

newsletter
on
intellectual
freedom



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Jefferson Muzzle Awards for 2015

Since 1992, the Thomas Jefferson Center at the University of Virginia has celebrated the birth and ideals of its namesake by calling attention to those who would censor free expression.

Announced on or near April 13—the anniversary of the birth of Thomas Jefferson—the Jefferson Muzzles are awarded as a means to draw national attention to abridgments of free speech and press and, at the same time, foster an appreciation for those tenets of the First Amendment. The Muzzles are a good-natured rebuke to all government officials, lest they forget or disregard Jefferson’s admonition that freedom of speech “cannot be limited without being lost.”

Because the importance and value of free expression extend far beyond the First Amendment’s limit on government censorship, acts of private censorship are not spared consideration for the dubious honor of receiving a Muzzle.

Below is the rundown of the past year’s most outrageous and ridiculous affronts to free speech and press. As the Center notes, “Unfortunately, each year the finalists for the Jefferson Muzzles have emerged from an alarmingly large group of candidates. For each recipient, a dozen could have been substituted. Further, an examination of previous Jefferson Muzzle recipients reveals that the disregard of First Amendment principles is not the byproduct of a particular political outlook but rather that threats to free expression come from all over the political spectrum.”

1) Peoria, Illinois, Mayor Jim Ardis

Harry Truman is widely credited for saying about politics, “If you can’t stand the heat, then get out of the kitchen.” This past year there was a plethora of politicians who apparently never learned the late President’s warning that politics requires a thick skin. Instead, they responded to admittedly annoying but fairly typical incidents of public service as if they were personal attacks.

Take, for example, former Congressman Steve Stockman who in a campaign for the U.S. Senate brought a defamation suit against Texans for a Conservative Majority because the group issued campaign ads noting that Stockman had been jailed several times—facts that Stockman himself admitted on numerous occasions to multiple newspapers. Then there was Terri Griffiths, acting Attorney General of the United States Virgin Islands, who

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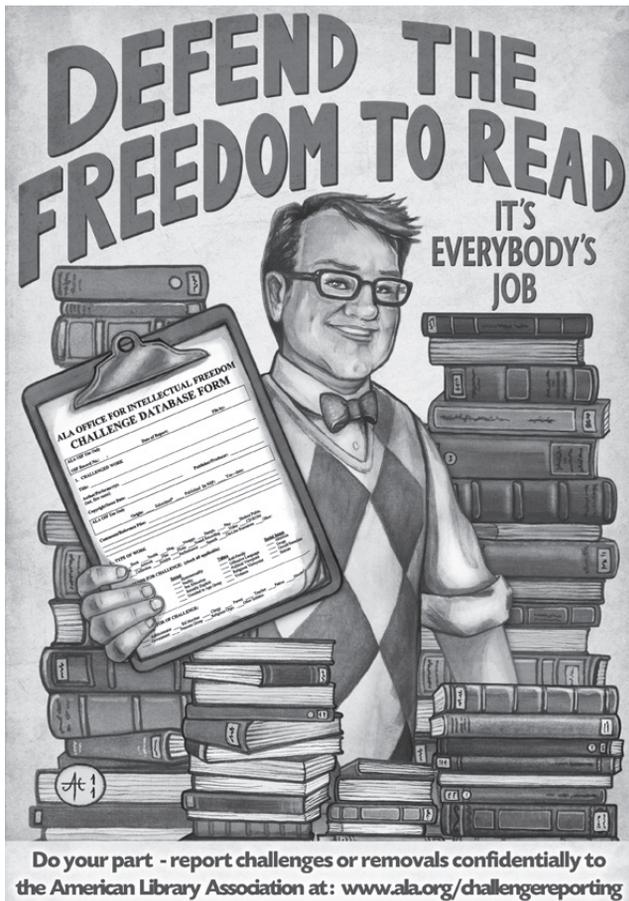
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FCC approves net neutrality rules, classifying broadband Internet service as a utility

The Federal Communications Commission voted February 26 to regulate broadband Internet service as a public utility, a milestone in regulating high-speed Internet service into American homes.

Tom Wheeler, the commission chairman, said the FCC was using “all the tools in our toolbox to protect innovators and consumers” and preserve the Internet’s role as a “core of free expression and democratic principles.”

The new rules, approved 3 to 2 along party lines, are intended to ensure that no content is blocked and that the Internet is not divided into pay-to-play fast lanes for Internet and media companies that can afford it and slow lanes for everyone else. Those prohibitions are hallmarks of the net neutrality concept.

Explaining the reason for the regulation, Wheeler, a Democrat, said that Internet access was “too important to let broadband providers be the ones making the rules.”

Mobile data service for smartphones and tablets, in addition to wired lines, is being placed under the new rules. The order also includes provisions to protect consumer privacy and to ensure that Internet service is available to people with disabilities and in remote areas.

Before the vote, each of the five commissioners spoke and the Republicans delivered a scathing critique of the order as overly broad, vague and unnecessary. Ajit Pai, a Republican commissioner, said the rules were government meddling in a vibrant, competitive market and were likely to deter investment, undermine innovation and ultimately harm consumers.

“The Internet is not broken,” Pai said. “There is no problem to solve.”

The FCC is taking this big regulatory step by reclassifying high-speed Internet service as a telecommunications service, instead of an information service, under Title II of the Telecommunications Act. The Title II classification comes from the phone company era, treating service as a public utility.

But the new rules are an à la carte version of Title II, adopting some provisions and shunning others. The FCC will not get involved in pricing decisions or the engineering decisions companies make in managing their networks. Wheeler, who gave a forceful defense of the rules just ahead of the vote, said the tailored approach was anything but old-style utility regulation. “These are a 21st-century set of rules for a 21st-century industry,” he said.

Opponents of the new rules, led by cable television and telecommunications companies, say adopting the Title II approach opens the door to bureaucratic interference with business decisions that, if let stand, would reduce incentives to invest and thus raise prices and hurt consumers.

“Today, the FCC took one of the most regulatory steps in its history,” Michael Powell, president of the National Cable and Telecommunications Association and a chairman of the FCC in the Bush administration, said in a statement. “The commission has breathed new life into the decayed telephone regulatory model and applied it to the most dynamic, freewheeling and innovative platform in history.”

Although board members at the National Cable and Telecommunications Association haven’t resolved to sue, it’s “highly likely” the trade group would join a lawsuit against the Federal Communications Commission, said NCTA president and chief executive Michael Powell.

Even before the FCC vote, Powell’s group was considering a legal challenge. “I think it’s just too dramatic, too serious a change not to ask the court to review the propriety of what the commission did,” said Powell, “particularly when so much of it rests on whether it had the authority to do it in the first place.” (Initial challenges were filed against the Commission in March; see page 76.)

Supporters of the Title II model include many major Internet companies, start-ups and public interest groups. In a statement, Michael Beckerman, president of the Internet Association, which includes Google, Facebook and smaller online companies, called the FCC vote “a welcome step in our effort to create strong, enforceable net neutrality rules.”

The FCC’s yearlong path to issuing rules to ensure an open Internet precipitated an extraordinary level of political involvement, from grassroots populism to the White House, for a regulatory ruling. The FCC received four million comments, about a quarter of them generated through a campaign organized by groups including Fight for the Future, an advocacy nonprofit.

Evan Greer, campaign director for Fight for the Future, said, “This shows that the Internet has changed the rules of what can be accomplished in Washington.”

An overwhelming majority of the comments supported common-carrier style rules, like those in the order the commission approved February 26. In the public meeting, Wheeler began his remarks by noting the flood of public comments. “We listened and we learned,” he said.

In November, President Obama took the unusual step of urging the FCC, an independent agency, to adopt the “strongest possible rules” on net neutrality. Obama specifically called on the commission to classify high-speed broadband service as a utility under Title II. His rationale: “For most Americans, the Internet has become an essential part of everyday communication and everyday life.”

Republicans in Congress were slow to react, and initially misread the public mood. Senator Ted Cruz of Texas portrayed the FCC rule-making process as a heavy-handed liberal initiative, “Obamacare for the Internet.”

In January, Senator John Thune, the South Dakota Republican, began circulating legislation that embraced the principles of net neutrality, banning both paid-for priority lanes and the blocking or throttling of any web content. But

it would also prohibit the FCC from issuing regulations to achieve those goals. As the FCC announced its new rules, the Republicans pulled back, with too little support to move quickly.

While the actual regulations have yet to be released, the reclassification could also bring more privacy protections to Internet users. Currently enforcing privacy restrictions on Internet service providers is up to the Federal Trade Commission—the government’s de facto privacy watchdog. But as so-called common carriers, Internet providers now fall under the jurisdiction of the FCC.

FCC spokesperson Mark Wigfield confirmed that the agency’s vote will give it more oversight over the privacy practices of Internet service providers. Privacy advocates say this is probably a win for consumers, because for the first time ISPs will have to abide by a specific set of rules designed to protect the privacy of communications.

The Communications Act, which governs the FCC, includes “one of the strongest federal privacy laws currently on the books,” according to Laura Moy, senior counsel at New America’s Open Technology Institute. “One reason is because the scope of information that is covered is broad,” she said, including pretty much all of the information collected by a carrier in order to deliver communications services to their consumers. The law also requires customers be notified if their data will be used for marketing and other purposes, Moy said, although the FCC will ultimately decide what that looks like for Internet providers.

Wigfield said the FCC will not apply existing rules designed for telephone service directly to Internet service providers, but that it will apply a key part of Title II that confers privacy powers, Section 222. It will take further actions to define how those protections apply to broadband if necessary, he said.

Structurally, the FCC’s approach to enforcement might also benefit consumers, privacy advocates said.

The Trade Commission’s enforcement is primarily reactive; while they also issue guidance to tell people what actions are likely to trigger enforcement, they often have to wait for someone to do something the agency considers unfair or deceptive. And for privacy, that often means holding companies to the broadly defined privacy policies they advertise.

But the FCC is different. “The FCC has broad rule-making authority,” said Moy. “They can set standards that companies will have to abide by before the troubling practices have even taken place.”

And privacy advocates say the agency is pretty aggressive at enforcing their current privacy rules on telephone providers. “The FCC’s privacy regulations have worked very well, which is why so many people are unaware of them—because they are so rigid about enforcing them, people don’t even have to think about it,” said Feld. “It’s an area they’ve always taken things very seriously.”

And that could rein in some controversial online tracking practices, like “supercookies,” unique identifiers that some mobile broadband providers have been inserting into their customers’ traffic, according to Feld, or at least require more robust consent mechanisms.

“A lot of the practices we see on the broadband side are unthinkable on the telephone side because no one would even think of trying them,” he said.

The FTC won’t be entirely out of regulating online privacy: It will still be the watchdog for the troublesome privacy practices of many services and Web sites, a huge chunk of the equation. “The FTC can go after telemarketers even though they use phone lines as their medium for communications,” Moy explained. The same principle will apply to the Internet: The FCC will oversee the pipes, while the FTC will be able to wield their enforcement tools against those who operate services that use the pipes.

Also at its February 26 meeting, the FCC approved an order to pre-empt state laws that limit the build-out of municipal broadband Internet services. The order focuses on laws in two states, North Carolina and Tennessee, but it would create a policy framework for other states. About twenty states, by the FCC’s count, have laws that restrict the activities of community broadband services.

