



SUPREME COURT

The US Supreme Court's June 18 decision in *Lozman v. City of Riviera Beach, Florida* held that in at least some circumstances, it may be a violation of a person's First Amendment rights to arrest them, even if the authorities had probable cause for making the arrest.

Writing for the 8-1 majority, Justice Kennedy explained, "This case requires the Court to address the intersection of principles that define when arrests are lawful and principles that prohibit the government from retaliating against a person for having exercised the right to free speech." More specifically, he added, "The question this Court is asked to consider is whether the existence of probable cause bars that First Amendment retaliation claim."

The court declined to issue a general answer to that question for any similar cases in the future, but instead ruled narrowly that the facts in the *Lozman* case offer enough evidence of retaliation for *Lozman's* suit to proceed. However, the Supreme Court decision is important to advocates of First Amendment rights, according to David L. Hudson, Jr. In Freedom Forum Institute, he writes that the Court now recognizes:

First . . . probable cause for an arrest doesn't give the government license to do whatever it wants.

Second, the Court specifically acknowledged that police officers could "exploit the arrest power as a means of suppressing speech." The arrest power is an awesome power held by the State. An arrest is a seizure within the meaning of the Fourth Amendment. Arresting people because they criticize the government is the hallmark of a police state, not a free society.

Third, the Court emphasized the importance of that forgotten freedom

of the First Amendment—the right of petition. Year after year, the State of the First Amendment survey showed that precious few American recognized the last textually based freedom—"petition the government for a redress of grievances." The Court wrote that "it must be underscored that this Court has recognized the 'right to petition' as one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman* had sued the city previously. He had petitioned the courts for a redress of grievances. Thus, the Court was correct to write that "*Lozman's* speech is high in the hierarchy of First Amendment values."

Reported in: supremecourt.gov, June 18; Freedom Forum Institute, June 19.

On June 22, the US Supreme Court ruled 5-4 that law enforcement must generally get a warrant in order to obtain an individual's cell site location information—that is, records of every place your phone has been. The court's decision in *Carpenter v. United States* both expands the scope of the Fourth Amendment and updates it for modern times, providing new and robust constitutional safeguards to the right to privacy.

Carpenter revolves around cell site location information (CSLI), which wireless carriers collect and store for business purposes. In recent years, CSLI has become extremely precise, tracking every movement your phone makes. For this reason, law enforcement often examines the CSLI of criminal suspects to glean information about their alleged misdeeds. Under a federal statute called the Stored Communications Act, the police could access an individual's CSLI so long as they can provide "reasonable grounds" for believing the data

is "relevant and material to an ongoing investigation." The SCA does not require police to get a warrant.

Timothy Carpenter, the criminal defendant whose appeal reached the Supreme Court, was convicted for robbery partly on the basis of his CSLI. (Law enforcement tracked his every movement for 127 days.) He argued that, by accessing his CSLI without a warrant, the government had violated his Fourth Amendment right to be free from unreasonable searches and seizures. Under the Supreme Court's longstanding "third-party doctrine," however, Carpenter didn't seem to have a case: This doctrine holds that an individual loses his right to privacy in information he voluntarily turns over to a third party. (For instance, you have no privacy rights in business records that you turn over to a bank.) Carpenter argued that the third-party doctrine shouldn't apply to CSLI, because it creates a comprehensive view of an individual's life that far exceeds anything possible in the pre-digital age.

In an opinion by Chief Justice John Roberts, joined only by the liberal justices, the Supreme Court agreed. CSLI, Roberts explained, constitutes "a detailed chronicle of a person's physical presence compiled every day, every moment, over several years." This chronicle "implicates privacy concerns far beyond" what the court considered in earlier cases, when the government could only see your business records or the phone numbers you dialed on a landline. "In light of the deeply revealing nature of CSLI," Roberts held, "its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection."



Having found that individuals have a “reasonable expectation of privacy” in their CSLI, and that “government access to cell-site records contravenes that expectation,” Roberts wrote that law enforcement must generally get a warrant—which requires probable cause to suspect criminal activity—in order to access this “sensitive information.” From now on, the government may no longer show mere “reasonable grounds” for seeking CSLI; it must meet the much higher standards required for a warrant. Thus, cell phone users in America regained their right to privacy “in the whole of their physical movements.”

Justices Kennedy, Thomas, Alito, and Gorsuch each wrote separate dissents, an unusual move that demonstrates their profound disagreement with the majority. Thomas and Gorsuch complained on originalist grounds, protesting that the court had moved beyond what the framers intended the Fourth Amendment to protect. Alito shared some of the majority’s concerns but fretted that the court had overreacted to new technology. Kennedy wrote that the court had “unhinge[d]” the Fourth Amendment “from the property-based concepts that have long grounded” its “analytical framework.” Reported in: *Slate*, June 22.

The US Supreme Court upheld President Donald Trump’s order restricting entry into the United States for nationals of seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—five of which have majority Muslim populations. The June 26 ruling in *Trump v. Hawaii* rejected arguments that the travel was motivated by religious bias and thus violated the separation of church and state enshrined in the First Amendment. In the 5-4 decision, a slim majority of justices accepted the

Administration’s arguments that the president has the authority to regulate immigration in the name of national security.

In dissent, Justice Sonia Sotomayor wrote, “The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court’s decision today fails to safeguard that fundamental principle.”

Earlier versions of the travel ban had been struck down by lower courts, which saw them as an effort by Trump to fulfill his campaign promise to implement a “total and complete shutdown of Muslims entering the United States.” Reported in: *Freedom Forum Institute*, June 27.

On June 26, the Supreme Court ruled 5-4 in *National Institute of Family Life Advocates v. Becerra* that a California law violated the First Amendment by requiring pro-life pregnancy centers to provide notices about the availability of abortion services. In this decision, the court rejected an emerging concept in the lower courts known as the “professional speech doctrine.”

While some observers viewed this as primarily a First Amendment case, others (including the California lawmakers who passed the law) viewed it as primarily a battle between pro-life and pro-choice sides in the abortion debate. Some pro-life pregnancy counseling clinics that do not offer abortions may withhold information after attracting pregnant women away from clinics that either offer abortions or provide referrals to abortion clinics.

The 9th Circuit Court of Appeals had said the requirement that pregnancy clinics disclose information about the availability of abortions was justified, because the requirement impacted only “professional speech.”

The appeals court wrote that “professional speech is speech that occurs between professionals and their clients in the context of their professional relationship.”

The Supreme Court majority ruled that compelling clinics to provide such notices violated the First Amendment, either because the notices were content-based compelled speech, or were unduly burdensome.

Justice Clarence Thomas wrote that the disclosures required in the California law “in no way relates to the services that licensed clinics provide.” Justice Thomas raised doubts about the professional speech doctrine: “But this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by professionals. This Court has been reluctant to mark off new categories of speech for diminished constitutional protection.”

Reported in: *Freedom Forum Institute*, June 26.

When labor unions collect a “fair share, agency fee” to cover the costs of negotiating and enforcing labor contracts at public sector government workplaces, this has now been judged a violation of the free speech rights of workers who are covered by the contract but who do not wish to pay the fee. With this 5-4 decision in *Janus v. AFSCME* on June 27, the Supreme Court overturned precedent, ruling that that Illinois’s fair-share, agency-fee requirement for non-members of public sector unions violated the First Amendment.

As part of the ruling, the Court overturned *Abood v. Detroit Bd. of Ed.*, a 1977 case that had upheld a similar fair-share requirement that faced a First Amendment challenge. In *Abood*, the Supreme Court held that the state’s interests in avoiding free-riders



and maintaining labor peace justify the fee's "intrusion" (if any) into First Amendment rights of nonmembers. In 2018, a majority of justices said that "*Abood* was poorly reasoned," that it "has led to practical problems and abuse," and that it "is inconsistent with other First Amendment cases."

The ruling means that states can no longer allow public sector unions to require non-members in a public-sector union shop to pay "agency fees" or "fair share" fees that go to the union's collective bargaining activities. (Union political activities, such as campaign contributions, were already separate, funded not by union dues nor fees, but by voluntary contributions to union PACs.)

The *Janus* ruling could have a devastating effect on public sector unions, or it could energize them. Time will tell.

The 5-4 ruling wasn't entirely a surprise: The Court has sent several signals in recent years that fair-share was on the chopping block. The big question for the Court in this case was how new Justice Gorsuch would vote. He voted with the other conservatives against fair-share.

It's unclear at this point whether the ruling could be used to challenge fair-share in the private sector.

Justice Kagan wrote the principal dissent, joined by Justices Ginsburg, Breyer, and Sotomayor. In addition to signing Justice Kagan's dissent, Justice Sotomayor wrote a separate dissent of her own. Reported in: *Constitutional Law Prof Blog*, June 27.

The White House is asking the Supreme Court to vacate a deal that allows Google to settle a class-action privacy lawsuit by donating \$5.3 million to nonprofits. The Supreme Court had agreed in April to take the new case, *Frank v. Gaos*, a challenge to the class action settlement in the original case, *Gaos v. Google*.

The challengers are led by Ted Frank, director of litigation for the Competitive Enterprise Institute (CEI), a Washington-based conservative think tank, who said the deal violated procedural rules in US law requiring settlements to be fair, reasonable and adequate.

A CEI news press release said the settlement "provided \$0 to class members and \$8.5 million to be divided between the plaintiffs' lawyers—who received \$1,000/hour on this case—and third-party charities unrelated to the case."

The White House is siding with CEI. In a friend-of-the-court brief filed in July, the US Solicitor General argues that Google and other companies shouldn't be able to resolve class-actions by making donations to charity unless trial judges have conducted a "rigorous" scrutiny of the deal. The White House specifically says that judges should examine whether the fund recipients will use the money to remedy the alleged harms that prompted the lawsuit.

The White House also argues that companies shouldn't be able to make donations to settle class-actions if it's feasible to give money directly to consumers. The administration is asking the Supreme Court to send Google's settlement back to a trial judge for re-evaluation.

The Solicitor General's papers mark the latest development in a dispute dating to 2010, when Google was sued for allegedly violating users' privacy by including their search queries in "referrer headers"—the information that's automatically transmitted to sites users click on when they leave Google. Some queries, like people's searches for their own names, can offer clues to users' identities. (Google no longer transmits search queries when people click on links in the results.)

Google and the plaintiffs resolved the case with a deal that calls for Google to donate \$5.3 million to six nonprofits—Carnegie Mellon University, World Privacy Forum, Chicago-Kent College of Law, Stanford Law, Harvard's Berkman Center and the AARP Foundation. The deal also calls for Google to pay more than \$2.1 million to the attorneys who brought the lawsuit.

Google, Facebook, and Netflix are among companies that have resolved privacy class-actions by agreeing to donate money to nonprofits. For instance, Google recently agreed to donate more than \$3 million to six schools and nonprofits to settle a lawsuit alleging that it violated Safari users' privacy by circumventing their no-tracking settings. (Frank recently brought a separate challenge to that settlement.)

Reported in: *mediapost.com*, July 20, *Reuters*, April 30; *cei.org*, April 30.

Arguing that corrections officials should not receive "blind deference" in deciding what publications inmates can read, attorneys for *Prison Legal News* have taken a long-running First Amendment fight to the US Supreme Court. The monthly magazine has been blocked from distribution to Florida prison inmates since 2009. In *Prison Legal News v. Florida Department of Corrections*, the US Court of Appeals for the 11th Circuit in May sided with the corrections department, which argues that advertisements in *Prison Legal News* pose security risks.

The magazine filed a petition in September, asking the Supreme Court to recognize that this "censorship" by the department violates First Amendment rights to free speech and a free press.

"Publishers, reporters, and advertisers have a constitutionally protected interest in communicating with



prisoners, and prisoners have a right to receive those communications,” the 45-page petition said. “These protections are all the more important when the publication at issue is uniquely designed to inform prisoners of their legal rights, and a prison’s decision to silence that speech is all the more suspect when it is applied in a blanket manner to the entire incarcerated population based on bare assertions of security concerns without supporting evidence.”

But the Department of Corrections has pointed to ads for such things as three-way calling services and pen pal solicitation as security threats. For example, the department is concerned that three-way calling services could hamper its ability to determine the identities and locations of people that inmates are calling and could undermine approved lists of people that inmates can call, according to the May appeals-court ruling.

The appeals court also pointed to Supreme Court decisions that it said require granting “substantial deference to the decisions of prison officials.”

“The Florida Department of Corrections has rules aimed at preventing fraud schemes and other criminal activity originating from behind bars, but inmates continually attempt to circumvent measures in place to enforce those rules,” the Atlanta-based appeals court said in its ruling. “The department, for its part, continually strives to limit sources of temptation and the means that inmates can use to commit crimes. One way it does that is by preventing inmates from receiving publications with prominent or prevalent advertisements for prohibited services, such as three-way calling and pen pal solicitation, that threaten other inmates and the public. In the department’s experience, those ads not only tempt inmates to violate

the rules and commit crimes, but also enable them to do so.”

In arguing that the Supreme Court should take up the First Amendment case, however, attorneys for *Prison Legal News* said other states could “follow Florida’s lead” in blocking the magazine or other publications. *Prison Legal News* is allowed to be distributed to inmates in other states.

“Although the censorship [of *Prison Legal News*] has been limited to Florida, the threat to First Amendment rights if the decision is left standing certainly does not end there,” the petition said. “The Eleventh Circuit’s decision provides both an invitation and a roadmap to silence PLN and any other publication that seeks to inform prisoners of their rights or to expose unlawful conduct by prison officials. There is little doubt that the ruling below will prompt other prison systems to follow Florida’s lead. Rather than let that trend blossom into further censorship, this [Supreme] Court should step in now to vindicate the First Amendment.” Reported in: *Panama City News Herald*, September 20.

LIBRARIES Centennial, Colorado

Seeking to block a research database used in many school libraries, a lawsuit alleges that educational software from EBSCO Industries allows school children to access pornography. In a local twist related to a national campaign against EBSCO, Colorado parents represented by a law firm that provides free counsel to mostly pro-life clients filed *Pornography is Not Education v. EBSCO and Colorado Library Consortium* in the **District Court of Arapahoe County, Colorado** on October 10.

