick-fix, one-size-fits-all solutions to legal disputes—specifically, the idea that copying less than a chapter or 10 percent of a book automatically protects an institution from a lawsuit.

"To further the purpose of copyright, we must provide for some fair use taking of copyrighted material," the opinion, authored by Judge Gerald Bard Tjoflat, reads. "But if we set this transaction cost too high by allowing too much taking, we run the risk of eliminating the economic incentive for the creation of original works that is at the core of copyright and—by driving creators out of the market—killing the proverbial goose that laid the golden egg."

Yet the court also came away "persuaded" that the Copyright Act of 1976 contains specific protections for colleges and universities, noting that Congress "devoted extensive effort to ensure that fair use would allow for educational copying under the proper circumstances."

Therefore, while the ruling looks at first glance like a loss for Georgia State and its allies, and a win for three academic publishers that had sued it, several copyright experts have argued like the ALA that the reversal is not as bad as it might seem.

"While it can be worrisome to see a fair use win sent back, in this case, it seems to be mostly for the right reasons," Mike Masnick, founder of the technology blog Techdirt, wrote. "Given these new instructions, it seems like the lower court now has a chance to come to the right answer for the right reasons, and that's always going to be a better result."

Kevin Smith, a scholarly-communications officer at Duke University, argued in a blog post that even though the publishers had revived their case, the appeals court had ruled against them on several important points:

- The court agreed that potential copyright violations should be addressed on an "item by item" basis, rather than a "big picture" approach that would probably require Georgia State to purchase a "blanket license" to post e-reserve materials.
- The court agreed that when evaluating whether e-reserve copying counts as fair use, it should be relevant that university libraries are nonprofit, educational institutions.
- The court rejected the lower court's "10 percent rule," which drew a bright line on how much of a copyrighted work the university could make available free. The appellate judges instead advocated for "a more flexible approach that takes into account the amount appropriate for the pedagogical purpose."
- The court agreed that if a publisher had not made it possible for libraries to license excerpts of a copyrighted work, then libraries do not harm the market for the publisher's products by copying the desired excerpts and making them freely available.

"These losses, which constitute the heart of what the publishers were hoping to achieve when they brought the lawsuit, are probably final," wrote Smith.

Nancy Sims, a copyright-program librarian at the University of Minnesota Libraries, also cheered the court's ruling, even as it reversed the previous decision in favor of Georgia State.

She cited the court's opinion that the Classroom Guidelines, a set of rules written nearly forty years ago by the U.S. Copyright Office, should not be treated as gospel by universities that maintain e-reserves. Sims wrote:

"Maybe this isn't great news to the many folks who have (quite correctly) long-since abandoned applying any mental energy to the outdated Guidelines. However, I regularly encounter librarians, library workers, teachers, and other educators who have received no other information about fair use—and often, these folks have explicitly been trained that the Guidelines are the One True (and complete maximum) Way to Know Fair Use in classroom contexts. (Oddly enough, many of them have also received their only copyright training at no cost, from generous publishers . . .) Having an affirming court opinion to refer to that clearly refutes the applicability of the Classroom Guidelines is quite a blessing, from my perspective."

"[T]he appeals court overruled Judge Evans not because she reached the wrong decision but because of how she reached it," Nate Hoffelder, editor of the blog The Daily Reader, wrote in a post. The publishers lost in 2012, he wrote, "And on Friday the publishers lost again."

Judge Evans used a four-point test to determine if Georgia State's e-reserves should be considered fair use, but found a tie. Two of the factors—whether the works were copyrightable and used for nonprofit educational purposes—favored the university, while the other two—the amount of the works used and the effect on their value—seemed to favor the publishers. Evans then tweaked her analysis, coming up with the 10-percent rule, and called it a three-to-one win in favor of Georgia State.

The appeals court called that piece of legal arithmetic "improper"; the four factors should not have been given

equal weight, but rather used in a "holistic analysis," the opinion concluded. Most importantly, the court dismissed the "blanket 10-percent-or-one-chapter benchmark." Instead, the opinion reads, each excerpt should be considered on its own.

"If copyright's utilitarian goal is to be met, we must be careful not to place overbroad restrictions on the use of copyrighted works, because to do so would prevent would-be authors from effectively building on the ideas of others," the ruling reads. "Some unpaid use of copyrighted materials must be allowed in order to prevent copyright from functioning as a straightjacket that stifles the very creative activity it seeks to foster. If we allow too much unpaid copying, however, we risk extinguishing the economic incentive to create that copyright is intended to provide."

Neither did the appeals court find that Georgia State's use of excerpts was "transformative"—in other words, that it served a role different than the original work—which likely would have given the university more legal protection. Yet after a long-winded analysis of whether or not Georgia State was using the excerpts for nonprofit educational purposes, the court agreed the first factor of the test favors the university.

The court's reasoning, however, may come as an encouragement to organizations such as HathiTrust, which since 2011 has been embroiled in a copyright lawsuit of its own. The most recent ruling in that case also placed a heavy emphasis on "transformative uses," which HathiTrust could claim thanks to its preservation and accessibility efforts. (In fact, the ruling against Georgia State specifically mentions HathiTrust as an example of transformative use.)

