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FCC chair goes beyond "net neutrality"; proposes to regulate Internet

For the last year, Tom Wheeler, chairman of the Federal Communications Commission, has been working on new rules to ensure so-called net neutrality, or an open Internet. Over that time, his hints and comments have shown a steady shift toward stronger regulation—and a more direct confrontation with the cable television and telecommunications companies that provide high-speed Internet service to most American homes.

But on February 4, Wheeler went further than some industry analysts had expected and even beyond the recommendations of President Obama, who in November urged the commission to adopt the "strongest possible rules," in a surprising public admonition to an independent agency. Under his plan, the FCC would regulate broadband Internet services to American homes using a common carrier provision of the Communications Act, called Title II, whose heritage goes back to the early days of the nation's telephone network.

First, Wheeler proposed regulating consumer Internet service as a public utility, saying it was the right path to net neutrality. He also included provisions to protect consumer privacy and to ensure Internet service is available for people with disabilities and in remote areas.

Wheeler's plan would also for the first time give the FCC enforcement powers to police practices in the marketplace for handling of data before it enters the gateway network into people's households—the so-called interconnect market. For good measure, he added a "future conduct" standard to cover unforeseen problems.

Some industry analysts expected Wheeler to leave some rules out of this order, partly to create a narrower target for legal challenges. Yet he chose to add the other provisions to the main thrust of his plan, which is to reclassify high-speed Internet service as a telecommunications service, instead of an information service, under Title II of the Telecommunications Act.

"Once you've decided to take the bold step—apply Title II—and open yourself up to attacks from the industry and in court, it makes sense to put in everything you want," said Kevin Werbach, a former FCC counsel and an associate professor at the Wharton School of the University of Pennsylvania.

Wheeler announced the basics of his plan in an op-ed article on *Wired*'s website in which he wrote that, "I am submitting to my colleagues the strongest open Internet protections ever proposed by the FCC. These enforceable, bright-line rules will ban paid

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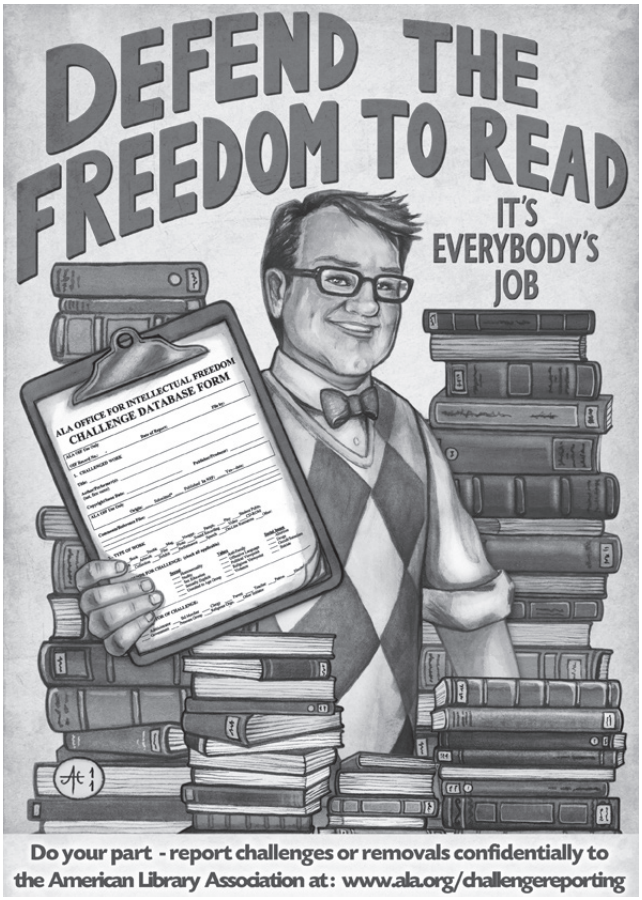

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IFC report to ALA Council

The following is the text of the ALA Intellectual Freedom Committee's report to the ALA Council, delivered on February 3 by IFC Chair Dennis Archer at the ALA Midwinter Meeting in Chicago.

The ALA Intellectual Freedom Committee (IFC) is pleased to present this update of its activities.

UPDATE

During the 2014 Annual Conference in Las Vegas, Nevada, the IFC proposed revisions to 14 Interpretations to the *Library Bill of Rights* for inclusion in the 9th edition of the *Intellectual Freedom Manual*. All of the proposed revisions to the Interpretations were adopted by Council. During the discussion of the resolutions, the IFC was tasked to review the Labeling and Ratings System Interpretation after the ALA Annual Conference and report back to Council on its findings. After review, the IFC has decided to split Labeling and Rating Systems into three separate Interpretations and will send the drafts to ALA Council in April for review and comment prior to submitting the revised Interpretations for approval at the 2015 ALA Annual Conference in San Francisco.

INFORMATION

The Intellectual Freedom Manual, Ninth Edition

Editor Trina Magi of the University of Vermont has re-imagined and re-designed the 9th Edition of the *Intellectual Freedom Manual* for use as a practical guide for librarians in the field. As part of the redesign, the historical materials will be published as a separate supplement to the manual. Manuscripts for the manual and the historical supplement have been submitted to ALA Editions and the manual is on track for release on April 2015. It will be available for purchase both online and at the ALA Store at Annual.

Challenges to Library Materials Update

Persepolis by Marjane Satrapi has been challenged many times this year. After a parent complained about *Persepolis* to the superintendent of schools in Chatham, Illinois, the superintendent immediately removed the book from the hands of all the high school seniors reading it for their Human Rights unit, violating the district's reconsideration policy. The parent's concerns included a complaint that the graphic novel format was low value literature and that *Persepolis* describes torture and is used as propaganda. OIF wrote a letter in support of *Persepolis*, graphic novels, the professional education and judgment of teachers and librarians. Ultimately, the Chatham Ball School District redirected the complaint through policy approved channels. At the conclusion of the reconsideration process, OIF received an email stating "Great news! The Board voted unanimously to keep *Persepolis* in our curriculum. Principal Jim Lee did a wonderful job in his presentation, extensively using materials you sent me. The decision is being reported in our local newspaper and radio stations. So we're all pretty happy here. Thank you again for your and your office's support. We're all extremely grateful!"

Highland Park Independent School District in Texas has received attention from multiple national and local press affiliates including the *New York Times* and *School Library Journal*. As in Chatham, the superintendent removed seven books from the curriculum in violation of school policy. (A frustrating pattern that is emerging is administrators not following their own reconsideration policies.) Parents in the community formed two organizations: HP Kids Read, supporting academic excellence, intellectual freedom and diverse curricula, and Speak Up for Standards, a group seeking to remove books containing content they deemed sexually explicit, vulgar and graphically violent. During the controversy, there has been a lot of discussion about selection policies and opt-out alternatives, and the novel *The Art of Racing in the Rain* by Garth Stein was officially challenged; after review by a reconsideration committee, it was retained. Subsequently, a parent challenged the nonfiction work *The Working Poor: Invisible in America* by Pulitzer Prize-winning reporter David Shipler, suggesting that the students read Ayn Rand's *We the Living* instead. That challenge remains pending before a reconsideration committee. The Freedom to Read Foundation provided HP Kids Read with a $5,000 grant to facilitate an educational event with Pat Scales, "Communicating with Your Kids Through Literature." OIF is continuing to work with the parents and students of this community.

At the Sussex Central High School Library (DE), *The Miseducation of Cameron Post*, an award-winning teen novel by emily danforth was quietly removed from school library shelves during a local debate about the inclusion of LGBT terminology and HIV and STD education in the school district health curriculum. When the act of censorship came to light, the school's Gay-Straight Alliance created its own library so students would still be able to read the book. Eventually, the book was reviewed by an official reconsideration committee and was retained only to have the committee's decision appealed by their very own school board president. Multiple conference calls and emails were exchanged between OIF, ACLU, NCAC and the IF Committee of the Delaware Library Association to decide how to best support the high school librarian, the novel, and the freedom to read for the students. At the board meeting, the superintendent eventually withdrew his appeal. The high school librarian has updated us and says that they now own four copies of *The Miseducation of Cameron Post* and

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FTRF report to ALA Council

The following is the text of the Freedom to Read Foundation's report to the ALA Council delivered February 2 by FTRF Chair Julius Jefferson at the ALA Midwinter Meeting in Chicago.

As President of the Freedom to Read Foundation, it is my privilege to report on the Foundation's activities since the 2014 Annual Conference:

LITIGATION ACTIVITIES

Antigone Books v. Horne

In September 2014, the Freedom to Read Foundation joined with the American Booksellers Foundation for Free Expression, the Association of American Publishers, Voice Media Group, Inc., the National Press Photographers Association and Arizona booksellers Antigone Books, Bookmans, Changing Hands Bookstore, Copper News Book Store, and Mostly Books to challenge an Arizona statute that makes it a crime to publish, sell, loan, or disclose images that include nudity without the depicted person's consent for each distribution. Although intended to target "revenge porn," the law, as written, potentially makes criminal the dissemination of a large number of historic, artistic, educational, and other newsworthy images.

While the Freedom to Read Foundation strongly condemns the malicious invasion of privacy resulting from "revenge porn," and supports using legal tools to stop it, the Arizona law goes far beyond criminalizing this reprehensible practice and potentially makes criminally liable anyone who provides access to any image that includes nudity, including newsworthy images such as the iconic image of the "Napalm Girl," running unclothed from her village during the Vietnam War, or the images of nude prisoners held at Abu Ghraib. Under this law, distributing or otherwise providing access to such materials puts librarians at risk for prosecution for a serious crime punishable by almost four years in prison.

FTRF joined the lawsuit on behalf of its member libraries because the law potentially could be used to impose criminal liability on libraries and librarians for material that currently is available in libraries both in and outside of Arizona. For example, FTRF member libraries provide Internet access through library computers through which patrons might access nude images. The statute requires consent for each distribution and such consent could not be obtained for every image accessed through the Internet, even if a publisher had original consent to publish the image.

Additionally, FTRF member libraries' online public access catalogs include many works containing nude images that are not obscene but would be restricted by the statute. While the images might not appear online, listing the restricted books online would be "offering" the images. Similarly, libraries outside of Arizona participating in interlibrary loan programs would have to restrict access to materials that may be covered by the law by either ensuring that the materials are not loaned to Arizona libraries or persons in Arizona, or by removing the materials from the interlibrary loan program altogether, thus denying libraries and library users in other states the opportunity to borrow such works.

After FTRF and our fellow plaintiffs filed a motion for preliminary injunction asking the district court to block enforcement of the law, attorneys for the State of Arizona joined with plaintiffs' attorneys to ask the district court to stay enforcement of the law and stay the lawsuit itself to allow the Arizona legislature the opportunity to narrow the law in its next legislative session. The district court agreed to do so, and thus the case remains pending.

Those interested can follow developments in the case at http://www.ftrf.org/?Current_Cases.

Arce v. Huppenthal

We continue to monitor the ongoing progress of this lawsuit filed by teachers and students in the Tucson Unified School District (TUSD) against the Arizona Superintendent of Public Instruction and other state officials that challenges the constitutionality of the Arizona statute prohibiting the use of class materials or books that encourage the overthrow of the government, "promote resentment toward a race or class of people," are "designed primarily for pupils of a particular ethnic group," or "advocate ethnic solidarity instead of the treatment of pupils as individuals." The plaintiffs sued after TUSD was forced to cease its Mexican American Studies program and remove books from its classrooms. After the district court upheld the statute, the students appealed to the Ninth Circuit Court of Appeals. Subsequently FTRF, joined by the American Library Association, REFORMA, the Black Caucus of the ALA, and the Asian Pacific American Librarians Association, filed an *amicus* brief in support of the students' First Amendment claims. Our brief has been well-received and has been cited by the plaintiffs and other parties to the appeal.

In the brief, FTRF takes the position that the ban on ethnic studies violates the First Amendment because the Supreme Court held in *Board of Education* v. *Pico* that students have the right to receive information and the government cannot censor material based on political or partisan motivations—as appears to be the case based on the public statements made by Superintendent Huppenthal and other proponents of the legislation. FTRF also took the position that the state violated the First Amendment because curriculum decisions based on political motivations do not constitute a legitimate pedagogical interest. FTRF further maintains that the statute is unconstitutionally overbroad, chilling a substantial amount of other speech not within the purview of the law's restrictions. FTRF argued that some might fear assigning Maya Angelou's *I Know Why*

the Caged Bird Sings because it could be viewed as being "designed primarily for pupils of a particular ethnic group" or Martin Luther King's "Letter From a Birmingham Jail" on the ground that it "advocates ethnic solidarity instead of the treatment of pupils as individuals."

The Ninth Circuit Court of Appeals heard the parties' oral arguments on January 12; constitutional scholar Erwin Chemerinsky, dean of the law school at the University of California, Irvine, argued the case on behalf of the students. We are hopeful that an opinion will be issued sometime in March or April of 2015. We thank ALA, REFORMA, BCALA, and APALA for their support of this effort.

I invite you track the progress of the case at www.ftrf.org/?Arce_v_Huppenthal and on Twitter @ftrf.

FTRF45—A CELEBRATION

On November 17, the Freedom to Read Foundation launched a year-long observance of its 45th anniversary with a Google Hangout featuring author Chris Crutcher; it was the first in a series of events we are calling "FTRF45." FTRF45 aims to achieve a number of goals: to honor FTRF's history and the free expression heroes that have contributed to FTRF's impressive record of defending the freedom to read, to build the capacity of FTRF so that we can expand our ability to challenge censorship and defend access to information, and to spread the word about the Freedom to Read Foundation to new audiences.

The first in-person FTRF45 event took place on January 17 in Salt Lake City. The reception celebrated the legacy of Emily Wheelock Reed, a librarian and FTRF Roll of Honor recipient who faced tremendous adversity and yet rose above it to defend the freedom to read—and basic human rights. It was held in conjunction with the world premiere of *Alabama Story*, an original play written by New York playwright Kenneth Jones that recounts how Reed fought to keep Garth Williams' book *The Rabbits' Wedding* on the Alabama central library shelves in 1959 against segregationists' protests that it promoted miscegenation. In addition to celebrating Reed, the reception highlighted the work FTRF has done in Utah to protect free speech, including supporting Jeanne Layton in the 1980s and more recently, supporting the librarians in the Davis County Public Schools defending access to Patricia Polacco's picture book *In Our Mothers' House*.

The second FTRF45 event took place Saturday evening and featured cartoonist Jeff Smith of *BONE* fame, who discussed the impact of censorship efforts on his creative work and generously spent time signing and discussing his books with those in attendance. Additional FTRF45 in-person events are planned for later in the year, including a meet-up in Portland, Oregon on Thursday, March 26 during the Association of College and Research Libraries national conference; a reception in Austin on April 15 in conjunction with the Texas Library Association annual conference; and a fundraiser in New York on May 29 in connection with BookExpo America.

I encourage you to join us in celebrating FTRF45 by joining us for one of our in-person events and by using the hashtag #FTRF45 for all posts and tweets related to the 45th Anniversary. Funds raised in the course of these activities will be used to support FTRF's Judith F. Krug Memorial Fund as well as for our litigation and advocacy efforts. For a collection of all information related to #FTRF45, including the recording of the Google Hangout launch, visit www.ftrf.org/?FTRF45.

SUPPORT FOR LOCAL ACTIVISM

In October, the Freedom to Read Foundation awarded a $5,000 grant to HP Kids Read, a parents group in Highland Park, Texas fighting book censorship in their local school district. HP Kids Read is working to counter efforts by another group, Speak Up for Standards, that wants the school district to remove a large number of books from the reading list developed by the district's high school English department. Speak Up for Standards, a well-funded interest group, also has lobbied for the district to change its challenge and opt-out policies to make them considerably more restrictive and to limit what books may be taught in the district.