The state laws unfairly restrict municipal competition with cable and telecommunications broadband providers, the FCC said. This order, too, is being challenged in court (see page 77). Reported in: *New York Times*, February 26; *Washington Post*, February 27. □

White House proposes broad consumer data privacy bill

The Obama administration on February 27 proposed a wide-ranging bill intended to provide Americans with more control over the personal information that companies collect about them and how that data can be used, fulfilling a promise the president had talked about for years.

But some privacy advocates immediately jumped on the proposed legislation, saying it failed to go far enough, particularly given the broad statements President Obama had made on the issue. They said the bill would give too much leeway to companies and not enough power to consumers.

There are already a number of federal laws, like the Fair Credit Reporting Act and the Video Privacy Protection Act, that limit how companies may use certain specific consumer records. The new proposed bill, the Consumer Privacy Bill of Rights Act, is intended to fill in the gaps between those statutes by issuing some baseline data-processing requirements for all types of companies.

“It applies common-sense protections to personal data collected online or offline, regardless of how data is

shared,” the Obama administration said in a statement, “and promotes responsible practices that can maximize the benefits of data analysis while taking important steps to minimize risks.”

The proposal, at its core, calls on industries to develop their own codes of conduct on the handling of consumer information. It also charges the Federal Trade Commission with making sure those codes of conduct satisfy certain requirements—like providing consumers with clear notices about how their personal details will be collected, used and shared.

Companies that violate those requirements could be subject to enforcement actions by the commission or by state attorneys general.

The administration’s proposal, considered a discussion draft, would need a congressional sponsor before it could be officially introduced. Already, though, industry analysts said that the proposal, along with several other legislative efforts on commercial privacy, was unlikely to be enacted in a Republican Congress.

The White House effort comes during heightened public awareness about both government and commercial data-mining. And the proposal drew sharp reactions.

Some prominent legislators and privacy law scholars said the administration’s effort failed to endow citizens with direct and clear legal rights to control who collects their information and how they use it. And the bill, they say, largely puts companies in charge of defining their own criteria for fair and unfair use of consumers’ personal details.

“Instead of codes of conduct developed by industries that have historically been opposed to strong privacy measures, we need uniform and legally enforceable rules that companies must abide by and consumers can rely upon,” Senator Edward J. Markey, a Massachusetts Democrat who has been investigating consumer-profiling companies called data brokers, said.

Companies like Acxiom, a database marketer in Little Rock, Arkansas, for instance, help marketers target individual consumers by estimated household income, ZIP code, race, ethnicity, social network or interests like “smoking/tobacco” or “gaming-casino.”

Experian Marketing Services, another marketing company, uses data-mining to stratify consumers into socioeconomic clusters with names like “small town, shallow pockets” and “diapers and debit cards.”

Armed with that kind of information, advertisers might, say, send smokers ads for the latest air filters. But in a report last year on data brokers, the Federal Trade Commission warned that such profiling could be also used in ways that could “adversely impact consumers.” Third parties, regulators wrote, could potentially use brokers’ information on smokers to decide whether someone was “a poor credit or insurance risk, or an unsuitable candidate for employment or admission to a university.”

The report called on Congress to enact legislation to protect this kind of volatile information by, among other things, requiring companies that serve consumers to obtain consent from individuals before collecting such sensitive details about them.

While the White House’s proposal does not explicitly require companies to obtain affirmative consent to collect health information, it does call on companies to give individuals reasonable means to control the use of their personal data, depending on the context and “in proportion to the privacy risk.”

Microsoft heralded the draft bill as a welcome first step in improving consumer trust in how companies handled their information.

“The White House framework tackles issues that are crucial to build trust and foster innovation,” Brendon Lynch, chief privacy officer of Microsoft, wrote in a blog post. “Not all will agree with every aspect of the proposal—some will say it goes too far, while others will say it doesn’t go far enough—but it’s a good place to start the conversation.”

But some privacy advocates warned against the bill’s reliance on industry-developed codes of conduct. The process, they contended, would allow companies to define for themselves whether their data-use policies constituted privacy risks to consumers. They also said the bill offered companies loopholes that would help them avoid giving consumers meaningful control over their records and make it difficult for federal regulators to enforce the legislation.

“While it claims to provide rights to consumers, behind its flimsy policy curtain is a system that gives real control to the companies that now gather our information,” said Jeffrey Chester, executive director of the Center for Digital Democracy, a consumer advocacy group in Washington.

A few privacy law scholars said that the draft bill could undermine protections consumers already had. If enacted as currently written, for instance, it could pre-empt stronger laws in a few states that require companies to obtain consumers’ explicit consent before collecting unique biometric information like fingerprints or facial scans.

“It would override state statutes that give people more protection,” said Alvaro M. Bedoya, executive director of the Center on Privacy and Technology at Georgetown University Law Center. “It would be a significant setback for privacy.” Reported in: *New York Times*, February 28. □

NSA surveillance program renewed

The Obama administration on February 27 received court reauthorization for a controversial National Security Agency surveillance program, weeks before a legal deadline was set to force Congress to act.

The government filed a request with the secretive Foreign Intelligence Surveillance Court to renew the NSA’s

bulk collection of Americans' phone records, as it must do every ninety days to keep the program active.

The current approval will be the final one before the portion of the USA PATRIOT Act undergirding the contested program expires. By June 1, Congress either needs to reauthorize the existing law, replace it, or allow the program to expire—which officials say would badly damage national security.

The program allows the NSA to collect phone metadata, such as information about who called whom and when, but not actual content of their conversations. Supporters say that information can be critical for connecting the dots to thwart terrorists, but critics say that it has never been as singularly useful as proponents say.

After the once-secret program was revealed by Edward Snowden in 2013, President Obama made a few minor reforms to the program and urged Congress to make sweeping changes that would effectively end the NSA's collection of the data and require officials to obtain specific records from phone companies only after obtaining a court order. Reported in: *The Hill*, February 27. □

Pam Klipsch receives 2015 John Phillip Immroth Memorial Award

The Intellectual Freedom Round Table (IFRT) of the American Library Association (ALA) has announced that Pam Klipsch is the recipient of the 2015 John Phillip Immroth Memorial Award.

Klipsch has vigorously defended intellectual freedom throughout her library career. For decades, she has served on the major committees and round tables within ALA devoted to intellectual freedom—the Intellectual Freedom Committee and IFRT. She has served five terms on ALA's Council and was IFRT's very first Councilor on ALA's Council. Over many years, she has supported the Freedom

to Read Foundation and has served on its board. She has authored and edited many of the *Library Bill of Rights Interpretations*, which are guiding principles of the library profession.

Klipsch has advocated for helping people who challenge controversial material to see how library principles concerning intellectual freedom reflect their own personal values, instead of treating such challengers as opponents. This philosophical foundation allowed her to work with elected officials across the political spectrum in securing passage of groundbreaking privacy legislation in her home state of Missouri, where she is the director of the Jefferson County Library.

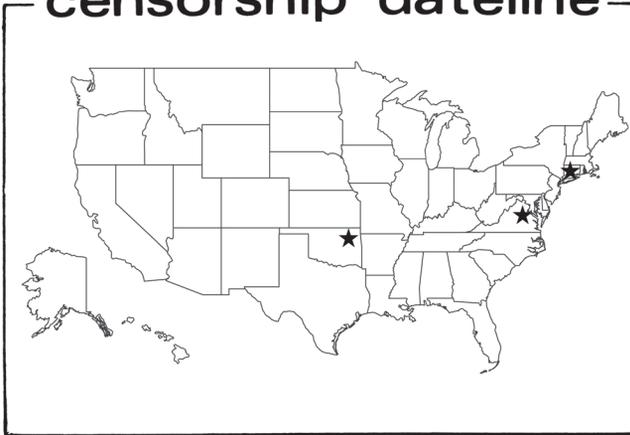
Klipsch worked with Missouri State Representative John McCaherty to introduce—and then pass—a bill in 2014 to extend the privacy rights of library patrons to include third-party vendors that contract with the library in providing services requiring access to patron information (usually, authenticating in a library's database that a patron is indeed a library cardholder). According to this law, any personally identifiable information about resources that patrons access through a third-party vendor is as protected and confidential on the vendor side as on the library side of the transaction. This statute stands as a model approach to privacy in the digital age.

For her long defense of intellectual freedom and for this legislative achievement, Klipsch is being recognized with the 2015 Immroth Award.

This year's award will be presented at the ALA Annual Conference in San Francisco at the IFRT Awards Reception from 7–9 p.m. on Friday, June 26.

The John Phillip Immroth Memorial Award honors intellectual freedom fighters in and outside the library profession who have demonstrated remarkable personal courage in resisting censorship. The award consists of \$500 and a citation. Individuals, a group of individuals or an organization are eligible for the award. The award was first presented in 1976. □

censorship dateline



schools

Wallingford, Connecticut

A coming-of-age novel was removed from the required high school freshman English curriculum by the school superintendent after a parent complained that the book included references to homosexuality, date rape and masturbation. *The Perks of Being a Wallflower*, by Stephen Chbosky, was selected by teachers for freshmen English classes this school year. The book's narrator is a freshman who tells his story through letters written throughout the school year. The novel was adapted into a film in 2012.

The complaint was filed by Jean Pierre Bolat in November—three months before he was sworn in as a Board of Education member. Bolat emphasized that he filed the complaint as a parent long before he knew he was going to be nominated for a school board seat by the local Republican Town Committee.

"In September, my son came up to me one night and was very anxious about a book he was reading. For a freshman in high school to come up and say that, it drew my concerns," Bolat said. "I read it and I was very offended by the passage."

He added that some of the passages dealt with homosexuality, masturbation, sex and a "glorification of alcohol use and drugs." One section of the novel that Bolat highlighted describes a boy and a girl engaging in sex, despite her saying "no."

"That's a description of date rape," Bolat said.

Bolat said there are other pieces of literature that can be used as teaching tools "without the graphic material."

Bolat filed the complaint with Sheehan Principal Rosemary Duthie after the teacher showed the movie to his

son's class. He met with Duthie and the teacher, where he asked her to read some of the passages.

"The principal had not read the book and when I showed her the passages across the table, she couldn't even read the passages aloud," Bolat said. ". . . I asked her to do something on the local level, remove the book from curriculum because she had the authority to do it."

Duthie told Bolat he had to send a letter to Shawn Parkhurst, the assistant superintendent for curriculum and instruction. Bolat sent the letter January 1. Later that month, he appeared before a committee of teachers and library staff to explain why he wanted to have the book removed.

"All the teachers were very far on the opinion that I was trying to ban a book and I tried to educate them that no, I'm an American and I don't believe in censorship, but believe in appropriateness," he said. "This book is inappropriate for children."

The committee decided keep the book. Bolat appealed the decision to School Superintendent Salvatore Menzo. In February, Menzo decided to remove the book from the curriculum, but said that it "will be available in the school library and will be made available to students for independent reading," according to a February 23 letter to Bolat.

Parkhurst said it was the first time in his two years as an administrator that a parent's complaint led to the removal of a book from the curriculum.