But since the e-reserves can't be considered transformative, their impact on the market value of the books and journals "looms large," and the appeals court found the lower court should have given more weight to that fourth factor.

Sims said that emphasis "creates some incredible barriers" for instructors. "By placing additional weight on market harm—a factor about which end users have almost no information—the court is creating major difficulties for end users," Sims wrote. "It would be hard, but not impossible, for many instructors to find out if a license is available."

Barbara Fister, a librarian at Gustavus Adolphus College said she was concerned the "market harm" factor could be used to trump the other three. "[I]t also seems at times in conflict with the reason academics publish—to share ideas," she wrote. "I hope that libraries, academics, and publishers will be able to come up with financial models that sustain quality publishing without requiring pay per use, which can inhibit learning and research."

On the second factor, which is sometimes the most straightforward, the court also disagreed with the prior ruling. Some of the excerpts didn't just contain factual information, but also "evaluative, analytical or subjectively descriptive material." The lower court, the opinion reads, should have called it a tie or even a point in favor of the publishers.

"This case reveals the critical need to see the 'big picture' when attempting to determine what constitutes fair use of copyrighted work," Judge Roger Vinson wrote in his concurring opinion. "It also highlights how the temptation to apply traditional statutory interpretation principles to a common law concept can lead to serious error."

Georgia State, which will now have to continue to litigate the case while paying its own legal fees (the lower court's decision to make the publishers pick up the tab was vacated), responded tepidly to the new ruling.

"Georgia State will continue to defend the rights of universities in this complex digital environment and protect access to information for our students," said Kerry Heyward, the university's lawyer, in an email to *The Chronicle of Higher Education*. "This decision, while not the outcome we had hoped for, supports the lower court's ruling on fair use."

The Association of American Publishers posted a short statement on its website, saying it was pleased with the decision. "AAP believes that today's decision will help to protect the intellectual-property rights of authors and publishers who are providing students with high-quality educational materials," it said. The association, along with the Copyright Clearance Center, a rights-permission service, helped bankroll the publishers' legal action.

Oxford University Press took a conciliatory tone in a statement it posted online. (The plaintiffs have come under fire from academic librarians in particular for suing some of their best customers.) "The three publishers involved reluctantly undertook this action to help clarify important questions of copyright in a digital world," the Oxford press said. "We welcome today's decision as it will help to protect the intellectual-property rights of authors and publishers who produce high-quality educational materials on which colleges and universities depend."

The statement noted that the publishing house had not sought damages or tried to extend copyright protections through the case, "merely wanting to bring Georgia State's practices in line with those at other universities." It also said that Oxford would "continue to work with the scholarly community, including libraries, authors, editors, and academic societies, to develop copyright policies and practices—together with industry bodies such as the Association of American Publishers, and with collective licensing bodies—that support both effective dissemination and production of scholarly knowledge." Reported in: *District Dispatch*, October 20; insidehighered.com, October 20; *Chronicle of Higher Education*, October 18, 20. □

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censorship dateline . . . from page 162

Frequently Challenged and Banned Books List as a means of identifying so-called "objectionable texts." In the letter, Jones wrote:

> [ALA's] Top Ten Most Frequently Challenged or Banned Books List is not and has never been a judgment on the quality or educational suitability of a work or a valid designation that the book is "objectionable." This is especially so since many challenges to books are determined to be without merit. Indeed, many challenges are motivated not by a challenger's concern about educational suitability but instead by the challenger's discriminatory and often unconstitutional beliefs regarding literature that incorporates themes and elements addressing race, religion, homosexuality, or unorthodox views. These biased and uninformed challenges, often disguised as an "unsuited for age group" objection, should never be used as grounds for determining restrictions on public school books and curricula. Employing the ALA's Top Ten Most Challenged or Banned Books List as a curriculum standard substitutes the unthinking opinion of a crowd for the considered judgment of the professional educators on your faculty.
>
> Moreover, delegating the Board's legal authority to determine what books may be freely taught in the classroom to a private association like the ALA raises certain due process issues, especially when the criteria used to determine the ALA Top Ten Most Frequently Challenged and Banned Books list are not narrowly and reasonably drawn definitive standards but the mere circumstance that someone, somewhere, complained about the book for any one of a number of reasons.

The Glass Castle is written by Jeannette Walls, who is scheduled to be keynote speaker at the district's annual literary festival in February. Walls said she was heartbroken to learn that her book was on the list. Her memoir is about growing up in poverty with a father who spent his money on alcohol and a mother who became homeless.

"My book has ugly elements to it, but it's about hope and resilience, and I don't know why that wouldn't be an important message," she said. "Sometimes you have to walk through the muck to get to the message."

Walls said teenage readers have told her the book gave them courage to overcome their own troubled childhood or seek help. "A lot of teachers told me someone reported an abusive relative after reading it in my book. How valuable is that?" she said. "People tell me about their drug-addicted parents. There are so many complicated situations out there. And we can begin to give kids the tools they need to deal with it, if only to say, 'You are not alone.'"

But she said she respects and admires the Highland Park parents who are trying to protect their children. "What I worry is that in order to protect them, we may be taking away the tools they need to protect themselves later on," Walls said.