As a result of the initial demands made by members of Speak Up for Standards, the district superintendent suspended seven books from the curriculum in violation of district policies. The books included *The Glass Castle* by Jeannette Walls, *Song of Solomon* by Toni Morrison, *Siddhartha* by Herman Hesse, and Sherman Alexie's *The Absolutely True Diary of a Part-Time Indian*. Concerned parents immediately organized HP Kids Read to support the faculty and to urge the district superintendent to reinstate the books. As a result of their efforts, the district superintendent reinstated the books but initiated a review of district policies that has resulted in the use of permission slips for classics such as *Dracula*, *The Picture of Dorian Gray*, and *Brave New World* as well as David Shipler's nonfiction work, *The Working Poor: Invisible in America*, which currently is being challenged.

HP Kids Reads remains vigilant and is continuing to fight to retain challenged works, maintain the academic integrity of the English department, and support its faculty. FTRF is pleased to provide essential financial support for their efforts.

DEVELOPING ISSUES

Members of the Foundation's Developing Issues committee reported on a number of issues involving threats to free expression. Committee chair Chris Finan

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reporters experience censorship on social media

In mid-January, a number of journalists were notified by Twitter that a Turkish court had issued an order for their tweets to be removed after a judge's complaint called the tweets defamatory. Many of the tweets were about a controversial court case he launched against police officers whose wiretapping investigation he had previously approved, and many of them mentioned the judge by name. Aysun Yazici, a court reporter for the daily newspaper *Taraf*, deleted her tweet after receiving an email from Twitter.

"As a correspondent, I just shared a piece of news that was true with my followers. Sharing this kind of news with people is my job," Yazici said. Her colleague, *Taraf*'s political editor Dicle Bastürk, received a similar notification and did not delete her tweet. She says it's still visible. Days later, Bastürk received another email from Twitter informing her that the company may still have to remove it.

Examples of media-related censorship on social media keep piling up—Facebook withheld images of the Prophet Muhammad for users in Turkey, reportedly acting in response to a court order. Social media companies don't break down their data on withheld content showing whether journalists are specifically targeted by government removal requests. But the notifications that Yazici and Bastürk received point to wider evidence that journalists are experiencing censorship on social media. Where this kind of censorship occurs, it isn't isolated: In Turkey and Russia, where journalists have been impacted by removal requests on social media, they're under pressure in other media too.

Turkey is a standout example of how gag orders (sometimes called injunctions or reporting bans) are used to stifle media coverage of breaking news. Over the past year, gag orders there—which prohibit reporting in broadcast, print, and online media—have coincided with removal requests on Twitter and Facebook. And Elif Akgül, freedom of expression editor for the Istanbul-based news website Bianet, said the government's use of reporting bans has spiked in that time.

"There have been a lot of media bans in the last 10 years, but most concerned coverage of family courts. But when we talk about bans on political issues, there were a lot more of those in 2014," Akgül said.

But political injunctions on reporting aren't limited to Turkey: Last June, Wikileaks revealed, for example, that an Australian court had issued a super-injunction (which prohibits reporting on the injunction itself) on bribery allegations against politicians from other countries.

When governments issue gag orders, social media companies can find themselves on the defensive: Though beholden to users, they sometimes comply with foreign governments' requests to remove allegedly illegal content. Freedom of expression activists have criticized Facebook and Twitter for complying in countries where they do not have offices or are not subject to jurisdiction, because when court-ordered reporting bans are enforced by social media companies, through withholding journalists' or their sources' accounts or content, an important source of information is endangered in already restricted media environments. During the 2009 presidential elections in Iran (the country's press status was rated "not free" last year by Freedom House), media outlets from outside the country relied on news shared by Twitter users there.

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David Cohen, 1909–2015

The library world lost a true giant with the passing of David Cohen on February 5. David received the FTRF Roll of Honor Award in 2005, just one of his many, many accolades honoring a career that spanned eight decades.

According to David's friend, Rocco Staino, David's family has requested that donations in his name be made to the Freedom to Read Foundation. The Foundation is deeply honored by this. The Foundation has created a special page to honor David. It includes photos, a list of honors and awards, and the text of his Roll of Honor citation.

FTRF Executive Director Barbara Jones wrote: "In the 1970s, fresh out of library school, I wanted to get involved with ALA. Intellectual freedom was my choice for focus. Then at NYU, I called David Cohen to ask how to get involved in IFRT. Within a couple of days, I was on the ballot to run for Secretary and the rest is history. David was generous like that."

FTRF Program Officer Jonathan Kelley wrote: "My most vivid memory of David Cohen was sitting backstage with him in 2005 as he waited to receive his Roll of Honor Award. Also waiting with us was then-US Senator Barack Obama. Senator Obama went out of his way to congratulate David on his award, and they chatted for a bit. Later, during his keynote address, the senator prefaced his remarks by commenting on how impressed he was by the 96-year-old.

"I will also always remember his powerful dedication to the LeRoy C. Merritt Humanitarian Fund, including spearheading the Intellectual Freedom Round Table's ongoing committee to support the Merritt Fund."

From the OIF/FTRF 30th Anniversary Roll of Honor Book (1999): "To many of his peers and colleagues, David is known as 'Mr. Intellectual Freedom.' His commitment to the principles have governed his professional career, as well as his personal life. He is one of the founders of the Long Island Coalition Against Censorship, and through this organization and many other means, he has worked unstintingly to make his beliefs a reality." Reported in ftrf.org. ☐

censorship dateline

library

Long Beach, California

Commissioned to create provocative art for a display at the Long Beach Public Library, Lethia Cobbs said she was surprised when a library official asked her to remove a piece because it was too controversial. Cobbs' display, titled "Dollandia" and located on the first floor at the Main Library, features ten handmade dolls in various settings: mermaids under water, a girl studying at a table and a couple lounging at the beach.

But the piece in question shows a white police officer, with his hand posed like a gun, standing over a lifeless and armless black male lying face down on the ground.

Cobbs, 47, of Long Beach said she made the dolls after hearing and reading news reports of unarmed black males in California and across the nation who had been fatally shot by white law enforcement officials.

"I make cute dolls, things people put on their shelf, but I wanted to make something that's not cute," said Cobbs, who said she was encouraged to be "edgy" and "provocative" at a June workshop for artists interested in being displayed at the library. "It's me wanting to say something. It's thought-provoking."

But while Cobbs was installing the display on January 2, Elizabeth Rogers, who is in charge of the art exhibits, told her to remove the black doll.

"Elizabeth came over and said, 'We can't have this. This is too controversial. It would offend certain segments of the public,'" Cobbs said. "She stood there until I removed the armless man."

Acting city spokesperson Kerry Gerot said, "We cannot confirm what was said at the workshop, however, our preliminary information indicates that this exhibit was installed and modified by one individual without the knowledge or approval of superiors."

Cobbs did sign a document that stated "The library reserves the right to accept or reject any item offered for display." But Peter Eliasberg, legal director at the ACLU of Southern California, said that doesn't cover the library's actions.

"By having no criteria for what is and what is not acceptable in this designated public forum, they have a problem," he said. "You don't get to be a Constitution-free zone by having that sentence on a piece of paper."

Eugene Volokh, First Amendment professor at the UCLA School of Law, agreed. "If the library's policy and procedure is to create an open forum for (say) all artists, or all local artists, or all local artists who work in particular genres or on particular subjects, then it couldn't discriminate based on viewpoint in choosing works for this sort of 'limited public forum.'"

Cobbs was one of four artists with work on exhibit until February 28 and the only one who was asked to remove something. The art by the other three includes abstract and landscape paintings, abstract and architectural photography and floral paintings, which are displayed in the lobby and the lower level.

Cobbs said she was encouraged by a library employee to submit provocative work. Cobbs submitted a CD with images of her doll work and said she was accepted a couple months later, but didn't have the idea for the police officer and armless youth until later in the year when the events made headlines, she said.

A library committee voted on people who had submitted examples of their work, and those artists with the largest number of votes were selected, Rogers said.

Gerot didn't have an answer as to whether the doll would be returned to the exhibit, but Cobbs wants to see the complete display as it was intended.

"I want to see it back in, especially since February is Black History Month," Cobbs said. "Art shouldn't always be about things that are pretty or comfortable." Reported in: *Long Beach Press-Telegram*, January 22.

schools

Collinsville, Alabama

A school superintendent denied some 50 high school students permission to attend a showing of the movie "Selma" January 16 in Gadsden due to the film's strong language and use of racial slurs.

Hugh Taylor, the superintendent of the DeKalb County Board of Education, denied a request for a Collinsville High School history club—sponsored by teacher Bradley Crawford—to attend the movie, along with other students from Crawford's classes.

Taylor cited the website "Kids In Mind" when explaining his decision. The site advises that the movie "Selma" has "about 2 F-words (and) 26 derogatory term (sic) for African-Americans."

"I understand the movie has a lot of historical value," Taylor said. "The request was denied based on language. (The website) told me there were about two F-words in that movie, which I presume may mean more. The school that wanted to go (Collinsville High) is a multicultural school and (the website) said there were going to be 26 African-American connotations, which I thought would probably be inappropriate.

"I deemed this movie in particular inappropriate and that's my job as the head of the school system to make those decisions," he said.

Crawford said that "Mr. Taylor made his decision and we respect it." He said he was unaware of who had first complained to Taylor about the denial.

Taylor is an elected official, a Republican who defeated four other candidates in a 2012 election to replace Charles Warren, who retired after 12 years in the post. Before then, Taylor served as principal at Ruhama Junior High in DeKalb County.

"We're trying to be good stewards of taxpayers' money, and sending them off to something that has immoral, unethical language, that may provoke other things, I don't feel like that's appropriate," he said.

"Selma" is rated PG-13, which would not preclude a high school student from entering the theater without an adult. The MPAA ratings system issues a PG-13 rating if "some material may be inappropriate for children under 13." The organization also cautions, "Parents are urged to be cautious. Some material may be inappropriate for pre-teenagers."

"I'm not going to send our DeKalb county kids to a movie that has the F-word in it," Taylor said. "I'm just not going to do that."

Taylor said that he had heard from only one parent "begging and pleading that I reconsider" and said the situation became public because there is "a person mad at me at a decision not to send kids to see something with some ugly talk. I know it has some historical value but I think parents, if they want to send their kids to do that, they'll do that on their own time with their money."

He was asked how close he had come to reconsidering and bristled for a moment. "I'm telling you I'm denying this because of the language," he said. "I'm trying to explain to you because I don't think it's going to be told correctly. That's why I have a hard time talking to the media, because I want the truth to be told. I'm denying it based on language. Just make sure you put that in, please."

Taylor, who has not seen the movie, did acknowledge as "a valid point" and would "sit down and consider" the idea of advising parents of the language and giving them the option of permitting the students to attend the movie or not.

"I don't want to assume the role of the parent. It's up to the parent to make the guiding decision as to whether or not they watch these types of movies," Taylor said.

When asked if he wasn't indeed eliminating the parental role by his denying permission, he responded, "I'm eliminating the decision to use taxpayer money to support going to see something that has filthy language.

"I don't rule over these people with an iron fist or a big club," he said. "I made a decision and some people are mad about it, but I'm going to go on about my business and try to run the school system." Reported in: al.com, January 16.

Tucson, Arizona

Tucson Unified School District (TUSD) Superintendent H.T. Sanchez is ready to fight to save culturally relevant classes, and believes that unlike last time, the district can prevail. The TUSD courses were deemed illegal by outgoing Arizona Schools Chief John Huppenthal during his final hours in office January 2, leaving Tucson's largest school district facing a possible funding loss of $14 million annually.

"They are not producing classes with adequate quality to meet the needs of the students," Huppenthal said.

The "notice of noncompliance" that Huppenthal sent Sanchez highlighted two music-related violations: the use of the Rage Against the Machine 1992 song "Take the Power Back" in Mexican-American history and an introduction to hip-hop written by KRS-One in an English class taught from an African-American perspective. Huppenthal's notice cited lyrics from "Take the Power Back," with asterisks covering profanity, and linked to the rap trailblazer's essay in which he defines hip-hop as "the artistic response to oppression."

Both instances were in reference to classes taught at Tucson's Cholla High Magnet School. The notice also noted a handout that asks, "Why was American slavery the most brutal in history?" and the requirement for students to recite Mayan and Aztec teachings daily. The classes replaced a Mexican-American Studies class that was deemed to violate the education law.

The schools chief threatened to cut state funding for the district by 10 percent if it did not comply with the law by March 4.

Sanchez is hopeful that the matter will be reconciled by either Huppenthal's successor, Diane Douglas, or by appeal.

The Tucson Unified School District went the appeal route in 2011 after then-state schools superintendent Tom Horne also found the district's ethnic studies classes to be in violation of state law. TUSD, however, lost and ultimately decided to eliminate the classes to avoid the financial penalty.

Since then a group of students has challenged the elimination in court in a case that is now before the US Court of Appeals for the Ninth Circuit and in which the Freedom to Read Foundation filed an *amicus* brief in November. That brief argues:

"The First Amendment protects the rights of students to access and receive information in the classroom. These rights ensure that America's youths are exposed to the diversity of ideas necessary to ensure an educated citizenry who can effectively participate in our democracy. Arizona Revised Statute §15-112 threatens these rights. For partisan and political reasons, the statute was aimed at and launched to dismantle Tucson's MAS program. Moreover, the statute is so broad that Arizona teachers and school districts must skirt a wide swath of protected instruction and material to avoid the possibility of serious penalties.

"Thus, the statute will chill a substantial amount of instruction that is beyond the purported purpose of the statute. This banning of books and courses from the classroom—both by direct application and by chilling effect—violates the First Amendment rights of students."

The case was argued before the Ninth Circuit on January 12. Representing the students, attorney Erwin Chemerinsky noted that one of the law's prime movers had "campaigned for this law by saying that he wanted to stop La Raza"—"a synonym for the Mexican American people."

Chemrinsky said that former state school superintendents John Huppenthal and Tom Horne, both of whom helped pass the law and later found TUSD in violation of it, had ignored independent studies finding no such violations in the MAS curriculum, as well as years of data showing improved test scores and graduation rates among program participants.

Chermrinsky, a professor at the University of California, Irvine School of Law, told the appellate panel that only "discriminatory animus" can explain the officials' actions.

"The reason why the legislature adopted this, the reason why Horne and Huppenthal found violations, was a discriminatory animus toward Mexican Americans," he said.

Citing the "considerable deference that federal courts owe to the state's authority to regulate public school education," US District Judge A. Wallace Tashima had previously ruled for the state on most of the students' constitutional challenges to the law in 2013.

Tashima found one section of the law barring classes "designed primarily for pupils of a particular ethnic group," to be overbroad and ambiguous, but said it could be severed from the otherwise nondiscriminatory statute. The state is using a cross-appeal to save that element of the law.

Judge Richard Clifton asked Arizona Assistant Attorney General Leslie Kyman Cooper to clarify the state's interest in prohibiting such classes.

"The state is concerned that all of its students should receive the same foundational education, and should be taught as individuals, should not be divided on the basis of groups such as class and race," Cooper said.

US District Judge Jed Rakoff, sitting on the panel in San Francisco by designation from the Manhattan, asked whether a course in San Francisco public schools on Chinese history would violate the law if it were designed to help "Chinese American students to understand their history." Cooper said that this hypothetical "could be" in violation of the Arizona's law.

Judge Clifton countered by asking why the state seemed to be saying "we don't want minorities to develop any kind of ethnic pride?"

"I'm not sure that a public school's purpose needs to be to develop ethnic pride," Cooper said. Cooper added that, considering that both the 9th and 5th circuits have previously ruled that "curriculum is government speech," Arizona has wide latitude to decide what is taught in its schools and how.

In the earlier case the state poked many holes in the district's case because it lacked a written curriculum to show what was actually being taught. That is no longer the case, Sanchez said.

"We feel very confident that we are in a good position," he said. "We have a written curriculum, all of the texts that are being used in the courses have been adopted by the governing board, a lot of the issues that were at question during the previous challenge, we've worked to ensure we've addressed."

