

Regular City Council Meeting
February 27, 2024, at 6:00pm
City of Palmer, Alaska
Palmer City Council Chambers
231 W Evergreen Avenue, Palmer, Alaska 99645
www.palmerak.org



Mayor Steven J. Carrington
Deputy Mayor Carolina Anzilotti
Council Member John Alcantra
Council Member Richard W. Best
Council Member Jim Cooper
Council Member Pamela Melin
Council Member Joshua Tudor

City Manager John Moosey
City Clerk Shelly M. Acteson, CMC
City Attorney Sarah Heath, Esq.

- A. CALL TO ORDER:
- B. ROLL CALL:
- C. PLEDGE OF ALLEGIANCE:
- D. APPROVAL OF AGENDA:
 - 1. Approval of consent agenda
 - 2. Approval of Minutes of Previous Meetings
 - A. February 13, 2024, Regular Meeting Minutes
- E. COMMUNICATIONS AND APPEARANCE REQUESTS:
 - 1. Elected Officials in Attendance
 - 2. Board/Commission Members
 - 3. Saroma Sister City Update - Carla Swick
 - 4. A Proclamation Recognizing Matthew Mitchell's Success at the ASAA/First National Bank Division I State Championships in Wrestling.
 - 5. A Proclamation Recognizing Amelia Fawcett's Success at the ASAA/First National Bank Division I State Championships in Wrestling.
 - 6. A Proclamation Recognizing Noah Justice's Success at the ASAA/First National Bank Division I State Championships in Wrestling.
- F. REPORTS:
 - 1. City Manager's Report

2. Mayor's Report
3. City Clerk's Report
4. City Attorney's Report - Libraries and Law: How the Law Relates to Library Materials in the Palmer Public Library
- G. AUDIENCE PARTICIPATION:
- H. PUBLIC HEARINGS:
- I. ACTION MEMORANDA:
- J. UNFINISHED BUSINESS:
- K. NEW BUSINESS:
- L. RECORD OF ITEMS PLACED ON THE TABLE:
- M. AUDIENCE PARTICIPATION:
- N. COUNCIL MEMBER COMMENTS:
- O. ADJOURNMENT:

A. CALL TO ORDER

A regular meeting of the Palmer City Council was held on February 13, 2024, at 6:00 p.m. in the Council Chambers, Palmer, Alaska. Mayor Carrington called the meeting to order at 6:10 p.m.

B. ROLL CALL

Comprising a quorum of the Council, the following were present:

Mayor Steve Carrington
Deputy Mayor Carolina Anzilotti
John Alcantra
Richard W. Best
Jim Cooper
Pam Melin
Joshua Tudor

Staff in attendance:

John Moosey, City Manager
Shelly M. Acteson, CMC, City Clerk
Benji Johnson, Deputy City Clerk
Sarah Heath, City Attorney
Dwayne Shelton, Palmer Police Chief
John Diument, Airport Superintendent

C. PLEDGE OF ALLEGIANCE

The Pledge of Allegiance was performed.

***Clerk's Note: Item E took place immediately after the Pledge of Allegiance was performed.
Item D took place after the break***

D. APPROVAL OF AGENDA

1. Approval of Consent Agenda
2. Approval of Minutes of Previous Meetings
 - A. January 23, 2024, Regular Meeting

Main Motion: To Approve the Agenda as Presented

Moved by:	Anzilotti
Seconded by:	Best
Vote:	Unanimous Consent
Action:	Motion Carried

E. COMMUNICATIONS AND APPEARANCE REQUESTS

1. Elected Officials in Attendance
2. Board/Commission Members in Attendance
3. Presentation of Golden Heart Lifetime Achievement Award

Mayor Carrington presented the Golden Heart Lifetime Achievement Award to Linda Combs, for former Mayor John Combs.

Mayor Carrington called a brief recess at 6:20 p.m., the meeting reconvened at 6:35 p.m.

****Clerk's Note: Agenda was approved after the break.****

F. REPORTS

1. City Manager's Report
 - Revamp of Title 4 will be coming to the Council shortly.
 - Spoke to potential additional funding for the building of the library.
2. Mayor's Report
 - Read updated information regarding the Palmer Library project received from Wolf Architecture
 - Reported that he was asked to be on the Southcentral Mayors Energy Coalition.
 - Spoke to Council Member Best's recent arrest and stated that no action can be taken until the conclusion of the case.
3. City Clerk's Report
 - Happy to be feeling better.
4. City Attorney's Report
 - Reported that she has been working with the Human Resources Director regarding Title 4.
 - Submitted draft of report and presentation for the February 27 meeting, therefore you should have it in advance of the meeting.
 - Gave a brief overview of what is going to be addressed on February 27.
 - There will be a Code of Ethics report at the March 12 meeting.

G. AUDIENCE PARTICIPATION

Travis Friesen:

- Spoke to the library project.
- Offered an alternate proposal for the proposed coffee shop space to be used as an art gallery.

Jackie Goforth:

- Expressed concerns regarding the books at the library.

Susan Pougher:

- Spoke about activities going on at the library.

Linda Swan:

- Believes the construction of the new library should be on hold until the book issues are concluded.

Heide Deadman:

- Works at the Palmer Library
- Report that is the one-year anniversary of the roof collapse and the book challenges.
- Also spoke to perception and perspective and provided information links.

Erik Anderson:

- Spoke regarding Council Member Best's two recent DUI arrests.
- Also spoke to the seriousness of drunk driving.

H. PUBLIC HEARINGS

1. **Resolution No. 24-010:** A Resolution of the Palmer City Council Authorizing the City Manager to Commence Design and Environmental Work on the Lighting System at the Palmer Municipal Airport

for the Purpose of Obtaining Federal Aviation Administration Grant Funding and Appropriate \$115,086 From the Unassigned General Fund Balance for this Project.

Mayor Carrington opened the public hearing on Resolution No. 24-010.

Seeing no one come forward, Mayor Carrington closed the public hearing.

Manager Moosey and Superintendent Diumentì spoke to Resolution No. 24-010.

Main Motion: To Adopt Resolution No. 24-010

Moved by:	Anzilotti
Seconded by:	Melin
Vote:	Unanimous
Action:	Motion Carried

2. **Resolution No. 24-011:** A Resolution of the Palmer City Council to Authorize the City Manager to Approve the Reclassification of Palmer Fire & Rescue's Fire Training Officer to Level 10 in the City of Palmer's Employee Pay Plan

Mayor Carrington opened the public hearing on Resolution No. 24-011.

Seeing no one come forward, Mayor Carrington closed the public hearing.

Chief Cameron gave a staff report regarding this Resolution and Resolution Numbers 24-012, 24-013, and 24-014.

Main Motion: To Adopt Resolution No. 24-011

Moved by:	Melin
Seconded by:	Tudor
Vote:	Unanimous
Action:	Motion Carried

3. **Resolution No. 24-012:** A Resolution of the Palmer City Council to Authorize the City Manager to Approve the Retitling of Palmer Fire & Rescue's Permanent, Part-Time Support Specialist to Communications Specialist and Reclassification to Level 6 in the City of Palmer's Employee Pay Plan

Mayor Carrington opened the public hearing on Resolution No. 24-012.

Seeing no one come forward, Mayor Carrington closed the public hearing.

Manager Moosey spoke to resolution.

Main Motion: To Adopt Resolution No. 24-012

Moved by:	Alcantra
Seconded by:	Melin
Vote:	Unanimous
Action:	Motion Carried

4. **Resolution No. 24-013:** A Resolution of the Palmer City Council Approving the Reclassification of Palmer Fire & Rescue's Fire Prevention Officer to Level 10 in the City of Palmer's Employee Pay Plan

Mayor Carrington opened the public hearing on Resolution No. 24-013.

Seeing no one come forward, Mayor Carrington closed the public hearing.

Main Motion: To Adopt Resolution No. 24-013

Moved by:	Tudor
Seconded by:	Melin
Vote:	Unanimous
Action:	Motion Carried

5. **Resolution No. 24-014:** A Resolution of the Palmer City Council to Donate Palmer Fire & Rescue's 1973 Seagrave Fire Engine to the Palmer Volunteer Firemen's Association

Mayor Carrington opened the public hearing on Resolution No. 24-014.