"That's a testament to the leadership in our district," Bolat said. ". . . They realized that if something doesn't smell good or feel good, it's probably not the right thing."

A thread on a Facebook community forum about the book's removal generated over forty comments, with some people calling it censorship. "I feel very strongly that it is the parents' responsibility to teach their kids about morality and immorality and values," Bolat responded.

In an effort to better inform parents in the future of books students have to read, Menzo wrote in his letter that the administration will provide up-to-date information on the school board's website.

While some residents questioned his actions, Bolat said he had the support of other parents. "I was cut from a different cloth," he said. "If I don't believe something is right or is an injustice, I'm going to stand up to it." Reported in: *Meriden Record-Journal*, March 17.

Windsor, Connecticut

An English teacher at South Windsor High School has been placed on leave after directing students to read what school officials are calling a "highly inappropriate" poem. The superintendent's office sent a letter to teacher David Olio March 2 notifying him of his suspension. According to his website, Olio graduated from Trinity College and has taught English at South Windsor High School since 1996.

“As we discussed at our meeting, you have been placed on paid administrative leave while we investigate the concerns that have been brought to our attention,” Assistant Superintendent Colin J. McNamara wrote in the letter.

McNamara said Olio is not allowed to contact students or enter school property during his suspension. While the South Windsor Board of Education is investigating, police said they are not taking part. Olio is not facing any charges.

The controversy stems from an assignment during which Olio allegedly asked students to read a sexually charged poem in class. The poem has been identified as “Please Master” by Allen Ginsberg and depicts sex between men.

Ginsberg, an icon of the ’50s and ’60s known for his sexually explicit writings, is described by the Poetry Foundation as one of the most acclaimed poets of his generation.

In an email to parents, Superintendent Kate Carter said both students and parents expressed concern on social media following the assignment. Carter said parents were notified immediately.

“I do wish to emphasize that we take seriously the trust that parents place in teachers and administrators,” Carter wrote, “and we do not tolerate the use of inappropriate materials in classroom settings.” Reported in: NBC Connecticut, March 6.

Hanover, Virginia

Last school year, Stephanie Mayle, a junior at Hanover High School, watched a movie that caused a big upset in the community just months ago. But after Mayle and her classmates watched the documentary, *Searching for the Roots of 9/11* by Thomas Friedman, in their history class, they discussed the perspectives and points of view that were presented in the film without the controversy that emerged this past fall.

“We had one of the best conversations we had all year,” she said.

The video tries to understand why the tragedy in New York occurred by interviewing Muslim students, academics, journalists and citizens.

Friedman’s video and the uproar it caused led the school board to review and alter its policies on controversial instructional materials, which generated media coverage. That’s how Mayle discovered what was going on in her school district, though she already knew that the Friedman video was controversial and had upset some community members.

At the beginning of the month, many students such as Mayle started sharing news articles about the school board’s actions and then created a Facebook group where they talked about their common dislike of the decisions being made about their education. As a result, they decided that they would step up and take some action, forming

the student-run group Hanover Students for Freedom of Information and Learning.

The students met in person for the first time at a local library February 16, where roughly 36 students from primarily Hanover High School, but also Atlee and Patrick Henry high schools, attended. HSFOIL plans to continue having regular meetings.

Caroline Ryan, a member of the group’s publicity committee, said they’d ideally like to put pressure on the school board to amend its newly revised policies, though that is a future goal since they were approved just last month. And, in April, they hope to be prepared enough to go in front of the board and present their concerns about the policies hindering Hanover students’ education. They also hope to continue to have a presence at school board meetings so that they can stay in the loop.

Ryan said they also plan to gather data by polling students and researching other jurisdictions’ policies on controversial materials.

Nathan Pal, the head of HSFOIL’s publicity committee, said it’s important for people to know that they aren’t a “radical group” and plan to act peacefully by talking to their principals and garnering support.

“It’s our education at stake and we’re not going to lose a lot so I felt like we needed to step forward,” Pal said, adding that teachers were frustrated by the board’s actions and could potentially lose their jobs if they tried to protest the decision.

And right now, the group is trying to get more and more students involved from across the division and not just at Hanover High School.

Recently, Mayle said they passed out flyers in school to let others know what’s been going on and notified them of the division’s sensitive materials list. She added that many teachers were interested and voiced their support. “I think it’s really shaping out well,” Pal said.

Neither of the members could believe how much support they’ve received and how quickly students have become interested in their cause. February 8, a high school senior at Hanover created a group for their peers who want to join their efforts. The next week, they launched a public Facebook page and by February 20, it had 224 likes.

The group plans to continue to spread the word about the cause through social media and word of mouth because they’re all really passionate about it.

For example, when Mayle first heard about the new changes to the school system’s policies from one of her teachers, she said she was mad.

“I don’t want my education to be hindered at all,” she said.

Mayle believes there are a lot of benefits to students learning about controversial and sensitive topics and ideas. For instance, when she watched the Friedman movie she said it really helped her understand Muslims’ perspectives. She added that absorbing and understanding different points of view makes for a well-rounded person.

Another concern for the group is the division's list of sensitive materials, which includes books such as *The Color Purple*, by Alice Walker. If teachers choose to use any of the six items on the list, which includes five books and the documentary, they must receive their principal's approval and notify parents before using it in a lesson. In addition, teachers must provide an opt-out option and alternative assignment for families who wish to have their children absent from the lesson.

Pal and his peers were a little offended by the list, especially with one of the books, *Thirteen Reasons Why*, by Jay Asher, which is about teen suicide. He believes they could absorb the material and understand it and take it for what it is rather than be convinced to commit suicide from the book. "I think we're mature enough," he said.

Mayle agreed and said it's one of her favorite books and felt it was really informative. In fact, once she found out about the division's list, Mayle tasked herself with the challenge of reading all of the flagged books to understand what people might find offensive in the material.

Some of the books were challenged by individuals because of a fear that it would "promote and encourage sexual misconduct and behavior," or it used foul language and involved the topic of sexuality, according to the division's summary of challenged materials.

"It's either we learn about these things in the classroom or we experience them outside of it in a less healthy environment," Mayle said. Reported in: *The Herald-Progress*, February 25.

university

Tulsa, Oklahoma

In a triple blow to free speech, due process, and freedom of the press, the University of Tulsa (TU) arbitrarily banned a student from campus until 2016 for Facebook posts that someone else admitted to writing and then attempted to intimidate student journalists who were trying to cover the story.

"The University of Tulsa's speech police are putting in some serious overtime on this case," said Peter Bonilla, Director of the Individual Rights Defense Program at the Foundation for Individual Rights in Education (FIRE). "Punishing someone for the speech of a friend or relative might be par for the course in a dictatorship, but it has no place on our nation's college campuses. Worse, TU wants to hide how it's ignoring its own rules from the oversight of campus courts or the student press."

TU suspended student George "Trey" Barnett last October for three Facebook posts published by his husband

that criticized another student and two TU faculty members. None of the Facebook posts came from Barnett's account; the statements were posted by his husband, who either tagged Barnett or posted them directly to Barnett's Facebook page. Barnett's husband later submitted a sworn affidavit attesting to his sole authorship of the posts. Nevertheless, shortly after TU professor Susan Barrett filed a complaint against Barnett arguing that Barnett could not "avoid responsibility" because someone else was responsible for the posts, TU Senior Vice Provost Winona Tanaka imposed eight restrictive interim measures against Barnett. The sanctions included suspending his participation in certain courses and activities and even barring him from speaking about certain individuals.

Without affording him the hearing he was entitled to under TU's University Student Conduct Policies & Procedures, and despite his husband's affidavit, Tanaka found Barnett responsible for "harassment." Tanaka also found Barnett guilty of retaliation and violating confidentiality requirements for speaking about the disciplinary charges with his husband—who was also his exculpatory witness.

Less than two months before Barnett was set to graduate, Tanaka not only suspended him until at least 2016 but also permanently banned him from receiving a degree in his major even upon his re-enrollment. Barnett was forced to wait two months for TU to respond to his appeal, which the university summarily denied on January 9 without explanation—leaving Barnett unable to earn his theater degree as planned.

TU has also threatened the expressive rights of the staff of its independent student newspaper, *The Collegian*, which reported on Barnett's suspension and criticized his treatment. *The Collegian* reports that after contacting TU administrators for comment, student reporters were told by TU's director of marketing and communications that if "anything that the university deems to be confidential" is "published or shared, (that) could violate university policies." The university refused to explain what might constitute "confidential" information and, come press time, the journalists were unsure what action the university might take against them.

"TU students are right to be concerned about their free speech and due process rights, given the university's sheer vindictiveness in banishing Barnett and its treatment of their student newspaper," said Bonilla. "We've warned TU about its dangerously overbroad harassment policy before, yet it continues to fly in the face of its promise that students retain 'the rights and privileges granted to all citizens in the Bill of Rights.' The university needs to be held accountable for breaking that promise." Reported in: thefire.org, February 12. □

from the bench



U.S. Supreme Court

The U.S. Supreme Court on March 30 left intact an appeals court ruling that school officials in California did not violate the free speech rights of students by demanding they remove T-shirts bearing images of the U.S. flag at an event celebrating the Mexican holiday of Cinco de Mayo.

The court declined to hear an appeal filed by three students at Live Oak High School in the town of Morgan Hill, south of San Francisco. School staff at the May 5, 2010, event told several students their clothing could cause an incident. Two chose to leave for home after refusing to turn their shirts inside out.

The school had been experiencing gang-related tensions and racially charged altercations between white and Hispanic students at the time. School officials said they feared the imposition of American patriotic imagery by some students at an event where other students were celebrating their pride in their Mexican heritage would incite fights between the two groups.

Lawyers for the students said that the fear that the T-shirts would offend others did not trump free speech rights because the act of wearing the shirts did not rise to the level of incitement to violence.

Three of the affected students—Daniel Galli, Matt Dariano, and Dominic Maciel—were involved in the lawsuit, which was filed on their behalf by their parents.

In the February 2014 ruling, the San Francisco-based U.S. Court of Appeals for the Ninth Circuit said officials did not violate the U.S. Constitution’s First Amendment, which guarantees freedom of speech. School officials acted out of legitimate concerns of violence when they sent a handful of

students home for refusing to change their American flag-embellished apparel, the court said.

The case is *Dariano v. Morgan Hill Unified School District*. Reported in: *New York Times* on March 30.

The Supreme Court declined March 30 to review a case involving New York City’s ban on religious groups’ holding worship services in public school buildings, leaving in place a decision by a lower court that found the longstanding policy constitutional.

The decision permits Mayor Bill de Blasio to expel immediately dozens of religious organizations that have been holding worship services in city school buildings after hours and on weekends. But consistent with a pledge the mayor made during his campaign to lift the prohibition, a spokesman said that the city remained committed to allowing churches to use the schools on the same grounds as other organizations.

“Now that litigation has concluded, the city will develop rules of the road that respect the rights of both religious groups and nonparticipants,” the spokesman, Wiley Norvell, said in a statement. “While we review and revise the rules, groups currently permitted to use schools for worship will continue to be able to worship on school premises.”