The suit comes, in part, at the behest of a couple from Aurora, Colorado, Drew and Robin Paterson. In late 2016, they claimed that the

EBSCO databases—which their child was using in school in the Cherry Creek School District in suburban Denver at the time—returned pornographic links for seemingly innocuous search terms. The couple protested and negotiated with the school board for nearly two years. Eventually, the school district dropped its contract with EBSCO in September [see “*Censorship Dateline*,” page 23]—but the Paterson’s organization, named Pornography is Not Education, broadened the attack by suing EBSCO and the statewide nonprofit library consortium that helps Colorado libraries obtain access to EBSCO’s research tools. The parents are represented in court by the national Thomas More Society, which has offices in Chicago and Omaha.

The suit claims that searching terms such as “romance” through the EBSCO database can generate links to pornographic titles. The claim alleges the title “Bondage bites: 69 super-short stories of love, lust and BDSM,” was readily available after only a few clicks.

EBSCO vehemently denies the allegations. Jessica Holmes, a spokeswoman for the company, said that the company, “does not license any pornographic titles, yet content from our databases is erroneously being labelled pornographic. The content being questioned is from mainstream magazines.”

EBSCO is used by an estimated 55,000 schools across the country. Since June 2017, it has been the target of a national censorship campaign promoted by the National Coalition on Sexual Exploitation (formerly known as Morality in Media), according to James LaRue, then-director of the American Library Association’s Office for Intellectual Freedom [see JIPF, *Fall-Winter 2018*, pages 13–19].



The lawsuit asks the Colorado court to halt EBSCO from providing sexually explicit content to children; to stop “conspiring to violate federal and state laws;” to compensate the plaintiff’s legal fees; and to provide \$500 in damages per violation of the Colorado Consumer Protection Act, which serves to protect the state’s residents from fraud.

Yet the lawsuit “fails to support any reasonable conclusion that the complained-of content meets the legal standard for obscenity for adults or minors,” according to Deborah Caldwell-Stone, deputy director of the Office for Intellectual Freedom. She said the lawsuit makes general “conclusory” allegations with little or no evidence. Further, she questioned the legal significance of the “harms” that the parents say that EBSCO caused. “None of these claimed ‘injuries’ are recognized rights or legally protected interests that the law protects,” she wrote on OIF’s blog. Reported in: *Aurora Sentinel*, October 11; Thomas More Society, October 11; oif.ala.org, October 15.

Houston, Texas

The case against a “Drag Queen Story Hour” at a Houston public library was not strong enough for Tex Christopher and his religious right Campaign for Houston PAC to immediately halt the event.

The lawsuit against the city of Houston and Rhea Lawson, head of the city’s library system, *Christopher et al. v. Lawson et al.*, will proceed in the **US District Court for the Southern District of Texas**, although Chief US District Judge Lee H. Rosenthal on October 24 denied the request for an emergency injunction.

The lawsuit argues that having drag queens and transgender storytellers in a public library violates the freedom of religion clause in the

Constitution. Christopher claims that Drag Queen Story Hours may indoctrinate children to believe in another religion, which he identifies as Secular Humanism.

Drag Queen Story Hour, a national non-profit organization, says its goal is to promote reading and acceptance of diversity. Its supporters say drag queens do not magically turn children queer by reading them *Clifford the Big Red Dog* or *And Tango Makes Three*. Reported in: *Houston Chronicle*, October 25, *LGBTQ Nation*, October 26; vox.com, November 5.

San Antonio, Texas

The enforcement of “free speech zones” outside of a public library in San Antonio, Texas, is being challenged by the San Antonio Professional Fire Fighters Union in a lawsuit announced by the union on July 19. The case, *San Antonio Firefighters’ Association Local 624 v. City of Antonio et al.*, was to be heard in US District Court for the **Western District of Texas, San Antonio Division**.

The union said its First Amendment rights were violated when it tried to gather signatures on petitions to amend the city charter.

A separate lawsuit was later filed against the union in August by Secure San Antonio’s Future, a political action committee that was set up earlier this summer as a means to fight the union’s proposed charter amendments. The PAC’s case ignores the location of the petition drive, but attacks how the union paid to gather signatures. The Texas Supreme Court on September 5 rejected the PAC’s request to invalidate the upcoming charter-amendment vote, in a case referred to as *Secure San Antonio’s Future PAC vs. Association of Firefighters 624*.

The union said the free speech zone at the Semmes Branch Library

on Judson Road, where the firefighters started their petition drive in March, is 288 feet away from the front door of the library and prevented union members from getting signatures for the union’s petition.

The president of the San Antonio Professional Firefighters Association, Chris Steele, released a statement saying, “Politicians were allowed to be at one place to talk to voters and citizens, but when it came time for regular citizens to have access to voters, the city attorney instructed the San Antonio Police Department to arrest anyone refusing to move to the so-called free speech zones. How are you supposed to talk to citizens that are nearly a football field away, and if you try to talk to them, you will be arrested?”

At a news conference on July 19, the firefighters union showed a copy of its lawsuit, but it had not yet been filed with the court.

The city has responded to the lawsuit, saying the purpose of free speech zones is to give library guests and voters space from people engaging in political activity. “The city has followed the law as the courts have allowed it for many, many years,” public affairs director Jeff Coyle said. “Free speech and First Amendment rights are equally important to us, but we do require they be in designated areas at our libraries. It’s that simple.”

One reason officials created the zones at libraries because they are commonly used as polling places during elections. Yet the union president said if candidates such as the mayor are allowed go to libraries on election days and be within 100 feet of the entrance, then signature-gatherers and other citizens exercising their free speech rights ought to be able to be closer as well.

The Firefighters Association has filed three petitions to make changes



to the city's charter. One is for a salary cap and term limits on the position of city manager. The second would allow the union to bypass contract negotiations and go straight to arbitration. The third would lessen the requirements for people to stop the City Council from taking action.

Ironically, the union succeeded in its petition gathering efforts, despite what it claims was the egregious efforts of the city to block its campaigning. The three measures made it onto the ballot.

The PAC's lawsuit had tried to keep it off the ballot with a charge that the fire union illegally gathered signatures by paying the company Texas Petition Strategies with union dues instead of political contributions.

The underlying issue is a labor dispute between the union and the city of San Antonio. The firefighters' collective bargaining agreement expired on September 30, 2014, and firefighters have worked under an extension of the old contract since then. Negotiations on a new contract have broken off.

Reported in: KSAT-TV News, July 19; WOAI Newsradio, July 20; firehouse.com, July 20; Texas Public Radio, August 10; *Express News*, September 5; *The Rivard Report*, September 7.

SCHOOLS San Francisco, California

A federal appeals court on July 25 struck down a California school district's policy of inviting clergy members or others to lead prayers before its school board meetings. A unanimous three-judge panel of the **US Court of Appeals for the 9th Circuit**, in San Francisco, said the public school board was in violation of the First Amendment clause that mandates separation of church and state. In *Freedom from Religion Foundation v. Chino Valley*

Unified School District, the judges found that "The prayers frequently advanced religion in general and Christianity in particular."

The ruling involving the 28,000-student Chino Valley school district adds to the disagreement among federal appeals court circuits about school board prayers, potentially making the case one that might interest the US Supreme Court.

Other courts have sometimes found that a simple invocation at the start of a meeting can be acceptable, but the appellate judges in Chino upheld an earlier US District Court ruling in this case that the Chino Valley officials crossed the line.

Officially, the school board has been opening its meetings with invocations since 2013. But prayer at meetings goes back to at least 2010, according to the 9th Circuit Court's opinion. Over time, it expanded to include mid-meeting prayers, Bible readings, and proselytizing.

One of the plaintiffs, the Wisconsin-based Freedom From Religion Foundation, alleged that "meetings resemble a church service more than a school board meeting."

Evidence in the trial record convinced the 9th Circuit judges. At one meeting, the board president urged "everyone who does not know Jesus Christ to go and find Him." Another board member regularly closed meetings with a Bible reading, in addition to the prayers used to open meetings, according to the original suit. At a July 2015 school board meeting, that board member discussed his religious beliefs for 12 minutes during board members' comments at the end of the meeting.

What was the real reason for inviting clergy to school board meetings? "The prayer policy's purpose is predominantly religious, in violation of the Establishment Clause" of the First

Amendment, which prohibits a governmental establishment of religion, the judges determined.

"This is not the sort of solemnizing and unifying prayer, directed at lawmakers themselves and conducted before an audience of mature adults free from coercive pressures to participate," the court opinion reads in part. "These prayers typically take place before groups of schoolchildren whose attendance is not truly voluntary and whose relationship to school district officials, including the board, is not one of full parity." Reported in: *Daily Bulletin*, July 25; *Education Week*, July 25.

Denver, Colorado

A federal appeals court has reinstated a lawsuit filed by an Oklahoma educator who says he was dismissed after writing a letter on district letterhead supporting a reduced sentence for his nephew in a child pornography case. A three-judge panel of the **US Court of Appeals for the Tenth Circuit**, in Denver, ruled unanimously in *Bailey v. Independent School District No. 69*, that the letter by Chester Bailey Jr., the athletic director of the Mustang, Oklahoma, district, addressed a matter of public concern—a criminal's sentencing.

The court rejected the school district's arguments that it fired Bailey over the improper use of its letterhead, since it frequently allowed teachers and others to write letters of recommendation using the district's logo and their titles.

The appeals court thus revived Bailey's lawsuit alleging wrongful termination in retaliation for the exercise of his First Amendment rights.

Bailey had worked as athletic director at the district since 2009. In 2014, Dustin Graham, Bailey's nephew, pleaded guilty in state court to various charges relating to video



recordings he had made of women in the bathroom of his apartment without their consent. Among those charges was one count of manufacturing child pornography based on a video he recorded of a minor.

During sentencing proceedings, Bailey wrote a letter to the court on his nephew's behalf. Because the district does not have a single form of letterhead, Bailey created his own, using the district's logo and address and signing the letter with his name and title. Court papers say it was common for educators in the district to create such letterhead.

It isn't clear if the letter had an effect on Graham's initial sentence, but in 2015 Bailey sent another letter, again on the impromptu district letterhead, supporting a sentence reduction for his nephew.

Graham did secure an early release.

In 2016, Sean McDaniel, the superintendent of the district, received a package from a relative of Bailey's who was evidently upset about Graham's early release and other family disputes, court papers say. The package alerted the superintendent to the details of Graham's case and about one of the letters that Bailey had sent.

McDaniel confronted Bailey, expressing concern that the athletic director had used district letterhead to advocate for the early release of someone convicted of a child pornography offense. The superintendent recommended Bailey's termination, which the school board approved.

Bailey sued the district and McDaniel on the First Amendment retaliation claim, but a federal district judge held that the content of Bailey's letters did not comment on a matter of public concern, and it granted summary judgment to the defendants.

The Tenth Circuit panel, however, declared, "The proper sentencing of convicted criminals is clearly a

matter of public concern," the appeals court said, adding that such proceedings "implicate public safety, an issue of vital importance to most communities, as well as questions regarding rehabilitation, deterrence, and reintegration of people who have committed criminal acts."

The court said that just because Bailey had a personal interest in his nephew's sentencing did not preclude his speech from addressing a public matter.

The court rejected the district's arguments that the use of the district letterhead suggested Bailey was speaking in an official capacity, which would allow greater regulation of his speech. It also said that the letter's commenting on a criminal sentence for someone convicted on a child pornography charge had not caused any disruption.

The court suggested that a district might have a legitimate interest in the control of its letterhead, but it assumed based on the record that Bailey was terminated based on the content of his letters and not merely the use of the letterhead.

Bailey's suit against the district itself may now proceed. Reported in: *Education Week*, July 24.

Chicago, Illinois

To settle a lawsuit, Chicago Public Schools cancelled the scheduled appearance of sex columnist and dancer Nicolette Pawlowski for its sexual education programming for 7th through 12th graders at Whitney M. Young Magnet High School. In the voluntary dismissal of a restraining order in *Wagenmaker et al. v. Kenner et al.*, in **Circuit Court of Cook County, Chancery Division**, on April 18, the school board also agreed to provide each administrator within the district with a copy of the *CPS Policy Manual for Sexual Health*

Education and Sexual Health Education Toolkit, which include details on parental notice, opt-out, and instructor approval requirements.

Parents Sally and Daniel Wagenmaker, represented by lawyers from the non-profit, pro-life Thomas More Society, had charged Principal Joyce Kenner and other administrators with violating state law by not providing parents with enough advance notice and an opportunity to have their child opt out of the program.

The Thomas More Society also charged that the planned program "violated Illinois law requiring emphasis on abstinence and avoidance of risky sexual behaviors by booking the sex columnist, whose extensive online articles advocated casual hook-up sex, pornography use and other risky sex behaviors."

According to a copy of a portion of the email from administrators included in the complaint, Pawlowski, in a session entitled "Straight Talk on Bodies, Relationships & Consent," had been scheduled to address 7th and 8th grade students. She was also scheduled to present a session entitled "Not the Birds and the Bees: Real Talk on Relationships, Sexuality and Consent" for juniors and freshmen, and "University Life: Sexuality and Dating" for seniors.

The Wagenmakers said that in researching on their own, they discovered Pawlowski has authored a column called "Hump Day," in which she published articles headlined, "Porn hardcore enough for Republicans and 11 year olds," "Playing it safe: Why hooking up safely with others is normal" and "Like a virgin: How to 'ease' in to first time." They cited articles published by Pawlowski purportedly extolling the virtues of pornography and seeming to encourage one-night stands.



CPS officials declined to comment on the case when asked by the *Cook County Record*. Reported in *Cook County Record*, April 19; Thomas More Society, June 15.

Detroit, Michigan The US District Court for the Eastern District of Michigan

on June 29 dismissed a legal challenge asserting that Michigan policymakers deprived Detroit students of a “constitutional right to literacy.” The case, *Gary B. v. Snyder*, based its claims in the US Constitution rather than in state laws—the basis of most education-equity lawsuits—arguing that students in the Detroit schools were so ill-served by Michigan policymakers that their failure to learn how to read ran afoul of their due process and equal protection rights under the 14th Amendment.

While sympathizing with the students who brought the lawsuit, Judge Stephen J. Murphy III wrote that despite the well-documented problems of vermin-filled classrooms, outdated textbooks, and dysfunctional leadership in Detroit, the US Constitution doesn’t guarantee literacy.