While Sanchez acknowledges that TUSD could not sustain such a large financial hit, he believes it is best to stay in good standing with the federal court order, which requires that the courses be taught.

"We feel we've done everything we need to be in compliance with the state law . . . but we're also doing everything we need to stay in compliance with our federal court order," Sanchez said.

"I am deeply concerned by the fact that the noncompliance appears to extend beyond classes taught from the Mexican-American perspective and now also includes classes taught from the African-American perspective," Huppenthal said, adding that he wants "students, regardless of their race or ethnic background, [to] have access to a high quality education." He also wrote, "In issuing this finding before classes resume, I am hopeful that the district will take immediate action to comply with the law."

In a related development, University of Arizona professors from the College of Education determined there was a link between Mexican American Studies and improved student performance in Tucson's Unified School District. Their findings were published in the December edition of the *American Education Research Journal*, before Huppenthal announced the state's latest legal challenge against TUSD.

Yet, through the latest study, "Missing the (Student Achievement) Forest for All the (Political) Trees: Empiricism and the Mexican American Studies Controversy in Tucson," Nolan Cabrera and a team of Arizona professors found the MAS program improved student achievement.

"Taking Mexican American Studies increased the likelihood of graduating and passing aims tests and that relationship because stronger the more classes the students took," Cabrera said. Through advanced statistical analysis, the study shows students increased their probability of

graduating by 9.5 percent when they took ethnic studies courses.

Huppenthal argued the courses are illegal by promoting an overthrow of the US government and resentment toward a race or class of people. "If the community could see video tapes of those classes, would it be proud of that instruction, and the answer is a resounding no," Huppenthal said.

Cabrera called the courses the most promising attempt to close the achievement gap in the classroom. "Too often people equate difference with being subversive or dangerous," Cabrera said, "but the problem that we have is that we've been doing the same educational processes for the past 40, 50, 60 years and the gaps in achievement between whites and latinos, low income kids and upper income kids, they persist." Reported in: *Arizona Star*, January 6; Courthouse News Service, January 12; *Rolling Stone*, January 5; KGUN9, January 5.

Highland Park, Texas

A book about poverty is again being challenged in Highland Park Independent School District, one of the wealthiest school districts in the state. *The Working Poor: Invisible in America* is "sexually explicit" and out of place in a high school English course, a parent has charged in a formal complaint to the district. The parent says the book, which is currently taught in Advanced Placement English III, a college-level course for juniors, is better suited for a political science or sociology class.

The district confirmed the challenge, which was filed in December. The nonfiction book will be taught until an appointed committee of parents, staff and students reviews it and decides whether it should stay in use.

The Working Poor, by Pultizer Prize-winning journalist David K. Shipler, was one of seven books that Superintendent Dawson Orr temporarily suspended in the fall following parent complaints. His unilateral decision was a break from district policy. The decision, which coincided with Banned Books Week, sparked national attention and outrage. Orr then reinstated the books. In early February the district revised its policy (see pages 31, 33).

This is the second title challenged since Orr reinstated the suspended books. *The Art of Racing in the Rain*, by Garth Stein, was challenged, but a committee upheld the book's use in November. The challenger has appealed the decision.

The Working Poor tells the story of men and women in the US who live just above the poverty line. In the English department's review of the text, teachers acknowledged the book contained some potentially controversial passages, but said overall it was "a means to build students' capacity for empathy and knowledge of an issue facing millions in America and millions more across the world."

In the complaint, the parent objected to the book's depiction of abortion, and sexual abuse and to its portrayal of women "as weak, pathetic, ignorant, sexual objects and incapable beings."

"*The Working Poor* is not a great work of literature or an example of rich writing we want our students to emulate. One must ask, is this the best piece of literature our students can read to learn to write?" she wrote.

If English teachers want to teach global poverty and economic equality, she suggested alternate books: *Out of the Dust*, by Karen Hesse, *We the Living*, by Ayn Rand, and *America the Beautiful* by Ben Carson.

Shipler said he hasn't heard of any challenge to the book in other districts. He was surprised to hear of its suspension in the fall and added an afterword about the Highland Park ISD debate to his forthcoming book, *Freedom of Speech: Mightier Than the Sword*.

"There's nothing prurient, obscene or sexually explicit in the book," Shipler said. "The women who told me they had been sexually abused as children told me that because they felt the trauma was relevant to their lasting problems."

As a father of grown children and a high school-aged granddaughter, Shipler said he's sensitive to parents' concerns. But he said the book describes challenges that cut across socioeconomic lines and teach students about harsh realities.

"My experience with high school kids these days—and I've done a lot of speaking at schools—is youngsters are generally mature enough to read about very troubling situations and learn a good deal from the reading, especially in the context of a class," he said. "They are not damaged by it at all. In fact, they may be helped by reading about it."

Two groups formed after the controversy in the fall—Speak Up for Standards, which objects to some mature content in high school books, and HP Kids Read, which opposes book suspensions and censorship.

Natalie Davis, a high school parent and president of HP Kids Read, said she's disappointed *The Working Poor* has been challenged, especially "because of the stereotype associated with Highland Park."

"I understand any parent has a right to their own views and what they want for their child, but the decision to challenge this book in particular embarrasses me," Davis said. "You can't change nonfiction to make it more palatable and you cannot find literature that depicts that side of America without those ugly depictions." Reported in: *Dallas Morning News*, January 18.

student press

Macomb, Illinois

The editor of Western Illinois University's student newspaper was suspended from his job and could face

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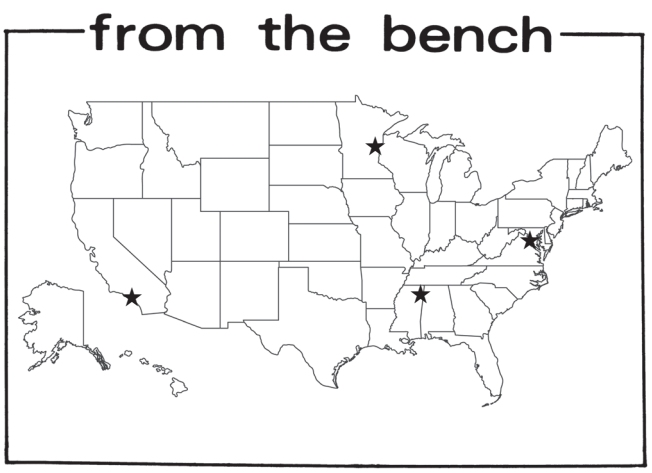

U.S. Supreme Court

The Supreme Court on January 20 unanimously ruled that Arkansas corrections officials had violated the religious liberty rights of Muslim inmates by forbidding them to grow beards.

The case concerned Gregory H. Holt, who is serving a life sentence for burglary and domestic battery. Holt, also known as Abdul Maalik Muhammad, sought to grow a half-inch beard. More than forty state prison systems allow such short beards. Most allow longer ones. The exceptions, according to Holt's brief, are Alabama, Arkansas, Florida, Georgia, South Carolina, Texas and Virginia.

In Arkansas, prison regulations allow "neatly trimmed" mustaches, along with quarter-inch beards for inmates with dermatologic problems, but ban beards in other cases. In an interim order in November, the Supreme Court ordered that the prisoner be allowed to grow a half-inch beard.

The United States Court of Appeals for the Eighth Circuit, in St. Louis, ruled that the state's security concerns were sufficient to prohibit Holt from growing a beard. Holt then filed a handwritten petition asking the justices to hear his case, pointing out that other courts had struck down policies banning beards in prisons.

In deciding the case, the justices applied the same legal test that they used in June in the *Hobby Lobby* case, which allowed some corporations run on religious principles to refuse to pay for contraception coverage for their female workers.

The test, set out in federal statutes, first considers whether the challenged government regulation places a substantial burden on religious practices. If it does, the test requires the government to show that it had a compelling reason for the regulation and no better way to achieve it.

Justice Samuel A. Alito Jr., the author of the majority opinion in *Hobby Lobby*, also wrote the court's opinion in *Holt* v. *Hobbs*. He said Holt had "easily satisfied" the requirement of showing that the ban on beards burdened his religious practices. Justice Alito said a trial judge had been mistaken in saying it was enough to provide Holt with a prayer rug, the ability to correspond with a religious adviser, appropriate meals and the like.

Even so, prison officials said they had compelling reasons for the ban, the most important being combating contraband. Even short beards, one official said, can conceal "anything from razor blades to drugs to homemade darts." Another said that SIM cards for cellphones can also be hidden in beards.

Justice Alito responded that the idea that security "would be seriously compromised by allowing an inmate to grow a half-inch beard is hard to take seriously."

"An item of contraband would have to be very small indeed to be concealed by a half-inch beard," he wrote, "and a prisoner seeking to hide an item in such a short beard would have to find a way to prevent the item from falling out."

Arkansas prisons do not require "shaved heads or short crew cuts," Justice Alito wrote, and so "it is hard to see why an inmate would seek to hide contraband in a half-inch beard rather than in the longer hair on his head."

Justice Alito noted that a magistrate judge had observed Holt and said, "It's almost preposterous to think that you could hide contraband in your beard." If officials remain fearful of contraband, Justice Alito said, they may search prisoners' beards. "The department already searches prisoners' hair and clothing, and it presumably examines the quarter-inch beards of inmates with dermatological conditions," he wrote, dismissing concerns "that requiring guards to search a prisoner's beard would pose a risk to the physical safety of a guard if a razor or needle was concealed in the beard."

That is true of other kinds of searches, Justice Alito wrote, adding that guards could also require that "the prisoner run a comb through his beard."

Prison officials offered a second justification for the ban, saying that allowing beards would make it easy for prisoners to alter their appearance. They said they were particularly worried about identification problems in prisons where inmates live in barracks and work in the fields.

Justice Alito responded that the prison authorities could take pictures of inmates with and without beards. He added that the ban on beards was curious given that

"prisoners are allowed to grow mustaches, head hair or quarter-inch beards for medical reasons."

"All of these could also be shaved off at a moment's notice," he said.

Justice Alito's decision was studded with citations to the *Hobby Lobby* case. Justice Ruth Bader Ginsburg, who dissented from that decision, added a one-paragraph concurrence to draw a distinction between the two rulings.

"Unlike the exemption this court approved in" the *Hobby Lobby* decision, she wrote, "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief." Reported in: *New York Times*, January 20.

An Arizona town ordinance that places strict limits on some religious signs appeared to be in trouble January 12 at the Supreme Court. A church and its pastor challenged on First Amendment grounds the ordinance in Gilbert, Arizona, that has differing restrictions on political, ideological and directional signs.

The case, *Reed* v. *Town of Gilbert*, presented the Supreme Court with an opportunity to clarify a tangled area of its jurisprudence of free speech. The tenor of the argument, however, suggested that the justices would agree on the result but not the rationale, and would produce a modest or fractured decision.

Most of the justices seemed uncomfortable with the ordinance, which makes distinctions based on the messages conveyed by various kinds of temporary signs. Political signs, concerning candidates and elections, are permitted to be as large as 32 square feet, are allowed to stay in place for months, and are generally unlimited in number. Ideological signs, about issues more generally, are not permitted to be larger than 20 square feet, are allowed to stay in place indefinitely and are unlimited in number. But signs announcing church services and similar events are limited to six square feet, may be displayed only just before and after an event, and must be limited to four per property.

Philip W. Savrin, a lawyer for the town, said the church could qualify for the more permissive standards governing ideological signs so long as it did not offer directions to its services. Several justices seemed to find that distinction absurd.

"So they could put up a quote-unquote ideological sign that says, 'Come to our service on Sunday morning,' but no arrow, and then they put up another sign that says, 'This is the arrow'?" Justice Samuel A. Alito Jr. asked. "Or maybe they put up on the first sign: 'Come to our service on Sunday morning. We can't tell you now where it will be because the town won't let us, but you drive by here tomorrow morning at a certain time, you will see an arrow.'"

Justice Stephen G. Breyer, who is not a First Amendment firebrand, asked Savrin whether he really meant to say that ideological messages were fine unless they were accompanied by directions like "three blocks right and two blocks left."

"That's what this argument is about?" Justice Breyer asked.

Savrin said, "That is what it comes down to."

That answer seemed to destroy the prospects for an important First Amendment ruling.

"Well, my goodness," Justice Breyer said. "It does sound as if the town is being a little unreasonable, doesn't it?"

Justice Elena Kagan tried to test the limits of the town's position, asking how it justified better treatment for ideological messages than for other ones. Savrin might have been expected to say that promoting safety or aesthetics warranted the differing treatment. Instead, he said the ideological signs were more valuable and thus more worthy of First Amendment protection.

Justice Kagan suggested that Savrin had given the wrong answer. "O.K.," she said. "So that is a content-based rationale. And, you know, on one theory, you lose regardless of what the standard of review is."

That theory was described by Justice Kagan herself when she was a law professor, in a 1996 article published in *The University of Chicago Law Review*.

The church's lawyer, David A. Cortman, also faced skeptical questioning when he suggested that the government might draw no distinctions among noncommercial messages. Some justices appeared concerned that such a categorical approach would have unacceptable consequences.

Justice Anthony M. Kennedy asked whether the town could regulate signs that said, "Happy birthday, Uncle Fred." Cortman gave a complicated answer, and Justice Kennedy summarized it. "Your answer to the question," he said, "is 'Happy birthday, Uncle Fred' can have as many signs and for as long as the political campaign."

Cortman agreed. "I think that is right," he said.

Justice Antonin Scalia voiced support for that absolutist position, which would do away with all distinctions among noncommercial signs. "So we're supposed to sit here and say, 'Oh, political speech is the most valuable and you can allow that, but ideological speech comes in a close second,' and then what? Then directional speech or whatever else?"

"I don't want to do that," the justice said.

But Justice Kennedy seemed prepared to allow officials to draw at least some lines, just not the ones used by the authorities in Gilbert. Religious signs are important, he told Cortman. "But it seems to me you are forcing us into making a very wooden distinction that could result in a proliferation of signs for birthday parties or for every conceivable event," Justice Kennedy said.

That did not seem to concern Justice Scalia. "There is as much a First Amendment right to give somebody directions," he said, "as there is to speak about being green or whatever else." Reported in: *New York Times*, January 12.

The US Supreme Court will address two important concepts when it hears arguments in *Walker* v. *Sons of Confederate Veterans*: government speech and viewpoint discrimination.

The case concerns whether Texas officials could deny a specialty license plate program to the Sons of Confederate Veterans (SCV). Government officials denied the group a plate because the group's plate logo contains a picture of the Confederate battle flag. The SCV sued, contending that state officials violated its First Amendment rights.

One of the state's arguments concerns the government speech doctrine, under which a governmental entity has a right to speak for itself. However, SCV argues that the specialty license plate is more private speech than government speech.

If the speech is considered private or even mixed (government and private), then First Amendment protections apply and it's unlikely officials could ban the SCV plate. SCV argues that when people see a vehicle with a specialty license plate affixed to the car, people associate that plate with the driver or owner of the vehicle more so than with the government.

Such a "private speech" aspect leads to the second important doctrine in this case—viewpoint discrimination. The most fundamental of all First Amendment free-speech principles is that the government generally cannot discriminate against private speakers based on their viewpoint. SCV contends that the state discriminated against its viewpoint that the Confederate flag is a symbol of heritage and history rather than a symbol of hate.

State officials contend that their decision to deny the specialty license plate was viewpoint neutral because they have not approved of a specialty plate that disparages the Confederate flag. Reported in: newseuminstitute.org, December 31.

Almost five years to the day after the Citizens United decision reshaped American politics, the Supreme Court on January 19 turned its attention to judicial elections.

Such contests already sometimes resemble regular political campaigns, awash in money and negative advertising. And judges already routinely hear cases involving lawyers and litigants who have contributed to their campaigns.