The case had become the latest test of de Blasio’s approach toward church-state issues. Since taking office, the mayor has repeatedly sided with the interests of his religious constituencies over the concerns of civil libertarians, carving himself out a niche as a more religion-friendly liberal.

In addition to his pledge to allow the churches to worship in the schools, public prekindergarten classes will soon be able to include a midday break for observant students to pray. Schools will be closed citywide for two Muslim holy days. And he is poised to ease a health regulation governing a controversial circumcision ritual that is favored by some ultra-Orthodox Jews.

Leaders of churches that worship in city schools expressed deep disappointment that the Supreme Court had let the lower court decision stand. Despite de Blasio’s apparent support of their cause, they still felt insecure, they said, because future mayors could choose to bring back the ban, and they believed the de Blasio administration’s statement stopped short of a full endorsement.

The Rev. Robert G. Hall, a pastor at the Bronx Household of Faith, the small evangelical church that brought the litigation to the Supreme Court, said he was hopeful that the de Blasio administration would now lift the ban.

“We are gratified that he is allowing the churches to stay,” Hall said. “It remains to be seen what the long-term policy is going to be, however.”

The case dates to 1995, when the Bronx Household of Faith was denied a permit to rent a school building for worship services and filed suit, contending its religious liberties were violated. A city Education Department regulation has long prohibited religious organizations from

using school buildings for worship services. But since 2002, religious organizations have been allowed to continue using school facilities while the court battles played out. From July 2014 through last month, 72 organizations were granted permits to conduct religious worship services in city schools, Norvell said.

The administration of de Blasio's predecessor, Mayor Michael R. Bloomberg, mounted a vigorous defense of the policy and pushed for the ban to be upheld. The United States Court of Appeals for the Second Circuit repeatedly sided with the city.

Its latest ruling, issued last April, said the city's policy was constitutional in light of the First Amendment's prohibition of government establishment of religion. The city was free to conclude "that it runs a substantial risk of incurring a violation of the Establishment Clause by hosting and subsidizing the conduct of religious worship services," Judge Pierre N. Leval wrote for the majority.

Advocates of ending the ban have long argued that the policy created a double standard—imposing an unfair burden on religious groups and treating them differently from any other organization.

Now that the Supreme Court has declined to hear the case, weekend worship services in schools violate Chancellor's Regulation D-180, an Education Department rule. City Hall must either ask for a change to that regulation or find another solution if it wants the churches to stay, lawyers familiar with the case said.

Jordan W. Lorence, a lawyer for the Bronx church, said he was concerned that by letting the lower court ruling stand, the Supreme Court had cleared the way for other districts, both in New York State and nationally, to enact similar policies. New York City is the only major school district in the country to ban worship services in schools, he said.

But Donna Lieberman, executive director of the New York Civil Liberties Union, said she was delighted by the court's decision and concerned the de Blasio administration was not taking seriously the issues that arise when schools become de facto churches on Sundays.

"They have an obligation to ensure that there is no appearance of official endorsement of any of the religious activities that go on in the schools," Lieberman said.

As is its custom, the court gave no reasons for its decision not to hear the case.

The Rev. Richard Del Rio, pastor of Abounding Grace Ministries, whose own church has worshiped since 2010 at Public School/Middle School 34 on Avenue D in the East Village, said he was grateful that de Blasio had pledged to let the churches stay, at least for now. "I think it will work out, at least during his administration," he said. "But one of the reasons we wanted to get the ruling is for ensuing administrations, because they could decide to change the rule again." Reported in: *New York Times*, March 30.

The U.S. Supreme Court on March 23 weighed a case about the Confederate battle flag on specialty license plates

that holds First Amendment implications for speech in public schools.

During the oral arguments in *Walker v. Texas Division, Sons of Confederate Veterans*, the justices focused heavily on the question before them: whether Texas violates the free-speech rights of the Confederate heritage group by denying its request to be included in the state's lucrative specialty-plate program.

But throughout the briefs in the case, there are references to what the First Amendment analysis might mean for schools, such as for regulating Confederate emblems on student shirts and pro-marijuana ads in the high school newspaper.

Citing a lower-court case involving school discipline of a student for displaying a Confederate battle flag at school, the Texas group seeking to display such a symbol on license plates said it could be a "catalyst" for discussion.

"The discussion that arises about the Confederate flag is exactly the sort of robust debate that is protected by the First Amendment, and the state may not discriminate against speakers in that debate on the basis of their viewpoint," the Sons of Confederate Veterans says in its brief. (The group didn't really acknowledge that many schools have barred Confederate symbols as racially disruptive and have largely been upheld in the courts.)

The Confederate heritage group is fighting a decision by Texas officials to bar the Confederate battle flag symbol from a specialty-plate program that currently permits 438 images and slogans such as "Choose Life" (an anti-abortion group), the Knights of Columbus, the Boy Scouts, the Girl Scouts, the University of Texas (and other state universities), and even a few commercial ones such as Dr Pepper and Mighty Fine Burgers, an Austin-based chain.

The board overseeing the Texas Department of Motor Vehicles narrowly rejected the Sons of Confederate Veterans' application because, as the board wrote, "public comments have shown that many members of the general public find the design offensive."

The group sued, and after a loss in a federal district court, the U.S. Court of Appeals for the Fifth Circuit, in New Orleans, ruled last year that specialty plates were private speech and that the state engaged in viewpoint discrimination in rejecting the Sons of Confederate Veterans' design. (A dissenting judge suggested that the license plate forum was similar to the state adoption of textbooks, which the Fifth Circuit has held to be government speech even though reasonable observers could also attribute their content to the private authors and publishers.)

In its brief, Texas says that denying the government's right to disassociate from messages, symbols, and viewpoints it does not want to convey would have far-reaching consequences.

"School districts would be unable to exclude ads promoting marijuana legalization from school newspapers, yearbooks, and athletic programs," the state's brief says.

“This is about the state of Texas not wanting to place its stamp of approval on certain messages,” Scott A. Keller, the state’s solicitor general, said during the oral arguments. “And a speaker is not entitled to the imprimatur of the state of Texas on whatever message that it wishes to put on a license plate.”

When R. James George Jr., an Austin, Texas, lawyer representing the Sons of Confederate Veterans, had his turn, Justice Ruth Bader Ginsburg pressed him on how accepting the state would have to be of potentially offensive viewpoints.

What about a swastika or “Jihad?” she wanted to know. George said yes, those symbols could not be rejected under his theory.

“How about ‘Make pot legal?’” Ginsburg continued. Yes, George said.

“That’s okay?” Ginsburg said. “And ‘Bong hits for Jesus?’” she asked, in reference to the message displayed by a high school student whose disciplinary punishment was upheld by the Supreme Court in 2007 in *Morse v. Frederick*.

Yes, that too, George said. He argued for a “reasonable observer” test in which such a person would not believe a Confederate battle flag or any other potentially offensive symbol would be the speech of the state.

“The state has . . . 480 designs for organizational messages,” George said. “And the issue in this case is the person who puts the license plates on their car is the one that communicates the message.”

Several legal groups that often take the side of students in free speech conflicts with schools have sided with the Sons of Confederate Veterans.

The Becket Fund for Religious Liberty argued in a friend-of-the-court brief that the Texas specialty license plate program is a public forum akin to the after-school meeting spaces that the Supreme Court ruled in a 2001 case, *Good News Club v. Milford Central School*, could not be denied to a student religious club.

A decision in the case is expected by June. Reported in: *Education Week*, March 23.

copyright

Los Angeles, California

For the last year and a half, the music industry has been gripped by a lawsuit over whether Robin Thicke’s 2013 hit “Blurred Lines” was merely reminiscent of a song by Marvin Gaye, or had crossed the line into plagiarism.

A federal jury in Los Angeles on March 10 agreed that “Blurred Lines” had gone too far, and had copied elements of Gaye’s 1977 song “Got to Give It Up” without permission. The jury found that Thicke, with Pharrell Williams, who shares a songwriting credit on the track, had committed copyright infringement, and it awarded more than \$7.3 million to Gaye’s family.

Nona and Frankie Gaye, two of Marvin Gaye’s children, are to receive \$4 million in damages plus about \$3.3 million of the profits earned by Thicke and Williams. The decision is believed to be one of the largest damages awards in a music copyright case. In one of the few comparable cases, in 1994, Michael Bolton and Sony were ordered to pay \$5.4 million for infringing on a 1960s song by the soul group the Isley Brothers.

Since the “Blurred Lines” suit was filed in August 2013, while the song was still No. 1, the case has prompted debate in music and copyright circles about the difference between plagiarism and homage, as well as what impact the verdict would have on how musicians create work in the future.

Thicke’s lawyers had argued that the similarity between the songs—both are upbeat dance tunes featuring lots of partylike atmospherics—was slight, and had more to do with the evocation of an era and a feeling than the mimicking of specific musical themes that are protected by copyright.

But speaking to reporters after the verdict was announced, Richard S. Busch, a lawyer for the Gaye family, portrayed the ruling as a refutation of that view.

“Throughout this case they made comments about how this was about a groove, and how this was about an era,” Busch said. “It wasn’t. It was about the copyright of ‘Got to Give It Up.’ It was about copyright infringement.”

Neither Thicke nor Williams was in court when the verdict was read. But in a joint statement, they said that “we are extremely disappointed in the ruling made today, which sets a horrible precedent for music and creativity going forward.”

Howard E. King, a lawyer for Thicke and Williams, said that his clients were considering their legal options but he declined to be more specific. (Noting the fame and fortune of Thicke and Williams, however, King—a wry voice inside and outside of the court—said that the verdict “is not going to bankrupt my clients.”)

The jury decided that while “Blurred Lines” infringed on the copyright of “Got to Give It Up,” Thicke and Williams had not done so willfully. Clifford Harris Jr., better known as T. I., who contributed a rap in the song, was found not liable. According to an accounting statement read in court and attested to by both sides, “Blurred Lines” has earned more than \$16 million in profit.

The case was unusual not only for its large damages award but for the fact that it reached the level of a jury verdict at all. Music executives and legal experts said that while accusations of plagiarism—and accompanying demands for credit and royalties—are common in the music industry, it is rare for a case to progress so far.

“Music infringement claims tend to be settled early on, with financially successful defendants doling out basically extorted payoffs to potential plaintiffs rather than facing expensive, protracted and embarrassing litigation,” said Charles Cronin, a lecturer at the Gould School of Law at

the University of Southern California, who specializes in music copyright.

The eight jurors in the case were instructed by the judge, John A. Kronstadt of United States District Court, to compare “Blurred Lines” and “Got to Give It Up” only on the basis of their “sheet music” versions—meaning their fundamental chords, melodies and lyrics, and not the sounds of their commercial recordings.

That led to several days of esoteric analysis by musicologists for both sides, whose testimony was often vociferously objected to by the lawyers. The disputes involved passages as short as four notes, as well as mash-ups pairing the bass line of one song with the vocals from the other.

Yet the case also had plenty of star power and revelations about some of the more unseemly practices of the music business. As part of his testimony, Thicke performed a piano medley of “Blurred Lines” and tracks by U2, Michael Jackson and the Beatles in an effort to show how easily one song could be shown to sound like another.