Seeing no one come forward, Mayor Carrington closed the public hearing.

Main Motion: To Adopt Resolution No. 24-014

Moved by:	Melin
Seconded by:	Cooper
Vote:	Unanimous
Action:	Motion Carried

I. ACTION MEMORANDA

J. UNFINISHED BUSINESS

K. NEW BUSINESS

L. RECORD OF ITEMS PLACED ON THE TABLE

Document from Manager Moosey

Documents from Jackie Goforth

M. AUDIENCE PARTICIPATION

Travis Friesen:

- Stressed the idea of the art gallery in the library.
- Would like the outside design of the new library to change, it is too modern.

Jackie Goforth:

- Spoke to concerns regarding books in the young adult section of the library.

Linda Swan:

- Expressed her concern about the books at the library.

Eric Anderson:

- Spoke to alleged DUI for Council Member Best and feels that there must have been evidence for the Officer to make an arrest.
- He also stated that Council Member Best should receive a public reprimand.
- Glad that the Mayor is going to symposium regarding natural gas and spoke to natural gas use in Alaska.

Mike Chmielewski:

- Suggested stop signs on the left and right, across the railroad tracks (N. Valley Way), be removed, or illuminate the signs.

Heidi Deadman:

- Pointed to the parent resources page on the library website to assist parents regarding electronic devices and encouraged everyone to check it out.

Susan Pougher:

- Looking forward to hearing from the City Attorney regarding libraries and the law.

N. EXECUTIVE SESSION

O. COUNCIL MEMBER COMMENTS

Deputy Mayor Anzilotti:

- Reminder that she will not be attending the February 27 meeting, sad to miss the attorney's report regarding the library books.

Council Member Melin:

- Thanked everyone for coming out.
- Thanked Chief Cameron for his transparency regarding the employee pay plan.
- Spoke regarding the feedback she has received about the library design.
- Expressed some concern with receiving grants from certain grantors.

Council Member Tudor:

- Gave kudos to Wolf Architecture regarding the library design.
- Feels there is a need to look at the design again, with a more fiscally responsible perspective.
- Asked for Council support to look at it again with a smaller footprint, Melin provided support.

Council Member Alcantra:

- Recently became a grandfather.
- Noted his friend Tom Anderson recently passed away and expounded on his positive attributes.
- Expressed support for his former neighbor Council Member Best.

Council Member Cooper:

- Spoke in favor of the Golden Heart Lifetime Achievement Award awarded to former Mayor John Combs.

Council Member Best:

- Congratulated Deputy Mayor Anzilotti's on her upcoming wedding day.
- Congratulated Council Member Alcantra on becoming a grandfather.

P. ADJOURNMENT

With no further business before the Council, the meeting was adjourned at 7:44 pm.

Approved this 27th day of February 2024.

Steve Carrington, Mayor

Shelly M. Acteson, CMC, City Clerk

Palmer Mayor's Report

Tuesday February 27, 2024 Council Meeting

Manager Search

Thus far we have two candidates. The position has been open since Feb. 1 and closes March 1. We will have another update at our meeting Feb. 27.

Palmer Community Resource Day

Twenty-six non-profits and social service agencies were at the Palmer Community Resource Day. Those needing services as well as interested community members were there as well. Polly-Beth and Sherry worked hard to pull off this event that had twice as many in attendance as last year.



Palmer Mayor's Report



Agenda Highlights

Consent Agenda (approved with the Agenda)

Minutes from Feb. 13, 2024, regular city council meeting

Communication & Appearance Requests

Saroma Sister City Update – Carla Swick


Proclamations

- Proclamation Recognizing Colony Wrestler Matthew Mitchell
- Proclamation Recognizing Colony Wrestler Amelia Fawcett
- Proclamation Recognizing Colony Wrestler Noah Justice

Reports

City Attorney's Report – Libraries and Law: How the Law Relates to Library Materials in the Palmer Public Library

We have a report from our Palmer Attorney Sarah Heath. I'll give some clues about some of the topics she covers and ask questions in my report. Hopefully this will intrigue people to read the report and look for answers.



Palmer Mayor's Report

The Law and Libraries

Our city attorney Sarah Heath will be giving a report on "*The Law and Libraries*" which summarizes issues with the law and limiting or removing materials in our library. To do this Sarah reviews many instances of what is happening in other states as well as our own state of Alaska.

I don't know if her report is exhaustive, but her report is around 27 pages long (with 33 footnotes documenting resources). She gives some excellent history of public libraries and the Palmer Library specifically. The city of Palmer was incorporated with the Territory of Alaska in 1951.

Do you know when the Palmer Library was officially recognized?

Sarah also has a section that explains the legal authority the City of Palmer has to manage and legislate the Palmer Library. Palmer is a home-rule city that is authorized and controlled by via Title 29 of the Alaska Statutes under the Alaska Constitution. Of course, we are also part of the U.S and subject to the United States Constitution. The Palmer Charter outlines two parties responsible for these matters.

Do you know who these two responsible parties are?


Sarah Heath covers how the first amendment applies to the City of Palmer. She covers how obscenity, defamation, and speech work in the context. There are issues of pornography, minors' rights and/or restrictions to rights. There are interesting factors in community standards and how and/or what is offensive. To me it seems easy to be offended, but to be officially/ legally offended can be tricky it seems.

Why is the First Amendment strictly scrutinized? And what does that actually mean?

This is all to get to the place of talking about Obscenity. To do this, Sarah covers the issue of definitions of some terms. Like a good lawyer she comes up with a definition from two or three cases.

Alaska's Legal Definition of Obscenity = ????

Now, like a good electrical cord, there is a 3-prong test or "alternative consisting of three separate elements. The first and third have to do with contemporary community standards and those are relatively easy elements to prove. But the second test is the hardest to meet and tends to be the defining element in obscenity determination. The challenge with all this is you are analyzing a book or material to see if it is an exemption to the First Amendment. Judges and courts are very careful and even reluctant when it comes to allowing government to control what people have access to read or view.



Palmer Mayor's Report

Who should control what other people have access to read?

ACTIONS! Can we do anything?

Attorney Sarah Heath listed 4 possible actions.

1. Are any states doing anything about these matters with their state law? Sarah's report gives examples of what is happening in other states (27 of them). The difficulty with most of these – they are recent. They may have passed a law, but many are in the process of being challenged. That means we don't know where the courts will land with many of these approaches.

Is Alaska one of those 27 states?

2. Can the District Attorney or the Attorney do anything? Sarah's report outlines a few states where the Legal side of things has been asked to rule and intervene in some of these matters.

Has the Alaska Attorney General ruled on any of these concerning books?

3. Let's just have the Palmer Library remove challenging materials from its library. Our attorney lists some of the case where cities and/or school districts have moved or even removed.

Which organization is in the process of suing the Mat-Su School District about book removal?

4. We could move the difficult books to a different section. Wasilla actually moved their entire Young Adult section to the Adult Section. Recategorizing books could be helpful but is a time-consuming process.

Have courts intervened when libraries simply move books within their library?

=====

Mayor Steve Carrington

The Palmer City Council

Libraries and The Law: How the Law Relates to Library Materials in the Palmer Public Library

Sarah Heath, Palmer City Attorney
2-8-2024

Purpose: Regarding your request for a summary of the law and how it relates to removing or limiting materials from the library particularly as it relates to books rated for minors; and a request for information on actions being taken around the United States to address this issue.

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Introduction

To evaluate the relationships and connections of Libraries and the Law; the following questions and explanations need to be discussed.

First, one needs to discuss what a Library is, what is its history, what is its' purpose; under what laws and authorities does a Library operate?

Secondly, since the library falls under the umbrella of the legal authority of the City of Palmer, how is the City authorized to manage and legislate? Where does the City of Palmer authority come from and what laws is Palmer subject to?

Thirdly, applying the Law. What is the U.S. Constitutional rights that most often interact with public libraries. What does the First Amendment say? How is the First Amendment applied to the City of Palmer? What standards and requirements are allowed and/or barred for a governmental body? How is a local governmental law analyzed to see if the local body has violated the first amendment? Are there exemptions to the First Amendment? What are they? What is the history of obscenity case law in the United States? What does Alaskan law say about obscenity? How does the Alaska Attorney General's November 11th, 2023, relate to the current laws? How are criminal statutes applied and analyzed? What are the elements? What are the standards of analysis?

