IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, a political subdivision in the City of Fayetteville, State of Arkansas; EUREKA SPRINGS CARNEGIE PUBLIC LIBRARY; CENTRAL ARKANSAS LIBRARY SYSTEM; NATE COULTER; OLIVIA FARRELL; JENNIE KIRBY, as parent and next friend of HAYDEN KIRBY; LETA CAPLINGER; ADAM WEBB; ARKANSAS LIBRARY ASSOCIATION; ADVOCATES FOR ALL ARKANSAS LIBRARIES; PEARL'S BOOKS, LLC; WORDSWORTH COMMUNITY BOOKSTORE LLC d/b/a WORDSWORTH BOOKS; AMERICAN BOOKSELLERS ASSOCIATION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AUTHORS GUILD, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION — PLAINTIFFS

v. — NO. 5:23-CV-05086-TLB

CRAWFORD COUNTY, ARKANSAS; CHRIS KEITH, in his official capacity as Crawford County Judge; TODD MURRAY; SONIA FONTICIELLA; DEVON HOLDER; MATT DURRETT; JEFF PHILLIPS; WILL JONES; TERESA HOWELL; BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD; FRANK SPAIN; TIM BLAIR; KYLE HUNTER; DANIEL SHUE; JEFF ROGERS; DAVID ETHREDGE; TOM TATUM, II; DREW SMITH; REBECCA REED MCCOY; MICHELLE C. LAWRENCE; DEBRA BUSCHMAN; TONY ROGERS; NATHAN SMITH; CAROL CREWS; KEVIN HOLMES; CHRIS WALTON; and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; — DEFENDANTS

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION, OR , IN THE ALTERANTIVE, A TEMPORARY RESTRAINING ORDER

Plaintiffs Fayetteville Public Library, Eureka Springs Carnegie Public Library, Central Arkansas Library System, Nate Coulter, Olivia Farrell, Jennie Kirby as parent and next friend of Hayden Kirby, Leta Caplinger, Adam Webb, Arkansas Library Association, Advocates for all Arkansas Libraries, Pearl's Books, LLC, Wordsworth Community Bookstore LLC d/b/a Wordsworth Books, American Booksellers Association, Association of American Publishers, Inc., Authors Guild, Inc., Comic Book Legal Defense Fund, and Freedom to Read Foundation (collectively, "Plaintiffs"), for their Motion for a Preliminary Injunction, or, in the Alternative, a Temporary Restraining Order, state as follows:

1. Plaintiffs seek to facially preliminarily enjoin two provisions, Section 1 (the "Availability Provision") and Section 5 (the "Challenge Procedure"), of Arkansas' recently-enacted Act 372 of 2023 ("Act 372").

2. The Availability Provision would make it a crime for libraries or booksellers to make certain books available to any minors.

3. The Challenge Procedure would establish a process for the removal of "inappropriate" books from Arkansas libraries.

4. A Brief in Support of Plaintiffs' Motion for a Preliminary Injunction, or, in the Alternative, a Temporary Restraining Order is submitted along with this Motion. *See* Fed. R. Civ. P. 65(a), (b); Local Rule 7.2(e).

5. As set forth more fully in the accompanying Brief, the Availability Provision and Challenge Procedure suffer from a variety of deficiencies under the First and Fourteenth Amendments of the United States Constitution, and chill and infringe upon Plaintiffs' rights under the First Amendment.

6. The Plaintiffs submit the following Declarations, and the exhibits attached thereto, in support of this Motion:

a. Declaration of John Adams;

b. Declaration of Deborah Caldwell-Stone;

c. Declaration of Leta Caplinger;

d. Declaration of Carol Coffey

e. Declaration of Nate Coulter;

f. Declaration of Christina Danos;

g. Declaration of Olivia Farrell;

h. Declaration of David Grogan;

i. Declaration of David Johnson;

j. Declaration of Daniel Jordan;

k. Declaration of Hayden Kirby;

l. Declaration of Mary E. Rasenberger;

m. Declaration of Matthew D. Stratton;

n. Declaration of Jeff Trexler;

o. Declaration of Adam Webb;

p. and Declaration of Kandi West.

WHEREFORE, Plaintiffs respectfully request that the Court grant their Motion and issue a preliminary injunction pending a decision on the merits of Plaintiffs' claims in this matter, or, in the alternative, issue a temporary restraining order barring the application of the Availability Provision and Challenge Procedure pending a decision on Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

/s/ John T. Adams

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* *Admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2023, a copy of the foregoing was served upon all counsel of record contemporaneously with its filing in the CM/ECF system, and was sent by e-mail and United States mail, postage prepaid, to:

Gentry Wahlmeier
Attorney for Crawford County, Arkansas
and County Judge Chris Keith
WAHLMEIER LAW FIRM, P.A.
P.O. Box 1811
Van Buren, AR 72957
Telephone: (479) 431-3366
E-Mail: gentry@wahlmeierlaw.com

/s/ John T. Adams
John T. Adams

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, et al. PLAINTIFFS

v. NO. 5:23-cv-5086

CRAWFORD COUNTY, ARKANSAS, et al. DEFENDANTS

DECLARATION OF JOHN ADAMS

I, John T. Adams, hereby declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are based on my personal knowledge and I can testify competently to them if called upon to do so. I submit this sworn declaration in support of Plaintiffs' motion for a preliminary injunction.

2. I serve as counsel to the plaintiffs Central Arkansas Library System, Nate Coulter, and the Eureka Springs Carnegie Public Library.

3. Attached as Exhibit 1 is a true and correct copy of Tomas Saccente, *Crawford County Library Board Looks to Create New A Public Comment Policy After Increased Engagement At Meetings*, Ark. Democrat Gazette (May 14, 2023)

4. Attached as Exhibit 2 is a true and correct copy of May 23, 2023 letter from Crawford County attorney, Gentry Wahlmeier to attorneys regarding a draft complaint.

5. Attached as Exhibit 3 is a true and correct copy of May 23, 2023 letter from Gentry Wahlmeier to the Crawford County Library Board.

6. Attached as Exhibit 4 is a true and correct copy of two emails sent by Arkansas State Librarian Jennifer Chilcoat on April 20, 2023 to all Arkansas public library directors.

I declare under penalty of perjury that the foregoing is true and correct.

Executed June 21, 2023 in Pulaski County, Arkansas.

John T. Adams

John T. Adams

Crawford County Library Board looks to create new a public comment policy after increased engagement at meetings

Recently, people wanting to speak at meetings have addressed LGBTQ books, rules by Thomas Saccente | May 14, 2023 at 1:00 a.m.

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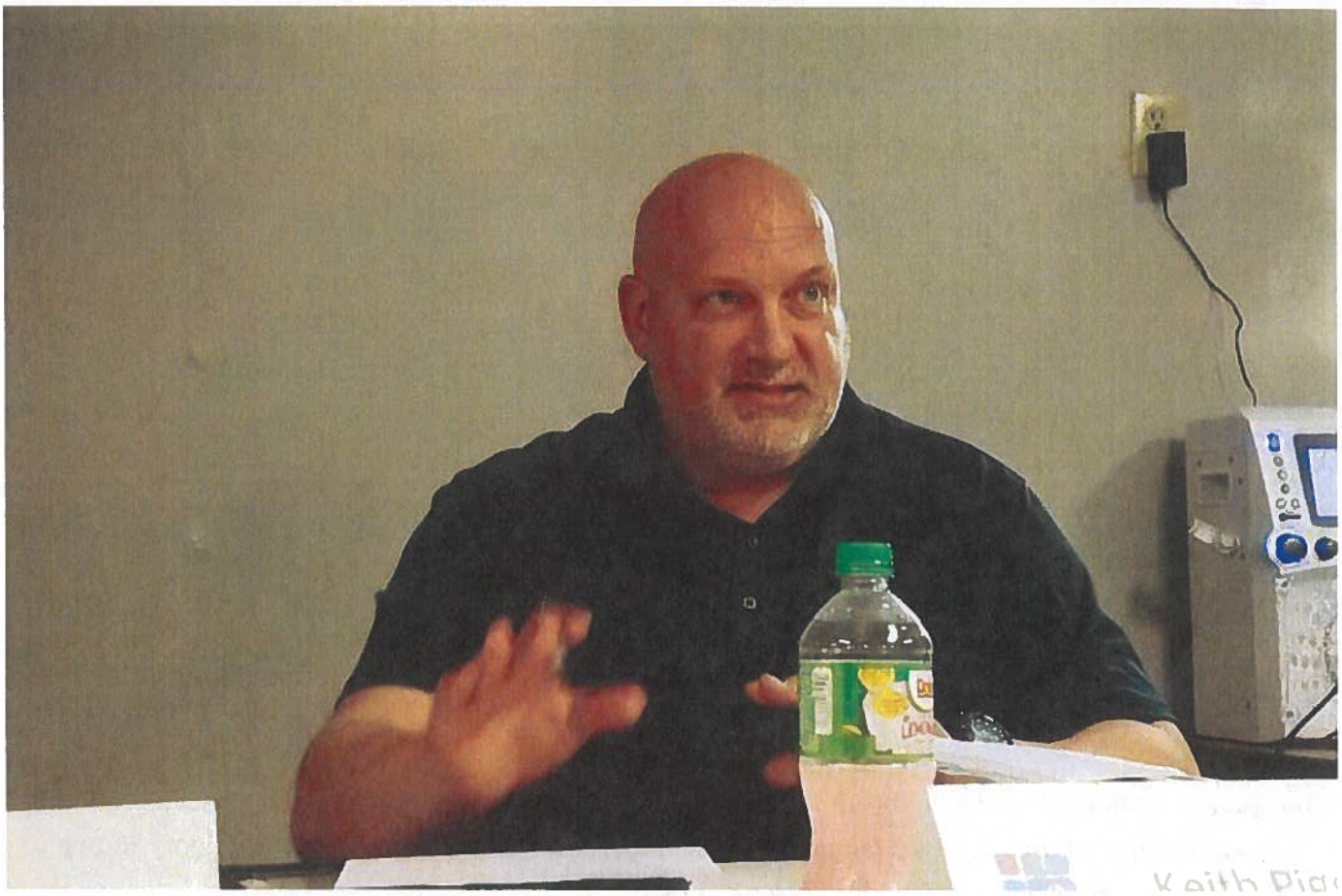


Keith Pigg, a member of the Crawford County Library Board representing the Mulberry Public Library, speaks during the Library Board's meeting in Alma Tuesday. (River Valley Democrat-Gazette/Thomas Saccente)

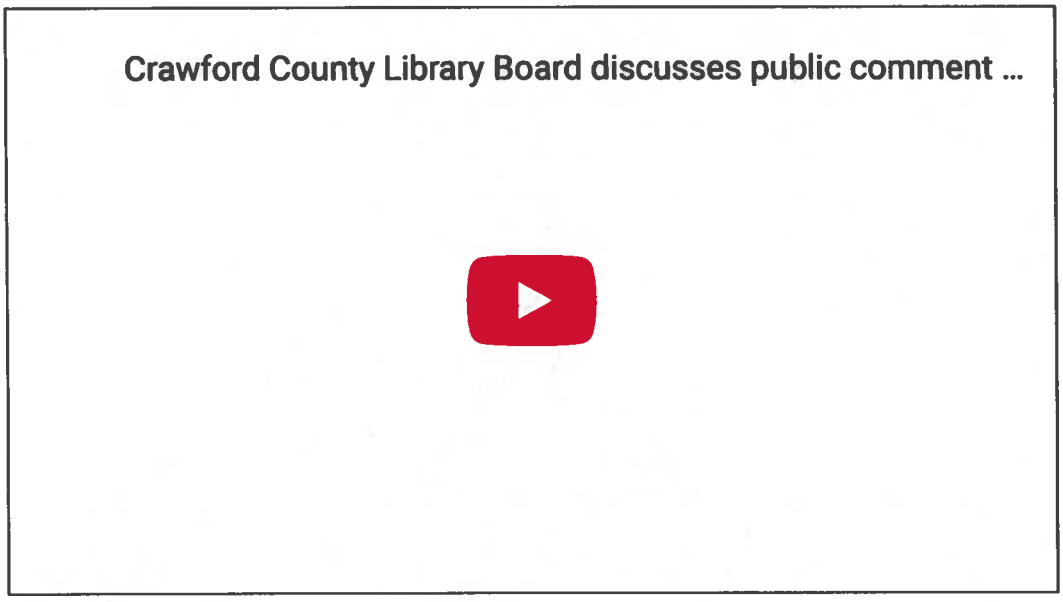
ALMA -- The Crawford County Library Board voted unanimously Tuesday to form a subcommittee to create a public comment policy amid ongoing controversy.

The subcommittee will consist of all five board members, as well as Eva White, the county library system's interim director.

Gentry Wahlmeier, an attorney for the county, said the Library Board hasn't enacted a public speaking policy, but people can speak during board meetings in accordance with Arkansas law requiring residents, at a minimum, be allowed to give input prior to the decision of any government body in the state.

The board's decision came after Tammi Hamby, board chairwoman, said during the board's meeting March 14 that only people who provided identification showing they live in Crawford County could speak at the meeting.

The county Quorum Court approved an ordinance outlining a similar procedure Feb. 21, according to minutes from that meeting. The ordinance limits public input at Quorum Court meetings to county residents, people who own businesses in the county and people the meeting chairperson invites to speak. The chairperson may also challenge a speaker to provide proof of residency in the county or "other bona fides."



However, in a March 27 letter to the library board included in Tuesday's board meeting packet, resident Rebecka Virden said the new rule Hamby provided prevented several people who hold county library system cards from speaking at the March 14 meeting.

The library board represents the interest of Crawford County Library System card holders, regardless of whether they can produce a photo ID with a Crawford County address, Virden wrote.

Permanent residents and property owners in the county, as well as people employed in the county and students enrolled in county schools, can get a library card for free, according to the library system's website. Other people can get a card for a $10 annual fee.

Public input and LGBTQ books

The library board has seen dozens of people attending and speaking at its recent meetings. The public comment portions of these meetings, which have taken place near the end, have largely consisted of residents weighing in on children's books with lesbian, gay, bisexual, transgender, queer or questioning subject matter and their place in each of the library system's five branches.

This included Tuesday's meeting, in which residents argued their perspectives with the board -- and each other -- for more than half an hour.

The board dealt with challenges from residents regarding multiple books of this nature at its Nov. 8 meeting, according to meeting material.

The River Valley City Elders, a local Christian community organization, requested people in a Dec. 13 newsletter to stand with Jeffrey Hamby -- Tammi Hamby's husband -- as he spoke to the Quorum Court on Dec. 19 regarding his concerns about these sorts of books being purchased with taxpayer money and displayed at the Van Buren Public Library.

Jeffrey and Tammi Hamby had also outlined their grievances on the subject in a letter dated Nov. 10 addressed to the Quorum Court, then-Crawford County Judge Dennis Gilstrap and current County Judge Chris Keith.

The Hambys argued the constitutional rights of parents and their religious liberties were being subverted by a "progressive woke ideology" driven by Deidre Grzymala -- director of the county Library System at the time -- and her employees. They claimed this reported ideology was "normalizing and equating homosexual and transsexual lifestyles with heterosexual family units" without parental consent or the ability to not participate.

Grzymala said at the Library Board's Jan. 10 meeting all branches had moved their LGBTQ children's books out of the children's section into a new area within their respective adult book sections, according to a recording of the meeting. This came after the Quorum Court discussed the library and a compromise regarding the material at its Dec. 19 meeting.

Going Forward

Board member Keith Pigg, who represents the Mulberry Public Library, said certain elements of the Garland County Library Board's procedures for public comments at its meetings could be tailored to suit Crawford County.

One of the rules Pigg mentioned is people wishing to speak at Garland County meetings have to fill out a form listing their name, contact information and the subject they want to discuss. They then have to turn

the form in to the library director or a board member at least one hour before the meeting.

"This gives the board time to adjust the meeting to allow for a time of public comments," the procedures state. "If no forms have been turned in one hour ahead of the meeting, such time will not be allotted."

Wahlmeier, the attorney for the county, said public comment sections of meetings generally happen before new business is discussed. In his experience, speakers are also limited to talking about items on the meeting agenda and usually have three to five minutes to do so.

The new subcommittee is set to devise a public comment policy for consideration at the Library Board's next regular meeting July 11 at the Cedarville Public Library.

Kara McCubbin, children and youth services librarian, reads a book to families during a weekly story time event, Thursday, May 11, 2023, at the Alma Public Library in Alma. At a meeting on Tuesday, the Crawford County Library Board discussed implementing a public comment policy at its meetings, as well as the search for a new county Library System director. (River Valley Democrat-Gazette/Hank Layton)

A selection of childrens books which have been under scrutiny from community members are displayed in a designated section, Thursday, May 11, 2023, at the Alma Public Library in Alma. At a meeting on Tuesday, the Crawford County Library Board discussed implementing a public comment policy at its meetings, as well as the search for a new county Library System director. (River Valley Democrat-Gazette/Hank Layton)

A list of policies displays on the wall, Thursday, May 11, 2023, at the Alma Public Library in Alma. At a meeting on Tuesday, the Crawford County Library Board discussed implementing a public comment policy at its meetings, as well as the search for a new county Library System director. (River Valley Democrat-Gazette/Hank Layton)

Library System Director

The Crawford County Library Board also voted 4-0 Tuesday to expand its search for a new director of the county Library System to a nationwide level. Tammi Hamby said the board had received only one application for the position after advertising on a statewide level.

The board appointed Eva White as interim director Feb. 24 after Deidre Grzymala left the director seat that same day as part of a separation agreement between her, Crawford County, the system and the Van Buren Public Library.

Source: Crawford County Library Board

Print Headline: Library panel to work on new public comment policy

Topics

Library Board, Crawford county, Quorum Court, Garland county, Tammi Hamby, Chris Keith, Jeffrey Hamby, Eva White, Hank Layton, River valley

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May 23, 2023

Via Email Only:
Terrence Cain
Via Email: terrencecain@windstream.net

Brian Meadors
Via Email: brianmeadors@gmail.com

Re: May 18 Email to Quorum Court of Crawford County

Mr. Cain and Mr. Meadors,

This Firm represents Crawford County's Quorum Court. The Quorum Court is in receipt of your email dated May 18, 2023. That email also contains a draft Complaint of a civil case in the Western District of Arkansas.

Acting as the legislative branch of a County is a task that comes with greater difficulty than one would think. The balancing test between the freedom of an unbounded First Amendment and protecting children from exposure to materials that might harm their innocence exposes the core of the phrase "*rational minds may differ*." You even stated in your email that "Where we disagree… is how best to protect children."

This balancing test is coming to the forefront of the national conversation. At the state level, Act 372 passed the legislature and is going into effect shortly. Its effect will be to require libraries to have a section that is inaccessible to minors. Quorum Courts across the State will hear appeals on relocation of books within county library systems. The State legislature's Act 372 will make it necessary to continue modifying and changing the library system's policies and procedures.

The Quorum Court of Crawford County has made no laws that violate the First Amendment to the Constitution of the United States. Expanding that out to include case law from the Supreme Court, the Quorum Court of Crawford County has not violated any legal precedent. When the conversation began that sexualized material was in the children's section of the libraries within the System, Justices simply stated that a compromise should be reached. No ordinance was passed proclaiming that books should be moved. No direction or supervision was implemented.

Cordially,

Gentry Wahlmeier

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May 23, 2023

CCLS Board &
Director Eva White

Re: Resignation per Act 372 Changes

Dear Board Members and Director White:

In our last general meeting I provided each of you with a summary of Act 372. The act adds A.C.A. § 13-2-106 to the laws of our State. That addition creates a requirement for the System to create or amend the policy for selection, relocation, and retention of physical materials. It has come to my attention that a conflict of interest may be created upon the enactment of Act 372 on August 1, 2023.

My letter only covered those items that are pertinent to the Library System. Continuing with the addition of A.C.A. § 13-2-106, beyond the challenge meeting, the law explains that the challenger may appeal to the County Judge and Quorum Court if the System's committee does not "find" for them. Pursuant to the rules of ethics that govern the practice of law, I am unable to advise both. Thus, I must resign. I will stay on in an advisory capacity until the end of June. As a Board, I advise that you hire new counsel.

Please remember that there are currently pending obligations to come into compliance with the new laws by August 1, 2023. Specifically, you must create a section that is not accessible to those under eighteen (18) and create a policy for challenging physical materials.

Sincerely,

Gentry C. Wahlmeier

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From: "Chilcoat, Jennifer (ASLIB)" <Jennifer.Chilcoat@ade.arkansas.gov>
Date: April 20, 2023 at 1:27:22 PM CDT
To: [redacted]

Subject: Senate Bill 81 / Act 372

CAUTION: This is an EXTERNAL email originated from outside the CALS organization. Do not click links or open attachments unless you recognize the sender.

Dear Public Library Directors,

As you all know, Senate Bill 81, now Act 372 and linked below, has been signed by Governor Sanders. Unless something happens between now and ***August 1****, that Act will be State Law. There is always talk of litigation with these types of legislation, but I have no crystal ball to say whether and when that could happen in this case. We need to at least be prepared for it to take effect.

I know that many of you have questions and are looking for guidance. I can walk you through the most basic particulars of the law, but how you ultimately plan to respond to this law is something that you will need to work with your board and your attorney (be that a county attorney or otherwise) to determine. Every building, every board, and every community is different, so there is not a one-size-fits-all solution. If you are a county or municipal library, you will need to make sure that you are prepared to conform to the new law, effective August 1.

Of course you need to read law fully, but here are what I regard as the major points:

Section 1: Harmful to Minors

Act 372 states that a person who, *knowing the character of the item involved,* provides a minor with material that meets the already-existing definition of "harmful to minors" as defined in Arkansas Code 5-68-501 (https://law.justia.com/codes/arkansas/2015/title-5/subtitle-6/chapter-68/subchapter-5/section-5-68-501/) commits the offense of furnishing a harmful item to a minor. This does not include transmitting or sending of items over the internet.

