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MEMORANDUM

TO: **Mayor Kiffer**
City Council
Lacey Simpson, Acting City Manager
Pat Tully, Library Director

FROM: **Mitch Seaver**
City Attorney

DATE: **June 13, 2022**

SUBJECT: **Drag Queen Story Time - Legal Issues**

1. Background. The Ketchikan Public Library regularly holds children's story time events for children and accompanying adults that sometimes involves guest readers. A typical format is that a guest reader will read a story to the children and a library staff member will also read stories related to the overall theme of the event followed by the children singing a song and dancing. The stories are reviewed by library staff before being read to the children.

Library staff were approached by a parent who suggested that a drag queen story time would be a good event for Pride Month. Staff contacted a person who volunteered to be the unpaid guest reader. Community members have expressed both support and opposition to the event which is scheduled to take place in the library's main meeting room on June 17, 2022.

2. Story Time Litigation. There have been legal claims brought by those opposing library drag queen story times and those supporting it.

(a) Opposing. In *Christopher v. Lawson,* 358 F. 3d Supp. 600 (S.D. Texas, 2019), public library patrons brought suit for violation of their constitutional rights because a monthly drag queen story time event violated the Establishment Clause of the First Amendment to the United States

Constitution based on religious objections to drag queens. Plaintiffs asserted that the event violated community standards of decency and that they did not want themselves or their children exposed to the program. They demanded that the library terminate "Drag Queen Story Time."

The matter came before the Court on the library's motion to dismiss for lack of standing. To have standing, a plaintiff must have suffered an "injury in fact," meaning an invasion of a legally protected interest that is concrete and particularized and actual or imminent as opposed to conjectural or hypothetical. There must also be a causal connection between the conduct complained of and the injury. Without standing there is no "case or controversy," under the United States Constitution and thus there is no subject matter jurisdiction. *Id.* at 606.

Plaintiffs contended that they had standing because they have library cards, have borrowed books from the library, attended meetings of the library, paid late fees and had been exposed to and offended by the, "Drag Queen Story Time" promotion materials. The defendants argued plaintiffs did not show any injury in fact because they did not claim they were required to, or ever did attend, "Drag Queen Story Time." The Court found there was no injury because the plaintiffs had never attended the event. The Court noted the plaintiffs response seemed to indicate they had attended a "Drag Queen Story Time," but the assertion was contradictory and that personal confrontation with the cannot be manufactured for the purpose of litigation. *Id.* at ftn. 2.

The plaintiffs also argued that they had taxpayer standing. The court rejected this argument on a number of grounds including plaintiffs failure to show that the library spent more than a de minimis amount on "Drag Queen Story Time." *Id.* at 609. The Court also found even if the expended funds were significant that the lawsuit was "not a direct dollars-and-cents injury," but a disagreement with the library's partnership with individuals allegedly associated with the LGBTQ community. *Id.* at 610.

The court also found that even if it had jurisdiction, the plaintiffs had not alleged a valid claim. The guiding principle for analysis of the Establishment Clause is that the First Amendment

mandates neutrality between religion and religion and religion and non-religion. *Id.* at 610. The plaintiffs argued that "Drag Queen Story Time, "is a religious event because of an alleged connection between that event, the LGBTQ Community, and secular humanism." The Court found that, even accepting that secular humanism could be a religion under the Establishment Clause, there was no showing that a reader discussed secular humanism at the event or any religion at all. The only other "Drag Queen Story Time" case I have found where the court issued an opinion is *Guidry v. Elberson,* 2019 WL 416500 (W.D. Louisiana 2019) concerning the Lafayette Public Library in Louisiana. That case involved Establishment Clause allegations similar to these made in *Christopher v. Lawson, supra*. This case was also dismissed by the Court due to lack of standing.[1]

(b) Supporting. The background and developments concerning *Guidry v. Elberson, supra* case are of interest. After that case was filed, the Lafayette Public Library decided to stand down from hosting the event because threats made by the public posed safety concerns for staff and participants in the event.[2] The library then created a policy which banned patrons from organizing "Drag Queen Story Time" events. Under the policy, residents who wanted to use a meeting room for any use were required to sign a document denying any relation with "Drag Queen Story Time" and promise not to use the room for that purpose.

The American Civil Liberty Union (ACLU) intervened in the suit challenging this policy as a violation of the participant's Constitutional right to freedom of speech. The ACLU asserted that the government cannot discriminate based on the content of a persons speech and that the ban on "Drag Queen Story Time" was prohibited viewpoint based discrimination. Complaint of Intervention

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[1] *Christopher* and *Guidry* involved standing in Federal Court. The Alaska Courts take a broader view of standing in favor of access to the courts. However, interest-injury standing requires more than generalized concern about a governmental decision and citizen-taxpayer standing must raise alleged illegal conduct concerning issues of public significance. See, *Young v. State* 502 P3d 964 (Alaska 2022). Significant public interest may be that specific constitutional limitations are raised although statutory and common law questions may also be significant.*Trustees for Alaska v. State* 736 P.2d 324,329 (Alaska 1987).