What cases have been tried? What has the United States Supreme Court held? How does that relate to Alaskan law? How does that relate to libraries?

Lastly, what actions are being taken to address this issue?

History and Purpose of a Public Library

What is the History of a Public Library?

The Palmer Public Library is a part of the longstanding history of Public Libraries in the United States that pre-dates the American Revolution. As recognized in *Fayetteville Pub. Library v. Crawford Cnty.*, 5:23 CV-05086, 7-8 (W.D. Ark. Jul. 29, 2023) ("Our founding fathers understood the necessity of public libraries for a well-functioning democracy. Benjamin Franklin is widely credited with founding the country's first lending library in 1731¹. After the British burned Washington's congressional library during the War of 1812, Thomas Jefferson sold his personal collection of 6,487 books to start what is now the Library of Congress.² He famously said, "I have often thought that nothing would do more

¹ As Cited in *Fayetteville Pub. Library v. Crawford Cnty.*, 5:23-CV-05086, 8 n.5 (W.D. Ark. Jul. 29, 2023) ("See Ben Franklin: Inventor and Innovator, University of Pennsylvania Almanac, Vol. 66, Issue 18, Jan. 14, 2020, <https://almanac.upenn.edu/articles/ben-franklin-inventor-and-innovator> (last accessed July 28, 2023).")

² As Cited in *Fayetteville Pub. Library v. Crawford Cnty.*, 5:23-CV-05086, 8 n.6 (W.D. Ark. Jul. 29, 2023) ("See *History of the Library of Congress*, <https://www.loc.gov/about/history-of-the-library> (last accessed July 28, 2023).")

extensive good at small expense than the establishment of a small circulating library in every county ” ”)³

What is the History of the Palmer Public Library?

In that theme, the Palmer Public Library was recognized before the incorporation of the City of Palmer. Officially the Palmer Public Library was recognized by the Territory of Alaska on February 11, 1946. The Palmer Public Library now operates as a service of the City of Palmer. The purpose of the Palmer Public Library is to “provides residents of Palmer and the Matanuska-Susitna Borough ready access to a broad collection of materials in a variety of media that record human knowledge, ideas, and cultures; organizes these resources; provides guidance and encouragement in the use of library materials; provides the community with access to reliable and available sources of information and reference, and participates in the Matanuska-Susitna Borough Library Network (MSLN), and the Alaska Library Catalog Network (ALC).”⁴

The Palmer Public Library has Librarians on staff. To implement the stated purpose of the Library, “The vocation of a librarian requires a commitment to freedom of speech and the celebration of diverse viewpoints unlike that found in any other profession. The librarian curates the collection of reading materials for an entire community, and in doing so, he or she reinforces the bedrock principles on which this country was founded.”⁵ In fact, as stated by United States Supreme Court, “Public libraries pursue the worthy missions of facilitating learning and cultural enrichment.”⁶ “To fulfill those missions, “public libraries must have broad discretion to decide what material to provide to their patrons.”⁷ The librarian's only enemy is the censor who judges contrary opinions to be dangerous, immoral, or wrong.”⁸

As such and a part of the ethics and professional accreditation to become a professional librarian- librarians are held to a significant professional standard, “Librarians-much like doctors and lawyers-are afforded significant professional responsibility and deference with respect to their area of expertise. As a part of their professional requirements, a Librarian is “tasked with the safeguarding of the public's First Amendment right to receive information by ‘resist[ing] all efforts to censor library resources.’ ”⁹

³ *Fayetteville Pub. Library v. Crawford Cnty.*, 5:23-CV-05086, 8 n.7 (W.D. Ark. Jul. 29, 2023) (“*See Library of Congress, Selected Quotations from the Thomas Jefferson Papers*, <http://www.loc.gov/collections/thomas-jefferson-papers/articles-and-essays/selected-quotations-from-the-thomas-jefferson-papers> (last accessed July 28, 2023).”)

⁴ <https://www.palmerak.org/library/page/mission-statement>

⁵ *Fayetteville Pub. Library v. Crawford Cnty.*, 5:23-CV-05086, 10-11 (W.D. Ark. Jul. 29, 2023)

⁶ *United States v. Am. Library Ass'n, Inc.*, [539 U.S. 194, 203](#) (2003).

⁷ *Id.* at 204.

⁸ *Fayetteville Pub. Library v. Crawford Cnty.*, 5:23-CV-05086, 11 (W.D. Ark. Jul. 29, 2023)

⁹ *Fayetteville Pub. Library v. Crawford Cnty.*, 5:23-CV-05086, 10 (W.D. Ark. Jul. 29, 2023) (Citing ALA Code of Ethics, <https://www.ala.org/tools/ethics>)

Under what laws and authority does the Palmer Public Library operate?

The Palmer Library is a funded and managed by the City of Palmer, but its mission and purpose are recognized by law to not be extension of government but “By virtue of its mission to provide the citizenry with access to a wide array of information, viewpoints, and content, the public library is decidedly not the state's creature; it is the people's.”¹⁰ As such, the Palmer Public Library operates under the authority of the City of Palmer.

The City of Palmer is a Home-Rule City

Where does the City of Palmer authority come from? What laws is the City of Palmer subject to?

The City of Palmer is a Home Rule City operating with a City Code and Charter. The City’s is authorized and controlled by Title 29 of the Alaska Statutes, under the Alaska Constitution. To this regard, home rule cities are subject to the United States Constitution, the Alaska Constitution and Alaska Statutes. Thus, the City of Palmer specifically is subject to the United States Constitution, Federal law, the Alaska Constitution and Alaskan laws, the Palmer Charter, and Palmer City Code. The Palmer Charter outlines the specific authorities and responsibilities- those which are administrative in nature are the responsibility of the Palmer City Manager¹¹ and those that are legislative¹² in nature to the Palmer City Council, as elected officials.

Therefore, any resolution and/or ordinance passed by the Palmer City Council must be in alignment with the above authorities.

This is particularly relevant to the issue of removing library materials from a Public Library and how those actions interact with the First Amendment of the U.S. Constitution.

The First Amendment, Strict Scrutiny, and Obscenity laws

What is the First Amendment? What does it say?

The First Amendment of the U.S. Constitution provides that “Congress shall make no law...abridging upon the freedom of speech or of press. The First amendment is applied to

¹⁰ *Fayetteville Pub. Library v. Crawford Cnty.*, 5:23-CV-05086, 11 (W.D. Ark. Jul. 29, 2023)

¹¹ “*Fayetteville Pub. Library v. Crawford Cnty.*, 5:23-CV-05086, 10 (W.D. Ark. Jul. 29, 2023)¹¹ Palmer Charter Section 3.8 Restrictions of powers of the council (a) and shall deal with the administrative service of the city through the City Manager only.

¹² Palmer Charter Section 3.1 “The Council shall exercise all of the legislative and policy-making powers of the city and shall provide for the performance of all duties and obligations imposed upon the city by law.”

<https://palmer.municipal.codes/Charter/III>

the state and state subdivision of government through the Fourteenth amendment and as defined by the U.S. Supreme Court, “This provision embodies “[o]ur profound national commitment to the free exchange of ideas.” *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (Citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989).”)

How is the First Amendment applied to the City of Palmer?

The City of Palmer is a government body, and as a government body Palmer City Council’s governing actions are required to be in alignment to the First Amendment (and all other applicable Constitutional requirements). The burden to uphold the First Amendment lies upon the government body, not an individual, since it is the First Amendment that ensures that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.¹³ “When a plaintiff shows that her ability to access information has been impeded by state action however minimally then that is sufficient concrete injury to confer standing for a First Amendment claim ” *Virden v. Crawford Cnty.*, 2023 U.S. Dist. LEXIS 161533 (W.D. Ark. Sep. 12, 2023).

How is a local governmental law analyzed to see if the local body has violated the First Amendment?

