IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

READ FREELY ALABAMA, *et al.*, **Plaintiffs,** **v.** **AUTAUGA-PRATTVILLE PUBLIC LIBRARY BOARD OF TRUSTEES,** **Defendant.**	**Civil Case No. __________**

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Until I feared I would lose it, I never loved to read.
One does not love breathing.
--*Scout Finch,* To Kill a Mockingbird

A public body "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). The Autauga-Prattville Public Library Board of Trustees is doing so anyway. The Board has enacted a set of policies that prevent both children and adults from accessing wide swaths of books and other library material in violation of the First Amendment. These policies facially shun speech because of its content, overbroadly restrict access to material far beyond what the Supreme Court permits, and operate through vague standards ripe for arbitrary administration.

Plaintiffs Samantha Diamond, her children J.D. and E.D., Amber Frey, and C.C. are patrons, library card holders, and supporters of the Autauga-Prattville Public Library ("APPL"). Plaintiff Read Freely Alabama is a grassroots organization dedicated to fighting censorship in public libraries and promoting inclusive library collections. And Plaintiff Alabama Library Association is a nonprofit that supports Alabama librarians and their libraries. Each has been injured by the Board's new policies. Through those policies, constitutionally protected books and other library materials are subject to removal on unconstitutional grounds. The policies should be preliminarily enjoined to prevent further irreparable injury.

BACKGROUND

The Autauga-Prattville Public Library Board of Trustees (the Board) is the "policy and planning body" for APPL's four libraries.[1] The Board thus claims "the right to exercise discretion over all library material," and that "[a]ll library staff members, including the Library Director, are accountable to the [Board] in matters related to collection development."[2]

As of November, APPL's selection criteria stated:

> Library staff strives to utilize professional judgment and expertise in making collection development decisions, including decisions about choosing titles, identifying quantities for purchase, and selecting locations for materials. Anticipated demand, community interests, strengths and weaknesses of the existing collections, system-wide availability, physical space limitations, acquisitions procedures, and available budgets are all factors taken into consideration. Highest selection priority is given to those materials in all formats that have the broadest appeal.
>
> Selection of books or other library material shall be made on the basis of their value of interest, information, accuracy of the information, comprehensiveness, and enduring significance. No book or library material shall be excluded purely because of race, nationality, or political or social views.[3]

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[1] *See* Autauga-Prattville Public Library, *Board of Trustees*, https://appl.info/Pages/Index/214608/board-of-trustees (last visited May 6, 2024); Compl. ¶ 15.

[2] *See* Ex. A at 16, 17; Compl. ¶ 15.

[3] Ex. B at 16 (APPL policies as of November 2023).

On February 8, 2024, the Board adopted a new policy governing APPL's acquisition of material.[4] This Selection Criteria Policy, which was added on to the previously existing criteria described above, states:

> For the avoidance of doubt, the library shall not purchase or otherwise acquire any material advertised for consumers ages 17 and under which contain content including, but not limited to, obscenity, sexual conduct, sexual intercourse, sexual orientation, gender identity, or gender discordance. Age-appropriate materials concerning biology, human anatomy, or religion are exempt from this rule.[5]

Although the Selection Criteria Policy appears on its face to apply solely to the acquisition of new library materials, two other APPL policies extend its reach to reviewing materials already in APPL's collection. First, APPL's Weeding Policy provides that APPL should "review[] and evaluate[]" library materials "at regular intervals to determine if they are to remain in the current collection"—considering, as a factor, whether they are aligned with the Selection Criteria Policy.[6] In this same Policy, the Board also "reserves the right to exercise discretion over weeding of materials."[7] Both the Weeding Policy's incorporation of the Selection Criteria Policy and the Board's asserted power over weeding practices were added to the library's policies in the Board's February 2024 revisions.[8]

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[4] *See* Compl. ¶ 19; Ex. A at 16.

[5] *See* Ex. A at 16; Compl. ¶ 20.

[6] *See* Ex. A at 17; Compl. ¶ 22.

[7] *See* Ex. A at 17.

[8] Before the February 2024 adoption of the new Selection Criteria Policy, APPL's Weeding Policy read, in full: "Both print and non-print materials should be reviewed and evaluated at regular intervals to determine if they are to remain in the current

Second, the Policies set forth a challenge procedure under which a resident of Autauga County or the City of Prattville may submit a "Request for Reconsideration form" that triggers a review process of library material, during which that material "will be held in reserve" and made inaccessible to library patrons.[9] During such a review, the Board requires a "Review Committee" to "[d]etermine the extent to which the [challenged] material supports the selection criteria."[10] Thus, to the extent that APPL's collection contains materials that would fall under the Selection Criteria Policy, they are presently subject to removal. Before February 2024, challenged books remained on the shelves during a review.[11]

Contemporaneously with its adoption of the Selection Criteria Policy, the Board also enacted a new Library Cards for Minors Policy.[12] The Library Cards for Minors Policy States:

> Children under the age of 18 shall receive library cards that are especially designated for minors. These cards will not permit the checkout of material with content containing, but not limited to, obscenity, sexual conduct, sexual intercourse, sexual orientation, gender identity, or gender discordance. Age-appropriate materials concerning

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collection. This final step in the selection process ensures the library collection will contain materials that are factual and current; useless materials are to be discarded. The librarian should consider space, budget, and user needs when deciding how much and how often to weed. The librarian will decide how to best dispose of discarded materials." Ex. B at 16.

[9] *See* Ex. A at 36; Compl. ¶ 23.

[10] *See* Ex. A at 37; Compl. ¶ 23.

[11] Ex. B at 35.

[12] The previous policies did not provide for specialized library cards for minors. *See* Ex. B at 5–7.

> biology, human anatomy, or religion are exempt from this rule.[13]

Each of these policies are now "the established operational policies of the Library."[14]

ARGUMENT

The Selection Criteria Policy (both as to book acquisitions and to its role in the removals of existing materials) and the Library Cards for Minors Policy (discussed together as the Policies) each violate the First Amendment of the United States Constitution in three ways. First, both Policies are overbroad. Second, they each restrict access to constitutionally protected speech on the basis of its content. Third, each Policy is vague. Each of these reasons requires preliminarily enjoining the two Policies.