This has the potential to be scary, and certainly no one expected to be on the wrong end of a criminal proceeding when they took this job. I have a hard time envisioning this law leading to any charges, and an even harder time imagining convictions. However, I do want to give you all the facts. Per Act 372, furnishing a harmful item to a minor is a Class A misdemeanor. *Conviction* of a Class A misdemeanor carries a maximum sentence of up to 12 months in jail and a maximum fine of $2,500. In order to be convicted of furnishing a harmful item to a minor, however, there is a process just like that of any criminal charge; you can't be hauled off to jail on a citizen's arrest. Someone has to go through the process of filing charges against you, and the Prosecuting Attorney has to move forward with the charge. Then a judge has to find you guilty and impose a sentence and/or fine. I'm sure we all have a variety of opinions about how likely it is that an accusation would go all the way to result in a conviction, so I'll leave it there.

Sections 2 and 3: Obscenity

This small section removes employees of a "school library" and a "public library" from the list of people who can't be charged with disseminating obscene materials. "Obscene" is a legal standard with a very high bar. I will eat several hats if anyone finds an item in one of your libraries that has been "judicially found" by a court to be obscene. While the penalty for disseminating obscenity is steep—a Class D felony carrying up to six years in prison and a fine up to $10,000—I think it's highly unlikely we'll see this used to any effect.

Section 4: Guidelines for Selection, Relocation, and Retention of Materials (School Libraries)

This section deals exclusively with school library media centers, so I'm going to skip it for the purposes of this email.

Section 5: Guidelines for Selection, Relocation, and Retention of Materials (Public Libraries)

This one's going to give you some heartburn. If you are a county or municipal library, this will govern how you respond when someone challenges materials in your library. I do have two pieces of solid advice for you to act on ASAP:

1. If your current policy makes a promise about how quickly you'll be able to respond to book challenges, I strongly advise you to amend that portion of your policy as you are making amendments to comply with this law. There are locations where certain citizens are marking their calendars for this law to take effect so they can begin filing scores of challenges. If your policy currently promises that you will consider all challenges within, say, 30 days, you will not be able to process 40 challenges in 30 days, especially considering that the Act rightly says that any material being challenged "shall be viewed in its entirety and shall not have selected portions taken out of context." If you don't make this adjustment, you could get into a situation where you are accused of breaking your own policy, and you don't want that. The Act simply states that you should allow "a reasonable time for the committee members to adequately review the material being challenged and the request submitted."
2. The Act states that "the county or municipal library shall decide if material being challenged shall remain available throughout the challenge process." You need to be sure that your policy states which route you will take. With possible backlogs of challenged materials to review, removing materials while they await review could mean that those materials will be off of your shelves (and housed in your already-crowded office or workroom) for a long time. Discuss with your board what course you want to take, but be sure that this issue is addressed in your policy.

The Act requires certain other things that may not be in your current policy:

- Those interested in challenging materials must first meet with the librarian, where they will receive a copy of the policy and a challenge form.
- The individual making the challenge shall be allowed to present their request to the review committee. You might want to make it clear in your policy that they are allowed to present the request, but they are not part of the review committee.
- Your review committee must be made up of library personnel; board members would technically not be allowed.
- Any meetings to discuss challenges will have to be open to the public, and all records submitted and considered at a meeting will be considered public records.
- Appeals of decisions about challenged materials will have to go to your "governing body of the county or city," not to your library board or other

entity.

If you are flummoxed as to how to even begin rewriting your policy to incorporate the new law, you would have the option to state that the library will comply with Act 372 of 2023, then go back in and state the parts of your policy that are not included in the Act, making sure to include the items I warned you about: timeframe for response and the location of materials that are under review. You will need to be sure that you also include a challenge form.

You will need to meet with your board, and likely your library's attorney, to discuss what you will do in the event that items go through the challenge process with the outcome that they need to be "relocated within the library's collection to an area that is not accessible to minors under the age of eighteen (18) years." I don't know of any library that currently has an area that they monitor for who goes into it, so this is going to be problematic for everyone. One minimalist possibility might be to purchase carts to hold the relocated materials, so that persons 18 and over can request access. Again, there are no one-size-fits all answers.

As you meet with your board members and attorney, you may want to have a discussion about the legal impact of several terms that we (who are not attorneys!) don't quite know how to interpret:

- The Act says that a "person affected" by the material my challenge it, but no definition of "affected" is given.
- The Act practically barely mentions removal or withdrawal of materials, except where it says that material "shall not be withdrawn solely for the viewpoints expressed within the material." Everywhere else, there is only reference made to decisions to relocate materials. You'll need to discuss with your board and attorney the ramifications of this wording.

On the plus side, this section of the Act is explicitly limited to refer only to physical materials, not eBooks.

Section 6: Disclosure of Library Records

This section says that a parent or legal guardian of a patron who is under eighteen (18) is entitled to see that minor's library record. Your policy will likely need to be changed to comply with this.

I dearly hope that this is helpful. Again, be sure that you read the law (linked below) to ensure you are familiar with all aspects of it, and let me know what questions you may have.

Unless bills contain an Emergency Clause, they become effective 90 days after the legislature adjourns "sine die." That adjournment has not occurred yet—it is scheduled for May 1. Therefore, the law will become effective on August 1.

https://www.arkleg.state.ar.us/Acts/FTPDocument?path=%2FACTS%2F2023R%2FPublic%2F&file=372.pdf&ddBienniumSession=2023%2F2023R

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www.library.arkansas.gov
[redacted]

From: "Chilcoat, Jennifer (ASLIB)" <Jennifer.Chilcoat@ade.arkansas.gov>
Date: April 20, 2023 at 3:59:38 PM CDT
To: [redacted]

Subject: Re: Senate Bill 81 / Act 372

I ask that you please disregard and delete my previous email and any technical assistance contained in it. The new law still needs to be reviewed, and my email was premature.

I will follow up with you at a later date with further information, once we have had adequate time to review the law.

Thank you.

Jennifer Chilcoat
Director, Arkansas State Library
A Division of the Arkansas Department of Education
900 W. Capitol Ave., Suite 100
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Please note email address change: jennifer.chilcoat@ade.arkansas.gov

www.library.arkansas.gov

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, a political subdivision in the City of Fayetteville, State of Arkansas; EUREKA SPRINGS CARNEGIE PUBLIC LIBRARY; CENTRAL ARKANSAS LIBRARY SYSTEM; NATE COULTER; OLIVIA FARRELL; JENNIE KIRBY, as parent and next friend of HAYDEN KIRBY; LETA CAPLINGER; ADAM WEBB; ARKANSAS LIBRARY ASSOCIATION; ADVOCATES FOR ALL ARKANSAS LIBRARIES; PEARL'S BOOKS, LLC; WORDSWORTH COMMUNITY BOOKSTORE LLC d/b/a WORDSWORTH BOOKS; AMERICAN BOOKSELLERS ASSOCIATION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AUTHORS GUILD, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION — PLAINTIFFS

v. — NO. 5:23-CV-05086

CRAWFORD COUNTY, ARKANSAS; CHRIS KEITH, in his official capacity as Crawford County Judge; TODD MURRAY; SONIA FONTICIELLA; DEVON HOLDER; MATT DURRETT; JEFF PHILLIPS; WILL JONES; TERESA HOWELL; BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD; FRANK SPAIN; TIM BLAIR; KYLE HUNTER; DANIEL SHUE; JEFF ROGERS; DAVID ETHREDGE; TOM TATUM, II; DREW SMITH; REBECCA REED MCCOY; MICHELLE C. LAWRENCE; DEBRA BUSCHMAN; TONY ROGERS; NATHAN SMITH; CAROL CREWS; KEVIN HOLMES; CHRIS WALTON; and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; — DEFENDANTS

DECLARATION OF DEBORAH CALDWELL-STONE

I, Deborah Caldwell-Stone, pursuant to 28 U.S.C.§ 1746, do declare:

1. I am the Executive Director and Secretary of the Freedom to Read Foundation ("FTRF").

2. FTRF is a nonprofit membership organization established in 1969 by the American Library Association ("ALA") to promote and defend First Amendment rights, to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen, to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and to set legal precedent for the freedom to read on behalf of all citizens. FTRF's membership includes organizations, libraries, librarians, and library patrons.

3. The American Library Association is the sole accrediting body for library and information science (LIS) schools in the United States and most degreed librarians are trained by ALA-accredited institutions. ALA accredits 67 programs at 63 institutions in the United States, Canada, and Puerto Rico. As part of their training, LIS students and library professionals are taught the ALA's Code of Ethics, and chief among the obligations laid out therein is the librarian's duty not to limit access to information based on viewpoint. Similarly, the ALA's Library Bill of Rights, the policy intended to guide the provision of library service to library users, is unequivocal in its condemnation of censorship and other attempts to limit information based on viewpoint or preference.

4. Library policies that restrict access to resources for any reason must be carefully formulated and administered to ensure they do not violate established principles of intellectual freedom. This caution is reflected in multiple ALA policies. The core function of public libraries is to provide all patrons with access to a broad spectrum of information and ideas that are of interest to them and to provide access to all points of view on current and historical issues.

5. Section 1 of Act 372 of 2023 ("Act 372") prohibits making books that are "harmful to minors" available to minors, forcing a large quantity of constitutionally protected materials to be

restricted from adults and older minors. Section 5 of Act 372 allows for a procedure to challenge the "appropriateness" of books by any "person affected by the material," which will result in challenges based on the viewpoint of the materials in the library.

6. Any public library contains hundreds of books with sexually related narrative, pictorial content, or subject matters that are constitutionally protected but might be incorrectly considered by some to be "harmful to minors" or "inappropriate." These books fall in many literary genres, such as fiction, non-fiction, romance, photography, health, art, and new releases. Examples include contemporary bestsellers like "It Ends With Us," and the "Bridgerton" series; literary classics such as "Lolita," "Sanctuary," and "Portnoy's Complaint;" and prizewinners such as "The Bluest Eye," "To Kill a Mockingbird," and "The Absolutely True Diary of a Part-Time Indian."

Library Patrons

7. FTRF's members who are library patrons in Arkansas will suffer irreparable injury if Sections 1, which limits the availability of books "harmful to minors," and Section 5, which allows books to be challenged on the basis of "appropriateness" go into effect because they will be deprived of access to books that they would like to peruse, read, or check out, and which would otherwise be available.

8. Library patrons generally become acquainted with books when they are readily visible. While many patrons come into libraries asking for a specific title, many more discover a new title while browsing. Hiding those titles as Act 372 necessitates would be a great disserve to library users. The prominent display of books shelved or displayed on a table in an orderly, easily accessible manner in an atmosphere conducive to browsing is essential for the success of libraries' mission to connect books with readers, and central for the ability of readers to find books.

Library Members

9. FTRF members in Arkansas will suffer irreparable injury if Section 1 goes into effect because many of the libraries that are members of FTRF or at which FTRF members work, carry materials that, though constitutionally protected, could be incorrectly deemed harmful to minors and therefore subject to Section 1. These same materials might be challenged as inappropriate pursuant to Section 5 at significant cost to the libraries.

10. FTRF member libraries fear that they and their employees may be at risk of prosecution under Section 1 for permitting minors to view or access constitutionally protected material which might be deemed "harmful to minors" for any minor under the meaning of the statute. They do not know how to determine what books may cross this vague line, which does not distinguish between older and younger minors. FTRF member libraries also do not know how to apply the vague standards of Section 5 which allows any "person affected by the material" in their collections to challenge the "appropriateness" of the material. In recent months, even picture books for young children have been targeted for removal from libraries based on the themes contained in those books and disagreement with their viewpoints.

11. To comply with Section 1 and Section 5 of Act 372, libraries are faced with untenable choices.

a. The library could bar all patrons under the age of 18 from entering the library facility. This would alter the purpose and actions of libraries, many of which hold events for children and have constructed rooms for children. This would also prevent older minors from perusing and purchasing materials constitutionally protected as to them.

b. A library could limit its inventory to books or other items not regulated by Section 1, however, that would curtail the availability of many books, including some bestsellers, and thus, this alternative is not practically feasible. In addition, this alternative would create practical difficulties in ordering new books because libraries rarely have the opportunity to review books before ordering them. In making collection decisions, librarians rely on third party sources such as professional journals, established book review sources, awards list, and bestseller lists. This alternative would also restrict the ability of adults and older minors to peruse and read materials constitutionally protected as to them. This would violate the statements of professional values discussed above, which are unequivocal in their condemnation of censorship and other attempts to limit information based on viewpoint or preference.

c. Alternatively, the library could place all materials that could be "harmful to minors" behind a counter or closed stacks but given the large number of constitutionally protected books involved, that may entail a restructuring of the library facility to ensure space. Even assuming member libraries could identify and afford to cordon off space to securely segregate material for adults only to avoid liability under the statute, most do not have enough staff to review quickly and efficiently every item in the collection to determine whether that item might subsequently be deemed harmful to a younger minor by a prosecutor, or challenged as inappropriate, and therefore must be placed in the segregated adults only room. For libraries with large collections that are constantly being added to and weeded by staff, a library might need an entire department of employees charged with screening materials to be sure

they can be placed in the general section of the libraries. Many libraries could not undertake such a task without shutting down core services. Further, separating items behind a counter or in some other way would restrict the ability of adults and older minors to peruse and select materials constitutionally protected as to them. Such a result would violate ALA statements of professional values.

d. The library could also designate a room "adults only." This would, like the "behind the counter" option, potentially involve costly renovations and burden employees with the separation of books. FTRF's library members are also frequently visited by families that include children too young to be left unattended while a parent or older sibling peruses, either as a matter of library policy or parental judgment. In such a case, the chaperoning parent or older minor-sibling would be unable to access books segregated in an area of the library where the younger minor is prohibited from entering. Further, this new room would be difficult to monitor necessitating keys or electronic access (which would also entail additional costs) and would be confusing to patrons. That kind of segregation would also lead to a drop in readership of those constitutionally protected books, as many adults would be hesitant to go into the "adults only" room. As with the other alternatives, this would restrict the ability of adults and older minors to peruse materials constitutionally protected as to them and would violate ALA principles.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19th day of June, 2023.

/s/ Deborah Caldwell-Stone
Deborah Caldwell-Stone

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, a political subdivision in the City of Fayetteville, State of Arkansas; EUREKA SPRINGS CARNEGIE PUBLIC LIBRARY; CENTRAL ARKANSAS LIBRARY SYSTEM; NATE COULTER; OLIVIA FARRELL; JENNIE KIRBY, as parent and next friend of HAYDEN KIRBY; LETA CAPLINGER; ADAM WEBB; ARKANSAS LIBRARY ASSOCIATION; ADVOCATES FOR ALL ARKANSAS LIBRARIES; PEARL'S BOOKS, LLC; WORDSWORTH COMMUNITY BOOKSTORE LLC d/b/a WORDSWORTH BOOKS; AMERICAN BOOKSELLERS ASSOCIATION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AUTHORS GUILD, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION — PLAINTIFFS

v. NO. 5:23-CV-05086

CRAWFORD COUNTY, ARKANSAS; CHRIS KEITH, in his official capacity as Crawford County Judge; TODD MURRAY; SONIA FONTICIELLA; DEVON HOLDER; MATT DURRETT; JEFF PHILLIPS; WILL JONES; TERESA HOWELL; BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD; FRANK SPAIN; TIM BLAIR; KYLE HUNTER; DANIEL SHUE; JEFF ROGERS; DAVID ETHREDGE; TOM TATUM, II; DREW SMITH; REBECCA REED MCCOY; MICHELLE C. LAWRENCE; DEBRA BUSCHMAN; TONY ROGERS; NATHAN SMITH; CAROL CREWS; KEVIN HOLMES; CHRIS WALTON; and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; — DEFENDANTS

DECLARATION OF LETA CAPLINGER

1. I am over the age of 21, competent to make this declaration, and have personal knowledge of the matters set out in this declaration.

2. I make this declaration in support of the Complaint and Motion for Preliminary Injunction and Declarative Relief in the captioned case.

3. I am an adult resident of Crawford County, Arkansas. I am an attorney with an office in Crawford County. I have a Crawford County Library System library card. I regularly use the main branch of the library system in Van Buren and also visit the Cedarville, Mountainburg, and Alma branches. I browse the libraries' collections and check out materials. I ordinarily do so without librarian or staff assistance. I usually use the automatic check-out system.

4. I have read Act 327 of 2023 and believe I understand it. I believe it imposes an unconstitutional restraint under the First Amendment of the U. S. Constitution on the availability, display, receipt, and perusal of constitutionally-protected material to myself.

5. Under its provisions, I believe the display and accessibility of certain materials to minors cannot be restricted without also restricting access to them to adults, such as myself. The act's provisions effectively require librarians to remove from their shelves and place in a segregated "adults only" section a potentially substantial amount of constitutionally-protected matter because it may be "harmful" or "inappropriate to a minor" – standards which seem vague to me. For a smaller library, physical segregation probably will require placing materials behind a desk or counter, where patrons will not be able to access the material without specifically requesting it.

6. Under other provisions of Act 372, certain materials would likely be removed entirely from the library collection while undergoing the review and determination process required and would not be accessible to me during this review process even if it is ultimately determined that the books can stay in the main collection without segregation to a special area.

7. When I visit the library, sometimes I have a specific book in mind that I want to check out. Other times, I roam the stacks in search of something that piques my curiosity or interest. I would find it chilling to enter a section that is segregated as "adults only," as I believe that would signal to others that I am interested in reading pornography. Also, since I would probably have to ask permission or request access from a library staff member to gain access to this segregated area, this would also deter me from accessing the "adults only" area. This, also, would deter me from accessing the "adults only" area. I do not think I should be subjected to this kind of scrutiny and that my choice of reading material should be unfettered and private. The same concerns if a certain book would have to be requested from library staff since I don't think it is anyone's business but my own what I choose to read, Thus, I would be discouraged from exercising my right to freely peruse these materials.

8. I am also concerned the Act will have a chilling effect on the choice of books that the librarians select for the library or fear of criminal or other consequences and the burden placed upon them by the procedures mandated if a book is challenged.

9. In addition, under provisions of the Act, I am not allowed input into whether a challenged book is to be determined to be obscene, inappropriate, or harmful to minors, while those that challenge a book do have input. I believe this is unfair and also an encroachment on my rights.

10. I am especially concerned by what is occurring now at the Crawford County Library System even before Act 372 goes into effect Because of actions by its current library board, the former head librarian resigned and the current library staff is being pressured to make access more difficult to certain books and materials because they are deemed by certain board members to be harmful to minors. In the main library, books that were previously on display in the front of the new book rack and fully visible to people entering the library, have been moved to the back side of the rack, where they are not visible to patrons unless they walk around the rack to the back side. Books on the back side of the rack are now labeled, "SJ" for "Social Juvenile" or "SYA" for "Social Young Adult." The books that are now being placed there are have LGBTQ+ themes. For instance, the book "This Book is Gay" by Juno Dawson is now labeled "SYA;" books by Neil Patrick Harris are now labeled "SJ." The whole segregated section is called the "Social Section" and is adorned with a sign with this title. If someone were looking at the books placed in this section, it would be obvious to other patrons of the library. I think this is an infringement on my right to freely look at any book I want without anyone else knowing what books I am interested in.

11. Unfortunately, because of statements made by certain school board members and the Crawford County Judge, I only expect more restrictions on what I can freely look at in the libraries in the future, if Act 372 goes into effect.

12. Not only don't I want other library knowing my reading interests, I don't want to have to ask a library staff member where a certain book is if I don't want to. In short, I don't want any interference with my ability to freely browse the collections and find a certain book to be interfered with. Interference with my ability to freely peruse the library collection will make the experience less enjoyable for me and make me less willing to visit the library.

13. I also frequent the bookstore Books A Million and have the same concerns that my unfettered freedom to view and access any book I choose will be curtained under provisions of Act. 372 once it goes into effect.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 18th of June, 2023.

Leta Caplinger

Leta Caplinger

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, et al. PLAINTIFFS

v. NO. 5:23-cv-5086

CRAWFORD COUNTY, ARKANSAS, et al. DEFENDANTS

DECLARATION OF CAROL COFFEY

I, Carol Coffey, hereby declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are based on my personal knowledge and I can testify competently to them if called upon to do so. I submit this sworn declaration in support of Plaintiffs' motion for a preliminary injunction.

2. I am the President of the Arkansas Library Association ("ArLA"), which is an Arkansas-based nonprofit corporation formed under Section 501(c)(3) of the Internal Revenue Code.

3. I hold an ALA-Accredited Master's Degree in Library & Information Science from Louisiana State University and have more than 30 years of professional experience in that field. For the past 26 years, I have worked in various capacities for the Central Arkansas Library System, where I am currently employed as the Strategic Data Manager.

4. I am familiar with the best practices that should govern a public library's acquisition and display of materials in its collection, which call for public libraries to take into account the various interests and needs of the patrons the libraries serve. Library staff should include materials that represent the broad range of human experience and reflect the diversity of

the region and the world. Works should not be excluded or included in the collection based solely on subject matter or on political, religious, or ideological grounds.

5. ArLA is a professional association for libraries and individuals who work in them throughout Arkansas. Its mission is to further the professional development of all library staff members; to foster communication and cooperation among librarians, trustees, and friends of libraries; to increase the visibility of libraries among the general public and funding agencies; and to serve as an advocate for librarians and libraries.

6. ArLA has more than 400 members, including both individuals and institutions. ArLA's individual members include those who are employed full- or part-time by a library or library-related institution. ArLA's institutional members include public libraries.

7. ArLA's members are physically located across Arkansas. ArLA has at least one active and dues-paying member in 56 of 75 counties in Arkansas, including Crawford County, and has at least one active and dues-paying member in each judicial district in the state.

Act 372 Causes Irreparable Injury to ArLA's Members

8. Act 372 causes irreparable injury to the interests of ArLA's members in the following ways:

9. ArLA suffers irreparable injury to the interests of its members because many of its member libraries or its member librarians' workplaces carry materials that, though constitutionally protected, some people may consider harmful to younger minors, and therefore the basis for liability under the Availability Provision, or inappropriate, and therefore subject to challenge under the Challenge Procedure.

10. It is true that many of our member-libraries have books that have been inaccurately and unfairly described as containing material that is obscene or otherwise

inappropriate for inclusion in a public library, like "It's Perfectly Normal," by Robie Harris and "Sex is a Funny Word," by Cory Silverberg. I expect that some of these books will, at a minimum, be the subject of repeated, burdensome challenges under Act 372. Indeed, a number of our member-libraries have already received demands that these books, and others dealing with similar themes, be removed from their collections; and at least one other library has faced backlash for featuring a gay pride-themed display, resulting in a major loss of funding. The Challenge Procedure will surely cause demands to remove or suppress such works to increase.