Some of the parents who object to the books say they also monitor what their children see in movies, on TV or online—and so do parents who support use of the books.

Tavia Hunt, a parent who raised objections, said she doesn't want her sophomore daughter or any students to feel uncomfortable in English class because of graphic sex scenes. She said the books should be allowed in the library, but not required in English class.

"This is not about banning books. No one is advocating that," Hunt said. "We want the kids to have access to the books in the library. The problem is having obscene literature mandatory in the classroom and for discussion."

Hunt said parents should also get a clear warning about mature content so they can make informed decisions for their children. In some cases, students can choose from a list of options for classroom reading.

Natalie Davis said her daughter was more distressed about not being allowed to continue studying *The Art of Racing in the Rain* than about the book's short sex scene. Davis defended using the books and feels the classroom is the appropriate place for teens to explore controversial issues. "I am very comfortable with my children discussing tough topics in a moderated discussion with a teacher I respect," she said.

Thad Smith, a parent and Highland Park graduate, said at a school board meeting that he was "frightened by the changes to recommended reading that have happened since I graduated." Smith said his company's email filter prevented him from sending an excerpt from one of the books.

Aimee Simms, another parent, urged the English Department to use classics rather than young adult books that "dumb down" literature. She said classics can address complex topics, such as poverty, with fewer sexual references and curse words.

One of the suspended books—*The Working Poor: Invisible in America*, written by Pulitzer Prize winner David K. Shipler—is about Americans in low-skilled jobs who struggle because of economic and personal obstacles. Some parents objected to the nonfiction book because it has a passage about a woman who was sexually abused as a child and later had an abortion.

High school English teacher Darcy Young cautioned board members that passages from the books had been taken out of context. She said the district's educational mission compels teachers to introduce challenging and sometimes uncomfortable topics to teach critical thinking.

"Our motto is to prepare the child for the path, not prepare the path for the child," she said.

More than 200 books are on the high school's approved book list. Each is reviewed by a committee of teachers and parents. Teachers choose books from the list for their curriculum. For certain books, they ask parents to sign permission slips because of mature content. They also let students choose a book from several options for class assignments.

If parents object to a book, they can request another option for their child. If they think it should be removed from the list, they can formally challenge the book with a one-page form.

Over the summer, Denise Beutel, the district's director of assessment and English Language Arts, audited the approved book list and reviewed rationales for their selection. She removed 18 books from the list because there was no documentation of their review. One book, *Nineteen Minutes*, by Jodi Picoult, was removed by administrative action.

Beautel said the department sometimes struggles to find parents to participate in the selection committee. "I don't think that we are going to find ourselves in that position anymore," she said. Reported in*: Dallas Morning News*, September 21; OIF Blog October 16.

colleges and universities

DeKalb, Illinois

Northern Illinois University has enacted an Internet Acceptable Use Policy that denies students access to social media sites and other content the university considers "unethical" or "obscene." A student discovered the new policy while trying to access the Wikipedia page for the Westboro Baptist Church from his personal computer in his dorm room. The student received a filter message categorizing the page as "illegal or unethical." It seems possible to continue to the webpage, but the message warns that all violations will be reviewed.

Effective for residents, students and staff, the restrictions span across the NIU network, which includes both campus research and education center as well as the school's Wifi network. The revised policy—enacted July 25—isn't entirely new, but the implementation of a new filter that will strictly enforce it was the first "act of office" for the university's new head of technology.

Under the policy, misrepresenting one's identity is forbidden. Anything the university considers to be "obscene, defamatory, or [that] constitutes a threat" is also a big no. This is quite vague, but they throw on "including pornography" at the end of that bullet point, to no surprise.

Perhaps one of the most controversial of the terms is the restriction on political activities such as surveying, polling, material distribution, vote solicitation and organization or participation in meetings, rallies and demonstrations, among other activities. According to the policy, social media sites including Facebook, Twitter, Flickr, Pinterest, LinkedIn, and Foursquare are also unacceptable "unless associated with professional responsibilities." However, students have reportedly been able to access social media.

To top it off, illicit activity discovered during "routine monitoring" is grounds for an investigation. The policy is loaded with phrases like "but not limited to" and "etc." to make it all as vague as possible. What exactly each bullet point means is unclear, but the idea of such censorship is concerning students.

"Explain to them that in the interest of advancing education you might need to access certain websites that may seem controversial or unethical/illegal," commented one student. Reported in: *BetaBeat*, August 20.

Eugene, Oregon

The University of Oregon (UO) has filed multiple conduct charges against a female student who jokingly yelled "I hit it first" from a dormitory window. The student, who wishes to remain anonymous, contacted the Foundation for Individual Rights in Education (FIRE) for help. FIRE is calling on UO to immediately dismiss all charges against the student and reform its unconstitutional speech policies.

"The University of Oregon's absurd overreaction is the real joke here, and it's not very funny," said FIRE Senior Vice President Robert Shibley. "Using an unconstitutional speech code to punish a student for a joke shows how out of control censorship has become on our campuses in the name of making everyone feel 'comfortable.'"

