newsletter on intellectual freedom

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authors sue to remove digital book collections

Three major authors' groups and eight individual authors filed suit against a partnership of research libraries and five universities September 12, arguing that their initiative to digitize millions of books constituted copyright infringement.

The lawsuit, filed in United States District Court for the Southern District of New York, contends that "by digitizing, archiving, copying and now publishing the copyrighted works without the authorization of those works' rights holders, the universities are engaging in one of the largest copyright infringements in history."

The suit names the University of Michigan, the University of California, the University of Wisconsin, Cornell University and Indiana University as defendants. It also names HathiTrust, a Michigan-based consortium that mirrors the digitized holdings of 50 research universities in its digital library.

The plaintiffs in the lawsuit are the Authors Guild, the Australian Society of Authors and the Québec Union of Writers. Individual authors include Pat Cummings, Roxana Robinson and T. J. Stiles.

"We've been greatly concerned about the seven million copyright-protected books that HathiTrust has on its servers for a while," said Paul Aiken, executive director of Authors Guild, an industry group that says it represents more than 8,500 authors. "Those scans are unauthorized by the authors."

The announcement leaves the Authors Guild fighting a two-front war against what it contends is copyright infringement. It filed a lawsuit in 2005 against Google, contending that the company's project of scanning and archiving digital books violated copyrights. In March, a federal judge in New York rejected a settlement that Google had worked out with authors' and publishers' groups.

In addition to copyright infringement, the new suit also cites concerns about the security of the files in the HathiTrust repository, which is organized and maintained by the University of Michigan. Scott Turow, the president of the Authors Guild, said the books on file were at "needless, intolerable digital risk."

The plaintiffs are not seeking damages in the lawsuit; instead, they are asking that the books be taken off the HathiTrust servers and held by a trustee.

HathiTrust, founded in 2008, is a collaboration of research libraries that share the goal of building a digital archive. The partnership has so far digitized more than 9.5

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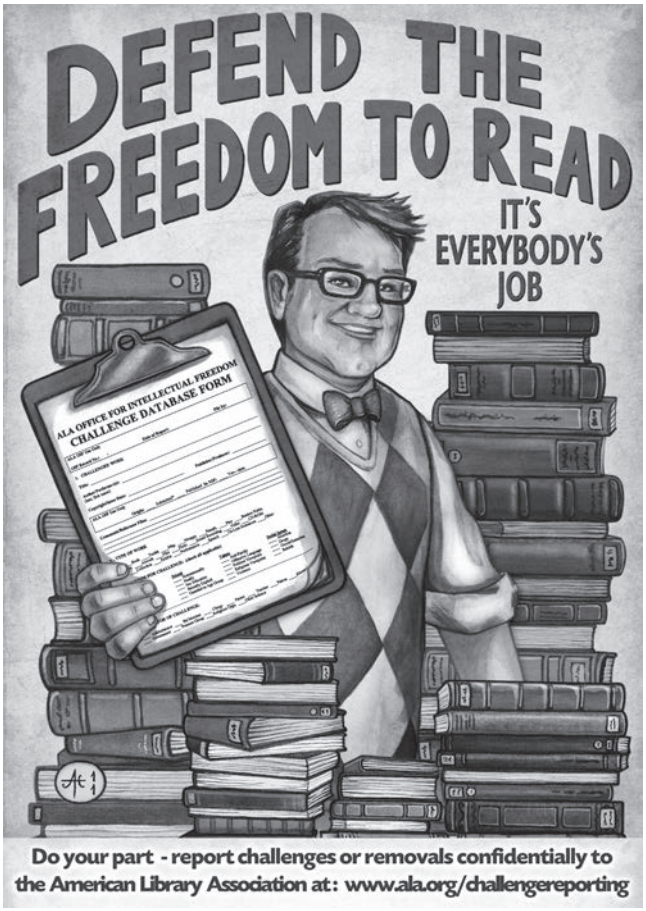
in this issue

targets of the censor



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million total volumes, including books and journals. About 27 percent of those works are believed to be in the public domain, the group said.

John P. Wilkin, the executive director of HathiTrust, said that nearly all the digitized works were provided by Google and that the project was "a lawful activity and important work for scholarship."

"This is a preservation operation, first and foremost," Wilkin said. "Books are decaying on the shelves. It's our intention to make them available to people at institutions for scholarly purposes. We are ensuring that the cultural record is preserved."

The lawsuit also objects to HathiTrust's method of determining which books are so-called orphan works, whose rights holders are unknown or cannot be found. About 150 books in the HathiTrust digital library have so far been identified as possible orphan works, Wilkin said, and many more are expected to be identified.

A list of the possible orphan works has been posted online, and after 90 days, if they have not been claimed, HathiTrust will consider them orphans, Wilkin said.

The first group of orphan works were expected to be made available to users of HathiTrust's repository on October 13.

For the most part, the legal action does not appear to have had much impact on individual scholars. "This is really strictly about the libraries at the moment," said James Grimmelmann, an associate professor of law at New York Law School who has closely followed the Google lawsuit. He said that a settlement in that case would have provided a framework to decide which use of the libraries' books was permitted. HathiTrust does not plan to make books available "unless they can't find the author or publisher, and this is a very small slice of books."

"They chose now to go after the libraries in part because of the posting of books online," Grimmelmann said. "And in part because the Google books settlement has fallen apart. . . . The Google settlement really had the potential to reshape the marketplace for books." The HathiTrust lawsuit "is very much about how far the scope of an academic library goes."

But Grimmelmann pointed out that the HathiTrust case does have the potential to determine how much material scholars get to see and use. The question for researchers isn't "Does this affect my life now?" he said, but "what the future of access to scholarly books in the digital age is going to be."

The university libraries and their supporters say providing digital versions of their existing holdings to authorized patrons is sheltered by the "Fair Use" exemptions to U.S. copyright law. Fair Use, a concept that emerged from court rulings and was eventually added to the law, provides some legal cover to those who copy works without permission for nonprofit educational purposes.

In a dense analysis, the Association of Research Libraries (ARL) said the HathiTrust's decision to let faculty and students access digital copies of orphan works holds up well under the four factors courts use to determine Fair Use: The purpose and character of the use (commercial versus nonprofit); the nature of the copyrighted work; the amount of the copyrighted work used relative to the whole; and the effect of the use upon sales or value of the copyrighted work.

"Here, three of the factors favor Fair Use, and one factor, the amount used, is at worst neutral," wrote Jonathan Band, a prominent D.C.-based open-access lawyer, on behalf of the association. (On the question of "amount used," he acknowledged that providing full-text copies of copyrighted orphan works "does not favor Fair Use," but said the law might be sympathetic to the idea that copying an entire copyrighted work is necessary to fully realizing the educational and cultural value of copying the work at all.)

"In the Proposed Use, HathiTrust seeks to increase the access of its members' faculty and students to lawfully purchased scholarly books that are orphans works," Band continues. "Copyright's goal of promoting knowledge is better served by allowing the Proposed Use than by preventing it."

Paul Aiken, executive director of the Authors Guild, said he does not buy the Fair Use argument. While Fair Use can be applied where U.S. copyright law provides no clear guidance, the guidance that law provides for libraries is clear, he says: libraries may not create and maintain digital copies of their print holdings unless the purpose is to replace a book that has deteriorated and is no longer usable.

Beyond that, "there can be no further distribution of the digital format; and the digital copy 'cannot be used outside premises of the library or archive,' " the guild and its fellow complainants assert in the lawsuit.

But Brandon Butler, director of public policy initiatives for ARL, says the explicit guidelines about library and archive usage written into the law do not mean the Fair Use exemptions do not also apply.

Case law is nevertheless thin in that regard, said Siva Vaidhyanathan, a media studies and law scholar at the University of Virginia. Notwithstanding the high-profile case currently being litigated against Georgia State University over the implications of Fair Use on library e-reserves, "There aren't a lot of cases about libraries and Fair Use," Vaidhyanathan said.

Aiken said the lawsuit was not really about the universities' decision to provide access to digitized orphans. It is more about the universities' having approved, and benefited from, Google scanning their entire collections without permission of the copyright holders.

While Aiken said the orphan issue gives the lawsuit "immediacy," the larger concern is that Michigan, California, Wisconsin, Indiana, and Cornell are currently holding ill-gotten digital copies of other in-copyright works — whose copyrights are owned by members of the Authors Guild.

In their court filing, the complainants note that just because the universities are not charging their students and faculty for access to the digitized orphans does not mean they have not profited from their controversial arrangements with Google.

"In light of the high-priced and sophisticated scanning technology and amount of staff required to digitize the works, the digital copies obtained by the universities carry significant economic value," they assert in court filings. "Prior to Google's involvement, libraries estimated their cost of digitization at $100 per volume. Thus, the digitization project is measured in the hundreds of million dollars."

Because they were not given the chance to grant permission, the guild never had the opportunity to negotiate security and usage rules with the libraries, Aiken said. For example, the guild would have required that the HathiTrust be held financially liable if a server was hacked and various works were released to the Web, he said.

The guild sued, Aiken said, because any post facto agreements would not carry the same weight as a court order. Reported in: *New York Times, September 12; insidehighered.com, September 14; Chronicle of Higher Education online, September 14.* □

Google books case set for trial

The case brought by authors and publishers over Google's vast book-digitizing project is headed to trial at last. But the parties told the federal judge handling the matter that there is still hope for some kind of settlement.

At a status conference held September 15 in Manhattan, Judge Denny Chin agreed to a trial schedule that would have the litigants in court by next summer. However, lawyers in the case told Judge Chin that settlement talks, especially those between Google and publishers, had made progress.

In March the judge rejected a proposed settlement, saying it overreached. The Department of Justice, a number of academic authors, and numerous other groups also opposed the deal. But Judge Chin also said that Google's proposed digital library would increase public access to knowledge, and he encouraged the parties to keep talking.

All of the parties to the case said that they would continue those discussions. "We informed the court that the Association of American Publishers, the five publisher plaintiffs, and Google have made good progress toward a settlement that would resolve the pending litigation," Tom Allen, president and chief executive of the publishers' association, said in a statement after the status conference. "We are working to resolve the differences that remain between the parties and reach terms that are mutually agreeable."

Google offered a ray of hope in its own statement. But it also sounded prepared for a courtroom battle. "We're encouraged by the progress we've made with publishers, and we believe we can reach an agreement that offers great benefits to users and rights holders alike," a company spokesperson said via e-mail. "We will continue to explore options with the authors.

"However, we proposed an aggressive timeline to resume the original litigation, and we were heartened by Judge Chin's agreement on a speedy schedule for proceeding. As we have said all along, Google Books was built to be fully compliant with copyright laws."

In 2005 the Authors Guild brought a class-action suit on behalf of authors against Google, arguing that its Book Search project violated copyright law. Five publishers and Allen's association filed their own civil lawsuit. Although all of the plaintiffs joined in reaching the proposed settlement with Google, the publishers could settle their complaint while the authors proceed to trial. Reported in: *Chronicle of Higher Education* online, September 15. □

ACLU of Texas issues 15th annual banned books report

Young Adult books are the most frequently challenged and banned in Texas public schools, the ACLU of Texas reported in its annual investigation published as "Free People Read Freely."

Based on reports from 750 school districts across the state, Texas schools banned 17 books last school year, 2010-2011, a decrease from the 20 taken from shelves the previous year. Most were in the popular Young Adult category, although at Cibolo Green Elementary School, *Merriam-Webster's Visual Dictionary* drew objections due to "sexual content or nudity." As a result of the challenge, the dictionary was placed in a restricted area of the library.

A total of 67 books were subjected to challenge. According to the report, "Round Rock ISD led the way with the most challenges in the 2010-2011 school year, but retained all six books at their schools. These challenges came from the elementary and middle school grade levels. Cypress-Fairbanks ISD came in second with five book challenges and banned two of Eric Jerome Dickey's novels, *Drive Me Crazy* and *Dying for Revenge*, at all their high schools.

"Burleson and Seguin ISD tied for third place in challenges with four books each. Of those books challenged, Burleson banned one at the middle school level. Seguin ISD took the lead in banning: three of the four books challenged were removed from elementary library shelves."

"Censorship of Young Adult books is concerning because these books motivate youth to read, improve literacy levels and drive interest in literature. They are also very relevant to youth, assisting them to make sense of the world and helping them to form their own ideas and values to prepare for the future," said Dotty Griffith, Public Education Director of the ACLU of Texas. "The ACLU of Texas absolutely respects parents' right to choose what books their children read and to work with teachers to find alternate titles when parents have concerns. But efforts by a single parent or small group to ban a book and keep all students from reading it infringes on the rights of other parents to make their own choices. That is the effect of banning books."

Among the 67 books challenged in the 750 ISDs that reported for the 2010-2011 year, numerous reasons were provided as to why the challenges were made:

- Politically/socially/racially offensive
- Offensive to religious beliefs
- Drugs and alcohol
- Violence and horror
- Profanity/poor language
- Sex or nudity

Most often, a single book was challenged for a multitude of reasons, such as *Dangerously Alice* by Phyllis Reynolds Naylor, for "sexual content or nudity," as well as "offensive to religious sensitivities." Naylor and two other YA authors, Francesca Lia Block and Eric Jerome

Dickey, lead the list of most banned books.

The ACLU of Texas annually requests information on challenges to books from all Texas school districts and compiles the data in its Banned Books Report. This year, the report also includes interviews with two successful YA authors: Francesca Lia Block, author of the popular *Weetzie Bat* series; and Phyllis Reynolds Naylor, author of more than 135 books, including the *Alice* series. □

Irvine 11 found guilty

After a rare prosecution related to a campus protest, ten Muslim students who are Palestinian supporters were found guilty of misdemeanors September 23 for heckling the Israeli ambassador to the United States when he spoke at the University of California at Irvine. (An 11th plead guilty before the trial.)