11. Most of the libraries that are members of ArLA or at which ArLA members work serve small local communities. I am aware, because of ArLA's work serving and supporting these members, that they often maintain their collections on open shelves organized by type of book and subject matter, which are designed so that patrons may access them without requiring assistance from library staff. These libraries serve patrons that range in age from toddlers to the elderly.

12. Many of these libraries do not have the financial or staff resources to review their entire collections in order to identify all material that might need to be physically segregated under Act 372. That would, at a minimum, require library staff to review each item in its collection closely enough to have an understanding of the content of the items and context in which that content is presented to the reader or viewer.

13. Similarly, many of them lack the physical space or financial resources to restructure their library to provide the segregated space they would need to prevent any risk of availability to minors. For example, Yell County Library in Danville is one of the smaller library branches represented among ArLA's membership, and the smallest in the Arkansas River Valley Regional Library System; their space already limits their ability to do basic

programming, let alone to create an adult-only space. See Exhibit A. Likewise, Calhoun County Library consists of only one room, with a desk at the back, shelves along the middle, and seats around the edge, with no office or staff break room. See Exhibit B. Finally, the libraries in Franklin and Logan counties are single-floor open-layout libraries with no separate space from the main collection and no walls to create division. See Exhibits C, D.

14. Even if these libraries had the resources to restructure their physical layout, doing so would violate the basic purpose of a library to create a welcoming and inviting environment, where readers can freely peruse the curated offerings in the collection.

15. Accordingly, many of ArLA's individual members will be at risk of criminal prosecution once Act 372 goes into effect unless they either (1) deny adults and older minors access to material that is appropriate for their age and reading level or (2) deny children access to the library entirely.

16. Many of ArLA's library-members also have one copy of books that are likely to be challenged, which they will need to conduct the review required by the Challenge Procedure. For example, I am aware that North Little Rock Public Library only has one copy of the sex-education book "It's Perfectly Normal," by Robie Harris, which has been repeatedly challenged and banned elsewhere. That means that, during the review required by the Challenge Procedure, the libraries will be forced to purchase additional copies of challenged materials like "It's Perfectly Normal," or the book will be unavailable to patrons.

17. Moreover, ArLA's member-libraries are frequently visited by families that include children too young to be left unattended while a parent or older sibling peruse, either as a matter of library policy or parental judgment. In such a case, the chaperoning parent or older

minor-sibling would be unable to access books segregated in an area of the library where the younger minor is prohibited from entering.

18. Based on my work with ArLA's members and in my professional experience as a librarian and library administrator, families will be less inclined to visit ArLA member-libraries if Act 372 prevents them from perusing books together. Similarly, I believe that adult visitors to ArLA member-libraries will generally be less inclined to peruse any books made available only in an adults-only section, as those books have a stigma attached and are less attractive to many readers for that reason.

Act 372 Causes Injury to ArLA's Organizational Interests

19. Act 372 also causes irreparable injury to ArLA's organizational interests in the following ways:

20. The Challenge Procedure discriminates between those who support a particular book and believe it is appropriate for inclusion in a public library's collection and those who oppose a particular book and would challenge it as inappropriate for inclusion. Thus, while a book's opponents are afforded multiple, formal opportunities to advocate for the book's removal or segregation, the book's supporters are given no similar right or ability to advocate for the book's continued inclusion in the library's collection.

21. If the Challenge Procedure permitted those who favor keeping a challenged book in circulation to have input, ArLA or its members would participate to advocate for books remaining available. Similarly, if the Challenge Procedure allowed appeals from a library's decision to segregate or remove a challenged book, ArLA or its members would avail themselves of that recourse.

22. ArLA also suffers irreparable injury to its organizational interests because, to counteract the harm that ArLA's members will suffer from Act 372, it has been forced to divert organizational resources—including staff time and money—to respond to Act 372 through public education campaigns, and development of training materials to help its members understand what compliance with Act 372 would require.

23. For instance, when Act 372 was being debated by the Arkansas Legislature, ArLA put out action calls to its members, which resulted in members attending legislative hearings and speaking out against the bill and contacting their representatives to voice opposition. ArLA has already begun to alter its training and professional development offerings to respond to concerns related to Act 372, including by producing a panel on intellectual freedom and shifting a large portion of its annual conference to cover how libraries will respond to Act 372.

24. Since Act 372 was signed into law, ArLA has received numerous questions from its members, who are concerned about being prosecuted under Act 372 and about the impact the new law will have on their jobs and libraries. I have spent time reading and responding to the dozens of messages that have been posted on ArLA's discussion boards. I know that other ArLA board members are spending a considerable amount of their personal time trying to provide guidance to concerned members about Act 372, as well.

25. Because ArLA is run by volunteers who are also balancing full-time obligations to their employers and families, the time its board members spend addressing Act 372 directly affects the time available to spend on core organizational priorities, like professional development trainings or ArLA's annual conference.

26. The Availability Provision and Challenge Procedure thus impede ArLA's overall mission by forcing ArLA to divert resources from projects and activities in which it would have otherwise engaged.

I declare under penalty of perjury that the foregoing is true and correct.

Executed June 21st, 2023 in Little Rock, Arkansas.

/s/ Carol Coffey

Carol Coffey, President
Arkansas Library Association

Exhibit A – Yell County Library in Danville, AR

Exhibit B – Calhoun County Library in Hampton, AR

Exhibit C – Franklin County Library in Ozark, AR

Exhibit D – Logan County Library in Booneville, AR

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, et al. PLAINTIFFS

v. NO. 5:23-cv-5086

CRAWFORD COUNTY, ARKANSAS, et al. DEFENDANTS

DECLARATION OF NATE COULTER

I, Nate Coulter, hereby declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are based on my personal knowledge and I can testify competently to them if called upon to do so. I submit this sworn declaration in support of Plaintiffs' motion for a preliminary injunction.

2. I am a member of the Arkansas and American Library Associations. I hold an A.B. in history from Harvard University, a J.D. from Harvard Law School, and a master's degree in Library & Information Science from the University of Wisconsin-Milwaukee. I have been a member of the Arkansas bar continuously since 1985.

3. I live in Pulaski County, Arkansas and have worked as the Executive Director of the Central Arkansas Library System ("CALS") since 2016. In my capacity as the Executive Director of CALS, I report to the CALS board. I prepare an annual budget for their consideration. I oversee the staff who plan and execute the day-to-day delivery of library services available in our fourteen branches and online. As its chief executive officer, I am primarily responsible for ensuring that CALS complies with Act 372.

4. CALS, as it is currently configured, was created in 1998 as a public body by an intergovernmental agreement among the City of Little Rock, Pulaski County, Perry County, the

City of Jacksonville, the City of Sherwood, and the City of Maumelle. It is the largest public library system in the state and now includes fourteen branches. Almost 350,000 Arkansans live in the CALS's service area which represents about 11% of the state's population.

5. Under my supervision, CALS maintains a collection of approximately 800,000 items, which have been acquired and are displayed in keeping with best practices for public library administration and within the physical constraints of the facilities maintained by CALS. The items in CALS's collection are principally displayed in library facilities with open floor plans on bookshelves that are logically arranged by genre and reading ability, such that a reader can quickly find the item they are looking for or, alternatively, browse through and consider materials that match their interests and comprehension levels. This setup is typical for other libraries that I have seen and visited in Arkansas.

6. From my training and professional experience, I am familiar with the best practices that should govern a public library's acquisition and display of materials in its collection, which call for public libraries to make available the widest diversity of views and expressions, including those that are unorthodox, unpopular, or considered dangerous by the majority.

7. As a matter of CALS Board Policy, I am obligated to oversee the collection of a diverse set of materials. Specifically, Board Policy #300 provides that CALS seeks to "[m]ake available a wide diversity of points of view, subjects, opinions, and modes of expression, reflecting the diversity of the community and world we inhabit, and the diversity of reader tastes and interests. No library material will be excluded because of the race, nationality, sex, or the political, social, or religious views of its author or its intended audience."

8. It is my belief that some of the items in CALS's collection, though constitutionally protected, and compatible with our board policy, could be deemed harmful to or inappropriate for

minors and therefore subject to the criminal penalties in section 1 of Act 372 of 2023 (the "Availability Provision") or a challenge under section 5 of Act 372 (the "Challenge Procedure"). For instance, I know that CALS has in its collection art and medical books that depict nudity. And I know that CALS has books that appear on lists of books considered objectionable by various groups and individuals, such as all thirteen of the American Library Association's Most Challenged Books of 2022.[1] Although these books have scientific, medical, and/or artistic value for adults and many older minors, some people could conceivably consider them harmful to younger (or even older) minors.

9. While these constitutionally protected but conceivably "harmful to minors" books are not shelved in the children's sections of our 14 libraries, at present these books are not physically and securely segregated and could be viewed by CALS patrons as young as 11, who are currently allowed to be in the library without an adult chaperone. CALS maintains this policy to support children's access to reading material and to foster a love for reading. Visitors who are younger than 11 years old must be accompanied by someone 16 or older to enter CALS facilities.

10. Across the system CALS currently does not have any rooms in which materials could be segregated and kept physically secure from younger readers that are not presently being used for some other purpose, such as a community meeting space. And constructing new, secure spaces within our various libraries is not a viable option for CALS.

11. The additional staff time that would be necessary to monitor the collection to ensure that minors do not enter the main CALS collection would, on its own, increase CALS's annual salary and benefit expenses by an estimated 11.7%, or $1.86 million. CALS does not have the budget to accommodate those expenses.

[1] https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10

12. CALS does not have enough staff to review quickly and efficiently every item in the collection to determine whether that item might subsequently be deemed harmful to a younger minor by a prosecutor, or challenged as inappropriate, and therefore must be placed in the segregated adults only room. That level of review would, at a minimum, require the staff to review each item in CALS's collection closely enough to understand the content of the item and context in which that content is presented to the reader or viewer. For a collection the size of ours that is constantly being added to and weeded by staff, we might need an entire department of employees charged with screening materials to be sure they are okay to place in the general section of the libraries.

13. In addition to CALS's limited staff, CALS also provides employment and internship opportunities for minors. These positions are essential to the library's ability to provide services and meet the needs of library users. They also provide an important opportunity for students who are passionate about books to learn about how a library works and gain practical skills. To effectively participate in library work, our 16- and 17-year-old interns and employees must be able to access CALS's entire collection of materials. If their access is restricted to only those materials that are suitable for CALS's youngest readers, these interns and employees will be unable to either provide assistance to many of CALS's patrons or ensure that materials are properly re-shelved.

14. For all of these reasons, I do not believe that CALS is in a position to make the drastic and prohibitively expensive changes to its floor plan and operating procedures that appear to be necessary to segregate all potentially covered materials in the collection and to otherwise comply with Act 372.

15. Moreover, even if CALS were in a position to change its physical layout to accommodate a dedicated space for segregated materials, doing so would deprive readers of access to information to which they are entitled, because such books would be harder to find and would require patrons to seek them out in a stigmatized "adults-only" area. For instance, the segregation of materials necessary to comply with Act 372 might, in some cases, require CALS to separate books within a series, which would be confusing for patrons and not in keeping with library best practices.

16. Because compliance with Act 372 will be difficult to accomplish for CALS, I am concerned that I could be criminally charged for simply doing my job and trying to make books available to all of CALS's readers, including both its youngest minor readers and more mature readers, that will be interesting, engaging, and well-matched to a reader's abilities and level of comprehension.

17. I will be irreparably harmed if I face criminal penalties, including up to a year in prison, for simply doing my job. Moreover, the hardship of a prison sentence would fall not only on me, but also on my family.

18. Even if I, or others at CALS, are not charged with a crime, I expect that CALS will be regularly burdened by challenges made under the Challenge Procedure required by Act 372.

19. CALS currently has a process through which patrons can request reconsideration of materials in the library's collection. This process has worked well for CALS and allows the library to be responsive to the feedback of its readers, including negative feedback, while not unduly burdening CALS staff or permitting the views of a few to shape what is available in our collection for the many thousands of patrons we serve.

20. Through this process, we have received requests to remove materials dealing with teenage suicide, nudity, and sexual activity. I expect that those same books, as well as others dealing with similar themes, will be challenged repeatedly under Act 372.

21. Unfortunately, it is my belief that our current processes will need to be substantially changed in order to comply with Act 372. For instance, our current process requires the person challenging materials to be a resident of the CALS service area. Act 372 allows "person affected" by a material to challenge it. This opens the door to unlimited challenges being submitted by individuals who are not CALS library users or even taxpayers living within our service area. This is not a hypothetical concern—recent reporting from the *Washington Post* showed that over 1,000 of the book challenges they analyzed were submitted by just 11 people.[2] Under Act 372 those same 11 people could challenge materials in libraries across Arkansas and create enormous burdens for our staff.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of June, 2023.

/s/ Nate Coulter
Nate Coulter

[2] Hannah Natanson, *Objection to sexual, LGBTQ content propels spike in book challenges*, Washington Post (May 23, 2023), https://wapo.st/43YJ1CJ.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, et al. PLAINTIFFS

v. NO. 5:23-cv-5086

CRAWFORD COUNTY, ARKANSAS, et al. DEFENDANTS

DECLARATION OF CHRISTINA DANOS

I, Christina Danos, hereby declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are based on my personal knowledge and I can testify competently to them if called upon to do so. I submit this sworn declaration in support of Plaintiffs' motion for a preliminary injunction.

2. I am a member of the Association for Rural and Small Libraries ("ARSL") and the Arkansas Library Association ("ArLA").

3. I live in Carroll County, Arkansas, and have worked at the Eureka Springs Carnegie Public Library ("ESCPL") for 16 years. I was promoted to Director of ESCPL on January 3rd, 2023. In my capacity as Director of ESCPL, I plan and direct the provision of library services to ESCPL's patrons, which means that I am primarily responsible for ensuring that ESCPL complies with Act 372.

4. From my training and professional experience, I am familiar with the best practices that should govern a public library's acquisition and display of materials in its collection, which call for public libraries to make available the widest diversity of views and expressions, including those that are unorthodox, unpopular, or could be considered dangerous by the majority.

5. ESCPL was created in 1910 with a grant from Andrew Carnegie.

6. Under my supervision, ESCPL maintains a collection of over 42,000 items, which have been acquired and are displayed in keeping with best practices for public library administration and within the physical constraints of the facilities maintained by ESCPL. The items in ESCPL's collection are principally displayed in the library's open floor plan on bookshelves that are logically arranged by topic and reading ability, such that a reader can quickly find the item they are looking for or, alternatively, browse through and consider materials that match their interests and comprehension levels. This setup is typical for other libraries that I have seen and visited in Arkansas.

7. It is my belief that some of the items in ESCPL's collection, though constitutionally protected, could be deemed harmful to or inappropriate for minors and therefore subject to the criminal penalties in section 1 of Act 372 of 2023 (the "Availability Provision") or a challenge under section 5 of Act 372 (the "Challenge Procedure"). For instance, I know that ESCPL has in its collection art and medical books that depict nudity. Although these books have indisputable scientific, medical, and/or artistic value for adults and many older minors, some people could conceivably consider them harmful to younger (or even older) minors.

8. At present these books are not physically and securely segregated and could be viewed by ESCPL patrons as young as 10, who are currently allowed to be in the library without an adult chaperone. ESCPL maintains this policy to support children's access to reading material and to foster a love for reading. Visitors who are younger than 10 years old must be accompanied by an adult to enter ESCPL facilities.

9. Nor does ESCPL currently have any rooms in which materials could be segregated and kept physically secure from younger readers that are not presently being used for some other

purpose, such as a community meeting space. And constructing new, secure spaces within the library is not a viable option for ESCPL due to its historic significance.

10. Attempting to reconfigure the layout of ESCPL's collection to comply with Act 372 would take a considerable amount of time and manpower, and the additional staff that would be necessary to monitor that newly created section during library open hours would, on its own, cost upwards of $44,400. ESCPL does not have the budget to accommodate this expense.

11. Even if ESCPL had a space to securely segregate material, it does not have enough staff to review every item in the collection to determine whether that item might subsequently be deemed harmful to a younger minor by a prosecutor or challenged as inappropriate. That level of review would, at a minimum, require the staff to review each item in ESCPL's collection closely enough to understand the content of the item and context in which that content is presented to the reader or viewer. Optimistically, a title-by-title review of 42,000 physical items using ESCPL's qualified librarians would take an estimated 26 years to accomplish if each librarian is able to review two hundred items per year in addition to their other duties. ESCPL cannot possibly manage to do that without shutting down its core services.

12. In addition to ESCPL's limited staff, ESCPL also provides volunteer, community service, and internship opportunities for minors. These positions are essential to the library's ability to provide services and meet the needs of library users. They also provide an important opportunity for students who are passionate about books to learn about how a library works and gain practical skills. To effectively participate in library work, our 16- and 17-year-old interns and volunteers must be able to access ESCPL's entire collection of materials. If their access is restricted to materials that are suitable for ESCPL's youngest readers, these interns and volunteers

will be unable to either aid many of ESCPL's patrons or ensure that materials are properly re-shelved.

13. For all these reasons, I do not believe that ESCPL is in a position to make the drastic and prohibitively expensive changes to its floor plan and operating procedures that appear to be necessary to segregate all potentially covered materials in the collection and to otherwise comply with Act 372.

14. Moreover, even if ESCPL were in a position to change its physical layout to accommodate a dedicated space for segregated materials, doing so would deprive readers of access to information to which they are entitled, because such books would be harder to find and would require patrons to seek them out in a stigmatized "adults-only" area. For instance, the segregation of materials necessary to comply with Act 372 might, in some cases, require ESCPL to separate books within a series, which would be confusing for patrons and not in keeping with library best practices.

15. Because compliance with Act 372 will be difficult to accomplish for ESCPL, I am concerned that I could be criminally charged for simply doing my job and trying to make books available to all of ESCPL's readers, including both its youngest minor readers and more mature readers, that will be interesting, engaging, and well-matched to a reader's abilities and level of comprehension.

16. I will be irreparably harmed if I face criminal penalties, including up to a year in prison, for simply doing my job. Moreover, the hardship of a prison sentence would fall not only on me, but also on my family.

17. Even if I, or others at ESCPL, are not charged with a crime, I expect that ESCPL will be regularly burdened by challenges made under the Challenge Procedure required by Act

372. According to https://www.salary.com, the national average salary for librarians is $68,900. The average pay at ESCPL is 60% less than that average. It can be difficult to find competent workers at these wages, and we are fortunate to have found employees willing to work for substandard industry pay. This is because they believe in the important role of libraries in communities. Adding the threat of incarceration and additional responsibilities to act as a content censor would create more obstacles in the hiring and retention of qualified staff members.

18. ESCPL currently has a process through which patrons can request reconsideration of materials in the library's collection. This process has worked well for ESCPL for approximately 20 years and allows the library to be responsive to the feedback of its patrons, including negative feedback, while not unduly burdening ESCPL staff or permitting the views of a few to shape what is available in our collection for the thousands of patrons we serve.

I declare under penalty of perjury that the foregoing is true and correct.

Executed June 20, 2023 in Carroll County, Arkansas.

Christina Danos

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, a political subdivision in the City of Fayetteville, State of Arkansas; EUREKA SPRINGS CARNEGIE PUBLIC LIBRARY; CENTRAL ARKANSAS LIBRARY SYSTEM; NATE COULTER; OLIVIA FARRELL; JENNIE KIRBY, as parent and next friend of HAYDEN KIRBY; LETA CAPLINGER; ADAM WEBB; ARKANSAS LIBRARY ASSOCIATION; ADVOCATES FOR ALL ARKANSAS LIBRARIES; PEARL'S BOOKS, LLC; WORDSWORTH COMMUNITY BOOKSTORE LLC d/b/a WORDSWORTH BOOKS; AMERICAN BOOKSELLERS ASSOCIATION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AUTHORS GUILD, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION — PLAINTIFFS

v. — NO. 5:23-CV-05086-TLB

CRAWFORD COUNTY, ARKANSAS; CHRIS KEITH, in his official capacity as Crawford County Judge; TODD MURRAY; SONIA FONTICIELLA; DEVON HOLDER; MATT DURRETT; JEFF PHILLIPS; WILL JONES; TERESA HOWELL; BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD; FRANK SPAIN; TIM BLAIR; KYLE HUNTER; DANIEL SHUE; JEFF ROGERS; DAVID ETHREDGE; TOM TATUM, II; DREW SMITH; REBECCA REED MCCOY; MICHELLE C. LAWRENCE; DEBRA BUSCHMAN; TONY ROGERS; NATHAN SMITH; CAROL CREWS; KEVIN HOLMES; CHRIS WALTON; and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; — DEFENDANTS

DECLARATION OF OLIVIA FARRELL

1. My name is Olivia Farrell. I am over the age of 21, competent to make this declaration, and have personal knowledge of the matters set out in this declaration.

2. I make this declaration in support of the Complaint and Motion for Preliminary Injunction and Declarative Relief in the captioned case.

3. I am an adult resident of Pulaski County, Arkansas. I have a Central Arkansas Library System library card and use it. I visit both the main library and the Fletcher branch, where I browse the collections to see if there is anything that I'd like to check out.

4. I have read Act 327 of 2023 and believe I understand it. I believe it imposes an unconstitutional restraint under the First Amendment of the U. S. Constitution on the availability, display, receipt, and perusal of constitutionally-protected, non-obscene material to me.

5. Under its provisions, I believe the display of certain materials to minors cannot be restricted without also restricting access to them to adults, such as me. The act's provisions effectively require librarians to remove from their library's shelves and place in a segregated "adults only" section a potentially substantial amount of constitutionally-protected matter because it may be "harmful" to a minor. For a smaller library, physical segregation probably will require placing materials behind a desk or counter, where patrons will not be able to access the material without specifically requesting it. In addition, an adults-only sections could discourage me from looking at materials in such sections, thus I would be discouraged from exercising my right to peruse these materials. Under other provisions of Act 372, certain materials would likely be removed entirely from the library collection while undergoing the review and determination process and would not be accessible to me.

6. When I visit the library, sometimes I have a specific book in mind that I want to check out. Other times, I roam the stacks in search of something that strikes my fancy.