On June 9, 2014, the female student in question was visiting with friends in UO's Carson Hall dormitory. According to the student, looking out of the dormitory window, she spotted a male and female student walking together (she did not know either of them) and shouted "I hit it first" at them in jest. The female of the couple responded with two profanities and the couple reported the student's comment to the Resident Assistant of the dorm. The Resident Assistant located the student and insisted that she apologize to the couple for her remark. The student readily obliged.

That did not end the matter, however. On June 13, the student was shocked to receive a "Notice of Allegation" letter charging her with five separate conduct violations for her four-word joke. In addition to dubious allegations of violating the residence hall's noise and guest policies, UO charged the student with "[h]arassment," "disruption," and "[d]isorderly conduct." After being presented with these charges, the student contacted FIRE.

FIRE wrote to UO President Michael Gottfredson on August 1, demanding that the charges against the student be dropped. FIRE also called on UO to revise its unconstitutional speech codes—in particular, the harassment policy under which it charged the student. That policy contains unconstitutionally broad and vague prohibitions on "[u]nreasonable insults," "gestures," and "abusive words" that may cause "emotional distress" to others, subjecting UO students to punishment for any expression deemed subjectively distressing. FIRE's letter explained that Oregon courts have struck down state harassment laws containing similar prohibitions.

As FIRE noted, the Supreme Court has defined peer harassment in the educational setting as conduct "so severe, pervasive, and objectively offensive" as to effectively deprive the target of educational opportunities or benefits. The student's isolated, four-word comment plainly fails to meet these criteria.

UO did not respond to FIRE's August 1 letter. FIRE had

also previously written to UO on June 5, urging the university to revise its unconstitutional speech codes. UO failed to respond to that letter as well.

"It is remarkable that the university apparently didn't give a first thought to this student's First Amendment rights before throwing the book at her and allowing these unconstitutional charges to hang over her head for the entire summer," said Peter Bonilla, Director of FIRE's Individual Rights Defense Program. "Incoming and returning UO students should be aware of the lack of regard shown by the university for their right to free speech."

FIRE has requested that UO immediately dismiss the charges, revise its unconstitutional speech codes, provide First Amendment training to its staff, and clarify to the UO community that it will not take action against constitutionally protected speech in the future. Reported in: thefire.org, August 26.

comedy

Portsmouth, Virginia

A comedian performing during a city-sponsored event in August was told he could not go back on after an early joke offended some police officers and city residents in the audience, a city official says. Cletus Kassady had performed for about thirty minutes at "Jokes and Notes," a free event at the Portside outdoor stage put on by the city parks and recreation department.

Kassady was taking a break while saxophonist Stan Howard took the stage. The pair were to switch off from 6 to 9 p.m. Instead, around 7 p.m. Portsmouth Parks and Recreation officials told Kassady he would not go back on because they received a call from Deputy City Manager Nita Mensia-Joseph saying several audience members, including police officers, were offended by some of his jokes.

Mensia-Joseph said she received text messages and calls from community members at the event telling her they were offended by some jokes that they took as negative about the city and police officers. "I was told he said something about how police officers don't even want to live in Portsmouth," Mensia-Joseph said.

City officials decided, with the city manager's authorization, they did not want to create a problem with community members and the city's police officers and decided to shut down the comedy act, Mensia-Joseph said. Kassady, however, said he "categorically denies" making any jokes that were negative about Portsmouth or its police force.

"I wouldn't say something negative about them," said Kassady, a Portsmouth native. "That's something I would never do." Kassady said he opened his set with a statement about the events in Ferguson, Missouri.

"I have absolutely no problem with demonstrating, but we shouldn't be tearing up our own communities," Kassady said. Kassady then said that if something were to happen in Portsmouth, he would not resort to violence, but he couldn't guarantee the same thing in Chesapeake.

"We have to laugh to get through these tough times," Kassady said of his joke. Kassady's website describes his comedy as "smart, fresh, funny and clean." Kassady said the event was free, so not many people were angry he didn't get to perform more. The bigger problem, he said, was that Howard was not prepared to perform for the next two hours.

In July, the city shut down a ship troupe's two final performances because of the show's profanity and dark themes. Reported in: *The Virginian-Pilot*, August 16.

foreign

Cairo, Egypt

The Egyptian authorities confiscated all the copies of one of the country's largest private newspapers October 1 in order to censor an article, just days after President Abdel Fattah el-Sisi vowed in an American television interview that there was "no limitation on freedom of expression in Egypt."

In fact, the censorship was another example of constriction of news media freedom since the military takeover in July 2013 that brought el-Sisi to power. The article, in the newspaper *Al Masry Al Youm*, was the latest installment in a serialized interview conducted with a senior spy before he died.

Although all the printed copies containing the article were seized, it was available through PressDisplay.com, an online newsstand, which evidently archived the edition before it could be confiscated. The headline quoted the former spy, Refaat Jibril, declaring that Egypt had never executed a single Israeli spy. "We used to return them to Israel in the context of deals to bring back our prisoners," he said, according to the article, which may have undercut the intelligence agencies' hard-line image.

Records indicate that Egypt has executed defendants convicted of spying for Israel as recently as the 1980s, with famous cases in 1954 and 1962, said Yossi Melman, co-author of *Spies Against Armageddon*, a history of the Israeli intelligence services.