But the verdict, which ended a two-week trial in Orange County, is unlikely to put to rest a controversy that raged for more than a year and a half, from the incident itself in February 2010 through the university's response and now the trial and sentencing. The students' lawyers have vowed to appeal. And some experts on campus free speech say the verdict could have consequences elsewhere, especially if other district attorneys choose to follow Orange County's lead in prosecuting student protesters.

"It seems as if the rules have been rewritten," said Jarret Lovell, a professor of politics at California State University at Fullerton, who has studied and written on protest. He said he sees universities as a place for trial and error, where students can try to apply civics lessons in practice—even if the result is rude and, as he described the interruptions, "absolutely silly."

"I think what this prosecution does is it sends a message that says if you're going to engage in protest, you'd better get it right the first time around," he said.

Speakers who strongly support or criticize Israel are controversial on many campuses, and at Irvine, which has a history of troubled relationships between some Muslim and Jewish student groups, controversy over Michael Oren's speech was almost inevitable.

Sure enough, during the speech, eleven students, some from Irvine and others from the University of California at Riverside, repeatedly interrupted, rising one at a time to shout criticism of Israel and drawing applause from others in the crowd. Officials pleaded with the audience, both

before the speech and after the interruptions, to let Oren continue; he did so, but ended his speech before a scheduled question-and-answer session.

The university condemned the heckling. While the protesters argued that theirs was a case of academic freedom and free expression, most campus policies defend the right to protest outside a talk, or to ask critical questions afterward, but not the right to interrupt repeatedly.

After an investigation that found that the Muslim Student Union had organized the protest, Irvine officials suspended the group for a quarter—an unusual step, since college officials rarely discipline political or religious groups. And while the university then considered the matter settled, the Orange County district attorney decided to proceed with a trial, charging all eleven students with two misdemeanors: conspiracy to disrupt a public speech, and disrupting it. The prosecution argued that the students acted as censors by disrupting the speech. The defense countered that the protests were legal and the prosecution infringed on the students' rights, emphasizing that the students' comments took up a small fraction of Oren's 30-minute speech.

Some who had criticized the students' actions, including Lovell, said taking the case to a jury was going too far and could have a "muting effect" both on student activism and on universities' willingness to invite speakers who could be controversial.

Others, including the president of the Israel on Campus coalition, said the verdict was important for academic freedom and sent a message that shouting speakers down would not be tolerated.

"It was an important vindication of the right of academic institutions and communities to protect academic freedom and academic integrity," said Stephen Kuperberg, president of the coalition, which has not taken an official position on the case. "The court reached the appropriate verdict."

Sanctioning the student organization was appropriate, given the repeated nature and intensity of the interruptions, said Cary Nelson, president of the American Association of University Professors: "Academic freedom requires any invited speaker to be given the space to deliver a talk," he wrote. Still, Nelson said the prosecution was unnecessary. "Except in the case of serious felonies, I object to the town/gown version of double jeopardy, in which punishments occur both on and off campus."

Many framed the controversy in ethnic or religious terms: in addition to the history of conflict between supporters of the Israeli and Palestinian causes at Irvine, charges were brought against the students a week before a protest at an Islamic charity event in Orange County. (Those who supported the court's actions, including Kuperberg, said the question was not Israelis vs. Palestinians, or Jews vs. Muslims, but rather a legal point.)

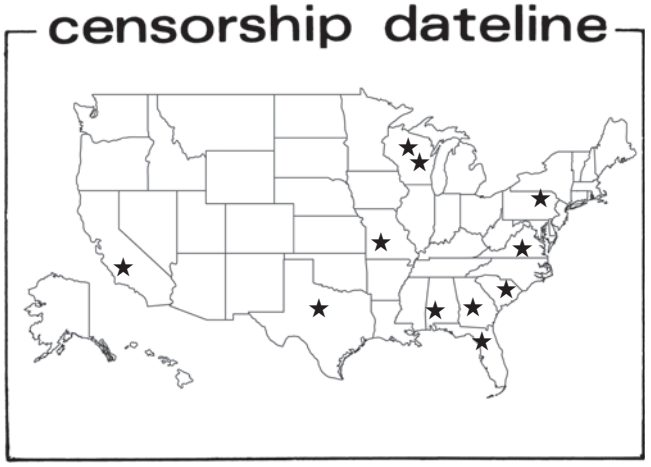
The trial was in part a result of that atmosphere, said Robert M. O'Neil, an emeritus professor of law and First Amendment expert at the University of Virginia. He noted that the case had other unique features, including the fact that students were interrupting a foreign ambassador and the clear ground rules that the university stated before the speech began.

"For some reason, the Middle East tension seems to have played out almost uniquely in Orange County and specifically at UCI," said O'Neil, who leads the Ford Foundation's Difficult Dialogues project, which seeks to help universities foster conversations on touchy issues. "Therefore, my best guess is that each of these incidents is distinctive, if not unique, and particularly the criminal sanctions here are not likely to translate very extensively."

In the end, the ten students (one of the so-called "Irvine 11" pleaded guilty in exchange for community service and probation before the trial began) were sentenced to 56 hours of community service and three years' informal probation.

But as the planned appeal goes forward, some controversy will no doubt linger. "One of the advantages that universities have over any other social institution is that they can deal with things themselves, without the law having to get involved," Lovell said. "This was such a case." Reported in: insidehighered.com, September 26. □

READ BANNED BOOKS



libraries

Tavares, Florida

Lake County Commissioner Jimmy Conner wants racy *Gossip Girl* books booted from the teen section of Lake's public libraries.

"We're not saying 'ban the books,'" Conner said of the teen series, which explicitly details the lives and loves of privileged adolescent girls in New York City. "We're allowing the filth to be in the library, just not in the children's section." He complained that the language in one passage is "so vulgar you couldn't read it right here at a commission meeting without being extremely embarrassed."

Commissioners Leslie Campione and Sean Parks concurred with Conner's position during a discussion that apparently was prompted by state Sen. Alan Hays (R-Umatilla), who relayed concerns raised by Dixie Fechtel.

Two years ago, Fechtel, a Leesburg mom, wanted books that described explicit sexual activity, drug use and violence and contained crude language to be moved to the library's adult section or labeled as "mature content" to warn parents of young readers. Her campaign, supported by Art Ayris, executive pastor of First Baptist Church of Leesburg, led the Leesburg City Commission to establish a separate "high school" area in the city library for the *Gossip Girl* series and books with similar content. Leesburg's library operates independently of the county library system.

County Attorney Sandy Minkoff warned commissioners to tread cautiously with the issue. "The federal courts have struck down decisions by elected boards to move books based on content," Minkoff said. "What one of us might think is obscene or one of us thinks is really terrible, another one of us might not."

County Library Services Director Thomas Merchant said the *Gossip Girl* series and other books that deal with adolescence are on shelves of the libraries' "teen" section, geared for readers between 13 and 18. He said the county has a procedure that allows residents to object to the location of books, but no one has filed a "request for reconsideration" form as required by county policy. Meanwhile, in the past 12 months, the *Gossip Girl* book, *Only in Your Dreams*, which Fechtel assailed for crude language and depictions of sexual activity, has been checked out 17 times.

Conner said the books belong in the library's adult section. "What I read was pornography without pictures," he said. Reported in: *Orlando Sentinel*, September 17.

Picayune, Mississippi

A book loaded with foul language and sexually explicit material has been pulled from the library shelves at Picayune Junior High School. The book is in the popular *Gossip Girl* series, which is described on a scholastic reader website as "containing profanity and sexual situations, some editions also talk about drug and alcohol use."

After seeing the book, the parents of one teen said it was time to take action. Tony Smith said it was the cover of the book *Nobody Does It Better* that got his wife's attention, but the words on the pages shocked her.

"The f-word is in there. It makes reference to 'Fuck this test,' 'Fuck the teacher.' It makes some sexual explicit comments that I find very offensive, as a parent."

"Here's one of the quotes in here it says, "Hopefully Nate's friends will get the hint and make like bees and fuck off," Smith read. Smith said his 13-year-old daughter, a 7th grade student at Picayune Junior High, checked out the book from the school library to do a book report.

Smith, who happens to be chairman of the Picayune School Board, told his wife the procedure to bring it to the attention of school leaders. "She expressed her concerns to the school board about how books get into the library system."

After hearing Mrs. Smith's complaint, the school board and administration decided to remove the *Gossip Girl* books from the all the libraries in the district. But this father is still not happy with how the book ended up in the junior high library.

Picayune Assistant Superintendent Brent Harrell said the book had been in the school library since January. But he couldn't say how many times students had checked it out. Smith said the district is now reviewing how library books are selected. Smith, who was recently elected to the State Senate, is in the process of drafting legislation in hopes of preventing a similar situation in other schools around the state.

The *Gossip Girl* books are on the Advanced Reader

selection list used by schools around the country. Students can choose to read more books and take tests on the content. Reported in: wlox.com, September 21.

Republic, Missouri

Two controversial books recently removed from Republic High School will return, but they'll be stored in a secure section of the library and only accessible to parents. Teachers still cannot make the books required reading nor read them aloud in school. The old policy had removed the books from the school altogether.

Two months after the Republic school board voted to remove Kurt Vonnegut's *Slaughterhouse-Five* and Sarah Ockler's *Twenty Boy Summer*—triggering a heated debate and national attention—the board revisited the issue during a packed meeting September 19. "It does keep the books there in the library, and if parents want their kids to read the book, by all means come and check it out," said Superintendent Vern Minor. "...It still puts the decision in parents' hands."

With no discussion—and only board president Ken Knierim commenting on the change—the board voted 6-0 to adopt a revised draft of the book standards originally approved earlier this year. It merely changed the way "challenged" books—the two in question and any others removed in the future—would be accessible in the district.

"That's what has come under scrutiny, that if parents want their children to read a book that has not met the district standards, they have to get the book from somewhere else," Minor said. "It's not in our library. That's the issue that seems to have surfaced."

A year ago, Republic resident Wes Scroggins filed a complaint about the appropriateness of three books. He argued that they teach principles contrary to the *Bible*. The district created a task force to develop book standards that were then used to review the books.

On July 25, following Minor's recommendation, the board voted 4-0—three members were absent—to keep Laurie Halse Anderson's *Speak* and remove the books by Vonnegut and Ockler.

"The book challenge actually created an opportunity for us as a school district, not just to look at the three books in isolation but to also develop a set of standards that we could use from this point forward," Minor said. "Those standards would do two things for us—help us resolve the public complaint ... and establish parameters to help staff make decisions in the future."

Some in the community came out to offer support for the ban, while others feel the modified policy is still too restrictive. "It's probably better than not, but I would rather have the English and literature teachers choose what will be in the curriculum and the library," said Margaret Heart-Struzs. "I would rather have them choose."

"This is or isn't about Christ and faith," countered Mark Kiser. "It's about what's right and what's wrong. And to read those out loud in public in a classroom a government classroom is wrong."

Responding to the decision, the Kurt Vonnegut Memorial Library in Indianapolis said that it will continue to offer one free copy of *Slaughterhouse-Five* to students at Republic High School.

"I was thrilled to see the headline that suggested the school board ended the ban of these books, although their action didn't really end the ban," said Julia Whitehead, Executive Director of the Kurt Vonnegut Memorial Library. "What they're doing is making books available to students only if parents or guardians physically come to the school library to check out the books. The books are otherwise being held in a 'secure location' within the library, where students cannot access them. These barriers are tantamount to the banning of books and are clearly inconsistent with our democratic freedoms and the free flow of ideas represented by the First Amendment. How do we expect our children to grow up to be inquisitive, educated, participating citizens if we set up such barriers to accessing classic American literature, such as *Slaughterhouse-Five*?" Reported in: *Springfield News-Leader*, September 20; ozarksfirst.com, September 19; reuters.com, September 20; *School Library Journal*, September 23.

Borger, Texas

What would you do if you were unhappy with a book your child was reading? One parent was, and took the concerns to the Borger Independent School District. That book is now banned from the district's intermediate and middle school library.

The book that was called into question by a Borger ISD Intermediate parent is, *Tangled*, by Carolyn Mackler. It's about four young adults who are staying at a resort in the Caribbean. Last year, the parent had concerns over the sexual content and profanity used in the book. So, that parent went to the district.

"As outlined in our board policy we created a committee to review the book. The committee determined that due to the sexual content and profanity that it was not appropriate for the age level served at our intermediate and middle school," said Chance Welch, Borger ISD Superintendent.

Welch says any time a parent has a concern, the school board addresses it. "We certainly take parent concerns seriously. We try to look for various options even informally if there's a concern in the classroom, like offering a different book," said Welch.

When a book is banned, it is taken off the library shelves and/or removed from class reading lists, which was the case at Borger's Intermediate and Middle School Library. Welch said this was the only book complaint they had last year,

and the first time they've banned a book. Reported in: connectamarillo.com, September 29.

schools

Glendale, California

Since its publication in 1965, Truman Capote's *In Cold Blood* has been widely recognized as a seminal work in American literature, frequently appearing on high school and college reading lists. But the contents of the nonfiction novel, which detail the brutal murder of a Kansas family, are apparently too macabre for some Glendale Unified School District officials and parents who are seeking to block a request by a high school English teacher to add the text to the district's advanced English curriculum.

The debate started midway through the 2010-11 school year when long-time Glendale High School English teacher Holly Ciotti submitted a request to add *In Cold Blood* to a list of books approved by the district for use in advanced placement language classes.

Capote's work is a great fit for the class, Ciotti said, because it introduces students to the American judicial system and the death penalty, among other contemporary topics. It is also superbly written and allows students to form their own opinions. *In Cold Blood* is used in classrooms across the country and Ciotti said she considered the request little more than a formality.

But while the book received unanimous support from the district's English Curriculum Study Committee, which is composed of high school teachers, it hit a snag with the Secondary Education Council. Its membership — made up of high school principals — expressed reservations, as did members of the PTA. Reported in: *Los Angeles Times*, September 25.

Williamstown, New Jersey

A New Jersey school district has pulled two novels from its required reading list after parents complained about the works. Haruki Murakami's *Norwegian Wood* and Nic Sheff's *Tweak: Growing Up on Methamphetamines* were both pulled from the list after parents complained about their gay sex scenes.