“The conditions and outcomes of Plaintiffs’ schools, as alleged, are nothing short of devastating. When a child who could be taught to read goes untaught, the child suffers a lasting injury—and so does society,” Murphy wrote. “But the Court is faced with a discrete question: does the due process clause demand that a state affirmatively provide each child with a defined, minimum level of education by which the child can attain literacy? Based on the foregoing analysis, the answer to the question is no.”

Writing in *Education Week*, Stephen Sawchuk said,

This case matters is because it characterized equity in terms of a specific

educational outcome: literacy. That is a shift from prior lawsuits, which have tended to focus on school access or on school financing. The case was always going to be a bit of an uphill battle, given the historic reluctance of courts to read educational rights into the US Constitution, which doesn’t mention education at all.

But Murphy’s decision ruled that while literacy is crucial and a necessity for public life, it is not a positive right. (Similarly, the judge noted, federal courts have not found a fundamental right to sanitary housing or water and sewer service, though those are also arguably prerequisites for a productive life.) Nor could the plaintiffs prove that the students were treated differently because of their race, he added.

The plaintiffs have vowed to appeal the decision. “Historically, denial of access to literacy has been a tool of unlawful discrimination used in an attempt to stigmatize, disenfranchise, and otherwise hold back certain communities. The most telling fact in Michigan is that this remains the case today,” said Mark Rosenbaum, an attorney for Public Counsel, one of the groups representing the plaintiffs, in a statement. “That is why we will continue to fight for the children of Detroit to have their day in court.” Reported in: *Education Week*, July 2.

Hillsboro, Oregon

Liberty High School in Hillsboro, Oregon, has agreed that it had violated a student’s First Amendment liberty to wear a shirt with an unpopular message backing Trump’s immigration and Homeland Security policies. On July 24, lawyers for Addison Barnes, an 18-year-old senior, announced they reached a settlement with the school district in *Barnes v. Liberty High School et al.*, the case they

had filed in **US District Court, Oregon District.**

Barnes had been told to go home or cover up his “Donald J. Trump Border Wall Construction Co.” shirt in January. He was suspended for not complying. He then sued the high school, the principal, and the Hillsboro School District, arguing they violated his First Amendment rights.

In late May, a federal judge issued a temporary restraining order, essentially barring the school for the remainder of the school year from enforcing its earlier decision prohibiting Barnes from wearing the shirt. In the settlement, Principal Greg Timmons will issue a letter of apology and the district will pay \$25,000 for Barnes’ attorney fees.

“I brought this case to stand up for myself and other students who might be afraid to express their right-of-center views,” Barnes said in a statement.

School district officials said in a statement that courts have ruled differently in similar cases, leaving students’ First Amendment rights in school a “gray area.” They said they decided to settle the T-shirt case “given the cost and disruption of litigation.”

The principal’s letter was brief, apologized for Barnes’ initial suspension and wished him well in the future, they said.

School officials had defended their actions in court, saying the shirt would contribute to a “hostile learning environment” and would make students feel insecure in school, noting that about 33 percent of the high school’s students are of Hispanic descent. The district described increased racial tensions arising from racially charged language around immigration, school officials said.

But US District Judge Michael W. Mosman found the school district



couldn't justify its censorship. The judge said he balanced constitutionally protected speech with the orderly running of a school. The school district is entitled to be concerned about the response of other students to the T-shirt, the judge said. But the "thin" court record offered little support for the district's argument that the shirt could "substantially disrupt" the school, he said. Reported in: *Oregonian*, July 24; KGW News, May 22.

Houston, Texas

Texas Attorney General Ken Paxton is defending a state law that requires schoolchildren to say the Pledge of Allegiance. Paxton is joining a lawsuit, *Landry v. Cypress Fairbanks ISD*, that could determine the legality of similar mandates nationwide. On September 25, Paxton intervened in the lawsuit that Kizzy Landry filed last October in **Texas Southern District Court** against the school district and several officials after a principal kicked her daughter, India, out of school for sitting during the pledge.

Landry supported her child's decision to sit. And while Texas allows parents to sign a waiver letting their child opt out of saying the pledge, Landry contends that the law requiring kids to say it in the first place violates their free speech rights.

Paxton disagreed, arguing: "School children cannot unilaterally refuse to participate in the pledge." In a prepared statement, he declared, "Requiring the pledge to be recited at the start of every school day has the laudable result of fostering respect for our flag and a patriotic love of our country."

The case is set for trial April 15, 2019. Experts said its outcome could have ripple effects nationwide.

"We've only ever seen one case litigated involving the mandate to say the pledge in modern history,"

Frank LoMonte, one of the nation's foremost experts on free speech and student rights, said in an interview. "If this one were to go up [to the US Supreme Court], it would be quite influential, not just in Texas but across the country as the first of its kind."

In July, a federal judge refused to throw out the case, saying that India could proceed with First Amendment free speech and 14th Amendment due process and equal protection claims against the district and its leaders.

The attorney general has the right to intervene in cases when the constitutionality of a state law is questioned.

The district, in responding to a request for comment, reiterated that state law requires students to stand for the pledge unless their parents sign a waiver.

LoMonte, the free speech and student rights expert, said punishing a child for refusing to stand flies in the face of earlier Supreme Court decisions. He cited a 1943 Supreme Court ruling that forcing schoolchildren to salute the flag violated their First Amendment right to free speech. Then, in 1969, the court ruled that school officials can suppress students' free speech rights only if they can prove the conduct would "materially and substantially interfere" with the school's operation.

States have tried to skirt these rulings by allowing parents to let their kids opt in or out of saying the pledge. A Florida law similar to Texas' was upheld after its legality was challenged. But the Supreme Court didn't take up the case, meaning the precedent applies only in Alabama, Florida, and Georgia.

LoMonte said the case could imperil compulsory pledge laws across the country if it ends up in the Supreme Court, a process that could take years. With students such as the survivors of the shooting in Parkland,

Florida, becoming more politically active, LoMonte said the rights of students are ripe for discussion. Reported in: *Dallas News*, September 25.

COLLEGES AND UNIVERSITIES

Ann Arbor, Michigan

US Attorney General Jeff Sessions promised that his Department of Justice would be more involved in cases of alleged censorship on college campuses. The department on June 11 issued a "statement of interest" in a free-speech lawsuit, *Speech First, Inc., v. Schlissel*, filed against the University of Michigan at Ann Arbor in the **US District Court for the Eastern District of Michigan**.

The department has filed similar statements in three other campus free-speech cases. Two involve colleges' use of free-speech zones and permitting. The other concerns a group of conservative students at the University of California at Berkeley who say the university selectively enforced its speaker policy in an attempt to censor their right to free speech.

Speech First describes itself as "a nonprofit membership association working to combat restrictions on free speech and other civil rights at colleges and universities across the United States." The Michigan lawsuit is the first the group has filed, and it is now soliciting new members.

In support of Speech First, the Justice Department's Statement of Interest argues that "the University of Michigan's Statement of Student Rights and Responsibilities, which prohibits 'harassment,' 'bullying,' and 'bias,' is unconstitutional because it offers no clear, objective definitions of the violations," the department said. "Instead, the Statement refers students to a wide array of 'examples of various interpretations that exist for the terms,' many of which depend



on a listener's subjective reaction to speech."

The department also said it was concerned that Michigan's bias-response team could be exerting a chilling effect on speech by disciplining students. The teams, which are meant to serve as a venue for students to report cases in which they feel maligned by someone else's bias, have also drawn criticism from free-speech advocates.

The University of Michigan's spokesman, Rick Fitzgerald, challenged the agency's statement. "The Department of Justice, like the plaintiff (Speech First), has seriously misstated University of Michigan policy and painted a false portrait of speech on our campus," he wrote in an email. "U-M prohibits 'harassing' and 'bullying,' but the definitions of those terms have just been streamlined and are based on provisions of Michigan law that have been upheld by the courts."

He added that the bias-response team doesn't have the authority to discipline students, and that, instead, it provides support to students on a voluntary basis.

Speech First's lawsuit against the university includes a long list of complaints about its policies and practices, as well as the assertion that the campus's climate chills the speech of conservative students enrolled there. But it's not clear from the complaint how those policies have actually affected any of the three students whom Free Speech says it is representing, beyond the alleged chilling effect.

Nicole Neily, president of Speech First, when questioned about how the university's policies affect students, said, "The harm being alleged is that it's a constitutionally impermissible prior restraint on speech."

The Justice Department's new statement of interest is just its latest

effort to shape the discussions of free speech on college campuses.

In September, Sessions declared in a much-publicized speech at Georgetown University that colleges were becoming "an echo chamber of political correctness and homogeneous thought, a shelter for fragile egos."

In January, Jesse Panuccio, a top official at the Justice Department, delivered a similar message, calling on colleges to punish students who disrupt speeches by controversial speakers. Reported in: *Chronicle of Higher Education*, June 11; Department of Justice Office of Public Affairs, June 11.

Austin, Texas

In defending its policy allowing the concealed carry of handguns in classrooms, the University of Texas (UT) took a surprising position in a federal appeals court—that individual professors do not have academic freedom. "The right to academic freedom, if it exists, belongs to the institution, not the individual professor," says a brief filed by the state's lawyers on behalf of UT President Gregory L. Fenves, several current and former UT System regents, and Texas Attorney General Ken Paxton. But, in a further twist, Fenves and the UT System say they don't really buy that argument.

"Academic freedom" was one of the arguments cited in a lawsuit challenging Senate Bill 11, the state's campus carry law. The law, which went into effect in August 2016, allows licensed handgun owners to carry concealed weapons into public university facilities. Three UT professors sued UT and the state of Texas to stop the law from affecting their classrooms.

Three UT faculty members—Jennifer Lynn Glass, Lisa Moore, and Mia Carter—contended in *Jennifer Glass et al. v. Ken Paxton et al.* that the potential presence of concealed

handguns in their classrooms has a chilling effect on discussion of controversial topics. "We want the option to say we do not want you to bring guns into our classroom and you may not bring guns into our classroom," their lawyer, Renea Hicks, told a three-judge panel of the **5th US Circuit Court of Appeals** during oral arguments.

UT President Fenves and the regents didn't challenge the notion of academic freedom when they initially responded to the professors' lawsuit. Indeed, in the original case in US District Court in Austin (Texas) two years ago, Attorney General Paxton's office seemed to acknowledge that professors have academic freedom. Arguments filed on behalf of the UT defendants included this reference to the campus carry policy: "It therefore does not implicate Plaintiffs' First Amendment right to academic freedom."

US District Judge Lee Yeakel said he found no precedent for the professors' argument that they have a right of academic freedom under the First Amendment so broad that it overrides decisions of the legislature and the university that employs them. In July 2017, he dismissed the case, ruling that the plaintiffs lack standing to assert their constitutional claims. Judge Yeakel concluded that the "plaintiffs present no concrete evidence to substantiate their fears [that concealed guns would chill their academic freedom], but instead rest on 'mere conjecture about possible actions.'"

The professors appealed to the 5th Circuit.

At that point, the attorney general added the argument that the professors didn't really have academic freedom: "Plaintiffs have no individual right to academic freedom, because the right to academic freedom is held



by their institution.” Under state law, the attorney general is entitled to decide what legal arguments to make on behalf of state agencies and universities. This became UT’s argument, too, because the legal arguments filed on behalf of Paxton, Fenves, and the regents were consolidated into a single brief.

The governor supported the Texas attorney general. “There’s a difference between privileges a university uses its discretion to give and legal rights a person can sue over,” said Marc Rylander, a spokesman for Governor Greg Abbott. “Academic freedom is a privilege the University of Texas System, like so many universities, has given to its faculty. But the courts have not recognized academic freedom as a legal right an individual can sue over—and certainly not a right like here, where a handful of professors want to weaponize academic freedom to conform a campus to their own image.”

A panel of the 5th Circuit Court of Appeals on August 16 upheld the lower court’s dismissal of the lawsuit. It found that Professor Glass failed to prove that any chilling of her academic freedom was directly caused by the Texas concealed carry law. According to the appellate court’s decision, “The problem with Glass’s argument is that none of the cited evidence alleges a certainty that a license-holder will illegally brandish a firearm in a classroom.”

Thus the decision seems to assume that professors do have academic freedom. The judges ignored the state’s arguments about whether academic freedom is granted by the university, or whether it is an individual right of each professor.

Outside of court, the UT president expressed support for professors’ academic freedom.

After a local newspaper, the *American-Statesman*, began asking questions about UT’s legal stance in the case (before the appellate decision was announced), Fenves sent a letter to faculty leaders seeking to reassure them.

“Because of the importance of faculty members’ rights, I want to be clear that the academic freedom of our faculty to express, learn, teach, and discover is at the very foundation of the University of Texas at Austin’s mission,” Fenves wrote. He added that he is “unable to address any specific legal questions.”

Fenves has said that handguns have no place on a college campus, declaring them “contrary to our mission of education and research, which is based on inquiry, free speech, and debate.” But he also has said he is duty-bound to comply with the state’s campus carry law, and in drafting rules for the Austin flagship he concluded that banning guns from classrooms would have the effect of generally prohibiting them on campus, in violation of that law.

Karen Adler, a spokeswoman for the UT System, also sought to distance the University of Texas from its own legal arguments against academic freedom. She referred the *Statesman* to a Board of Regents rule that says faculty members at the system’s 14 campuses are free to conduct and publish research and to discuss their subjects in the classroom. “The UT System stands by this policy,” Adler said.

The rule notes that professors “are expected not to introduce into their teaching controversial matter that has no relation” to their subjects. It adds that a faculty member who speaks as a citizen “should be free from institutional censorship or discipline, but should make it plain that the faculty member is not an institutional spokesperson.”

The *American-Statesman* stated,

The argument that faculty members lack academic freedom seems to fly in the face of a core principle of higher education in the US, which holds that the unfettered search for truth, and its free expression, are fundamental to teaching and research. As the US Supreme Court put it in a 1967 case: “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”

Despite the public assurances, UT’s arguments in court questioning academic freedom raised concerns among professors at UT and other universities.