Jibril, the former spy, was also quoted describing an expansive role for the intelligence agencies in domestic affairs, including "the economic, social and cultural." An enemy might seek to "stir up unrest and gather information," he said, claiming that he had once apprehended two Europeans who were working as spies for Israel by "passing leaflets randomly to people, inciting them to a revolution."

Since the military takeover, the government has shut down the main opposition news media, the remaining private media are almost as supportive of the president as the state-run outlets, and the government has jailed several journalists. In June, a court sentenced three journalists for

Al Jazeera's English-language network to at least seven years in prison on charges of broadcasting false reports of civil unrest as part of a so-called Islamist conspiracy.

Al Masry Al Youm, too, is broadly supportive of el-Sisi and the military takeover. A senior editor responsible for the article said that security officials had offered no explanation for the censorship. "They just said, 'Remove this article,'" the editor, Ahmed Ragab, said. "The regime tries to protect its story about history, and we journalists try to search out new facts. It is the normal fight."

In an interview with the broadcaster Charlie Rose in New York, el-Sisi insisted that the freedom of the Egyptian news media was now absolute. "There is no limitation and this is final," he said. "Anybody can be criticized in the media, from the president to any state institution," he added, saying, "We are very keen on ensuring that."

But longstanding Egyptian law requires journalists to obtain the permission of military intelligence before publishing any information relating to the spy agencies. And the authorities used the law to block publication of certain articles in a similar fashion under Hosni Mubarak, the former president, although this appeared to be the first instance of such censorship since the uprising that removed him in 2011.

Negad el-Borai, a lawyer who often represents Egyptian news organizations, said the paper had broken the law by publishing without prior permission.

Tamara Cofman Wittes, a researcher at the Brookings Institution and a former United States diplomat, said the censorship showed how little had changed after three years of upheaval. "Sisi is telling everybody in New York, 'We have a free media,'" she said. "Well, what we actually have is the same darn system." Reported in: *New York Times*, October 1. □

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clashing with universities were purposely combative or rigidly fundamentalist. So she was amazed when her intellectual, "progressive" students "were all painted with a broad brush, as discriminators," she recalled in an interview.

It took a couple of years for the effect to be felt, but her Vanderbilt group began to dwindle. For its part, Vanderbilt insists that it did not change its policy in 2011, merely clarified existing nondiscrimination rules, and it stresses that registered groups simply sometimes get priority over unrecognized ones for campus meeting rooms.

John Sims Baker, a priest and chaplain of University Catholic—Vanderbilt Catholic, before it was derecognized—called Vanderbilt's policy "dishonest," also citing the fraternity example. "When the university wants to make an exception," he said, "it is more than capable of doing so."

For some observers, that raises the inflammatory question of the degree to which arguments over homosexuality are driving this debate. Vanderbilt first examined how its policies were being enforced after a student accused a Christian fraternity of expelling him because he is gay. And following the *Cal State* decision, a columnist in *Slate* dismissed claims of religious discrimination as a smoke screen and wrote: "There's only one issue truly in play here: whether antigay student groups can force public universities to subsidize their discriminatory behavior."

Jao acknowledged that noncelibate homosexuals would not be eligible to be leaders in InterVarsity—but neither would noncelibate unmarried heterosexuals. He said he understood why homosexuals would take offense at such a view and said he felt "deep grief over the deep hurt" Christians had caused gays in the past. "Our only answer is that we think our religion compels this posture."

"For the university to fulfill its mandate, we have to have a place where challenging, even offensive conversations can be held. . . . Wouldn't it be great if universities could help us have the real conversations we need to have about religion and sexuality and politics?"

At the same time, several members of InterVarsity, at Cal State and elsewhere, said disputes over sexuality did not play a big part in the lives of their groups. "Anyone who is willing to sit down and have a civilized conversation about your faith and what you believe and the Bible is welcome," said Austin Weatherby, a junior at Chico State who is an InterVarsity Bible-study leader.

So far, Weatherby's group has been inconvenienced but not crippled, moving its meetings from a campus coffee shop to an off-campus Presbyterian church. His chapter has always had guest ministers from local churches speak, but he notices a special enthusiasm from outsiders this year.

"Different churches have bought us pizza or ice cream. They have said they are praying for us." Reported in: *Chronicle of Higher Education*, October 6.

surveillance

Sunnyvale, California

The federal government was so determined to collect the Internet communications of foreign Yahoo customers in 2008 that it threatened the company with fines of $250,000 a day if it did not immediately comply with a secret court order to turn over the data.

The threat—which was made public September 11 as part of about 1,500 pages of previously classified documents that were unsealed by a federal court—adds new details to the public history of a fight that unfolded in secret at the time, as Yahoo challenged the constitutionality of a statute that legalized a form of the Bush administration's program of warrantless surveillance of foreigners—and lost. Under the Foreign Intelligence

Surveillance Act, companies that receive data requests are prohibited by law from talking about the substance of specific requests or even acknowledging they occurred.