He also said that he had been high on drugs and alcohol throughout the recording and promotion of “Blurred Lines,” and that while he claimed a songwriting credit on the track, it was Williams who had created most of it.

“The biggest hit of my career was written by somebody else, and I was jealous and wanted credit,” Thicke testified.

As news of the ruling spread, some legal experts expressed worry about the precedent it set. Lawrence Iser, an intellectual property lawyer in Los Angeles who was not involved in the case, called it “a bad result.”

“It will cause people who want to want to evoke the past to perhaps refrain from doing so,” Iser said. “Rather than helping to progress the arts, it is a step backward.”

For the family of Marvin Gaye—who died in 1984—the jury’s verdict was welcome. In one of the twists of the often complicated case, Thicke and Williams sued first, seeking a declaration from a judge to protect them against infringement claims that they said had been made privately by the Gaye family. Nona and Frankie Gaye quickly countersued.

When the verdict was read, members of the Gaye family—who were present at court throughout the trial—exulted and shed tears of joy.

“I’m really grateful,” said Janis Gaye, Marvin’s former wife and the mother of Nona and Frankie Gaye. “I hope people understand that this means Marvin deserves credit for what he did back in 1977.” Reported in: *New York Times*, March 10.

Internet

Jackson, Mississippi

An investigation of Google by Mississippi Attorney General Jim Hood was halted in March when a federal

judge in Hood’s home state granted Google’s motion for an injunction. A few weeks later, U.S. District Court Judge Henry Wingate published an opinion laying out his reasoning for siding with Google. In a 25-page order, Wingate found “significant evidence of bad faith” on Hood’s part.

In particular, Wingate said some of Hood’s remarks at a conference of attorneys general were overly threatening. According to a transcript submitted by Google, Hood said:

“I told [Google] if you don’t work with us to make some of these changes that we’ve been suggesting since November, then I’m going to call on my colleagues to issue civil investigative demands or subpoenas to get some of these documents that we think we show that they have, in fact, manipulated their algorithm to allow for these search of some of these pirating sites to pop up.”

In his order, Wingate sided with Google on every significant point, finding that the company is likely to prevail on claims that Hood’s wide-ranging investigation violated Google’s First and Fourth Amendment rights. Hood’s concerns about piracy on Google are likely to fail, since enforcing copyright is the domain of the federal government. Similarly, Hood’s concerns that Google searches lead to illegal sales of prescription drugs are preempted by the federal Food, Drug and Cosmetic Act.

“Google has submitted competent evidence showing that the Attorney General issued the subpoena in retaliation for Google’s likely protected speech, namely its publication of content created by third-parties,” wrote Wingate.

The lawsuit proceeds as scheduled from here. For now, Google has only won a “preliminary injunction” that will stop the investigation from proceeding until Wingate makes a final decision.

Hood’s investigation became closely scrutinized last year after press reports revealed that it was encouraged, and partly funded, by the Motion Picture Association of America. MPAA lawyers wrote drafts of subpoenas intended to be used by the attorneys general. Reported in: *arstechnica.com*, March 31.

FOIA

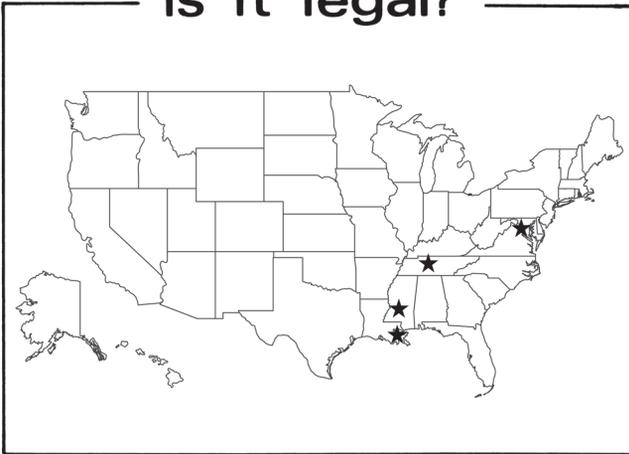
Phoenix, Arizona

The Energy & Environment Legal Institute (EELI), which brands itself as the home of “free-market environmentalism through strategic litigation,” has lost another round of said strategic litigation. An Arizona court has ruled that a large collection of e-mails from faculty at state universities can remain private.

The group (formerly the American Tradition Institute) has been attempting to obtain the e-mails of climate scientists who work at state universities through the states’

(continued on page 83)

is it legal?



schools

Jackson, Mississippi

Oral arguments in a lawsuit over whether a Mississippi high school student was exercising his right of free speech when he posted a rap song online criticizing two coaches he accused of misconduct toward female students are now set for May 12. The full U.S. Court of Appeals for the Fifth Circuit will hear the case in New Orleans.

Last December, a three-judge panel overturned Taylor Bell's suspension, ruling that his actions occurred off school grounds. The full court granted the Itawamba County School District's motion for a hearing.

School officials said that Taylor Bell did not cooperate when they tried to investigate the allegations against the coaches and that he caused a major disruption at school by posting the video in early 2011. The accusations were never substantiated, and charges were never filed. Bell was suspended for seven days and assigned to an alternative school for more than a month.

Bell wrote the song "PSK The Truth Needs to be Told" after he said several young women told him that two coaches at school were behaving inappropriately.

School officials said they became aware of the song after it was posted on Facebook and YouTube. School attorneys said Bell made no effort to distance himself from the school and included the coaches' names and posted the school's logo with the song.

Court papers say Bell wrote the song in December 2010 and put it on his Facebook page January 3, 2011. A disciplinary committee suspended Bell on January 25, 2011, and

the county school board upheld the suspension about two weeks after that.

Bell and his mother, Dora Bell, of Fulton, sued the county school district in 2011. A federal judge in Mississippi upheld the suspension, and Bell appealed to the Fifth Circuit.

The Fifth Circuit panel, in a 2-1 decision, found the school system failed to prove Bell's song caused a substantial disruption of school work or discipline. Reported in: *New Orleans Times-Picayune*, April 5.

net neutrality

Washington, D.C.; New Orleans, Louisiana

An industry trade group and a small, Texas-based Internet provider are among the first to mount a legal challenge to the federal government's new net neutrality rules.

On March 23, USTelecom—a group that includes some of the nation's largest Internet providers—filed suit in Washington, while Alamo Broadband sued the Federal Communications Commission in New Orleans.

The court filings begin a legal effort to overturn the FCC's regulations, passed in February (see page 65), that aim to keep Internet providers from speeding up, slowing down or blocking Web traffic.

"We do not believe the Federal Communications Commission's move to utility-style regulation invoking Title II authority is legally sustainable," USTelecom President Walter McCormick said in a statement. "Therefore, we are filing a petition to protect our procedural rights in challenging the recently adopted open Internet order."

In its petition, Alamo alleges that the FCC's net neutrality rules apply onerous requirements on it under Title II of the Communications Act, the same law that the FCC uses to monitor legacy phone service.

"Alamo is thus aggrieved by the order and possesses standing to challenge it," the company's lawyers wrote in the petition.

The challenges are coming much sooner than expected. Many analysts believed that Internet providers would have to wait until the FCC's rules were officially published in the Federal Register before being eligible to appeal. But according to legal experts familiar with the challenges, certain sections of the FCC's rules operate on a different timeline. Those parts, referred to as the "declaratory ruling" sections of the net neutrality rules, were considered final as soon as the FCC published them on its Web site, according to the experts, which it did March 12.

"USTelecom is filing this protective petition for review out of an abundance of caution," USTelecom writes in its challenge.

After the declaratory ruling becomes final, potential challengers have ten days to file an appeal; both petitions were filed hours before the deadline.

In a statement, the FCC called the petitions “premature and subject to dismissal.” It is unclear whether the FCC will be immediately asking for the cases to be thrown out.

Supporters of the FCC are eager for the battle to be joined. “Our side does want an early challenge so that this administration will defend it, and [FCC Chairman Tom] Wheeler will defend it,” said one industry lobbyist who represents smaller telecom firms. “The sooner the better.”

Consumer advocacy groups that had pushed hard for the strong new rules said Title II was “the right law” and insisted that the FCC has a strong case.

“These companies have threatened all along to sue over the FCC’s decision, even though that decision is supported by millions of people and absolutely essential for our economy,” said Matt Wood, policy director at Free Press. “Apparently some of them couldn’t wait to make good on that threat.”

In a related development, Republican FCC Commissioner Ajit Pai has asked the House of Representatives to strip the FCC of funding it needs to enforce net neutrality rules.

“Congress should forbid the Commission from using any appropriated funds to implement or enforce the plan the FCC just adopted to regulate the Internet,” Pai said in prepared statements for an FCC budget hearing. “Not only is this plan bad policy; absent outside intervention, the Commission will expend substantial resources implementing and enforcing regulations that are wasteful, unnecessary, and affirmatively detrimental to the American public.”

“This is a costly endeavor for the agency, one that will end the permissionless innovation that has spurred the Internet’s explosive growth up until today,” Pai said, going on to call it a “lose-lose proposition for companies and consumers.”

Wheeler, who also testified at the hearing, defended the rules. Responding to claims that net neutrality rules don’t address any actual behavior by ISPs, Wheeler pointed out that Comcast was caught interfering with BitTorrent traffic in 2007 and that Verizon last year planned to throttle its users who have unlimited 4G data plans until Wheeler objected.

The FCC’s budget request is appropriate, Wheeler also said.

“Since 1994, our financial return to the government has equaled 13 times our combined operational costs,” he said. “For every dollar generated by the FCC, our agency uses only eight cents for its operations.”

Wheeler described how the latest spectrum auction raised \$41 billion, including \$20 billion to reduce the country’s deficit and billions to fund a nationwide public safety communications network.

“To build on this progress, and fulfill our statutory responsibilities, the Commission is requesting \$388 million in general spending authority derived from Section 9 regulatory fees for our overall non-auction costs, up from

\$339.8 million in FY 2015,” Wheeler said. “In addition, we are requesting an auctions cap of \$117 million, an \$11 million increase from last year, as well as the transfer of \$25 million from the Universal Service Fund to cover our costs for that program. These are well-considered requests that reflect necessary operational demands and the unique circumstances of this budget cycle.”

The fate of the budget request is still up in the air, but Senate Commerce Committee Chairman John Thune (R-SD) said it “raises eyebrows, particularly when American households continue to do more with less in this stagnant economy.” Reported in: *Washington Post*, March 23; arstechnica.com, March 24.

broadband

Nashville, Tennessee

The State of Tennessee is fighting for its right to enforce a law that prevents municipal broadband networks from providing Internet service to other cities and towns.

Tennessee filed a lawsuit March 20 against the Federal Communications Commission, which in February voted to preempt state laws in Tennessee and North Carolina that prevent municipal broadband providers from expanding outside their territories (see page 66). The FCC cited its authority granted in 1996 by Section 706 of the Telecommunications Act, which requires the FCC to encourage the deployment of broadband to all Americans by using “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”

In Tennessee, the Electric Power Board (EPB) of Chattanooga offers Internet and video service to residents, but state law prevented it from expanding outside its electric service area to adjacent towns that have poor Internet service. Tennessee is one of about twenty states that impose some type of restriction on municipal broadband networks, helping protect private Internet service providers from competition.