When a governmental body passes a law that may restrict or infringe upon a Constitutional right, then the Court uses **strict scrutiny** as the standard for reviewing the constitutionality of the law. Strict scrutiny places the highest burden upon the governmental body to prove that the law was passed to further a “compelling governmental interest”¹⁴ and the law must then also be narrowly tailored to specifically achieve the compelling interest the government has stated. This is a difficult standard to achieve, and many laws, resolutions and ordinance have been overturned on constitutional grounds. This is occurring right now, as the Mat-Su Borough School District is currently being sued for allegedly violating certain constitutional rights of its students by removing books from the library.¹⁵

Are there exemptions to the First Amendment? If so, what are they?

The First Amendment, like all fundamental rights, is not absolute. There are areas where the First Amendment does not apply. These are areas where the Courts have found that a governmental body has a compelling governmental interest to protect the public by imposing limitations on a individuals or group of individuals the First Amendment rights. In general, these are Incitement, Obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, grave, and imminent threats. Relevant to this

¹³ *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (*Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)”).

¹⁴ Cornell Law School, Legal Information Institute, Strict Scrutiny.

¹⁵ See *Dawn Adams, Et. AL v. Mat-Su Borough School District*; filed on November 17, 2023 in Federal Court.

discussion the areas where the U.S. Supreme Court has ruled that the First Amendment rights may be regulated, restrained, limited by government are “obscenity” or “harmful to minor” laws and child pornography (which focuses on the subject of the material rather than the viewer- i.e. child pornography portrays a child engaged in pornographic acts; child pornography is not a child reading pornography.)

Minor’s First Amendment Rights may be limited.

This issue was recently discussed in *Fayetteville Pub. Library v. Crawford Cnty.*,¹⁶ stating that “The Bill of Rights to the United States Constitution guarantees the right of every American to speak freely and to receive speech. This freedom of speech, codified in the First Amendment, is enjoyed by everyone-even children. However, by virtue of the fact that minors are “not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees,” *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring), the rights of persons under the age of 18 to speak and receive speech are not “co-extensive with those of adults,” *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring). In other words, minors' First Amendment rights are limited in some way.” Currently, in Alaska, this limitation on minors’ rights is defined by A.S.11.61.128(c).

In *Ginsberg v. New York*, 390 U.S. 629 (1968) the U.S. Supreme upheld a harmful-to-minors (obscenity) law. Allowing for a state law to establish the illegality of selling adult magazines to teens. The argument centered around the constitutionality of a harmful to minors law which limited the first amendment rights of a minor. The *Ginsberg* case held that minor’s first amendment rights are limited in some way and that a minor’s first amendment rights are not equal to that of adults regarding issues of obscenity. The Supreme Court established that material is considered obscene to minors if it is “patently offensive to prevailing standard of the adult community as a whole with respect to what is suitable materials for minors;” and “predominately appeals to the prurient interests of minors;” and “is utterly without redeeming social importance to minors.” These tests have been in part replaced by the *Miller v. California* and refined by the *Pope v. Illinois* cases.

Obscenity: The tension between the First Amendment and Community Values.

Historically, there has always been tension between restraining freedom of thought and expression and the values of a community’s morales. The word moral “derives from mores- the customs which are deemed essential to the well-being of a group. Their very

¹⁶ *Fayetteville Pub. Library v. Crawford Cnty* 5:23-CV-05086, 3 (W.D. Ark. Jul. 29, 2023)

elusiveness renders controversy inevitable.”¹⁷ The question asked is: Where is the line? When does a material rise to the level of obscene? Is it coarse language? Is it a reference to drugs? A reference to sex? A description(s) of sexual acts? Who has the authority to make that decision? How does that balance on the scales of freedom of expression which is protected by the First Amendment? Do we as a society want the Government to be given the authority to tell the public what they can and cannot read? What the public can and cannot access?

There is often a significant difference between what an individual community member or community members may subjectively determine as obscene and what the law says is obscene.

The Challenges with Obscenity: The issue of Definition(s).

What is legally obscene?

This historical tension between freedom and values resides on the definition of: What is obscene?

The Alaska legislature has attempted to clarify this tension with the definition of “harmful to minors” located in A.S. 11.61.128(c). This ‘harmful to minors’ statute is Alaska’s Obscenity law.

Settling on a definition: *Ginsberg, Miller, and Pope*

Case law also demonstrates the attempts of the U.S. Supreme Court to resolve this tension. In 1957, *Roth v. United States* stating that, “Obscene speech, for example, has long been held to fall outside the purview of the First Amendment.”¹⁸ But this Court struggled in the past to define obscenity in a manner that did not impose an impermissible burden on protected speech.”¹⁹ Case law has varied significantly until the *Ginsberg* case, followed by *Miller v. California* and refined further by *Pope v. Illinois* in 1987. These cases combine to create the Miller’s test which is the current Alaska law defining what is legally obscene and therefore “harmful to minor(s).”

Following *Ginsberg*, in 1973, the Supreme Court revised the definition of obscene in *Miller v. California*. As summarized by the court in *Fayetteville Pub. Library v. Crawford County*:

“Prior to this case, in the 1960s, the Supreme Court had struggled mightily with how to define pornography, with Justice Potter Stewart famously concluding, “I know it when I see

¹⁷ (See Bruce L. Newman, *Constitutional Law--The Problem with Obscenity*, 11 *Wes. Rsrv. L. Rev.* 669 (1960) Available at: <https://scholarlycommons.law.case.edu/caselrev/vol11/iss4/11>)

¹⁸ See, e.g., *Roth v. United States*, 354 U.S. 476, 484-485 (1957).

¹⁹ As discussed in *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574 (2002) Citing *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968)”

it.”²⁰ Obscenity was then defined as being “utterly without redeeming social importance” and undeserving of constitutional protection.²¹ The *Miller* Court reaffirmed that obscene materials were not entitled to First Amendment protection but changed the definition of “obscene” from “utterly without redeeming social value” stated in *Ginsberg* to lacking “serious literary, artistic, political, or scientific value.”²²

Pope v. Illinois, 1987, refining the Miller’s test by defining the standards to analyze the three (3) prongs (or elements) of the Miller’s Test. The U.S. Supreme Court held that Miller’s 3rd prong “serious literary, artistic, political or scientific value” is interpreted by applying a reasonable person objective standard and not a (subjective) contemporary community standard.

Alaska’s Obscenity Law

Following *Ginsberg* and *Miller* cases, state legislatures wrote obscenity laws using the court’s language. The law in Alaska for obscenity is ‘harmful to minors’ law using the *Millers-Ginsberg* test which was later refined in *Pope v. Illinois*, 481 US 497-1987. The November 16, 2023 the Attorney General of Alaska’s letter to School and Public Libraries outlined the current criminal laws and definitions of obscenity in Alaska.

As stated by the Alaska Attorney General and Alaska criminal statutes; the definition of obscenity is found in *Distribution of Indecent Material to Minors*, A.S. 11.61.128:

(a) A person commits the crime of distribution of indecent material to minors if:

(1) the person, being 18 years of age or older, intentionally distributes or possesses with intent to distribute any material described in (2) and (3) of this subsection to either

(A) a child that the person knows is under 16 years of age; or
(B) another person that the person believes is a child under 16 years of age;

(2) the person knows that the material depicts the following actual or simulated conduct:

(A) sexual penetration;

(B) the lewd touching of a person's genitals, anus, or female breast;

²⁰ Citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

²¹ Citing *Roth v. United States*, 354 U.S. 476, 484-85 (1957).

²² *Fayetteville Pub. Library v. Crawford Cnty.*, 5:23-CV-05086, 25 (W.D. Ark. Jul. 29, 2023) Citing *Miller v. California* 413 U.S. at 24 (1973)

- (C) masturbation;
 - (D) bestiality;
 - (E) the lewd exhibition of a person's genitals, anus, or female breast; or
 - (F) sexual masochism or sadism; and
- (3) the material is harmful to minors.

(b) In this section, it is not a defense that the victim was not actually under 16 years of age.

(c) In this section, “harmful to minors” means

(1) the average individual, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest in sex for persons under 16 years of age;

(2) a reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, educational, political, or scientific value for persons under 16 years of age; and

(3) the material depicts actual or simulated conduct in a way that is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable for persons under 16 years of age. (d) Except as provided in (e) of this section, distribution of indecent material to minors is a class C felony.