Yahoo's 2008 challenge to the warrantless surveillance law and an appeals court's rejection of that challenge were first reported by *The New York Times* last year, shortly after Edward J. Snowden, a former National Security Agency contractor, exposed a more extensive government surveillance program called Prism through classified documents leaked to *The Washington Post* and *The Guardian*.

The government threatened to fine the Sunnyvale-based company $250,000 a day if it did not immediately comply with a secret court order.

The new documents show that the government expected Internet providers to begin complying with orders under the law—which Congress later replaced with another statute called the FISA Amendments Act—before the intelligence court had approved the procedures for targeting specific accounts and protecting any private information about Americans collected incidentally in the course of the warrantless surveillance aimed at people abroad.

The records also provide perhaps the clearest corroboration yet of the Internet companies' contention that they did not provide the government with direct access to vast amounts of customer data on their computers.

When the Snowden revelations surfaced last summer, there were reports that the government had direct access to look into the databases of Internet companies for any information they wanted, which the companies have denied. Instead, they said, the government had to send them a lawful request for information on a specific individual and only then would they hand it over.

In a document reporting on its compliance with the 2008 order to turn over customer data, Yahoo said it had begun surveillance on the requested accounts, beginning with the government's highest-priority targets. That indicates that the government was sending Yahoo the names of the people it was investigating and waiting for the company to send the information, as opposed to directly accessing Yahoo's servers.

Over all, the cache of documents shows how Yahoo fought the government and eventually lost its appeal. That helped set the stage for a vast expansion of the federal government's surveillance of Internet users through the secret Prism program. Ultimately, Yahoo and seven other companies had to give data to the government under the program.

Yahoo described the government's threat to seek fines in a blog post. A Yahoo spokesman further explained that the court ordered it to comply while its appeal was pending.

Proceedings in front of the Foreign Intelligence Surveillance Court are usually secret, and Yahoo had been pressing for months for the declassification and release of the documents.

"We consider this an important win for transparency, and hope that these records help promote informed discussion about the relationship between privacy, due process and intelligence gathering," Ron Bell, Yahoo's general counsel, wrote in the blog post.

The Justice Department has posted many of the documents online and Yahoo said it would work to make more of them available to the public.

Yahoo brought its challenge after the 2007 enactment of the Protect America Act, which gave the first, temporary legalization to a form of the Bush administration's warrantless surveillance program. It authorized the government to collect, from domestic networks and providers, the communications of people thought to be located abroad.

In 2008, the Protect America Act expired and Congress replaced it with the FISA Amendments Act, which reauthorized a more permanent version of the program. The 2008 law extended some protections for Americans abroad—an issue Yahoo had concerns about—by limiting the targets of the warrantless surveillance to noncitizens abroad.

While Yahoo's challenge was technically to the Protect America Act, however, most of its concerns applied equally to the FISA Amendments Act. The rulings by the Foreign Intelligence Surveillance Court and its review panel upholding the Protect America Act became an important, though secret, precedent for the constitutionality of expansive government surveillance powers.

Yahoo did not seek Supreme Court review of the issue. One complication, the Yahoo spokesman noted, was that the Protect America Act had expired and such a challenge might have had to start over again addressing the FISA Amendments Act. The spokesman did not say how much the litigation had cost, but said it was considerable.

In 2012, Congress reauthorized the FISA Amendments Act, and that same year a constitutional challenge to the law, brought by Amnesty International and other plaintiffs, reached the Supreme Court. But the justices dismissed the case without examining the merits on the grounds that the plaintiffs could not prove they had been wiretapped and so lacked standing.

Yahoo's only victory was that the intelligence courts agreed that it had standing to file a challenge on behalf of its users, rejecting the Bush administration's argument that it could not raise the concerns in court, the newly disclosed documents show.

The American Civil Liberties Union praised the court's decision to release the documents. "Yahoo should be lauded for standing up to sweeping government demands for its customers' private data," Patrick C. Toomey, a staff lawyer at the group, said in a statement. "But today's release only underscores the need for basic structural reforms to bring transparency to the NSA's surveillance activities." Reported in: *New York Times*, September 11.

nudity

Phoenix, Arizona

On September 23, the Freedom to Read Foundation joined several other organizations and bookstores in filing a lawsuit in federal court against Arizona House Bill 2515, which makes it a felony "to intentionally disclose, display, distribute, publish, advertise, or offer a photograph, viodeotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure."

The suit asserts that the law violates the First Amendment, in that it is overbroad, vague, not narrowly tailored to achieve its stated goal, and is a content-based restriction on constitutionally protected speech.

The law, whose putative target is "revenge porn" (that is, the malicious online posting of explicit photos by aggrieved ex-lovers), in fact cuts a much broader swath: the complaint lists a number of every day situations in which libraries, booksellers, journalists, artists, and others could be prosecuted for distribution of protected speech that is historic, educational, artistic, and/or newsworthy in nature.

The suit, *Antigone Books* v. *Horne*, was coordinated by Media Coalition and the ACLU. Media Coalition has created a Q&A that explains the case and discusses the reasons for the lawsuit and the law's problematic reach. Included in that is this, specifically regarding the concerns of librarians:

"Q7: What can booksellers and librarians do to comply with the law?