Tennessee isn’t going to give up its restriction on municipal broadband without a fight. “[T]he FCC has unlawfully inserted itself between the State of Tennessee and the State’s own political subdivisions,” Tennessee Attorney General Herbert Slatery wrote in the state’s petition to the U.S. Court of Appeals for the Sixth Circuit. “The State of Tennessee, as a sovereign and a party to the proceeding below, is aggrieved and seeks relief on the grounds that the Order: (1) is contrary to the United States Constitution; (2) is in excess of the Commission’s authority; (3) is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act; and (4) is otherwise contrary to law.”

It’s no surprise that the FCC is facing a lawsuit over its decision, as this is the first time the commission has tested

its Section 706 authority by preempting state laws restricting municipal broadband.

Despite Tennessee's lawsuit, there are members of the state legislature who want to get rid of the restrictions on municipal broadband. Legislation in the state Senate and House would eliminate the provisions of state law that prevent municipal electric utilities from offering broadband and video service outside their electric service footprint. The legislation is scheduled for markups, but AT&T and other telecom companies are lobbying against it, *Communications Daily* reported.

One of Tennessee's representatives in Congress, U.S. Rep. Marsha Blackburn (R-TN), introduced legislation to overturn the FCC's municipal broadband decision.

The Tennessee restriction dates to 1999, when the legislature authorized municipal electric systems to provide Internet access and cable TV, but only within their electric service areas.

Partly because of a previous case involving a municipal telecommunications ban in Missouri, the FCC's order removing the geographic restrictions in Tennessee and North Carolina "would allow preemption only in cases of underlying authorization." In other words, if a state completely banned municipal broadband, precedent prevents the FCC from taking action. In that Missouri case, the FCC sided with the state and the Supreme Court upheld its decision in 2004. The FCC's conclusion in this latest proceeding was that it can intervene in states that allow cities and towns to offer broadband but impose restrictions on their ability to do so.

The Missouri case also involved a different statute, Section 253 from Title II of the Communications Act, which lets the FCC remove state laws that restrict telecommunications. In Missouri, "the Court upheld a Commission ruling that section 253(a) of the Act did not preempt a state-law flat ban on municipal telecommunications, i.e., phone service," the FCC wrote.

The FCC decided in the Tennessee and North Carolina decision that Section 706 is different because it "addresses barriers to advanced telecommunications," i.e. broadband Internet rather than phone service. "Because section 706 specifically addresses barriers to advanced telecommunications, which are the services at issue in these petitions, we conclude that section 706 is available as a source of authority, regardless of whether section 253 would or would not also apply here," the FCC wrote.

"[H]ere we contemplate preemption under section 706 where a state has allowed municipalities to enter the broadband market but has also imposed regulations to affect the state's communications policy preferences," the FCC further wrote. "Where we preempt those state regulations that apply to municipal providers, the municipal providers are still authorized under the separate delegation of authority. Unlike in *Nixon [vs. Missouri Municipal League]*, the municipality is not 'powerless to enter the . . . business.'"

The FCC could face a separate lawsuit over its North Carolina decision. Even if unsuccessful, lawsuits could delay expansion of municipal broadband. "We'll have to understand any ramifications of anticipated legal challenges before we move forward," EPB communications VP Danna Bailey told *Ars* last month.

But if the FCC successfully defends its decision, municipalities in many more states could ask for the right to expand broadband networks.

An FCC spokesperson told *Arstechnica* the commission is confident in the legality of its ruling. "We are confident that our decision to pre-empt laws in two states that prevented community broadband providers from meeting the needs and demands of local consumers will withstand judicial scrutiny," the FCC said.

Unlike the FCC's net neutrality order, which will become effective 60 days after publication in the *Federal Register*, the community broadband order became "effective on release because it was an adjudicatory matter," the FCC said. That means the Tennessee lawsuit won't face a challenge for being filed too early, whereas the lawsuits filed in March over the FCC's net neutrality plan could be dismissed for being premature. Reported in: *arstechnica.com*, March 24. □

Jefferson Muzzle Awards for 2015. . . . from page 63

threatened to bring criminal charges against a newspaper because its reporters were calling her cell phone after business hours seeking comment on breaking stories. Similarly, Frederick County (Maryland) Councilman Kirby Delauter, unhappy with how he was being portrayed in *The Frederick News-Post*, threatened to sue the newspaper if it ever printed his name in a story again without first obtaining his permission. To his credit, the councilman quickly recanted his threat and acknowledged that a newspaper was not required to receive authorization before it can use a person's name in a news story, especially if that person is an elected official.

In these foregoing incidents, the politicians ultimately backed down. Not so Mayor Jim Ardis of Peoria, Illinois. Ardis certainly appears to enjoy the confidence of his constituents, having won three elections and serving as mayor since 2005. In March 2014, however, one of those constituents caused Ardis a great deal of consternation by creating a Twitter account spoofing the mayor. Inspired by the thousands of Twitter accounts parodying actors, athletes, and politicians, Peoria native Jon Daniel thought he might amuse his friends by producing a steady stream of sophomoric tweets under the alias @peoriamayor. Shortly after creating the account, Daniel noticed that the feed was gaining in popularity, so he specifically marked it as

a parody account to avoid any misunderstanding. “It was created to be a joke,” said Daniel.

Mayor Ardis was not amused. Records obtained under the Freedom of Information Act show Ardis demanded that police do whatever it took to identify the prankster and stop the tweets. The police reported back that the “phony Twitter account does not constitute a criminal violation” but Ardis continued to pressure them to find something. Eventually, a detective discovered a state statute prohibiting people from falsely identifying themselves as public officials. Citing that statute, the police were able to subpoena Twitter, which suspended the account and turned over the associated IP address. The police then subpoenaed Comcast, obtaining Daniel’s name and address. Three weeks after Twitter suspended the account, police raided Daniel’s residence. Daniel was not home at the time, but an unlucky roommate who answered the door was arrested for possession of marijuana. In all, the police confiscated four computers, four iPhones, an iPad, and two Xboxes belonging to other people who lived in the house. Daniel was never arrested because it was soon discovered that the impersonation statute, on which the entire search was based, did not apply to the Internet.

When news of the whole affair became public, Mayor Ardis received a great deal of criticism for what many saw as an unprecedented overreaction to a parody account. Soon copycat parodies began appearing on Twitter and other social media platforms. Emails from all over the world were sent to Ardis’s official address admonishing him for using the police to silence speech that only he found objectionable. “Just to give you heads up, sir,” wrote one, “I will be mocking you at the dinner table this evening. I will await your storm troopers with some fresh coffee and rolls. Please phone ahead.”

For abusing the power of his office to intimidate and silence a harmless parodist, Mayor Jim Ardis receives a 2015 Jefferson Muzzle.

2) Bergen Community College, New Jersey

What happens when the people running your college don’t understand basic First Amendment principles or popular culture? Francis Schmidt, a professor at New Jersey’s Bergen Community College, knows all too well. Schmidt, a longtime professor of art and animation, was ordered to meet with college administrators one day after a dean at the school received an allegedly “threatening email” from Schmidt.

The email, an automated notification sent to Schmidt’s Google+ contacts whenever he posted new content on his account, contained a photo of the professor’s young daughter doing yoga in a T-shirt reading “I will take what is mine in fire and blood.” Fans of HBO’s *Game of Thrones* or the George R.R. Martin books upon which the series is based will immediately recognize the line as Daenerys

Targaryan’s vow to reclaim her rightful place atop the throne in Martin’s fictional kingdom of Westeros. The quote is so iconic that it served as the tagline for an entire season of the hit show. Schmidt’s bosses, unfortunately, don’t appear to be fans.

Officials from human resources and the school’s security office questioned Schmidt to determine whether the automated email was intended as a threat against the dean. Schmidt says that officials pressed him on the source of the quote and questioned the popularity of *Game of Thrones*. One official instructed Schmidt to verify his claims by searching for the phrase on Google; the search returned more than four million results. Administrators nevertheless suspended Schmidt without pay and ordered him to see a psychiatrist before he would be allowed to return to campus.

When asked to defend their actions, school officials said only that three recent school shootings compelled them to investigate situations where someone “expresses a safety or security concern.” A photo of a seven-year-old fantasy enthusiast apparently fit this bill, particularly when, as noted by the college’s security director, William Corcoran, the “fire” mentioned on the shirt could have been “a kind of proxy for AK-47 fire.” (BCC seemingly appreciates this sort of out-of-the-box thinking; Corcoran has since been promoted!) For his part, Schmidt believes the threat angle was a red herring and that he was actually suspended in retaliation for a grievance he filed against the school two months earlier.

When news of his suspension surfaced last April, the college came under heavy fire (no threat intended) from free speech advocates, *Game of Thrones* fans, and proponents of common sense nationwide. The administration finally saw the light in September, when it rescinded the suspension and removed all mention of the incident from Schmidt’s personnel file. Director of Human Resources Patti Bonomolo sent a letter to Schmidt acknowledging that the college “may have lacked basis to sanction you” for posting the picture, and that in doing so “BCC may have unintentionally erred and potentially violated your constitutional rights.” As FIRE’s Greg Lukianoff noted, that’s like saying King Joffrey “may have been a less than ideal ruler.”

For demonstrating its collective cluelessness on two distinct levels, the administration of Bergen Community College is awarded a 2015 Jefferson Muzzle.

3) Mora County, New Mexico, Board of Commissioners

For Alfonso Griego, it was all about the water. As vice chairman of the Mora County Board of Commissioners, Griego was instrumental in passing a first-of-its-kind ordinance that barred oil and gas drilling within the county, noting that his “ultimate goal” was to “protect the water sources of Mora County against contamination.” In pursuit of that goal, however, Griego—along with Chairman

John Olivas, who cast the other vote approving the ban—attempted to unilaterally revoke the constitutional rights of oil producers and leaseholders.

Mora County’s “Community Bill of Rights” provided that entities “seeking to engage in activities prohibited by this ordinance, shall not have the rights of ‘persons’ afforded by the United States and New Mexico Constitutions, nor shall those corporations be afforded rights under the First or Fifth Amendments to the United States Constitution.” In other words: the county’s interest in environmental preservation would, as a matter of law, trump any purported speech or property interests of oil companies.

In the commissioners’ defense, this gross abridgment of established constitutional principles was not entirely their own doing. The Mora County ordinance was written by Thomas Linzey, an attorney for the Pennsylvania-based Community Environmental Legal Defense Fund. Linzey has presented nearly identical versions of the ordinance to local officials across the country in an attempt to openly challenge the legal theory known as corporate personhood.

The county was promptly sued by a Dutch petroleum interest and two private landowners who argued that the rural northeastern New Mexico county did not have the authority to implement a blanket ban on drilling in the area. Last January, a federal judge agreed, overturning the ordinance on grounds that it violated both state and federal laws and chilled corporate activity protected under the First Amendment. In response, the county voted unanimously two months later to repeal the ban. It remains to be seen whether the ramifications of the Board’s folly will be limited to the embarrassment it has already suffered or if it will also face the potentially steep financial consequences of its attempt to strip away the plaintiff’s First Amendment rights.

For biting off way more than they could chew, the Mora County Board of Commissioners is awarded a 2015 Jefferson Muzzle.