A preliminary injunction requires the showing of four factors: "(1) a substantial likelihood of success on the merits; (2) that the preliminary injunction is necessary to prevent irreparable injury; (3) that the threatened injury outweighs the harm the preliminary injunction would cause the other litigant; and (4) that the preliminary injunction would not be averse to the public interest." *Chavez* v. *Fla. SP Warden*, 742 F.3d 1267, 1271 (11th Cir. 2014). "When ruling on a preliminary injunction, 'all of the well-pleaded allegations [in a movant's] complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction are taken as true.'" *Alabama* v. *U.S. Dep't of Commerce*, 546 F. Supp. 3d 1057, 1063 (M.D. Ala. 2021)

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[13] *See* Ex. A at 5; Compl. ¶ 27.

[14] *See* Ex. A at 2; Compl. ¶ 17.

(quoting *Elrod* v. *Burns*, 427 U.S. 347, 350 n.1 (1976)). All four of these factors weigh in favor of preliminarily enjoining the Policies here.

I. Plaintiffs are likely to succeed on their claims.

Plaintiffs are likely to succeed in their facial challenges to the Policies on three separate and independent grounds: the Policies are overbroad, they discriminate on the basis of content, and they are vague. Furthermore, Plaintiffs have standing to vindicate those claims.

A. Plaintiffs have standing.

Plaintiffs must allege three factors to establish standing: injury in fact, a causal connection between that asserted injury and the challenged action of the defendant, and that the injury can be redressed by a favorable decision. *See, e.g.*, *Speech First, Inc.* v. *Cartwright*, 32 F.4th 1110, 1119 (11th Cir. 2022) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). "These requirements are 'somewhat more lenient' in the First Amendment context," *Singleton* v. *Taylor*, Case No. 21-12583, 2021 WL 3862001, at *6 (M.D. Ala. Aug. 25, 2021) (quoting *Bischoff* v. *Osceola County, Florida*, 222 F.3d 874, 883 (11th Cir. 2000)), particularly given "the liberal standing requirements for overbreadth challenges," *Solomon* v. *City of Gainesville*, 763 F.2d 1212, 1214 (11th Cir. 1985). Although this Court need satisfy itself that only one plaintiff has standing, *see, e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 446 (2009); *Jones* v. *Governor of Florida*, 950 F.3d 795, 805–06 (11th Cir. 2020), all meet the requirements here.

Injury-in-Fact: Individual Adult Plaintiffs. The individual adult Plaintiffs (Ms. Frey and Ms. Diamond) are directly injured because their ability to access constitutionally protected material is and will be infringed by the Selection Criteria Policy. *See, e.g.*, *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 161–62 (2014) (finding standing where plaintiff alleged "an intention to engage in a course of conduct arguable affected with a constitutional interest" and that conduct was "arguably proscribed by the statute they wished to challenge" (internal quotation marks, citations, and alterations omitted)); *Fayetteville Public Library* v. *Crawford County, Arkansas*, Case No. 23-5086, 2023 WL 4845636, at *10 (W.D. Ark. July 29, 2023) (finding that library patrons had standing where complaint alleged "a likelihood that libraries . . . may eliminate many, if not all, books from their collections that contain any sexual content"). As detailed in their attached declarations, these are Prattville and Autauga County residents who visit, rely on, support, and love their library and love that it provides their children a window into a wider world as they grow.[15] Each of the individual Plaintiffs is a current APPL library card holder and frequent patron of APPL.[16] Each regularly checks out material from APPL, including material with content that falls within the new Policy.[17] And each plans to continue checking out material with subjects falling within the sweep of the new Policy.[18] Both Ms. Frey and Ms. Diamond read books

[15] *See* Frey Decl. ¶¶ 7, 10; Diamond Decl. ¶¶ 4, 7–8; Compl. ¶¶ 34, 36.

[16] *See* Frey Decl. ¶ 4; Diamond Decl. ¶ 5; Compl. ¶¶ 32, 36.

[17] *See* Frey Decl. ¶¶ 5–6; Diamond Decl. ¶¶ 6–10, 13–15, 18; Compl. ¶¶ 32, 36.

[18] *See* Frey Decl. ¶ 9; Diamond Decl. ¶¶ 12–13, 17–18; Compl. ¶¶ 32, 36.

with a wide range of characters and subjects, including characters who are gay (or otherwise have an LGBTQ+ identity), both for their own leisure and to preview whether a book is suitable for their children.[19] For example, Ms. Diamond is a fan of John Green's young adult novels (which sometimes feature characters who fall in love and have a sexual relationship),[20] and Ms. Frey enjoys the *Heartstopper* series about two teen boys falling in love.[21]

Plaintiff Samantha Diamond has suffered an additional injury that is unique to her. Ms. Diamond relies on APPL to supplement the homeschool curriculum she provides for her children, including history lessons reflecting diverse experiences (including LGBTQ+ history) and age-appropriate lessons on sexual health.[22] The materials that Ms. Diamond plans to access to supplement her homeschool curriculum include materials that fall within the scope of the Selection Criteria Policy.[23]

Injury-in-Fact: Individual Minor Plaintiffs. The individual minor Plaintiffs, J.D., E.D., and C.C., suffer from the same injuries as the individual adult plaintiffs. They, too, are current APPL library card holders and frequent patrons of APPL; they, too, regularly check out material from APPL, including material with content that falls within the new Policies; and they, too, plan to continue checking out such

[19] *See* Frey Decl. ¶¶ 6–9; Diamond Decl. ¶ 18; Compl. ¶¶ 34, 36.

[20] *See* Diamond Decl. ¶ 18; Compl. ¶ 33.

[21] *See* Frey Decl. ¶¶ 8–9; Compl. ¶ 36.

[22] *See* Diamond Decl. ¶¶ 7–13; Compl. ¶ 34.

[23] *See* Diamond Decl. ¶¶ 8–13; Compl. ¶ 34.

material.[24] For example, E.D. and J.D. have enjoyed (and plan to continue checking out) middle-grade books featuring LGBTQ+ main characters, such as the *Sir Callie* and *Dragon Pearl* series.[25] And C.C. has likewise enjoyed (and plans to continue reading) books featuring LGBTQ+ characters, such as mangas from the series *Ranma ½*.[26] Furthermore, each of these minor Plaintiffs regularly checks out and reads books with gender pronouns like "he" and "she," which are covered by the Policies.[27]

Both the Selection Criteria Policy and the Library Cards for Minors Policy injure the individual minor Plaintiffs. They are injured by the Selection Criteria Policy in the same way that the individual adult Plaintiffs are, and they suffer the additional injury of being restricted in what material they may use their own library cards to check out. *See, e.g.*, *ACLU of Florida, Inc.* v. *Miami-Dade County School Board*, 557 F.3d 1177, 1194–95 (11th Cir. 2009) (finding standing where a plaintiff declared that he and his son had planned to check out from the school library and read a book that had been removed from the library collection); *GLBT Youth in Iowa Schools Task Force* v. *Reynolds*, Case Nos. 4:23-cv-474, 23-cv-478, 2023 WL 9052113, at *10 (Dec. 29, 2023) (finding that a student has standing to challenge a statute requiring that books in her school library be "age-appropriate" because the restrictions "directly limit the books and materials she can obtain from the school library"); *Fayetteville Public Library*, 2023 WL 4845636, at *10 (finding that library

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[24] *See* E.D. Decl. ¶¶ 2–3, 7; J.D. Decl. ¶¶ 2–3, 9; C.C. Decl. ¶¶ 2–9; Compl. ¶ 32, 37.