7. I also volunteer to aid an Afghan refugee family in Little Rock. The family includes three children, 6, 8 and 14 years of age. Sometimes, I visit the library to search for books for them to read; other times they accompany me on these visits. Under Act 327, I would have to enter section that is segregated as "adults only," to either find books for myself or these Afghani children. It would discourage me from doing so, as I believe that would signal to others that I am interested in reading pornography. Also, I would probably have to interact with a library staff member to gain access to this segregated area. This, also, would deter me from accessing the "adults only" area. I do not think I should be subjected to this kind of scrutiny and that my choice of reading material should be unfettered and private. I have the same concerns if a certain book would have to be requested from library staff.

8. Under provisions of the Act, I am not allowed input into whether a challenged book is to be determined to be obscene to minors, while those that challenge a book do have input. I believe this is unfair and an encroachment on my rights.

9. I also shop for books at Wordsworth Books and Barnes Noble bookstore. In both these establishments, I browse through the stacks to see if there is anything I would like to either examine further or buy. Again, I don't want my access to books limited in these establishments because of Act 327. I don't want to have to go to an "adults only" section to view books I might want to read for the same reasons I don't want to be subjected to this is a library.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 18th of June, 2023.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, a political subdivision in the City of Fayetteville, State of Arkansas; EUREKA SPRINGS CARNEGIE PUBLIC LIBRARY; CENTRAL ARKANSAS LIBRARY SYSTEM; NATE COULTER; OLIVIA FARRELL; JENNIE KIRBY, as parent and next friend of HAYDEN KIRBY; LETA CAPLINGER; ADAM WEBB; ARKANSAS LIBRARY ASSOCIATION; ADVOCATES FOR ALL ARKANSAS LIBRARIES; PEARL'S BOOKS, LLC; WORDSWORTH COMMUNITY BOOKSTORE LLC d/b/a WORDSWORTH BOOKS; AMERICAN BOOKSELLERS ASSOCIATION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AUTHORS GUILD, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION — PLAINTIFFS

v. NO. 5:23-CV-05086

CRAWFORD COUNTY, ARKANSAS; CHRIS KEITH, in his official capacity as Crawford County Judge; TODD MURRAY; SONIA FONTICIELLA; DEVON HOLDER; MATT DURRETT; JEFF PHILLIPS; WILL JONES; TERESA HOWELL; BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD; FRANK SPAIN; TIM BLAIR; KYLE HUNTER; DANIEL SHUE; JEFF ROGERS; DAVID ETHREDGE; TOM TATUM, II; DREW SMITH; REBECCA REED MCCOY; MICHELLE C. LAWRENCE; DEBRA BUSCHMAN; TONY ROGERS; NATHAN SMITH; CAROL CREWS; KEVIN HOLMES; CHRIS WALTON; and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; — DEFENDANTS

DECLARATION OF DAVID GROGAN

I, David Grogan, pursuant to 28 U.S.C.§ 1746, do declare:

1. I am the Director of the American Booksellers for Free Expression, Advocacy and Public Policy ("ABFE"), a division of the American Booksellers Association ("ABA"). I have been working at the ABA since 2002.

2. The ABA was founded in 1900 and is a national not-for-profit trade organization that works to help independently owned bookstores grow and succeed. The ABA represents over 2,100 member companies operating in over 2,500 locations. The ABA's core members are key participants in their communities' local economy and culture. To assist them, the ABA provides education, information dissemination, business products, and services; creates relevant programs; and engages in public policy, industry, and local-first advocacy. The ABA has 17 members located in Arkansas who are subject to Act 372.

3. Section 1 of Act 372 of 2023 ("Act 372") prohibits making books that are "harmful to minors" available to minors, forcing this large quantity of constitutionally protected materials to be restricted from adults, as I describe below.

4. The ABA and its Arkansas member bookstores and booksellers fear that they and their employees may be at risk of prosecution under Section 1 for permitting minors to view or access constitutionally protected material which might be deemed "harmful to minors" for any minor under the meaning of the statute. ABA's Arkansas members do not know how to determine what books may cross this vague line, which does not distinguish between older and younger minors.

5. Any bookstore contains hundreds of books with sexually related narrative or pictorial content that might appeal to prurient interest in sex to minors. These books fall in many literary genres, such as fiction, non-fiction, romance, photography, health, art/photography and new releases. Contemporary bestsellers like "Fifty Shades of Grey" and the "Bridgerton" series;

literary classics as "Dracula," "Romeo Juliet," "Ulysses," "Gone with the Wind," and "The Color Purple" come to mind.

6. Adults generally become acquainted with books when they are readily visible. While many customers come into ABA member bookstores asking for a specific title, many more discover a new title while browsing. If titles were hidden away, those sales would be lost. The prominent display of books shelved or displayed on tables in an orderly, easily accessible manner in an atmosphere conducive to browsing is essential for the success of ABA member bookstores.

7. To comply with Section 1 of Act 372, bookstores are faced with untenable choices.

   a. The bookstore could bar all patrons under the age of 18 from entering the bookstores. This would alter the purpose and actions of the bookstore owners. This would also dramatically affect children and young adult book sales, and would imply the store only sold "adult" books, which would be immensely detrimental to business. Further, it would prevent older minors from perusing and purchasing materials constitutionally protected as to them.

   b. A bookstore could limit its inventory to books or other items not regulated by Section 1, however, that would curtail the availability of a number of very popular books, including some bestsellers, and thus, this alternative is not practically or commercially feasible. In addition, this alternative would create practical difficulties in ordering new books because bookstores rarely have the opportunity to review books before ordering them. This alternative would also prevent older minors from perusing and purchasing materials constitutionally protected as to them.

c. Alternatively, the bookstore could place all materials that could be "harmful to minors" behind a counter, but given the large number of constitutionally protected books involved, that may entail a restructuring of the store to ensure space. Since the display of books is crucial to book sales, this would also hurt sales. This option would also necessitate that employees perform the difficult task of designating books across multiple genres as "harmful to minors." This too would restrict the ability of adults and older minors to peruse and purchase materials constitutionally protected as to them.

d. The bookstore could also designate a room "adults only." This would, like the "behind the counter" option, potentially involve costly renovations and burden employees with the separation of books. Further, this new room would be difficult to monitor necessitating keys or electronic access (which would also entail additional costs) and would be confusing to patrons. That kind of segregation would also lead to drop in sales of the segregated books, as many adults would be hesitant to go into the "adults only" room. As with the other alternatives, this would restrict the ability of adults and older minors to peruse and purchase materials constitutionally protected as to them.

8. For all the reasons stated above, ABA's Arkansas members fear prosecution under Section 1. If Section 1 is not held unconstitutional, the members will be forced to self-censor and restrict materials available in their stores to a great degree to great business detriment, or risk criminal liability.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of June, 2023.

/s/ David Grogan
David Grogan

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, et al. PLAINTIFFS

v. Case No.: 5:23-cv-05086-TLB

CRAWFORD COUNTY, ARKANSAS, et al. DEFENDANTS

DECLARATION OF DAVID JOHNSON

I, David Johnson, hereby declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts in this declaration are based on my personal knowledge and I can testify competently to them if called upon to do so. I submit this sworn declaration in support of Plaintiffs' motion for a preliminary injunction.

2. The Fayetteville Public Library ("FPL") is a municipal public library and is a quasi-political subdivision in the City of Fayetteville, Arkansas. FPL was formed pursuant to Arkansas law to provide library services to local residents.

3. I hold Bachelor's and Master's Degrees in Communication from the University of Arkansas. I hold an ALA-Accredited Master's Degree in Library Science from the University of Tennessee.

4. I live in Fayetteville, Arkansas and have worked at FPL for more than eleven years. I am the Executive Director of FPL. In that capacity, I plan and direct the provision of library services to FPL's patrons. I am principally responsible for FPL's compliance with Act 372.

5. I am familiar with the best practices that govern a public library's acquisition and display of materials in its collection. These practices are designed to ensure public libraries provide their diverse patrons with a wide variety of materials that provoke thought and otherwise

meet the patrons' needs. These materials must necessarily embrace the human experience from all viewpoints. To that end, public libraries cannot (and should not) tailor their collections to reinforce the political, social, or ideological beliefs of some to the exclusion of divergent beliefs of others.

Act 372 Will Cause Irreparable Injury to FPL and Its Patrons

6. Act 372 will cause irreparable injury to the interests of FPL and its patrons in the following ways:

7. FPL's library collection contains some constitutionally protected materials that may fall within the definition of "harmful to minors" as defined in Arkansas Code Annotated § 5-68-501.

8. Some such materials include contemporary bestsellers like "Fifty Shades of Grey" and the "Bridgerton" series; literary classics such as "Lolita," "Sanctuary," "Portnoy's Complaint," "Diary of a Young Girl" (by Anne Frank), "The Adventures of Captain Underpants," and "Maus;" and prizewinners such as "The Bluest Eye," "To Kill a Mockingbird," and "The Absolutely True Diary of a Part-Time Indian."

9. These materials, if "furnishe[d] . . . to a minor," could subject me or other librarians to the criminal penalties in section 1 of Act 372 of 2023 (the "Availability Provision").

10. I (or my staff) will be irreparably harmed if I face criminal penalties, including up to a year in prison, for simply doing my job. Moreover, the hardship of a prison sentence would fall not only on me, but also on my family.

11. This risk of prosecution will also burden my ability to conduct ordinary First Amendment protected activities.

12. The Availability Provision confronts FPL with untenable choices to ensure compliance with section 1 of Act 372. FPL could bar patrons under the age of eighteen from

entering the library. This is totally antithetical to all FPL stands for. FPL could remove potentially offending materials from its collection and cease acquiring such materials in the future. This option would deprive FPL's patrons of very popular books, including best sellers. FPL could cordon off potentially offending materials from minors by placing such materials behind a counter. Aside from the fact that FPL does not have sufficient space behind the counter for this option, this option, too, would make it difficult for patrons to browse these materials. Or FPL could create an "adults only" section. This option is not practical from a resources perspective. FPL does not have floorspace for an "adults only" section. So creating such a section would require FPL to convert space currently utilized by patrons (such as study rooms) for other valuable reasons.

13. But even if FPL did implement the above options, there is no guarantee that some material would not slip through the net(s). If that happened, no amount of effort on FPL's part to guard against minors accessing "harmful" material would stave off a criminal prosecution. There is no safe harbor in the Availability Provision.

14. FPL does not have the resources to review the more than 330,000 physical titles in its collection to determine whether such titles contain material that a prosecutor deems harmful to minors. That level of review would require FPL staff to review each title page by page to understand whether any material could be deemed harmful. And this review would necessarily be further complicated by the fact that a material could be "harmful" to a five-year-old minor but not to a seventeen-year-old. FPL cannot engage in such a review that would ensure it is not running afoul of Act 372.

15. Even if FPL could engage in such a review, Act 372 does not provide any guidance on what it means to make something available to minors. Nor does Act 372 prescribe steps FPL should or must take to ensure that no covered items are available to minors.

16. FPL's library collection contains some constitutionally protected materials that may nevertheless be deemed inappropriate for minors. These materials could thus be subject to section 5 of Act 372 (the "Challenge Provision").

17. FPL currently has a "Reconsideration of Library Materials Policy." This policy allows patrons to request removal of material from the collection by submitting a reconsideration form. That form is submitted to the director of library services. If the patron is a Fayetteville resident and holds a current library card, the form is directed to me. I then appoint an ad hoc committee from the professional library staff that includes, but is not limited to, the librarian responsible for curating the subject area in which the questioned material falls and the appropriate department manager. The committee evaluates the material and makes a recommendation to me. I then make a disposition regarding the material. I inform FPL's Board of Trustees of the disposition and provide a written statement regarding the disposition to the patron. If the patron is displeased with my decision, the patron can appeal in writing to the president of FPL's Board. In the event of an appeal, the Board hears the appeal at a regularly scheduled Board meeting. The Board has discretion to uphold my decision or overturn it. The Board's decision is final.

18. The Challenge Provision, however, sets forth a burdensome process by which anyone (not just Fayetteville citizens with a current library card) may "challenge the appropriateness of material available" in the library. If, at the end of this process, FPL determines that the challenged material is appropriate, "a person affected by the material" can appeal that decision to the Fayetteville City Council. If the City Council deems the material inappropriate, FPL can either remove the material from its collection or segregate it from minors. At no point in the process does the Challenge Provision give a voice to patrons who want to advocate in favor of keeping the material in the collection as classified by trained library staff.

19. FPL does not have the resources to empanel a committee each time a material is challenged. Doing so would necessarily divert critical library resources from normal tasks to reviewing titles and replying to challenges. FPL has already received a couple of requests for the removal of certain titles from its collection. One person, who was not qualified to request reconsideration through FPL's policy, has requested that FPL remove "The Bible" from its collection. The Challenge Provision will likely increase the number of similar requests significantly as people who are not currently qualified to challenge materials under FPL's policy will have an avenue to do so under the Challenge Provision.

20. FPL designs its library layouts to be inviting and welcoming. It does not have areas restricted to adults. All its materials are presented on open shelves or are otherwise available to all patrons in the library. This design allows patrons to find materials they are looking for and, as important, browse other materials that may be of interest to patrons.

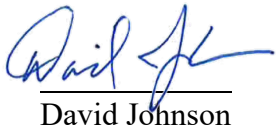
21. To comply with the Availability Provision or Challenge Provision, FPL would face the choice of depriving all its patrons of materials some may deem harmful to minors or changing the physical layout of its libraries to create an adults-only section to house such materials. If FPL declines to deprive its patrons of certain materials or make burdensome changes to its libraries' layouts (or even if it does but fails to segregate a single title in its large collection), FPL faces criminal liability under Section 1 of Act 372.

22. FPL does not have the resources to create adults-only sections to segregate portions of its collections. FPL does not have the resources to hire staff responsible for ensuring that minors do not gain access to adults-only sections. And Act 372 provides no guidance on what makes an area "accessible to minors."

23. Moreover, FPL fears that creating an adults-only section will prevent patrons from discovering titles that may be of interest to them. That is because many patrons will forego perusing titles in an adults-only section because of the inherent stigma "adults only" connotes.

I declare under penalty of perjury that the foregoing is true and correct.

Executed June 21, 2023, in Fayetteville, Arkansas.



David Johnson

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, a political subdivision in the City of Fayetteville, State of Arkansas; EUREKA SPRINGS CARNEGIE PUBLIC LIBRARY; CENTRAL ARKANSAS LIBRARY SYSTEM; NATE COULTER; OLIVIA FARRELL; JENNIE KIRBY, as parent and next friend of HAYDEN KIRBY; LETA CAPLINGER; ADAM WEBB; ARKANSAS LIBRARY ASSOCIATION; ADVOCATES FOR ALL ARKANSAS LIBRARIES; PEARL'S BOOKS, LLC; WORDSWORTH COMMUNITY BOOKSTORE LLC d/b/a WORDSWORTH BOOKS; AMERICAN BOOKSELLERS ASSOCIATION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AUTHORS GUILD, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION — PLAINTIFFS

v. — NO. 5:23-CV-05086

CRAWFORD COUNTY, ARKANSAS; CHRIS KEITH, in his official capacity as Crawford County Judge; TODD MURRAY; SONIA FONTICIELLA; DEVON HOLDER; MATT DURRETT; JEFF PHILLIPS; WILL JONES; TERESA HOWELL; BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD; FRANK SPAIN; TIM BLAIR; KYLE HUNTER; DANIEL SHUE; JEFF ROGERS; DAVID ETHREDGE; TOM TATUM, II; DREW SMITH; REBECCA REED MCCOY; MICHELLE C. LAWRENCE; DEBRA BUSCHMAN; TONY ROGERS; NATHAN SMITH; CAROL CREWS; KEVIN HOLMES; CHRIS WALTON; and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; — DEFENDANTS

DECLARATION OF DANIEL JORDAN

I, Daniel Jordan, pursuant to 28 U.S.C.§ 1746, do declare:

1. I am the co-owner of Pearl's Books, an independent bookstore that sells new books and gifts in Fayetteville, Arkansas. Pearl's Books also hosts reading and writing events for readers of all ages.

2. Our customers range in age from babies to senior citizens and include students who are 16-17 years of age, and therefore minors. Often parents and grandparents and other adults browse the store with younger children, and there is no section from which younger children are restricted.

3. Section 1 of Act 372 of 2023 ("Act 372") prohibits making books that are "harmful to minors" available to minors, forcing this large quantity of constitutionally protected materials not to be readily available, and not to be displayed.

4. We fear that anyone who works at our store may be at risk of prosecution under Section 1 for permitting minors to view or access constitutionally protected material which might be deemed "harmful to minors" under the meaning of the statute.

5. I am unclear how I or my staff would know which books may meet the standard to be "harmful to minors" under Arkansas' variable obscenity statue, but our bookstore contains hundreds of books with sexually related narrative or pictorial content that might be "harmful to minors." Those books fall in many literary genres, such as fiction, nonfiction, romance, photography and new releases; many are bestsellers and prizewinners. These are sold in different sections of the store. Some possible examples are contemporary bestsellers like "A Court of Thorns Roses" and the "Bridgerton" series, literary classics such as "Maus," "Sanctuary," and "If Beale Street Could Talk," and prizewinners such as "To Kill a Mockingbird" and "Beloved." Books that are appropriate for a 17-year-old, but may be inappropriate for 10-year-old include "The Outsiders" and "The Absolutely True Diary of a Part-Time Indian."

6. Adults generally become acquainted with our books when they are readily visible. While many customers come into Pearl's Books asking for a specific title, many more discover a new title while browsing. If titles were hidden away, those sales would be lost. The prominent display of books shelved or displayed on a table in an orderly, easily accessible manner in an atmosphere conducive to browsing is essential for our commercial success, and also essential to fulfill our goal of connecting readers with books.

7. None of the options available to us to comply with Section 1 of Act 372 are tenable:

   a. We could bar all patrons under the age of 18 from entering the bookstore. This would alter our purpose. This would also dramatically affect children and young adult book sales, and would imply the store only sold "adult" books, which would be immensely detrimental to business. Further, it would restrict the ability of older minors to peruse and purchase materials constitutionally protected as to them.

   b. We could limit our inventory to books or other items not regulated by Section 1, however, that would curtail the availability of a number of very popular books, including some bestsellers, and thus, this alternative is not practically or commercially feasible. In addition, this alternative would create practical difficulties in ordering new books because we rarely have the opportunity to review books before ordering them. This alternative would also restrict the ability of adults and older minors to peruse and purchase the materials in our store that are constitutionally protected as to them.

   c. Alternatively, we could place all materials that could be "harmful to minors" behind a counter, but given the large number of constitutionally protected books involved, that would entail a restructuring of the store to ensure space. Since the display of

books is crucial to book sales, this would also hurt sales. This option would also necessitate that our employees perform the difficult task of designating books across multiple genres as "harmful to minors." This too would restrict the ability of adults and older minors to peruse and purchase materials constitutionally protected as to them.

d. We could also designate a room "adults only." This would, like the "behind the counter" option, potentially involve costly renovations and burden employees with the separation of books. Further, this new room would be difficult to monitor necessitating keys or electronic access (which would also entail additional costs) and would be confusing to patrons. That kind of segregation would also lead to drop in sales of the segregated books, as many adults would be hesitant to go into the "adults only" room. As with the other alternatives, this would restrict the ability of adults and older minors to peruse and purchase materials constitutionally protected as to them.

8. For all the reasons stated above, we fear prosecution under Section 1. If Section 1 is not held unconstitutional, we will be forced to self-censor materials and restrict available in our stores to a great degree to great business detriment, or risk criminal liability.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19th day of June, 2023.

/s/ Daniel Jordan
Daniel Jordan

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, a political subdivision in the City of Fayetteville, State of Arkansas; EUREKA SPRINGS CARNEGIE PUBLIC LIBRARY; CENTRAL ARKANSAS LIBRARY SYSTEM; NATE COULTER; OLIVIA FARRELL; JENNIE KIRBY, as parent and next friend of HAYDEN KIRBY; LETA CAPLINGER; ADAM WEBB; ARKANSAS LIBRARY ASSOCIATION; ADVOCATES FOR ALL ARKANSAS LIBRARIES; PEARL'S BOOKS, LLC; WORDSWORTH COMMUNITY BOOKSTORE LLC d/b/a WORDSWORTH BOOKS; AMERICAN BOOKSELLERS ASSOCIATION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AUTHORS GUILD, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION — PLAINTIFFS

v. NO. 5:23-CV-05086-TLB

CRAWFORD COUNTY, ARKANSAS; CHRIS KEITH, in his official capacity as Crawford County Judge; TODD MURRAY; SONIA FONTICIELLA; DEVON HOLDER; MATT DURRETT; JEFF PHILLIPS; WILL JONES; TERESA HOWELL; BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD; FRANK SPAIN; TIM BLAIR; KYLE HUNTER; DANIEL SHUE; JEFF ROGERS; DAVID ETHREDGE; TOM TATUM, II; DREW SMITH; REBECCA REED MCCOY; MICHELLE C. LAWRENCE; DEBRA BUSCHMAN; TONY ROGERS; NATHAN SMITH; CAROL CREWS; KEVIN HOLMES; CHRIS WALTON; and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; — DEFENDANTS

DECLARATION OF HAYDEN KIRBY

1. My name is Hayden Kirby. I am 17 years of age and competent to make this declaration. I have personal knowledge of the matters set out in this declaration.

2. I make this declaration in support of the Complaint and Motion for Preliminary Injunction and Declarative Relief in the captioned case.

3. I am a resident of Little Rock, Arkansas, and a student at Central High School. In the fall, I will be a senior. I presently have a 4.3-point grade average. I have a CALS library card and use CALS' Fletcher branch library and CALS' main library. Most of the time, I am unaccompanied by a parent. At the library, I either search for a specific book, or roam the stacks looking for books to read in both the young adult and adult sections. Currently, I am free to look at whatever I want and pick out what I want to look at further or check out. I usually do so without librarian or staff assistance. To check out books, I use the automated check-out kiosk. With rare exceptions, no one either working or visiting the library knows what I am looking at or checking out.

4. I have read Act 372 of 2023 and believe I understand it. I believe it will block me from finding books I either want to read or might want to read. It will prevent me from browsing and finding books and other materials I might previously have been unaware of but upon seeing them discover that I do want to read them. I don't believe there should be anything that blocks me from the opportunity to read any book.