(e) Distribution of indecent material to minors is a class B felony if the defendant was, at the time of the offense, required to register as a sex offender or child kidnapper under AS 12.63²³ or a similar law of another jurisdiction.²⁴

Defining a Crime: Meeting the Elements

In the United States and in Alaska, every crime that is charged has specific components of it called elements. For a crime to have been committed all elements of a criminal statute that an individual is charged with must be met. These elements are listed in the criminal statutes and define the crime. The prosecution then has the responsibility to prove each of these elements in court beyond a reasonable doubt. In the case of a criminal charge of committing distribution of indecent material all elements plus the three elements of harmful to a minor must be met, this is a total of six elements.

²³<https://www.akleg.gov/basis/statutes.asp#12.63>

²⁴ See <https://www.law.alaska.gov/press/releases/2023/111723-ParentalNotification.html>

Alaska's Legal Definition of Obscenity= Harmful to Minors

Alaska utilizes the form of the Miller's test. For material to be determined legally obscene it must meet the criteria established by "harmful to minors" in A.S. 11.61.128(c). Harmful to minors is a 3-prong test or alternatives consisting of three separate elements. Each element must be met and within each element are standards and further prongs which also must be met.

The first and third elements use an contemporary community standard, "a State may choose to define an obscenity offense in terms of `contemporary community standards' as defined in *Miller* without further specification . . . or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*."²⁵ A "contemporary community standard is interpreted as the average community member in the community (such as Palmer) this is narrower and more subjective to the local community viewpoint.

The second element uses a "reasonable person" standard. This is a more objective viewpoint and is not narrow to a local community- that any reasonable person (including those in more liberal and urban areas) would find serious literary, artistic, educational, political or scientific value. This element is the hardest to meet and tends to be the defining element in obscenity determination. If a book or other material does not meet all three elements of this statute, then the material is not legally obscene even if members of the community may object to it, "The constitutional guarantee of freedom of speech and the press protects not only the great literary works which we all revere but also those questionable forms of literary expression which some of us abhor." *People v. Berger*, 185 Colo. 85, 90, 521 P.2D 1244, 1246 (1974).

Obscenity: Analyzing the Elements

Harmful to Minors Element 1: Does it appeal to prurient interests?

(1) the average individual, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest in sex for persons under 16 years of age;

To clarify and apply Element 1: Would the average individual in the community with Palmer's community standards, find that the material taken as a whole appeals to the prurient (indecent sexual) interests for someone younger than 16. The key points of meeting this element are (A) the *contemporary community standard*; and (B) *taken as a whole* as opposed to single segments of the book. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) the court stated that, "the artistic merit of a work does not depend on the presence of a single explicit scene" and therefore "where the scene is part of the narrative,

²⁵ *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 576 (2002)

the work itself does not become obscene, even though the scene in isolation might be offensive." *Id.* at 248.

Harmful to Minors Element 2: Does the material have value?

(2) a reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, educational, political, or scientific value for persons under 16 years of age; and

The second and most strict element has multiple sub-elements required to be met. Whether a 'a reasonable person would find that the material, (B) *taken as a whole*, (C) lacks serious (D) *literary, artistic, educational, political, or scientific value* for persons under 16 years of age', this element must in its entirety be met to justify a First Amendment exception. The Supreme Court has repeatedly emphasized this, "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." *Miller v. California, Id.*, 413 U. S. at 34. "At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection." *Miller, Id.*, at 26.

The Supreme Court set a 'reasonable person' as an objective standard, "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political or scientific value in allegedly obscene material but whether a reasonable person would find such value in the material taken as a whole period." See *Pope v. Illinois*, 481 U.S. 497, 501 (1987) In cases where the material being objected to has public awards, accolades, reviews etc. it is highly unlikely that material will meet the definition of obscene because the reasonable person standard has not been met. On October 25, 2023, the District Court Judge dismissed a lawsuit against the Michigan school district that the allegedly explicit books in the school library did not meet the definition of obscene in the Miller's test. The judge stated that while he agreed with the plaintiffs concerned about the sexual explicit nature of some of the texts and illustrations in the books they do not qualify as being harmful to minors because the books as a whole have literary value; "Plaintiffs cannot establish that a reasonable person would not find value in the identified works as a whole," the judge wrote in his ruling "In fact every book identified by plaintiffs has either received accolades or have been on a best sellers list. ²⁶ "Taken as a whole has already been defined, the next key is lacks serious literary... etc. The addition of the word serious is an essential part of this determination. It allows for the judge or jury as trier of fact to consider intent for including the material in the book, to determine "If that intent is to convey a literary, artistic, political, or scientific idea or to advocate a position then the

²⁶ Litigation against Rockford Public Schools in Kent County Michigan lawsuit filed by "Parents and Taxpayers Against Pornography in Rockford Public Schools." Judge George J. Quist on Oct. 25, 2023 approved motion to dismiss.

intent is "serious." *State v. Walden Books Co.*, 386 So.2d 342 (La. 1980) (citing Schauer's *The Law of Obscenity*).

Lastly, having *literary, artistic, political, or scientific value*. The Court has stated that material depicting sexual activity that may be offensive to some may still have literary artistic political or scientific value and as such are not legally considered obscene and therefore regulation of such books is a First Amendment infringement without allowable exception. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), a case that considered the constitutionality of a law that regulated virtual child pornography (i.e. computer-generated pornography produced without the use of a real children), the Supreme Court held that the law was unconstitutional in part because it prohibited the publication of work that had serious literary, artistic, political, or scientific value. The court was concerned that "the statute prescribes the visual duplicate depiction of an idea- that of teenagers engaging in sexual activity- that is a fact of modern society and has been a theme in art and literature throughout the ages period." *Id.* at 246. The court emphasized that themes of teenage sexual activity and sexual abuse of children have inspired "countless literary works" and it cited Romeo and Juliet and several award-winning movies as examples. *Id.* at 247-248. It declared that "the artistic merit of a work does not depend on the presence of a single explicit scene" and therefore "where the scene is part of the narrative, the work itself does not become obscene, even though the scene in isolation might be offensive." *Id.* at 248.²⁷

Harmful to Minors Element 3: Is the material patently offensive?

(3) the material depicts actual or simulated conduct in a way that is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable for persons under 16 years of age.

Element 3 holds the same contemporary community standard as Element 1, where the (A) local adult community as whole (contemporary community standard); would agree that works depicts, (B) patently (obviously, blatantly) offensive conduct and is therefore not suitable for minors under 16 years of age. Those are relatively easy elements to prove.

Even if a concerned citizen sincerely objects to a book or other materials; unless that material meets the requirements discussed above to be determined legally obscene than actions to remove it, or limit access to it, or otherwise suppressing access – is most likely to be determined to be a First Amendment violation by the governing body limiting access.

²⁷ See discussion in Letter from Colorado's District Attorney's Office dated 12/21/23 re "Allegations of 'obscene' books in school libraries insufficient for criminal charges. Release #2023-010

Examples of actions taken regarding this issue in the United States.

ACTION SCENARIO 1: AMENDING, OR CREATING AN OBSCENITY OR HARMFUL TO MINOR'S STATE LAW

This approach is taken at the State level and if held to be constitutional would allow all subdivisions of the state (cities etc.) to apply that definition at the municipal level as well. While several states are doing this no one state is approaching it the same way. The 27 states as listed below are tackling this issue at the state legislative level.

Arizona has proposed Bills to amend sexually explicit materials in schools, and the definition of material harmful to minors especially as it pertains to the internet. See AZ SB 1007; SB1125; SB1298.