4) Bedford County, Pennsylvania, District Attorney Bill Higgins

It should surprise few to hear that teenage boys sometimes do stupid things. The significant physical growth that typically occurs during the male pubescent years often seems accompanied by a decrease in intelligence that in turn frequently results in some truly obnoxious behavior. One such example occurred in July 2014 when a 14-year-old boy in Everette, Pennsylvania, posed in front of a statue of Jesus in a manner suggesting a lewd sex act was taking place. No one would have known about the incident had the boy not posted pictures of it on his Facebook page.

Two months later, the Facebook photos were brought to the attention of Bedford County District Attorney Bill Higgins. When the owners of the statue declined to press

charges, Higgins charged the boy under a law criminalizing the “desecration of a venerated object.” The charge carried with it a sentence of up to two years in jail. Rather than risk jail time, the teen agreed to stay off social media for the next six months, complete 350 hours of community service, obey a 10 p.m. curfew, and allow random drug tests. After successfully completing this program, the charges will be dismissed.

Regardless of how one feels about the boy’s actions, there is a bigger issue at stake—the use of a clearly unconstitutional statute by a government official sworn to uphold the Constitution. The language of the Pennsylvania statute is nearly identical to the text of another statute that the United States Supreme Court held could not be applied constitutionally. In *Texas v. Johnson*, the high court held that the Texas “desecration of a venerated object” statute could not be used to prosecute an individual for burning an American flag because it was not the conduct that was being prosecuted, but the message that the conduct conveyed.

Here the teen’s conduct did nothing more than convey a message that some might find offensive. But speech does not lose First Amendment protection merely because it offends the sensibilities of others. Moreover, unlike the defendant in *Johnson*, the young man in this case did no actual damage to the object he was accused of desecrating.

When news of this case became publicized, District Attorney Higgins received a firestorm of criticism. He responded to the controversy by characterizing it as a partisan issue: “I guess I should take solace in the fact that liberals are mad at me—again.” The fact is, however, that free speech is not a partisan issue and liberals and conservatives alike took issue with Higgins’ actions. Writing in *The Washington Times*, Drew Johnson noted “it’s not just liberals who are upset with Mr. Higgins. It’s also conservatives like me who respect the First Amendment, as well as anyone who has the sense to understand the difference between a teenage prank and an actual crime.”

For putting his own sensibilities above the First Amendment, Bedford County District Attorney Bill Higgins receives a 2015 Jefferson Muzzle.

5) Alabama Circuit Court Judge Claud D. Neilson

Alabama resident Roger Shuler is a former newspaper reporter who since 2007 has maintained the blog Legal Schnauzer. The blog aims to “scale all obstacles in pursuit of truth and justice” and since its founding Shuler has used it to allege a wide variety of illegal or unethical activities by Alabama’s public officials and political figures.

In late 2013, Shuler posted claims that Rob Riley, son of a former Alabama Governor and active member of the Republican Party, was engaged in an extra-marital affair. Riley strongly denied the allegation and went to court

seeking an injunction prohibiting Shuler from writing anything further about the alleged affair and asking that all posts about Riley be removed from the blog.

At a hearing in which Shuler was not present, acting Circuit Judge Claud Neilson issued the requested injunction, effectively placing a prior restraint on Shuler's speech. Shuler did not comply with the injunction, however, and not only refused to remove his earlier posts on Riley but also soon wrote a new one. Shuler's non-compliance landed him in jail for contempt of court. He remained in jail for 5 months until he could not bear incarceration any longer. In March 2014, Shuler had his wife remove the allegedly defamatory posts about Riley and he was released from jail. (When a law enforcement officer went to Shuler's house to arrest him for contempt of court, an altercation occurred resulting in a resisting arrest charge against Shuler. That matter involves legal issues that are not relevant for the purposes of this Muzzle.)

While in many circumstances it is not unusual to find someone in contempt of court for refusing to obey a court order, it is virtually unheard of in the context of allegedly defamatory speech. Were it otherwise, individuals could effectively silence critics by merely alleging their speech to be defamatory without actually having to prove it. To avoid this, the established remedy for reputation-harming falsehoods is post-publication relief, not pre-publication censorship. Yet Judge Neilson issued an injunction without any finding that Shuler's posts about Riley were defamatory. By issuing a prior restraint on Shuler's speech, Judge Neilson employed a legal mechanism that the U.S. Supreme Court has described as "the most serious and the least tolerable infringement on First Amendment rights." Moreover, Judge Neilson's unconstitutional injunction deprived a U.S. citizen of his liberty for five months.

In hopes that it will inspire him to learn what any law student in a basic First Amendment course already knows, Alabama Judge Claud Neilson is awarded a 2015 Jefferson Muzzle.

6) The Indiana Department of Corrections

Leon Benson is an inmate at Indiana's Pendleton Correctional Facility who maintains that he is innocent of the crime for which he is incarcerated. His sister, Valerie Buford, communicates regularly with Benson from her home in Michigan. The siblings conduct virtual visitations through J-Pay, a system that facilitates various forms of electronic communication between inmates and approved parties on the outside. In addition to email, live video chats, and other services, J-Pay offers users the option of creating and sending prerecorded video messages of 30 seconds or less. These "videograms" are subject to various content restrictions and are screened by prison personnel prior to delivery.

Last August, Leon Benson recorded a videogram in which he thanked all those who had followed his case and asked for their continued support. This message was subsequently delivered to Ms. Buford, who viewed the file and then reposted it to an event listing on her personal Facebook page. That page, entitled "PACK THE COURT! MAKE IT TREMBLE! Justice for Leon Benson," was intended to organize supporters of her brother's cause to attend future court proceedings. In response to Buford's posting of this videogram, prison officials took action against both her and Mr. Benson. Buford had her access to J-Pay revoked indefinitely (it has since been restored, although not before changes were made system-wide rendering future reposts impossible), while Benson was charged with, and convicted of "group demonstration," a violation of the Department's disciplinary code. Benson lost 90 days of good time credit, spent 90 days in disciplinary segregation, and had his own J-Pay privileges revoked for three months.

The Department claims that its actions against Ms. Buford have nothing to do with freedom of speech. Instead, they point to the terms of service all users ostensibly agree to prior to using J-Pay. Under that agreement, users are expressly forbidden from reproducing or copying J-Pay content. By reposting her brother's videogram, they say, Ms. Buford violated the agreed-upon rules, rendering any infringement of her speech inconsequential. Even if one accepts this account, it does not explain the Department's punishment of Mr. Benson. His message wasn't flagged by DOC staff, so there is no reason to believe that its content violated prison rules, and Mr. Benson had nothing to do with reposting the videogram, so he can't have been punished for violating the user agreement.

It appears as though prison officials took these actions simply because they could. Courts have long approached questions related to the operation of prisons with great deference. In order to facilitate the State's legitimate penological objectives, "many of the liberties and privileges enjoyed by other citizens must be surrendered by prisoners." On the other hand, prisoners retain all "those First Amendment rights that are not inconsistent with" the State's objectives. As for Ms. Buford, while she may not have a constitutional right to communicate with her brother via J-Pay, or even to repost those communications online, that does not mean that the Department may ignore her speech interests outright. The Supreme Court ruled in 1972 that "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . it may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."

The Department can claim that it was merely enforcing a user agreement—one, it should be noted, that J-Pay itself

has thus far declined to join the DOC in enforcing—but its actions have undoubtedly resulted in a violation of both Mr. Benson’s and Ms. Buford’s First Amendment rights. As such, the Indiana Department of Corrections is awarded a 2015 Jefferson Muzzle.

7) Asnuntuck Community College, Connecticut

While public colleges and universities may enforce certain rules regarding student conduct, such rules may not infringe upon protected speech. Over the past eighteen months, Connecticut’s Asnuntuck Community College (ACC) has repeatedly ignored this basic tenet of First Amendment law, resulting in the unconstitutional disciplining of a student and culminating in an official purge of critical commentary from the school’s social media accounts.

ACC’s troubles began in October 2013, following Connecticut Governor Dannel Malloy’s appearance at an on-campus employment conference offering local companies an opportunity to learn “how to expand their business and help veterans and state residents.” At the conclusion of the conference, an ACC student named Nicholas Saucier approached Governor Malloy to discuss his own experiences as a veteran and small business owner. As they walked to the Governor’s car, Saucier and Malloy spoke about the impact of recent gun legislation on Saucier’s business. As the conversation progressed, ACC’s Interim President James Lombella intervened, physically restraining Saucier and attempting to steer the student away from Malloy. Governor Malloy then stepped into his car, effectively ending the conversation, at which point Saucier called Malloy “a snake.” This sequence of events was recorded by Saucier, with consent from Governor Malloy.

Lombella proceeded to question Saucier in the presence of an ACC security officer who ultimately escorted Saucier off campus, instructing him not to return until he had spoken with Dean of Students Katie Kelley. Later that day, Kelley notified Saucier that he was “banned from the Asnuntuck Community College campus” pending a meeting to discuss the Malloy incident. Much—though not all—of this encounter was recorded as well.

When they met several days later, Kelley explained ACC’s accusations against Saucier, alleging that he had caused a disruption and had acted in a threatening manner. When informed that Saucier possessed video recordings of the events in question which appeared to refute ACC’s claims, Kelley refused to view the videos, but did request that any copies of such recordings be turned over to school officials. At the conclusion of his meeting with Kelley, Saucier was placed on interim suspension on grounds that “[his] continued presence on campus would present a danger to the persons, property and/or academic process of the College.”

A November 6, 2013 letter from Kelley further detailed the factual allegations against Saucier. Therein, ACC accuses Saucier of being “aggressive and hostile” during his conversation with Governor Malloy, claiming that Saucier “created a perceived threat” by becoming “increasingly escalated in [his] tone” and cursing at the Governor. Kelley went on to condemn Saucier’s interaction with President Lombella, suggesting that he had “demonstrated disrespect and aggression by swearing, screaming and approaching [Lombella’s] personal space.” The letter went so far as to claim that Saucier experienced an “increased fear of a threat” when Lombella retrieved from his bag a video camera “which was perceived to be a possible weapon.”

Noting that these allegations could result in his expulsion, ACC offered two options for resolving the charges. Saucier could either consent to a “written agreement in lieu of a hearing” which would require him to accept full responsibility for all charges against him and “voluntarily withdraw” from school, or he could defend himself at a formal hearing. Although Saucier opted for the hearing, it soon became clear that, in the words of the Foundation for Individual Rights in Education (FIRE), the entire process was “biased against him in a way practically guaranteed to result in a guilty finding.” FIRE has detailed numerous due process violations committed by ACC, including:

- Refusing to consider the exculpatory video evidence offered by Saucier;
- Failing to provide Saucier with an opportunity to review witness statements against him in advance;
- Giving Saucier less than fifteen minutes to review the evidence against him during the hearing;
- Rejecting Saucier’s attempts to directly refute the testimony of ACC’s witnesses; and
- Refusing to permit any recording of the proceedings, going so far as to prevent Saucier and his witness from writing a transcript by hand.