5. Under Act 372's provisions, I believe restricting the display of materials to minors because they might be considered harmful, obscene, or inappropriate for young minors cannot be done without also restricting access to them by minors of my age. For instance, previously I have checked out and read from the YA section, "Looking for Alaska" by John

Green, and "Everything Everywhere" and "The Sun is Also a Star" by Nicola Yoon. These books contain passages with sexual activity in them, and I fear they would be placed in an "Adults Only" section and off limits to me. I also fear other, similar books and books by the same authors will be placed off limits to me. I think that is wrong as I enjoyed reading them and think I benefitted from having read them. Under other provisions of Act 372, I believe certain materials would likely be removed entirely from the library collection while undergoing a review process and therefore unavailable to me during this review process even if it is later decided they are not inappropriate, harmful, or obscene to minors.

6. I believe that I am old enough and mature enough to have access to all the library materials that are accessible to adults. I don't believe that a government official, librarian, other parents, or any other person can determine what is appropriate for me to read. The only people who I think should have any say in what I read are my parents, and they consider me mature enough to make my own reading choices.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 19th of June, 2023.

Hayden Kirby

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, a political subdivision in the City of Fayetteville, State of Arkansas; EUREKA SPRINGS CARNEGIE PUBLIC LIBRARY; CENTRAL ARKANSAS LIBRARY SYSTEM; NATE COULTER; OLIVIA FARRELL; JENNIE KIRBY, as parent and next friend of HAYDEN KIRBY; LETA CAPLINGER; ADAM WEBB; ARKANSAS LIBRARY ASSOCIATION; ADVOCATES FOR ALL ARKANSAS LIBRARIES; PEARL'S BOOKS, LLC; WORDSWORTH COMMUNITY BOOKSTORE LLC d/b/a WORDSWORTH BOOKS; AMERICAN BOOKSELLERS ASSOCIATION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AUTHORS GUILD, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION — PLAINTIFFS

v. NO. 5:23-CV-05086

CRAWFORD COUNTY, ARKANSAS; CHRIS KEITH, in his official capacity as Crawford County Judge; TODD MURRAY; SONIA FONTICIELLA; DEVON HOLDER; MATT DURRETT; JEFF PHILLIPS; WILL JONES; TERESA HOWELL; BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD; FRANK SPAIN; TIM BLAIR; KYLE HUNTER; DANIEL SHUE; JEFF ROGERS; DAVID ETHREDGE; TOM TATUM, II; DREW SMITH; REBECCA REED MCCOY; MICHELLE C. LAWRENCE; DEBRA BUSCHMAN; TONY ROGERS; NATHAN SMITH; CAROL CREWS; KEVIN HOLMES; CHRIS WALTON; and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; — DEFENDANTS

DECLARATION OF MARY E. RASENBERGER

I, Mary E. Rasenberger, pursuant to 28 U.S.C.§ 1746, do declare:

1. I am the Chief Executive Officer of the Authors Guild, Inc. ("Guild"). I have held this position since 2021; before that, I held the position of Executive Director starting in 2014, when I joined the Guild.

2. The Guild's predecessor organization, the Authors League of America, was founded in 1912. The Guild is a national non-profit association of more than 13,000 professional, published writers of all genres, 32 of whom are located in Arkansas. The Guild counts historians, biographers, academicians, journalists, and other writers of non-fiction and fiction as members.

3. The Guild works to promote the rights and professional interest of authors in various areas, including copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business, and other areas; they are frequent contributors to the most influential and well-respected publications in every field.

4. The ability to write on topics of their choosing and to have their work available through bookstores and libraries is vital to their ability to make a living in their chosen profession.

5. Section 1 of Act 372 of 2023 ("Act 372") prohibits making books that are "harmful to minors" available to minors, forcing this large quantity of constitutionally protected materials to be separated, and not prominently displayed. As a practical matter, this would also result in libraries limiting the access adults have to these books. Many libraries and bookstores do not have room to provide for a separate space for "adults only" materials; moreover, putting the materials in a separate area could stigmatize them and draw attention to adults wishing to access them, thus discouraging them from accessing, buying and reading these materials. Section 5 of Act 372 requires that libraries establish a process for challenging the appropriateness of a book's inclusion in the main collection of the library.

6. The Guild and its Arkansas members fear that Act 372 will restrict the ability of authors to sell, and thus write, books about their chosen topics, and will chill free speech as it will force authors to self-censor their writing. Guild members do not know which books cross the vague line under Section 1, nor which books will be challenged under Section 5. Books may be categorized as "harmful to minors" even if they are appropriate for older minors, and placed in a separate "adult section," making access to them difficult. Authors need their books to be sold, and want their books to be read.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of June, 2023.

/s/ Mary E. Rasenberger
Mary E. Rasenberger

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, a political subdivision in the City of Fayetteville, State of Arkansas; EUREKA SPRINGS CARNEGIE PUBLIC LIBRARY; CENTRAL ARKANSAS LIBRARY SYSTEM; NATE COULTER; OLIVIA FARRELL; JENNIE KIRBY, as parent and next friend of HAYDEN KIRBY; LETA CAPLINGER; ADAM WEBB; ARKANSAS LIBRARY ASSOCIATION; ADVOCATES FOR ALL ARKANSAS LIBRARIES; PEARL'S BOOKS, LLC; WORDSWORTH COMMUNITY BOOKSTORE LLC d/b/a WORDSWORTH BOOKS; AMERICAN BOOKSELLERS ASSOCIATION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AUTHORS GUILD, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION — PLAINTIFFS

v. — NO. 5:23-CV-05086

CRAWFORD COUNTY, ARKANSAS; CHRIS KEITH, in his official capacity as Crawford County Judge; TODD MURRAY; SONIA FONTICIELLA; DEVON HOLDER; MATT DURRETT; JEFF PHILLIPS; WILL JONES; TERESA HOWELL; BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD; FRANK SPAIN; TIM BLAIR; KYLE HUNTER; DANIEL SHUE; JEFF ROGERS; DAVID ETHREDGE; TOM TATUM, II; DREW SMITH; REBECCA REED MCCOY; MICHELLE C. LAWRENCE; DEBRA BUSCHMAN; TONY ROGERS; NATHAN SMITH; CAROL CREWS; KEVIN HOLMES; CHRIS WALTON; and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; — DEFENDANTS

DECLARATION OF MATTHEW D. STRATTON

I, Matthew D. Stratton, pursuant to 28 U.S.C.§ 1746, do declare:

1. I am the Deputy General Counsel of the Association of American Publishers ("AAP").

2. The AAP, a not-for-profit organization, represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. AAP's members range from major commercial book and journal publishers to small, non-profit, university, and scholarly presses, as well as leading publishers of educational materials and digital learning platforms. AAP's members publish a substantial portion of the general, educational, and religious books produced in the United States, including critically acclaimed, award-winning literature for adults, young adults, and children. AAP represents an industry whose very existence depends on the free exercise of rights guaranteed by the First Amendment.

3. AAP's members believe that freedom of speech and freedom to publish are twin pillars of our democracy, and they help ensure that our democracy benefits from a vibrant marketplace of ideas

4. Section 1 of Act 372 of 2023 ("Act 372"), which prohibits making books that are "harmful to minors" available to minors, forces this large quantity of constitutionally protected materials to be segregated for older minors and adults, and not prominently displayed. Section 5 provides flawed procedures for challenges to books' appropriateness.

5. When access to books is restricted such as is contemplated by Sections 1 and 5 of Act 372, it affects the ability of publishers to disseminate important educational, scientific and literary works; contribute to the economy and the culture; enrich our democracy; and support authors.

6. Publishers cannot fulfill their mission if their books are not available for readers to browse and peruse, nor can publishers commercially succeed if their customers (such as libraries,

bookstores, and other retailers) are unable to sell or lend a large amount of constitutionally protected books because of the inability to properly display them.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19th day of June, 2023.

/s/ Matthew D. Stratton
Matthew D. Stratton

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, a political subdivision in the City of Fayetteville, State of Arkansas; EUREKA SPRINGS CARNEGIE PUBLIC LIBRARY; CENTRAL ARKANSAS LIBRARY SYSTEM; NATE COULTER; OLIVIA FARRELL; JENNIE KIRBY, as parent and next friend of HAYDEN KIRBY; LETA CAPLINGER; ADAM WEBB; ARKANSAS LIBRARY ASSOCIATION; ADVOCATES FOR ALL ARKANSAS LIBRARIES; PEARL'S BOOKS, LLC; WORDSWORTH COMMUNITY BOOKSTORE LLC d/b/a WORDSWORTH BOOKS; AMERICAN BOOKSELLERS ASSOCIATION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AUTHORS GUILD, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION — PLAINTIFFS

v. — NO. 5:23-CV-05086

CRAWFORD COUNTY, ARKANSAS; CHRIS KEITH, in his official capacity as Crawford County Judge; TODD MURRAY; SONIA FONTICIELLA; DEVON HOLDER; MATT DURRETT; JEFF PHILLIPS; WILL JONES; TERESA HOWELL; BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD; FRANK SPAIN; TIM BLAIR; KYLE HUNTER; DANIEL SHUE; JEFF ROGERS; DAVID ETHREDGE; TOM TATUM, II; DREW SMITH; REBECCA REED MCCOY; MICHELLE C. LAWRENCE; DEBRA BUSCHMAN; TONY ROGERS; NATHAN SMITH; CAROL CREWS; KEVIN HOLMES; CHRIS WALTON; and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; — DEFENDANTS

DECLARATION OF JEFF TRE LER

I, Jeff Trexler, pursuant to 28 U.S.C.§ 1746, do declare:

1. I am the Interim Director of the Board of the Comic Book Legal Defense Fund ("CBLDF"). I have held this position since 2020.

2. The CBLDF is a nonprofit organization founded in 1986 dedicated to protecting the legal rights of the comic arts community. With a membership that includes creators, publishers, retailers, educators, librarians, and fans, the CBLDF has defended dozens of First Amendment cases in courts across the United States and led important educational initiatives promoting comics literacy and free expression.

3. While comic books, graphic novels, webcomics, newspaper strips, and other expressions of the comic arts are often mischaracterized as material directed primarily at children, they have long appealed to adult readers. In recent years, the comic arts have received widespread recognition for their value in expressing serious literary, artistic, political, and scientific content in genres across the demographic categories, including middle-grade, young adult, and material addressed to older audiences. A particularly significant historical milestone in this regard was the awarding of a Pulitzer Prize in 1992 to Art Spiegelman for *M* , a graphic novel about the Holocaust. Subsequent decades have seen numerous other cartoonists and graphic novelists win significant awards, including Alison Bechdel, author of (MacArthur Award, 2014), Gene Luen Yang, author of *r r* (MacArthur Award, 2016) Lauren Redness, author of *d M r d rr r d* (MacArthur Award, 2016) Maia Kobabe, author of *d r r M r* (American Library Association Alex Award and Stonewall Honor, 2020), and Jerry Craft, author of *d* (Newberry Medal, 2020).

4. Section 1 of Act 372 of 2023 ("Act 372") prohibits making books that are "harmful to minors" available to minors. In so doing, it creates a substantial risk that access to constitutionally

protected materials will be limited or removed for members of the CBLDF community in Arkansas, including retailers, teachers, librarians, and readers.

5. Act 372 creates a reasonable apprehension among Arkansas retailers, school officials, and library administrators that they and their employees may be at risk of prosecution under Section 1 for permitting minors to view or access constitutionally protected material that might be deemed "harmful to minors" under the statue. Determining what books may cross this vague line is not at all clear, especially in light of recent mischaracterizations of certain graphic novels as obscene, pornographic, or otherwise "harmful to minors" despite the books' demonstrable and widely recognized serious value for minors.

6. As a result, Arkansas retailers seeking to comply with Section 1 of Act 372 are faced with untenable choices.

a. The bookstore could bar all patrons under the age of 18 from entering the bookstores. This would not only have a deleterious effect on children and young adult book sales, but it also would imply the store only sold "adult" books, which would be immensely detrimental to business. Further, it would prevent minors from perusing and purchasing materials constitutionally protected as to them.

b. A bookstore could exclude from its inventory all graphic novels and related comic art material that could conceivably fall within the scope of Section 1. However, this would curtail the availability of a number of popular books, including bestsellers distributed by mainstream publishers, to the point of risking a store's financial viability. In addition, this alternative would create practical difficulties in advance orders of new books, since bookstores rarely have the opportunity to review books

before ordering them. This alternative would also prevent minors and adults from perusing and purchasing materials constitutionally protected as to them.

c. Alternatively, the bookstore could place all materials that could be "harmful to minors" behind a counter, but given the large number of constitutionally protected books involved, that may entail a substantial and expensive restructuring of the store to ensure space. Since the display of books is crucial to book sales, this would also have a substantial negative impact on a store's revenue. This option would also necessitate that employees perform the uncertain task of designating books across multiple genres as "harmful to minors." This too would restrict the ability of adults and minors to peruse and purchase materials constitutionally protected as to them.

d. The bookstore could also designate a room "adults only." This would, like the "behind the counter" option, potentially involve costly renovations and burden employees with the separation of books. Further, this new room would be difficult to monitor, necessitating keys or electronic access (which would also entail additional costs) and would be confusing to patrons. That kind of segregation would also lead to drop in sales of the segregated books, as many adults would be hesitant to go into the "adults only" room. As with the other alternatives, this would restrict the ability of adults and minors to peruse and purchase materials constitutionally protected as to them.

7. For creators in the comic arts, any of the above alternatives would substantially limit their ability to write on topics of their choosing and to have their work available and displayed prominently in both libraries and bookstores, which is vital to their ability to make a living in their chosen profession.

8. For all the reasons stated above, Arkansas members of the CBLDF community have a reasonable fear of prosecution under Section 1. If Section 1 is not held unconstitutional, retail members will feel forced to restrict access to materials available in their stores to a significant degree; librarians and teachers will be forced to limit access to constitutionally protected works; and author members will be pressed to self-censor their writing despite the First Amendment's long-established safeguards for freedom of speech.

Executed on this 20th day of June, 2023.

/s/ Jeff Trexler
Jeff Trexler

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, et al. PLAINTIFFS

v. NO. 5:23-cv-5086

CRAWFORD COUNTY, ARKANSAS, et al. DEFENDANTS

DECLARATION OF ADAM WEBB

I, Adam Webb, hereby declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are based on my personal knowledge and I can testify competently to them if called upon to do so. I submit this sworn declaration in support of Plaintiffs' motion for a preliminary injunction.

2. I am an American Library Association–accredited Librarian, Certified Public Library Administrator, and I hold a master's degree in Library & Information Science from the University of North Texas.

3. I live in Garland County, Arkansas and have worked at the Garland County Library ("GCL") for more than sixteen years, including, since 2019, as GCL's Executive Director. In my capacity as the Executive Director of GCL, I plan and direct the provision of library services to GCL's patrons, which means that I am primarily responsible for ensuring that GCL complies with Act 372.

4. In addition to my duties as the Executive Director of GCL, I am also the President of Advocates for All Arkansas Libraries ("AAAL") and a member of the Arkansas Library Association ("ArLA").

5. From my training and professional experience, I am familiar with the best practices that should govern a public library's acquisition and display of materials in its collection, which call for public libraries to make available the widest diversity of views and expressions, including those that are unorthodox, unpopular, or considered dangerous by the majority.

Garland County Library

6. GCL, which is in Hot Springs, Arkansas, is a beloved part of the Garland County community. It serves approximately 61,000 registered library users in a county where roughly 100,000 people live.

7. Under my supervision, GCL maintains a collection of approximately 160,000 items, which have been acquired and are displayed in keeping with best practices for public library administration and within the physical constraints of the municipal building in which GCL is located. The items in GCL's collection are principally displayed in a single story, open floor plan library on bookshelves that are logically arranged by genre and reading ability, such that a reader can quickly find the item they are looking for or, alternatively, browse through and consider materials that match their interests and comprehension levels. This setup is typical for other libraries that I have seen and visited in Arkansas.

8. It is my belief that some of the items in GCL's collection, though constitutionally protected, could be deemed harmful to or inappropriate for minors and therefore subject to the criminal penalties in section 1 of Act 372 of 2023 (the "Availability Provision") or a challenge under section 5 of Act 372 (the "Challenge Procedure"). For instance, I know that GCL has in its collection art and medical books that depict nudity. Although these books have indisputable

scientific, medical, and/or artistic value for adults and many older minors, some people could conceivably consider them harmful to younger (or even older) minors.

9. At present these books are not physically and securely segregated and could be viewed by GCL patrons as young as 11, who are currently allowed to be in the library without an adult chaperone. GCL maintains this policy to support children's access to reading material and to foster a love for reading. Visitors who are younger than 11 years old must be accompanied by an adult chaperone.

10. Nor does GCL currently have any rooms in which materials could be segregated and kept physically secure from younger readers that are not presently being used for some other purpose, such as a community meeting space. And constructing new, secure spaces within the library is not a viable option for GCL.

11. In fact, Garland County recently explored adding a new area for teenagers at GCL, which would have required reconfiguring our existing facility. Based on estimates I received in connection with that project, I would estimate that reconfiguring GCL's layout to comply with Act 372 would cost a million dollars, or more. And the additional staff time that would be necessary to monitor that newly created space would, on its own, cost upwards of $50,000. GCL does not have the budget to accommodate those expenses.

12. At the same time, even if GCL had a space to securely segregate material, it does not have enough staff to review every item in the collection to determine whether that item might subsequently be deemed harmful to a younger minor by a prosecutor, or challenged as inappropriate. That level of review would, at a minimum, require the staff to review each item in GCL's collection closely enough to understand the content of the item and context in which that content is presented to the reader or viewer. GCL's policies require at least one

ALA-accredited librarian review the challenged material and GCL only has eight staff members with those qualifications. Optimistically, a title-by-title review of 160,000 physical items using GCL's eight qualified librarians would take an estimated one hundred years to accomplish, if each librarian is able to review two hundred items per year in addition to their other duties. GCL cannot possibly manage to do that without shutting down its core services.

13. In addition to GCL's limited staff, GCL also provides volunteer opportunities for students in Garland County. These volunteer positions are essential to the library's ability to provide services and meet the needs of library users in Garland County. They also provide an important opportunity for students in Garland County who are passionate about books to learn about how a library works and gain practical skills. To effectively participate in the work of GCL, and to maximize the benefit to GCL, however, our volunteers—many of whom are under 18 years of age—must be able to access GCL's entire collection of materials. If our volunteers' access is restricted to materials that are suitable for GCL's youngest readers, the volunteers will be unable to either provide assistance to many of GCL's patrons or ensure that materials are properly re-shelved.

14. Presently, I am waiting for clarity about how Act 372 will operate before responding to a request from several dozen students who are interested in volunteering at GCL. Students from the Arkansas School of Mathematics, Science, and the Arts have requested that GCL become an official "Partner in Education" through the National Honors Society, but I am reluctant to allow them to volunteer in the library until we receive more clarification regarding Act 372.

15. For all of these reasons, I do not believe that GCL is in a position to make the drastic and prohibitively expensive changes to its floor plan and operating procedures that

appear to be necessary to segregate all potentially covered materials in the collection and to otherwise comply with Act 372.

16. Moreover, even if GCL were in a position to change its physical layout to accommodate a dedicated space for segregated materials, doing so would deprive readers of access to information to which they are entitled, because such books would be harder to find and would require patrons to seek them out in a stigmatized "adults-only" area. For instance, the segregation of materials necessary to comply with Act 372 might, in some cases, require GCL to separate books within a series, which would be confusing for patrons and not in keeping with library best practices.

17. Because compliance with Act 372 will be difficult to accomplish for GCL, I am concerned that I could get into trouble, and even go to prison, simply by doing my job and trying to make books available to all of GCL's readers, including both its youngest minor readers and more mature readers, that will be interesting, engaging, and well-matched to a reader's abilities and level of comprehension.

18. I will be irreparably harmed if I face criminal penalties, including up to a year in prison, for simply doing my job. Moreover, the hardship of a prison sentence would fall not only on me, but also on my family.

19. Even if I, or others at GCL, are not charged with a crime, I expect that GCL will be regularly burdened by challenges made under the Challenge Procedure required by Act 372.

20. GCL currently has a process through which patrons can provide feedback on materials in the library's collection, which the library uses to inform its choices about which books are made available to readers in Garland County. This process has worked well for GCL and allows the library to be responsive to the feedback of its readers, including negative

feedback, while not unduly burdening GCL staff or permitting the views of a few to shape what is available in our collection for the many thousands of patrons we serve.

21. Through this process, we have received requests to remove books dealing with LGBTQ and racial justice themes, including *Esther the Wonderpig, The Body Book*, and a blanket request regarding all materials with LGBTQ characters, which we declined to do because they make a valuable contribution to GCL's collection. I expect that those same books, as well as others dealing with similar themes, will be challenged repeatedly under Act 372.

22. Unfortunately, it is my belief that our current processes will need to be substantially changed in order to comply with Act 372. For instance, our current process requires the person challenging materials to be a GCL library user in good standing. Act 372 allows *any* person to challenge materials, as long as they are "a person affected." This opens the door to unlimited challenges being submitted by individuals who are not GCL library users or even in our service area. This is not a hypothetical concern—recent reporting from the *Washington Post* showed that over 1,000 of the book challenges they analyzed were submitted by just 11 people.

Advocates for All Arkansas Libraries

23. As mentioned above, I am the President of AAAL. AAAL is a nonprofit corporation formed under Arkansas law as a membership organization whose mission is to advocate for the preservation and improvement of libraries and library services across the state, and to educate the public, state leaders, and legislators of the value and importance of libraries in Arkansas.

24. AAAL has 118 members, comprised of libraries, library staff, and library patrons, including both adult and minor patrons.

Act 372 Causes Injury to AAAL's Members

25. Act 372 causes AAAL's members to suffer irreparable injury because many of the libraries that are members of AAAL or at which AAAL members work carry materials that, though constitutionally protected, could be deemed harmful to some younger minors and therefore subject to the Availability Provision, or could be challenged under the Challenge Procedure.

26. Like GCL, AAAL's library members serve patrons of all ages, from small children to older adults. Few if any have the financial or staff resources to review their entire collections, such that they can identify and segregate material that might conceivably be covered by the Availability Provision. Accordingly, many of AAAL's librarian members will be unable to ensure that their library completely eliminates all access to material that could possibly be found harmful to younger minors and will therefore be at risk of criminal prosecution once the Availability Provision goes into effect.

27. Moreover, many of these smaller libraries have only a single copy of some of the books that are likely to be challenged, meaning that, during the pendency of the challenge process, they will be unavailable to patrons (such as AAAL's patron members) unless the libraries purchase additional copies.