[25] *See* E.D. Decl. ¶ 4–7; J.D. Decl. ¶¶ 5–6, 9; Compl. ¶ 33.

[26] *See* C.C. Decl. ¶ 8; Compl. ¶ 37.

[27] *See, e.g.*, C.C. Decl. ¶ 9.

patrons had standing to challenge policy providing for challenges built on vague standards where "patrons claim[ed] their First Amendment right to access non-obscene (i.e., constitutionally protected) reading material will be dramatically curtailed").

Injury-in-Fact: Read Freely Alabama. Read Freely Alabama has associational standing on behalf of its members to challenge the Selection Criteria Policy. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Each of these factors is met here. Read Freely Alabama includes as members more than forty APPL library card holders and patrons,[28] many of whom would have standing to sue in their own right for the same reasons articulated by the individual Plaintiffs (two of whom are Read Freely Alabama members) above.[29] Protecting their access to library materials is germane to Read Freely Alabama's purpose: its mission is to uphold the values of American democracy by fighting any censorship in our public libraries, and by advocating for inclusive library collections that accurately

[28] *See* Hayden Decl. ¶ 11; Compl. ¶ 8.

[29] Read Freely Alabama need not "name the members on whose behalf suit is brought." *Doe* v. *Stincer*, 175 F.3d 879, 882 (11th Cir. 1999).

reflect the diversity of the communities they serve.[30] *See Greater Birmingham Ministries* v. *Secretary of State*, 992 F.3d 1299, 1316 (11th Cir. 2021) (finding a voting rights lawsuit germane to organizations "whose purposes focus on voter rights and equal opportunity for minority voters"). And neither Read Freely Alabama's First Amendment claims nor its requested declaratory and injunctive relief require the participation of individual members in the lawsuit, given that Read Freely brings a facial challenge that is appropriate for a decision on the papers. *See id.* ("[W]e cannot say that the constitutional and voting rights claims asserted, or the declaratory or injunctive relief requested, require the participation of the individual members in this lawsuit.").

Injury-in-Fact: Alabama Library Association. The Alabama Library Association has both associational standing and organizational standing to challenge the Selection Criteria Policy. *See, e.g.*, *Arcia* v. *Florida Secretary of State*, 772 F.3d 1335, 1341–42 (11th Cir. 2014) (holding that organizations had both associational and organizational standing where they submitted affidavits showing that "the interests at stake in this case are germane to the purpose and goals of the organizations" and that they had diverted resources from their mission "to address the [defendant's] programs").

As to associational standing, the Selection Criteria Policy also injures ALLA members who are APPL library patrons for the same reasons articulated by the individual plaintiffs. As one ALLA member and APPL patron explained in a

[30] *See* Hayden Decl. ¶ 5; Compl. ¶ 8.

declaration, she has checked out and plans to continue checking out books for her four-year-old son that would fall within the scope of the Policy, such as those with LGBTQ+ characters.[31] The availability of a robust and diverse collection of library materials is germane to ALLA's purpose of ensuring access to information for all. And, for the same reasons as Read Freely Alabama, neither the claim asserted. nor relief requested require the participation of individual ALLA members in this lawsuit.

Organizational standing requires "the same inquiry as in the case of an individual: Has the plaintiff alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction?" *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 378–79 (1982) (internal quotation marks and citations omitted). A "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes" an injury that will suffice. *Id.* The Eleventh Circuit has therefore found organizational standing where an organization "was forced to divert resources from its regular activities to educate and assist affected individuals in complying with the challenged statute." *Georgia Latino Alliance for Human Rights* v. *Governor of Georgia*, 691 F.3d 1250, 1259–60 (11th Cir. 2012) (internal quotation marks and alterations omitted) (citing *Common Cause/Georgia* v. *Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) and *Florida State Conference of NAACP* v. *Browning*, 522 F.3d 1153, 1165–66 (11th Cir. 2008)). "[W]hen a drain on an organization's resources arises from

[31] *See* Hayes Decl. ¶ 15; Compl. ¶ 39.

the organization's need to counteract the defendants' assertedly illegal practices, that drain is simply another manifestation of the injury to the organization's noneconomic goals." *Browning*, 552 F.3d at 1166 (internal quotation marks and citation omitted).

Here, the Alabama Library Association's mission is to encourage and promote the welfare of libraries and the professional interests of librarians in Alabama, including providing leadership for the development, advocacy, and improvement of library and information services and promoting the profession of librarianship, to enhance learning and ensure access to information for all, including library patrons.[32] ALLA works to protect libraries, librarians, and library patrons from censorship and to promote access to a broad range of subjects through books and other library materials representing a broad range of viewpoints and ideas.[33] ALLA has historically accomplished this mission by holding informational outreach events for legislators, providing training and toolkits to Alabama libraries, and advocating for libraries in government budgeting processes.[34] Since the Policy was enacted, however, ALLA has had to divert resources from these tasks to reviewing the Policy, informing members about the Policy's requirements, and monitoring the Policy's implementation (including through its incorporation into the weeding policy)—work that ALLA anticipates will continue, as that knowledge informs ALLA's advocacy

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[32] *See* Hayes Decl. ¶ 4; Compl. ¶ 9.

[33] *See* Hayes Decl. ¶ 4; Compl. ¶¶ 9, 39.