But 30 of the 39 states with judicial elections have tried to draw the line by forbidding judicial candidates to personally ask for money, saying that such solicitations threaten the integrity of the judiciary and public confidence in the judicial system.

The current case is a First Amendment challenge to the solicitation bans, which have been struck down by four federal appeals courts. But most of the American legal establishment supports them. The American Bar Association and a group representing the chief justices of every state have filed briefs urging the Supreme Court to uphold the bans.

Opinions seem more divided among incumbent judges on lower courts and candidates seeking to challenge them. They say direct requests are more efficient than ones made through campaign committees and are no more apt to lead to corruption.

Marcus Carey, who twice lost judicial elections in Kentucky, said there was no point to requiring that contribution requests be made through intermediaries. "You create this farce," he said. "I have to tell them who to call." At the same time, he said, everything else about judicial elections resembles an ordinary political campaign.

"There are fund-raising events," said Carey, who successfully challenged Kentucky's ban. "There are cocktail parties. There are shrimp and grits. And the candidate is there. It's a game."

"It is far more effective," he said, "if a candidate calls me on the phone and says, 'Marc, I need your help.'"

Margaret H. Marshall, a former chief justice of the Massachusetts Supreme Judicial Court, responded: "Of course it's effective. That's the problem. The level of coercion is that much higher."

Randolph Wolfson, who has lost two judicial elections in Arizona, said solicitation bans protect incumbent judges and disfavor outsiders. "The inability to raise funds directly for a minor-party candidate is just devastating," he said.

Wolfson's challenge to Arizona's ban is pending before the full United States Court of Appeals for the Ninth Circuit, in California.

Judge David Certo, who serves on a state trial court in Indianapolis, said that his state's solicitation ban went too far. "I'm not allowed to solicit anybody for a contribution—not my mom, not my wife, not my brother, who lives in Arizona," he said.

He admitted to a little uneasiness about some sorts of requests. "Getting money from people appearing before me is probably not the best idea," said Judge Certo, who lost a First Amendment challenge to the Indiana law. "But lawyers appearing before me are eager to help me."

Personal solicitations are allowed in the judicial ethics rules of nine states, including Texas and Alabama. Four former chief justices from those states filed a brief describing their own use of a practice they said was "ingrained in our political and legal cultures."

"Our experience confirms," they wrote, that "there is a real risk that solicitation can morph into a demand."

In an interview, one of the former chief justices, Thomas R. Phillips, who served on the Texas Supreme Court, added that "dialing for dollars sometimes results in untoward things slipping out during those conversations." Phillips said that allowing personal solicitations may be appropriate in some states. But he added that other states should be free to make the opposite choice, notwithstanding the First Amendment. Still, he said, the

fear of corruption, at least on state supreme courts with many members, can be overstated.

"One vote is not all that decisive," he said. "You have to justify everything you do by reason. And hopefully you're casting a wide net for contributions."

Harry Lee Anstead, a former chief justice of the Florida Supreme Court, countered that public confidence is undermined by direct solicitations. "The rule of law is premised on impartial judges and not on the image of a robed hand reaching out to take money from a contributor," he said.

The case, *Williams-Yulee* v. *Florida Bar*, concerns Lanell Williams-Yulee, who lost a race for a seat on the county court in Hillsborough County, Florida, which includes Tampa. She was reprimanded and made to pay $1,860 in court costs for signing a fund-raising letter. In her briefs, she said Florida's ban is a poor way to address potential problems.

In barring not only one-on-one requests but also mass mailings and speeches to large groups, one of her briefs said, Florida's solicitation ban censors speech that is unlikely to give rise to judicial corruption. The ban also does too little, the brief continued, by allowing candidates to raise money through campaign committees and then personally thank their donors.

But Daniel L. Wallach, a Florida lawyer, said the state's history, which includes recent and widespread judicial corruption, justifies the solicitation ban. In the 1970s, two justices of the Florida Supreme Court resigned after evidence emerged that they had tried to fix cases for contributors. A third stepped down when a gambling junket paid for by a litigant came to light.

"Florida is unlike all the other states that have elected judges," said Wallach, who filed a brief urging the Supreme Court to uphold the Florida ban on behalf of Anstead, other former chief justices and bar leaders.

Even opponents of the solicitation bans say some limits may be appropriate or at least less offensive to the First Amendment. Williams-Yulee said states should consider limiting contributions and requiring judges to recuse themselves from cases in which their impartiality is open to question.

A brief from Judge Certo, Carey, Wolfson and others said states may ban solicitation inside courthouses and from people involved in pending lawsuits. The American Civil Liberties Union, which supports Williams-Yulee, said less restrictive ways of ensuring judicial integrity included bans on one-on-one solicitations of parties in pending cases, the required disclosure of contributions and public financing of judicial elections.

But Michael Wolff, a former chief justice of the Missouri Supreme Court, said there was little chance that new restrictions would be adopted if the Supreme Court struck down solicitation bans.

"Judges who get elected know how they got there," he said. "They know how they can stay there. And I'm not sure they're ready for reform." Reported in: *New York Times*, January 18.

schools

Itawamba, Mississippi

Public high school officials in Mississippi violated the First Amendment rights of a student punished for posting online his rap song criticizing two coaches for allegedly sexually inappropriate behavior toward female students, a sharply divided federal appeals court has ruled.

Given the sharply divided opinions in the appellate ruling, the case may well offer the US Supreme Court an opportunity to examine a decades-old standard for judging how school officials must view student expression.

Taylor Bell, a then-eighteen year-old student at Itawamba Agricultural High School posted a rap song entitled "P.S. Koaches" on Facebook in December 2010. Bell, who has recorded rap songs at a studio, wrote the song after several female classmates told him two coaches, Michael Wildmon and Chris Rainey, acted in a sexually inappropriate manner toward them.

Bell's song contained explicit language. He posted the song on YouTube, but did not use school computers to create or post the material. However, school officials suspended Bell and transferred him to an alternative school. In February 2011, Bell and his mother sued school officials, alleging they violated Bell's First Amendment rights. School officials countered that they could punish Bell because his rap song substantially disrupted school activities and constituted a true threat.

In 2012, a federal district court ruled in favor of school officials, finding that it "was reasonably foreseeable to school officials the song would cause such a disruption."

Bell appealed the district court's ruling to the US Court of Appeals for the Fifth Circuit, where a three-judge panel on December 12 reversed the lower court. *Bell* v. *Itawamba County School Board*.

Writing for the majority, Judge James L. Dennis said Bell's rap song was not substantially disruptive or a true threat. In student-speech law, school officials can prohibit student speech if they can reasonably forecast that the student speech would cause a substantial disruption of school activities. This principle comes from the US Supreme Court's seminal student-speech decision *Tinker* v. *Des Moines Independent Community School District*.

School officials can also prohibit student speech that constitutes a true threat.

Judge Dennis noted that school officials could not point to any evidence at Bell's hearing that the song

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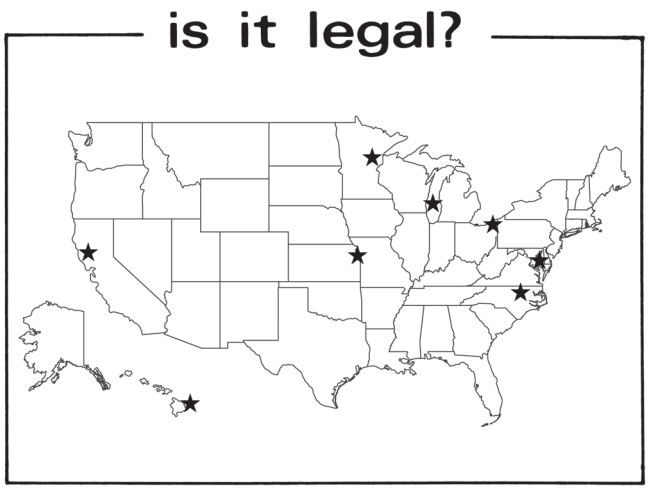

library

Cleveland, Ohio

The Cleveland Public Library's Board of Trustees voted in January in favor of bending the public institution's official meeting room policy, which bans the hosting of "political demonstrations, rallies or campaigns for specific partisan issues or candidates" on library premises. The Board of Trustees, which is headed by President Thomas D. Corrigan, made the controversial decision to place on hold for the Republican National Committee each and every one of the Main Library's meeting rooms, auditorium, garden, and essentially the entire two-building downtown library—at no charge—during the Republican National Convention to be held in Cleveland in July 2016 despite the fact that the RNC has not even submitted a request to utilize the space.

The Cleveland Public Library Board of Trustees is appointed by the Cleveland Metropolitan School District's nine-member Board of Education, which is appointed by Cleveland Mayor Frank Jackson. The CPL board includes President Thomas D. Corrigan, Vice President Maritza Rodriguez, Secretary Alan Seifullah, Alice G. Butts, John M. Hairston, Anthony T. Parker, and Rick Werner.

The official library policy regarding the availability and scheduling of library meeting rooms and space is posted publicly on the library's website, which is at www.cpl.org. The policy clearly states that such political and partisan events are not permitted to be held on library property. The Board of Trustees has argued that they interpret this as being applicable only during the hours that the library is regularly open, and that it does not apply to after-hours events. This is a sharp departure from past practice.

The library's meeting room reservation policy also states that after normal library hours, the only area open for reservation after hours is the Louis Stokes wing of the library, which includes just the auditorium, lower level lobby, and first floor. Other floors and areas of the Louis Stokes Wing and/or Main Library are not reservable under the stipulations outlined on the website. Reserving the LSW comes with a charge of $2,000, plus the cost of overtime pay for library staff required to be on hand, and other smaller fees for serving food, etc.

The library board has violated its own policy by deciding to make available other spaces during the times that the library is closed. The rules, apparently, do not apply when the Republican National Convention comes to town.

Furthermore, fees incurred by making an after-hours reservation for library meeting space must be paid within seven days of making the reservation request. Beyond seven days, the policy states that "payments will be considered late and pending reservations may be cancelled." CPL has not received any official request to reserve these meeting rooms and spaces from anyone with the RNC, and therefore cannot collect any reservation fees at this time. Instead, they've simply blocked off the spaces for the RNC just in case they do decide to come knocking one day, at which time they would collect the due fees. This prevents others from reserving the meeting areas, despite the fact that no one has actually even made any reservation. Reported in: *Cleveland Leader*, January 22.

schools

Fort Bragg, California

A high school basketball tournament on the Northern California coast has become the latest flashpoint in the ongoing protests over police killings of unarmed black men after a school was disinvited because of concerns its players would wear T-shirts printed with the words "I Can't Breathe" during warmups.

The athletic director at Fort Bragg High School informed his counterpart at Mendocino High School in December that neither the boys nor girls team would be allowed to participate in the three-day tournament hosted by Fort Bragg High, Mendocino Unified School District Superintendent Jason Morse said.

The boys were reinstated after all but one player agreed not to wear the shirts inspired by the last words of Eric Garner, the New York man who died after an officer put him in a chokehold, while on the Fort Bragg campus during the Vern Piver Holiday Classic tournament, Morse said. Too few girl players accepted the condition for the team to field a tournament squad, he said.

Mendocino varsity teams first wore the "I Can't Breathe" T-shirts before a game with Fort Bragg on December 16, according to the girls coach, Caedyn Feehan. The girls also wore them before games at two other tournaments and didn't receive any blowback, Feehan said.

"I didn't even know what it meant. I thought it was a joke about how I had conditioned them so hard," Feehan said. "None of the administrators knew what it was or that any of them were doing it in advance. This was entirely for their cause that they had strong feelings about."

Professional basketball players such as LeBron James, Derrick Rose and Kyrie Irving wore "I Can't Breathe" shirts during warmups without repercussions from the NBA. After Kobe Bryant and other Los Angeles Lakers players wore them before a game and on the bench on December 9, coach Byron Scott said he viewed it as a matter of "freedom of choice and freedom of speech."

That's how Marc Woods, whose 16-year-old son Connor sat out the tournament, sees it. Connor wore the T-shirt at the December 16 game in the name of team solidarity, but the shirt has now taken a constitutional angle, the father said.

Marc Woods said he brought the issue to the American Civil Liberties Union. He referred to the 1969 US Supreme Court ruling, *Tinker* v. *Des Moines*, which found high school students wearing black armbands to protest the Vietnam War were protected by the Free Speech Clause of the First Amendment.

"This is completely a First Amendment issue," Marc Woods said. "That's why I'm offended."

Fort Bragg Principal Rebecca Walker issued a written statement saying school administrators respected the Mendocino teams "for paying attention to what is going on in the world around them" and that the T-shirts were being prohibited as a security precaution.

"To protect the safety and well-being of all tournament participants it is necessary to ensure that all political statements and or protests are kept away from this tournament," wrote Walker, who said she was speaking on behalf of the athletic director and the Fort Bragg school superintendent. "We are a small school district that simply does not have the resources to ensure the safety and well-being of our staff, students and guests at the tournament should someone get upset and choose to act out."

Marc Woods, whose father was a California Highway Patrol officer, said he is outraged by what he sees as using intimidation to silence players and fans. Fort Bragg administrators have warned spectators who plan to protest the T-shirt ban that they will be asked to leave, he said.

"It doesn't take a lot to suppress the exchange of ideas when you put fear into it," Marc Woods said.

Both schools are located in Mendocino County, known for redwood forests, rugged coastline and marijuana-growing, located 120 miles north of San Francisco. The student bodies at the two schools are 1 percent black and 50 percent white and 41 percent Hispanic at Fort Bragg, 75 percent white and 9 percent Hispanic at Mendocino. Reported in: Associated Press, December 28.

Topeka, Kansas

Public schoolteachers in Kansas could be jailed for teaching "harmful material," and university professors would be banned from signing op-ed letters with their titles when writing about public officials, if two new bills become law.

Senate Bill 56 , introduced on January 22 by state Sen. Mary Pilcher-Cook, R-Shawnee, would amend Kansas' public morals statute by deleting an exemption that protects K-12 public, private and parochial schoolteachers from being prosecuted for presenting material deemed harmful to minors.

According to the bill, "harmful material" includes depictions of nudity, sexual conduct, homosexuality, sexual excitement or sadomasochistic abuse "in a manner that is patently offensive to prevailing standards in the community with respect to what is suitable for minors."

Teachers could be charged with a class B misdemeanor and face up to six months in jail if teaching materials contain depictions that a "reasonable person" would find to lack "serious literary, scientific, educational, artistic or political value for minors."

Pilcher-Cook said she sponsored S.B. 56 in response to parental outrage over a poster affixed to a Shawnee Mission middle school door last year that asked the question: "How do people express their sexual feelings?" and listed answers such as "hugging, kissing, saying 'I like you' and talking" along with other possibilities: "oral sex, anal sex, masturbation, vaginal intercourse, grinding, and touching each other's genitals."

"Pornography and obscene materials are becoming more and more prevalent in our society, and it is all too common to hear of cases where children are not being protected from the harm it inflicts," Pilcher-Cook told the *Topeka Capital Journal*.

Opponents of the bill say it is unconstitutionally broad and could be misused. "Senate Bill 56 could criminalize teachers simply for distributing handouts, displaying posters or sharing educational information," Micah Kubic, executive director of the American Civil Liberties Union in Kansas, told the *Kansas City Star*.

"If a teacher is afraid that they're going to be charged and convicted of a misdemeanor just for doing their job, they're going to be a lot less likely to share any information that someone somewhere might object to," Kubic said.

The other bill, House Bill 2234 , introduced February 4, would bar professors and university employees from using their official titles when they submit letters to newspaper opinion pages. The bill targets newspaper opinion pieces specifically, and only when the writer's opinion concerns an

elected official, a candidate for office or any matter pending before the legislature.

The bill would require community colleges, municipal universities and technical colleges to have a policy that prohibits an employee from "providing or using such employee's official title when authoring or contributing to a newspaper opinion column."