Alan Friedman, a professor of English and secretary of UT’s Faculty Council, said he was surprised and dismayed by the university’s legal posture, noting that it contradicts a statement of principles dating back to 1940 adopted by the American Association of University Professors and the Association of American Colleges & Universities. “As far as I know, all institutions of higher education worthy of the name adhere to that statement because it is the gold standard on the issue of academic freedom,” he said.

Risa Lieberwitz, general counsel for the American Association of University Professors and a professor of labor and employment law at Cornell University, said courts have recognized academic freedom. But faculty members at private colleges and universities do not have the constitutional right to academic freedom that their counterparts at state schools enjoy, she said. That’s because a First



Amendment right to academic freedom must be asserted against the government; as a public university, UT is an arm of the state. Private schools typically assure faculty members of academic freedom through contracts and school rules.

The right to academic freedom is not unlimited, said Lynn Pasquerella, president of the Association of American Colleges & Universities. For example, a professor can't use a classroom as a platform to espouse political or religious views wholly unrelated to the subject she or he is teaching. "We strongly believe that academic freedom is a right of individual faculty members and that there is a responsibility that accrues to that right," Pasquerella said. Reported in: *Austin American-Statesman*, July 18; *Daily Texan*, August 16; uscourts.gov, August 16.

Fairfax, Virginia

Activists have pushed back against the Charles Koch Foundation's campaign to promote conservative ideas through donations to public and private colleges and universities, such as Chapman University, Montana State University, and George Mason University. A group of those activists suffered a setback on July 5, when judge John M. Tran of **Virginia's Fairfax County Circuit Court** rejected their attempt to lift the curtain of secrecy shielding gifts to a foundation that raises money for George Mason.

A George Mason student group, Transparent GMU, had sued to gain access to donor agreements between the Koch Foundation and the George Mason University Foundation. The students argued that George Mason's foundation, an entity that accepts and manages private gifts, works for the public university and should be subject to the same open-records laws.

But the ruling in *Transparent GMU v. George Mason University* found that the foundation is not a public body under current Virginia law. The judge said state legislators could change that law if they saw fit.

This does little to clarify a cloudy legal picture. As the *Chronicle of Higher Education* has reported, little consensus exists on the reporting obligations of university foundations. States such as California have put laws in place that subject those foundations to open-records requests. Other states, such as Connecticut, have laws exempting foundations. The question has divided state courts.

Judge Tran's decision was issued as the Koch Foundation continues to pour money into academic programs. The foundation donated \$49 million to more than 250 colleges in 2016, according to the Associated Press, a 47-percent spike over the previous year.

At George Mason, students and professors had long pressed to find out more about the university's Koch ties. In April their pressure led George Mason to release some older agreements, dating as far back as 2003, between outside funders and the university. Those documents revealed that donors had leeway to influence faculty hiring and assessment. George Mason's president, Ángel Cabrera, said the deals fell short of academic standards and announced a review of gift-acceptance policies.

The students pledged to appeal Thursday's decision to the Virginia Supreme Court. Despite the setback, "we've successfully galvanized a national conversation about transparency and about the relationship private donors have with universities," said Samantha Parsons, a George Mason alumna who co-founded both Transparent GMU and UnKoch My

Campus, a national advocacy group for which she now works.

Jay O'Brien, chairman of the George Mason University Foundation, released a statement welcoming the July 5th court decision.

"We believe this ruling affirms that our foundation, and others like it at colleges and universities across the commonwealth, are private entities and that our donors have certain rights, including privacy, associated with their gifts," O'Brien said. "This does not however mean that this foundation or George Mason University, who we so proudly support, should ever relinquish its academic integrity." The foundation, he said, is cooperating with Cabrera's gift-policy review.

The judge's ruling did offer some hope for transparency advocates. The judge noted that, when it comes to donations with strings attached, those gifts could become public records once they are accepted and used by the university. That's because George Mason has a gift-acceptance committee composed largely of senior university officials. The committee's work, he wrote, is not exempt from the state's Freedom of Information Act. Reported in: *Chronicle of Higher Education*, July 6.

Madison, Wisconsin

The **Wisconsin Supreme Court** has come down on the side of political science professor John McAdams in his dispute against Marquette University, ending his nearly four-year absence from the Jesuit campus and an acrimonious battle over academic freedom and tenure rights. The justices ruled 4-2 in *McAdams v. Marquette* that Marquette violated McAdams' academic freedom by suspending him indefinitely, without pay, over a blog he wrote about a graduate student-teacher's alleged suppression



of a student's opinion against "gay marriage" in a classroom discussion. The court overturned an appellate court ruling and ordered McAdams reinstated immediately and awarded damages, including back pay.

"The undisputed facts show that the university breached its contract with Dr. McAdams when it suspended him for engaging in activity protected by the contract's guarantee of academic freedom," concluded the decision written by Justice Daniel Kelly.

The ruling stated that Marquette violated McAdams' academic freedom by suspending him for the November 9, 2014, blog post he wrote about then-graduate student-teacher Cheryl Abbate. The court stated the blog was an "extramural comment" protected under the tenure contract.

McAdams had alleged on his personal blog, "Marquette Warrior," that Abbate stifled a student's attempt October 28, 2014, to present a view opposing "gay marriage" in her philosophy class—a characterization of events Abbate later disputed.

The student secretly recorded his confrontation of Abbate after class and then gave the recording to McAdams, his academic adviser. When McAdams wrote about the account, he linked to Abbate's blog, where her contact information was two page clicks away. The post went viral and reached a new audience, and Abbate found her inbox flooded with a torrent of largely male readers sending her violent and obscene messages.

By December 2014, Abbate had left Marquette, and McAdams was suspended from campus.

A seven-member faculty hearing committee selected by the academic senate investigated and ultimately recommended in January 2016 that McAdams be suspended with benefits minus pay for one to two semesters. It stopped short of recommending

McAdams' dismissal, citing the "complex" nature of the case. Marquette President Michael Lovell adopted the recommendation, but then added the requirement that McAdams admit fault and apologize to Abbate by April 4, 2016.

McAdams refused and sued. McAdams, who is an evangelical Protestant, has described himself as a professor whose conservative views run afoul of political correctness on Marquette's campus. He has used his personal blog particularly in calling the university to uphold its Catholic identity. In a prior interview with the *National Catholic Register*, he described the demand to write the letter as akin to "the Stalinist purge trials of the 1930s."

The university had unsuccessfully argued the high court should defer to the university's disciplinary judgment and affirm a circuit court ruling that held that "Dr. McAdams' actions are in direct conflict with Marquette's foundational values as a Jesuit university of *cura personalis*—care for the whole person." The high court refused to defer to Marquette's disciplinary process, stating it was "structurally flawed" as a legal arbitration process and found that McAdams had a right to sue in Wisconsin courts.

Justice Ann Walsh Bradley, writing for the dissent, objected that the majority had violated Marquette's academic freedom by siding with McAdams, whom she noted actively pushed the story about Abbate beyond his blog to other local and national news outlets. "In determining who may teach at its university, Marquette has academic freedom to uphold its values and principles," she said. "It has academic freedom to provide an educational environment that is consistent with its mission as a university." She added the decision erodes the shared governance principles of universities

and the rights of tenured faculty to judge their peers.

Ralph Weber, Marquette's legal counsel in this case, said the case had nothing to do with McAdams' conservative politics, but was about McAdams' violating the responsibility tenured professors have toward students, including graduate student-teachers.

McAdams, for his part, said he would continue blogging about the goings-on at Marquette. However, McAdams said he will take into consideration whether a person mentioned in his blog might suffer harassment as a consequence.

Rick Esenberg, the president of the Wisconsin Institute for Law and Liberty who represented McAdams, said the high court was making Marquette abide by its contractual guarantee of academic freedom. In this case, he added, the court made Marquette follow a lesson he learned from the nuns in Catholic school: "When you make a promise, you have to keep it."

The case before the Wisconsin Supreme Court had generated national attention, with approximately a dozen supporting briefs from outside parties on both sides and the interest of tenured faculty around the United States. Reported in: *National Catholic Register*, July 11; *Chronicle of Higher Education*, July 12.

Milwaukee, Wisconsin

A university's ban on "offensive" speech on campus is being challenged in *Olsen v. Northeast Wisconsin Technical College* in the **US District Court for the Eastern District of Wisconsin**. The lawsuit was filed by the Wisconsin Institute for Law & Liberty.

The university's policy—applied in this case to someone passing out religious valentines—also bans "signs . . . with offensive content," and more generally limits even non-offensive



signs and leafletting to a narrow “free speech zone.”

According to Eugene Volokh, in his blog “the Volokh Conspiracy” on reason.com, “The ban on ‘offensive’ speech is clearly unconstitutionally vague and likely viewpoint-based; and, even setting that aside, the rule limiting leafletting to a narrow zone would be unconstitutional even if it were content-neutral. A university does have power to limit speech that is loud enough to cause a disruption, or to limit large demonstrations that can block pedestrian traffic; that is particularly so within university buildings. But the policy here is much broader than that.”

Reported in: reason.com, September 6.

INTERNET Washington, DC

The Electronic Frontier Foundation (EFF) has asked a court to invalidate a new anti-prostitution law, saying that it amounts to unconstitutional censorship of the internet.

The Fight Online Sex Trafficking Act (FOSTA) was approved by Congress and signed by President Trump in April. Websites responded to the new law by shutting down sex-work forums, potentially endangering sex workers who used the sites to screen clients and avoid dangerous situations.

The EFF filed the lawsuit, *Woodhull Freedom Foundation et al. v. USA*, on June 28 in **US District Court for the District of Columbia** on behalf of several plaintiffs.

“In our lawsuit, two human rights organizations, an individual advocate for sex workers, a certified non-sexual massage therapist, and the Internet Archive, are challenging the law as an unconstitutional violation of the First and Fifth Amendments,” EFF Civil Liberties Director David Greene wrote. “Although the law was passed

by Congress for the worthy purpose of fighting sex trafficking, its broad language makes criminals of those who advocate for and provide resources to adult, consensual sex workers and actually hinders efforts to prosecute sex traffickers and aid victims.”

Despite Congress’s stated purpose of stopping sex trafficking, FOSTA barely distinguishes between trafficking and consensual sex work.

While Section 230 of the 1996 Communications Decency Act provides website operators with broad immunity for hosting third-party content, FOSTA eliminates that immunity for content that promotes or facilitates prostitution. Operators of websites that let sex workers interact with clients could thus face 25 years in prison under the new law.

FOSTA “is the most comprehensive censorship of internet speech in America in the last 20 years,” Greene said.

The complaint asks the court to declare that FOSTA is unconstitutional and to permanently enjoin the US from enforcing it. The lawsuit argues: “The law erroneously conflates all sex work with trafficking. By employing expansive and undefined terms to regulate online speech, backed by the threat of heavy criminal penalties and civil liability, FOSTA casts a pall over any online communication with even remote connections to sexual relations. It has impeded efforts to prevent trafficking and rescue victims, and has only made all forms of sex work more dangerous. FOSTA has undermined protections for online freedom of expression, contrary to the near unanimity of judicial decisions over the past two decades.”

The speech of sex worker advocates is being inhibited “even though they do not advocate for, and indeed are firmly opposed to, sex trafficking,”

the lawsuit said. FOSTA “prohibits a substantial amount of protected expression” by making it a crime to operate an “interactive computer service” with the intent to “promote” or “facilitate” prostitution, the lawsuit said.

FOSTA places no real limits on “what might constitute promotion or facilitation of prostitution or trafficking,” violating a precedent that the government must regulate speech “only with narrow specificity,” the lawsuit said. If the government can achieve its interests in a way that doesn’t restrict speech “or that restricts less speech,” it is required to do so, the lawsuit said.

One plaintiff, the Woodhull Freedom Foundation, “works to support the health, safety, and protection of sex workers, among other things,” the EFF wrote. “Woodhull wanted to publish information on its website to help sex workers understand what FOSTA meant to them. But instead, worried about liability under FOSTA, Woodhull was forced to censor its own speech and the speech of others who wanted to contribute to their blog. Woodhull is also concerned about the impact of FOSTA on its upcoming annual summit, scheduled for next month.”

FOSTA already “led to the shutdown of Craigslist’s ‘Therapeutic Services’ section, which has imperiled the business of a licensed massage therapist who is another plaintiff in this case,” the EFF wrote. The Internet Archive joined the lawsuit “because the law might hinder its work of cataloging and storing 330 billion web pages from 1996 to the present.”

“FOSTA calls into serious question the legality of online speech that advocates for the decriminalization of sex work, or provides health and safety information to sex workers,” the EFF wrote.



Human Rights Watch, which “advocates globally for ways to protect sex workers from violence, health risks, and other human rights abuses,” is worried “that its efforts to expose abuses against sex workers and decriminalize voluntary sex work could be seen as ‘facilitating’ ‘prostitution,’ or in some way assisting sex trafficking,” the EFF wrote. Reported in: arstechnica.com, June 29.

Hudson County, New Jersey

“The right to be forgotten” (i.e., to have material about oneself removed from databases and search engine results) may be legally recognized in Europe, but hasn’t been considered legal doctrine in the United States—until Presiding Judge Jeffrey Jablonski of the **Superior Court of New Jersey, Chancery Division**, in Hudson County issued a remarkable and unusual temporary restraining order. In *Malandrucco v. Google*, he has commanded Google to “de-index [an] ‘explicit’ post-assault image from searches of ‘Greg’ and ‘Gregory Malandrucco’ and/or ‘Malandrucco,’” and has forbidden Google from “continuing to permit the display of the subject image.”

The court papers make clear that the order is targeted largely at a *Chicago Tribune* blog post by columnist Eric Zorn about a police assault on Malandrucco and his friend Matthew Clark; the column contains photos of the two men with injuries to their faces. (The order was issued July 6, but Eugene Volokh, who reported it on his “Volokh Conspiracy” blog on reason.com, said he found the column, with the help of the “invaluable” Lumen Database, a few weeks later.) Google has apparently not complied, and Malandrucco has asked Judge Jablonski to hold Google in contempt of court; the hearing on

that was scheduled for August 17, but on August 6, Google and the *Tribune* had the case moved to federal court. By August 14, Malandrucco dropped his lawsuit.