[34] *See* Hayes Decl. ¶ 5.

positions statewide as other jurisdictions consider adopting policies that are similar or different to that in Prattville.[35]

As a result, ALLA has been forced to divert its resources from other mission-critical activities. For example, responding to the Policy has taken time and effort away from ALLA's ability to plan and engage in advocacy for the improvement of library services and increased library funding at the state level.[36] The Policy's adoption also required ALLA to divert time and resources away from planning its annual conference in April 2024, resulting in a delayed opening in registration, fewer participants, and less income from one of ALLA's largest sources of annual revenue.[37]

Causation & Redressability. The second and third standing factors are readily met for each Plaintiff as well. "An injury is fairly traceable to the defendant if it results from the defendant's action and is not the result of an independent action of some third party." *Baughcum* v. *Jackson*, 92 F.4th 1024, 1032 (11th Cir. 2024) (citation omitted). Here, all of the Plaintiffs' injuries described above flow from the enactment of the Policies by the Board, which has "reserve[d to itself] the right to exercise discretion over all library material."[38] "Likewise, an injury can be redressed by the court when a decision for the plaintiff would make it significantly more likely that he would obtain relief that directly remedies his injury." *Id.* (citation omitted). And a decision declaring the Policies void and enjoining their enforcement would

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[35] *See* Hayes Decl. ¶ 9; Compl. ¶ 39.

[36] *See* Hayes Decl. ¶ 11; Compl. ¶ 39.

[37] *See* Hayes Decl. ¶ 12; Compl. ¶ 39.

[38] *See* Ex. A at 16, 17.

redress those injuries, as the materials restricted by the Policies would no longer be restricted and Plaintiffs would no longer be deprived of access that constitutionally protected library material. *See Speech First*, 32 F.4th at 1119 ("Nor is there any real dispute that the members' injury is 'traceable' to UCF's policies within the meaning of *Lujan*'s prong (2) or that it is 'redress[able]' within the meaning of prong (3)." (second alteration in original)).

B. The Policies are unconstitutionally overbroad.

In the First Amendment context, "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States* v. *Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks and citations omitted). "For a court to find that a statute is overbroad, it must find the existence of a realistic danger that the statute itself will significantly compromise recognized first amendment protections of parties not before the court"—in this case, other library patrons and the authors and publishers of books that will no longer be acquired by APPL. *Clean Up '84* v. *Heinrich*, 759 F.2d 1511, 1513 (11th Cir. 1985) (internal quotation marks and citation omitted). "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Stevens*, 559 U.S. at 474 (internal quotation marks, citation, and alteration omitted). Although there is no dispute that true obscenity is regulable under the First Amendment, each Policy here covers far more than hardcore obscenity: indeed, each could be read to cover nearly any material that could be found in any public

library, and even under a more limited construction of its vague terms, reaches vast amounts of widely read, non-obscene materials.[39]

First, each Policy—on its face—captures substantial amounts of material that is not obscene and therefore is constitutionally protected. The Policies prohibit materials containing several different categories of content ("sexual conduct, sexual intercourse, sexual orientation, gender identity, or gender discordance") *in addition* to their respective prohibitions on obscenity. The Policies therefore necessarily encompass non-obscene materials. *See, e.g.*, *Fuerst* v. *Housing Authority of City of Atlanta, Georgia*, 38 F.4th 860, 869 (11th Cir. 2022) (applying surplusage canon). That alone renders the Policies overbroad.

Second, the mere existence of sexual conduct or sexual intercourse in library material does not necessarily render it obscene. *See Reno* v. *ACLU*, 521 U.S. 844, 864–65 (1997). Without any requirement that the Policies' prohibition on sexual conduct or sexual intercourse apply only to material that "lack[s] serious literary, artistic, political, or scientific value," *id.* at 865, they are overbroad. The Policies also

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[39] Although some courts have saved obscenity provisions from invalidity through a limiting construction, *see, e.g.*, *American Booksellers Ass'n* v. *Webb*, 919 F.2d 1493, 1508–09 (11th Cir. 1990), courts are not permitted to rewrite a statute (or in this case, a policy) to do so, *see Gay Lesbian Bisexual Alliance* v. *Pryor*, 110 F.3d 1543, 1550 (11th Cir. 1997). "The key to application of this principle is that the [text] must be 'readily susceptible' to the limitation; we will not rewrite a [policy] to conform it to constitutional requirements." *Virginia* v. *American Booksellers Ass'n Inc.*, 484 U.S. 383, 397 (1988). Here, the Policies could be saved only by construing them to capture only true obscenity—but "[s]uch an interpretation is inconsistent with the plain meaning of the words of the" policy, and so the Policies are "not capable of a narrowing interpretation and [are] therefore invalid on [their] face." *Gay Lesbian Bisexual Alliance*, 110 F.3d at 1550.

fail to consider meaningful literary value in the context of the age of the intended reading audience. *See, e.g.*, *American Booksellers*, 919 F.2d at 1502–03 (describing as overbroad a statute that "covered material that would not be obscene as to minors under the *Ginsberg* standard"); *GLBT Youth*, 2023 WL 9052113, at *21 (noting the "undeniable political, artistic, literary, and/or scientific value" of books such as *As I Lay Dying*, *I Know Why the Caged Bird Sings*, *Speak*, *Last Night at the Telegraph Club*, *1984*, and *Ulysses*).[40]

Third, the Policies' prohibitions on materials containing sexual orientation, gender identity, and gender discordance are even further afield from any legitimate restrictions. "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). Yet that is precisely the case here. For example, the term "sexual orientation" means "[t]he direction of a person's sexual interest, as toward people of a different sex, toward people of the same sex, or without regard to sex."[41] And the term "gender identity" means "[a]n individual's self-identification as being male, female, neither gender, or a blend of both genders."[42]

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[40] *GLBT Youth* is currently on appeal in the Eighth Circuit. *See* Docket Nos. 24-1075, 24-1082.

[41] *Sexual Orientation*, The American Heritage Dictionary of the English Language, https://www.ahdictionary.com/word/search.html?q=sexual+orientation (last visited May 7, 2024).

[42] *Gender Identity*, The American Heritage Dictionary of the English Language, https://www.ahdictionary.com/word/search.html?q=gender+identity (last visited May 7, 2024).