The books were on a required summer reading list for middle school and high school students. The district decided to pull the books off the list, with the start of school just days away. "There were some words and language that seemed to be inappropriate as far as the parents and some of the kids were concerned," said Chuck Earling, superintendent of Monroe Township Schools in Williamstown.

Norwegian Wood was on a list for incoming sophomores in an honors English class. The book includes a graphic depiction of a lesbian sex scene between a 31-year-old woman and a 13-year old girl. "I don't think that's relevant for any teenager," parent Robin Myers said. Her daughter was assigned to read the book. "I was just kind of in shock," she said.

Tweak includes depictions of drug usage and a homosexual orgy. "That has created a controversy," Earling said, referring to the drug usage – along with the lesbian and gay sex scenes. "We've pulled them from our summer reading list."

Earling said the school district's summer reading list was prepared by a committee made up of teachers, librarians and school administrators. The board of education ultimately approved the list.

"They read the books," he said. "They didn't feel it was inappropriate based on the language that's used, common language used on the street." The superintendent said students have seen more graphic things on television or in the movies – and noted that only about a dozen people actually complained.

As a result of the controversy, Earling said the district is going to rework the summer reading lists to include a rating system for books. And he also said that in the future, they will include parents on the reading list committee. Reported in: foxnews.com, August 23.

Mt. Pleasant, South Carolina

Author Bret Lott says his book *The Hunt Club* is a story about a 15-year-old figuring out who he is in the most specific and universal sense. Wando High School parent James Pasley says the book uses foul language, degrades women and people of color, and isn't appropriate to be on a recommended reading list for high school students.

Pasley and his wife challenged the book's inclusion as an option for required summer reading at Wando, in Mount Pleasant, and the county School Board is planning a hearing to decide whether the book should be allowed on any district bookshelf. Pasley said his family never wanted the book banned from school libraries. They disagreed with the district's approval of *The Hunt Club* as recommended reading material, and that's why they appealed to the board.

"Sometimes there are unintended consequences of policies and procedures," Pasley said. "If that is the result, then that is on the district, not us. If the policy has unintended consequences, then they need to make adjustments to the policy. That still shouldn't require students and parents to be inflicted with the kind of negative impact that this particular piece of literature offers."

It's the first time in recent memory, and possibly ever, that a challenge of a book has gone to the board, said Connie Dopierala, the district's coordinator for media services. Parents have the right to make decisions about the books their children read, and the vast majority of the issues parents have with school-approved books are resolved

informally, she said.

"When it gets to the board level, it is tantamount to censorship because that's what they're asking," Dopierala said. "What makes this different is if this book is removed … it's taking away another parent's right to determine appropriate reading material for their student."

The Hunt Club is set in the South Carolina Lowcountry and tells the story of a teenage boy and his uncle who find a dead body and have to figure out what happened. Wando High used the book until summer 2010 as one of eight summer reading options for incoming juniors.

Emilie Woody, a Wando High media specialist who served on Wando's summer-reading-list review committee, said the school tries to offer a broad spectrum of literature because of its diverse student population. *The Hunt Club* was one of the recommended options because it was written by a local author and involved hunting, and that appealed to students who sometimes aren't interested in reading, she said.

Pasley said he understood the desire to give students interesting reading material, but he didn't think the school should resort to "that kind of cheap-thrill-novel kind of literature."

Pasley and his wife are involved in their son's education, and he said they keep tabs on his assignments. His wife read *The Hunt Club* and couldn't believe its contents, he said. Students shouldn't be recommended to read that kind of profanity or derogatory treatment of women and minorities, he said. "That was inappropriate and distasteful," he said.

After Pasley and his wife expressed their concern about the novel, Dopierala asked a group of Wando High teachers to read the book and decide whether it was appropriate for students. The group agreed that it should remain a choice for students, because of its broad appeal and because it fit with the theme of 11th-grade English, which is American literature.

The family disagreed with that decision, so Dopierala convened a district committee that included teachers, media specialists and parents. All were asked to read the book, and the district held an administrative hearing in which the family and school were given an opportunity to make their cases.

It resulted in a recommendation for the district to continue use of the book, but for summer reading lists to include a warning note about the types of themes contained in young adult literature. Going any further, such as rating books on a scale, would be too subjective a decision for the district to make, Dopierala said. Superintendent Nancy McGinley accepted the committee's recommendation.

Pasley said any note included with reading lists should be descriptive enough to reflect the graphic content of the material; parents should be able to know exactly what their children are reading. He compared it to the warnings on cigarette packages; the first of those were innocuous, but the new ones gave enough information so consumers understood the risks, he said.

Charleston educators didn't deny the book's use of foul language, but they said that language isn't the heart of the book. "The language is not there just to be there," Woody said. "It has a specific purpose."

Lott said the book is about good and evil, and the evil characters are foul-mouthed and rude. He thought *The Hunt Club* was fine for students. "The objection is a bit baffling to me," he said. "Even the most cursory look at MTV or movies will expose (young people) to bad language. Just roll your car window down and drive through your own neighborhood sometime."

Educators also disagreed with the charge that the book is degrading to women and that it contained racial prejudice toward African-Americans. Lott said readers actually root for the relationship the white protagonist has with his African-American girlfriend.

"I don't know what motivates this kind of reaction except a kind of Victorian sensibility, and I say that as a believing Christian and Sunday school teacher," Lott said. "How do you shield children from racism? Virtue is not virtue unless it is made vulnerable and put to the test in confronting these things."

Lott plans to attend the county school board's hearing, when a date is determined; this isn't a situation writers often encounter, he said. He feels "an odd kind of pride in it. On the other hand, I wonder what my pastor will think," he said.
Reported in: *Charleston Post and Courier*, September 24.

Albemarle County, Virginia

A Virginia school district has removed from the required sixth grade reading list at one middle school a Sherlock Holmes book because a Mormon parent complained about the way it portrayed Mormons.

Josh Davis, chief operating officer for the Albemarle County Public Schools said the school board decided in August to honor the request of a group of parents, "one in particular of the Mormon faith," who complained earlier in the year.

The book in question is *A Study in Scarlet*, by Sir Arthur Conan Doyle, a classic novel that was the first to present the character of the brilliant sleuth Sherlock Holmes and his friend, Dr. Watson. Doyle wrote the novel in three weeks; it was published in 1886.

A committee of teachers, students and members of the central staff was formed to review the book and consider the request, and it recommended that it be removed from the required sixth grade reading list at Henley Middle School in the town of Crozet. It was not on the reading list of any other middle school in the district.

According to Davis, the book remains in the library and is available for students who wish to read it. "Banned is not

the correct word for what happened," he said.

Some members of the school community were unhappy with the decision, and some former Henley students testified at the August 11 school board meeting where the final decision was made, he said. "Some folks felt there was some censorship involved here," he said. "There wasn't."

That is questionable, one columnist wrote: "What the school board did was force every sixth grader in the school to bow to the sensibilities of a parent. If the parent didn't want his or her own child reading the book, arrangements could surely have been made. This doesn't make any more sense than the incident last year when Culpeper County Public Schools (also in Virginia) removed from school libraries a version of the *Diary of A Young Girl*, by Anne Frank, because a parent complained about graphic sexual language." Reported in: *Washington Post*, August 16.

Merrill, Wisconsin

A group of residents concerned about the mature themes of the book *Montana 1948* is trying again to have the book banned from classrooms and libraries of Merrill Area Public Schools.

The Merrill School Board held a public hearing on the matter at September 29. It was the second time this year the School Board considered the matter.

This spring, the same group asked that *Montana 1948* be removed immediately from the district's schools, short-cutting district policy. The book, written by former University of Wisconsin-Stevens Point English professor Larry Watson, is taught in 10th-grade English classes. The School Board voted 7-2 against the book's removal at the time. Bruce Anderson, interim superintendent, said that vote was about whether the group needed to follow the lengthy protocol called for by district policy to remove the book.

Since then, a group of 34 residents has followed the policy by filing a formal complaint and meeting with the principal and superintendent. A committee of educators and parents also scrutinized the book and its use. At each of those phases, the book has been deemed appropriate for the classroom and the library of the high school, Anderson said. Those findings led to the public hearing and a possible vote by the School Board—the last step in the process.

Dorly Dahlke, 46, of the town of Scott is one the parents who opposes the use of *Montana 1948* in Merrill High School, on the grounds that it includes mature themes of rape, sex, abuse of power and obscene language.

"I could see us do better," Dahlke said. "I understand that there are people who feel it has some educational value, and I would say, yeah, as an adult, as an 18-year-old or higher, I'm sure there can be life lessons that can be taught."

But, she said, the book's themes aren't appropriate for minors when less-controversial books could be used in the place of *Montana 1948*. Dahlke, the mother of six children, four of whom attend Merrill schools, believes students already are saturated with images of sex and other mature themes in their daily lives. Schools should not add to that, she said.

The majority of School Board members said in May that they believed the critically acclaimed book highlights valuable themes that are important for students to explore, including racism and morality.

In May, Watson, who now teaches English as a visiting professor at Marquette University in Milwaukee, said he wrote about rape, racism and abuse of power "because they are part of life. Do I wish they weren't? Of course I do. But they are, and I think we're always better off trying to be open and honest about the really unpleasant side of life."

Watson said in May that he was opposed to removing the book. "It's censorship," Watson said. "It's other people deciding what's best for others."

Bill Jaeger, acting Merrill School Board president, said he'll listen with an open mind to residents at the public hearing. But based on past arguments, he personally feels *Montana 1948* is appropriate for high school students. He also worries about the precedent that pulling the book might set.

"What do we pull next?" Jaeger said. "Do we pull Huck Finn books because of the 'n' word? Where do we draw the line?" Reported in: *Wausau Daily Herald*, September 27.

theater

Carrolton, Georgia

The mayor of a west Georgia town has nixed a community theater group's plans to perform a play based on the "Rocky Horror Picture Show" at the town's cultural arts center.

The director of the Carrollton production, Michelle Rougier, and a company of young and energetic performing artists were thrilled when the city agreed to let them present, in October, four performances of the original stage version of "The Rocky Horror Show" at the city-owned, 266-seat Cultural Arts Center in downtown Carrollton.

But after months of planning, someone showed Carrollton's mayor and his staff a brief video of one of the rehearsals. The choreography is R-rated, as the cast readily acknowledges. A cast member had shot the video and posted it on his personal Facebook page. A copy of the risque rehearsal video made its way to the city manager, who showed it to the mayor.

"It was too risque for them, but it's 'The Rocky Horror Show,'" Rougier said. She and the actors are asking—what was the city expecting from "The Rocky Horror Show"?

"You would imagine they knew, since they were the ones who signed all the contracts and got everything together and did all the advertising, that they knew what Rocky

Horror was all about," Rougier said. "[The play] is a farce. It's making fun of all of the 1950s science fiction shows. It should not be taken seriously."

Mayor Wayne Garner takes it seriously. He said he was not expecting an R-rated show on a city-owned stage. "I found [the video of the rehearsal] very offensive," he said, "not in keeping with the community of Carrollton, if you will."

So Garner overruled the community leaders who make up the theater's board; they are the ones who gave the go-ahead for the show and committed $2,500 of city money toward the production.

Actor Jarrett Jones said the mayor's decision to shut down the play offended the members of the show's cast and crew who are taxpayers just like those Garner said he is protecting from being offended. Jones said that he and the others have just as much right to use the taxpayers' stage for theater that is not always "polite."

"The show is adult-themed," Jones said. "But if you focus solely on the more lascivious aspects of the play, then you lose out on all the wonderful ideas—of things about embracing eccentricity, or these ideas of metamorphosis, the ideas of taking hold of adventure and really living in the moment.... [A play] shouldn't be something that's always polite or always something that's easy to grasp. Why would you go to the theater if you're always going to see 'Barney and Friends?' It should be something that makes you think, that puts some fire underneath you, that either makes you enraged or absolutely delighted. They should accept that it's not always going to be 'Mary Poppins' or 'Little Mermaid.'"

The theater group had planned to admit only adults to the four performances, and had arranged to distribute to those audiences all of the party props that have been part of the zany, audience participation showings of the movie version.

Mayor Garner is convinced there is no place for adult-oriented plays at the city's Cultural Arts Center. "I know this community well," he said. "If that play was allowed to proceed... we'd be run out of town."

"It frightens me to a point where I'm worried for the local artists here in Carrollton," Rougier said. "Is this [attitude] going to move into the art gallery? It's definitely censorship in a way that will have a negative impact on the art community within our community."

Garner said that from now on, he will make sure that only G, PG and PG-13 types of plays are approved for the city-owned stage. "The city has every right not to do certain shows," Rougier said. "But what this is, is this is something that was approved at some faction of our government, and it has now been disapproved by another faction of our government because of censorship. I mean, they are censoring what they think should be on the stage in Carrollton, rather than giving it a chance or even giving me a chance as director to change things, to make it less risque."

Garner said Rougier and the others are perfectly welcome to put on the play anywhere they want in Carrollton on some private stage. "That's my opinion," the mayor said. "I know those people have worked hard on this, and maybe in some other setting, it may be appropriate, but it is not appropriate for [the city-owned theater in] Carrollton, Georgia."

The play's cast and crew said they would try to find some private sponsors and put the show on a different stage—in Carrollton. Reported in: 11alive.com, September 14.

university

Stout, Wisconsin

The University of Wisconsin-Stout has come under fire from free-speech advocates for refusing to let a theater professor decorate his office door with posters described by some administrators as threatening.

The conflict over speech began when the professor, James Miller, hung a poster from the science-fiction television series *Firefly* that referred to killing. The campus police chief took it down, telling Miller in an e-mail exchange that he could face a criminal charge if he rehung the poster or another one similar to it. When Miller hung a second poster denouncing fascism as leading to violence, the campus police took it down, as implying a threat, at the urging of a campus threat-assessment team that had conferred with the university system's office of general counsel.