"It's silly is what it is," said Dr. Chapman Rackaway, professor of political science at Fort Hays State University. Rackaway said the bill was drafted in response to columns regularly published by *Insight Kansas*, to which he belongs, a blog run by a group of university professors who analyze Kansas politics in letters to newspapers.

Calls from television and newspaper reporters to *Insight Kansas* for opinions poured in to "near-saturation points" during the November 2014 Kansas elections, Rackaway said. In those elections, Governor Sam Brownback, a Republican, was elected to a second term, and Republicans seized control of the Senate for the first time since 2006.

Both bills intend to severely restrict speech "that is simply uncomfortable to some people," said Rackaway. "When you can't be critical of public officials, even when you have facts, you can't say that we live in a democracy," he said.

"The bill wouldn't be in place if people didn't want to somehow squelch us," Rackaway said. "It has a chilling effect. It's meant as a threat." Reported in: Courthouse News Service, February 9.

colleges and universities

Hilo, Hawaii; Brainerd, Minnesota

In the coming months, federal appellate courts are set to decide two important cases about the extent to which colleges can use vague, broad "professional codes" to punish student speech.

First is *Keefe* v. *Adams*, the case of a student at Central Lakes College in Minnesota who was expelled from the nursing program for venting some frustrations about classmates on his Facebook page. Administrators labeled the post "behavior unbecoming of the profession and transgression of professional boundaries." But, it's hard to tell what speech would land students in trouble under that standard.

"Impossibly broad, hopelessly vague prohibitions like this violate the First Amendment. How can students be sure exactly what speech does and does not 'transgress' a college administrator's understanding of 'professional boundaries'?" asked Will Creeley of the Foundation for Individual Rights in Education (FIRE). "Nurses and lawyers gripe about colleagues on Facebook, just like everyone else. And even setting aside the unfairness of holding a student still learning his or her trade to a standard meant for practicing professionals, policing poorly-defined 'professional boundaries' means that protected speech—like jokes made far outside of the classroom, frank conversations about a professor or peer, or complaints about a professional practice—become off-limits," he added.

Added Creeley: "Empowering college administrators to punish students for speech that runs afoul of vague rules all but guarantees viewpoint-based censorship. An elastic ban on 'behavior unbecoming of the profession' may be invoked all too easily by an administrator to punish speech that he or she simply dislikes, First Amendment be damned. Today, sarcastic Facebook jokes about whiskey or pencil sharpeners are grounds for expulsion; tomorrow, publicly criticizing the nursing program or health care reform might be."

Meanwhile, the US Court of Appeals for the Ninth Circuit is considering *Oyama* v. *University of Hawaii*, in which a student was effectively dismissed from a teaching program for his controversial views on disabilities and age of consent laws. FIRE's joint *amici curiae* brief with the Student Press Law Center, reminded the court that in time, professions sometimes accept ideas that were once flatly rejected, and vice versa. It is therefore critically important for students in all programs to be free to challenge contemporary beliefs. Reported in: thefire.org, January 16.

Durham, North Carolina

What began as a gesture of interfaith hospitality ended badly when Duke University suddenly cancelled plans to begin broadcasting the Muslim call to prayer from the bell tower of Duke Chapel every Friday afternoon. The first "call to prayer" was scheduled for January 16—which, as it happens, was also Religious Freedom Day in America. Duke officials cited "security concerns" as the reason for cancelling the prayer call, but declined to elaborate on specific threats.

What seems clear, however, is that Duke came under considerable public pressure after evangelist Franklin Graham (son of Billy Graham) attacked the university for promoting terrorism in the name of religious pluralism—and calling on alumni donors to boycott Duke.

As he has done since 9/11, Graham uses every terrorist attack carried out in the name of Islam—in this instance, the murders in Paris—as an opportunity to conflate Islam with terrorism. He has famously defamed the Muslim faith by repeatedly describing Islam as "a very evil and wicked religion."

In a Facebook post condemning Duke, Graham went so far as to link the planned Muslim call to prayer with the brutal attacks in Paris, citing the use of the phrase "Allahu Akbar" (God is great) in both.

What's disturbing about Duke's cancellation is the perception—and perhaps the reality—that the university has allowed a "heckler's veto" to stop the broadcast of a Muslim call to prayer from Duke Chapel.

Unfortunately, the prayer controversy at Duke is not an isolated incident. The about-face by Duke officials came during a period of renewed backlash toward American

Muslims in the wake of the murderous terrorist attacks in Paris. American Muslim civil rights groups have reported a significant spike in anti-Muslim rhetoric, including a threat to blow up a mosque in Ohio and another threat to attack a Muslim conference in North Texas.

Islamophobia is based on ignorance and fear—and fueled by extremists who have hijacked Islam for their violent and evil ends. It can only be countered by informing people of the truth about Islam and Muslims in America and working to strengthen America's arrangement in religious freedom for people of all faiths and none.

Despite the timidity of Duke officials in the face of hate speech, Duke Chapel will remain a welcoming place to people of many faiths. Muslim students will continue to gather there for Friday prayer as they have for some years now. Hindu, Buddhist and other groups will continue to be welcomed to use space there as they have in the past. And the university will continue to have a Muslim chaplain to serve the spiritual needs of the some 700 Muslim students attending Duke.

No call to prayer rang out from the bell tower of Duke Chapel on January 16. But hundreds of Duke students—Muslim and non-Muslim—gathered that day to hear the call from a small speaker set up on the steps of the chapel.

In the end, students of conscience and goodwill came together to defy hate and intimidation, supporting their Muslim brothers and sisters by standing up for freedom. Thanks to their welcoming spirit, Religious Freedom Day was celebrated at Duke University on January 16 after all. Reported in: newseuminstitute.org, January 26.

Milwaukee, Wisconsin

A controversial professor on February 4 revealed that Marquette University is trying to revoke his tenure and fire him for statements he made about a graduate instructor, with her name, on his blog.

The university says his behavior was unprofessional and that he misled the public about what happened in a dispute between the graduate instructor and an undergraduate student. The professor, John McAdams, says he is being punished for his free speech. He also maintains that Marquette shouldn't be attacking him, given that he is defending an undergraduate's views against gay marriage that are consistent with Roman Catholic teachings. (Marquette is a Jesuit university.)

The dispute over McAdams attracted national attention even before Marquette moved to fire him, with some academics backing the graduate student and others McAdams.

In November, McAdams, an associate professor of political science, wrote a blog post accusing a teaching assistant in philosophy of shutting down a classroom conversation on gay marriage based on her own political beliefs. His account was based on a recording secretly made by a disgruntled student who wished that the instructor, Cheryl Abbate, had spent more time in class one day on the topic of gay marriage, which the student opposed. McAdams said Abbate, in not allowing a prolonged conversation about gay marriage, was "using a tactic typical among liberals," in which opinions they disagree with "are not merely wrong, and are not to be argued against on their merits, but are deemed 'offensive' and need to be shut up."

Abbate said McAdams had distorted her actions—and that she wasn't trying to shut down an argument she disagreed with, but simply had wanted to keep a focus on an in-class conversation about the philosopher John Rawls's equal liberty principle. But conservative blogs spread McAdams's take on the situation—and she found herself receiving a flood of hateful e-mail messages, some of them threatening.

McAdams on February 4 posted a letter he received from his dean, Richard C. Holz, in which Holz told McAdams the university was starting the firing process.

"Tenure and academic freedom carry not only great privileges but also vital responsibilities and obligations," Holz wrote. "In order to endure, a scholar-teacher's academic freedom must be grounded on competence and integrity, including accuracy 'at all times,' a respect for others' opinions, and the exercise of appropriate restraint. Without adherence to these standards, those such as yourself invested with tenure's power can carelessly and arrogantly intimidate and silence the less-powerful and then raise the shields of academic freedom and free expression against all attempts to stop such abuse."

Graduate student instructors, Holz wrote, "should expect appropriate and constructive feedback in order to improve their teaching skills. Multiple internal avenues of review were available to you if you believed a situation had occurred between a graduate student instructor and an undergraduate student that called for a corrective response. Instead, you chose to shame and intimidate with an Internet story that was incompetent, inaccurate, and lacking in integrity, respect for others' opinions, and appropriate restraint."

Holz wrote that McAdams spread a fundamentally false view of the exchange between Abbate and the undergraduate. For example, McAdams's blog post said that the department chair didn't do anything about the dispute. In fact, Holz said, the chair reached out to all parties.

Of particular distress to Holz, McAdams described the undergraduate as dropping the class Abbate taught, at her invitation, after she said that "in this class, homophobic comments, racist comments, will not be tolerated." That description set the tone for bloggers elsewhere to suggest Abbate was forcing out of her class students with whom she disagreed.

Wrote Holz: "That is false. As you knew or should have known . . . , the student told the university three days after withdrawing that he had done so because he was getting an

(continued on page 56)

success stories

schools

Highland Park, Texas

In a unanimous vote, Highland Park Independent School District trustees approved policy changes February 10 that could bring to a close a months-long contentious debate about books taught in high school English classes.

The policy guides how the district selects books and handles parents' objections. Trustees say the revisions aim to strike a balance among parents with different views about what's appropriate for teens.

"We could work on this for months and months and months trying to achieve absolute perfection and I think we would fail," trustee Paul Rowsey said at the board of trustees' meeting. "The time has come to make a decision. It's time to move forward."

Under the revised policy, staff members are required to ensure that books "are evaluated as a whole and selected for their strengths rather than rejected for their weaknesses." Selections "shall not contain excessive or gratuitous explicit sexuality, excessive or gratuitous profanity, or excessive or gratuitous graphic violence."

The revised policy also limits redundant objections. If the district receives multiple challenges to the same book or material, they would be consolidated and reviewed by one committee. A complaint would not be heard about the same book or material until three years after the last one.

The debate began in the fall after parents raised concerns about some books that included sex scenes and references to rape, abortion and abuse. Superintendent Dawson Orr suspended seven books from use in September, a decision that sparked backlash and drew national attention. He reinstated the seven books.

At the meeting, some parents commended the policy changes and others said the district had to work hard to regain trust. One parent, Tavia Hunt, said she had lost faith in district leaders and pulled her daughter from the high school. She said she believes committees chosen to review challenged books have been "stacked" with people who support the status quo.

But Orr rejected the suggestion that people who volunteer for the committees—including parents, teachers and staff members—"would bring their biases and prejudice and would act in bad faith."

Several people said it's inappropriate for high school students to be on the review committees. Trustee Joe Taylor said district officials should protect students so they don't feel pressured by others' views, but he said it's important to include them. He said he has received many comments from high schoolers, including handwritten letters.

"Over the course of the last four, five months, the most impressive voice I've seen has been coming from the students," he said. Taylor said it will take everyone's help to make sure the revised policy is a success. "The policy is going to be only as strong as we are willing to implement it in a respectful manner," he said.

Policy changes include the following:

If a committee decides to restrict a challenged book's use, a parent of a student who is in the relevant class or preregistered for the class will have the right to appeal.

Committees that review challenged books or materials may include juniors and seniors who have previously studied them, in addition to parents and staff.

Committees "shall weigh the strengths and weakness of the challenged material as a whole rather than on passages or sections taken out of context."

Teachers in the English Department will not use an approved book list. Instead, they will propose books for the curriculum and the books will go through an approval process. If they anticipate controversy, a literature review committee of district employees can refer the book to a community feedback group for extra input.

Selected book titles and materials will be posted online before the start of the school year.

An individual who objects to a book or material can file a challenge up to 21 days after the date of its posting. Reported in: *Dallas Morning News*, February 11.

university

Athens, Ohio

Ohio University will pay $32,000 in legal fees and damages to a student who said the school violated his free-speech rights by telling him not to wear a sexually

suggestive T-shirt. Of the settlement amount, $6,000 will go to Isaac Smith, 23, a fifth-year student at the Athens campus, and $26,000 will go to the attorneys who represented Smith in his federal lawsuit.

The settlement, announced February 2, also requires the university to change policies that Smith said were vague and encouraged students to self-censor their speech on campus. Smith said he wants the settlement to send a message to other colleges not to censor students.

"The most exciting thing, obviously, is the fact that the policy has been changed. That's the reason the lawsuit was filed," Smith said.

Ohio University settled the case "to avoid further expense and burden on our educators," Ryan Lombardi, vice president for student affairs, wrote in a statement. He added that no OU administrators directed Smith to remove the shirt, but only to rethink its message.

The black T-shirt featured white lettering on the back that read "We get you off for free." It's the slogan for Students Defending Students, a group of OU students who help others navigate the campus judicial process. The slogan dates to the formation of the group in 1976, the group said.

Smith and two other students were wearing the shirt to recruit students on campus in 2013 when an OU administrator took offense to it, according to the suit. Smith alleged that Jenny Hall-Jones, dean of students, later told the group, "I don't want to see you wearing that T-shirt again."

Members of the group stopped wearing the shirt, fearing that they would be punished under an OU rule that forbids any act that demeans, degrades or disgraces any person, the suit said.

As part of the settlement, the university will revise that rule. Now, it will forbid harassment that interferes with someone else's education. The school also will revise its handbook to say that "students will not be subject to disciplinary action for the lawful expression of ideas."

In his statement for the university, Lombardi said that OU already had been revising its policies. "Although the process of updating the new Code of Conduct began before — and has progressed independent of — Mr. Smith's lawsuit, the university also has ensured that the new code reflects our commitment to freedom of speech and expression," Lombardi wrote.

Smith filed the lawsuit with the help of the Foundation for Individual Rights in Education, a Philadelphia civil-rights group. Ohio University was one of four schools that the nonprofit targeted in lawsuits last year, saying that their rules unfairly limited students.

"For too long, universities have engaged in censorship with little or no fear of repercussions. FIRE is bringing that era to an end," the group's president, Greg Lukianoff, said.

After a long hiatus in the closet, the shirts will soon return to campus, Smith said. "I think a lot of people will be excited to be able to wear the T-shirts." Reported in: *Columbus Dispatch*, February 3. □

FCC chair goes beyond "net neutrality" . . . from page 29

prioritization, and the blocking and throttling of lawful content and services." Senior FCC officials elaborated at a briefing later in the day.

The American Library Association (ALA) welcomed this affirmation of strong network neutrality protections. "I am very pleased that Chairman Wheeler's outlined proposal matches the network neutrality principles ALA and nearly a dozen library and higher education groups called for last July," said ALA President Courtney Young. "America's libraries collect, create and disseminate essential information to the public over the Internet, and enable our users to create and distribute their own digital content and applications. Network neutrality is essential to meeting our mission in serving America's communities and preserving the Internet as a platform for free speech, innovation, research and learning for all."

In its January 2014 ruling on *Verizon* v. *FCC*, the D.C. Circuit Court of Appeals struck down much of the FCC's 2010 Open Internet Order. The Commission responded by opening a new public proceeding in May 2014. Subsequently, nearly 4 million public comments were filed with the FCC.

"The ALA commends the chairman for asserting FCC authority under both Title II of the Communications Act and Section 706 of the Telecommunications Act of 1996 to provide the strongest possible legal foundation for network neutrality rules," said Larra Clark, deputy director of the ALA Office for Information Technology Policy. "We also are pleased these rules will apply to both fixed and mobile broadband, which ALA has long advocated."

Wheeler also outlined provisions of Title II from which he would forbear from enforcing, including rate regulation or imposing new taxes or fees. "After the recent successful completion of E-rate program modernization to better enable affordable access to high-capacity broadband through libraries and schools, ALA has a particular interest in safeguarding FCC authority related to the Universal Service Fund," Clark said. "We are encouraged the chairman specifically called out universal service and look forward to better understanding how a partial application of Section 254 will work."

Young concluded: "Libraries strongly value and support the open Internet as a cornerstone for preserving our democracy in the information age. We also depend on it to make sure essential library services and content aren't stuck in an Internet 'slow lane.' The educational and public interest benefits of an open Internet are extremely important, and we welcome strong network neutrality protections that will help ensure equitable access to online information, applications and services for all."