The order against Google also seems to cover, besides the image at the *Chicago Tribune*, a similar image posted on an entirely different blog, which was criticizing Malandrucco and Clark and their lawsuit. Volokh commented,

The order against Google is legally unjustified. (Almost all I say here is also true of the apparently intended order against the *Tribune* as well.) To start with the substantive law, there was no evidence that the material is defamatory—the picture is apparently accurate. It is not actionable under the “disclosure of private facts” tort, since that tort does not apply to newsworthy material, and the picture of a victim of police brutality that illustrates a post about the brutality is newsworthy.

At the hearing, Malandrucco suggested that the use of the photo, which was apparently taken by himself, infringes his copyright. But, first, such a news use of the photo would likely be a fair use; and, more importantly, copyright claims cannot be brought in a state court lawsuit. Malandrucco also claimed that there was “potential violation of both state-wide and federal crime victims’ rights laws,” but such laws control what government officials do, not what the media or others do.

Google wouldn’t comment on the lawsuits, but the *Tribune* passed along this statement: “We are aware of the recent complaints against *Chicago Tribune* and Google. We will be responding in court in due course and believe the allegations are wholly without merit. This suit grew out of

news coverage of a lawsuit alleging that off-duty Chicago police officers beat two men. It was unquestionably newsworthy at the time, and that coverage remains an important part of the public record and should not be erased from the internet.”

Volokh also wrote, “The order against Google is procedurally defective as well: A court can’t just order Google to stop displaying certain material—even temporarily—based simply on the plaintiff’s say-so, at least absent some extraordinary urgency. . . . I think that any injunction entered before a full hearing on the merits at which speech is found to be constitutionally unprotected is an unconstitutional prior restraint.”

Volokh did some research into the backstory, and found that prior to this lawsuit, Malandrucco worked to have information about himself removed from more than 130 publications. This led Volokh to conclude:

This history suggests that the lawsuits against Google and the *Chicago Tribune* are aimed not just at removing a particular photo of an otherwise anonymous citizen. Instead, they seem to be part of a broader campaign to hide a considerable amount of commentary and political activism from the publicly available record. And I think this helps reinforce the wisdom of existing American law, which generally does not let people use coercive government power to order search engines and publishers to hide such information.

Except, apparently, in a courtroom in New Jersey.

Reported in: reason.com, August 3.

Houston, Texas

It appears the state of Texas is offering a limited “right to be forgotten” in county courts. In *Barone v. Harris*



County Sheriff's Office, the **District Court of Harris County, Texas**, not only ordered the expungement of official arrest records, but also sent an official copy of the expungement order to KTRK-TV News, the ABC-affiliate in Houston. A story subsequently disappeared from the TV station's website, which had reported that Damone Barone had lost his job as a public school teacher, even though charges were dropped against him in a domestic violence arrest that occurred away from school.

Tim Cushing, in his "Free Speech" blog on Techdirt, wrote:

While his case may have been expunged, expungement only covers the official record. This would remove info from government databases. Texas law also provides for the removal of info from certain sites reliant on public records (mugshot sites, background check services), but the law does not go so far as to demand news sites and search engines purge themselves of articles related to now-expunged criminal acts.

A lower court decided to drag Google into this, demanding it de-index anything covering the expunged crime. Google did not comply and the state appeals court reversed the lower court's order, finding it not so much a violation of the First Amendment (which it is), but that it skirted due process by not allowing Google and the sites being de-indexed to argue against the removal order in court.

Cushing also wrote, "A few years back, the state appeals court had to get involved and remind the county no such right [to have nongovernmental records expunged] exists" in Texas. He added, "KTRK was under no legal obligation to remove the story. State law does not require the deletion

of news stories following an expungement order." Reported in: techdirt.com, July 24; reason.com, July 16.

PRISONS Springfield, Illinois

Historian Heather Thompson's Pulitzer Prize-winning book *Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy* was censored by Illinois prison officials. Attorneys from Uptown People's Law Center (UPLC) in Chicago filed a lawsuit against the Illinois Department of Corrections on her behalf on September 13. The case, *Thompson v. Baldwin* in the **US District Court for Central Illinois**, seeks damages and an injunction to end the censorship, and it is the second lawsuit from UPLC to challenge censorship. Another lawsuit filed in February alleged corrections officials were censoring issues of *Prison Legal News*.

The lawsuit alleges that the censorship of *Blood in the Water* is "arbitrarily applied," as the book was sent to three different prisons and censored only at Pontiac and Logan Correctional Centers. It argues this censorship is a violation of the author's First Amendment right to communicate with incarcerated people, as such communication should only be restricted when there is a legitimate penological interest. The lawsuit also claims that her Fourteenth Amendment right to due process was violated because she did not receive notice of this restriction, and as such was not provided an opportunity to challenge it.

The book provides a thorough history and analysis of the Attica prison uprising, detailing events beforehand, the week-long uprising, ensuing legal battles, and the event's role in perpetuating mass incarceration in the United States. *Blood in the Water* has won high praise and numerous awards, including the Pulitzer Prize in

History, the Bancroft Prize in American History and Diplomacy, and the Public Information Award from the New York Bar Association. The book was also included on more than a dozen "Best of 2016" lists, including the *New York Times*' Most Notable Books list, as well as similar lists published by *Kirkus*, *Publishers Weekly*, *Newsweek*, *Christian Science Monitor*, the *Boston Globe*, and others.

"It is unconscionable that prisons forbid human beings on the inside to read any book, and I am determined to speak out on behalf of the First Amendment wherever it is being violated," said author Heather Thompson. "My book underscores the sanctity of both correctional officer and prisoner lives, and covers an important event in American history that I have the right to share with any American who wants to learn about our country's past."

Alan Mills, executive director of UPLC, said, "We've been negotiating with the department to see if whether they would agree to voluntarily reverse their position. A week or so ago, they said they would not."

Officials are "over-censoring things that aren't any sensitive security issue at all but are things the department just doesn't want any prisoners to read about," Mills added. There also is "no sort of central review here. . . . Each individual publication officer at each individual prison is sort of making these decisions on the fly, as evidenced by this case."

The author "has a Constitutional right to share her book with prisoners," Mills said. "This right must not be infringed upon at the whims of the Illinois Department of Corrections. What's more, prisoners should be able to read this fantastic, important book. IDOC may not like the book's content, but that is not a sufficient legal reason to censor it." Reported in:



suburbanchicagoland.com, September 13; shadowproof.com, September 13.

FREEDOM OF THE PRESS Los Angeles, California

A federal judge on July 17 lifted a controversial order requiring the *Los Angeles Times* to remove information in an article about a former Glendale police detective accused of working with the Mexican Mafia.

Judge John F. Walter of the **US District Court for the Central District of California** had issued the order in the case of *USA v. Balian* on Saturday, July 14, after the *Los Angeles Times* published information on its website about a plea agreement between prosecutors and the former detective. The agreement had been sealed by the court but was placed in a court database of documents accessible to the public.

After the *Times* challenged the order, Walter held a hearing three days later, on Tuesday, July 17, in which he said he was initially unsure whether the newspaper had legally obtained access to the agreement but after conducting an investigation concluded the document was publicly posted as the result of a clerical error. The sealed agreement had been publicly available for more than 31 hours from the afternoon of Thursday, July 12 to the night of Friday, July 13, the judge said.

The document contained new details about crimes committed by the former detective while he was serving on the force, including how he overheard some of his Glendale police colleagues discussing plans to raid a local gang tied to the Mexican Mafia and then called someone in the criminal organization to warn them. The detective, John Saro Balian, pleaded guilty to one count each of soliciting a bribe, obstruction of justice, and making false statements to federal

investigators and agreed to cooperate with federal authorities.

The *Times* had been closely following the case as a matter of public interest because it involved a police officer who had allegedly tipped off gang leaders about impending raids and lied to cover up his crimes.

Judge Walter said he had issued his extraordinary order over the weekend out of concern for the safety of the former detective and his family; an attorney for Balian said their safety would be jeopardized by the paper's disclosure. The three days since his initial order, the judge said, should have given both the prosecutor and defense attorney enough time to take steps to protect Balian and his family from any potential harm.

"I'm concerned about somebody's life. And if I err, I'm going to err on the side of protecting this defendant," Walter said. He added: "I've always been a strong proponent of the First Amendment and believe in public access to this courtroom."

Walter said the paper was free to publish the information subject to his earlier order, but said he hoped the *Times* "will use some restraint . . . in light of potential consequences."

Balian's attorney, Craig Missakian, told the judge that he knew the law gives weight to the freedom of speech but said the risks to his client were grave enough to justify putting a restriction on the press.

Kelli Sager, an attorney for the *Times*, said no matter how the information was obtained by the reporter, the law was abundantly clear that the press cannot be prevented from publishing it or ordered to delete information it had already made public. She pointed to the US Supreme Court decision allowing the press to publish the Pentagon Papers, which was leaked to reporters and contained highly classified and sensitive

information. Sager said the case showed the incredibly high bar for "prior restraint," preventing the press from publication.

Courts have said such censorship should be permitted only in extraordinary cases, such as troop movements in wartime or information that would "set in motion a nuclear holocaust."

The *Times* initially complied with Walter's Saturday order, deleting paragraphs relating to the sealed information to avoid being held in contempt by the judge, but challenged it. After Walter lifted his order Tuesday, July 17, the original version of the article was restored on the paper's website.

Besides raising its challenge in Judge Walker's courtroom, the newspaper had also sought review Sunday night in the US 9th Circuit Court of Appeals. On behalf of 59 media organizations, the Reporters Committee for Freedom of the Press filed a petition before the 9th Circuit late Monday proposing to file a friend-of-the-court brief in favor of the *Times*. Those supporting the *L.A. Times* included the *New York Times*, the *Washington Post*, the Associated Press, the major network news broadcasters and other prominent media throughout the nation.

Walter asked attorneys to immediately notify the higher court of his vacated order, stopping the appellate case.

Constitutional scholars who have followed the case said it was rare for a judge to issue the kind of order that Walter handed down. They also said the news media cannot lawfully be ordered to excise information they have lawfully obtained and published except in exceptional circumstances.

The scholars pointed to a 1989 US Supreme Court ruling finding that it was unconstitutional for a Florida weekly to be punished for publishing the name of a rape victim, which is



barred under Florida law. The woman had sued the paper and won damages, but the high court reversed the jury verdict and award because the newspaper truthfully published information released by the government.

Norman Pearlstine, executive editor of the *L.A. Times*, welcomed Walter's decision to lift his order, but reiterated the paper's position that the initial order was an unconstitutional violation of the paper's First Amendment rights. Reported in: *Los Angeles Times*, July 17.

Washington, DC

President Trump's Justice Department made its first move to go after a journalist's data, in a grand jury indictment unsealed on June 7. The action comes as part of a case against former Senate Intelligence Committee senior staffer James A. Wolfe, who has been charged with lying to the FBI about his contacts with reporters, in *USA v. James A. Wolfe* in **US District Court for the District of Columbia**.

Minutes before the indictment against Wolfe was unsealed, the *New York Times* reported that prosecutors had secretly seized years' worth of the phone and email records of one of its reporters, Ali Watkins. "Mr. Wolfe's case led to the first known instance of the Justice Department going after a reporter's data under President Trump," wrote the paper's Adam Goldman, Nicholas Fandos, and Katie Benner.

Watkins, who had a previous romantic relationship with Wolfe, was notified in February that her records, covering a period during which she worked for BuzzFeed and Politico, had been seized. The communications between a journalist and a source aren't protected by a federal shield law, but rules require authorities to take "all reasonable steps" to obtain information through alternative

sources before targeting reporters' information. It's not clear whether those guidelines were followed in this case.

"Freedom of the press is a cornerstone of democracy, and communications between journalists and their sources demand protection," Eileen Murphy, a *Times* spokeswoman, said in a statement.

Trump and his then-Attorney General, Jeff Sessions, have made leak prosecutions a priority since shortly after taking office. In November, Sessions told the House Oversight Committee that his department was pursuing more than two dozen investigations into the leaking of classified information, adding that "it cannot be allowed to continue and we will do our best effort to make sure that it does not continue." Wolfe, it should be noted, is charged only with making false statements, not with leaking classified information.

The press freedom issues raised by the case aren't new, and they aren't limited to the current administration. The *Times* notes that the seizure of Watkins' data "suggested that prosecutors under the Trump administration will continue the aggressive tactics employed under President Barack Obama." The previous administration faced criticism for a lack of transparency and for ensnaring journalists in its leak prosecutions. Obama's Justice Department prosecuted more leak cases than all previous administrations combined. Reported in: *Columbia Journalism Review*, June 8.

New York City, New York

The United States government can monitor journalists under the Foreign Intelligence Surveillance Act (FISA), according to documents newly released as a result of *Freedom of the Press Foundation et al., v. US Justice Department et al.*, filed November 29,

2017, in **US District Court for the Southern District of New York**, by the Freedom of the Press Foundation and the Knight First Amendment Institute at Columbia University.

FISA allows invasive spying and operates outside the traditional court system, but targeting members of the press requires approval from the Justice Department's highest-ranking officials.

In two 2015 memos for the FBI, the attorney general spells out "procedures for processing Foreign Intelligence Surveillance Act applications targeting known media entities or known members of the media." The guidelines say the attorney general, the deputy attorney general, or their delegate must sign off before the bureau can bring an application to the secretive panel of judges who approves monitoring under the 1978 act, which governs intelligence-related wiretapping and other surveillance carried out domestically and against US persons abroad.

The high level of supervision points to the controversy around targeting members of the media at all. Prior to the release of these documents, little was known about the use of FISA court orders against journalists. Previous attention had been focused on the use of National Security Letters against members of the press; the letters are administrative orders with which the FBI can obtain certain phone and financial records without a judge's oversight. FISA court orders can authorize much more invasive searches and collection, including the content of communications, and do so through hearings conducted in secret and outside the sort of adversarial judicial process that allows journalists and other targets of regular criminal warrants to eventually challenge their validity.



“This is a huge surprise,” said Victoria Baranetsky, general counsel with the Center for Investigative Reporting, previously of Reporters Committee for the Freedom of the Press. “It makes me wonder, what other rules are out there, and how have these rules been applied? The next step is figuring out how this has been used.”