The Foundation for Individual Rights in Education, a free-speech advocacy group, has accused the university of censorship, but top campus officials argued in an e-mail to the faculty and staff that they had "a responsibility to promote a campus environment that is free from threats of any kind." Reported in: *Chronicle of Higher Education* online, September 28.

foreign

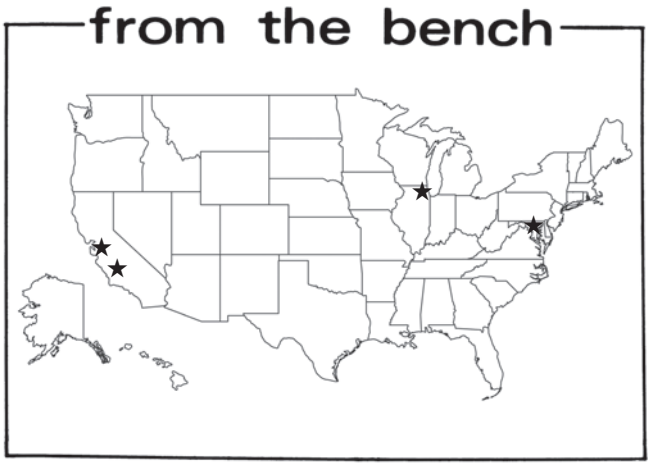
Moscow, Russia

A senior Russian Orthodox official claimed September 28 that novels by Vladimir Nabokov and Gabriel Garcia Marquez justify pedophilia and said they should be banned in the nation's high schools.

Father Vsevolod Chaplin's demand that Russia's government investigate and limit the use of the books was his church's latest attempt to impose religious norms in a country that once rejected religion altogether.

Chaplin, who heads the Moscow Patriarchate's public relations department, discussed Nabokov's *Lolita* and Garcia Marquez's *One Hundred Years of Solitude* on

(continued on page 221)



U.S. Supreme Court

A case pending before the U.S. Supreme Court could significantly alter how much freedom religious colleges have to skirt anti-discrimination laws in dealing with their employees.

At issue in the case is the somewhat ill-defined legal doctrine of "ministerial exception," which holds that the courts should not interfere with religious institutions' decisions regarding employees with religious duties, such as priests.

The Supreme Court, which was scheduled to hear the case on October 5, has never ruled on the legitimacy or limits of "ministerial exception." But most federal appeals courts, and many state courts, have long embraced it as rooted in the First Amendment's clauses protecting religious freedom. They have generally abided by it in dealing with disputes between religious institutions and rabbis or clergy members, although they have been somewhat split on how to apply it in cases involving employees without religious titles.

The case pending before the Supreme Court, known as *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* involves a conflict between a now-defunct religious elementary school and a teacher it had fired. Even so, many of the organizations that have weighed in on the dispute have voiced concern that the court's eventual ruling, expected by the summer of 2012, could significantly affect the operations of all religious institutions, including colleges.

Lawyers for the Obama administration, for example, have filed a brief on behalf of the EEOC warning that a ruling giving religious institutions a broad right to declare themselves exempt from anti-discrimination laws "would chill employees' ability to invoke their rights."

More than sixty professors of law or religion at American higher-education institutions have submitted an *amicus curiae*, or "friend of the court," brief similarly arguing that "the ministerial exception has breathtaking implications for denying the civil rights of employees of religious schools and institutions," including the nation's roughly 900 religiously affiliated colleges and universities.

On the other side of the debate, the Council for Christian Colleges and Universities, which has 109 members and 28 affiliates in the United States, has submitted an *amicus* brief urging the justices not to let the federal courts get involved in determining which employees of religious institutions should be classified as ministerial. "Such questions," the council's brief argues, "are the very type of entanglement with religion that the ministerial exception was created to avoid."

The former teacher at the center of the case, Cheryl Perich, came into conflict with the Hosanna-Tabor church, in Redford, Michigan, in January 2005 after taking sick leave and being diagnosed with narcolepsy. She had sought to return from leave to her teaching job, assuring her managers that her disease had been brought under control with the help of medication. But officials of the church, which is affiliated with the Lutheran Church—Missouri Synod, pressed her to resign, saying they were unconvinced she could carry out her duties and did not want to have to remove the teacher hired to replace her.

When Perich refused to resign and threatened legal action, church officials accused her of being insubordinate and conducting herself in a manner that violated the church's teachings about resolving disputes internally, rather than through the courts. She was fired that April, and, the following month, filed a complaint with the EEOC accusing the school of violating her rights under the Americans With Disabilities Act by discriminating and retaliating against her.

The federal district court that took up the case sided with the church after accepting its argument that Perich was a ministerial employee. In reversing that decision in March 2010, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit undertook a detailed examination of Perich's responsibilities. It noted that she taught 30-minute religion classes four days each week, and attended chapel with her class once a week for 30 minutes. But, it concluded, during the rest of the week she "taught secular subjects using secular textbooks commonly used in public schools," and nothing in the court record indicated that the church relied on her to indoctrinate students in theology.

Holding that determinations of which employees fall under the ministerial exception should be based on those employees' primary duties, the appeals panel said the

district court had erred in rejecting Perich's claim under the disabilities act. "The fact that Perich participated in and led some religious activities throughout the day does not make her primary function religious," its ruling said. Asserting that the intent of the ministerial exception "is to allow religious organizations to prefer members of their own religion and adhere to their own religious interpretations," the appeals panel rejected the church's argument that the exception precluded the courts from taking up Perich's claims related to disability.

Hosanna-Tabor's lawyers argue in a brief submitted to the Supreme Court that Perich was fired for violating church rules, and that the courts cannot take her side without becoming entangled in a religious dispute, interfering with the church's ability to determine who teaches its faith, and delving into the religious question of what constitutes a ministerial function.

The Council for Christian Colleges and Universities argues in its *amicus* brief that the group's members reject "the Sixth Circuit's view that there is a distinction between sacred subjects and secular subjects" taught by employees of such institutions. Instruction at such colleges "demonstrates how religious faith is exercised in all subject matters," not just those that are explicitly religious, the council's brief says.

"These institutions," the brief argues, "have a real commitment to integrating faith into the subjects they teach; the concept of faith integration is not a subterfuge to take advantage of the ministerial exception." Determining whether a particular class is a secular activity, it says, requires the court to examine the curriculum, to investigate what the professor discusses, and to assess whether the professor's instruction is consistent with the intent of his or her employer, and otherwise invite "the very type of entanglement with religion that the ministerial exception was created to avoid."

"At the college level, even a professor who devotes 100 percent of his time to teaching mathematics or theater might rightly be viewed as having a ministerial role, if the college's mission statement or his job description tasks him with spreading the faith or with educating students in how that faith applies in the context of those particular subjects," the brief says. The courts' determination of when to apply a ministerial exception should take into account the institution's stated mission, and not be based on some sort of quantitative analysis of how an employee's time is spent, it says.

Applying ministerial exception does not strip the faculty members of religious colleges of their rights, the brief argues, because those who disagree with their institution's employment decisions have access to grievance and appeal processes.

Perich's lawyers argue in their brief to the Supreme Court that the sort of immunity from federal intervention sought by Hosanna-Tabor "would leave hundreds of thousands of teachers without the protection from discrimination and retaliation that Congress intended to afford them." It would allow religious organizations to discriminate against any employee who performs an important religious function, and leave the employees of such organizations "unprotected against retaliatory dismissals" for activities such as reporting health violations or sexual abuse, or fighting for better pay. "Nothing in the right of free association—or, indeed, in any right under the Religion Clauses—grants religious organizations such a sweeping exemption from neutral and generally applicable anti-discrimination laws," the brief says.

The Obama administration's brief argues that the sort of broad exception to the disabilities act sought by Hosanna-Tabor "would critically undermine" the protections offered employees by a wide variety of federal laws. "The constitutional issues that can arise in litigation between religious entities and their employees are best resolved on a case-by-case basis," it says. If, the brief argues, the court does decide to adopt a categorical exception to federal laws for cases dealing with religious institutions' employees, it should be limited only to employees "who perform exclusively religious functions and whose claims concern their entitlement to occupy or retain their ecclesiastical office."

Although there might be cases in which the right to expressive association trumps an employment discrimination claim against a religious organization—such as a case involving a legal challenge to a church's practice of ordaining only men as ministers—Hosanna-Tabor did not offer any evidence that Perich's dismissal was necessary to express some religious message, the brief says.

The *amicus* brief submitted by more than sixty professors of law and religion argues that the Supreme Court should do away with the ministerial exception, which already has been applied by the courts in several lawsuits, mainly involving gender discrimination, brought by employees of colleges and universities. The professors argue that the Constitution's clauses dealing with religion do not require that such an exception be applied, because the Supreme Court has held that laws that are neutral on matters of religion, such as the disabilities act, do not violate the clause protecting free exercise of religion even if a religion is burdened by them. The ministerial exception, they say, "creates a lawless zone."

Among the other groups that have weighed in on the case, several religious organizations, including Loma Linda University, which is Seventh-day Adventist, have filed an *amicus* brief arguing that the courts should defer to religious organizations in determining which employees' positions are ministerial.

Several professors and scholars of antitrust law have submitted an *amicus* brief cautioning the court not to define the ministerial exception in ways that will enable religious

associations to cite it in imposing cartel-like restraints on their labor market. Reported in: *Chronicle of Higher Education* online, September 25.

The precedent is novel. More precisely, the precedent is a novel.

In a series of rulings on the use of satellites and cellphones to track criminal suspects, judges around the country have been citing George Orwell's *1984* to sound an alarm. They say the Fourth Amendment's promise of protection from government invasion of privacy is in danger of being replaced by the futuristic surveillance state Orwell described.

In April, Judge Diane P. Wood of the federal appeals court in Chicago wrote that surveillance using global positioning system devices would "make the system that George Orwell depicted in his famous novel, *1984*, seem clumsy." In a similar case last year, Chief Judge Alex Kozinski of the federal appeals court in San Francisco wrote that "*1984* may have come a bit later than predicted, but it's here at last."

In August, Judge Nicholas G. Garaufis of the Federal District Court in Brooklyn turned down a government request for 113 days of location data from cellphone towers, citing "Orwellian intrusion" and saying the courts must "begin to address whether revolutionary changes in technology require changes to existing Fourth Amendment doctrine."

The Supreme Court is about to do just that. In November, it will hear arguments in *United States v. Jones*, the most important Fourth Amendment case in a decade. The justices will address a question that has divided the lower courts: Do the police need a warrant to attach a GPS device to a suspect's car and track its movements for weeks at a time?

Their answer will bring Fourth Amendment law into the digital age, addressing how its 18th-century prohibition of "unreasonable searches and seizures" applies to a world in which people's movements are continuously recorded by devices in their cars, pockets and purses, by toll plazas and by transit systems.

The *Jones* case will address not only whether the placement of a space-age tracking device on the outside of a vehicle without a warrant qualifies as a search, but also whether the intensive monitoring it allows is different in kind from conventional surveillance by police officers who stake out suspects and tail their cars.

"The *Jones* case requires the Supreme Court to decide whether modern technology has turned law enforcement into Big Brother, able to monitor and record every move we make outside our homes," said Susan Freiwald, a law professor at the University of San Francisco.

The case is an appeal from a unanimous decision of a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit, which said last year that the government was simply seeking too much information.

"Repeated visits to a church, a gym, a bar or a bookie tell a story not told by any single visit, as does one's not visiting any of those places in the course of a month," wrote Judge Douglas H. Ginsburg. He added: "A person who knows all of another's travel can deduce whether he is a weekly churchgoer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups — and not just one such fact about a person, but all such facts."

Federal appeals courts in Chicago and San Francisco, on the other hand, have allowed the police to use GPS tracking devices without a warrant. The police are already allowed to tail cars and observe their movements without warrants, those courts said, and the devices merely allow them to do so more efficiently.

Judge Richard A. Posner, writing for a unanimous three-judge panel in the Chicago case, did caution that institutionalized mass surveillance might present a different issue.

Some judges say that world is fast approaching.

"Technology has progressed to the point where a person who wishes to partake in the social, cultural and political affairs of our society has no realistic choice but to expose to others, if not to the public as a whole, a broad range of conduct and communications that would previously have been deemed unquestionably private," Magistrate Judge James Orenstein of the Federal District Court in Brooklyn wrote last year.

The case to be heard by the Supreme Court arose from the investigation of the owner of a Washington nightclub, Antoine Jones, who was suspected of being part of a cocaine-selling operation. Apparently out of caution, given the unsettled state of the law, prosecutors obtained a warrant allowing the police to place a tracking device on Jones's Jeep Grand Cherokee. The warrant required them to do so within ten days and within the District of Columbia. The police did not install the device until eleven days later, and they did it in Maryland. Now contending that no warrant was required, the authorities tracked Jones's travels for a month and used the evidence they gathered to convict him of conspiring to sell cocaine. He was sentenced to life in prison.

The main Supreme Court precedent in the area, *United States v. Knotts*, is almost thirty years old. It allowed the use of a much more primitive technology, a beeper that sent a signal that grew stronger as the police drew closer and so helped them follow a car over a single 100-mile trip from Minnesota to Wisconsin.

The Supreme Court ruled that no warrant was required but warned that "twenty-four hour surveillance of any citizen of the country" using "dragnet-type law enforcement practices" may violate the Fourth Amendment.

Much of the argument in the *Jones* case concerns what that passage meant. Did it indicate discomfort with intense

and extended scrutiny of a single suspect's every move? Or did it apply only to mass surveillance?

In the *Jones* case, the government argued in a brief to the Supreme Court that the *Knotts* case disapproved of only "widespread searches or seizures that are conducted without individualized suspicion." The brief added: "Law enforcement has not abused GPS technology. No evidence exists of widespread, suspicionless GPS monitoring." On the other hand, the brief said, requiring a warrant to attach a GPS device to a suspect's car "would seriously impede the government's ability to investigate leads and tips on drug trafficking, terrorism and other crimes."