See Stevens, 559 U.S. at 474–75 & n.4 (using dictionary definitions to interpret the "ordinary meaning" of words in a statute challenged for overbreadth). Thus, each Policy, by the ordinary meaning of its own terms, prohibits the acquisition (or checkout) of any material advertised for minors that includes people who are heterosexual, people who are homosexual, people who are considering their gender identity, and people who do not identify as either, along with people who are men, people who are women, and people who do not identify as either. This would include the *Winnie-the-Pooh* books by A.A. Milne (featuring young boy Christopher Robin), *Madeline* by Ludwig Bemelmans (featuring twelve little girls in two straight lines), and the *Sir Callie* books so greatly enjoyed by E.D. and J.D. (featuring a non-binary young person who wishes to become a knight). It would capture *Little House on the Prairie* by Laura Ingalls Wilder (featuring a family with a mom and a dad struggling with the realities of pioneer life) and *Bathe the Cat* by Alice McGinty and David Roberts (featuring a family with two dads struggling to get chores done as the family cat hilariously interferes). Or, put differently, the Policies prohibit "virtually every book ever written" that is marketed to minors. *GLBT Youth*, 2023 WL 9052113, at *23 (explaining that prohibitions on material relating to gender identity or sexual orientation would include books "that refer to any character's gender or sexual orientation," as well as a math test "stating that Sally bought eight apples and ate three and asking how many 'she' has left"). If the overbreadth doctrine means anything, it means that a truly all-encompassing policy cannot stand.

Even if this Court were to adopt a more limited construction of "gender identity" and "sexual orientation" than is reflected in their dictionary definitions, such a construction (as well as the term "gender discordance") still would swallow enormous amounts of non-obscene children's and young adult literature, which often addresses themes about developing a sense of personal identity and first love. For example, *Little Women* features Jo as a quintessential tomboy who grows into adulthood by working through her complicated emotions about gender roles in the nineteenth century: "It's bad enough to be a girl, any-way, when I like boy's games, and work, and manners. I can't get over my disappointment in not being a boy."[43] The *Anne of Green Gables* series traces a narrative arc of Anne's intellectual and emotional growth through the plot of her relationship with Gilbert Blythe, as it moves from one of deep annoyance, to rivalry, to friendship, to romantic (heterosexual) attachment and love.[44] And George Orwell's classic fictionalization of dystopian thought-policing, *1984*, featured characters who engaged in sex not only out of physical attraction, but as a physical, silent display of rebellion against the Party.[45] Each of these books—and countless others like them—substantively engage with themes of gender identity and sexual orientation in a non-obscene way that carry

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[43] Louisa May Alcott, *Little Women* 5 (Sterling Publishing Co. ed. 2004).

[44] *See* Lindsey Weishar, *What Anne Shirley Taught Me about Navigating Romantic Relationships*, Verily (May 16, 2019), https://verilymag.com/2019/05/relationships-anne-of-green-gables-inspiration.

[45] George Orwell, *Animal Farm and 1984*, at 207 (Harcourt, Inc. ed. 2003).

meaningful literary value for their readers, including minors. But the Policies do not permit any analysis of the value these materials can provide.

Fourth, although the enumerated categories of material prohibited by the Policies are already overbroad, the Policies sweep more broadly still. The Selection Criteria Policy prohibits the acquisition of "any material advertised for consumers ages 17 and under which contain content including, but not limited to," those terms.[46] Similarly, the Library Cards for Minors Policy prohibits the checkout of "material with content containing, but not limited to," those terms.[47] Neither Policy explains what, precisely, it is supposed to capture that is "not limited to" the enumerated categories. And the vagueness that pervades each Policy magnifies the risk that each will be interpreted overbroadly. *See Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.6 (1982) ("[A] court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis.").

Fifth, the Policies fail to distinguish between older and younger minors. This, too, is inconsistent with First Amendment jurisprudence, which teaches that "if any reasonable minor, including a seventeen-year-old, would find serious value, the material is not 'harmful to minors.'" *American Booksellers*, 919 F.2d at 1504–05. Thus, "if a work is found to have serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack

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[46] *See* Ex. A at 16.

[47] *See* Ex. A at 5.

such value for the entire class of juveniles taken as a whole." *Id.* at 1505 (internal quotation marks and citations omitted). Yet the Policies fail to provide any nuance that acknowledges the relative maturity of older minors. The same prohibition that would prevent a six-year-old from checking out *Speak*—an award-winning young adult novel by Laurie Halse Anderson that addresses a high school student's efforts to recover emotionally from rape—also reaches high school students on the cusp of adulthood, who may wish to turn to such a book to understand the world around them or process their own experience.

The overbreadth of these Policies comes into further focus when they are compared to the Autauga County Schools curriculum standards. For example, the Alabama literary classic *To Kill a Mockingbird* is suggested reading for high school freshmen (and advertised for teenagers).[48] But because the novel's plot centers on a trial over allegations of rape, it would be prohibited by each Policy for including sexual conduct and sexual intercourse, as well as sexual orientation, and gender identity. In other words, a high school student could read the 1961 Pulitzer Prize winner for school—but they would be unable to find or check out a copy at the public library.

Sixth, the Selection Criteria Policy is overbroad for an additional reason that specifically affects adult patrons of APPL. That Policy prohibits the acquisition of any material advertised for people aged seventeen or younger—no matter where in

[48] *See, e.g.*, *Autauga County Schools Pacing Guides 9th Grade English Language Arts*, at 3, https://drive.google.com/file/d/19oXJaY995sp8LgkefkrGI28DAB2CU8mz/view (last visited May 7, 2024).

the library such material would be housed. This Policy therefore ignores the reality that a large segment—indeed, around half—of books advertised as "young adult" are actually read by adults.[49] For example, Plaintiff Sam Diamond recently enjoyed reading *The Fault in Our Stars* by John Green,[50] a novel that features teens who fall in love and enter into a sexual relationship—and would thus fall within the Policy. The Policy therefore prevents the acquisition of books that adult library patrons plan to check out and read themselves, or to procure for their own children. But there is no basis in the First Amendment for restricting adults' access to materials such as these on grounds other than obscenity. Instead, "the First Amendment forbids reducing the adult population to reading and viewing only works suitable for children." *See American Booksellers*, 919 F.2d at 1501.[51]

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[49] *See* Caroline Kitchener, *Why So Many Adults Love Young-Adult Literature*, The Atlantic (Dec. 1, 2017), https://www.theatlantic.com/entertainment/archive/2017/12/why-so-many-adults-are-love-young-adult-literature/547334/ ("Approximately 55 percent of today's YA readers are adults."); Joanne O'Sullivan, *Who Is YA For?*, Publishers Weekly (Oct. 13, 2023), https://www.publishersweekly.com/pw/by-topic/childrens/childrens-industry-news/article/93417-who-is-ya-for.html ("According to January 2023 WordsRated statistics, 51% of YA books are purchased by people between the ages of 30 and 44, and 78% of those buyers said that they intended to read the books themselves.").

[50] *See* Diamond Decl. ¶ 18; Compl. ¶ 33.