"A: The threat of going to prison means every bookseller and librarian is responsible for every book, magazine newspaper and video they carry. To follow the law, they would have to review each picture in every book and magazine they carry, which would be an almost impossible task. They would also have to determine whether each picture violates the law, without knowing the circumstances surrounding each photograph. Many booksellers and librarians will decline to carry material that includes nude images, rather than risk prosecution, even though they have a constitutional right to sell this material."

The law also affects their customers and patrons. If booksellers and librarians are forced to remove any material that includes a nude photo, customers and patrons are deprived of their right to purchase and borrow these materials. That means you would not be able to purchase an issue of National Geographic at the bookstore and you won't be able to borrow art books that include nude images from the library.

Joining FTRF as plaintiffs are five Arizona booksellers (including Antigone Books), the American Booksellers Foundation for Free Expression, the Association of American Publishers, the National Press Photographers Association, and Voice Media Group, publisher of the *Phoenix New Times* and other alternative newspapers. Reported in: FTRF Blog, September 24.

social media

Peoria, Illinois

Jon Daniel was watching cartoons with one of his sons when he created a spoof Twitter account in the name of the Peoria mayor. Out of boredom, he said, he soon began sending profane messages about sex, drugs and alcohol.

Daniel never intended for the fake account to be seen by anyone other than his friends, and it never attracted more than a few dozen followers. But within weeks the raunchy parody led to a police raid of his home and ignited a debate about online satire, free speech and the limits of a mayor's power.

Now Daniel is taking the matter to federal court in a lawsuit alleging the city violated his civil rights.

The 29-year-old, who works as a tavern cook in his hometown, modeled the tweets on those of other fake accounts that lampoon sports stars by tweeting in a voice that appears drunk. He was dumbfounded when Twitter suspended the account.

"I was like, 'Well, OK, that's the end of that chapter,'" he told The Associated Press. Except it wasn't. A few weeks later, four police officers acting on a complaint from Mayor Jim Ardis raided the home Daniel shares with several roommates, seizing computers and smartphones.

Daniel discovered that the type of spoof that might be tolerated—or even welcomed as flattery—in Chicago, New York or Hollywood can play differently in smaller cities in middle America, like Peoria, a manufacturing center of 120,000 people.

After the April raid, Peoria's public prosecutor declined to file charges, but with the backing of the American Civil Liberties Union of Illinois, Daniel filed the lawsuit, which he hopes sends a warning to others in power.

The raid unleashed waves of criticism—much of it on social media, where fake profiles of celebrities and prominent politicians have long proliferated.

Authorities sought warrants on the basis that Daniel falsely impersonated a public official. The fake account used the handle @peoriamayor and included Ardis' official photo, email address and a link to the mayor's bio on the city's website. Ardis saw the account as an attempt to steal his identity.

Daniel only added the parody label—required under Twitter's terms of service—a few days after creating the account when he noticed that people he did not know were starting to follow him. Even without the label, an account that is clearly a parody is protected, legal experts say.

The tweets—one said, "Im (sic) thinking it's tequila and stripper night"—expressed a preoccupation with sex and drugs that no reasonable person could have concluded came from the actual mayor, the lawsuit argues.

It would have been a more difficult question if Daniel had been talking about policy issues, said Jack Lerner, an assistant law professor at the University of California

at Irvine, though he does say Daniel was "unwise" not to include a clear parody label from the start.

For Daniel, the line is simple. "You can't do terrorist type of things or threaten people," he said in an interview at the ACLU office in Chicago. "But a simple joke, a parody, mocking somebody, that's obviously not illegal."

Twitter suspended the account after the city threatened to file a lawsuit.

City attorneys insist authorities had probable cause to seek Daniel's identity from Twitter and to raid his home. They've asked a judge to dismiss the case.

Ardis, Peoria's mayor for the last nine years, said he felt the tweets "went way over the line" and made him "a victim of sexual doggerel and filth. And perhaps I'm guilty of reacting as a man, as a father and as a husband rather than as a government official with whom constituents might disagree," he told a City Council meeting.

Other parody accounts have drawn scrutiny, although none apparently led to police raids. Police in Starkville, Mississippi, recently subpoenaed Twitter for information about the person behind an account in the name of Vice Mayor Roy Perkins.

In Arizona, state Rep. Michelle Ugenti introduced legislation in 2012 that would have made it a crime to create an online profile in someone else's name with the intent to "harm, defraud, intimidate or threaten." Ugenti was the target of a Twitter parody but said her bill, which died in committee, was not meant to affect parodies.

Not all phony profiles are badly received. When former White House Chief of Staff Rahm Emanuel was running for mayor of Chicago, a journalism professor crafted a fake, foul-mouthed Twitter version of Emanuel. The real Emanuel acknowledged the tweets sometimes captured his attitude on the campaign trail. He eventually met the man behind the account and even pledged to donate $5,000 to a charity of his choice.

And now, Twitter has at least a dozen Peoria mayor accounts—all fake. Reported in: talkingpointsmemo.com, September 19.