A decade ago, the Supreme Court ruled that the police needed a warrant to use thermal imaging technology to measure heat emanating from a home. The sanctity of the home is at the core of what the Fourth Amendment protects, Justice Antonin Scalia explained, and the technology was not in widespread use.

In general, though, Justice Scalia observed, "it would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." Reported in: *New York Times*, September 10.

privacy

Washington, D.C.

The U.S. government must tell the public how it tracked suspects by cellphone without having given a judge detailed reasons for the tracking in some cases, an appeals court ruled September 6 in a case pitting new technology against privacy rights.

A leading civil liberties group claimed victory in one of several cases making its way through the court system weighing privacy rights against law enforcement using data available through the proliferation of new technologies like the Global Positioning System (GPS), cellphones and laptop computers.

"I highly doubt that the 90 percent of Americans who carry cell phones thought that when they got cellphone service they were giving up their privacy in their movements," said Catherine Crump, a lawyer for the American Civil Liberties Union who argued the case.

The group has argued that prosecutors are getting information about a suspect's location with a judge's approval—but without a warrant providing probable cause, which is typically needed in criminal cases for a warrant. The ACLU questioned how often prosecutors have used applications for such information and sued to get details, a challenge the Justice Department said would violate the privacy of those under investigation or prosecuted.

A federal judge in 2010 ruled the Justice Department must reveal those cases that used such information in which the suspect was convicted, a decision upheld by a three-judge panel of the U.S. Court of Appeals for the District of Columbia.

"The disclosure sought by the plaintiffs would inform this ongoing public policy discussion by shedding light on the scope and effectiveness of cell phone tracking as a law enforcement tool," Judge Merrick Garland wrote in the unanimous decision.

Disclosure would, for example, provide information about the kinds of crimes the government uses cellphone tracking data to investigate, the appeals court said.

Citing privacy rights, the district court judge refused to order the government to reveal other cases in which such applications were used, such as the acquittal of a suspect or a sealed case. The appeals court sent that issue back to the lower court for more proceedings to determine the extent of those cases.

The Justice Department could appeal the ruling to the full appeals court or to the Supreme Court, which already has agreed to consider another privacy case involving new technology. Later this year the Supreme Court will hear arguments over whether law enforcement should have obtained a warrant before attaching a GPS device to a suspect's vehicle (see page 210).

Justice Department spokesman Charles Miller said the agency was reviewing the decision and had not decided on its next step.

After surveying several U.S. Attorneys' offices, the Drug Enforcement Agency and the Justice Department, some 255 cases were identified in which an application for cellphone location information was used. The government has offered to identify the nature of the charges as well as whether a motion to suppress that information was filed and the outcome. The ACLU said it was open to ideas on how to provide the public details of the information as a possible settlement. Reported in: reuters.com, September 6.

colleges and universities

San Diego, California

The U.S. Court of Appeals for the Ninth Circuit weighed in August 2 on whether nondiscrimination policies for student groups can be more narrowly written than the one addressed in an important 2010 Supreme Court decision.

The unanimous ruling, by a three-judge panel of the appeals court, upheld San Diego State University's policy for recognizing student groups. But the panel questioned whether the university had applied its policy fairly.

Two religious groups, a fraternity and a sorority, had challenged the policy in federal court, arguing that the university had violated their First Amendment rights by

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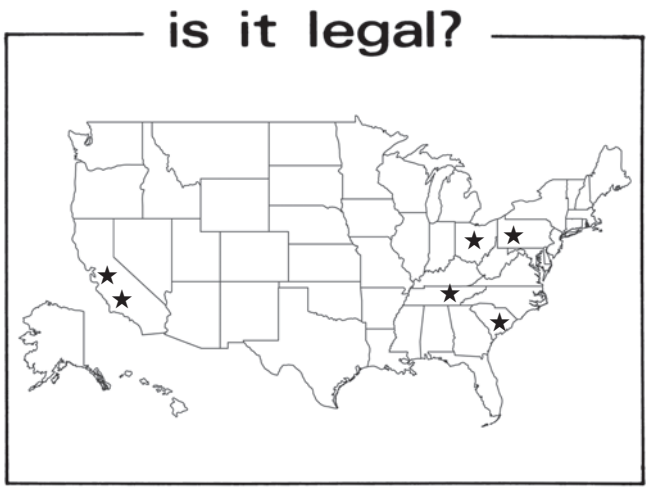

libraries

Bethlehem, Pennsylvania

The Bethlehem Area Public Library is a place to take your kids to story hour, pick up your favorite book or search for jobs on the Internet. As of July, it's not a place to sleep, bathe or panhandle.

The library revised its acceptable patron behavior policy to deal with the significant influx of homeless people who were spending their days at the library, Executive Director Janet Fricker said. While most of the 26 behavior rules are general — such as no eating, smoking or talking on cell phones — others seem to be directly targeted at the homeless, including rules that prohibit bringing in sleeping bags or having offensive bodily hygiene.

Those are the rules that particularly trouble the Rev. William Kuntze. The senior pastor at Bethlehem's Christ Church United Church of Christ has long been an advocate for the homeless and said he doesn't like to see them discriminated against. Kuntze said he is particularly bothered by the rules that involve judgment calls. What constitutes offensive bodily hygiene or sleeping versus napping is subjective, he said.

"I have no doubt if I was in a suit and was napping for a long time I wouldn't be thrown out," he said. "It's very clear some of these wouldn't be applied in the same way to someone like you or like me as they are to our homeless neighbors."

Kuntze also said he would like to see some change to the rule that patrons cannot bring in sleeping bags, bedding or more than two bags total. Unlike people with homes or cars, homeless people don't have anywhere else to store their belongings when they go to the library, he said.

Kuntze met with Fricker about his objections. She brought them up last week to the library board, which made one minor revision to the policy, changing no sleeping, napping or loitering to merely no sleeping.

Homeless people have always utilized the Bethlehem library, but the issue came to a head early this year when a van started dropping a group of them off at the library every weekday morning, Fricker said.

"A library cannot be an adult day care center — we do not have the resources for it," she said. "It was getting out of balance. It was getting to a point where people who regularly use the library with their kids weren't coming here anymore."

The van was from the rotating shelter program run by a dozen Bethlehem churches that provide the homeless with places to sleep in the winter. Craig Updegrove, the program's volunteer coordinator, said the program has both a Center City and South Side pickup location and that the library was seen as a central location for homeless people who use the library, Trinity Episcopal Church's nearby soup kitchen and other Center City services.

Kuntze has been keeping Updegrove and others involved in the sheltering program apprised of his objections to the library behavior policy, but Updegrove said not all participants, including himself, feel similarly to Kuntze.

"What can we really expect the library to do?" said Updegrove, a parishioner at St. Andrew's Episcopal Church. "We don't expect them to let them sleep there or smell up the place, if that's the case. It's a public place, and you want to have a safe place for everyone."

The church coalition met in the spring along with other officials to try to find solutions to assist Bethlehem's homeless. The city does not have a year-round shelter, and the group resolved to work toward creating one and providing the homeless with health services. The coalition is talking to potential health services partners and will run the rotating shelter program again this winter, but it is far from its goal of a year-round shelter, Updegrove said.

Fricker told the library board that the revised policy has already been helpful. A library employee mentioned the offensive bodily hygiene provision to one man, and the next time he came in, he was wearing fresh clothes and seemed very pleased about it, she said.

But Kuntze knows of others who have steered clear of the library since the new rules were enacted. "The people who are experiencing them know they're discriminatory against them," he said. "Those who are advocates, particularly for the homeless in this case, we need to try to at least get fairer policies with some options." Reported in: *Lehigh Valley Express-Times*, August 7.

Knoxville, Tennessee

The American Civil Liberties Union of Tennessee asked Knoxville Mayor Tim Burchett September 16 to withdraw a policy he implemented earlier that week banning registered sex offenders from county libraries. In a one-page letter, the ACLU said the mayor's new rule is "overly broad and raises a host of constitutional issues."

"As you know, access to information is a fundamental underpinning of the protection of the First Amendment's guarantees of free speech," wrote executive director Hedy Weinberg.

The U.S. Supreme Court and other lower courts have held that "some level of access to a library cannot be proscribed if there is no compelling state interest," according to Weinberg. "ACLU-TN asks that you rescind this and instead consider addressing your concerns in a less-restrictive manner that is mindful of the First Amendment rights of all Knox County residents," the letter states.

A federal court in New Mexico last year struck down a similar ban in Albuquerque.

On September 12, Burchett announced that sex offenders are no longer welcome in Knox County libraries. He said they can use the system's online services and have a proxy check out and return materials on their behalf. They face misdemeanor criminal trespass charges if they are caught in the buildings. The policy is based on a new state law that gives public library directors the authority to "reasonably restrict the access of any person listed on the sexual offender registry."

Weinberg said many libraries have materials that are not online and cannot be checked out, like reference books and new magazines. She also said most Tennessee libraries have procedures in place to protect children, which strikes a "balance between protection and access."

Burchett said "it's clear they're angling towards a lawsuit," and he said he's prepared to turn any legal action over to Knox County Law Director Joe Jarret. "Everything we've done has been with the law department's approval and it's within the parameters of the law that was passed (by the General Assembly) in Nashville," he said. Reported in: *Knoxville News-Sentinel*, September 17.

colleges and universities

Washington, D.C.

The American Association of University Professors is trying once again to get federal judges to pay attention to a few key sentences.

The language in question—in a 2006 Supreme Court decision limiting the free speech rights of public employees—explicitly stated that the decision in *Garcetti v. Ceballos* did not apply to faculty members in public higher education. Some (but not all) federal courts have been ignoring that portion of the decision, and the AAUP filed a brief in August in one such case, which the association says highlights the dangers of the way Garcetti is being applied to free speech for faculty members.

The case that the AAUP entered is one in which a federal judge in February was explicit in finding that *Garcetti* removed protections for much faculty speech. "[S]ince *Garcetti*, courts have routinely held that even the speech of faculty members of public universities is not protected when made pursuant to their professional duties," said the ruling.

That ruling came in a suit filed by Loretta Capeheart, a tenured professor in the justice studies department at Northeastern Illinois University. Capeheart sued the university, charging that it retaliated against her by refusing to let her serve as department chair—despite being elected to the post by her colleagues—because of her activism on campus.

This retaliation, she said, violated her First Amendment rights. Among other things she has spoken out on behalf of two students who were arrested by campus police while they were protesting Central Intelligence Agency recruiting on campus. Further, she has made critical statements about administrative spending, and blamed the university for budget priorities that have made it difficult to attract more minority faculty members.

The various statements Capeheart made were in her capacities as a faculty member, as a member of the faculty governance system and as faculty adviser to the Socialist Club, a student group whose members were involved in the protest that led to two arrests.

Northeastern Illinois has denied doing anything that limits anyone's free speech rights. But the district court ruling in February did not address any evidence seeking to link university decisions about Capeheart to her campus activism. For the district court in February, the only relevant fact it needed was that she acted in her official capacity. Since Capeheart's claim was based on a First Amendment violation, once the court determined that *Garcetti* applied and that she had no First Amendment protection for the statements in question, it found that there was no reason to consider the merits of the case.

In *Garcetti*, the Supreme Court limited the rights of public employees in a case involving Richard Ceballos, a Los Angeles deputy district attorney who was demoted and transferred after criticizing a local sheriff's conduct to his supervisors. As the *Garcetti* case moved through the courts, advocates for faculty rights eyed it nervously, worried about limits on the speech of public employees, but hopeful that courts would see public higher education as having different needs for robust, public debate than some other units of government.

The *Garcetti* decision and dissent both contained evidence of the justices' concerns about academic freedom. In his dissent, then-Justice David Souter wrote that what

the majority had defined as "beyond the pale of the First Amendment ... is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil the First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'"

The decision, written by Justice Anthony M. Kennedy, answered Souter in a way that (at the time) relieved faculty members. "Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value," Kennedy wrote. "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."

Despite that seemingly clear directive from the Supreme Court, several courts have applied *Garcetti* to disputes involving public college faculty members. But other courts—notably the U.S. Court of Appeals for the Fourth Circuit in an April ruling—have found that *Garcetti* should not be applied to public higher education. "Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment," said the decision, in a case involving a faculty member at the University of North Carolina at Wilmington.

The AAUP brief urges the U.S. Court of Appeals for the Seventh Circuit to apply similar logic. "The district court decided this case without acknowledging the academic speech reservation, much less undertaking the 'nuanced consideration of the range of issues that arise in the unique genre of academia' that both the majority and the dissent in *Garcetti* clearly called for," the AAUP brief says.

It goes on to talk about the unique nature of academic speech—and ways that academic employees' speech doesn't fit the *Garcetti* model. For example, the AAUP brief notes that the *Garcetti* decision says that public employees who speak out are employed "to speak on behalf of the government." And that there is thus a legitimate government need for "substantive consistency and clarity" in the case of many government officials' speech, the brief says.

The AAUP adds: "This framework is fundamentally at odds with the professoriate's unique role in the advancement of human knowledge – a 'transcendent value' not only for a community of scholars and students, but, as the Supreme Court has long recognized, for society as a whole." Reported in: insidehighered.com, August 15.

Due West, South Carolina

On September 2, the American Association of University Professors wrote to Erskine College, expressing worry about the treatment of William Crenshaw, an English professor who has been among the most outspoken critics of the role of religious conservatives in shaping the direction of the institution. While the AAUP didn't weigh in on the disputes over Erskine, it said that Crenshaw never should have been suspended and barred from teaching—as he recently had been—unless he met the college handbook's requirement of causing "immediate harm" by his presence.

On August 31, Erskine fired Crenshaw, who had taught at the college for 35 years, earning tenure, an endowed chair and teaching awards, and attracting devoted students and alumni. Religious traditionalists have been pushing for years for Crenshaw's ouster. Some of the documents about the case suggest that officials at the college argue that Crenshaw—with his criticisms of the college—discouraged potential students from enrolling at Erskine. He says this is inaccurate.