The documents were turned over by the Justice Department’s Office of Information Policy to the Freedom of the Press Foundation and the Knight First Amendment Institute as part of an ongoing lawsuit seeking the Trump administration’s rules for when and how the government can spy on journalists, including during leak investigations. Freedom of the Press and Knight shared the documents with *The Intercept*. (First Look Media, *The Intercept*’s parent company, provides funding for both organizations, and multiple *Intercept* staffers serve on the board of Freedom of the Press Foundation.)

The memos discussing FISA are dated in early 2015, and both are directed at the FBI’s National Security Division. The documents are on the same subject and outline some of the same steps for FISA approvals, but one is unclassified and mostly unredacted, while the other is marked secret and largely redacted. The rules apply to media entities or journalists who are thought to be agents of a foreign government, or, in some cases, are of interest under the broader standard that they possess foreign intelligence information.

Jim Dempsey, a professor at Berkeley Law and a former member of the Privacy and Civil Liberties Oversight Board, an independent federal watchdog, said that the rules were “a recognition that monitoring journalists poses special concerns and requires higher approval. I look on it

as a positive, and something that the media should welcome.”

“They apply to known media, not just US media,” he added. “Certainly back in the Cold War era, certain Soviet media entities were in essence arms of the Soviet government, and there may have been reasons to target them in traditional spy-versus-spy context. And it’s possible today that there are circumstances in which a person who works for a media entity is also an agent of a foreign power. Not every country lives by the rules of journalistic integrity that you might want.”

But Ramya Krishnan, a staff attorney with the Knight Institute, said that concerns remained. “There’s a lack of clarity on the circumstances when the government might consider a journalist an agent of a foreign power,” said Krishnan. “Think about WikiLeaks; the government has said they are an intelligence operation.” Hannah Bloch-Wehba, a professor at Drexel University, said that “a probable example would be surveillance of reporters who are working for somewhere like RT”—the state-funded Russian television network—“and as a consequence, anyone who is talking to reporters for RT. The reporters are probably conscious they are subject to surveillance, but their sources might not be.”

The guidelines, at least in the unredacted portions, do not say how to handle the information that is gathered or how to mitigate the risk of exposing journalists’ sources and sensitive information unrelated to an investigation (although they would be subject to minimization procedures if they pertained to a US person, Dempsey noted). There is no requirement that the journalist be notified that their records were sought. The unredacted guidelines also do not discuss the scenario in which a journalist

themselves might not be the target, but where surveillance is likely to reveal journalists’ communications with a target.

“Journalists merely by being contacted by a FISA target might be subject to monitoring—these guidelines, as far as we can tell, don’t contemplate that situation or add any additional protections,” said Krishnan.

Targeting journalists for surveillance, especially when trying to determine their sources, has historically been limited by First Amendment concerns. In 2015, after it emerged that the Obama administration had secretly seized phone records from the Associated Press and named a Fox News reporter as a co-conspirator in a leak case, former Attorney General Eric Holder instituted new guidelines that made the targeting of journalists in criminal cases a “last resort,” and said that the Justice Department ordinarily needed to notify journalists when their records were seized.

The guidelines still worried advocates, however, because they left room for the use of National Security Letters. In 2016, *The Intercept* obtained 2013 guidelines that showed that National Security Letters involving the media required only two extra layers of sign-off. The Justice Department has since said that the FBI does not currently use the letters against journalists for leak investigations, but it’s not clear how often they’ve been used in the past, or in other contexts.

Through an earlier Freedom of Information Act request, the Freedom of the Press Foundation obtained emails referencing a “FISA portion” of FBI guidelines for handling the press, but that glancing mention was the only clue that FISA could be used against journalists.

Many journalists already worried that their calls and emails were likely to be swept up in dragnet acquisition



of overseas communications authorized under a controversial provision of FISA, added in 2008, that allows intelligence agencies to acquire large quantities of electronic communications without obtaining individualized warrants for each target. Journalists could become entangled in such collection since many of them likely communicate with people who meet the broad definition of possessing “foreign intelligence” information—which could include information on “foreign affairs.”

That concern applied to journalists based in the United States, or US citizens, who might have their end of a conversation picked up “incidentally” under the FISA provision; such incidental collection can then be tapped by domestic law enforcement for use against Americans in so-called backdoor searches. But the issue resonated even more with foreign journalists based overseas who could be spied on without triggering constitutional restraints.

The 2015 memos, however, contemplate a scenario in which a journalist or media entity is specifically targeted for surveillance under various provisions of the act, either in the US or as a US person abroad. There are no publicly reported instances of FISA being used in this way. Reported in: knightcolumbia.org, November 29; *The Intercept*, September 17.

RELIGIOUS FREEDOM Washington, DC

A panel of judges in the **US Court of Appeals for the District of Columbia Circuit** has sided with the Washington Area Metropolitan Transit Authority (Metro) over the Catholic Archdiocese in a lawsuit that centered on the transit agency’s advertising guidelines, *Archdiocese of Washington v. WMATA*.

Last fall, Metro said its ad policies forced it to reject a Christmas advertisement submitted by the Archdiocese for the outside of buses that had the silhouettes of three shepherds on a hill with the words “Find the Perfect Gift,” indicating it could be found in the Catholic church. On July 31 the appeals court upheld those policies, rejecting the church’s argument that the guideline violated the First Amendment and the Religious Freedom Restoration Act.

The rule in question is the twelfth of fourteen guidelines Metro implemented in November 2015 in order to close “WMATA’s commercial advertising space to any and all issue-oriented advertisements, including, but not limited to, political, religious, and advocacy advertising.” Guideline 12 specifically bars ads that “promote or oppose any religion, religious practice, or belief.”

The policies were implemented after Islamophobic activist Pamela Geller submitted an ad that showed an image of the prophet Muhammad. Geller is suing Metro over their rejection of that ad in a case that has yet to be decided by the US Court of Appeals for the DC Circuit. Geller had previously been awarded \$35,000 in legal fees from WMATA, when a federal judge ordered that they could not refuse posting advertisements that equated Muslims with savages, many of which were vandalized.

Judge Judith Rogers wrote in the July 31 decision that “WMATA’s advertising space is a non-public forum,” and therefore the First Amendment argument does not apply. Unlike “parks and sidewalks that have historically been used for congregation and discussion [and] have a utilitarian purpose that governments are entitled to maintain. . . . City buses, by contrast, enjoy no historical tradition like parks and sidewalks.”

The Washington Archdiocese’s campaign includes extensive advertising in public spaces as well as on social media. Church officials said that buying advertisements on the Washington Metropolitan Area Transit Authority’s buses and Metro subway cars is one of the most effective ways for the Archdiocese to spread its message of giving and hope to the DC metro area.

The appellate court’s opinion confirms a lower court’s decision on the case.

It isn’t the only lawsuit against these guidelines. In August 2017, the American Civil Liberties Union of DC sued Metro, with plaintiffs ranging from a women’s clinic to an alt-right provocateur, all of whom (including the ACLU itself) have had ads rejected by the transit agency. That suit has been on hold pending the outcome of the case involving the Archdiocese.

Metro maintains that the guidelines are “viewpoint neutral.” That means that as long as Metro rejects ads from or against all religions (and groups espousing secularism), it’s not a violation of the First Amendment. The court agreed.

The transit agency has also faced backlash from the application of some of its other guidelines, like the ninth one, which prohibits “advertisements intended to influence members of the public regarding an issue on which there are varying opinions.” While it outright rejected ads for a clinic offering the abortion pill, ads for a faith-based adoption service made it onto buses before WMATA acknowledged it had erred and removed them.

Similarly, Metro took down ads of controversial media personality Milo Yiannopoulos’s book after receiving a barrage of complaints. The agency cited guidelines 9 and 14, which says “advertisements that are



intended to influence public policy are prohibited.”

Yiannopoulos and Carafem, the health clinic, are among the plaintiffs in the ACLU of DC’s suit against Metro over their ad guidelines. Arthur Spitzer, the legal director of the ACLU of DC and the lead counsel on the case, said that the ACLU’s case centers on one aspect that neither the Archdiocese’s nor Geller’s cases do: “A big part of our argument is that the definition and application of those definitions with respect to opinions on which people disagree is pretty vague and we’ve given lots of examples where we think Metro has exercised its veto in inconsistent and unreasonable ways.”

Metro makes about \$20 million each year through ad revenue. Reported in: becketlaw.org, July 31; dcist.com, July 31.

PRIVACY

San Francisco, California

Google is facing new scrutiny in the wake of revelations that it stores users’ location data even when “Location History” is turned off. Google users’ lack of privacy was exposed in a civil case, *Patacil v. Google*, in **US District Court for the Northern District of California**, in San Francisco.

Until mid-August, Google’s privacy policy simply stated: “You can turn off Location History at any time. With Location History off, the places you go are no longer stored.” This turns out to not be true, as the Associated Press exposed in a story on August 13.

On August 17, Google quietly edited its description of the practice on its own website—while continuing said practice—to clarify that “some location data may be saved as part of your activity on other services, like Search and Maps.”

Attorneys representing a man named Napoleon Patacsil of San Diego argued that Google is violating the California Invasion of Privacy Act and the state’s constitutional right to privacy. The lawsuit, filed on August 17, seeks class-action status, and it would include both an “Android Class” and “iPhone Class” for the potential millions of people in the United States with such phones who turned off their Location History and nonetheless had it recorded by Google. It will likely take months or longer for the judge to determine whether there is a sufficient class.

Simultaneously, activists in Washington, DC are urging the Federal Trade Commission to examine whether the company is in breach of its 2011 consent decree with the agency. On August 17, attorneys from the Electronic Privacy Information Center wrote in a sternly worded three-page letter to the FTC that Google’s practices are in clear violation of the 2011 settlement with the agency.

In that settlement, Google agreed that it would not misrepresent anything related to “(1) the purposes for which it collects and uses covered information, and (2) the extent to which consumers may exercise control over the collection, use, or disclosure of covered information.”

Google did not respond to Ars’ request for comment. Reported in: arstechnica.com, August 20.

San Francisco, California

The US government is trying to force Facebook Inc. to break the encryption in its popular Messenger app so law enforcement may listen to a suspect’s voice conversations in a criminal probe, three people briefed on the case said, resurrecting the issue of whether companies can be compelled

to alter their products to enable surveillance.

The previously unreported case in **a federal court in California** is proceeding under seal, so no filings are publicly available, but the three people told Reuters that Facebook is contesting the US Department of Justice’s demand.

The judge in the Messenger case heard arguments on August 14 on a government motion to hold Facebook in contempt of court for refusing to carry out the surveillance request, according to the sources, who spoke on condition of anonymity.

Facebook and the Department of Justice declined to comment.

The Messenger issue arose in Fresno, California, as part of an investigation of the MS-13 gang, one of the people said.

US President Donald Trump frequently uses the gang, which is active in the United States and Central America, as a symbol of lax US immigration policy and a reason to attack so-called “sanctuary” laws preventing police from detaining people solely to enforce immigration law.

Trump called members of the gang “animals” this year when the Sheriff of Fresno County complained that California laws limited her cooperation with federal immigration enforcement targeting gang members.

The potential impact of the judge’s coming ruling is unclear. If the government prevails in the Facebook Messenger case, it could make similar arguments to force companies to rewrite other popular encrypted services such as Signal and Facebook’s billion-user WhatsApp, which include both voice and text functions, some legal experts said.

Law enforcement agencies forcing technology providers to rewrite software to capture and hand over data that is no longer encrypted



would have major implications for the companies which see themselves as defenders of individual privacy while under pressure from police and lawmakers.

Similar issues came into play during a legal fight in 2016 between the Federal Bureau of Investigation and Apple Inc. over access to an iPhone owned by a slain sympathizer of Islamic State in San Bernardino, California, who had murdered county employees.

In the Apple case, the company argued that the government could not compel it to create software to breach the phone without violating the company's First Amendment speech and expression rights. The government dropped the litigation after investigators got into the phone with a contractor's help.

Unlike the San Bernardino case, where the FBI wanted to crack one iPhone in its possession, prosecutors are seeking a wiretap of ongoing voice conversations by one person on Facebook Messenger.

Facebook is arguing in court that Messenger voice calls are encrypted end-to-end, meaning that only the two parties have access to the conversation, two of the people briefed on the case said.

Ordinary Facebook text messages, Alphabet Inc.'s Gmail, and other services are decrypted by the service providers during transit for targeted advertising or other reasons, making them available for court-ordered interception.

End-to-end encrypted communications, by contrast, go directly from one user to another user without revealing anything intelligible to providers.

Facebook says it can only comply with the government's request if it rewrites the code relied upon by all its users to remove encryption or else

hacks the government's current target, according to the sources.

Legal experts differed about whether the government would likely be able to force Facebook to comply.

Stephen Larson, a former judge and federal prosecutor who represented San Bernardino victims, said the government must meet a high legal standard when seeking to obtain phone conversations, including showing there was no other way to obtain the evidence. Still, the US Constitution allows for reasonable searches, Larson said, and if those standards are met, then companies should not be able to stand in the way.

A federal appeals court in Washington, DC ruled in 2006 that the law forcing telephone companies to enable police eavesdropping also applies to some large providers of Voice over Internet Protocol, including cable and other broadband carriers servicing homes. VoIP enables voice calls online rather than by traditional circuit transmission.

However, in cases of chat, gaming, or other internet services that are not tightly integrated with existing phone infrastructure, such as Google Hangouts, Signal, and Facebook Messenger, federal regulators have not attempted to extend the eavesdropping law to cover them, said Al Gidari, a director of privacy at Stanford University Law School's Center for Internet and Society. "A messaging platform is excluded," maintains Gidari, who is not involved in the Fresno case.

Legal analysis in *The Verge* says "Facebook's biggest problem is the Wiretap Act. . . . If phone companies receive a wiretap order, then they're required to give police technical assistance in tapping the phone. . . . the government's argument is far more straightforward than what Apple faced."

The Verge added that both the Apple and Facebook cases "are part of a much larger fight, as law enforcement comes to terms with the limits of its reach in the digital age." Reported in: Reuters, August 17; *The Verge*, August 20.

Baltimore, Maryland

A lawsuit against the National Security Agency's "Upstream" surveillance, *Wikimedia Foundation v. NSA*, is continuing, following procedural hearings in the **US District Court for the District of Maryland** in Baltimore in August.