On November 19, Saucier was informed that he had been found guilty of all charges. While ACC did permit Saucier to return to campus, he was formally placed on probation and warned that “ANY future violations of the Expectations for Student Conduct, Board of Trustees Policy on Student Conduct, will likely result in Suspension or Expulsion from the College.”

Public attention was focused squarely on ACC when FIRE issued a press release detailing the school’s misdeeds on April 1, 2014. Observers from within the ACC community and beyond quickly took to ACC’s official Facebook page to register their concerns about the school’s apparent lack of respect for the First Amendment. Proving, if nothing else, that they are equal opportunity censors, ACC responded by systematically deleting each and every critical post

from its page. Perhaps overwhelmed by the volume of negative posts, someone with administrative access to the account disabled new posts by other parties, meaning that critics could only comment by replying to one of ACC's own posts. And reply they did; dozens of comments were posted—and quickly deleted—in the days that followed. As its final, cowardly piece de resistance, ACC removed its Facebook page entirely just as soon as word started getting out about the school's campaign against its critics.

Screenshots preserved by vigilant and sharp-eyed observers will ensure that ACC can't simply sweep these censorious shenanigans under the rug. Whether the school will step up to rectify the damage its policies have done to Nicholas Saucier remains to be seen. In any event, its actions have earned Asnuntuck Community College a 2015 Jefferson Muzzle.

8) The University of Illinois at Urbana–Champaign

In a letter dated October 3, 2013, Steven Salaita, a professor in the English Department at Virginia Polytechnic Institute and State University (“Virginia Tech”) was offered a tenured position at the University of Illinois at Urbana-Champaign. He was given an October 14 deadline to respond. On October 9, Salaita accepted the offer. In the ten months that followed, Salaita and his family prepared for the move from Virginia to Illinois. He resigned his tenured position at Virginia Tech, his wife resigned from her job, he and his family visited the Illinois campus in order to find a place to live, and, having found a place, initiated the process of purchasing it by making a nonrefundable payment of earnest money.

Having gone through these efforts and more, Professor Salaita was stunned when, less than two weeks before he was to begin teaching at the University of Illinois at Urbana-Champaign he received a letter from the Chancellor of the University Dr. Phyllis Wise, informing him that his offer of employment had been withdrawn. Although the letter offered no explanation for the University's action, many quickly assumed it was a response to numerous controversial comments Salaita made on Twitter that were highly critical of Israel and its recent actions in the Gaza strip. This charge was strongly denied by Chancellor Wise in a statement she issued on August 22: “The decision regarding Prof. Salaita was not influenced in any way by his positions on the conflict in the Middle East nor his criticism of Israel.” However, Chancellor Wise essentially conceded that the tweets were indeed the basis for the decision not because of what they said, but how they said it. “What we cannot and will not tolerate at the University of Illinois are personal attacks and disrespectful words. . . . [a]s chancellor, it is my responsibility to ensure that all perspectives are welcome and that our discourse allows new concepts and differing points of view to be discussed

in and outside the classroom in a scholarly, civil and productive manner.”

Chancellor Wise's explanation is unsatisfactory for a number of reasons. First, regardless of how one feels about Professor Salaita's tweets, they constitute political speech clearly protected by the First Amendment. Moreover, political speech does not lose its protection because others might object to its tone or manner. Second, seven years of highly positive teaching and scholarly evaluations for Professor Salaita belie the claim that he would ever be “uncivil” in a campus setting. None of Salaita's comments were made on the Urbana-Champaign campus, nor were they directed to future colleagues and students. Third, Chancellor Wise's failure to speak to Salaita himself, the hiring committee that vetted him, or the department that hired him, while listening extensively to his critics raises questions about her commitment to hearing “differing points of view.” In letters and emails obtained under the Illinois Freedom of Information Act, many university donors expressed to Chancellor Wise their dismay with the views expressed by Salaita and their intention to withhold future financial support if he were allowed to work at the University.

The administration's refusal to hear opposing viewpoints on this matter continues to the present. In December 2014, the University's Senate Committee on Academic Freedom and Tenure (CAFT) issued a report finding fault with the University's actions towards Professor Salaita. (This finding was consistent with an earlier vote of “no confidence” in the University administration by sixteen academic departments over its handling of this matter.) The CAFT report recommended that Professor Salaita's appointment be remanded to the College of Liberal Arts and Sciences and that he be provided the opportunity to respond to any proposed findings of professional unfitness. On January 15, 2015, the University announced it would not implement the Committee's recommendations.

Whether it was for the content or the tone of his tweets, it is clear that the administration of the University of Illinois Urbana-Champaign revoked Steven Salaita's job offer for speech protected by the First Amendment and thereby earns a 2015 Jefferson Muzzle. Reported in: <http://tjcenter.org/muzzles/2015-muzzles>. □

from the bench. . . . from page 75

freedom of information laws. In cases where e-mails are not released, EELI has sued. Last year, it lost a case in Virginia that focused on the e-mails of climate scientist Michael Mann, as a court ruled that information about research still in progress could be shielded from freedom of information requests in that state.

In the new case, the EELI went after the e-mails of faculty at state universities in Arizona, apparently including two who attempt to reconstruct past climates using proxies for global temperature: Jonathan Overpeck and Malcolm Hughes. The state Board of Regents refused to release over 1,700 e-mails, saying they were private, involved student information, or discussed ongoing research projects. This prompted EELI to sue.

In a decision handed down in March, the state Superior Court for Pima County upheld the state's decision. The court was given 90 e-mails considered "typical" of the remaining 1,700 to determine if the state was acting arbitrarily. The task was daunting; one e-mail chain took up over 800 pages when printed, and the court found that "to describe the content of the emails as technical and esoteric is an understatement." Nevertheless, the court concluded that the documents were as the Board of Regents described them, and thus that their decision not to disclose them was not arbitrary.

This is the second case where a state court has ruled that pre-publication research—in this case, "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary"—was not a valid subject

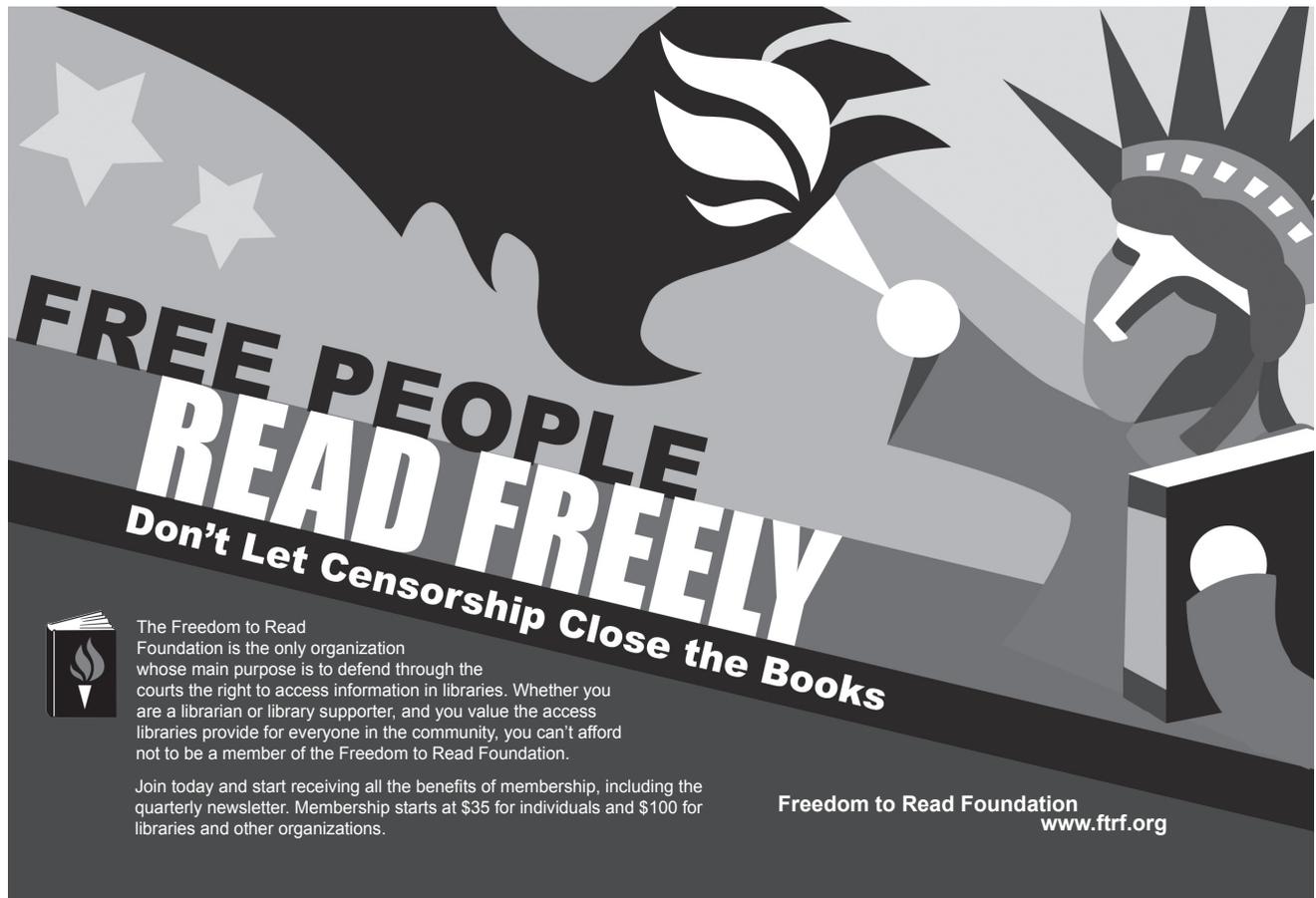
for freedom-of-information disclosures. Reported in: arstechnica.com, March 30.

panhandling

Charlottesville, Virginia

Charlottesville has a reputation as a liberal town, at least by Virginia standards. Conservatives have been known to refer to it as "the People's Republic of." But it certainly showed no concern for the poor and downtrodden when it passed an ordinance banning panhandling around the Downtown Mall.

A federal district judge has now tossed out the ordinance, declaring it unconstitutional. The decision follows a string of others that also have found anti-panhandling measures antithetical to the First Amendment. Asking for money is speech, just like asking for a petition signature or asking for the time of day. Charlottesville's ordinance prohibited one but not the others. That rendered it a government regulation based on the content of speech, which is so blatantly unconstitutional it's a wonder cities keep trying to get away with it.



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And yet they do, because panhandlers tend to be homeless and therefore dirty, unkempt and smelly, albeit not by choice. They're bad for business, in other words, especially around quaint little pedestrian malls occupied by trendy restaurants and eclectic boutiques. The businessmen and businesswomen who earn their daily bread running those establishments deserve every break from the city they can get—up to the point they start infringing on the rights of others, including the homeless.

U.S. District Judge Norman Moon's ruling gained additional weight from a recent Supreme Court decision

striking down a buffer zone around Massachusetts abortion clinics. Under the Massachusetts law, abortion clinic workers could address potential customers within the zones, but abortion opponents could not—another content-based restriction forbidden by the tenets of freedom of expression. Charlottesville's own buffer zone concerned a different type of speech, but the principle remains the same. Reported in: *Richmond Times-Dispatch*, February 22. □

intellectual freedom bibliography

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