The firing is the latest escalation in an increasingly intense fight over the future of the college. The disputes have led to court battles. And in contrast to the fights of the last two years, Crenshaw won't be on campus anymore to participate. According to various letters between Crenshaw and college officials, he was willing to negotiate a retirement deal, but balked at any arrangement that would have required him to stop speaking out about the college.

Erskine, in South Carolina, is part of the Associate Reformed Presbyterian Church, a small denomination that describes itself as conservative and evangelical. For most of his career at Erskine, Crenshaw and other faculty members of a variety of faiths (the denomination is too small to have only its members teach at the college) juggled the responsibilities and sometimes the tensions of providing a liberal arts education in a religious community. Crenshaw developed a reputation as someone who questioned assumptions (even religious assumptions), which he said over the years was a way to build up students' reasoning and logic skills, not to denigrate anyone's faith.

But while many alumni have rallied behind Crenshaw, traditionalists in the Associate Reformed Presbyterian Church have made him a target, and they have been rejoicing over word that he had been suspended from teaching. ARP Talk, a blog that has criticized the college for not being strict enough on issues of faith, has repeatedly called for his ouster. "Crenshaw Is GONE!" read a headline about his suspension.

That blog and other church traditionalists have particularly attacked Crenshaw because the professor has

come to the defense of science instruction that is not based on the Bible alone. On a private Facebook group run by alumni who want to maintain the college's independence, Crenshaw recently participated in a discussion about what qualities he would like to see at the college. His statements about the teaching of science infuriated ARP Talk and its readers.

Crenshaw's comments included the following: "Science is the litmus test on the validity of the educational enterprise. If a school teaches real science, it's a pretty safe bet that all other departments are sound. If it teaches bogus science, everything else is suspect.... I want a real college, not one that rejects facts, knowledge, and understanding because they conflict with a narrow religious belief. Any college that lets theology trump fact is not a college; it is an institution of indoctrination. It teaches lies. Colleges do not teach lies. Period."

Such views wouldn't shock many academics, but the official position of the Associate Reformed Presbyterian Church is that the Bible is inerrant and thus explains such issues as creation in ways that should be accepted. The ARP Talk blog called Crenshaw's comments on science evidence that he is "functionally an atheist who, in his rabid, secular fundamentalism, preaches his views with as much vigor and determination as an old-time Methodist revivalist of 100 years ago." The blog added that Crenshaw was "an evangelist of infidelity" and said that he encourages students to question faith with "his secular brain-dribble."

Cliff Smith, a spokesman for the college, said he was "pretty limited" in what he could say about Crenshaw, given that this was "an ongoing personnel matter." He said that the college was committed to protecting the confidentiality rights of Crenshaw and others. He also said that administrators at Erskine see that this is "a difficult and sad situation, and we understand that people who don't have a full view would be confused and/or angered by it."

The AAUP letter pressed the college on the issue of academic freedom, noting that administrators have said that Crenshaw has engaged in "disloyal" online speech, and that Crenshaw has said that the college violates principles of academic freedom. Suspending such a professor, when he poses no danger, the AAUP writes, "will clearly do nothing to prevent further such expressions" of doubts about academic freedom at Erskine.

Smith said that the college's leaders would respond later to the AAUP letter. But he said that its emphasis on the faculty handbook statement about suspending tenured faculty members only when "immediate harm" is likely was incorrect. "The AAUP interpretation seems to be limited to physical harm," Smith said. "I think we would maintain that there was the very real threat of harm to the institution, but we don't want to argue with the AAUP." Reported in: insidehighered.com, September 8.

Internet

Washington, D.C.

Long-delayed U.S. Internet rules that tackle the controversial issue of balancing consumer and content provider interests against those who sell access to the Web will take effect November 20. The Federal Communications Commission's "open Internet" order was published in the *Federal Register* September 23, and immediately drew threats of court and congressional challenges.

The guidelines say essentially this: Internet providers can't deliberately block or slow speeds for "heavy" Internet users, such as people who stream movies or play online games, nor throttle traffic from a certain source, such as from competitors or peer-to-peer downloads.

The rules might get delayed or prevented, though, by lawsuits that Internet providers have brought against the FCC. The legal contention stems from the basic argument against net neutrality: companies such as Verizon and AT&T say they ought to be able to charge more from consumers who use more data. They worry that heavy data consumption – such as streaming movies or downloading music – slows down the online experience of other users, forcing providers to spend more on infrastructure.

On the other side, consumer advocacy groups and other net neutrality proponents argue that the Internet should be freely accessible to everyone, and that artificially throttled speed, fines for heavy downloading, and other usage penalties stifle innovation and creativity. The Internet should be a "neutral" playing field for all, goes this line of reasoning.

The rules were adopted by the FCC late last year after a lengthy debate, but only recently cleared a review by the White House's Office of Management and Budget. Criticized by opponents as a legally shaky government intrusion into regulating the Internet, the new rules forbid broadband providers from blocking legal content but leave flexibility for providers to manage their networks.

Broadband provider Verizon Communications Inc. has been a vociferous opponent, and renewed its pledge to take the FCC to court as soon as the rules are published.

"We have said all along that once we see the publication ... we intend to file another notice of appeal," Verizon spokesman Ed McFadden said.

For the past ten years, the possibility of regulations to mandate the neutrality of the Internet—in terms of restrictions on content, sites, platforms and types of equipment that may be attached—has been the subject of fierce debate. The latest rulemaking was prompted by a U.S. federal appeals court ruling last year that the FCC lacked the authority to stop Comcast Corporation from blocking bandwidth-hogging applications on its broadband network.

The rules, adopted last December in a 3-2 vote, give the FCC power to ensure consumer access to huge movie files and other content while allowing Internet service providers

to manage their networks to prevent congestion. An FCC spokesman said the rules increase certainty and predictability, stimulating investment and ensuring job creation and economic growth.

The rules are slightly different for fixed and mobile networks. Providers of fixed broadband can't block lawful content or services, or discriminate against any network traffic. That means they can't deliberately slow down traffic for heavy Internet users. Mobile networks can still discriminate against certain apps, but can't block lawful websites or block applications that compete with their own services. And the new rules call for greater transparency from both fixed and mobile providers: the FCC says all broadband providers have to "disclose the network management practices, performance characteristics, and commercial terms of their broadband services."

But public interest groups criticized the rules as too weak, saying the FCC bent heavily to the will of big industry players including AT&T and Comcast.

Matt Wood, policy director of public interest group Free Press, said broadband providers will be able to divide the Internet into "fast and slow lanes" and that the rules fail to protect mobile broadband users.

"Even in their watered-down form, the rules might do some good—but that would require a vigilant FCC to carefully monitor and address complaints," Wood said in a statement, adding that he doubted the agency would do enough to protect consumers.

While some public interest groups had considered a lawsuit to strengthen the rules, they now seem focused on ensuring the rules stay in place. "We are prepared to vigorously defend the FCC's rules in court and in Congress," said Gigi Sohn, president of Public Knowledge. She said the rules are a good start despite not being as strong as she had hoped.

The U.S. Court of Appeals for the District of Columbia Circuit in April threw out earlier challenges to the FCC's open Internet order by Verizon and MetroPCS Communications Inc, dismissing their lawsuits as premature. FCC rulemakings generally cannot be challenged until the rules are published in the *Federal Register*.

Top Republican lawmakers vowed after the rules were adopted to find a way to reverse what they called an unprecedented power grab by the FCC, calling the rules unnecessary and misguided.

"In order to turn back the FCC's onerous net neutrality restrictions, I will push for a Senate vote this fall on my resolution of disapproval," Senator Kay Bailey Hutchison, the ranking Republican on the Senate Commerce Committee, said.

The Republican-controlled House of Representatives pushed through a measure in April to overturn the order and prevent the FCC from adopting any rules related to it. The effort faces a tougher climb in the Senate, where Democrats retain a majority.

The White House has said President Barack Obama's advisers would recommend he veto any such resolution against the Internet rules if it were to make it to his desk. Reported in: reuters.com, September 23; *Christian Science Monitor*, September 23.

cell phones

San Francisco, California

BART is the acronym for the Bay Area Rapid Transit system in the San Francisco area. On August 11, BART officials shut down cell-phone service in several of its underground stations, provoking a storm of protest.

The First Amendment says government cannot restrain our freedom of speech or of the press, or our right to assemble and to petition for changes in government policy or practices. It also guarantees religious freedom. But by experience we know that for many hard-and-fast rules in life – even in constitutional law – there's an "except for."

Historically, some exceptions to our full protection by the First Amendment have been the "time, place and manner" considerations concerning when and where we speak. What's OK in the public square at high noon probably isn't OK at 3 a.m. under someone's bedroom window. There are also national-security exceptions. And some kinds of speech, such as true threats and slander, simply don't qualify for protection.

The BART controversy ignited a national discussion over the simmering question of exactly where in our new cyber-world does the "except for" begin with regard to speech and assembly.

BART officials said they had information of planned protests and feared cell phones would be used to organize so-called "flash mob" demonstrations on its subway platforms, endangering protesters and others. A month earlier, protests had occurred at some subway stops against a July 3 BART police shooting of a homeless man with a knife. At one station a demonstrator climbed atop a transit car.

In legal terms, BART's position is that "imminent danger" from what it feared would be a lawless mob outweighed free-speech concerns for a relatively short period of time, in specific areas, namely a few subway platforms.

Critics of BART's shutdown said there's no provision in law for restricting constitutional freedoms under the mere apprehension that something bad might happen. Nationwide, First Amendment advocates also fear that other government officials will pick up on BART's tactic, shutting down communication among organizers of political protests in other instances where officials fear violence or other danger to the public.

A common argument in the BART debate is the oft-cited distinction that there is no First Amendment protection for someone who falsely shouts "Fire!" in a crowded theater,

because the likelihood of panic overrides free-speech concerns.

What the BART incident does, at a basic level, is challenge that adage with a new question: Does a report that someone, sometime might falsely shout "Fire!" justify taping over the mouths of all of the theatergoers as they enter … if only in that place, on that night, and only during that play? Reported in: firstamendmentcenter.org, August 19.

privacy

Washington, D.C.

The American Civil Liberties Union announced a new effort August 3 to uncover details on how local law enforcement agencies use location data stored on cell phones to track or provide evidence on private citizens.

In July, a top lawyer at the National Security Agency, Matthew Olsen, suggested the USA PATRIOT Act may have given the federal government powers to use cell phone data to track Americans inside the United States, a comment that alarmed privacy advocates and civil libertarians.

On August 3, 34 ACLU affiliates across the country cited Olsen's remarks and announced they had filed requests under government transparency laws for documents that could reveal how authorities use location data on cell phones for law enforcement. The ACLU groups want to know if agencies provide citizens the appropriate protections when they access this data; for instance, they want to know if officers tend to obtain a warrant first. They are also seeking statistics on how often authorities use this data and how much funding these efforts receive.

"The ability to access cell phone location data is an incredibly powerful tool and its use is shrouded in secrecy. The public has a right to know how and under what circumstances their location information is being accessed by the government," Catherine Crump, staff attorney for the ACLU Speech, Privacy and Technology Project, said in a statement.

"A detailed history of someone's movements is extremely personal and is the kind of information the Constitution protects."

The ACLU supports a bill under consideration in Congress that spells out clear guidelines on how government authorities may use location data from cell phones. Sen. Ron Wyden (D-OR) and Rep. Jason Chaffetz, (R-UT) introduced the "Geolocation Privacy and Surveillance (GPS) Act" in June.

Privacy concerns related to cell phone use are not limited to questions about how the government may be tracking citizens. Reports earlier this year that revealed the extent to which smart phone companies track users' location were a major concern for privacy advocates. Reported in: *National Journal*, August 3.

Menlo Park, California

Users and privacy advocates have reservations about Facebook's planned redesign, the way the change will affect third-party apps and the network's general approach to privacy.

Third-party apps will be fully integrated into a user's profile page, with updates about activity on each app. That means that users won't actively click to share updates from apps — the apps will add that information to a user's page automatically. With this change, users will have to think more carefully about what apps they use, since their private media consumption, exercise routines and other habits could be automatically published on their profiles.

On September 25, self-proclaimed hacker Nik Cubrilovic accused Facebook of using cookies to track users while they are logged off, something Facebook engineer Gregg Stefancik denied in a comment on Cubrilovic's post. Stefancik confirmed that Facebook alters rather than deletes cookies when users log out as a safety measure, but said the company does not use those cookies to track users or sell personal information to third parties. He also said that the company does not use cookies to suggest friends to other users.

Marc Rotenberg, executive director of the Electronic Privacy Information Center, said that the organization is opposed to changes made to the Timeline, Facebook's newly designed profile page. Acting as a sort of digital scrapbook, the Timeline now shows all the information a user has put on Facebook in chronological order. The new format changes rules about how information is accessed, Rotenberg said, adding that the problem is that this has happened after the company has already acquired user data. EPIC is preparing a letter to the Federal Trade Commission about the changes, he said. The organization has led the charge calling for the agency to look into Facebook's privacy policies.

The change in format is also confusing to many users. Pam Dixon, executive director at the World Privacy Forum, said the nonprofit has heard from several consumers who don't understand how their privacy settings will work. In an attempt to make privacy controls more granular, Facebook has made it an option for users to set privacy limitations on every post, which also apply to its associated likes and comments.

Users can set up the baseline sharing settings for their account in their personal privacy settings, but many users don't understand how and why sharing settings are being set by default, Dixon said. Facebook users who've contacted her group also have said that they are concerned about how privacy settings are set up for opt-in third-party apps and whether or not they'll be able to delete their data from an app if they decide they no longer want to use it.

(continued on page 223)

libraries

Lee County, Florida

Parents are speaking out against a controversial book on the shelves of Lee County's libraries. *It's Perfectly Normal* is meant to give children real answers about sex and their changing bodies. But the illustrations in the book are turning heads and it's now at every Lee County library branch on the bottom shelf of the children's section.