The surveillance is designed to ensnare all of Americans' international communications, including emails, web-browsing content, and search engine queries. The government claims it is authorized by the Section 702 of the FISA Amendments Act. In March 2015, the American Civil Liberties Union filed a lawsuit challenging its constitutionality. More than three years later, the case is still mired in procedural and bureaucratic limbo.

In a separate challenge to Upstream, the Electronic Frontier Foundation is suing the NSA in *Jewel v. NSA*.

The ACLU's lawsuit was brought on behalf of nearly a dozen educational, legal, human rights, and media organizations that collectively engage in trillions of sensitive internet communications and have been harmed by Upstream surveillance. The district court dismissed the case in October 2015, concluding that the plaintiffs lacked "standing" to sue because they had not sufficiently alleged that their communications had been intercepted—but the Fourth Circuit Court of Appeals in May 2017 unanimously reversed a part of the lower court's dismissal, ruling that Wikimedia has standing to pursue its challenge.



The original plaintiffs in the lawsuit included: Wikimedia Foundation, the National Association of Criminal Defense Lawyers, Human Rights Watch, Amnesty International USA, PEN American Center, Global Fund for Women, *The Nation* magazine, the Rutherford Institute, and the Washington Office on Latin America. These plaintiffs' sensitive communications have been copied, searched, and likely retained by the NSA. The lawsuit claims that Upstream surveillance hinders the plaintiffs' ability to ensure the basic confidentiality of their communications with crucial contacts abroad—among them journalists, colleagues, clients, victims of human rights abuses, and the tens of millions of people who read and edit Wikipedia pages.

With the help of companies like Verizon and AT&T, the NSA has installed surveillance devices on the internet “backbone”—the network of high-capacity cables, switches, and routers across which Internet traffic travels.

The NSA intercepts and copies private communications in bulk while they are in transit, and then searches their contents using tens of thousands of keywords associated with NSA targets. These targets, chosen by intelligence analysts, are never approved by any court, and the limitations that do exist are weak and riddled with exceptions. Under Section 702, the NSA may target any foreigner outside the United States believed likely to communicate “foreign intelligence information”—a pool of potential targets so broad that it encompasses journalists, academic researchers, corporations, aid workers, business persons, and others who are not suspected of any wrongdoing.

The ACLU says Upstream's general, indiscriminate searches and seizures of the plaintiffs'

communications invades their Fourth Amendment right to privacy, infringes on their First Amendment rights to free expression and association, and exceeds the statutory limits of Section 702 itself. The ACLU adds that the law's permissive guidelines for targeting make it likely that the NSA is also retaining and reading their communications.

The ACLU litigated an earlier challenge to surveillance conducted under Section 702—*Clapper v. Amnesty*—which was filed less than an hour after President Bush signed Section 702 into law in 2008. In a 5-4 vote, the Supreme Court dismissed the case in February 2013 on the grounds that the plaintiffs could not prove they had been spied on. Edward Snowden has said that the ruling contributed to his decision to expose the full scope of NSA surveillance a few months later. Among his disclosures was Upstream surveillance, the existence of which was later confirmed by the government.

Following Wikimedia's victory in the Fourth Circuit in May 2017, the case returned to the district court. There, Wikimedia sought documents and deposition testimony from the NSA. The government refused to comply with many of Wikimedia's discovery requests, invoking the “state secrets privilege” to withhold basic facts from both Wikimedia and the court. Wikimedia challenged the government's unjustified use of secrecy to shield its surveillance from scrutiny, but in August 2018 the district court upheld it. Nevertheless, Wikimedia's lawsuit is moving forward based on the extensive public disclosures about Upstream surveillance.

“Our clients advocate for human and civil rights, unimpeded access to knowledge, and a free press,” the ACLU wrote. “Their work is essential to a functioning democracy. When

their sensitive and privileged communications are monitored by the US government, they cannot work freely and their effectiveness is curtailed—to the detriment of Americans and others around the world.”

The Wikimedia Foundation, which the ACLU is representing along with co-counsel from the Knight First Amendment Institute and Cooley LLP, engages in more than a trillion communications per year with people around the world, and has hundreds of millions of visitors each month to Wikipedia. The organization is suing to stop Upstream surveillance, the process by which the NSA passively monitors and collects a huge amount of data and text-based communications by combing international internet traffic as it moves across service providers' backbone infrastructure.

The suit alleges that this tactic violates the First and Fourth Amendment, along with other laws. But it took two years for Wikimedia to simply prove its standing to bring the suit. Now, the government is using a concept known as the “state secrets privilege,” which protects classified information from the discovery process in a lawsuit, to resist cooperating with Wikimedia's requests. As a result of these evasive tactics, the core constitutional issues of Upstream surveillance remain unexamined.

“No public court has ever addressed the lawfulness of this surveillance,” says Ashley Gorski, a staff attorney for the ACLU's National Security Project. “It's very clear that Wikimedia's communications are in fact subject to this surveillance and what it has done is seek additional information from the government that would provide more direct evidence of that. So that's what's at issue in this hearing. The government is saying that it wants to exclude all of that information from the case altogether,



because it is classified and to disclose it would be to reveal state secrets.”

The state secrets privilege comes up in other contexts at times, including in cases related to potential human rights violations and torture, so the outcome of the *Wikimedia v. NSA* hearings on the topic could have larger conceptual implications. In the particular case of surveillance, though, the ACLU points out that the Foreign Intelligence Surveillance Act includes a provision that specifically states that when entities like Wikimedia seek to discover classified information on surveillance operations, the court can act as an intermediary to review the relevant evidence, even if it's too sensitive for the public or the plaintiffs themselves to see directly.

“The government has put up a series of obstacles to having our public courts fairly and openly litigate the big legal questions at stake here,” says Patrick Toomey, also a staff attorney in the ACLU's National Security Project. “We've known about this surveillance in detail since the Snowden revelations and it existed before that, but the government has really tried to avoid having public courts weigh in on whether this real-time computer scanning of our international communications is constitutional.”

The intelligence community has argued that the NSA's international bulk collection doesn't impact US citizens, and focuses instead on investigating targets of interest to national security. But the ACLU points out that this list of targets has recently ballooned to include about 129,000 people, according to a recent transparency report—one indication that the scope of the surveillance dragnet is ever-expanding. And privacy advocates have long pointed out that bulk scanning can sweep up countless people's irrelevant personal data

in the process of drilling down to the intended targets. Furthermore, even though the NSA focuses on international data, watchdogs note that there are a variety of reasons that domestic communications might be routed internationally and end up passing through surveillance scanners. An NSA spokesperson said that the agency “is unable to comment on ongoing litigation.”

“Our lawsuit is one of very few ways the public can hold the NSA accountable for its indiscriminate interception of communications between Americans and those abroad,” says Wikimedia legal counsel Jim Buatti. “It is critical that the federal courts have the information they need to effectively oversee these otherwise unchecked surveillance activities. The Wikimedia projects can only thrive when users are confident that their rights to privacy and free expression will be respected.” Reported in: Electronic Frontier Foundation, December 28; *Wired*, June 29; Wikimedia.com, August 23; aclu.org, September 6.

Albuquerque, New Mexico

A group of tech companies are illegally tracking children online, New Mexico Attorney General Hector Balderas charged in a lawsuit on September 12. The suit, *New Mexico v. Tiny Lab Productions et al.*, filed in **US District Court for the District of New Mexico**, alleges that gaming apps designed by Tiny Lab Productions and marketed by Google in its Play Store are targeted at children and contain illegal tracking software.

According to the suit, the software allows the defendants to track, profile, and target children, which federal law makes illegal for children under 13 without parental consent. Named in the suit are Google, Twitter, Tiny Lab Productions, MoPub,

AerServ, InMobi PTE, AppLovin, and IronSource.

“These apps can track where children live, play, and go to school with incredible precision,” Balderas said in a news release. The attorney general contends that once the data has been collected, it is accessible not only to advertisers, but because of the “ever-present” risk of data breaches, also potentially to criminals, according to the release. Reported in: nmag.gov, September 12; *Albuquerque Journal*, September 13.

Chelsea, Vermont

Jessamyn West, a librarian from a tiny town in Vermont, took Equifax to court following revelations last September that consumer credit bureau Equifax had suffered a data breach that exposed personal data of nearly 150 million people. The **Orange County Small Claims Court of the Vermont Superior Court, Civil Division**, gave her a small but symbolic victory in *Jessamyn West v. Equifax* on June 4, awarding her \$600 in damages stemming from the 2017 breach.

Just days after Equifax disclosed the breach, West filed a claim with the local Orange County courthouse asking a judge to award her almost \$5,000. She told the court that her mother had just died in July, and that it added to the work of sorting out her mom's finances while trying to respond to having the entire family's credit files potentially exposed to hackers and identity thieves.

The judge ultimately agreed, but awarded West just \$690 (\$90 to cover court fees and the rest intended to cover the cost of up to two years of payments to online identity theft protection services).

In an interview with KrebsOnSecurity, West said she's feeling victorious even though the amount



awarded is a drop in the bucket for Equifax, which reported more than \$3.4 billion in revenue last year.

“The small claims case was a lot more about raising awareness,” said West, a librarian at the Randolph Technical Career Center who specializes in technology training and frequently conducts talks on privacy and security. “I just wanted to change the conversation I was having with all my neighbors who were like, ‘Ugh, computers are hard, what can you do?’ to ‘Hey, here are some things you can do,’” she said. “This case was about having your own agency when companies don’t behave how they’re supposed to with our private information.”

West said she’s surprised more people aren’t following her example. After all, if just a tiny fraction of the 147 million Americans who had their Social Security number, date of birth, address, and other personal data stolen in last year’s breach filed a claim and prevailed as West did, it could easily cost Equifax tens of millions of dollars in damages and legal fees.

Equifax is currently the target of several class action lawsuits related to the 2017 breach disclosure, but there have been a few other minor victories in state small claims courts.

In January, data privacy enthusiast Christian Haigh wrote about winning an \$8,000 judgment in small claims court against Equifax for its 2017 breach (the amount was reduced to \$5,500 after Equifax appealed).

West said she plans to donate the money from her small claims win to the Vermont chapter of the American Civil Liberties Union, and that she hopes her case inspires others.

“Even if all this does is get people to use better passwords, or go to the library, or to tell a company, ‘No, that’s not good enough, you need to do better,’ that would be a good

thing,” West said. Reported in: Krebs on Security, June 13.

Montpelier, Vermont

Tech companies don’t violate customers’ privacy rights when searching their stored communications pursuant to terms of service because the tech firms aren’t acting as government agents—even if they report their findings to law enforcement, the **Vermont Supreme Court** ruled. The court on August 17 denied a motion to suppress law enforcement evidence obtained through an AOL search of a user, Stuart Lizotte, in the case of *State v. Lizotte*.

Lizotte was charged with multiple child pornography counts after emails dating from 2010 to 2013 were found on his account. AOL, which now operates as Oath Inc., alerted law enforcement to the communications after the tech company searched his account using an algorithm aimed at detecting suspicious content.

Under AOL’s terms of service, the company could have accessed user communications if there was reason to believe a crime had been committed. The privacy policy stated that customers couldn’t use AOL accounts to transmit or distribute illegal content.

But those are essentially moot points, the Vermont high court ruled, denying Lizotte’s Fourth Amendment privacy challenge to criminal evidence presented against him in court. AOL wasn’t acting as an agent of the government, the justices ruled.

Generally, internet service providers “do not act as agents of law enforcement by monitoring the content of transmissions for suspected child pornography” and other illegal activity, Judge Marilyn Skoglund wrote for the court in a unanimous decision.

Representatives for Oath and the defendant didn’t immediately respond

to *Bloomberg Law*’s email request for comment. Reported in: *Bloomberg Law*, August 21.

FREE SPEECH IN ENTERTAINMENT Pittsburgh, Pennsylvania

When gangsta rappers use music to call for harm to specific police officers, they cross the line between protected free speech and terroristic threats and intimidation. That’s the ruling of the **Pennsylvania Supreme Court** in a 24-page opinion in *Pennsylvania v. Knox* written by Chief Justice Thomas Saylor. All seven justices agreed on the result, although two justices had different reasoning than the majority.

The case involved rapper Jamal Knox, arrested when two Pittsburgh officers found fifteen stamp bags of heroin in his vehicle, large sums of cash, and a loaded stolen firearm.

Shortly after his arrest, he and his accomplice wrote a rap song called “F— the Police” and posted it online, calling out the police officers by name. The rap lyrics include:

This first verse is for Officer [name deleted] and all you fed force [expletive].

And Mr. [name deleted], you can [expletive] my [expletive].

Let’s kill these cops, cause they don’t do us no good.

When the named officers saw the video, they felt threatened. Knox was convicted of terroristic threats and intimidation, but he appealed, saying it was just a rap song protected by the First Amendment. In a separate video at the time, Knox insisted he’s just an entertainer.

“We’re in the studio right now, getting it in. I’m an entertainer. This



is what we do. I'm only 18, Soulja 20. We're chasing our dream. That's all that it is. It's music to me. I'm a poet."

But in his rap tune he signaled knowledge of the cops' work shift and where they sleep, adding the following:

I ain't really a rapper dog, but I spit wit the best.

I ain't carry no 38, dog, I spit with a tec.

That like 50 shots, [racial slur]. That's enough to hit one cop 50 on blocks."

The state Supreme Court said this was not some general anti-police song.

"The calling out by name of two officers involved in (Knox's) criminal cases who were scheduled to testify against him," wrote the Chief Justice for the Court, "and the clear expression repeated in various ways that these officers are being selectively targeted in response to prior interactions with (Knox), stand in conflict with the contention that the song was meant to be understood as fiction."

No decision yet on whether Knox will appeal to the US Supreme Court. Reported in: KDKA-TV, August 22.

CAMPAIGN FINANCE San Francisco, California

A public interest law firm and a charitable group co-founded by the Koch brothers have to comply with the California attorney general's demand for information regarding top charitable donors, a federal appeals court has ruled. The **9th US Circuit Court of Appeals** in San Francisco ruled on September 11 that there was no showing of a significant First Amendment burden to the right of free association. The court ruled in a challenge by the Thomas More Law Center and the Americans for Prosperity Foundation.