[51] The fact that APPL's policies elsewhere note that APPL "supports the principles inherent in the First Amendment of the Constitution of the United States," Ex. A at 36, cannot save the Policies. *See Gay Lesbian Bisexual Alliance*, 110 F.3d at 1545, 1550 (striking down as overbroad a statute that included a savings clause indicating that it "shall not be construed to be a prior restraint of the first amendment protected speech").

Finally, contrary to the arguments of the Board's supporters,[52] policies governing the acquisition and check-out of library materials are subject to First Amendment scrutiny because the composition of library collections does not constitute government speech. In this circuit, the question of whether expression is government speech includes the examination of factors such as "(1) whether the government maintains control over the speech; (2) whether the type of speech has traditionally communicated government messages; and (3) whether the public would reasonably believe that the government has endorsed the speech." *McGriff* v. *City of Miami Beach*, 84 F.4th 1330, 1334 (11th Cir. 2023). As another district court in this circuit has recently explained, "the Court simply fails to see how any reasonable person would view the contents of the school library (or any library for that matter) as the government's endorsement of the views expressed in the books on the library's shelves." *PEN American Center, Inc.* v. *Escambia County School Board*, Case No. 23-10385, 2024 WL 133213, at *2 (N.D. Fla. Jan. 12, 2024).[53] This stands in contrast to

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[52] *See, e.g.*, Laura Clark, *Laura Clark: Is book removal a First Amendment violation?*, 1819 News (Dec. 15, 2023), https://1819news.com/news/item/laura-clark-is-book-removal-a-first-amendment-violation.

[53] In dicta, the Eleventh Circuit has quoted the D.C. Circuit's view that "'the government speaks through its selection of which books to put on the shelves and which books to exclude.'" *ACLU of Florida, Inc.* v. *Miami-Dade County School Board*, 557 F.3d at 1202 (quoting *PETA, Inc.* v. *Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005) (alteration omitted)). The Eleventh Circuit did not, however, analyze the question of government speech in the context of that school library case. And the language it quoted from the D.C. Circuit opinion was also dicta there, as that case addressed the rather different question of whether D.C. Commission on the Arts and Humanities had violated the First Amendment in its selection of a happy circus elephant, rather than a sad circus elephant, for display in a public art project. *See PETA*, 414 F.3d at 26–27. Furthermore, as the D.C. Circuit acknowledged, "[t]hose who check out a

cases where government speech has been found "because the speech embodied in a library collection is materially different from the speech embodied in government-sponsored parades, prayers, art exhibits, and monuments on public property." *Id.* Indeed, the point—and joy—of a public library is that its collection contains an array of books with different viewpoints on different subjects. And, to the extent that the Selection Criteria Policy governs the removal of books, any arguments that removal constitutes government speech are even more attenuated.

C. The Policies unconstitutionally discriminate on the basis of content.

Under the First Amendment, both children and adults have the right to receive information. *See, e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes . . . the right to receive [and] the right to read . . . ."); *Erznoznik*, 422 U.S. at 214 ("In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." (footnote omitted)); *see also Buehrle* v. *City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015) ("The First Amendment protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people who view it."). Where, as here, that right is infringed by the government's discrimination on the basis of content, the government bears a heavy burden to maintain its policies. *See, e.g.*, *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 231 (1987). The Board cannot meet that burden here.

Tolstoy or Dickens novel would not suppose that they will be reading a government message." *Id.* at 28.

"[T]he principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 642 (1994) (internal quotation marks, citations, and alterations omitted). "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id.* at 643. "A law can be content-based either because it draws facial distinctions defining regulated speech by particular subject matter or because, though facially neutral, it cannot be justified without reference to the content of the regulated speech." *NetChoice, LLC* v. *Attorney General, Florida*, 34 F.4th 1196, 1223 (11th Cir. 2022) (internal quotation marks, citation, and alteration omitted).

Even among the famously splintered Supreme Court opinions in *Pico*, the justices achieved a near-consensus[54] that the First Amendment forbade removal of school library books on the basis of political disagreement. The plurality opinion, representing the views of four justices, stated, "In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books." *Pico*, 457 U.S. at 872 (Brennan, J., joined by

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[54] Only Justice O'Connor and Justice White did not join one of the opinions that acceded to the plurality's view that schools cannot remove school library books "in a narrowly partisan or political manner," *Board of Education, Island Trees Union Free School District No. 26* v. *Pico*, 457 U.S. 853, 870, 907 (1982); Justice White explained simply that he would not have reached the First Amendment analysis at all, *id.* at 883 (White, J., concurring in the judgment).

Marshall, Stevens, and Blackmun, JJ.).[55] And in his dissent, Justice Rehnquist—joined by Chief Justice Burger and Justice Powell—"cheerfully concede[d]" the plurality's point that, even where school libraries "possess significant discretion" over their collections, it "may not be exercised in a narrowly partisan or political manner." *Id.* at 907 (Rehnquist, J., dissenting).[56] Justice Rehnquist likewise agreed that the Constitution would not permit "a Democratic school board, motivated by party affiliation" to "order[] the removal of all books written by or in favor of Republicans," or "an all-white school board, motivated by racial animus," to "remove all books authored by blacks or advocating racial equality and integration." *Id.* at 871–72.

Justice Rehnquist believed that these "extreme examples" were best "save[d] for another day—feeling quite confident that that day will not arrive." *Id.* at 908. But if that day did not arrive with the Policies at issue here, it has come perilously close. And indeed, because the Policies originate at a public library serving all ages, rather than a school library, they merit even greater scrutiny. *Id.* at 915 (Rehnquist, J., dissenting) ("Unlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry," but are "tailored[] to the teaching of basic skills and ideas.").

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[55] Justice Blackmun declined to join Part II-A-(1) of the majority opinion. *Id.* at 855. However, the quotation provided above appears in Part II-A-(2) of the majority opinion. *See id.* at 869 (beginning of Section II-A-(2)).

[56] Any argument that the retention of books in a library collection constitutes government speech, and is therefore not susceptible to First Amendment challenge, cannot be squared with either the majority *or* dissenting views in *Pico*.