Georgia- Creating an amendment to the Harmful Materials to Minors Act; and to give email notification to parents for schoolbooks their child has checked out. See GA SB154; GA SB363

Iowa- Bills related to obscenity exemptions, exposure and admittance to obscene performances, public library taxes. See IA HF2040; IA SF2176; IA SSB3131

Idaho- Amending state law to prohibit materials available to a minor; creating a state law to establish the selection, review, and reconsideration of school library materials; library board elections every 4 years. See ID S1221; ID S1235; ID H0384

Indiana- amending obscene materials definition See IN HB1221

Kansas- Removing an affirmative defense for public, private and parochial schools from the crime of promotion to minors of material harmful to minors. See KS SB188

Kentucky- Require the local board of education to allow parents and guardians an opportunity to orally recite passages from materials, programs, or events subject to appeal; require immediate removal of the material, program, or event... (school related) See KY HB191

Maryland- Concerning Public Schools - Sexually Explicit Materials - Prohibited in Libraries and Media Centers FOR the purpose of prohibiting sexually explicit materials in public elementary, middle, and secondary school libraries and media centers; See MD HB25 and altering the definition of "item" relating to the prohibition against displaying or distributing obscene material to minors to include a drawing or illustration; and prohibiting certain public schools from displaying certain obscene material... See MD HB671

Minnesota- A bill for an act relating to education; prohibiting certain material in school libraries; amending Minnesota Statutes 2022, section 134.31, by adding a subdivision. See

MN SF2174; A bill for an act relating to education; removing exemptions from obscenity laws for public schools and postsecondary institutions; amending Minnesota Statutes 2022, sections 617.291, subdivision 2; 617.295. See MN SF2434

Missouri: MO HB1543 - Modifies the offense of providing explicit sexual material to a student (Introduced); MO HB1574 - Prohibits the state librarian from disbursing funds to libraries that offer obscene materials to children (Introduced); MO HB2374 - Requires schools to adopt school policies governing materials that are obscene or harmful to minors (Introduced); MO SB1272 - Modifies provisions relating to providing explicit sexual material to a student (In Committee); MO SB1330 - Establishes a cause of action against libraries for furnishing or allowing access of pornographic materials to minors (In Committee).

Nebraska: NE LB441 - Change provisions relating to obscenity (In Committee); NE LB635 - Provide requirements regarding access to digital and online resources provided for students by school districts, schools, and the Nebraska Library Commission (In Committee);

New Hampshire: NH SB523 - Relative to the regulation of public-school library materials. (In Committee) This bill prohibits material that is obscene or harmful to minors in schools, requires vendors of school library materials to develop appropriate ratings, and creates a procedure for removal and cause of action.;

New Jersey: NJ A708 - Requires DOE to develop model policies for ensuring parental notification of sexually explicit content in curriculum; requires board of education to provide parental notification of sexually explicit content in curriculum. (In Committee) This bill requires the Department of Education to develop model policies for ensuring parental notification of sexually explicit content in the school curriculum and requires boards of education to provide parental notification of sexually explicit materials; NJ S508 - Requires each public school to post on website comprehensive list of all resources available in school library. (In Committee).

Ohio: OH HB245 - Prohibits certain adult cabaret performances (Introduced)

Oklahoma: OK HB1811 - Schools; prohibiting schools from maintaining certain books or materials; OK HB3115 - Public libraries; Opposition to Marxism and Defense of Oklahoma Children Act of 2024; associations; Department of Libraries Board; required credentials; effective date. (In Committee); OK SB95 - Schools; prohibiting school districts and charter schools from providing certain material to students without written consent. Effective date. (In Committee); OK SB1208 - Schools; requiring school districts and charter schools to submit certain list of library materials; providing process for reporting violations; providing penalties. Effective date. Emergency. (In Committee); OK SB1221 - Child pornography; modifying terms. Effective date. (In Committee); OK SB1888 - Schools; prohibiting certain schools and school libraries from maintaining or promoting books with certain subjects. Effective date. Emergency. (In Committee).

Pennsylvania: PA HB209 - In public indecency, further providing for the offense of obscene and other sexual materials and performances. (In Committee); PA HB1659 - In terms and courses of study, providing for parental control relating to instructional materials and books containing sexually explicit content. (In Committee); PA SB7 - In terms and courses of study, providing for parental control relating to instructional materials and books containing sexually explicit content. (Crossed Over).

Rhode Island: RI S2041 - Rights of Parents and Guardians In Public Educational Instruction Act (In Committee)

South Carolina: SC H3826 - Protection of Minors from Pornography and Obscenities Act (In Committee); SC H3616 - Defense of Children's Innocence Act (In Committee); SC H3304 - Transparency and Integrity in Education Act (In Committee); SC H4654 - Public school libraries (In Committee); SC H4701 - READER Act (In Committee) A bill to amend the South Carolina Code of Law by Enacting THE "RESTRICTING EXPLICIT AND ADULT-DESIGNATED EDUCATION RESOURCES (READER) ACT"; by adding sections 59-31-5 SO as to define necessary terms; SC S0506 - Protection of Minors from Pornography and Obscenities Act (In Committee) A bill to amend the South Carolina Code of Laws by enacting the "PROTECTION OF MINORS FROM PORNOGRAPHY AND OBSCENITIES ACT" by amending section 16-15-375, relating to definitions applicable to the article regarding obscenity laws.

Tennessee: TN HB1090 - AN ACT to amend Tennessee Code Annotated, Title 39, Chapter 17, Part 9, and Title 49, relative to obscenity. (In Committee) As introduced, removes the educational justification of a person possessing obscene material if the person is at a school building, bus, school campus, grounds, recreational area, athletic field, or other property; TN HB1661 - AN ACT to amend Tennessee Code Annotated, Title 10, Chapter 1 and Title 10, Chapter 3, relative to accessing or viewing obscene library materials by minors. (In Committee); TN SB2173 - AN ACT to amend Tennessee Code Annotated, Title 10, Chapter 1 and Title 10, Chapter 3, relative to accessing or viewing obscene library materials by minors. (Introduced) As introduced, enacts the "Restricted Access by Minors to Obscene Library Materials Act." - Amends TCA Title 10, Chapter 1 and Title 10, Chapter 3.

Utah: UT HB0029 - Sensitive Material Review Amendments (Crossed Over) This bill amends provisions regarding the evaluation of instructional material to identify and remove pornographic or indecent material; UT HB0417 - School Materials Amendments (Introduced) This bill amends provisions regarding student access to sensitive material within the public education system.

Virginia: VA HB1206 - Obscene materials; modifies restrictions on purchase, distribution, exhibition, or loan. (In Committee).

Wisconsin: WI AB15 - Pupil or minor access to harmful material in public libraries and to harmful material or offensive material in public schools. (FE) (In Committee) An Act to

amend 119.04 (1); and to create 43.75 and 118.073 of the statutes; Relating to: pupil or minor access to harmful material in public libraries and to harmful material or offensive material in public schools.; WI AB308 - Protection from prosecution for employees of libraries and educational institutions possessing obscene materials. (In Committee) An Act to repeal 944.21 (8) (b) 1. and 944.21 (8) (b) 2. of the statutes; Relating to: protection from prosecution for employees of libraries and educational institutions possessing obscene materials. WI SB597 - Parental notification related to school library materials. (FE) (In Committee).

West Virginia: WV HB4011 - To modify exemptions from criminal liability to include a distinction for biological lessons regarding reproduction. (In Committee) The purpose of this bill is to clarify exemptions from criminal liability for obscene material; WV HB4654 - Removing bona fide schools, public libraries, and museums from the list of exemptions from criminal liability relating to distribution and display to minor of obscene matter (In Committee); WV HB5191 - Relating to permitting obscenity in schools (In Committee) The purpose of this bill is to provide that exemptions to distribution and display to minor of obscene matters do not apply to public libraries or museums with regard minors in elementary or middle schools.; WV SB197 - Prohibiting obscene materials in or within 2,500 feet of WV schools (In Committee); WY HB0068 - Obscenity-impartial conformance. (Introduced) AN ACT relating to crimes and offenses; repealing an exception to the crime of promoting obscenity regarding possessing obscene materials for specified bona fide educational purposes; and providing for an effective date.

Action Scenario 2: Request the Attorney General to make a determination as to whether certain materials are considered harmful to minors, as a follow-up to his Nov. 16th letter.

In Alaska, the District Attorney Offices (Prosecution) fall under the Attorney General. If the Attorney General made a determination as to whether certain books were considered obscene then that would be a State-wide opinion with state-wide impact. This approach has been done in various communities and states. Examples Include:

- In Colorado, the District Attorney's Office was requested to make a legal criminal determination as to whether certain books in the school library were legally obscene and therefore subject to an investigation of criminal conduct. The DA found the materials were not obscene and there were no grounds for criminal charges.
- In Wyoming, the Sheriff's Office responded to a request to make a determination on 4 youth books for obscenity and if the Campbell County Public Library should be subject to criminal prosecution. The District Attorney office and the Sheriff did a analysis of the requested books and determined that they did not meet the requirements of obscenity and declined to pursue any criminal charges.