The open Internet order, the FCC officials said, will give the commission strong legal authority to ensure that

no content is blocked and that the Internet is not divided into pay-to-play fast lanes for Internet and media companies that can afford it and slow lanes for everyone else. Those prohibitions are hallmarks of the net neutrality concept.

Wheeler was widely expected to take the Title II approach after President Obama urged the commission to do so. And the politics surrounding net neutrality were influenced by the nearly four million public comments the FCC received last year, the vast majority urging forceful action.

Wheeler also plans to place mobile data service under the open Internet order and its Title II powers. Since the 1990s, mobile voice service has been regulated under Title II, using the light-touch model Wheeler intends to apply to broadband Internet service. That approach, for example, has shunned the regulation of pricing decisions made by cellphone operators and most business dealings between private companies to manage their mobile networks.

Wheeler said he would circulate his proposal to other FCC commissioners and the plan could be modified. The proposal was subject to a vote by the full commission on Februay 26. The commission typically decides major decisions by 3-2 votes, with the two other Democrats joining Wheeler.

If the proposal is approved, as expected, the cable and telecommunications companies have vowed to fight it in court.

"The agency is reaching for very broad powers here," said Justin Hurwitz, an assistant professor at the Nebraska College of Law. "Whether Title II applies to the Internet is very open to debate."

In Congress, Republicans are circulating draft legislation that embraces the essence of net neutrality by prohibiting content blocking and the creation of fast and slow lanes on the Internet. But their proposal would prevent the FCC from issuing regulations to achieve those goals.

The opponents of utility-style rules, led by the cable and telecommunications companies, view the approach as opening a door to heavy-handed regulation that will deter investment and innovation, ultimately harming consumers.

Michael Powell, FCC chairman in the Bush administration and president of the National Cable and Telecommunications Association, said that Wheeler's plan would place a "heavy burden" on broadband services and go "beyond the worthy goal of establishing important net neutrality protections."

Supporters of the Title II model include major Internet companies like Google, Facebook, Amazon and Netflix, as well as start-up companies and many public interest groups. They view the strong rules as a necessary safeguard because the Internet is increasingly the essential gateway of communication and commerce in modern life. A robust regulatory framework, they say, will ensure continued business innovation and diversity of expression.

Gene Kimmelman, president of Public Knowledge, a public advocacy group that backs Title II rules, called Wheeler's proposal a "historic initiative" to preserve an Internet system of innovation and free expression. But Kimmelman, a former antitrust official in the Obama administration, said Wheeler's proposal represented a "natural progression" as government tries to find an appropriate regulatory framework for rapid technological change, powerful corporations and the public interest.

Ajit Pai, a Republican commissioner on the Federal Communications Commission, took direct aim at the Wheeler proposal, which he said in a speech would open the door to having a Washington bureaucracy "micromanage the Internet." Pai is not reassured by the proposal's pledge that the agency will refrain—or forbear, in regulatory parlance—from setting prices someday. "Expect regulation to ratchet up and forbearance to fade," he said. "The FCC is going to be deciding prices."

Pai said that because the plan would permit lawsuits to challenge business practices not deemed "just and reasonable" by a plaintiff, Wheeler's proposed rules amount to "a gift to trial lawyers." Inevitably, according to Pai, consumers will be saddled with higher costs, companies will have less incentive to invest and innovation will suffer.

In his verbal assault, Pai employed phrases original and well worn. In the latter category, he said that strong net neutrality rules are "a solution in search of a problem." That tag line, though, suggests the substantive difference between the two camps Pai and Wheeler represent. Pai sees what he called "a very competitive marketplace" for broadband Internet service, while Wheeler's policy assumes there is not one—and thus the need for strong rules.

Much depends on how high-speed broadband is defined. The new FCC standard, adopted in January defines broadband as a download speed of 25 megabits per second or more. At that threshold, 83 percent of American households have access to high-speed broadband, but in many local markets there is only one provider at that level of service. At lower speeds, technologies like mobile broadband offer competition.

Pai called on Wheeler to publicly release the full document of his proposed order and supporting materials. The full documents of FCC proposals have not been published in the past, but Pai said this issue is of such widespread public interest that an exception should be made. Pai said he would not release it himself, adhering to commission rules.

Pai repeatedly referred to the length of the proposed order, 332 pages. But only eight of those pages are about the new rules, a senior FCC official said. The rest of the document, the official said, describes how the plan would fine-tune provisions of Title II for the Internet and summarizes the four million public comments the commission received last year.

Pai added that the Wheeler plan would embolden authoritarian states that already regulate and censor Internet

traffic. "If in the United States we adopt regulations that assert more government control over how the Internet operates," he said, "it becomes a lot more difficult for us to go on the international stage and tell governments: 'Look, we want you to keep your hands off the Internet.'"

Pai also called the proposed order "President Obama's plan to regulate the Internet," a reference to Obama's public statement last November urging the commission to adopt the utility-style regulation of Title II. Taking such a public stance is unusual for a president when an independent agency is formulating policy.

On February 9, speaking at the University of Colorado, Wheeler was out on the hustings and answering critics of his approach. Wheeler said that there had been "endless repetition of the talking point" that he was proposing "old-style, 1930s monopoly regulation." He told the audience, "It's a good sound bite, but it is misleading when used to describe the modernized version of Title II that I'm proposing."

Wheeler has said repeatedly that his plan would not include regulating prices or meddling deeply in the Internet marketplace. But his approach, he insists, is needed to ensure that Internet service providers—mainly cable television and telecommunications companies—cannot block content or offer paid-for fast lanes for those who can afford it and slow lanes for those who cannot.

In an editorial, the *San Jose Mercury-News* praised the proposal:

"The chairman of the Federal Communications Commission last week scored the biggest victory for the freedom of the Internet since Columbia law professor Tim Lu coined the phrase 'net neutrality' in 2003.

"Tom Wheeler's proposal for the 'strongest open Internet protections' in tech history represents a huge victory for consumers and Silicon Valley's ecostructure, which requires an Internet with a level playing field for the thousands of entrepreneurs who are the valley's most important asset.

"The massive presence of companies such as Google and Apple, with their billions in resources, makes it easy to forget that it's really the thousands of tech startups and small businesses that make the valley go. The region can't expect its most creative minds to launch the next wave of tech innovation if we fail to nurture their basic needs.

"The massive broadband providers such as Verizon, AT&T and Comcast are, of course, furious. They're threatening lawsuits and a massive lobbying effort to protect their virtual monopolies. They had hoped to get richer by charging content providers such as Netflix higher prices for faster Internet speed and better reliability, leaving small players in the dust.

"President Barack Obama obviously pushed the FCC chairman, whom he had appointed, to do the right thing and regulate consumer Internet service as a public utility. Wheeler originally took a position more favorable to broadband providers.

"The president in November made a bold and somewhat unorthodox move by weighing in on an issue governed by a legally independent agency. Declaring that an open Internet 'has been one of the most significant democratizing influences the world has ever known,' Obama argued that 'we must not allow Internet service providers to restrict the best access or to pick winners and losers in the online marketplace for services and ideas.'

"The FCC proposal forbids broadband providers from blocking any website from consumers as long as its content is legal. It also bans providers from either slowing down or speeding up the content for websites, a crucial victory for content producers hoping to put their products before the widest audience of viewers.

"One crucial but largely overlooked aspect of the proposal is the commitment to protect consumer privacy. Wheeler indicated the regulations would include assurances that the integrity and privacy of consumer data gathered by broadband companies would be maintained."

Reported in: *New York Times*, February 4, 10; *The Hill*, February 11; *San Jose Mercury-News*, February 6. □

IFC report to ALA Council . . . from page 31

that all four copies are checked out and there is a waiting list to read the book.

Online Learning

To help achieve its goal of educating librarians and the general public about the nature and importance of intellectual freedom in libraries, OIF will continue to host webinars on founding principles and new trends of intellectual freedom. Upcoming topics include

- Advocating for Internet Access in School Libraries;
- Introducing the 9th edition of the *Intellectual Freedom Manual*; and
- I'm a New State IFC Chair, Now What?

Every quarter there are web meetings to connect state IFC chairs and AASL IF affiliates. We discuss state, local, and national intellectual freedom issues; the projects and programs OIF and various chapter IFCs are working on; and how ALA can provide assistance and support to the state IFCs and members of state affiliates.

Robert B. Downs Award

This year's recipient of the University of Illinois Graduate School of Library and Information Science's Robert B. Downs Intellectual Freedom Award are the staff and trustees of the Orland Park Public Library. The award recognizes the steadfast commitment of the staff

and trustees to intellectual freedom and the principles established in the *Library Bill of Rights* as demonstrated by their decision to maintain the library's policy of not filtering adults' Internet access despite a protracted year-long controversy fostered by pro-filtering advocates. The Office for Intellectual Freedom and the Freedom to Read Foundation were pleased to provide support and assistance to Orland Park Public Library as they fought to protect freedom of access.

PROJECTS

Banned Books Week

For the fourth year in a row, the ALA hosted the Virtual Read-Out during Banned Books Week (September 22–28). Over 500 readers joined critically acclaimed authors and celebrities, Stan Lee, Lois Lowry, and Jeff Bridges in the Read-Out. SAGE Publications generously helped to sponsor the Virtual Read-Out.

Banned Books Week 2015 will take place September 27–October 3. Banned Books Week merchandise, including posters, bookmarks, t-shirts, and tote bags, are sold and marketed through the ALA Store and will be available online in the late Spring. More information on Banned Books Week can be found at www.ala.org/bbooks and www.bannedbooksweek.org.

Choose Privacy Week

Choose Privacy Week will take place May 1–7, 2015. This year's theme is "Who Reads the Readers?" and the IFC's Privacy Subcommittee looks forward to working with LITA's Patron Privacy Interest Group and other ALA offices and groups on developing online programming and materials for librarians and the general public about data mining, data flows, and the need to adopt new policies and procedures to protect user privacy. It is hoped that the online materials and programming will encourage libraries and librarians to develop privacy programs and resources for their communities. Posters, buttons, and other items addressing both "Freedom From Surveillance" and "Who's Tracking You?" remain available online via the ALA Store.

ACTION ITEMS

If one were unaware of the growing number and intensity of assaults worldwide on free expression in general and journalists in particular, the recent deadly attack on the staff of the French satirical publication *Charlie Hebdo* came as a harsh wake up call. Librarians, traditional defenders of free expression, were equally shocked by this event. In order to express solidarity with our French library colleagues and affirm the basic human right of free expression, the American Library Association's International Relations Committee and its Intellectual Freedom Committee have jointly prepared the following resolution for action by ALA's governing Council.

In closing, the Intellectual Freedom Committee thanks the division and chapter intellectual freedom committees, the Intellectual Freedom Round Table, the unit liaisons, and the OIF staff for their commitment, assistance, and hard work.

Resolution Denouncing Recent Assaults on the Freedom of Expression as Exemplified in the Attack on Charlie Hebdo

Whereas the American Library Association has long been on record affirming the freedom of expression as described in the Article 19 of the Universal Declaration of Human Rights (Policy B.6.2.1 Article 19 of the United Nations' Universal Declaration of Human Rights);

Whereas the American Library Association has been a staunch advocate for and defender of the freedom of the press and the freedom of speech contained in the First Amendment to the Constitution of the United States of America;

Whereas the American Library Association's *Library Bill of Rights* states that "Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment" and that "Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas" (Policy B.2.1 *Library Bill of Rights*);

Whereas these rights when taken together form a core professional value of the American Library Association, intellectual freedom (Policy B.1.1 Core Values of Librarianship);

Whereas the recent attack upon *Charlie Hebdo* is another heinous attempt to undermine freedom of expression;

Whereas over 60 journalists were killed and over two hundred were imprisoned worldwide in 2014 alone*; now, therefore, be it

Resolved, that the American Library Association

1. denounces these bloody assaults on fundamental human rights;
2. expresses its deepest condolences to all those associated with the publication *Charlie Hebdo* and to the French people;
3. affirms its solidarity with L'Association des Bibliothécaires Francais;
4. reaffirms in the strongest possible terms its unwavering commitment to the advocacy and defense of intellectual freedom including freedom of the press, freedom of speech and freedom of expression; and
5. directs Keith Michael Fiels, executive director of the American Library Association, to communicate its support and resolve to Francois Hollande,

* Committee for the Protection of Journalists, www.cpj.org

president of the French Republic, for the people of France and to our colleagues of L'Association des Bibliothécaires Francais. ☐

FTRF report to ALA Council . . . from page 33

reviewed the provisions of the USA PATRIOT Act that authorize mass surveillance and the prospects for reform in the new Congress. Theresa Chmara, FTRF's general counsel, provided a helpful overview of the Supreme Court's First Amendment jurisprudence concerning "true threats" and discussed the facts of the "Facebook threats" case currently pending before the Supreme Court. Kristin Pekoll, the Office for Intellectual Freedom's assistant director, described the growing phenomenon of parent groups organized for the sole purpose of removing books from school and public libraries. Eldon James, the ASCLA liaison to the FTRF Board, discussed how a recent Supreme Court decision facilitates states' efforts to restrict access to public records, and Jill Vassilakos-Long, GODORT liaison, discussed how the failure to institute archiving standards is causing the loss of innumerable federal documents.

JUDITH F. KRUG MEMORIAL FUND

The Judith F. Krug Memorial Fund, created by donations made by Judith's family, friends, colleagues, and admirers, supports projects and programs that assure that her life's work will continue far into the future. At present, the fund supports two major initiatives: a program to augment and improve intellectual freedom education in LIS programs and a grants program that underwrites Banned Books Week activities in libraries, schools, and community institutions. "Intellectual Freedom and Censorship," the first online class offered under the auspices of the Krug Memorial Fund and the University of Illinois Graduate School of Library and Information Science (GSLIS) took place this past fall. Students taking the class, which was taught by GSLIS professor Emily Knox, gave the course uniformly positive reviews and noted their appreciation for FTRF's support for the course, including scholarships; textbooks; historical articles and videos from FTRF's archives; and guest speakers on a variety of topics. FTRF and GSLIS plan to offer the course again in Fall 2015 and in subsequent years. We hope to increase participation from students enrolled in other LIS programs across the nation and I want to particularly thank Professor Knox and consultant Joyce Hagen-McIntosh for making this particular goal a reality.

The seven recipients of the 2014 Banned Books Week Krug Fund grants put together a multitude of inventive, memorable events. These included a dance performance to the sound of banned books being read; an online quiz, "Which Banned Book Are You?" which was shared over 329,000 times; a Family Story Time program with *And Tango Makes Three*; and a panel of local authors and students talking about their experiences with censorship including students from Chicago's Lane Tech High School discussing the controversy over the school district's attempt to ban Marjane Sartrapi's *Persepolis*. In addition, the grant recipients—including Nashua (N.H.) High School North, the Charleston (S.C.) Friends of the Library, DePaul University Library and DePaul University Center for Writing-based Learning, the Columbus State Community College, the Northern Virginia Fine Arts Association, the LGBT Center of Raleigh Library, and the Greater Pittsburgh Chapter of the ACLU of Pennsylvania—sponsored traditional banned book read-outs and lectures in their communities, many of which reflected this year's Banned Books Week theme of banned and challenged graphic novels and comics.

STRATEGIC PLAN REVIEW

Prior to Friday's board meeting, FTRF trustees and many liaisons met for half a day to review the progress of our 2012 strategic plan. Groups met to document the Foundation's many accomplishments in recent years, including expanding organizational capacity, increased awareness of FTRF, and significant activity in intellectual freedom education and community engagement. The groups also came up with concrete suggestions for implementing the rest of the plan in coming years.

Following Midwinter, I will appoint a committee to begin the process of envisioning the future of the Freedom to Read Foundation. I'll provide more information on that during my Annual Conference update in San Francisco.