Here, the Policies restrict library patrons' right to receive information that includes certain content (sexual orientation, gender discordance, etc.) precisely because it includes that content. But, as another district court explained in invalidating a statute much narrower than these Policies, a provision that "requires the wholesale removal of every book containing a description or visual depiction of a 'sex act,' regardless of context," sends the "underlying message . . . that there is no redeeming value to any such book even if it is a work of history, self-help guide, award-winning novel, or other piece of serious literature." *GLBT Youth*, 2023 WL 9052113, at *19. As in that case, the Board here "has imposed a puritanical 'pall of orthodoxy' over . . . libraries." *Id.*; *see also Fayetteville Public Library*, 2023 WL 4845636, at *18 (holding that an administrative process deeming library material as inappropriate "would result in a content-based restriction on otherwise constitutional speech—unless the challenged book met the legal definition of obscenity").

As content-based regulations of speech, the Policies must satisfy strict scrutiny to survive. They cannot. "Under strict scrutiny, content-based restrictions 'are presumptively unconstitutional.'" *Otto* v. *City of Boca Raton, Florida*, 981 F.3d 854, 868 (11th Cir. 2020) (quoting *Reed* v. *Town of Gilbert, Arizona*, 576 U.S. 155, 163 (2015)). They "can be justified 'only if the government proves that they are narrowly tailored to serve compelling interests.'" *Id.* (quoting *Reed*, 576 U.S. at 163). Although the Board will presumably argue that it acted in the compelling interest of protecting children, its "legitimate authority to protect children . . . 'does not include a free-floating power to restrict the ideas to which children may be exposed.'" *Id.* (quoting

Brown v. *Entertainment Merchants' Ass'n*, 564 U.S. 786, 794–95 (2011)). In other words, "while protecting children is a crucial government interest, speech 'cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'" *Id.* (quoting *Erznoznik*, 422 U.S. at 213–14). But that is precisely what the Board has done.

The Board failed to tailor the Policies narrowly to a compelling interest in protecting children from obscenity—or, indeed, to tailor them at all. As set forth above, *see supra* Section I.B, on their faces, the Policies reach broadly into all children's literature (or literature children seek to check out), capturing a wide range of content that could not reasonably be deemed harmful to children—such as the use of the "she" pronoun to refer to beloved children's book character Amelia Bedelia, or the heterosexual marriage of Mama and Papa Bear of Berenstain fame.[57] Similarly, no compelling interest is furthered in preventing a teenager from reading, for example, an age-appropriate non-fiction book about the Stonewall riots, a biography of Harvey Milk, or the aforementioned and beloved novels about "tomboys" coming of age, and neither Policy is tailored in a way that would permit such a book to be acquired by APPL, or checked out by that teenager.

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[57] Should the Board argue that the broad terms "sexual orientation" and "gender identity" *really* mean "homosexuality" and "transgender identity," then they will succeed only in emphasizing that the Policies discriminate on the basis of content—and also, worse, on the basis of viewpoint. *See NetChoice,* 34 F.4th at 1223–24 (explaining that viewpoint-based laws are prohibited, "seemingly as a *per se* matter"). The prohibition on material containing "gender discordance," for instance, prohibits materials featuring characters who are transgender, but not those who are cisgender—a clear example of discrimination that is rooted in protecting children from unpopular ideas, rather than from obscenity.

Furthermore, the tailoring of the Selection Criteria Policy fails for an additional reason. As explained above, *see supra* Section I.B, that Policy altogether prevents the acquisition of materials marketed to minors within its sweep, regardless of where in the library they are located. As a result, adults will be precluded from perusing (even in the adults section) or checking out a non-fiction book about two male penguins successfully hatching a penguin egg, much less coming-of-age novels aimed at LGBTQ+ teens that adults might want to read in order to understand and empathize with their children's experiences. This overreach cannot further any governmental interest, let alone a compelling one.

United States v. *American Library Association*, 539 U.S. 194 (2003), does not disturb the analysis above. In *ALA*, the Supreme Court upheld the Children's Internet Protection Act, a federal law that conditioned public libraries' receipt of federal funds on the use of Internet filtering software to block "images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them." *Id.* at 199. *ALA* is a case about keeping materials recognized for decades as constitutionally unprotected—obscenity, child pornography, and material harmful to minors—inaccessible at public libraries. *Id.* at 199. While there is also dicta discussing the "broad discretion" public library staffs have to consider content in making collection decisions, *id.* at 205, this merely recognizes librarians' expertise in putting together a comprehensive and rich collection that serves their communities. This recognition is meaningfully different from categorically prohibiting certain types of constitutionally protected content,

particularly where that categorical bar addresses politically charged issues and people who constitute a protected class.

Furthermore, the decision in *ALA* turned on the fact that a librarian could disable the software filter immediately upon the request of an adult user. *See id.* at 214–15 (Kennedy, J., concurring in the judgment).[58] Here, of course, there is no such escape hatch. And finally, even if this Court were to apply a less stringent standard of review (either the heightened scrutiny test proposed by Justice Breyer in *ALA*, *id.* at 217 (Breyer, J., concurring in the judgment), or even rational basis review), Plaintiffs would still prevail: for all of the reasons articulated elsewhere, the Board can "offer no basis—let alone a rational one—to justify the burdens [the Policies] would impose on older-minor and adult access to protected reading materials in the public library." *Fayetteville Public Library*, 2023 WL 4845636, at *16 n.27.

D. The Policies are unconstitutionally vague.

Any government enactment, whether it regulates First Amendment activity or other behavior, is void for vagueness "if its prohibitions are not clearly defined." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). The danger of such enactments lies in the concern that "[u]nconstitutionally vague laws fail to provide 'fair warning' of what the law requires[ ] and . . . encourage 'arbitrary and discriminatory enforcement' by giving government officials the sole ability to interpret the scope of the law." *Keister* v. *Bell*, 29 F.4th 1239, 1258 (11th Cir. 2022) (quoting *Grayned*, 408

[58] Given the fractured decisions in *ALA*, the holding is "that position taken by those Members who concurred in the judgment on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977).

U.S. at 108–09). "Vague laws 'encourage erratic administration whether the censor be administrative or judicial; individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law.'" *Dream Defenders* v. *DeSantis*, 559 F. Supp. 3d 1238, 1281–82 (N.D. Fla. 2021) (quoting *Interstate Cir., Inc.* v. *City of Dallas*, 390 U.S. 676, 685 (1968)).[59]

When an enactment implicates the First Amendment's interests, the void-for-vagueness doctrine carries from that Amendment even further scrutiny: "The First Amendment context amplifies [the vagueness doctrine's] concerns because an unconstitutionally vague law can chill expressive conduct by causing citizens to 'steer far wider of the unlawful zone' to avoid the law's unclear boundaries." *Keister*, 29 F.4th at 1258 (quoting *Grayned*, 408 U.S. at 109); *see also Reno* v. *ACLU*, 521 U.S. 844, 871–72 (1997) (where vagueness arises amid a "content-based regulation of speech[, t]he vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech").