Jennifer McGuire's four-year-old daughter loves visiting the Cape Coral library. She'll roam every aisle, plucking out book after book. "She's definitely hungry to learn so she's quick to pick up things that draw attention, like colorful books," she said. Luckily, McGuire says, her daughter hasn't picked out *It's Perfectly Normal*. "It's not appropriate for young kids," she said.

It's Perfectly Normal is causing local controversy after a six-year-old picked the book up in the 12 and under children's section. Her mom requested the book be moved. But after a careful review, a library committee said it is appropriate for kids. "It's written clearly for children within the age range of the children's services department. It's very highly regarded by teachers and librarians," said Sheldon Kaye, director of the Lee County Library System.

The book is about as honest as it gets—featuring drawings of couples engaged in sexual intercourse. It also contains explanations as to why sex feels good, and illustrations of masturbation. "Those illustrations belong in the adult section," said parent Steven McGuire.

But at least one mom wishes she'd had the book when her kids were young. "Kids are going to ask questions. You got to give them answers," said Deborah Hawkins.

Kaye says it's too difficult for them to distinguish what's appropriate for youth or teens. She says that's the parents' job. And when the new edition of the book comes out next year, the libraries plan to shelve it too. "It's knowledgeable and it's open minded," Kaye said. Reported in: *www.abc-7.com*, August 10.

schools

St. Charles, Illinois

A social studies textbook that stirred up controversy in St. Charles Unit District 303 will remain in classrooms for two more years. After a lengthy discussion, school board members agreed during a committee meeting August 15 that replacing the book before its scheduled 2013-14 replacement would be too costly.

"In this particular instance, I don't think it's an egregious problem," School Board Vice President Kathleen Hewell said.

Parent Jennifer Nazlian had challenged the third-grade book *Social Studies Alive!: Our Community and Beyond*, saying it has a liberal slant on issues such as health care, immigration, unions and natural resources. Nazlian declared the paragraph beginning with "Sometimes people discriminate against immigrants" was "so far from the truth," and she also took issue with a second passage that read, "Jen's athletic shoes might cost a lot more if they were made in the United States." Instead, Nazlian said, "We should be buying things locally."

After Superintendent Don Schlomann ruled in July that the book should stay in the classroom, Nazlian appealed to the school board. She has said she is not trying to ban the book but wants additional teaching resources used if the book remains.

Board member Judith McConnell was the book's biggest critic, calling it "relatively egregious."

"I'd like anyone if they could show me balance in this book to point it out to me," she said. "I think it's very unbalanced."

Schlomann said parents can provide counterpoints on topics their children learn about, and he offered to speak with teachers to ensure they use the book cautiously. Several of those teachers also may address the board this winter on how they are using the book.

"Textbooks are not curriculum," Schlomann added. "Curriculum (is) an outline of the things we want children to know. Textbooks are a vehicle by which we get them to know that." Reported in: *Chicago Tribune*, August 17; *Beacon-News*, August 31.

Jefferson City, Missouri

Missouri lawmakers voted overwhelmingly September

23 to repeal part of a contentious new law that had prohibited teachers from chatting privately with students over Internet sites such as Facebook. If the repeal is signed as expected by Gov. Jay Nixon, Missouri's law restricting online communications would instead be replaced with a new requirement for public school districts to develop their own policies on the use of electronic media between employees and students.

"It puts things back into the hands of the school districts," said Todd Fuller, a spokesman for the Missouri State Teachers Association, which had challenged Missouri's law in court.

A Cole County judge issued a preliminary injunction placing Missouri's law on hold shortly before it was to take effect August 28, declaring that "the breadth of the prohibition is staggering" and the law "would have a chilling effect" on free-speech rights guaranteed under the U.S. Constitution.

Shortly after the judge's order, Nixon added the online communications law to the agenda of a special session that began September 6. Nixon's written message to lawmakers specifically limited them to repealing the law not replacing it with new wording, as they did.

The Missouri Constitution gives the governor the authority to determine which matters lawmakers can consider during extraordinary sessions. But lawmakers contend that does not mean the governor can limit how legislators act on those matters — for example, by restricting them only to repealing a section of law instead of amending it.

Lawmakers removed the original law's most publicly controversial provision, which barred teachers from using websites that allow "exclusive access" with current students or former students who are 18 or younger, such as occurs with private messages on Facebook. But the repeal went a step further by also requiring public school districts to adopt policies by March 1 on employee-student communications, including "the use of electronic media," in order "to prevent improper communications."

The House passed the legislation to repeal and replace the law by a 139-2 vote. The Senate passed it 33-0 earlier in the month.

"When we make errors we need to fix them, and that's what we're doing here today," said Rep. Chris Kelly, a Democrat from Columbia.

The original provisions about Internet communications had been included in a broader law enacted earlier this year that sought to stop school personnel who have sexually abused students from quietly resigning and getting hired by other districts. That law requires schools to share information with other districts about teachers who have sexually abused students and allows lawsuits in cases where districts fail to disclose such information and teachers later abuse someone else. Those provisions of the law were not challenged in court and were not part of the repeal considered during the special session.

There was little debate about the online communications section of the legislation when it passed this spring. But afterward, confusion and concerns began to mount among some teachers about whether they could be barred from using Facebook. Other teachers feared the law also could have had implications for online courses, which may be configured to allow limited access only by teachers and students.

"It became easy to call this a Facebook bill, but it was bigger than that," Fuller said. "It was more, `we're using a form of social media in the classroom right now that we're not sure if we can continue to use."'

The only two House members to vote against the repeal were Republican Jay Barnes of Jefferson City and Democrat Mike Colona of St. Louis. Both are attorneys. And both suggested that local school districts could end up adopting policies that still infringe on free speech, essentially multiplying the lawsuits that could be filed.

"We just traded one big unconstitutional ball of wax for 529 little balls of wax," Barnes said. Reported in: Associated Press, September 23.

universities

Urbana, Illinois

A policy governing emails and other electronic communication at the University of Illinois has been put on hold after educational groups raised free-speech concerns about it. The campus senate was scheduled to discuss the policy September 12 but the item was pulled from the agenda.

On September 9, the Foundation for Individual Rights in Education and the American Association of University Professors wrote to the interim Chancellor Robert Easter to express "deep concerns" about the proposed policy, saying it would restrict the First Amendment rights and academic freedom of students and faculty.

"We believe this warrants more serious consideration by senate committees, the Senate Executive Committee and the chancellor's office," Professor Matthew Wheeler, chairman of the Senate Executive Committee, said.

That will "give us time to sit down and review the letter in detail," agreed Michael Corn, chief privacy and security officer for the university.

The measure is an attempt to create a comprehensive electronic communications policy at the university, pulling together several "disparate computing policies in various stages of being out of date," campus spokeswoman Robin Kaler said.

But a clause designed to ensure compliance with the state's ethics act, which forbids the use of state property for political campaigning, raised concerns from

Cary Nelson, a UI professor emeritus and president of the AAUP, and Azhar Majeed of the Foundation for Individual Rights in Education. Their letter said the policy's prohibition on using email and other communications for "political campaigning" would deprive students and faculty of the right to engage in a range of "constitutionally protected political speech and activity."

As a public university, the UI can't place that kind of restriction on political speech, which was the impetus for the First Amendment's free-speech guarantee, the letter argued.

The policy fails to provide a definition for what constitutes political campaigning, giving administrators "unchecked discretion" in enforcing it, the authors said. They referred to a 2008 incident in which UI employees were told not to wear pins or T-shirts in support of a political candidate or party because of the university's obligation not to endorse candidates. Then-President B. Joseph White later rescinded the policy after the AAUP raised free-speech concerns.

Corn said that he appreciates the sensitivity to the issue, saying the university "strongly, strongly, strongly supports free speech. We work in an environment where our goal is to facilitate the exchange of information, not throttle it." But he added, "We can't pass a policy that says you can violate state law."

"I am a university employee. I can't run for mayor and print letterhead in my office. I can't use the university to put up a website to support my campaign," he said. "It in no way prohibits the free exchange of ideas and information. That's all that clause does. It doesn't create any policy. It simply references the fact that we work as state employees using state resources and are beholden to state law."

The proposed policy also would ban electronic communications that "interfere with the mission of the University," as well as "uses that violate other existing University and campus policies." The letter said the policy is too ambiguous.

"If the university decides that faculty expression about union activities, for example, interferes with its mission, this determination alone would be sufficient grounds to prohibit and sanction the expression," the letter said.

Nelson and Majeed regard some existing UI policies as unconstitutional because they ban "acts of intolerance" or "offensive" speech, and fear the new policy would broaden those restrictions. They also called a requirement for preapproval to send unsolicited emails to more than a hundred recipients "onerous." Students and faculty should have the right to alert the campus to urgent issues, such as a threat of violence or important policy change, they said.

Corn said the section is designed to prevent an individual from "spamming" members of the UI community with unsolicited messages and "avoid diluting the communications value of official communications streams." It merely codifies an existing practice for campus mass emails, he said.

Nelson and Majeed said a better approach would be to take action against an individual who abuses email.

Corn said he's hopeful the issues can be addressed as the policy is further reviewed. "Technology is evolving and changing faster than anyone can possibly keep up with it," Corn said. "Policy by definition moves slowly." Corn said the policy had been vetted by three committees in the campus senate, which includes faculty, students and academic professionals.

"The last thing we want to do is violate anyone's right to free speech," interim Chancellor Robert Easter said. Reported in: *The News-Gazette*, September 13.

St. Louis, Missouri

Alex Christensen is getting the last laugh after a blog he created poking fun at his alma mater was shut down, and then restored. It started simply enough. After Washington University in St. Louis unveiled its website redesign in December, Christensen, a senior at the time, decided to poke a little fun at his university. He started the blog "Wash U Photo Captions" in December, posting what he calls the "ridiculous" promotional photographs from the university's new website and adding his own snarky captions.

"They were obviously posed or cheesy or didn't quite give the same impression of the campus that I had being there for four years," he said. "So I started the blog to poke fun at both the photos themselves and the kind of . . . public image that Wash U. is putting out there."

But after a few months of operation and almost a thousand hits per day, the blog's host, Tumblr, e-mailed him in March saying his account had been suspended because the content of his site violated the company's user agreement by featuring copyrighted photos.

Christensen, who has since graduated and is now a business analyst in Minnesota, cried foul shortly after he received word, citing the Fair Use doctrine, which allows copyrighted material to be repurposed for a variety of reasons, including satire and parody. With the help of a volunteer law group in St. Louis whose members petitioned Tumblr, the host for the blog, the site is back for the new academic year.

"It's an adaptable format to both comment on what's going at Wash U. and what's going on in a larger world through the lens of a Wash U. student," Christensen said. "There's that more serious role for it to play. But it's also just meant to be fun and to giggle at every once in a while."

Christensen's inaugural post after the legal dispute

was resolved depicted a photograph of a professor and student smiling and talking in a classroom. The caption: "Washington University's beautiful campus looks like it could easily be part of Cambridge or Hogwarts, but some visitors only realize they're in the US when they see the big, white molars of the smiling students and faculty. Just look at those teeth!"

The university's vice chancellor of public affairs, Fredric Volkmann, said he was not directly involved with the controversy surrounding the site, but did say it "contains a registered, protected trademark (Wash U), which the University vigorously protects from unauthorized use in web addresses, particularly by those outside the wustl.edu domain."

Christensen said he has his suspicions about who prompted Tumblr to suspend his account, but the university never reached out to him in any way about the site.

Peter Jaszi, an American University law professor and co-author of Reclaiming Fair Use, said the site would fall under the Fair Use doctrine "pretty obviously." It would be considered a transformative use of the copyrighted material, and thus protected by the doctrine. The photographs are being used for a different purpose and a different audience, he said.

On top of that, the blog's pretty funny. Jaszi said he found himself laughing aloud as he read through it. And it's that reaction that is part and parcel of Christensen's Fair Use argument. "If this was actually going before a neutral judge … the greatest likelihood is that the student blogger would be vindicated," Jaszi said. Reported in: insidehighered.com, September 14.

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censorship dateline …from page 207)

Ekho Moskvy radio, accusing both of "justifying pedophilia." The priest later elaborated in comments carried by Interfax, saying the authors' works should not be included in high school curriculums as they "romanticize perverted passions that make people unhappy."

"Obviously, the popularization of these novels in schools will not make our society more morally happy," he was quoted as saying.

Mikhail Shvydkoi, a Kremlin envoy for international cultural co-operation, disagreed, saying such action by authorities would badly hurt Russia's image.

Nabokov, who left his native Russia shortly after the 1917 Bolshevik Revolution, published *Lolita* in English in 1955. The book, which describes a relationship of a middle-aged intellectual with his 12-year-old stepdaughter, was briefly banned in several European countries, Argentina and South Africa – as well as by several library systems and public schools in the U.S.

Nabokov translated the book into Russian in 1967, but that work – along with the rest of his writings – was banned in the Soviet Union as "pornography."

Unlike *Lolita*, Garcia Marquez's *One Hundred Years of Solitude* was published in the Soviet era – despite numerous references to incest and sex with minors. The Colombian novelist was awarded the Nobel Prize in Literature in 1982.

The Russian Orthodox Church has called for tighter controls on the content of television and radio broadcasts and said Russian women should observe an "Orthodox dress code" by wearing longer skirts and non-revealing clothes. The church has experienced a revival since the collapse of the officially atheist Soviet Union in 1991. It now claims more than 100 million followers in Russia and tens of millions elsewhere, but polls have shown that only about 5 per cent of Russians are observant believers.

Church and state are officially separate under the post-Soviet constitution, but Orthodox leaders seek a more muscular role for the church, which has served the state for much of its 1,000-year history.

Some nonreligious Russians complain that the church has tailored its doctrine to suit the government, which has justified Russia's retreat from Western-style democracy by saying the country has a unique history and culture. Reported in: *Globe and Mail*, September 28. □

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from the bench …from page 211)

not officially recognizing them. Both groups limit membership to students who affirm their Christian beliefs. Official recognition gives student groups access to various benefits, such as free meeting space, publicity in student publications, and use of the university logo.