- In Florida, the Flagler County Sheriff's Office response to a request for criminal charges and all young adult books to be checked in the libraries. The Sheriff's General Counsel responded that the book requested to be analyzed, "it fails a third prong of the test laid out in state law. Specifically, the third prong requires when taken as a whole that the book be without serious literary artistic political or scientific value for minors this book is widely recognized award-winning piece of nonfiction which deals with a difficult subject of both social and political issues impacting this age group the book is readily available online and in public libraries this book does not meet the legal definition of harmful to minors.

ACTION SCENARIO 3: REMOVAL OF MATERIALS FROM PUBLIC LIBRARIES AND/OR SCHOOL LIBRARIES:

A Public Library has even greater expectation to protect First Amendment Rights than a school library, whose purpose and mission is limited to minors only, "The principles set forth in Pico--a school library case--have even greater force when applied to public libraries." *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530 (N.D. Tex. 2000).

The cases listed below show fact patterns of various attempts in different jurisdictions to remove materials from libraries. These actions are overwhelming to be found as a First Amendment Violation and overturned by the Courts.

List of Cases Summaries: ²⁸

- **(School Library) *Right to Read Defense Committee v. School Committee of the City of Chelsea*, 454 F. Supp. 703 (D. Mass. 1978)²⁹:**
 - o **Fact Pattern:** The Chelsea, Mass. School Committee decided to bar from the high school library a poetry anthology written by adolescents entitled, *Male and Female under 18*."
 - o **Court Held:** Challenged in U.S. District Court, Joseph L. Tauro ruled that The poetry anthology by returned to the school library and made available to students who have written parental or guardian permission
 - o **Quotes:**
 - "The library is 'a mighty resource in the marketplace of ideas.' There a student can literally explore the unknown and discover areas of interest and thought not covered by the prescribed curriculum. The student who discovers the magic of the library is on the way to a life-long experience of self-education and enrichment. That student

²⁸ First Amendment challenged case summaries taken from West Law, A.L.A, and Casetext resources.

²⁹ This case is publicly available at <https://law.justia.com/cases/federal/district-courts/FSupp/454/703/2135164/>

learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom. The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger from such exposure. The danger is mind control. The committee's ban of the anthology *Male and Female* is enjoined."

- The Supreme Court has commented that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S. Ct. 247, 251, 5 L. Ed. 2d 231 (1960). The fundamental notion underlying the First Amendment is that citizens, free to speak and hear, will be able to form judgments concerning matters affecting their lives, independent of any governmental suasion or propaganda. Consistent with that noble purpose, a school should be a readily accessible warehouse of ideas. at pg.710

- **(School Library) *Salvail v. Nashua Board of Education*, 469 F. Supp. 1269 (D. N.H. 1979)³⁰:**

- **Fact Pattern:** Magazine was removed from a New Hampshire high school library by order of the Nashua School Board. MS magazine subscription canceled by vote of school board members based upon content of magazine containing Lesbianism, witchcraft, pro-communism concepts.
- **Court Held:** The U.S. District Court held that
 - the Resolutions of the Nashua Board of Education of March 27, 1978, and March 27, 1979, are hereby declared null and void as in violation of the First Amendment to the United States Constitution.
 - The Nashua Board of Education and the members thereof are hereby enjoined from the continued withdrawal of MS magazine from the shelves of the Nashua High School library and are ordered to replace the issues they have caused to be removed and to resubscribe to MS magazine...
 - The Nashua Board of Education and the members ... are ordered to follow the current guidelines relative to any complaints about any publications in the Nashua High School library, whether said

³⁰ Public access of this case may be found at <https://law.justia.com/cases/federal/district-courts/FSupp/469/1269/1581860/>

complaints are generated by a member of the Board or by any other Nashua resident.

○ **Quotes:**

- ...the Board is required neither to provide a library for the Nashua senior high school nor to choose any particular books therefor, but, once having created such a privilege for the benefits of its students, it could not place conditions on the use of the library related solely to the social or political tastes of Board members. *Minarcini v. Strongsville City School District*, 541 F.2d 577, 582 (6th *1273 Cir. 1976).
- The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. *Shelton v. Tucker*, [364 U.S. 479](#), 487, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960).
- When First Amendment values are implicated, the local officials removing a publication must demonstrate some substantial and legitimate government interests. *Right to Read Defense Committee, supra*, at 713.
- A library is "a mighty resource in the free marketplace of ideas . . . specially dedicated to broad dissemination of ideas . . . a forum for silent speech." *Minarcini, supra*, at 582, 583.

- **(Public Library) *Kreimer v. Bureau of Police for Morristown*, 958 F.2d 1242 (3d Cir. 1992):**

- **Fact Pattern:** A homeless man was a frequent patron of the library and was at least five times evicted from the public library for violating the libraries rules of patron conduct. The man sued to prohibit enforcement of the Libraries rules.
- **Court Held:** The court of appeals held that a municipal public library was a limited public forum, open to the public for the specified purposes of exercising their First Amendment rights to read and receive information from library materials. Such exercise could not interfere with or disrupt the library's reasonable rules of operation. The court then upheld three library rules which: 1) required patrons to read, study, or otherwise use library materials while there; 2) prohibited noisy or boisterous activities which might disturb other patrons; and 3) permitted the removal of any patron whose offensive bodily hygiene was a nuisance to other patrons.

- **(School Library) *Case v. Unified School District No. 233*, 908 F. Supp. 864 (D. Kan. 1995)³¹:**
 - **Fact Pattern:** The School Board and school superintendent of Johnson County Kansas removed the book *Annie on My Mind*, a novel depicting a lesbian relationship between two teenagers, from the district's junior and senior high school libraries. The book had recently been part of local controversy but had been on the shelves at the high school for many years. The school district had a 13-step established procedure for reconsideration of challenged material. The reconsideration of materials process was not followed and the material was removed based upon dislike of the ideas contained in the book.
 - **Court Held:** The federal district court in Kansas found the removal of the materials violated the students' rights under the First Amendment to the United States Constitution and the corresponding provisions of the Kansas State Constitution. Even though the school board testified that they had removed the book because of "educational unsuitability," which school boards are allowed to do under the *Pico* decision, but during testimony it was established that the book was removed because the board disapproved of the book's ideology. In addition, it was found that the school board did not follow their own materials selection and reconsideration policies.
 - **Quotes:**
 - Although local school boards have broad discretion in the management of school affairs, they must act within fundamental constitutional limits. See *Board of Educ. v. Pico*, 457 U.S. 853, 863-65, 102 S. Ct. 2799, 2806-07, 73 L. Ed. 2d 435 (1982) (citing *Meyer v. Nebraska*, 262 U.S. 390, 402, 43 S. Ct. 625, 627-28, 67 L. Ed. 1042 (1923) and *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 507, 89 S. Ct. 733, 737, 21 L. Ed. 2d 731 (1969)).
 - In *Pico*, the United States Supreme Court addressed the very issue that confronts the court in the present case: Does the First Amendment impose any limitations upon the discretion of school officials to remove library books from high school and junior high libraries? In a plurality opinion, the Court concluded there are limits. *Id.* at 871-72, 102 S. Ct. at 2810.