28. AAAL's library members are also frequently visited by families that include children too young to be left unattended while a parent or older sibling peruses, either as a matter of library policy or parental judgment. In such a case, the chaperoning parent or older minor-sibling would be unable to access books segregated in an area of the library where the younger minor is prohibited from entering. Based on my work with AAAL's members and my professional experience as a librarian and library administrator, I believe that many adult and

older minor patrons will be less inclined to visit AAAL member-libraries if Act 372 forces them to choose between accessing books they are interested in and minding a minor child.

29. Similarly, I believe that adult visitors to AAAL member-libraries will generally be less inclined to peruse any books made available only in an adults-only section, as those books have a stigma attached and are less attractive to many readers for that reason. This will impede their access to those books and make them less inclined to patronize AAAL member-libraries.

30. AAAL's members are also injured because the Challenge Procedure discriminates between those who support a particular book and believe it is appropriate for inclusion in a public library's collection and those who oppose a particular book and would challenge it as inappropriate for inclusion. While a book's opponents are afforded multiple, formal opportunities to advocate for the book's removal or segregation, the book's supporters are given no similar right or ability to advocate for the book's continued inclusion in the library's collection.

31. If the Challenge Procedure permitted participation by those who favor keeping a challenged book in circulation, AAAL's members would participate to share that view. Similarly, if the Challenge Procedure allowed appeals from a library's decision to segregate or remove a challenged book, AAAL's members would avail themselves of that recourse.

Act 372 Causes Injury to AAAL's Organizational Interests

32. Like its members, AAAL is also irreparably injured by the Challenge Procedure's failure to provide an opportunity for those who would support a book's continued inclusion in a library's collection to express that countervailing view.

33. In addition, AAAL suffers irreparable injury to its organizational interests because, to counteract the harm that AAAL's members will suffer from Act 372, AAAL has

been and will continue to be forced to divert organizational resources, including staff time and money.

34. In particular, prior to Act 372's enactment, AAAL focused its organizational resources on developing educational programming on library services for library para-professionals and providing consultation services to library directors regarding best practices for library management. Since Act 372 was signed into law, however, AAAL has been consumed by the need to respond to the concerns of its members about Act 372's requirements, including both the high financial costs that AAAL's member-libraries face to comply with the law, as well as the potential that AAAL members will face criminal liability.

35. I have spent considerable time fielding dozens of worried phone calls and emails from AAAL librarian, institutional, and individual members, which comes at a personal cost and means that I have less time to spend on other AAAL priorities. AAAL does not have paid staff, but operates through volunteers, like me, who must balance full-time jobs and family obligations with our work on behalf of AAAL. Thus, the time I spend responding to AAAL members about Act 372 directly affects my ability to advance AAAL's core organizational priorities, like promoting library services across the state and educating the public, state leaders, and legislators of the value and importance of libraries in Arkansas. I have spent most of my time combating false accusations that libraries are full of obscene materials, yet I am unaware of any library materials in the State of Arkansas being declared judicially obscene.

36. AAAL will incur expenses responding to Act 372, which it would not have otherwise incurred or would have spent on other organizational priorities, and which it will not be able to recoup. For instance, AAAL is in the process of hiring an attorney to help develop

model policies that member libraries can use in implementing the processes required by the Challenge Procedure.

I declare under penalty of perjury that the foregoing is true and correct.

Executed June 21, 2023 in Garland County, Arkansas.

Adam Webb

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, a political subdivision in the City of Fayetteville, State of Arkansas; EUREKA SPRINGS CARNEGIE PUBLIC LIBRARY; CENTRAL ARKANSAS LIBRARY SYSTEM; NATE COULTER; OLIVIA FARRELL; JENNIE KIRBY, as parent and next friend of HAYDEN KIRBY; LETA CAPLINGER; ADAM WEBB; ARKANSAS LIBRARY ASSOCIATION; ADVOCATES FOR ALL ARKANSAS LIBRARIES; PEARL'S BOOKS, LLC; WORDSWORTH COMMUNITY BOOKSTORE LLC d/b/a WORDSWORTH BOOKS; AMERICAN BOOKSELLERS ASSOCIATION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AUTHORS GUILD, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION — PLAINTIFFS

v. — NO. 5:23-CV-05086

CRAWFORD COUNTY, ARKANSAS; CHRIS KEITH, in his official capacity as Crawford County Judge; TODD MURRAY; SONIA FONTICIELLA; DEVON HOLDER; MATT DURRETT; JEFF PHILLIPS; WILL JONES; TERESA HOWELL; BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD; FRANK SPAIN; TIM BLAIR; KYLE HUNTER; DANIEL SHUE; JEFF ROGERS; DAVID ETHREDGE; TOM TATUM, II; DREW SMITH; REBECCA REED MCCOY; MICHELLE C. LAWRENCE; DEBRA BUSCHMAN; TONY ROGERS; NATHAN SMITH; CAROL CREWS; KEVIN HOLMES; CHRIS WALTON; and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; — DEFENDANTS

DECLARATION OF KANDI WEST

I, Kandi West, pursuant to 28 U.S.C.§ 1746, do declare:

1. I am the co-owner of WordsWorth Books, an independent bookstore that sells new books and gifts in historic heights neighborhood in Little Rock, Arkansas. WordsWorth Books sells books for people of all ages, and regularly hosts author events and children's storytime events.

2. Our customers range in age from babies to senior citizens and include students who are 16-17 years of age, and therefore minors. Often parents and grandparents and other adults browse the store with younger children, and there is no section from which younger children are restricted.

3. Section 1 of Act 372 of 2023 ("Act 372") prohibits making books that are "harmful to minors" available to minors, forcing this large quantity of constitutionally protected materials to be segregated, and not prominently displayed.

4. We fear that anyone who works at our store may be at risk of prosecution under Section 1 for permitting minors to view or access constitutionally protected material which might be deemed "harmful to minors" under the meaning of the statue.

5. I am unclear how I or my staff would know which books may meet the standard to be "harmful to minors" under Arkansas' variable obscenity statue, but our bookstore may contain hundreds of books with sexually related narrative that might be "harmful to minors" and those books fall in many literary genres, such as fiction, nonfiction, romance, photography, health, art/photography, and new releases. These are sold in different sections of the store. Examples of books we carry that could be appropriate for a 17-year old but perhaps not a 10-year old include: "The Hate U Give" by Angie Thomas; "Speak" by Laurie Halse Anderson; "The Color Purple" by Alice Walker; "Maus I: A Survivor s Tale: My Father Bleeds History" and "Maus II: A Survivor s Tale: And Here My Troubles Began" by Art Spiegelman; "The Catcher in the Rye" by JD Salinger;

"The Bluest Eye" by Toni Morrison; "The Book Thief" by Markus usak; and "Looking for Alaska" by John Green.

6. Adults generally become acquainted with our books when they are readily visible. While many customers come into WordsWorth Books asking for a specific title, many more discover a new title while browsing. If titles were hidden away, those sales would be lost. The prominent display of books shelved or displayed on tables in an orderly, easily accessible manner in an atmosphere conducive to browsing is essential for our commercial success, and also essential to fulfill our goal of connecting readers with books.

7. None of the options available to us to comply with Section 1 of Act 372 are tenable:

   a. We could bar all patrons under the age of 18 from entering the bookstore. This would alter our purpose. This would also dramatically affect children and young adult book sales, and of course our events for children, and would imply the store only sold "adult" books, which would be immensely detrimental to business. Further, it would prevent older minors from perusing and purchasing materials constitutionally protected as to them.

   b. We could limit our inventory to books or other items not regulated by Section 1, however, that would curtail the availability of a number of very popular books, including some bestsellers, and thus, this alternative is not practically or commercially feasible. In addition, this alternative would create practical difficulties in ordering new books because we often do not have the opportunity or the time to review books before ordering them. This alternative would also prevent older minors from perusing and purchasing materials constitutionally protected as to them

c. Alternatively, we could place all materials that could be "harmful to minors" behind a counter, but given the large number of constitutionally protected books involved, that would entail a restructuring of the store to ensure space. Since the display of books is crucial to book sales, this would also hurt sales. This option would also necessitate that our employees perform the difficult task of designating books across multiple genres as "harmful to minors." This too would restrict the ability of adults and older minors to peruse and purchase materials constitutionally protected as to them.

d. We could also designate a room "adults only." This would, like the "behind the counter" option, potentially involve costly renovations and burden employees with the separation of books. Further, this new room would be difficult to monitor necessitating keys or electronic access (which would also entail additional costs) and would be confusing to patrons. That kind of segregation would also lead to drop in sales of the segregated books, as many adults would be hesitant to go into the "adults only" room. As with the other alternatives, this would restrict the ability of adults and older minors to peruse and purchase materials constitutionally protected as to them.

8. For all the reasons stated above, we fear prosecution under Section 1. If Section 1 is not held unconstitutional, we will be forced to self-censor materials and restrict available in our stores to a great degree and to great business detriment, or risk criminal liability.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19th day of June, 2023.

/s/ Kandi West
Kandi West

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FAYETTEVILLE PUBLIC LIBRARY, a political subdivision in the City of Fayetteville, State of Arkansas; EUREKA SPRINGS CARNEGIE PUBLIC LIBRARY; CENTRAL ARKANSAS LIBRARY SYSTEM; NATE COULTER; OLIVIA FARRELL; JENNIE KIRBY, as parent and next friend of HAYDEN KIRBY; LETA CAPLINGER; ADAM WEBB; ARKANSAS LIBRARY ASSOCIATION; ADVOCATES FOR ALL ARKANSAS LIBRARIES; PEARL'S BOOKS, LLC; WORDSWORTH COMMUNITY BOOKSTORE LLC d/b/a WORDSWORTH BOOKS; AMERICAN BOOKSELLERS ASSOCIATION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AUTHORS GUILD, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION — PLAINTIFFS

V. — NO. 5:23-CV-05086-TLB

CRAWFORD COUNTY, ARKANSAS; CHRIS KEITH, in his official capacity as Crawford County Judge; TODD MURRAY; SONIA FONTICIELLA; DEVON HOLDER; MATT DURRETT; JEFF PHILLIPS; WILL JONES; TERESA HOWELL; BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD; FRANK SPAIN; TIM BLAIR; KYLE HUNTER; DANIEL SHUE; JEFF ROGERS; DAVID ETHREDGE; TOM TATUM, II; DREW SMITH; REBECCA REED MCCOY; MICHELLE C. LAWRENCE; DEBRA BUSCHMAN; TONY ROGERS; NATHAN SMITH; CAROL CREWS; KEVIN HOLMES; CHRIS WALTON; and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; — DEFENDANTS

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, A TEMPORARY RESTRAINING ORDER

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs have filed a motion for preliminary injunction asking this Court to preliminarily enjoin Defendants from enforcing parts of Arkansas Act 372, codified at Ark. Code Ann. §§ 5-27-212 (eff. August 1, 2023) and 13-2-106 (eff. August 1, 2023), as these statutes impermissibly abridge Plaintiffs' constitutional rights to free speech and due process under the First and Fourteenth Amendments to the United States Constitution.

I. BACKGROUND

A. Act 372

Governor Sanders signed Arkansas Act 372 of 2023 ("Act 372") on March 31, 2023, and it is scheduled to go into effect on August 1, 2023. Two portions of Act 372 are relevant to this case: Section 1 (the "Availability Provision") and Section 5 (the "Challenge Procedure").

Section 1, the Availability Provision, makes it a criminal offense, punishable by imprisonment for up to a year, to make available, provide, or show to a minor an item that meets the definition of "harmful to minors."[1]

Under the Availability Provision, which constitutes a misdemeanor criminal offense,

[1] Act 372's definition of "harmful to minors" is incorporated from Arkansas' variable obscenity statute, which defines the term to mean "that quality of any description, exhibition, presentation, or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when the material or performance, taken as a whole, has the following characteristics: (A) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors; (B) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement, or sadomasochistic abuse in a manner that it patently offensive to prevailing standards in the adult community with respect to what it suitable for minors; and (C) The material or performance lacks serious literary, scientific, medical, artistic, or political value for minors." Ark. Code Ann. § 5-68-501(2) (2017).

> [a] person commits furnishing a harmful item to a minor if, knowing the character of the item involved, the person knowingly . . . [f]urnishes, presents, provides, makes available, gives, lends, shows, advertises, or distributes to a minor an item that is harmful to minors.

The term "item" encompasses every form of expressive material that one could expect to find in a public library or bookstore, including books, magazines, and motion pictures. *See* Act 372 § 1(a)(4)(B).

Just like a predecessor statute enjoined by a federal court, *see Shipley, Inc. v. Long*, 454 F. Supp. 2d 819 (E.D. Ark. 2004) (*Shipley III*), the Availability Provision prohibits librarians and booksellers from making an item available to an older minor even if the item "is only harmful to the youngest of the minors . . . [and] would not be harmful to adults or older minors." *Id.* at 829; *see also Shipley, Inc. v. Long,* 359 Ark. 208, 216, 195 S.W.3d 911, 915 (2004) (*Shipley II*).

The Availability Provision does not define what it means to "make [an item] available" to minors. Nor does it explain what steps are sufficient for a library or bookstore to ensure that no covered items are available to minors, in contrast to existing law regulating sale or display of actual pornography to minors. *See* Ark. Code 5-68-502(a)(1)(B) (2015).

Section 5, the Challenge Procedure, requires public libraries to establish a process through which any "person affected by [a] material"[2] in their collection can challenge the "appropriateness" of that material's inclusion in the library's main collection (the "Challenge Procedure"). Act 372 § 5(c)(1). A successful challenge would result in the work being "withdrawn" from the library's main collection, *see id.* § 5(c)(7)(B), and (if the work remains in the library) "relocated . . . to an area that is not accessible to minors." *Id.* § 5(c)(11)(A). Section 5

[2] As with regards to the term "item" in the Availability Provision, the term library "materials" may include magazines and other printed materials, as well as DVDs and other forms of motion pictures. While this brief will refer to *book* challenges as the common likely use of the Challenge Procedure, the same analysis will apply to library materials like DVDs.

provides no guidance to libraries, cities, or counties as to what may be considered "appropriate," or what makes an area "accessible" to minors; it provides for the removal of works while a challenge is pending, *id.* § 5(c)(2), while failing to provide any timeline for resolution of a challenge; it does not allow for judicial review of a removal decision; and, should the library decline to remove the works, it provides opponents the opportunity to appeal to political leaders, *id.* § 5(c)(12), while denying a similar right of petition to supporters of a work who oppose its removal.

B. Effects of Act 372 on Plaintiffs

Plaintiffs are libraries, librarians, library patrons, and booksellers whose rights will be significantly infringed in a variety of ways if these provisions of Act 372 take effect, along with associations of libraries, librarians, patrons, and booksellers.

1. The Availability Provision

The Availability Provision threatens librarians and booksellers with criminal prosecution for providing protected expression to people with a constitutional right to receive it. Under the statute, librarians and booksellers could face criminal liability for providing a 17-year-old with a book that was only potentially "harmful" to a 5- or 6-year-old. *See Shipley III*, 454 F. Supp. 2d at 829.

Even if the statute did not criminalize protected speech, the attached declarations show that, if the Availability Provision takes effect, public libraries and bookstores will be faced with a series of untenable choices in order to avoid potential criminal liability and imprisonment. Depending on their respective budgets and tolerance for criminal legal risk, bookstores and libraries may respond by banning patrons under 18 years old altogether; by ridding their shelves of all books that Arkansas law would treat as "harmful," regardless of their literary or scientific

value; or by segregating huge swaths of their collections into "adult-only" sections or placing them behind counters, as if they were pornography, and cutting older minors off from access to a wide variety of age-appropriate materials, while undertaking prohibitively costly renovations to secure the materials.

Any of these options would severely and irreparably harm libraries, librarians, booksellers, and their patrons. Barring all patrons under the age of 18 from entry would be antithetical to the purpose of public libraries, which exist to foster reading and education among people of all ages and, in particular, to make reading material available to minors without the means of purchasing books themselves. *See*, *e.g.*, Declaration of David Johnson ("Johnson Decl.") at ¶ 12; Declaration of Deborah Caldwell-Stone ("Caldwell-Stone Decl.") at ¶ 4 (testifying that the "core function of public libraries is to provide all patrons with access to a broad spectrum of information and ideas that are of interest to them and to provide access to all points of view on current and historical issues"). It would similarly constrict the mission and actions of bookstores and their owners, dramatically affect their sales of children and young adult books, and imply the store only sold "adult" or pornographic books, which would be immensely detrimental to business. And it would harm older minors by preventing them from perusing and purchasing materials constitutionally protected as to them. *See* Declaration of David Grogan ("Grogan Decl.") at ¶ 7(a); Declaration of Kandi West ("West Decl.") at ¶ 7(a); Declaration of Daniel Jordan ("Jordan Decl.") at ¶ 7(a); Declaration of Jeff Trexler ("Trexler Decl.") at ¶ 6(a); Caldwell-Stone Decl. at ¶ 11(a).

Alternatively, a library or bookstore could limit its inventory to books or other items not regulated by the Availability Provision. However, that would curtail the availability of a number of popular books, including bestsellers and literary classics, and thus, this alternative is not practically or commercially feasible. In addition, this alternative would create practical difficulties

in ordering new books because bookstores and libraries rarely have the opportunity to review books before ordering them. This would also restrict the ability of adults and older minors to peruse, borrow, and purchase materials constitutionally protected as to them, including not only literary works but educational materials on subjects such as human biology. *See* Grogan Decl. at ¶ 7(b); West Decl. at ¶ 7(b); Jordan Decl. at ¶ 7(b); Trexler Decl. at ¶ 6(b); Caldwell-Stone Decl. at ¶ 11(b).

Perhaps some bookstores or libraries could place all materials that could be "harmful to minors" behind a counter, but, given the large number of constitutionally protected books involved, that may entail a restructuring of the store or library to ensure space, a costly prospect noted by multiple Plaintiffs. *See* Declaration of Carol Coffey ("Coffey Decl.") at ¶ ¶ 11-13; Declaration of Adam Webb ("Webb Decl.") at ¶ ¶ 10-11; Grogan Decl. at ¶ 7©; Jordan Decl. at ¶ 7(c); West Decl. at ¶ 7(c); Trexler Decl. at ¶ 6(c); Caldwell-Stone Decl. at ¶ 11(c). This option would also necessitate that employees perform the difficult task of designating books across multiple genres as "harmful to minors." This, too, would restrict the ability of adults and older minors to peruse, borrow, and purchase materials deemed "harmful," as such materials—despite being protected speech—could not be organized and presented by subject matter as library and bookstore offerings commonly are. *Id.*

A bookstore or library could also designate a room "Adults-only." This would, like the "behind the counter" option, potentially involve costly renovations and burden employees with the task of separating books. As Mr. Coulter notes in his declaration, across the entire Central Arkansas Library System, there are not currently "any rooms in which targeted materials could be segregated and kept physically secure from younger readers that are not presently being used for some other purpose, such as a community meeting space." Declaration of Nate Coulter ("Coulter Decl.") at ¶

10. As Ms. Coffey explained, libraries today typically "maintain their collections on open shelves . . . which are designed so that patrons may access them without requiring assistance from library staff," and "lack the physical space or financial resources to restructure their library to provide the segregated space they would need to prevent any risk of availability to minors." Coffey Decl. at ¶ ¶ 11-13, Ex. A-D (describing certain ArLA member library spaces and attaching photos). Creating adult-only rooms is impracticable for smaller libraries, such as the Yell County Library, whose "space already limits their ability to do basic programming, let alone to create an adult-only space," or the Calhoun County Library, which "consists of only one room, with a desk at the back, shelves along the middle, and seats around the edge," and does not even have an "office or staff break room." *Id.* at ¶ 13; *see also* Johnson Decl. at ¶ 12 (the Fayetteville Public Library "does not have floorspace for an 'adults only' section. So creating such a section would require FPL to convert space currently utilized by patrons (such as study rooms) for other valuable reasons."); Coulter Decl. at ¶ 10-12; Webb Decl. at ¶ ¶ 10-12 (describing the logistical difficulties of creating an adults-only section, as well as the impossibility of existing staff undertaking timely review of vast quantities of challenged material). Further, this new room would be difficult to monitor, necessitating either keys or electronic access (which would also entail additional costs), and would be confusing to patrons. *See* Grogan Decl. at ¶ 7(d); Jordan Decl. at ¶ 7(d); West Decl. at ¶ 7(d); Trexler Decl. at ¶ 6(d); Caldwell-Stone Decl. at ¶ 11(d).

Moreover, it is not even clear that the "behind the counter" and "adults-only" approaches would suffice to protect librarians and booksellers from liability if a minor obtained a restricted item notwithstanding the librarian's or bookseller's efforts. The statute creates no safe harbor, so it is unclear whether, say, a librarian could be prosecuted if a book is misshelved, or a bookseller could be prosecuted if a customer leaves an "adults-only" book in a section that minors can access.

Segregation of "adults-only" books would also lead to a drop in sales and readership of the segregated books, as some adults would be hesitant to go into the room. *See*, *e.g.*, Declaration of Olivia Farrell ("Farrell Decl.") at ¶ 7 (library patron stating concerns that she would no longer be able to search for books for herself in an "adults-only" section because she would fear "signal[ing] to others that [she is] interested in reading pornography"); Declaration of Leta Caplinger ("Caplinger Decl.") at ¶ 7 (patron "would find it chilling to enter a section" of a library "segregated as 'adults only,'" as she believes "that would signal to others that [she was] interested in reading pornography. Requesting permission or access to a segregated area from a staff member would also deter her, in part because she "do[es] not think [she] should be subjected to this kind of scrutiny" and that her "choice of reading material should be unfettered and private."); West Decl. at ¶ 7(d), Jordan Decl. at ¶ 7(d) (bookstore owners stating that an "adults-only" room would lead to drop in sales of books therein "as many adults would be hesitant to go into the 'adults only' room"). It would also hamper the ability of adults to access materials appropriate for them when, by choice or necessity, they are accompanied to the library by minors. *See*, *e.g.*, Farrell Decl. ¶ 7 (patron volunteers to aid an Afghan refugee family in Little Rock, with three children ages 6, 8, and 14, and sometimes brings them to the library, where she would no longer be able to search for books for herself while accompanied by these children); *see also* Coulter Decl. at ¶ 9 (noting that the CALS system requires all visitors under 11 to be accompanied by someone 16 or older); Caldwell-Stone Decl. at ¶ 11(d) ("Freedom to Read Foundation's library members are also frequently visited by families that include children too young to be left unattended while a parent or older sibling peruses, either as a matter of library policy or parental judgment.").