The vagueness doctrine requires that government policies "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned*, 408 U.S. at 108. When an enactment "delegates basic policy matters . . . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and

[59] The district court's decision in *Dream Defenders* is currently on appeal. In that appeal, the Eleventh Circuit has certified to the Florida Supreme Court a question concerning the definition of a statutory term. *Dream Defenders* v. *Governor of the State of Florida*, 57 F.4th 879, 893 (11th Cir. 2023).

discriminatory application," the enactment is impermissibly vague. *Id.* at 108–09. For the same reasons addressed above, both the Selection Criteria Policy and the Library Cards for Minors Policy are unconstitutionally vague under this standard.

First, the enumerated categories of content (such as "sexual conduct") are undefined. Each Policy therefore fails to provide a basis on which a person of ordinary intelligence can determine what non-obscene sexual content falls within the prohibitions: it is unclear, for instance, if kissing goes too far, much less other intimate contact. *See GLBT Youth*, 2023 WL 9052113, at *22 (describing the vagueness of "sex act," including the ambiguity as to whether a statement that sexual intercourse occurred (rather than a descriptive narrative thereof) qualified). The terms "sexual orientation" and "gender identity" similarly suffer from a lack of clarity. *See, e.g.*, *id.* at *23–24 (finding that the "incredible breadth" of a statute prohibiting programming relating to gender identity and sexual orientation made plaintiffs likely to prevail on their void-for-vagueness challenge). Second, each Policy enumerates only some categories of content that are prohibited, adding in a catch-all "including, but not limited to" provision. The absence of any limiting principle prevents a person of ordinary intelligence from knowing what other categories of content are unenumerated but still fall within the Policy's scope. But, as the Eleventh Circuit has explained, "[u]nconstitutionally vague laws . . . encourage arbitrary and discriminatory enforcement by giving government officials the sole ability to interpret the scope of the law." *Keister*, 29 F.4th at 1258 (internal quotation marks and citation omitted).

The upshot of this is that the precise contours of the Policies are unclear. This lends itself to overbroad interpretations (as addressed above), but it also means that library patrons cannot reasonably know what to expect when they try to use the library (and that experiences may vary at different branches). When a minor tries to use their library card to check out *My Footprints* by Bao Phi—a picture book featuring a young girl who treks through the snow after having a hard day, imagining the footprints of different animals with her two loving mothers—some librarians may say no (citing the Policy against sexual orientation), and others may say yes (believing that the existence of two fictional mothers is not directly addressing that issue). Some patrons (perhaps those personally known to the librarian) may be permitted to check out the book, and others may not. And other librarians may prevent minors from checking out books beyond the (already broad) scope of the Policy out of an abundance of caution and fear they will lose their jobs if they incorrectly interpret the vague Policy. This is precisely the sort of arbitrary enforcement that the vagueness doctrine is designed to avoid.

II. The Policies have caused and will continue to cause irreparable harm.

"Because the plaintiffs have shown a likelihood of success on the merits, the remaining requirements necessarily follow." *Honeyfund.com Inc.* v. *Governor*, 94 F.4th 1272, 1283 (11th Cir. 2024). As long as these Policies are in force, they will limit the acquisition of materials available at APPL, and they will block Plaintiffs' access to library materials in violation of the First Amendment. The Eleventh Circuit has made clear that the First Amendment is an "area of constitutional jurisprudence

where we have said that an on-going violation constitutes irreparable injury." *Northeastern Florida Chapter of Ass'n of General Contractors of America* v. *City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Indeed, "[i]t is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Deerfield Medical Center* v. *City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981)[60]; *see also Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (similar). "The rationale behind these decisions was that chilled free speech . . ., because of [its] intangible nature, could not be compensated for by monetary damages; in other words, plaintiffs could not be made whole." *Northeastern Florida Chapter of Ass'n of General Contractors*, 896 F.2d at 1285. If the Plaintiffs are deprived of their First Amendment rights during the pendency of this lawsuit, only to be "vindicated" in the end, it would be a hollow victory: they could never be made whole for the losses they suffered in the interim. This factor therefore weighs in favor of granting the preliminary injunction.

III. The balance of equities weighs in favor of a preliminary injunction and enjoining the Policies would serve the public interest.

The third and fourth factors of a preliminary injunction inquiry "merge when, as here, the government is the opposing party." *Gonzalez* v. *Governor of Georgia*, 978 F.3d 1266, 1271 (11th Cir. 2020) (internal quotation marks, citations, and alterations omitted). This question too counsels in favor of entering a preliminary injunction. As the Eleventh Circuit has explained, "the public interest is served when constitutional

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[60] Fifth Circuit Unit B decisions are binding on this Court. *See Stein* v. *Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

rights are protected." *Jones* v. *Governor of Florida*, 950 F.3d 795, 830 (11th Cir. 2020) (internal quotation marks and citation omitted). Thus, the irreparable injury Plaintiffs have alleged cannot be outweighed by any harm to the Board because it "has 'no legitimate interest' in enforcing an unconstitutional law." *Honeyfund.com Inc.*, 94 F.4th at 1283 (quoting *KH Outdoor, LLC* v. *City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006)).

A claim by the Board that it has a legitimate interest in protecting children from obscene material does not alter this conclusion. Plaintiffs challenge the Policies precisely because, as set forth above, they restrict the acquisition of and access to overwhelming amounts of library material that are not obscene. Nor would enjoining the plainly unconstitutional Policies leave the children of Autauga County and Prattville unprotected by existing prohibitions on obscenity. Should an individual book in the collection prove problematic, other procedures provide a mechanism for the library to reconsider whether it belongs in the collection.[61] And existing policies require that young children "must be accompanied at all times by a parent, guardian or other responsible caregiver,"[62] while in the library. No countervailing governmental interest can warrant a continued incursion against the First Amendment.

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[61] *See* Ex. A at 36–37. Of course, should the preliminary injunction be granted, it would no longer be appropriate for the Review Committee to consider, as one of its factors in evaluating challenged material, "the extent to which the material supports the selection criteria." *See id.* at 37.

[62] *See* Ex. A at 39.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter a preliminary injunction preventing the Board from enforcing the Selection Criteria Policy or Library Cards for Minors Policy during the pendency of this litigation.

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Respectfully submitted,

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**application for admission* pro hac vice *forthcoming*

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