A status update on the strategic plan will be made available on the FTRF website at www.ftrf.org/?Strategic_Plan in February.

FTRF MEMBERSHIP

Your membership in the Freedom to Read Foundation is needed to sustain and grow FTRF's unique role as the defender of First Amendment rights in the library and in the wider world. I invite you to join me in supporting FTRF as a personal member, and ask that you please consider inviting your organization or your institution to join FTRF as an organizational member. Please visit www.ftrf.org and join today. Alternatively, you can call the FTRF office at (800) 545-2433 x4226 and join by phone, or send a check ($35+ for personal members, $100+ for organizations, $10+ for students) to:

Freedom to Read Foundation
50 E. Huron Street
Chicago, IL 60611 ☐

reporters experience censorship . . . from page 34

Adrian Shahbaz, a researcher with Freedom House's Freedom on the Net project, says in recent years, there have been prominent cases of media coverage being prohibited on specific topics in the UK, Israel, and Brazil, where courts have granted government-issued injunctions about topics ranging from discussions held in Parliament to prominent arrests and corruption investigations. But they're hard to enforce online.

"Now governments are looking to in some cases create new laws and in other cases enforce laws that have in the past only been applicable to print media. The overall trend is that Internet freedom is declining and people's freedom to express themselves on social media is declining," Shahbaz said.

Google, Facebook, and Twitter publish biannual reports listing requests they receive from governments to remove content and provide information about users' accounts, but it's hard to draw numbers on how many removal requests affect journalists and news outlets since they don't provide those details in their reports. Google and Twitter do post requests they receive on the clearinghouse Chillingeffects.org, often including documents sent with the requests. Reported in: *Columbia Journalism Review*, February 3. □

censorship dateline . . . from page 38

further disciplinary action because he sold a video of a melee on campus.

On December 12, a crowd started a brawl outside the university's student union building after a Black Student Association-sponsored dance. Nicholas Stewart, the editor-in-chief of the *Western Courier*, captured video of campus police pepper-spraying the crowd, which he sold to a news organization and later posted to the student newspaper's website.

On January 22, Stewart received a letter from the university's vice president for student services, which said he was being placed on "paid administrative suspension" from the paper because he sold the video to an off-campus news organization, creating a "threat to the normal operations of the university."

According to the letter, Stewart cannot participate in the student newspaper until after a university judiciary committee hearing determines how the university should proceed.

That night after the brawl, Stewart posted the video to his account on Live Storms Media, a company he freelances for, he said, adding he used his own equipment to film the incident. Additionally, he said he identified himself as an LSM reporter in the video's lower-third.

Several media outlets across the country bought the video from Live Storms Media, he said.

Even though the *Courier* had shut down for winter break, he also wrote an article about the fight for the *Courier*'s website and included a version of the video he published to his personal YouTube account. In the byline on that video, he identified himself as a *Courier* reporter.

"The video all the media outlets across the country have, they have the video that says 'Nicholas Stewart, LSM,'" he said. "It has no connection to me with the *Western Courier*."

On December 15, Stewart was called into Vice President for Student Services Gary Biller's office and questioned about his role in the fight, whether he filmed the incident with school-owned equipment and whether he was paid for the video. Stewart said he was told the *Courier* owned the video and he therefore owed the university any profits he made from his freelance work.

"I believe that they're claiming I was working for the *Courier* at that point, and so I believe they're claiming that I didn't have the consent of the *Courier* to send that video in," he said.

According to an email Biller sent Stewart, his actions had violated several sections of the student conduct code, including "committing acts of dishonesty" by representing the newspaper "without the explicit prior consent of the officials of that group."

Stewart said he believes he is being punished as a form of censorship "and I believe they're attempting to silence me so that things like this don't happen again."

Although the newspaper does receive funding from the university, it is an independent student newspaper and is not affiliated with the university's journalism department, *Courier* faculty advisor Richard Moreno said. The *Courier*'s offices are on campus, and about three-quarters of its budget comes from student fees.

Moreno said that although the *Courier*'s handbook does contain a section addressing freelancing, its language is vague. "There's a section in the handbook that basically says that you can freelance with permission, but it doesn't say permission from who," Moreno said.

The handbook does not specifically address multimedia or online journalism, and many of the paper's photographers are hired on a freelance basis, Moreno said. However, the publications board, a group of faculty and students who oversee the funding and operation of both the newspaper and the institution's student magazine, will revise the handbook, Moreno said, because Stewart's situation raised an issue they'd never encountered before.

"I've always tried to encourage people to freelance and do as much as they could," he said, adding that journalism today is "all about creating your own brand." Reported in: splc.org, January 23.

foreign

Cairo, Egypt

Egypt has banned a Hollywood film based on the Biblical book of Exodus because of what censors described as "historical inaccuracies." The head of the censorship board said these included the film's depiction of Jews as having built the pyramids, and that an earthquake, not a miracle by Moses, caused the Red Sea to part. "Exodus: Gods and Kings" stars Christian Bale as Moses.

There have also been reports that the film is banned in Morocco. Although the state-run Moroccan Cinema Centre (CCM) had given the film the green light, Moroccan business website Medias24.com said that officials had decided to ban the movie from being screened the day before its premiere.

According to the book of Exodus, Jewish slaves were led to freedom by Moses after God inflicted a series of plagues on Egypt. The pyramids are believed to have been built about 1,000 years before the story of the Exodus. The Biblical story tells how the Red Sea was parted by a miracle performed by God through Moses, allowing the Jewish people to escape from the pursuing Egyptian army. Reported in: BBC News, December 26.

London, England

Robin Thicke, Nietzsche and "Page 3" do not, at first glance, appear to have a great deal to do with terrorism. But there is a thread that links all three, suggests a new ranking—freedom of speech. Thicke's song "Blurred Lines" (accused by some campaigners of glorifying rape), a society dedicated to the German philosopher, and *The Sun* have all been banned from British universities.

At a time when higher education leaders are battling against the government's proposed counterterrorism bill, those behind the Free Speech University Rankings, produced by the online magazine *Spiked*, claim their findings mean that institutions should get their own houses in order before taking the fight to the home secretary.

The rankings found restrictions on freedom of expression at four out of five British universities. A total of 47 institutions were given a red rating by the rankings, meaning they were deemed to be particularly censorious.

Dennis Hayes, professor of education and head of the Center for Educational Research at the University of Derby, was in the team behind the report. He said that many university policies went far beyond legislative requirements.

"If universities believe in academic freedom and free speech, they should be looking at their own practices and those of student unions, as well as what the government imposes," he added.

But should we consider the banning of a newspaper or a song to be in the same league as restricting a speaker who condemns people on account of their religion, ethnicity or sexuality?

Another member of the team that compiled the rankings, Joanna Williams, suggested that the arguments fell into the same arena because censorship on campus was part of a general trend that reflected a fear of giving offense.

"The idea of putting things beyond debate, particularly in the name of safety and emotional protection, says that some things are [too] dangerous to be discussed. I think university should be the place where students do confront all different kinds of ideas and engage with these discussions and don't have discussions closed down," Williams, senior lecturer in higher education and academic practice at the University of Kent, said. "The real world doesn't have a 'safe-space policy'—students are going to be confronted by UKIP [a far-right party] MPs and *The Sun* newspaper, and the danger of creating university as a safe place is that students don't learn how to deal with these things."

But Eve Livingston, vice president for societies and activities at the Edinburgh University Students' Association, takes a different view. "It is precisely because of the importance of freedom of speech that we enact no-platform policies and we reserve the right not to use our resources for material that is potentially harmful to our students," she said. "When speakers, events or media make students feel unsafe and marginalized, their voices are being silenced."

When this happens, she said, "free speech is no longer serving its origins of holding the privileged and powerful to account. We owe it to our students not to allow this co-opting of a very important principle."

The producers of the rankings question whether students' unions typically have the democratic mandate to decide on what is palatable for their members. Hayes said that it reflected a "thinly veiled prejudice" that presumes that some groups of students are less able to withstand a challenge than others.

But Williams acknowledged that although the current campus constraints reflected a history of no-platform tactics, they had resulted from the accumulation of "incremental, one-off bans" rather than a conscious decision to restrict free speech. "My hope is that the rankings, in exposing the extent to which this is happening across the country, will really encourage students, lecturers and managers to assess whether this is a good thing in total," she said.

The online magazine *Spiked* cites the following as incidents of free speech being curtailed at British universities:

- No will for Nietzsche. The German philosopher's work is the pillar of several politics courses, but a society set up in Nietzsche's honor was banned by the University College London Union. UCLU accused it of promoting fascism and racism and banned it from meeting or advertising on university premises. *Spiked* warned that "once censorship is

justified on campus, it will quickly eat away at intellectual life." Just as Nietzsche urged people to cast aside the standard rules of morality, some scholars may well question whether UCLU's actions had gone "beyond good and evil."

- *The Sun* setting on campus. More than 30 universities banned the *Sun* newspaper, which for decades has featured pinup shots of topless women on its inside pages, from campus shops and common rooms as students' unions showed their support for the No More Page 3 campaign. Students at the University of Leeds backed the ban in 2013, after a motion described Page 3 as "deeply degrading, dehumanizing and damaging to women." Students' unions at Kingston University, the University of East Anglia and the University of Essex also banned the tabloid. *Spiked* denounced the ban as an example of how "modern campus censorship is more about appearing to tackle a problem, rather than actually doing anything about it." Tom Slater, the assistant editor of Spiked, added: "Censoring it was an exercise in moral grandstanding more than anything else."
- Abortion debate: for women only? A debate organized by an anti-abortion group at the University of Oxford was canceled after students threatened to disrupt it. Tim Stanley, a journalist and historian, got into hot water when he tried to take part in a debate titled "This House believes that abortion culture harms us all" with Brendan O'Neill, the editor of *Spiked*. On its Facebook page, the Women's Campaign at Oxford said that it was "absurd to think we should be listening to two cisgender men debate about what people with uteruses should be doing with their bodies." However, writing in *The Daily Telegraph*, Stanley said: "I would've thought that the one place in Britain where you could agree to disagree amicably would be Oxford University. But I was wrong."
- Nothing funny about religion. Students at the London School of Economics and Political Science were forced to cover up T-shirts featuring images from the satirical comic strip "Jesus and Mo" at the institution's freshers' fair. The two members of the Atheist, Secularist and Humanist Society were told that they would be removed from the event if they refused to hide the tops. However, LSE later backtracked and apologized to the students. Terry Sanderson, president of the National Secular Society, congratulated the students for their "fearless defense of freedom of expression." In a similar incident at the University of Reading, the atheist society was thrown out of the freshers' fair for naming a pineapple Mohammed to "encourage discussion about blasphemy, religion and liberty." Reported in: insidehighered.com, February 5.

New Delhi, India

The BJP, RSS and other Hindu political organizations have reportedly demanded a ban on Tamil writer Perumal Murugan's novel, *Madhorubhagan*, alleging that it portrays the Kailasanathar temple in Tiruchengode and women devotees in "bad light."

The book's English edition, called *One Part Woman*, has been published by Penguin India in two editions. Murugan has reportedly written to the police seeking protection for himself and his family. According to *The Hindu*, he has been receiving threats and abuses.

Madhorubagan tells the tale of a childless couple, Kali and Ponna. Their predicament is discussed in the backdrop of the "traditional free, consensual sex rituals" held once in a year during the car festival of the temple in the past.

Publishers of the book have reportedly come out in support of the author and pledged to stand by him. They have also appealed to Tamil intellectuals to "get together and face this challenge." There were also reports that Tiruchengode RSS president had led a protest demanding a ban on the book, but protesters were stopped by the police. They also managed to burn copies of the book in front of the local police station.

Calling for the arrest of both the author and the publisher, the BJP, RSS and other outfits said in their petition that the author had denigrated Lord Shiva and the women devotees who visited the temple during the car festival. Reported in: outlookindia.com, December 26. □

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from the bench . . . from page 42

caused a substantial disruption or even a reasonable forecast of such a problem. The two teachers mentioned in the song testified that they had to alter their teaching styles for fear of being accused of inappropriate behavior, but Judge Dennis reasoned that this was a far cry from meeting the *Tinker* substantial disruption standard. He wrote that "the facts simply do not support a conclusion that Bell's song led to a substantial disruption of school operations or that school officials reasonably could have forecasted such a disruption."

Judge Dennis also reasoned that Bell's rap song did not constitute a true threat or reveal a serious expression of intent to cause harm. He noted that rap songs often contain "hyperbolic and violent language" and that the song was not communicated directly to the coaches.

Judge Rhesa Hawkins Barksdale wrote a scathing dissent, calling the majority decision "beyond comprehension" and "absurd." She emphasized that judges must show deference to school administrators in a time when mass school shootings occur. She reasoned that school officials had enough evidence to consider the song

substantially disruptive and that "there can be no question that an objectively reasonable person would interpret the rap recording as a true threat."

School officials have the option of appealing to the full panel of the Fifth Circuit or to file for review with the US Supreme Court. The case could present an attractive case to review for several reasons.

First, the majority opinion questions whether the *Tinker* substantial disruption standard should apply at all to off-campus, online student speech. The opinion further notes a division among different federal appeals courts in how they approach this issue. Second, the panel decision was a sharply divided opinion with very contrasting interpretations of not only the evidence in the case but also the application of the prevailing legal tests.

Finally, the US Supreme Court already has shown a willingness to address whether communications made in the form of rap music constitute a true threat in another case—*Elonis* v. *U.S.* Reported in: newseuminstitute.org, January 27.

fighting words

Chisago County, Minnesota

Don't expect the First Amendment to protect you from disorderly conduct charges if you curse store employees in front of other customers.

A recent Minnesota appeals court decision said no protection exists in such a instance, in a case involving a man charged with repeatedly cursing at a liquor store clerk and then refusing to leave the store.

Jeffrey Nelson entered the liquor store in February 2013 and started cursing at the store clerk—a person with whom he had previous confrontations. The clerk asked him to leave but Nelson refused and continued to utter profanity, police said.

Police cited Nelson for disorderly conduct and criminal trespass. At his trial, Nelson argued that he had a First Amendment right to speak intemperately to the store clerk. The trial judge found him guilty of disorderly conduct.

On appeal, Nelson contended that his speech was protected by the First Amendment and that his profanity did not cross the line into so-called fighting words—defined by the US Supreme Court in *Chaplinsky* v. *New Hampshire* (1942). The ruling said "fighting words" were those which inflict injury or cause an immediate breach of the peace. Nelson also argued that the fighting-words doctrine was "archaic" and not applicable in the modern day.

The Minnesota Court of Appeals disagreed in its December 22 decision in *State* v. *Nelson*. The appeals court first explained that "fighting words" remains a category of unprotected speech in First Amendment jurisprudence, noting that the US Supreme Court recently had identified "fighting words" as a "historic and traditional" category of unprotected speech. The Minnesota court concluded that "the 'fighting words' category of unprotected speech remains good law and is appropriate for application in this case."

The appeals court noted that Nelson entered the store and started uttering repeated instances of profanity in a loud voice. He continued to do so even after being asked to vacate the premises. The appeals court distinguished cases involving individuals cursing at police officers, who are expected to exercise restraint. "A police officer, unlike a store clerk, is trained to deal with unruly citizens," the appeals court wrote. "A store clerk at his place of work should not be expected to tolerate the same level of abuse as a trained police officer who often deals with intoxicated or mentally ill persons."