Additionally, it would restrict the ability of older minors to peruse, borrow, and purchase materials that the state deems harmful to younger minors. *See* Declaration of Hayden Kirby

("Kirby Decl.") at ¶ 4-5 (Act 372 will block 17-year-old library patron from "finding books I either want to read or might want to read," and Act 372's protections for access to young minors "cannot be done without also restricting access to [materials] by minors of my age," listing a number of young adult books that would likely be removed from the library's general collection under Act 372 because of some passages involving sexual activity).

The uncertainty associated with the vast and breathtaking scope of Act 372 is already affecting library operations. *See* Webb Decl. at ¶ 14 (Executive Director of the Garland County Library notes that he is "waiting for clarity about how Act 372 will operate" before responding to a request from high school students to partner with the library as volunteers through the National Honors Society, given the potential legal risks associated with minor volunteers working at the library under Act 372).

For authors, represented by plaintiff Authors Guild, and creators in the comic book arts, represented by the Comic Book Legal Defense Fund, any of these alternatives would substantially limit their ability to write on topics of their choosing and to have their work available through bookstores and libraries. *See* Declaration of Mary E. Rasenberger ("Rasenberger Decl.") at ¶ ¶ 5-6; Trexler Decl. at ¶ 7. Further, publishers, represented by the Association of American Publishers, cannot fulfill their mission if their books are not available for readers to browse and peruse, nor can publishers commercially succeed if their customers (such as libraries, bookstores, and other retailers) are unable to sell or lend a large amount of constitutionally protected books because of the inability to properly display them. *See* Declaration of Matthew D. Stratton ("Stratton Decl.") at ¶ ¶ 5-6.

2. The Challenge Procedure

The Challenge Procedure will impact libraries, librarians, and patrons in many of the same ways as the Availability Provision. By providing a new, sweeping process for any person to challenge the "appropriateness" of any book in an Arkansas library in order to remove it from the library's general collection, the Challenge Procedure forces the same set of choices upon Arkansas libraries to come into compliance: banning minors from libraries, undertaking prohibitive physical restructuring of their libraries to ensure that "inappropriate" books are not "accessible" to minors, or altogether removing "inappropriate" books from their collections.

The Challenge Procedure imposes those burdens while providing libraries with even less guidance than the Availability Provision, leaving libraries to guess at what books Arkansas would consider "appropriate," or whether "inappropriate" works have been rendered adequately "not accessible to minors." And, in contrast to the current procedures of many libraries, it imposes a requirement that, at the demand of *any* person who feels affected by a book, not just residents or members, library staff undertake a resource-intensive review proceeding for any book in its collection. *See* Johnson Decl. at ¶ ¶ 17-18 (describing FPL's current reconsideration policy and noting that it may only be initiated by Fayetteville citizens with a current library card). This is a particularly troubling feature that will allow even a small, but vocal, number of activists to substantially increase the volume of challenges that libraries expect to see to works in their collections. *See* Webb Decl. at ¶ 22 (noting that recent nationwide reporting has shown that just 11 people have been responsible for over 1,000 book challenges).

Indeed, Mr. Webb notes that Garland County Library has already received a "blanket request" to remove "all materials with LGBTQ characters," and expects to see challenges to "those same books, as well as others dealing with similar themes," made "repeatedly under Act 372." *See*

id. at ¶ 21. Under current policy, his library is able to deny such broad requests without undertaking a resource-intensive re-review of each book. *See id.* But the unlimited challenges invited by Act 372 will impose a far greater burden on libraries, which will be practically impossible to meet. *See* Johnson Decl. at ¶ 19 (noting the practical impossibility of existing staff undertaking timely review of vast quantities of challenged material); Caldwell-Stone Decl. at ¶ 11(c) (noting that a large library "might need an entire department of employees charged with screening materials to be sure they can be placed in the general section of the libraries").

The Challenge Procedure's vague standards, its grant of unfettered discretion to remove titles pending review, the lack of a time limitation on how long those reviews may last, and the unavailability of judicial review of the decision by a library, city, or county to remove a book from the main collection also raises the specter that library patrons will see their access to library materials disappear based on political disagreements about the content of books, and lack any recourse to reverse those decisions. *See* Webb Decl. at ¶ 27 (noting that many "smaller libraries have only a single copy of some of the books that are likely to be challenged").

These concerns are not hypothetical. In January 2023, Crawford County's public library announced that all branches had "moved their LGBTQ children's books out of the children's section into a new area within their respective adult sections." *See* Declaration of John Adams ("Adams Decl.") at ¶ 3, Ex. 1 (citing Tomas Saccente, *Crawford County Library Board Looks to Create New A Public Comment Policy After Increased Engagement At Meetings*, N.W. Ark. Democrat Gazette (May 14, 2023), https://tinyurl.com/29mvtzbp). In defending the Crawford County Library's decision to segregate LGBTQ-themed children's books, Defendant Crawford County, through its attorney, noted the interest of the county in "protecting children from exposure to materials that might harm their innocence" given that "sexualized material was in the children's

section of the libraries." *See id.* at ¶ 4, Ex. 2 (May 23, 2023 letter from Crawford County attorney, Gentry Wahlmeier). He also connected this decision to Act 372's forthcoming requirement that libraries "have a section that is inaccessible to minors" and a process through which quorum courts can "hear appeals on relocation of books within county library systems." *See id.* Crawford County's attorney also advised Crawford County Library that, to comply with Act 372, it should "create a section that is not accessible to those under eighteen (18) and create a policy for challenging physical materials," thereby treating all minors alike, regardless of age or maturity level. *See id.* at ¶ 5, Ex. 3 (May 23, 2023 letter from Gentry Wahlmeier to the Crawford County Library Board).

Nor are these concerns confined to Crawford County. As soon as Act 372 was signed by Governor Sanders, Jennifer Chilcoat, the Director of the Arkansas State Library, sent an email to every public library director in the state and noted that the Challenge Procedure was likely to cause public libraries "heartburn" because there would be "locations where certain citizens are marking their calendars for this law to take effect so they can begin filing scores of challenges." *See* Adams Decl. at ¶ 6, Ex. 4 (April 20, 2023 email from Jennifer Chilcoat to public library directors in Arkansas).[3]

[3] A few hours after sending her initial, extensive candid guidance, Ms. Chilcoat sent a subsequent message, asking the public library directors to "please disregard and delete [her] previous email and any technical assistance it contained." *See id.* She contended that Act 372 required further review, that her "email was premature," and that she would "follow up . . . at a later date with further information, once we have had adequate time to review the law." *See id.* Ms. Chilcoat did not explain which portion of her "technical assistance," in particular, was ill-considered. *See id.* ,*see* ., nor has any replacement guidance been circulated by her office to public library directors.

With the irreparable harms arising from the Availability Provision and the Challenge Procedure in plain view, Plaintiffs now move for a preliminary injunction or, in the alternative, a temporary restraining order, to prevent enforcement of these provisions of Act 372.

II. ARGUMENT

A. Plaintiffs Have Standing

Plaintiffs have standing to bring a facial challenge to the statute. See *Virginia v. American Booksellers Ass'n,*, 484 U.S. 383, 392-93 (1988) ("[I]n the First Amendment context, '[l]itigants ... are permitted to challenge a statute not [only] because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'"). In addition to this chilling effect, Plaintiffs have standing due to their own activities and actual injuries.

To maintain an action in federal court, each Plaintiff must show: (1) an injury-in-fact, i.e., "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent"; (2) the injury is "fairly ... trace[able] to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted). In the context of a First Amendment challenge, the "standing inquiry is lenient and forgiving," particularly with regards to "the doctrine's first element: injury-in-fact." *Dakotans for Health v. Noem*, 52 F.4th 381, 386 (8th Cir. 2022) (internal quotations and citations omitted). "[W]hen . . . threatened enforcement effort implicates First Amendment rights, the [standing] inquiry tilts dramatically toward a finding of standing." *Id.* (internal quotations and citations omitted). In the context of First Amendment litigation, the law does not require Plaintiffs

to "await and undergo a criminal prosecution as the sole means of seeking relief." *Holder v. Humanitarian Law Project.*, 561 U.S. 1, 15 (2010) (internal quotation and citation omitted).

As described above, *supra* § I.B, and documented extensively in the declarations filed in support of this motion, Plaintiff librarians and booksellers have shown that the Availability Provision creates a risk of prosecution and burdens to their ability to conduct ordinary First Amendment protected activities. Plaintiff librarians have made a similar showing regarding the Challenge Procedure. Library patrons and bookstore customers have described their interest in accessing materials that will be moved and removed as a result of the Availability Provision and Challenge Procedure, and the manner in which the Challenge Procedure's imbalanced design denies them a right to petition their government based entirely on their viewpoint.

B. Preliminary Injunction Standard

Federal Rule of Civil Procedure 65 governs the Court's issuance of temporary restraining orders and preliminary injunctions.[4] Whether to issue injunctive relief is a matter addressed to the sound discretion of the trial court. *See Benson Hotel Corp. v. Woods*, 168 F.2d 694, 696-97 (8th Cir. 1948). Preliminary injunctions exist to "prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated." *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 n.5 (8th Cir. 1981) (en banc); *see also Benson*, 168 F.2d at 696 ("[T]he purpose of an injunction . . . [is] to prevent a threatened wrong or any further perpetration of injury, or the doing

[4] A preliminary injunction may only be issued upon notice to the other party. *See* Fed. R. Civ. P. 65(a). A temporary restraining order requires notice to the other party unless "specific facts in ... a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition" and the "movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b). Concurrently with filing, undersigned counsel are providing copies of this Motion to the defendants' counsel.

of any act pending the final determination of the action whereby rights may be threatened or endangered, and to maintain things in the condition in which they are at the time and thus to protect property or rights from further complication or injury until the issues can be determined after a full hearing.").

In determining whether to grant a motion for preliminary injunction, a district court weighs the following four considerations: (1) the threat of irreparable harm to the moving party; (2) the movant's likelihood of success on the merits; (3) the balance between the harm to the movant if the injunction is denied and the harm to other party if the injunction is granted; and (4) the public interest. *Dataphase Sys.*, 640 F.2d at 114. "While no single factor is determinative, the probability of success factor is the most significant." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1133 (8th Cir. 2019) (internal citation and quotation omitted).

In particular, "[w]hen a Plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Phelps-Roper v. Troutman,* 662 F.3d 485, 488 (8th Cir. 2011).*Willson v. City of Bel-Nor, Mo.*, 924 F.3d 995, 999 (8th Cir. 2019); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op).).

C. Plaintiffs are likely to succeed on the merits.

1. Plaintiffs Are Likely to Prove That the Availability Provision Is Unconstitutional

The Availability Provision imposes an unconstitutional prior restraint on the availability, display, distribution, receipt, and perusal of constitutionally protected, non-obscene material to both adults and older minors, is unconstitutionally overbroad, and is unconstitutionally vague.

a) The Availability Provision is an unconstitutional prior restraint.

Prior restraints like the Availability Provision are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). They may stand only when necessary for "the essential needs of the public order." *Carroll v. President & Comm'rs of Princess Ann*, 393 U.S. 175, 183 (1968). Therefore, like any "system of prior restraints," *id.* at 181, the Availability Provision faces a "heavy presumption" of unconstitutionality. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (quoting *Carroll*, 393 U.S. at 181). Where a "scheme" of "prior restraint" creates a "risk of delay, such that every application of the statute creates an impermissible risk of suppression of ideas," courts have "permitted parties to bring facial challenges." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-24 (1990) (internal quotations and citations omitted).

As a content-based restriction on protected, non-obscene speech, the Availability Provision is "presumptively invalid, and the Government bears the burden to rebut that presumption." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks omitted). The Availability Provision must survive strict scrutiny—meaning it must: (1) serve a compelling governmental interest, (2) be narrowly tailored to achieve that interest, and (3) be the least restrictive means of advancing that interest. *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989). The Availability Provision does not meet this standard.

While the state can have an interest in protecting minors from materials that are obscene and harmful as to them, *see Ginsberg v. New York*, 390 U.S. 629, 636-43 (1968), "the government's role in helping parents to be the guardians of their children's well-being is [not] an unbridled license to governments to regulate what minors read and view." *Interactive Digital Software Ass'n v. St. Louis Cnty. Mo.*, 329 F.3d 954, 959-60 (8th Cir. 2003). *See also American Booksellers Association, Inc. v. McAuliffe,* 533 F. Supp. 50 (N.D. Ga. 1981)); *Tattered Cover, Inc. v. Tooley,* 696 P.2d 780 (Colo. 1985); *American Booksellers Association, Inc. v. Superior Court of Los Angeles Cnty.,* 129 Cal. App. 3d 197, 181 Cal. Rptr. 33 (1982). "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975).

Nor can the state's ostensible goal of protecting minors be pursued by means which effectively stifle the access of an older minor or adult to communications he or she is entitled to receive. *See Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) (recognizing that "sexual expression which is indecent but not obscene is protected by the First Amendment" and that the government cannot pursue its interest in protecting minors through an "unnecessarily broad suppression of speech addressed to adults"). Thus, the level of discourse reaching commercial bookshelves and public libraries cannot be limited to what might be appropriate for an elementary school library. As the District Court for the Eastern District of Arkansas has explained, it is unconstitutional to "effectively stifle[] the access of adults and older minors to communications and materials they are entitled to receive and view" just because such material may be "harmful to the youngest of minors." *Shipley III*, 454 F. Supp. 2d at 829-30. Rather, material must be considered in the context of the age and maturity of the specific minor to which the material is sold, shown, or given.

The Availability Provision entirely fails to regulate with the nuance required by the First Amendment, treating all minors under the age of 18 as a monolith. *See, e.g.*, Act 372 § 1(b)(1) (prohibiting furnishing "to a minor an item that is harmful to minors"). Lest there be any doubt about the breadth of this language, the Arkansas Supreme Court definitively interpreted indistinguishable language in a 2003 statute (discussed further below) to refer to all minors, not just younger minors. *See Shipley II,* 195 S.W.3d at 915 ("There is no limitation or qualification to this definition; thus, we construe the phrase 'any person [under the age of eighteen]' to mean 'every person' under the age of eighteen."). While the intended effect of Section 1 may be to prevent examination and perusal by minors of certain "harmful" materials, the unavoidable collateral effect of the law is to severely limit the ability of older minors and adults to examine these protected materials—and to criminally penalize librarians and booksellers who provide such materials to older minors.

The State has known for nearly 20 years that this type of provision is unconstitutional. In 2003, it enacted a statute that made it unlawful to "[s]ell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor, with or without consideration, any material which is harmful to minors." *Id.* at 914 (quoting Ark. Code Ann. § 5-68-502(1)(A) (Supp. 2003). The District Court for the Eastern District of Arkansas came to the same conclusion that should carry the day here—that such a provision is unconstitutional. *Shipley III*, 454 F.Supp.2d at 829-31. The court in *Shipley III* concluded that the law was "overbroad and impose[d] unconstitutional prior restraints on the availability of constitutionally protected, non-obscene materials to both adults and older minors." *Id.* at 831.

Similarly, another judge in this district has previously examined a school district's policy of restricting students' access to certain books in school libraries, such as the *Harry Potter* series,

without a parental permission slip, and found that policy constitutionally infirm. *Counts v. Cedarville School Dist.*, 295 F.Supp.2d 996 (W.D. Ark. 2003). In *Counts*, the Court found that the student's First Amendment rights were burdened by the stigmatization of books she sought to read as well as the procedural barriers erected to her access to those books, and found that those burdens could not stand in the face of clear Supreme Court precedent calling for exacting scrutiny of regulations that suppress, disadvantage, or place differential burdens on speech because of its content. *Id.* at 999-1000, 1002-05 (citing *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994)) (internal quotations omitted). Notably, the *Counts C*ourt came to this conclusion despite the fact that the state's ability to regulate First Amendment activity is heightened within schools. *See id.* at 1003 (noting narrow exceptions to the First Amendment rights of primary and secondary school students to avoid interference with schoolwork or discipline, as well as the "important, delicate, and highly discretionary functions" of boards of education) (citing *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503 (1969) (internal quotations omitted). This Court should reach the same result as the courts in *Shipley III* and *Counts.*

The Availability Provision is a clear violation of Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution. It imposes substantial burdens on libraries and librarians that want to make available and lend non-obscene protected materials, booksellers that want to make available and sell non-obscene protected materials, publishers and authors who want to have their non-obscene protected works available and read, and older minor and adult readers who want to peruse, purchase, or borrow non-obscene protected material.

Moreover, none of the conceivable methods of complying with the Availability Provision described above, *see supra* § I.B.1, allows older minors to access material "harmful" to younger minors but constitutionally protected as to them. None of these methods give adults unrestricted

access to material "harmful" to minors of any age but constitutionally protected as to them. And none of these methods give libraries and booksellers a reasonable way to offer to adults and older minors the constitutionally protected works they desire and that libraries and booksellers are entitled to offer. The Availability Provision therefore must be enjoined.

b) The Availability Provision is both constitutionally overbroad and vague.

A statute that burdens otherwise protected speech is facially invalid when that burden is not only real, but "substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Put another way, the overbreadth doctrine prohibits the Government from restricting even unprotected speech where "a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coal.*, 535 U.S. at 237. An overbreadth analysis often engages in the same questions as the narrow tailoring prong of a strict scrutiny analysis. *See ACLU v. Ashcroft*, 322 F.3d at 266 ("Overbreadth analysis—like the question whether a statute is narrowly tailored to serve a compelling governmental interest—examines whether a statute encroaches upon speech in a constitutionally overinclusive manner.").

So, too, may overbreadth challenges overlap substantially with Fourteenth Amendment void-for-vagueness challenges. *See Kolender v. Lawson*, 461 U.S. 352, 358 n. 8 (1983) ("[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines."). A regulatory scheme is void for vagueness if it "forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application," or if it enables "arbitrary and discriminatory enforcement" by "impermissibly delegat[ing] basic policy matters to [government officials] for resolution on an ad hoc and

subjective basis." *Stephenson v. Davenport Cmty. School Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1997) (internal citations and quotations omitted).

To avoid unconstitutional vagueness, regulations must define their prohibitions and requirements "with sufficient definiteness that ordinary people can understand" what is required, and "establish standards to permit [government officials] to enforce the law in a non-arbitrary, non-discriminatory manner." *Woodis v. Westark Cmty. Coll.*, 160 F.3d 435, 438 (8th Cir. 1998) (citations omitted). Where "the literal scope of the [] regulation is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Stephenson*, 110 F.3d at 1308-09 (internal quotations and citations omitted); *see also Reno v. ACLU*, 521 U.S. at 871-72 (1997) (where the vagueness arises amidst a "content-based regulation of speech[,] the vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech"). Imprecise statutory terms that leave "grave uncertainty" about how to understand their scope are void for vagueness, even if some parts of what the terms encompass might be "straightforward" exercises of government power. *Johnson v. United States*, 576 U.S. 591, 597, 602 (2015) ("[O]ur holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."). "[T]he failure to define the pivotal term of a regulation can render it fatally vague," particularly where common tools courts use to interpret imprecise terms, such as "the common usage of statutory language, judicial explanations of its meaning, and previous applications of the statute to the same or similar conduct," fail to provide necessary clarity. *Stephenson*, 110 F.3d at 1309 (internal quotations and citations omitted).

The Availability Provision makes it a crime "if, knowing the character of the item involved, the person knowingly. . . furnishes, presents, provides, makes available, gives, lends,

shows, advertises, or distributes to a minor an item that is harmful to minors." Act 372 § 1(b)(1). As an initial matter, there can be no dispute that the Availability Provision implicates constitutionally protected expression, and therefore must provide heightened specificity and clarity in its definitions and in its protections against arbitrary enforcement. *See Stephenson*, 110 F.3d at 1308-09.

The Availability Provision's broad approach to criminalizing those responsible for minors' access to ostensibly harmful materials cannot meet these heightened standards. Many of these terms are obviously overbroad. The terms "presents" and "shows" encompass substantially the same conduct as the term "display," which was struck down as overbroad in *Shipley III*. 454 F. Supp. At 831.

The prohibition on the advertisement of material harmful to minors is also obviously overbroad. It would prohibit an Arkansas bookseller from even advertising a book that would arguably be harmful to a young minor on TV or in a local paper where someone under 18 may see it. But as the Supreme Court has explained, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71, 74 (1983) (holding unconstitutional a ban on mail advertisements that would expose children to "sensitive and important subjects such as birth control"). "[A] restriction of this scope is more extensive than the Constitution permits," because the government "may not reduce the adult population to reading only what is fit for children." *Id.* at 73 (internal citation and quotation omitted).

Finally, the prohibition on "making available" harmful material goes even beyond the unconstitutional 2003 statute, establishing a prohibition far too vague to provide adequate notice of what conduct is prohibited. For example, does a library that segregates material to an adults-

only room but does not lock the door or staff its entrance to verify the age of entrants run afoul of the Availability Provision because they have "made available" harmful material? If a library knowingly lends a book to a patron who is accompanied by a minor, and the patron then gives the book to the minor, has the library "made it available"?

A comparison to Arkansas's current statute regulating the sale, lending, or display of material harmful to minors illustrates just how troublingly vague the Availability Provision is. That statute makes clear that "a person is deemed not to have displayed material harmful to minors if," inter alia, the material is behind "blinder racks" that obscure "the lower two-thirds of the material." Ark. Code 5-68-502(a)(1)(B) (2015). The new Availability Provision contains no such clear guidance or safe harbor. Instead, it leaves libraries with guesswork as their only tool to determine whether they are complying with Arkansas law, resulting in precisely the sort of "grave uncertainty" that renders a statute unconstitutionally vague. *Johnson*, 576 U.S. at 597.

The Availability Provision was not crafted with the careful, precise, and clear tailoring of language that due process demands when imposing criminal penalties, particularly in the First Amendment context, and must be struck down.