The combined cases are *Americans for Prosperity Foundation v. Becerra* and *Thomas More Law Center v. Becerra*.

California law requires the attorney general to maintain a registry of charities, and authorizes the attorney general to obtain information to maintain the registry. The attorney general requires charities on the registry to submit federal tax forms listing the names and addresses of their largest donors.

The charities had argued the requirement chills donor contributions, despite a ban on public release of the information. When individuals are deterred from making contributions, the charities' right of free association is violated, they had claimed.

Circuit Judge Raymond Fisher's opinion stated that the "mere possibility that some contributors may choose to withhold their support does not establish a substantial burden on First Amendment rights." The opinion said the law is substantially related to an important state interest in policing charitable fraud.

Donor information is "collected solely for nonpublic use, and the risk of inadvertent public disclosure is slight," Fisher wrote. "Nothing is perfectly secure on the internet in 2018, and the attorney general's data are no exception, but this factor alone does not establish a significant risk of public disclosure." Reported in: *ABA Journal*, September 12.

3-D PRINTING Seattle, Washington; Austin, Texas

A federal judge has granted a preliminary injunction blocking a private defense firm in Texas from sharing files online that could be used to create 3-D printed guns.

US District Judge Robert Lasnik granted the motion on August 27 from a coalition of state attorneys

general who are suing the Trump administration over those files. The lawsuit, *State of Washington et al. v. US Department of State et al.*, was filed in July in the **US District Court for the Western District of Washington** at Seattle, after a settlement between Defense Distributed, the private defense firm, and the US State Department allowed the firm to share the files online. Defense Distributed was planning to make the files available for download earlier this month, but was halted by a temporary restraining order granted at the end of July.

The settlement is unique to Defense Distributed, which sued the State Department over a rule that prohibited the files from being shared. The federal agency previously rejected the company's efforts to share the files because, they argued, it was not in the best interest of the country's security to have the plans publicly available.

The State Department then settled with Defense Distributed earlier this year rather than face further litigation over the issue. The agency said in April it would allow a temporary modification of the US Munition List (USML) to allow the firm to share files online. That earlier (now settled) case was *Defense Distributed and Second Amendment Foundation v. US Dept. of State et al.*, in the **US District Court for the Western District of Texas at Austin**.

The states claimed the administration did not go through the proper steps to change the rule, which they said would require notifying Congress at least 30 days before it took effect. That has not happened.

Lasnik said in his decision on August 27 that based on that alone, the states having standing to bring litigation through the Administrative Procedure Act (APA).



“Plaintiffs have shown a likelihood of success on the merits of their APA claim because the temporary modification of the USML to allow immediate publication of the previously regulated CAD files constitutes the removal of one or more items from the USML without the required congressional notice,” Lasnik wrote.

The State Department has argued that their change to the USML as part of the settlement did not remove a specific item from the list and therefore did not require notice to Congress. The agency has also said their function is to regulate firearm exports, not change domestic gun laws. Lasnik acknowledged that argument in his decision but said allowing notice to Congress would have provided more opportunity for input at the state and federal levels.

“Forcing the federal defendants to give Congress 30 days’ notice of the removal of the CAD files from the USML and to seek the concurrence of the Department of Defense would afford other executive branch entities (including the president) an opportunity to impact the decision-making process and would give both Congress and the states a chance to generate any statutes or regulations deemed necessary to address the regulatory void the delisting would create,” Lasnik wrote.

President Donald Trump said in a tweet in July that he was “looking into 3-D Plastic Guns being sold to the public” and that the idea “doesn’t seem to make much sense!”

The states have also criticized the State Department for providing no tangible evidence that modifying the rule was in the public’s best interest.

The attorneys general have pointed to the possible dangers associated with guns that are 3-D printed. Some of the guns can be made completely of plastic without a serial number, making them impossible to detect or track

in the event of a crime, for example. The State Department has countered that argument by citing a federal law that prohibits undetectable guns.

Lasnik said in his decision there was no proof the agency had considered the potential risks of changing the rule.

“There is no indication that the department evaluated the unique characteristics and qualities of plastic guns when it was considering the deletion of the small firearms category from the USML,” Lasnik said.

New York Attorney General Barbara Underwood said in a statement after Lasnik’s decision that the preliminary injunction will help ensure public safety until the litigation is resolved.

“In yet another victory for common sense and public safety, today a federal court granted our motion for a nationwide preliminary injunction—continuing to block the Trump administration from allowing the distribution of 3-D printed gun files,” Underwood said. “As the court pointed out, we filed suit because of the legitimate fear that adding these undetectable and untraceable guns to the arsenal of available weaponry will only increase the threat of gun violence against our communities.”

Defense Distributed, which is also named in the lawsuit, has argued that the files should be made available to consumers based on free speech rights. They said the public has a right to the information and that since some of it has been leaked, it’s already in the public domain anyway. Lasnik said the issue at hand was not over the company’s First Amendment claims, but rather over the State Department’s actions.

“Whether or not the First Amendment precludes the federal government from regulating the publication of technical data under the authority

granted by the [Arms Export Control Act] is not relevant to the merits of the APA claims plaintiffs assert in this litigation,” Lasnik said.

The lawsuit is being led by Washington state Attorney General Bob Ferguson, who is also joined by Underwood and attorneys general from Connecticut, Maryland, New Jersey, Oregon, Massachusetts, Pennsylvania, California, Colorado, Delaware, Hawaii, Illinois, Iowa, Minnesota, North Carolina, Rhode Island, Vermont, Virginia, and Washington, DC.

The State Department has deferred comment to the US Department of Justice on the lawsuit. A spokeswoman for the DOJ declined to comment on the preliminary injunction.

While the states obtained a temporary injunction, there is no guarantee they will win the permanent injunction they are seeking.

It’s not a clear-cut case, experts told the *Washington Post*. Judge Lasnik will have to weigh whether the states’ public safety concerns are strong enough to trump Wilson’s First Amendment protections. To do that, the judge would also have to decide whether Wilson’s computer code really is “speech”—a largely unsettled legal question that may challenge the boundaries of the First Amendment as it is traditionally understood.

On August 21, Lasnik said he believed “a solution to the greater problem” in this case was better suited for Congress or the president to answer, rather than the court. Reported in: *cnet.com*, August 23; *Washington Post*, August 23; *National Law Journal*, August 27.

GENDER ISSUES Winston-Salem, North Carolina

A lawsuit can proceed against North Carolina’s newly revised “bathroom



bill,” which prohibits local governments from enacting new antidiscrimination laws regarding multiple occupancy restrooms. Judge Thomas Schroeder of the **US District Court for the Middle District of North Carolina** ruled on September 30 in *Caraño et al. v. Cooper et al.*, that transgender individuals have at least one legal justification for suing the governor and other state and University of North Carolina (UNC) officials.

The case originally challenged the state’s 2016 “bathroom bill,” House Bill 2. HB 2 was repealed in 2017 after facing a number of legal challenges, and subsequently replaced by current restrictions under House Bill 142, which effectively requires all anti-discrimination laws pertaining to multiple occupancy restrooms to be passed through the state government. The lawsuit seeks to block the statewide bill, and thus allow local governments to protect transgender individuals’ rights within their local jurisdiction to use the bathroom of their choice.

Governor Roy Cooper and members of his administration were willing to sign a consent decree that would declare that transgender persons are not prevented from using public facilities in accordance with their gender identity, but not everyone involved in the lawsuit agreed. Officials from UNC, along with the president pro tempore of the North Carolina Senate, and the speaker of the North Carolina House of Representatives, sought to have the lawsuit dismissed so the state law would remain in place.

Judge Schroeder determined that he needed to rule on whether the transgender plaintiffs had grounds to sue before he could consider the consent decree. Schroeder allowed the suit to continue on Equal Protection grounds, stating that “while HB142

does not prohibit Plaintiffs’ efforts at advocacy, it plainly makes them meaningless by prohibiting even the prospect of relief at the local level.”

However, he dismissed the parts of the lawsuit where the plaintiffs claimed Due Process, Title IX, and Title VII violations arising under the new law. The plaintiffs argue that transgender individuals have faced uncertainty as to which restrooms they are legally allowed to use in light of the law. Judge Schroeder said HB 142 does not threaten imminent prosecution for using an unlawful bathroom, so their “uncertainty” is not a sufficient harm for the courts to block the law. Reported in: lambdalegal.org, October 1; jurist.org, October 2.

INTERNATIONAL Toronto, Ontario, Canada

An Ontario judge has ruled that Canada’s constitutional protection of free expression does not extend to hate speech. In *Paramount Fine Foods v. Johnston*, **Ontario Superior Court of Justice**, Justice Shaun Nakatsuru, rejected the argument that anti-Muslim statements are immunized from civil liability because they are protected political commentary. The court relied on a 30-year-old Canadian Supreme Court judgment on anti-Semitic hate speech to rule that the public is best served in the suppression of communications of racial, ethnic, or religious hatred.

The case centers on a defamation suit brought by prominent restaurateur Mohamad Fakhri against two notorious anti-Muslim advocates. Last summer, Ranendra “Ron” Banerjee and Kevin J. Johnston showed up at a Mississauga location of Paramount Fine Foods to purportedly “protest” during a fundraiser Paramount was hosting that day for the leader of the Liberal Party of Canada, Prime Minister Justin Trudeau.

Banerjee and Johnston filmed themselves harassing guests as they arrived and talking to the camera about the event, videos of which were later posted across dozens of websites and social media platforms. Banerjee is filmed saying that one would have to be a “jihadist” and “raped your wife a few times” to enter the restaurant. Johnston, who has already been charged with willfully promoting hatred against the Peel Muslim community, was there providing his own comments.

Banerjee tried to stop the lawsuit from proceeding by claiming that he was expressing his viewpoint on a matter of public interest and invoking Ontario’s new anti-SLAPP (Strategic Litigation Against Public Participation) legislation passed in 2015. Banerjee claimed he was at the fundraiser to protest the government’s \$10.5 million settlement with Omar Khadr and shouldn’t face civil liability for freely expressing his political views.

But the judge rejected the argument and provided analysis that not only allows the lawsuit to proceed (though Banerjee can still appeal), but also provides important clarity for others targeted by defamatory hate speech including racist stereotypes.

“This is a case about freedom of expression,” wrote Nakatsuru. “But it is also about the limits to that constitutionally protected right. Expressions of hatred and bigotry towards racial, ethnic, religious, or other identifiable groups have no value in the public discourse of our nation.”

The court decision may help public institutions deal with individuals or groups attempting to organize events which promote hatred or racist views. The Ottawa Public Library, for instance, is currently being sued for cancelling the showing of a film called *Killing Europe*. The film paints



a horrifying picture of immigration, particularly of Muslims.

A similar outcry erupted when the Toronto Public Library was unwilling to prevent a memorial for a lawyer, who had defended white supremacists and neo-Nazis, from taking place. The library board later went on to implement a policy that would allow it to prevent groups from renting space if they are “likely to promote, or would have the effect of promoting discrimination, contempt or hatred of any group, hatred for any person.” Reported in: *Toronto Star*, July 4.

Luxembourg

Most people outside Europe don’t know much about the digital “right to be forgotten,” the idea that private citizens can ask search engines to scrub certain results about them. Google is fighting to limit that right, in the **European Court of Justice** in *Google v. CNIL*.

A landmark ruling in 2014 from the European Court of Justice set the initial parameters of how the right to be forgotten might apply. That ruling said search engines like Google could be forced to delete results. CNIL, France’s data-protection agency, is arguing that the right to be forgotten should apply to search-engine results globally, not just within the European Union. [*European copyright legislation may also force Google and others to limit information beyond Europe’s borders—see “Is It Legal?” page 82.*]

According to CNIL’s complaint, Google does delete, or “delist,” some results from private citizens when requested. But CNIL argues that Google isn’t delisting the results everywhere. Some delisted

information, CNIL said, was still visible on non-EU versions of Google.

On September 11, Google shot back at a hearing before 15 EU judges and said expanding the right to be forgotten globally would impinge on freedom of speech.

Bloomberg reported September 11 that Google’s counsel Patrice Spinosi described CNIL’s proposals as “very much out on a limb” and in “utter variance” with other judgments.

Google isn’t alone in arguing that deleting search results may equate to censorship. Media organizations including BuzzFeed, Reuters, the *New York Times*, and various nonprofits have argued the same.

“This case could see the right to be forgotten threatening global free speech,” Thomas Hughes, the executive director of the freedom-of-expression group Article 19, said. “European data regulators should not be allowed to decide what internet users around the world find when they use a search engine.” He said the court “must limit the scope of the right to be forgotten in order to protect the right of internet users around the world to access information online.”

The Google dispute before the EU’s Court of Justice in Luxembourg is the highest-profile case yet to test where jurisdiction begins and ends when it comes to data.

“It will set governments’ expectations about how they can use their leverage over internet platforms to effectively enforce their own laws globally,” said Daphne Keller, who studies platforms’ legal responsibilities at the Stanford Center for Internet and Society and previously was Google’s associate general counsel.

At issue in these disputes, experts say, is a fundamental mismatch between how both laws and the borderless internet each operate. As regulations proliferate, tech firms risk ending up in a legal bind no matter which course of action they take, lawyers say.

“It’s a clash between the way data is managed and moved around, which doesn’t respect borders, and efforts by territorial governments to impose their norms and rules,” said Jennifer Daskal, an American University law professor.

Google says it will argue that its application of the right to be forgotten is already effective in France for well over 99 percent of searches. More broadly, the company plans to assert that the EU has an obligation to minimize legal conflict with other jurisdictions. It also will argue that the right to be forgotten is far from settled law in many places, such as the United States, where freedom of speech usually prevails over privacy concerns.

Google will be joined by several press-freedom groups in its arguments on September 11. One group, Reporters Committee for Freedom of the Press, says a ruling against Google would have “grave worldwide consequences.”

“There would be nothing to prevent other jurisdictions from claiming the same global scope of application for their own laws,” the group wrote in a brief to the court. “The result would be a ‘race to the bottom,’ as speech prohibited by any one country could effectively be prohibited for all, on a world-wide basis.” Reported in: *Wall Street Journal*, September 9; *Business Insider*, September 11.