The bottom line is that hurling profanities at other citizens in public places may well be considered unprotected "fighting words" and not protected speech. The fighting words doctrine is an active, not archaic, part of First Amendment law. Reported in: newseuminstitute.org, January 21.

pornography

Los Angeles, California

A Los Angeles County ordinance requiring actors in pornographic films to use condoms does not violate the industry's First Amendment rights of free expression, a federal appeals court ruled December 15. The decision from a three-judge panel of the United States Court of Appeals for the Ninth Circuit rejected the industry's contention that having actors use condoms would interfere with a film's fantasy element by subjecting viewers to real-world concerns. The ordinance, adopted by Los Angeles County voters in 2012, was championed by the AIDS Healthcare Foundation as a means of reducing sexually transmitted diseases. Reported in: *New York Times*, December 15. □

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is it legal? . . . from page 46

'F' at mid-term. He further specifically agreed that his grade fairly reflected his performance and had nothing to do with his political or personal beliefs. Similarly, by leaving out any reference to Ms. Abbate's follow-up class discussion in which she acknowledged and addressed the student's objection to gay marriage, you created a false impression of her conduct and an inaccurate account of what occurred. You either were recklessly unaware of what happened in the follow-up class, or you elected not to include these facts in your Internet story."

The blog post by McAdams had significant consequences, Holz wrote. "As a result of your unilateral, dishonorable and irresponsible decision to publicize the name of our graduate student, and your decision to publish information that was false and materially misleading about her and your university colleagues, that student received a series of hate-filled and despicable e-mails, including one suggesting that she had committed 'treason and sedition' and as a result faced penalties such as 'drawing, hanging, beheading, and quartering,'" Holz wrote. "Another note, delivered to her campus mailbox, told the student, 'You must undo the terrible wrong committed when you were born. Your mother failed to make the right choice. You must abort yourself for the glory of inclusiveness and tolerance.' Accordingly, and understandably, the student feared for her personal safety, and we posted a Public Safety Officer outside her classroom. In addition, as a result of your conduct and its consequences, Ms. Cheryl Abbate now has withdrawn from our graduate program and moved to another university to continue her academic career."

The name of McAdams's blog is Marquette Warrior, and he indicated on the blog that he intends to take on the university. "We will indeed fight this," he wrote. "We have excellent legal counsel, and most certainly will not go quietly."

In the post, McAdams disputes the university's account of what happened. He writes that the undergraduate's complaints did not get a fair hearing and that the undergraduate was rebuffed when trying to get an acknowledgement that he could make statements critical of gay marriage in class.

McAdams also rejects the idea that Abbate should be viewed as a student in this controversy, even if she was a graduate student. The dispute, McAdams wrote, concerned the way Abbate interacted with an undergraduate while in the role of an instructor. McAdams also noted that Abbate was not in his department. "We had no teacher/student relationship. The people who should have mentored her (the Philosophy faculty) apparently failed to do so," he wrote.

Turning to the larger issues, McAdams wrote that Marquette had no right to silence him, and that suggestions he file internal grievances were just an attempt to keep "the whole thing quiet."

As a blogger, McAdams wrote, he has the right not to keep the whole thing quiet. And he said that principles of free speech and academic freedom should allow him to speak out as he did. McAdams closes his blog post by noting that Holz wrote to him that his "conduct clearly and substantially fails to meet the standards of personal and professional excellence that generally characterizes university faculties. As a result, your value to this academic institution is substantially impaired."

McAdams wrote administrators shouldn't be able to determine the value of a tenured professor. "If academic freedom is dependent on administrators' judgments of the 'value' of a faculty member, notions of academic freedom are meaningless," McAdams wrote. "Campus bureaucrats hate controversy, since it makes trouble for them. Thus the most 'valuable' faculty members are the ones who avoid controversy, and especially avoid criticizing administrators. In real universities, administrators understand (or more likely grudgingly accept) that faculty will say controversial things, will criticize them and each other, and that people will complain about it. They understand that putting up with the complaints is part of the job, and assuaging those who complain the loudest is not the best policy. That sort of university is becoming rarer and rarer. Based on Holz' actions, Marquette is certainly not such a place." Reported in: insidehighered.com, February 5.

surveillance

Washington, D.C.

The US government's privacy board is calling out President Barack Obama for continuing to collect Americans' phone data in bulk, a year after it urged an end to the controversial National Security Agency program. The Obama administration could cease the mass acquisition of US phone records "at any time," the Privacy and Civil Liberties Oversight Board (PCLOB) said in an assessment it issued January 29.

The PCLOB's assessment came amid uncertainty over the fate of legislation to cease that collection. An effort intended to stop it, known as the USA Freedom Act, failed in the Senate in November. While the administration said after its defeat that Obama would push for a new bill, the administration has yet to do so in the new Congress, and the president has thus far pledged in his State of the Union address only to update the public on how the bulk-surveillance program now works in practice.

David Medine, the PCLOB chairman, said that the administration was acting in "good faith" and had agreed in principle to most of the 22 reform recommendations the board had offered in its two 2014 reports into bulk NSA surveillance. The board's report found that the administration had in many cases not implemented recommendations it agreed to in principle, such as assessing whether the NSA is successfully filtering out purely domestic communications when it siphons data directly from the "backbone" of the Internet.

Medine reiterated his call for Obama to cease the domestic bulk phone records collection unilaterally. "At some point, you have to draw the line and say you have to act on your own, because this program isn't particularly effective. A better alternative is to go to the phone companies on a case-by-case basis," Medine said.

"It's now well past time for the administration to have developed alternative procedures and alternative relationships with the telephone companies to stop the daily flow of data to the government," said James Dempsey, another member of the PCLOB.

As it currently stands, the legislative calendar will force a decision. On June 1, a portion of the USA PATRIOT Act that the NSA cites to justify the bulk domestic phone records collection will expire. Known as Section 215, the provision also governs investigative authorities the FBI cites as critical for acquiring business and other records in counter-terrorism cases.

Medine called the expiration a "real-world deadline" for either executive or legislative action, and hesitated to back repeal of the entirety of Section 215.

"It would be in my view a net positive if the telephony metadata aspect" were repealed, Medine said, but "215 is broader. I don't think it's necessarily a net gain if the whole of 215 ended."

Several civil libertarian legislators have predicted that congressional inertia and antipathy to bulk surveillance will doom re-authorization of the provision should a bill similar to the USA Freedom Act fail to pass. But the rise of the Islamic State (ISIS), the terrorist attack in Paris and a Republican-led Congress increasingly willing to use those phenomena as a cudgel against privacy advocates have complicated congressional attitudes to mass surveillance.

The PCLOB, however, found in a January 2014 report that the bulk phone records collection had not stopped terrorist attacks and had "limited value" in combatting terrorism more broadly. Despite the NSA effort's repeated blessing by a secret surveillance court, the PCLOB considered the program illegal.

Both Medine and Dempsey said they believed the administration still backed legislative reform of its surveillance authorities. Dempsey expected Congress to pass "down-to-the-wire action," such as a temporary extension of Section 215, rather than let it expire.

Last January, Obama unilaterally imposed a series of changes to the NSA's handling of its bulk phone records, stopping short of shutting down the program entirely. While he did not limit the ongoing mass collection, NSA officials now need to demonstrate "reasonable articulable suspicion" to the secret court ahead of searching through phone records databases for connections to terrorism, and can now only examine phone accounts with two degrees of separation from a suspicious phone number.

While the PCLOB's report notes those changes, it also observes that Obama continues to permit the NSA to store

its bulk phone data for five years, rather than purging it after two years, as the board recommended.

Nor does the secret court hear arguments from anyone besides government lawyers before issuing surveillance orders, the report acknowledged. The USA Freedom Act permitted special advocates to argue before the court in limited circumstances.

The PCLOB disappointed civil libertarians in the summer by giving its blessing to a controversial constellation of efforts to collect Americans' international communications and a wide swath of foreign communications information. But it noted on January 29 that the intelligence agencies have yet to declassify the first order issued by the surveillance court assessing the legality and constitutionality of the effort.

"Intelligence Community representatives have stated to us that they intend to implement this recommendation, but their efforts to comply are constrained by the limited time and resources available to carry out declassification reviews," the board said.

Additionally, the PCLOB signaled that the intelligence agencies plan an "imminent" release of internal rules for the FBI, CIA and NSA governing when they can collect, use and disseminate information from the international communications dragnets. The NSA, however, has only committed to "studying" how many Americans' communications are caught in those nets.

Its recommendation for the intelligence agencies to create a "comprehensive methodology for assessing the efficacy and relative value of counter-terrorism programs" is "not implemented," the PCLOB said. Reported in: *The Guardian*, January 29.

Washington, D.C.

Although the government's warrantless surveillance program is associated with the National Security Agency, the Federal Bureau of Investigation has gradually become a significant player in administering it, a newly declassified report shows.

In 2008, according to the report, the FBI assumed the power to review email accounts the NSA wanted to collect through the "Prism" system, which collects emails of foreigners from providers like Yahoo and Google. The bureau's top lawyer, Valerie E. Caproni, who is now a Federal District Court judge, developed procedures to make sure no such accounts belonged to Americans.

Then, in October 2009, the FBI started retaining copies of unprocessed communications gathered without a warrant to analyze for its own purposes. And in April 2012, the bureau began selecting new email accounts and phone numbers belonging to foreigners for collection, including through the NSA's "upstream" system, which collects communications transiting network switches.

That information is in a 231-page study by the Justice Department's inspector general about the FBI's activities under the FISA Amendments Act of 2008, which authorized the surveillance program. The report was entirely classified when completed in September 2012. But the government has now made a semi-redacted version of the report public in response to a Freedom of Information Act lawsuit filed by *The New York Times*.

The *Times* filed the lawsuit after a wave of declassifications about government surveillance activities in response to leaks by the former intelligence contractor Edward J. Snowden.

In the report, the inspector general, Michael E. Horowitz, concluded that the FBI was doing a good job in making sure that the email accounts targeted for warrantless collection belonged to noncitizens abroad. But parts of the report remained heavily redacted. For example, there was only one uncensored reference to the Prism system. It was not clear why the Justice Department had redacted all the other references to Prism in the report; the name of that program and many details about it have been declassified and were discussed in a July 2014 report by the Privacy and Civil Liberties Oversight Board.

David McCraw, a *Times* lawyer, said the newspaper may challenge the redactions at a later stage in the Freedom of Information Act litigation.

The report also filled in a gap about the evolving legality of the warrantless wiretapping program, which traces back to a decision by President George W. Bush in October 2001 to direct the NSA to collect Americans' international phone calls and emails, from network locations on domestic soil, without the individual warrants required by the Foreign Intelligence Surveillance Act, or FISA. The *Times* revealed that program in December 2005.

After the article appeared, telecommunications providers that had voluntarily participated in the program were sued, and a Federal District Court judge in Detroit ruled that the program was illegal, although that decision was later vacated. The Bush administration sought to put the program on more solid legal footing by gaining orders from the Foreign Intelligence Surveillance Court approving it.

In January 2007, the Bush administration persuaded the court's Judge Malcolm Howard to issue an order to telephone and network companies requiring them to let the security agency target foreigners' accounts for collection without individual warrants. But in April 2007, when the order came up for renewal before Judge Roger Vinson, he said that it was illegal.

Judge Vinson's resistance led Congress to enact, in August 2007, the Protect America Act, a temporary law permitting warrantless surveillance of foreigners from domestic network locations. The next year, Congress replaced that law with the FISA Amendments Act.

In December, as a result of separate Freedom of Information Act lawsuits by *The Times* and the Electronic Frontier Foundation, the government declassified the identities of the judges who disagreed in early 2007 and several court filings

from that episode. But it remained unclear what the NSA had done in June and July of 2007.

The newly declassified report said Judge Vinson issued an order on May 31, 2007, that allowed existing surveillance to continue by approving collection on a long list of specific foreign phone numbers and email addresses. But after that, when the agency wanted to start wiretapping an additional person, it had to ask the court for permission.

The report said that "the rigorous nature of the FISA Court's probable cause review of new selectors submitted to the various FISA Court judges following Judge Vinson's May 31, 2007, order caused the NSA to place fewer foreign selectors under coverage than it wanted to." That and other factors "combined to accelerate the government's efforts" to persuade Congress to enact the Protect America Act. Reported in: *New York Times*, January 12.

copyright

Washington, D.C.

In a 245-page report issued February 5, the US Copyright Office is throwing its weight behind what would be the most radical changes to how music is licensed in nearly a half century.

Many of the copyright laws governing music were first erected at the time that player pianos became popular and have developed through the advent of radio, new recording devices and, most recently, digital networks. Maria Pallante, director of the Copyright Office, believes the law is behind the times.

"The structures that evolved in the previous century to facilitate the lawful exploitation of musical works and sound recordings, while perhaps adequate for the era of discs and tapes, are under significant stress," states the report. "From a copyright perspective, we are trying to deliver bits and bytes through a Victrola."

Some of the proposals figure to spark controversy, debate and furious lobbying should the US Congress tackle a broad overhaul of music licensing.

For example, the Copyright Office wants to extend the public performance right in sound recordings to terrestrial radio broadcasts—a big shift from the time when publicity was seen as payment enough to copyright owners. Also proposed is fully federalizing pre-1972 recordings, a change that would come on the heels of lawsuits against SiriusXM, Pandora and others who have been exploiting older sound recordings without compensation to their owners.

Many of the changes would be boon to those who hold or manage public performance rights.

The Copyright Office endorses reconsidering 75-year-old antitrust decrees for ASCAP and BMI and also wishes to give music rights owners such as publishers the ability to withdraw streaming rights from services. What's more, the proposal would essentially turn performance rights organizations into "music rights organizations" with the ability to bundle reproduction, distribution and performance rights together.

The report also envisions changes to which rights are subject to compulsory blanket licensing and which rights will be subject to free market negotiations. Certain digital uses and public television uses of music may fall under fixed rates while in other circumstances, music rights owners will be given more flexibility to seek bigger payouts. For the types of licensing that are subject to rate-setting, the Copyright Office is looking to streamline the procedures.

Other changes including allowing SoundExchange to administer record producer payments; having those in the music industry work on creating an authoritative public database of music data; and taking care of songwriters and recording artists who want more transparency in the deal-making between labels and publishers on one side and services like Spotify on the other.

The proposals would definitely be a huge shake-up of music licensing, though the Copyright Office makes clear that it is not attempting to reinvent the music industry altogether.

"As a number of commenters remarked during the course of this study, if we were to do it all again, we would never design the system that we have today," says the report. "But as tempting as it may be to daydream about a new model built from scratch, such a course would seem to be logistically and politically unrealistic. We must take the world as we find it, and seek to shape something new from the material we have on hand."

ASCAP president Paul Williams had this to say: "With its report today, the US Copyright Office was clear: the current music licensing system needs reform and fast. The report emphasizes how the current system undervalues musical works—something many of our members experience daily. The many proposed updates—particularly recommendations intended to make the system more equitable for songwriters—underscore yet again the inefficiency of the current system for music fans and creators alike. As outlined in the report, the current marketplace is strained by the 70-year old consent decree regime and is not appropriately responsive to the free market, particularly in our new digital world. As we continue to advocate for our members in Washington, today's report is an important step towards meaningful reform."

And here's the statement from Pandora's director of public affairs Dave Grimaldi: "We believe that greater transparency will benefit artists and music lovers alike, and we look forward to working with the Copyright Office and stakeholders across the industry to advance a bright and thriving future for music. As we have said previously, Pandora would be open to supporting the full federalization of pre-1972 sound recordings under a technology-neutral

approach that affords libraries, music services and consumers the same rights and responsibilities that are enjoyed with respect to all other sound recordings. Full-federalization would also guarantee that the full rights granted to these deserving recording artists, including termination rights under Chapter 3 of the Copyright Act."

The RIAA put out a long statement and here's part of it: "The office recognizes a consensus within the industry that the current system for licensing musical compositions is broken. Reform is necessary to develop new revenue streams for all creators and innovative consumer product offerings for music fans. The office also recognized that it is time to fix the system to ensure that all creators are paid fair market value for their work, regardless of the platform on which their work is used. For example, a performance right for FM and AM radio is long overdue. The fact that a multi-billion dollar broadcasting industry that derives its value from music gets a special interest carve-out from paying artists and labels continues to be indefensible." Reported in: *The Hollywood Reporter*, February 5. □

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