2. The Challenge Procedure is unconstitutional.

Alongside Section 1's threats of criminal prosecution for individual librarians, Arkansas has in Section 5 created a sweeping, vague, and unaccountable new Challenge Procedure that would drown Arkansas libraries in an endless and virtually standardless cycle of reviews and removals. This Procedure would empower objectors to achieve via administrative mischief the objectives that they may struggle to achieve through direct censorship, while denying supporters

of a book any voice in the administrative process or any recourse via the judiciary. Like Section 1, the Challenge Procedure is a clear affront to the First Amendment and the Due Process Clause.

On its face, Act 372's Challenge Procedure violates the Constitution in four separate ways: First, the Challenge Procedure's "appropriateness" and "inaccessible to minors" standards are unconstitutionally vague. Second, the Challenge Procedure's sweeping approach to identifying material for removal from libraries' general collections cannot survive strict scrutiny. Third, the Challenge Procedure fails to comply with longstanding precedent requiring state censorship procedures to be subject to prompt judicial review. Finally, the Challenge Procedure unconstitutionally enshrines viewpoint discrimination in its guarantee of preferential access to parties favoring restrictions.

a) The Challenge Procedure is void for vagueness.

Like the Availability Provision, the Challenge Procedure is unconstitutionally vague, particularly in light of the heightened protections against vagueness that attach to attempts to regulate protected expression. *See supra* § II.C.1.b. It is excessively vague in its definition of the content it purports to reach, and it is excessively vague in describing the steps libraries must take to be in compliance with Act 372. *See, e.g.*, Adams Decl. ¶ 6, Ex. 4 (email from Ms. Chilcoat, noting that the Challenge Procedure contains "several terms that we (who are not attorneys!) don't quite know how to interpret," including "affected" and "withdrawn").

The Challenge Procedure requires libraries to evaluate "the appropriateness of material available in the county or municipal library." Act 372 § 5(c)(1). "Appropriateness" is not a term that is defined in the statute, nor does the statute reference a definition anywhere else in Arkansas laws. Nor does there appear to be any caselaw interpreting the term "appropriate" within the context of the long line of First Amendment jurisprudence guiding the regulation of obscenity. The

use of such a vague, ambiguous, and undefined "pivotal term" in the Challenge Procedure renders the scheme "fatally vague." *Stephenson*, 110 F.3d at 1310.

The Challenge Procedure's process requiring the restriction of "inappropriate" books must fail for the same reasons that the prohibition on "gang related symbols" in *Stephenson* failed. *See id.* at 1305, 1310-11. The Procedure leaves library patrons and staff with no meaningful guidance as to what constitutionally protected expression may be deemed inappropriate, and, perhaps by design, vests officials with "unfettered discretion" to restrict access to such materials. *Id.* at 1310. Such limitless discretion is particularly concerning when it comes to the sudden removal of books which have long been deemed appropriate for inclusion in libraries' collections. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 204 (2003) (finding that "libraries collect only those materials deemed to have requisite and appropriate quality" and "seek to provide materials that would be of the greatest direct benefit or interest to the community") (internal citations and quotations omitted); *cf. Stephenson*, 110 F.3d at 1310 (noting that there was "no evidence that District students had perceived Stephenson's tattoo as a gang symbol or complained about the tattoo during the thirty months Stephenson had it on her other hand").

The Challenge Procedure's requirement that inappropriate books be "relocated . . . to an area that is not accessible to minors" is similarly impermissibly vague. *See* Act 372 § 5(c)(11)(A). Act 372 does not define what makes a space "accessible to minors," leaving libraries in a position of guessing what level of security is necessary to meet the law's requirements. Indeed, at one point the Challenge Procedure confusingly refers to materials being "withdrawn" rather than relocated, Act 372 § 5(c)(7)(B)(i) ("Material being challenged [s]hall not be withdrawn solely for the viewpoints expressed within the material"), a complication noted in the State Librarian's quickly-

withdrawn guidance to libraries, in which she recommended that libraries "discuss with your board and attorney the ramifications of this wording."Adams Decl. ¶ 6, Ex. 4

Many potential measures could reduce the access minors have to "inappropriate" materials, but what is necessary to make them legally inaccessible? Is it sufficient to label sections of bookshelves "adults-only," or must they be segregated in a separate room? Must libraries lock them behind closed doors and have library staff physically limit entry and seek age verification for patrons entering the area? Depending on how strictly the vague term "an area that is not accessible to minors" is interpreted, libraries may need to spend a million dollars or more to come into compliance. *See* Webb Decl. at ¶ 11; *see also supra* at I.B.1. And what if, despite a library's best efforts, a minor accesses a prohibited book? The statute provides no clarity as to whether a library could be found in violation.

As above, a comparison to current Arkansas law regulating the distribution of material harmful to minors is instructive. *See supra* § II.C.1.b (examining Ark. Code 5-68-502(a)(1)(B)) (2015). The Challenge Procedure targets a broader range of material with far less clarity, piling vague term upon vague term and leaving libraries with exceedingly little guidance.

b) The Challenge Procedure is a content-based restriction that cannot survive strict scrutiny.

Like the Availability Provision, the Challenge Procedure is also a content-based restriction on expression and is therefore "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). The fact that the Challenge Procedure may result in the movement of library materials to an area inaccessible to minors, rather than in the removal of the materials completely, does not immunize it from First Amendment scrutiny. *See*, *e.g.*, *Counts*, 295 F.Supp.2d at 999 (requiring parental permission slip to check out certain books from school

library was an impermissible burden on student's First Amendment rights). In *Sund v. City of Wichita Falls, Tex.,* 121 F.Supp.2d 530 (N.D. Tex. 2000), a city adopted a rule allowing 300 library card holders the right to have books removed from the children's section of the municipal public library and placed in the adult book section. Rejecting the city's argument that the First Amendment was not implicated because the books were moved rather than removed, the district court found a "significant burden on the Library patron's ability to gain access to the Books." *Id.* at 541. The burden here is even greater than the one addressed in *Sund,* because the materials will not be in a library's main adult collection, but rather a separate, stigmatized area inaccessible to minors.

Established precedent makes clear that the Challenge Procedure unavoidably fails to meet its burden for one of two reasons: either (1) the Challenge Procedure does not serve a compelling interest, or (2) the Challenge Procedure ostensibly serves a compelling interest but is not narrowly tailored. Either way, it fails strict scrutiny.

As discussed above, if the Challenge Procedure restricted its reach solely to materials that are obscene as to minors, then it might conceivably further a legitimate interest. But, by its own terms, the Challenge Procedure does not review for obscenity; its prohibitions turn on library material's "appropriateness." Act 372 at § 5(c)(1). If the Challenge Procedure term "appropriateness" extends to materials that are not *obscene* – even to young children – then it does not serve a compelling state interest. It is immaterial that the Defendants or private citizens find the materials' content or viewpoints offensive, immoral, or otherwise objectionable, because the First Amendment protects such materials. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

The Supreme Court recently reinforced this principle in *Iancu v. Brunetti*, in which the Court struck down the Lanham Act's prohibition on "immoral or scandalous" trademarks, finding that term to be inherently and facially "viewpoint-based" for favoring ideas "aligned with conventional moral standards" and disfavoring ideas "hostile to them." 139 S. Ct. 2294, 2299-2300 (2019). The government may not justify viewpoint-based restrictions on protected speech by claiming to prevent harms to minors; "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik*, 422 U.S. 213-14.

Obscenity falls within the "well-defined and narrowly limited classes of speech" that may be restricted without violating the First Amendment, *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 791 (2011) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)), but "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated," *id.* at 791. Yet that is exactly what the Challenge Procedure seeks to do.

If the Legislature had intended to confine the Challenge Procedure's reach to materials that are obscene to minors, then it knew how to do so: it could have incorporated the "harmful to minors" standard of Ark. Code § 5-68-501 (2019), which tracks the definition of obscenity as to minors approved of by *Ginsberg*, 390 U.S. at 642. Instead, it chose to proscribe an indefinite, broader category that the Supreme Court has never sanctioned, and that smacks of enabling the sort of viewpoint discrimination that courts have not tolerated.

While the Challenge Procedure clearly reaches beyond the permissible scope of unprotected speech such as obscenity, even if the Challenge Procedure's "appropriate" standard could be limited to restricting younger minors' access to materials obscene to them, it would fail

strict scrutiny because it is not narrowly tailored. Rather than narrowly targeting young minors' access to materials obscene to them, the Challenge Procedure also inhibits older, more mature minors and adults from accessing these materials, which are not obscene as to them.

Specifically, when books or other library materials are deemed inappropriate for young children, they are segregated in areas accessible only to adults. *See* Act 372 at § 5(c)(11)(A). As described above, this approach discourages adult library patrons from visiting a stigmatized area of the library and this deprives all access to older, more mature children for whom the materials are not obscene. This violates the First Amendment. *See Butler v. State of Michigan*, 352 U.S. 380, 383 (1957) ("We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."); *see also Shipley III*, 454 F. Supp. 2d at 831 (censorship scheme was unconstitutional because it "impose[d] unconstitutional prior restraints on the availability and display of constitutionally protected, non-obscene materials to both adults and older minors").

The Challenge Procedure segregation requirement is precisely what Judge Eisele indicated would have rendered a segregation requirement invalid in *Shipley III*. The 2003 statute created a safe harbor under which "a person shall be deemed not to have displayed material harmful to minors if the lower two-thirds (2/3) of the material is not exposed to view and [is] segregated in a manner that physically prohibits access to the material by minors." *Shipley II*, 195 S.W.3d at 919. On a set of certified questions, the Arkansas Supreme Court in *Shipley II* was presented with alternative interpretations of the segregation requirement in the challenged statute. The *Shipley* plaintiffs contended that the challenged statute required booksellers to "create a separate room or physically segregated area, with one or more entryways, with entry limited to adults either through

technology or human control." *Shipley II*, 195 S.W.3d at 920. The Arkansas Supreme Court, however, read it more narrowly, concluding "that the 'safe harbor' provision requires only that some physical obstacle stand between minors and the area where prohibited material is displayed, so that minors have no access to such material." *Id.* Under that interpretation, the federal court concluded that, although a "close[ ] question," the segregation requirement did not facially violate the Constitution. *Shipley III*, 454 F. Supp. 2d at 831.

Unlike the 2003 statute, the statute here requires more than simply "some physical obstacle" between minors and "inappropriate" books. Rather, it requires *relocation* of these books to an *area* that is not accessible to minors, Act 372 § 5(c)(11)(A), closer to the interpretation put forward by the *Shipley* plaintiffs. As described above, the burden of this requirement is likely to be substantial, and potentially impossible for libraries to comply with. And the creation of an "adults-only" room would create its own needless burdens on the ability of adults and older minors to access materials similar to the burdens struck down in *Counts*. 295 F. Supp. 2d at 1005. This failure to serve its ostensible purpose through a narrowly tailored approach renders the Challenge Procedure unconstitutional. *See Butler*, 352 U.S. at 383.

c) The Challenge Procedure lacks a mechanism for judicial review.

As a prior restraint, the Challenge Procedure faces a "heavy presumption" of unconstitutionality. *Org. for a Better Austin*, 402 U.S. at 419. By erecting a process that exists solely to restrain dissemination and availability of books and other library materials, the Challenge Procedure "freezes" First Amendment activity—the "immediate and irreversible" result of any prior restraint. *Nebraska Press Ass'n*, 427 U.S. at 559. That the Challenge Procedure provides for *withdrawing* books and other materials from a library's general collection (rather than preventing

their inclusion in the first place) is irrelevant to library patrons who hope to access the materials; it *restrains* their access *prior* to viewing, reading, or otherwise consuming the materials.

Whenever a state system of censorship imposes a prior restraint on expression, it must provide for prompt judicial review. Because the protection of free expression requires sensitive, legally intensive analysis, state censors may not remove speech from public view "in a manner which would lend an effect of finality to the censor's determination" about a particular work's protection under the First Amendment. *Freedman v. State of Md.*, 380 U.S. 51, 58 (1965); *see also City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.,* 541 U.S. 774 (2004) (noting the heightened need for special procedural rules to provide speedy access to judicial review where the state seeks to impose content-based restrictions using subjective, discretionary criteria). The proper venue for such a determination is the judiciary: "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression," *Freedman*, 380 U.S. at 58 (collecting cases), "[b]ecause the censor's business is to censor" and he therefore "may well be less responsive than a court" to First Amendment interests, *id.* at 57. Moreover, the burden of showing that the expression is unprotected and may be silenced "must rest on the censor," and the censor must, "within a specified brief period," either allow the expression "or go to court to restrain [it]." *Id*. at 58-59; *see also Teitel Film Corp. v. Cusack*, 390 U.S. 139, 142 (1968) (holding censorship procedures are unconstitutional in "[t]he absence of any provision for a prompt judicial decision by [a] … court").

The Challenge Procedure does none of the above. It provides no mechanism for judicial review, let alone a path to a "prompt judicial decision." There is no "specified brief period" within which the Library Committee must make a decision. The only review the Procedure does contemplate is by the "governing body" of the municipality or county where the library is located,

whose decision is "final." Act 372 at § 5(c)(12)(C)(ii). Even if executive review could take the place of judicial review, such appeals are tilted in favor of removal: appeal to the governing body is available only where the Library Committee *declines* to remove a book from library shelves, Act 372 at § 5(c)(12)(A), thus reversing *Freedman*'s directive that the decision to *restrict* a work must be appealable. *Freedman*, 380 U.S. at 51. The Challenge Procedure provides no mechanism for challenging a decision to restrain expression, and it places no burden on the "governing body" as censor to justify to the public or to a court its decision to impose a final restraint on speech.

The Challenge Procedure therefore builds in Potemkin procedural protections when a challenge is taken up by the library committee, then ultimately puts unreviewable authority over a content- or viewpoint-based decision to a simple up-or-down vote by the governing body. Like the flawed city resolution at issue in *Sund,* the Challenge Procedure "actually facilitates an infinite number of content- and viewpoint-based speech restrictions," 121 F. Supp. 2d at 549, and does so without contemplating any involvement by the judiciary.[5]

Even where a challenge is denied and a book retained, the statute provides no limit on the number of times a book may be challenged, resulting in an indefinite threat of suppression. The Challenge Procedure therefore fails to "assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license" for a book to remain on shelves, *Freedman*, 380 U.S. at 59, and precludes judicial determination of whether an item may be removed consistent with the First Amendment. This process is unaccountable to the judiciary

[5] The lack of judicial review in the Challenge Procedure is even more troubling when viewed in connection with the Availability Provision. A local governing body's "final" decision that a library collection contains "inappropriate" material, *see* Act 372 § 5(c)(12)(C)(ii), will be easily confused for—or, worse, readily used as—evidence that the library's employees furnished "harmful" material available to minors, in violation of the Availability Provision. *See, e.g.*, Adams Declaration at ¶ 4, Ex. 2 (Wahlmeier letter discussed *supra* at I.B.2, connecting the Challenge Procedure to "protecting children from exposure to materials that might harm their innocence").

and designed with a thumb on the scale in *favor* of restriction. It shifts the burden of bringing the issue before the court (and thus indirectly shifts the burden of persuasion) from the government imposing restraint to the party seeking to lift it. That is precisely what the Constitution forbids.

Freedman is instructive on this point. In that case, the Supreme Court struck down a censorship system even though it included a mechanism for judicial review because 1) the censorship system required the party advocating in favor of free expression to "assume the burden of instituting judicial proceedings"; 2) once censored, the expression would be "prohibited pending judicial review, however protracted"; and 3) there was "no assurance of prompt judicial determination." *Id.* at 59-60. The Challenge Procedure, by contrast, has no mechanism for judicial review at all (let alone one that properly places the burden on the censor), and provides for the removal of books from shelves during review, *see* Act 372 § 5(c)(2) ("The county or municipal library shall decide if material being challenged shall remain available throughout the challenge process."), with no corresponding "pending judicial review" and "no assurance" of alacrity during the library's review. *Freedman*, 380 U.S. at 60. It also impermissibly "places 'unbridled discretion in the hands of [] government'" and, during the library's review, provides the government with "unlimited time within which" to decide whether it will suppress expression, which "creates the risk of indefinitely suppressing permissible speech." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-27 (1990).

Because the Challenge Procedure, like the system the Court struck down in *Freedman*, "fails to provide adequate safeguards against undue inhibition of protected expression," it thus constitutes "an invalid [prior] restraint." *Freedman*, 380 U.S. at 60.

d) The Challenge Procedure discriminates on the basis of viewpoint.

The Challenge Procedure further offends the First Amendment by providing different rights to individuals based on the content of their viewpoint. The First Amendment's "protections are at the core of our democratic society" and "include the ability to petition the government," consistent with our nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 686 (8th Cir. 2012) (internal quotations omitted). "[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based," and the courts "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content." *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642-43 (1994). By actively empowering and providing formal procedural protections to parties petitioning their government to restrict access to materials in libraries while failing to provide any similar avenue for parties favoring access to petition the government, the Challenge Procedure fails to ensure equal treatment of these opposing views. *Cf.*, *e.g.*, *Boos v. Barry*, 485 U.S. 312, 318-21 (1988) (finding that a law that prohibited picketing on sidewalks in front of foreign embassies where the messages on the signs were critical of those governments—but would allow picketing if the messages were favorable—constituted a content-based restriction subjected to strict scrutiny).

The Challenge Procedure requires county and municipal libraries to adopt written policies for challenges against material's inclusion within a library's collection. The policy must allow "[a] person affected by the material" to "challenge the appropriateness of material available in the . . . library." Act 372 at § 5(c)(1). Following a meeting between the librarian and the "affected" person, *id.* at § 5(c)(3), the librarian must assemble a committee of library personnel to review materials

in response to a challenge. *Id.* at § 5(c)(6). The "affected" person must be permitted to present their request to the committee, *id.* at § 5(c)(9), after which the committee "shall vote to determine whether the material being challenged shall be relocated within the library's collection to an area that is not accessible to minors under the age of eighteen (18) years," *id.* at § 5(c)(11)(A).

If the committee votes in favor of the challenge, then the process ends without any recourse for library patrons aggrieved by the material's segregation. Only if the committee rejects the challenge is there a right of review, and only for those who seek removal—not for those seeking retention. Specifically, if the librarian's committee votes against a challenge, then "the person who submitted the request" for removal may appeal "to the governing body of the county or city." *Id.* at § 5(c)(12)(A). Once the appeal is received, the county or city's executive head must present the challenge to the county or city's governing body, and may include a recommendation for how to rule. *Id.* at § 5(c)(12)(B)(ii). The challenge is then decided by the members of the governing body, which must "review" the challenge and make a decision within 30 days but need not hear from a book's supporters in any fashion before rendering a decision to remove material from a library's main collection. *See id.* at § 5(c)(12)(C)(i). Act 372 describes the resulting decision as "final." *See id.* § 5(c)(12)(C)(ii).

In sum, people who hold the view that a book should be withdrawn from the library's collection or segregated have a right to file a formal challenge, meet with the library, and appeal to the local government. But people who hold the view that a book should *not* be withdrawn have no such rights. They do not even have an opportunity to comment in the process or hear the reasons for withdrawing a book. If you oppose a book, Act 372 gives you extensive procedural rights to

petition the government; if you support a book, Act 372 does not allow you to be heard.[6] Such viewpoint discrimination cannot survive First Amendment scrutiny. *Turner*, 512 U.S. at 642.

D. Irreparable Harm

In addition to having a high likelihood of success on the merits, Plaintiffs will suffer irreparable harm if the preliminary injunction is not granted because the Availability Provision and Challenge Procedure abridge their First Amendment rights. *Phelps-Roper,* 662 F.3d at 488. No legal remedy exists which could compensate for their loss of protected constitutional rights. *Nat'l People's Action v. Village of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990).

As described extensively, above, Plaintiffs' First Amendment rights stand to be impacted in a variety of ways should the challenged provisions of Act 372 go into effect, including librarians and booksellers facing prosecution for failing to censor constitutionally-protected speech, libraries and bookstores struggling to comply with the vague mandates of the Availability Provision and Challenge Procedure, and bookstore and library patrons being faced with a rapid erosion in their access to constitutionally-protected materials, without procedural protections allowing them to advocate for retention of challenged materials.

These "loss[es] of First Amendment freedoms . . . unquestionably constitute[] irreparable injury," and the "public interest" always favors the "protect[ion of] constitutional rights." *Nixon*, 545 F.3d at 690.

[6] As with the lack of judicial review, *see supra* n. 5, Plaintiffs' concerns about the Challenge Procedure's viewpoint discrimination are heightened by the proximity of that process to the Availability Provision's criminal liability. Specifically, Plaintiffs are concerned that a local governing body's "final" decision that a library collection contains inappropriate material, *see* Act 372 § 5(c)(12)(C)(ii), will be used as evidence that the employees of that library made "harmful" material available to minors, in violation of the Availability Provision. This Court should not permit the Challenge Procedure's one-sided process to jeopardize Arkansas librarians' liberty in this manner.

E. Balance of the Equities and Public Interest

When the government opposes the issuance of a preliminary injunction, the final two factors—the balance of the equities and the public interest—merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance of the equities and public interest here decidedly favor the Plaintiffs, given the infringement on their First Amendment rights. *See Troutman,* 662 F.3d at 488. If a preliminary injunction is not granted, enforcement of the Availability Provision and Challenge Procedure will prevent Plaintiffs from exercising their First Amendment rights. Defendants have no legitimate interest in enforcing a statute that violates the First Amendment, so the principal public interest at stake here is the constitutionally guaranteed right to free expression.

By contrast, Defendants will suffer no harm if the preliminary injunction is granted. Existing state laws prohibit evils associated with displaying or furnishing materials harmful to minors. *See* Ark. Code Ann. § 5-68-502. Laws the State considered adequate for decades will remain on the books throughout this litigation, mitigating any conceivable harm to whatever interests the State purports to advance.

III. CONCLUSION

The Availability Provision and Challenge Procedure violate the First Amendment on their face. Plaintiffs respectfully request that this Court (1) upon hearing, find that the Availability Provision and Challenge Procedure violate the First and Fourteenth Amendments and issue a Preliminary Injunction pending final adjudication of this litigation; or, in the alternative, grant a Temporary Restraining Order barring the application of the Availability Provision and Challenge Procedure pending a decision on Plaintiffs' Motion for a Preliminary Injunction; and (2) award any other relief that the Court may deem just and proper to vindicate the rights of the Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2023, a copy of the foregoing was served upon all counsel of record contemporaneously with its filing in the CM/ECF system, and was sent by e-mail and United States mail, postage prepaid, to:

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