Muhlenburg County, Kentucky

Thirty-one-year-old James Evans of Muhlenberg County, was arrested on terroristic threatening charges after he posted lyrics from a song by the heavy metal band Exodus on Facebook. On August 24, Evans posted the following quote from the song "Class Dismissed (A Hate Primer)", "Student bodies lying dead in the halls, a blood splattered treatise of hate. Class dismissed is my hypothesis, gun fire ends [the] debate." Shortly thereafter, he was taken into custody by authorities under the rationale that his posting constituted a threat "to kill students and or staff at school," according to his arrest warrant.

Evans ended up spending eight days in jail for exercising his First Amendment rights. Terroristic threat charges haven't been dropped but his case has been deferred for six months. He's also been ordered to undergo a mandatory mental health evaluation—all for posting lyrics written by someone else.

According to Evans, even some of the officers he spoke to felt there was no reason he should have been arrested. But the statement made by the county's school resource officer seems to indicate this response was perfectly justified. Resource officer Mike Drake said "multiple agencies" received calls about Evan's post. As Tim Cushing of techdirt.com, commented, "When you have multiple complainants babbling about school shootings, you really can't just sit around the precinct doing nothing. What you can do, however, is get a little context before booking someone on criminal charges. Turning someone into a criminal simply because they showed a little lack of judgment isn't the appropriate response. Beyond that, there's the First Amendment—which doesn't cover actual threats but definitely protects stuff a bunch of people mistakenly viewed as a threat." Reported in: techdirt.com, September 8.

Abbeville, Louisiana

The ACLU of Louisiana has filed suit to invalidate a policy of the City of Abbeville Police Department prohibiting department employees from engaging in commentary on social media if the comments might give a "negative view towards" the police department, the City or its employees or residents.

Plaintiff Colt Landry, a Sergeant in the Abbeville Police Department, has made comments while off duty on his private Facebook page about working conditions at the Police Department. Concerned that this policy violates his free speech rights, Sgt. Landry has sued to stop enforcement of the policy, known as General Order 222.

Sgt. Landry maintains a private Facebook page on which he, like millions of Americans, posts comments about issues of concern to him. Like many others, his comments occasionally address conditions at his workplace. Unlike most Americans, he is subject to discipline if he posts anything that could be construed as critical—not just of his workplace but of anyone who lives in his community.

"Public employees retain their Constitutional rights to free speech," said Marjorie R. Esman, ACLU of Louisiana Executive Director. "Sgt. Landry, like the rest of us, has the right to say what he wants on his private Facebook page, maintained on his own time. He shouldn't have to risk his job for stating his opinion about his community."

General Order 222 does not adequately define what is prohibited, which makes it impossible for anyone to know what they may and may not say. While it bans "insulting, profane or derogatory" messages about the "City of Abbeville, the Abbeville Police Department, its officials, employees or citizens," it does not define what constitutes "insulting, profane or derogatory." It's not clear whether

Sgt. Landry or anyone else could post a photograph of a dilapidated building, which could be construed as "derogatory." Nor is it clear whether someone could post a comment disagreeing with a public official's public position on an issue.

"Without clear guidance as to what is and what isn't permitted, the employees of the City of Abbeville police department are effectively prevented from using social media altogether," continued Esman. "This total ban on the expression of personal opinions and statements is simply not permitted in a free country." Reported in: aclu.org, September 24.

police interaction

Portland, Maine

The arrest of a Bar Harbor couple for observing and attempting to film an interaction between several police officers and a woman in downtown Portland was illegal and unconstitutional, according to a lawsuit filed September 16 by the ACLU of Maine.

"The right of citizens to observe and record the police is a critical check on the use of power and force," said Zachary Heiden, legal director for the ACLU of Maine. "The police need to understand that individuals who are quietly observing their work from a distance have a right to do so, and it is not cause for their arrest."

Jill Walker and Sabatino Scattoloni were visiting Portland on May 25 when they observed the encounter between five police officers and one woman. Walker and Scattolino decided to film the incident from a distance, neither speaking to nor interfering with the work of the police officers. They were then approached by Officer Benjamin Noyes, who forcefully ordered them to get off the sidewalk or face arrest. When Walker and Scattoloni asked the reason they would be arrested, Officer Noyes immediately ordered two other officers to arrest the couple.

Walker and Scattoloni were searched and interrogated without Miranda warnings and incarcerated until they could meet bail. They were charged with "Obstructing Government Administration" and obligated to hire a defense attorney. Ultimately, the district attorney dropped the charges.

"We've heard a lot about police mistreating innocent bystanders in other places, but we never thought it would happen to us in Portland, Maine," said plaintiff Jill Walker. "We're filing this case because we think it's important for the public to be able to witness government officials doing their job, and we don't want what happened to us to happen to other people."

The ACLU of Maine filed the lawsuit against Officer Noyes, charging that his actions violated Walker and Scattoloni's First Amendment right to peacefully observe and record the police doing their job in public, as well as their Fourth Amendment right to be free from unlawful arrest.

In 2011, the U.S. Court of Appeals for the First Circuit ruled in *Glik* v. *Cunniffe* that the arrest of a Massachusetts man for observing and videotaping the police violated his First and Fourth amendment rights. The Court of Appeals issued a similar ruling in *Gerick* v. *Begin*, regarding a New Hampshire man, earlier this year. Reported in: aclu.org, September 16. □

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