³¹ Public access of this case may be found at <https://law.justia.com/cases/federal/district-courts/FSupp/908/864/1457522/>

- The plurality went on to hold that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to `prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Id.* at 872, 102 S. Ct. at 2810 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187, 87 L. Ed. 1628 (1943)).
 - The *Pico* plurality indicated that removal may be permissible if the book contained "pervasive vulgarity" or if the book was "educationally unsuitable." *Id.*
 - "The plurality decision in *Pico* is not binding precedent. *United States v. Friedman*, 528 F.2d 784 (10th Cir.1976), judgment vacated on other grounds, 430 U.S. 925, 97 S. Ct. 1541, 51 L. Ed. 2d 769 (1977); *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 189 (5th Cir.1995). The court notes, however, that this is the only Supreme Court decision dealing specifically with the removal of books from a public-school library. The court also notes that there are no Tenth Circuit Court of Appeals decisions directly on point. Thus, the court concludes that it should follow the *Pico* decision in analyzing the Olathe School District's removal of 'Annie on My Mind' from the district's libraries. *Case v. Unified Sch. Dist. No. 233*, 895 F. Supp. 1463, 1469 (D.Kan.1995); see *Campbell*, 64 F.3d at 189.
- **(School Library) *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184 (5th Cir. 1995):**
- **Fact Pattern:** First Amendment Challenge to a removal of book. A parent of a 7th grader objected to the book and filed a formal complaint with the school principal. Following the districts material objection, a school-level committee was established and voted unanimously to retain the book. Following this the parents filed a appeal and a 7 person committee was established to consider the appeal. All but one voted to keep the book; the one dissented a school board member. The parent again appealed to the school board and the St. Tammany Parish School Board removed the book *Voodoo and Hoodoo*, a discussion of the origins, history, and practices of the voodoo and hoodoo religions that included an outline of some specific practices, from all district library shelves. Following the removal parents of several students sued, and the district court granted summary judgment in their favor. The court of appeals reversed, finding that there was not enough evidence at that stage to determine that board members had an unconstitutional motivation, such as denying students access to ideas with

which board members disagreed; the court remanded the case for a full trial at which all board members could be questioned about their reasons for removing the book. The court observed that "in light of the special role of the school library as a place where students may freely and voluntarily explore diverse topics, the school board's non-curricular decision to remove a book well after it had been placed in the public-school libraries evokes the question whether that action might not be an attempt to 'strangle the free mind at its source.'" The court focused on some evidence that school board members had removed the book without having read it or having read only excerpts provided by the Christian Coalition. The parties settled the case before trial by returning the book to the libraries on specially designated reserve shelves, which required parental permission.

CONCLUSION: AS THE ABOVE CASES ILLUSTRATE, REMOVAL OF LIBRARY MATERIALS HAS OVERWHELMING BEEN FOUND TO BE A VIOLATION OF THE FIRST AMENDMENT.

Action Scenario 4: Moving Books to a different section, recategorizing books and other issues of access.

These are cases illustrating the Issue of Access. Note that it is not just the action of removing a book from the Library that can trigger First Amendment infringement.

(Public Library) *Sund v. City of Wichita Falls, Texas*, 121 F. Supp. 2d 530 (N.D. Texas, 2000)³²

- **Fact Pattern:** City residents who were members of a church (First Baptist Church in Wichita Falls) sought removal of two books, *Heather Has Two Mommies* and *Daddy's Roommate*. The City of Wichita Falls City Council passed a resolution (the "Altman Resolution") and voted to restrict access to the books by moving them from the children's area of the library to the adult section. The Altman Resolution allowed for a book to be removed if 300 people signed a petition asking for the restriction. A separate group of citizens filed a Motion for Preliminary Injunction to return the books to the children's section- after the books were removed from the children's section and placed on a locked shelf in the adult area of the library.
- **Court Held:**
 - The District Court permanently enjoined (prevented) the city from enforcing the resolution permitting the removal of the two books. Holding the resolution was a violation of the First Amendment because the City's resolution constituted impermissible content-based and viewpoint-based

³² The Public may view this case at <https://law.justia.com/cases/federal/district-courts/FSupp2/121/530/2505416/>

discrimination, “where, as here, a speech regulation targets not only the content of speech but also its perceived viewpoint, judicial scrutiny is even more exacting.” The court further held that the resolution was not narrowly tailored to serve a compelling state interest; provided no standards or review process; and improperly delegated governmental authority over the selection and removal of the library's books to any 300 private citizens who wish to remove a book from the children's area of the library.

- The court held that moving the books from the children’s area to the adult section of the area “placed a significant burden on Library’s patrons’ ability to gain access to these books.”
- The Burden on Public Libraries as a limited public forum to uphold First Amendment rights, in comparison to school libraries, stating that: “the right to receive information is vigorously enforced in the context of a public library, “the quintessential locus of the receipt of information.” *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992). See also, e.g., *Pico*, 457 U.S. at 868, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (noting that “public library is ` a place dedicated to quiet, to knowledge, and to beauty” Id. at 548) (quoting *Brown v. Louisiana*, 383 U.S. 131, 142, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966)); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir.1976) (“A library is a mighty resource in the free marketplace of ideas.”).
- “In *Pico*, for example, the Supreme Court made clear that government officials may not remove books from school library shelves “simply because they dislike the ideas contained in those books and seek by their removal to ` prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Pico*, 457 U.S. at 872, 102 S. Ct. 2799 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)). See also, e.g., *Campbell*, 64 F.3d at 190 (same). The principles set forth in *Pico* a school library case have even greater force when applied to public libraries. Although it confirmed that the state may not “contract the spectrum of available knowledge” by restricting books on the basis of their message or viewpoint, *Pico*, 457 U.S. at 886, 102 S. Ct. 2799, the *Pico* plurality acknowledged that public schools have an “inculcative” function that affords school boards greater discretion in curricular matters. *Id.* at 846, 102 S. Ct. 2799. By contrast, public libraries do not serve the same inculcative functions, and instead are, as even Justice Rehnquist's *Pico* dissent recognized, “designed for freewheeling inquiry.” *Id.* at 915, 102 S. Ct. 2799 (Rehnquist, J., dissenting).

(School Library) *Counts v. Cedarville School District*, 295 F.Supp.2d 996 (W.D. Ark. 2003)³³:

- **Fact Pattern:** The school board of the Cedarville, Arkansas school district voted to restrict students' access to the Harry Potter books on the grounds that the books promoted disobedience and disrespect for authority and dealt with witchcraft and the occult. As a result of the vote, students in the Cedarville school district were required to obtain a signed permission slip from their parents or guardians before they would be allowed to borrow any of the Harry Potter books from school libraries.
- **Court Held:** The U.S. District Court overturned the Board's decision and ordered the books returned to unrestricted circulation, on the grounds that the restrictions violated students' First Amendment right to read and receive information. In so doing, the Court noted that while the Board necessarily performed highly discretionary functions related to the operation of the schools, it was still bound by the Bill of Rights and could not abridge students' First Amendment right to read a book on the basis of an undifferentiated fear of disturbance or because the Board disagreed with the ideas contained in the book.
- **Quotes:** “[T]he stigmatizing effect of having to have parental permission to check out a book constitutes a restriction on access’ for First Amendment purposes”

(Public Library) *Viriden v. Crawford Cnty.*, 2023 U.S. Dist. LEXIS 161533 (W.D. Ark. Sep. 12, 2023):

- **Fact Pattern:** The Public Library in Crawford County implemented a policy where in their children’ section all LGBTQ themed books were removed, has a color label place on them and re-categorized under a new section called the “social section. This policy was dictated to the Library from the County.
- **Court Held:** Plaintiff sued for injunctive relief, the court denied on procedural grounds, stating, “To be clear, the Court is not saying it will be impossible for Plaintiffs to show their entitlement to injunctive relief at some later stage of this case, nor is the Court saying it believes Plaintiffs cannot prove their constitutional rights have been violated. The Court is simply saying that if Plaintiffs ultimately prove a violation of their constitutional rights, then they will need to request injunctive relief that is much more narrowly tailored to remedying the harms they have suffered than the relief which was requested in their amended complaint and in their motion.” *Viriden v. Crawford Cnty.*, 2:23-cv-2071, 15 (W.D. Ark. Sep. 12, 2023)
- **Quotes:** The Court stated that, “Supreme Court majorities have in fact repeatedly acknowledged, in a wide variety of contexts, that the First Amendment protects the

³³ The Public may access this case at <https://law.justia.com/cases/federal/district-courts/FSupp2/295/996/2307891/>

right to access information. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”); see also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read”)”) *Virden v. Crawford Cnty.*, 2:23-cv-2071, 10 (W.D. Ark. Sep. 12, 2023).

Conclusion: As the above cases illustrate, limiting access to reading materials is highly likely to be considered a First Amendment Violation and therefore overturned by the Courts.