The ruling in the case, *Alpha Delta Chi-Delta Chapter v. Charles Reed*, is the first major decision to rely on last year's U.S. Supreme Court decision upholding the nondiscrimination policy for student groups at the University of California's Hastings College of the Law. In that 5-to-4 ruling, *Christian Legal Society v. Martinez*, handed down in June 2010, the justices rejected arguments by the Christian Legal Society that the law school had violated the First Amendment rights of students by denying official recognition and financial support to groups that barred gay students.

That ruling focused on a type of policy that is found at only some colleges: an "accept all comers" rule,

requiring any student group seeking official recognition to be open to anyone who wishes to join.

San Diego State's policy, however, is more narrowly written. Instead of "prohibiting all membership restrictions," it prohibits membership restrictions "only on certain specified bases, for example, race, gender, religion, and sexual orientation," wrote Judge Harry Pregerson of the appeals-court panel.

The plaintiffs in the case said that the university policy "allows secular belief-based discrimination while prohibiting religious belief-based discrimination," according to the court's summary of the Christian groups' arguments. For example, a student Republican group would be allowed to exclude Democrats because the policy does not prohibit discrimination on the basis of political belief. "But a Christian group could not exclude a Muslim student because that would discriminate on the basis of religious belief," the summary said.

That sounds convincing, Judge Pregerson wrote, but there is no evidence that the policy was meant to suppress any viewpoints. And the university was not requiring the Christian groups to accept non-Christian members, the court wrote, but was setting conditions for recognition as an official student group.

"Were San Diego State compelling plaintiffs to include non-Christians, plaintiffs might have a sound argument. But as Christian Legal Society makes clear, there is a difference 'between policies that require action and those that withhold benefits,'" Judge Pregerson wrote.

The appeals court did strike one note in favor of the Christian groups, sending the case back to the federal district court to decide whether the university had applied its policy fairly to all student groups.

"Plaintiffs also offer evidence that San Diego State has granted official recognition to some religious student groups even though those groups, like plaintiffs, restrict membership or eligibility to hold office based on religious belief," said the court's opinion. For example, officers of a campus group for Catholic students must be "members, in good standing," with the Catholic Church. And even some nonreligious student groups may be discriminating in violation of the policy, the court said. For instance, leaders of the African Student Drama Association must be from Africa, the court noted. Reported in: *Chronicle of Higher Education* online, August 2.

Santa Barbara, California

A psychology professor's scathing internal memorandum about his department's chairman was protected free speech because he wrote it without malice, a California appeals-court panel ruled unanimously August 15.

The case involved a lengthy 2007 memo that Raymond Launier, a professor of psychology for the Santa Barbara Community College District, wrote criticizing Arthur Olguin, who was then the department's chairman, after Olguin directed the college bookstore not to order materials Launier had written. Olguin had responded by suing Launier for defamation and intentional infliction of emotional distress, and the community-college district for negligence.

Although the memo included personal attacks on Olguin and accused him of having engaged in lewd behavior, it focused on arguing that Olguin had trampled Launier's academic freedom, and a jury found it to have been written without malice, the appeals judges ruled in upholding a lower court's decision against Olguin. Olguin could not prove damages from harm to his reputation because his colleagues' testimony indicated they already had a fairly poor opinion of him, the appeals panel held. Reported in: *Chronicle of Higher Education* online, August 16.

Evanston, Illinois

Students in a Northwestern University journalism class who collected evidence in an effort to win a new trial for a man who may have been wrongly convicted of murder were "acting as investigators in a criminal proceeding" and are not shielded by the Illinois Reporter's Privilege Act, a state judge ruled September 7. Judge Diane Gordon-Cannon of the Cook County Circuit Court ruled that more than 500 e-mails between the students and their former professor, David Protess, must be turned over to prosecutors. The university has already turned over student memos and other class materials sought by prosecutors in the long-running case, but it has opposed the release of internal e-mails. The judge stayed her order for ten days to give university lawyers time to consider an appeal. Reported in: *Chronicle of Higher Education* online, September 7.

"pole tax"

Houston, Texas

The Texas Supreme Court ruled August 26 that the state's "pole tax" — a $5-per-customer fee that strip clubs that serve alcohol are required to pay the state — did not violate the clubs' free-speech rights, overturning a lower court decision that declared the fee unconstitutional.

In 2007, state legislators passed the Sexually Oriented Business Fee Act, which imposed the fee on nearly 200 establishments that feature live nude performances and allow the consumption of alcohol. The $5-per-customer entrance fee, which is imposed on the business and not

the patron, is intended to raise money for sexual assault prevention programs and health insurance coverage for low-income people.

An Amarillo strip-club owner and the Texas Entertainment Association, which represents many of the state's topless clubs, sued the state attorney general and comptroller over the fee. A district judge struck down the law in 2008, and an appeals court in 2009 ruled, in part, that the law was a "selective taxation scheme" that singled out nude dancing and a specific class of "First Amendment speakers."

The Supreme Court, however, ruled unanimously that the fee was constitutional, declaring it a "minimal restriction" on the businesses and that any establishment seeking to avoid the fee "need only offer nude entertainment without allowing alcohol to be consumed," Justice Nathan L. Hecht wrote for the court. He wrote that the fee was not intended to suppress expression in nude dancing, but was directed instead at "the secondary effects of nude dancing when alcohol is being consumed."

Stewart Whitehead, a lawyer for the Texas Entertainment Association, said he and his client were considering whether to appeal to the United States Supreme Court or to have the state district court rule on the law's constitutionality under the Texas Constitution. "We're obviously disappointed and disagree with the ruling," Whitehead said.

A spokesman for Greg Abbott, the state attorney general, called the ruling a victory for both the state and victims of sexual assault. "Thanks to today's ruling, we are a step closer to freeing up millions of dollars for sexual assault prevention and crime victims' assistance," said the spokesman, Jerry Strickland.

Texas lawmakers had expected the fee to initially raise about $44 million, but because many strip clubs have refused to pay it while the case was in the courts, only about $15 million has been generated. The money "will continue to be held in an account pending the final outcome of the legal proceedings," said a spokesman for Susan Combs, the comptroller. Reported in: *New York Times*, August 26. □

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Understanding privacy settings on Facebook accounts is particularly important, Dixon noted, since the Federal Trade Commission has made it clear that it's fine for employers to look at social media profiles as part of background checks for potential employees.

Jeffrey Chester of the Center for Digital Democracy said one of the main problems users and regulators have with Facebook is that the company makes frequent changes to its network. "Facebook is such a moving target that hardly anyone can keep up," he said. Reported in: *Wall Street Journal*, September 26.

prison

Montgomery, Alabama

The past is never dead, though at the Kilby Correctional Facility outside of Montgomery it seems it is not particularly welcome.

On September 23, Mark Melvin, who is serving a life sentence at Kilby, filed suit in federal court against the prison's officials and the state commissioner of corrections, claiming they have unjustly kept a book out of his hands.

The book, which was sent to him by his lawyer, is a work of history. More specifically, it is a Pulitzer Prize-winning work of Southern history, an investigation of the systematically heinous treatment of black prisoners in the late 19th and early 20th centuries. Melvin, 33, alleges in his suit that prison officials deemed it "a security threat."

The dispute began a year ago. Melvin was entering his 18th year in the state's custody, having been charged at 14 with helping his older brother commit two murders. He was well-behaved enough to be granted parole in 2008, but after committing what his lawyer called "a technical violation" at a transition house, he was sent back.

So he has been reading novels and biographies, studies of World War II and Irish history, his lawyer, Bryan Stevenson, said. After his return to prison, Melvin was assigned by the warden to work in the prison's law library.

Last September, Stevenson sent Melvin a couple of books, including *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*, by Douglas A. Blackmon, the senior national correspondent at *The Wall Street Journal*. It won the Pulitzer Prize for general nonfiction in 2009.

The book chronicles the vast and brutal convict leasing system, which became nearly indistinguishable from antebellum slavery as it grew. In this system, people, in almost all cases black, were arrested by local law enforcement, often on the flimsiest of charges, and forced to labor on the cotton farms of wealthy planters or in the coal mines of corporations to pay off their criminal penalties. Though convict leasing occurred across the South, the book focuses on Alabama.

Melvin never received the book. According to his lawsuit, he was told by an official at Kilby that the book was "too incendiary" and "too provocative," and was ordered

to have it sent back at his own expense.

He appealed, but in his lawsuit he says that prison officials upheld the decision, citing a regulation banning any mail that incites "violence based on race, religion, sex, creed, or nationality, or disobedience toward law enforcement officials or correctional staff." (Melvin is white.)

So he sued.

Stevenson, who is also the director of the Equal Justice Initiative in Montgomery, said he considered the lawsuit to be less about the rights of people in prison but primarily about the country's refusal to own up to its racial history

Stanley Washington, a former inmate who is now a caseworker for the equal justice group, said that at the Alabama prison where he was serving a sentence in 2001, inmates were forbidden to watch the mini-series "Roots."

"They didn't give a reason," Washington said. "We figured they thought it would rile up the blacks against the whites."

Blackmon said he had not heard about any other instance of his book's being banned, though makers of a documentary based on it were prevented from filming in one Alabama town by the mayor and city attorney. "The idea that a book like mine is somehow incendiary or a call to violence is so absurd," he said.

While doing research on the book in small county courthouses around the state, he said, he was met sometimes with wariness but never with outright resistance. "To be honest, these events had slipped deep enough into the past that there weren't very many people who even knew to be cautious about them," he said.

Indeed, the last of the thousands of convicts who had been toiling in the deadly Birmingham coal mines were moved out in 1928. They were sent to Kilby. Reported in: *New York Times*, September 26. □

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The move to a digital publishing platform brings additional benefits. We will be able to move to a redesigned publication that will include new and original content addressing intellectual freedom and privacy. Subscribers can look forward to book reviews, original research, scholarly articles, and practical advice for librarians, educators, trustees, and administrators, in addition to our current features. We also hope to make the Newsletter more interactive, with opportunities for our readers to share their ideas with other professionals and to interact with the thinkers and practitioners whose articles fill the pages of NIF.

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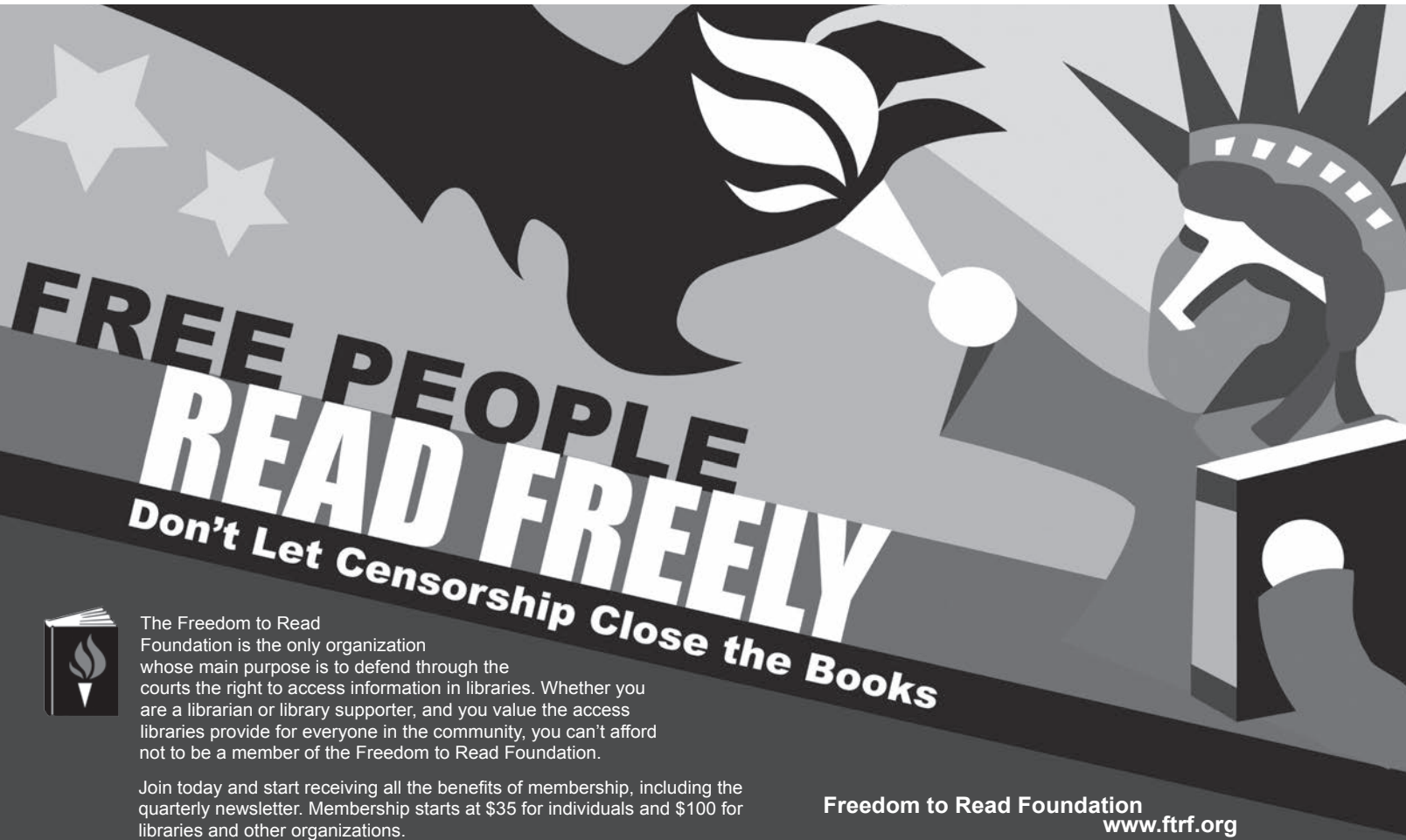

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