[2] The Alaska Supreme Court has held that, "it is not permissible to suppress constitutional protected forms of expression in order to curb the lawless conduct of those who are reacting to it, unless other law enforcement techniques which do not infringe first amendment freedoms are unavailable or likely to be ineffective."*Mickens v. Kodiak,* 640 P2d. 818, 822 (Alaska 1982).

filed 12/21/2018. After that suit was filed in the then ongoing litigation, the Lafayette Library decided to lift the policy banning "Drag Queen Story Time."

2. Government regulation of speech. The right to access public property for the purpose of speaking there is evaluated depending on the nature of the property. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n,* 460 U.S. 37 (1983). Property is typically categorized in three way for First Amendment freedom of speech purposes: traditional public forum, a designated public forum or a non-public forum. *Id.* at 44-45. Traditional public forum includes places that have historically been open for use by the public for expressive activity such as streets or parks. A designated public forum is one created or designated by the government for expressive use by the public. *Cornelius v. NAACP Legal Defense and Education Fund,* 473 U.S. 788 (1985). Non-public forums are places that are only open for selective use for expression by the public. *Krishna Consciousness Inc. V. Lee*, 505 U.S. 622 (1992).

Where a traditional public forum is involved the government can exclude a speaker, "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to serve that interest." *Cornelius, supra* at 800. The same limitation on governmental authority applies to a designated forum in that the government may not exclude a speaker who belongs to the class of persons to which a limited public forum is generally made available. *United States v. Kokinda,* 497 U.S. 720 (1990).

In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) where the parties had agreed that the school operated as a limited public forum, the Court wrote:

> When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *Rosenberger v. Rector and Visitors of Univ. Of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); see also *Lamb's Chapel, supra*, at 392-393, 113 S.Ct. 2141. The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, *107 *Rosenberger, supra*, at 829, 115 S.Ct.

> 2510, and the restriction must be "reasonable in light of the purpose served by the forum," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). *Id.* at 107.

Thus, while content may be regulated in a designated forum to the extent such regulation preserves the purpose of the forum, it may not regulate speech based on the viewpoint of the speaker. As the U.S. Court of Appeals for the Second Circuit put it, once the government, "allows expressive activities of a certain genre it may not selectively deny access for other activities of that genre." *Travis v. Oswego-Appalachin School Dist.*, 927 F2d 688 (1991).

Freedom of speech in a government controlled forum was addressed by the Alaska Supreme Court in *Alaska Gay Coalition v. Sullivan,* 578 P2d. 951 (Alaska 1978). In that case, the Municipality of Anchorage excluded the Alaska Gay Coalition in a government publication entitled the Anchorage Blue Book which provides information regarding public and private services and organizations in the city. The Court concluded that the publication constituted a public forum. The Court reasoned that the Blue Book was dedicated for expressive and associational use and that once it was opened for such use the government could not deny access based solely on the content of the Coalition's beliefs. *Id.* at 957. The Court concluded the municipality had violated the coalitions constitutional rights, stating:

> In deleting the Alaska Gay Coalition from the *Blue Book*, however, appellees denied that group access to a public forum *based solely on the nature of its beliefs*. In so doing, they violated appellant's constitutional rights to freedom of speech and association and equal protection under the law. *Id.* at 960 (emphasis in original).

Under this decision, denying access to the library for Drag Queen Story Time based solely on the nature of the beliefs involved could be found a violation of the constitutional rights to freedom of speech and association and equal protection under the law.

3. Ketchikan Municipal Code Chapter 9.08 - Equal Rights. Section 9.08.005 sets forth the policy of the City of Ketchikan as follows:

> It is the policy of the city of Ketchikan to eliminate unlawful discrimination based on race, color, age, religion, sex, familial status, disability, sexual orientation, *gender identity, gender expression*, or national origin. Such discrimination poses a threat to the health, safety and general welfare of the citizens of the city. (Emphasis added)

Ketchikan Municipal Code Section 9.08.020 prohibits discrimination in public accommodation:

> (a) It shall be a prohibited discriminatory public accommodation practice for any person, including any owner, lessee, manager, proprietor, custodian, agent, or employee of a place of public accommodation, to discriminate against any individual because of race, color, age, religion, sex, familial status, disability, sexual orientation, gender identity, gender expression, or national origin with respect to the terms, conditions, and privileges of access to or with respect to the uses, services, and enjoyment of a place of public accommodation.
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> (b) To publish, circulate, issue, display, post, or mail a written or printed communication, notice, or advertisement that states or implies:
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> > (1) That any of the services, goods, facilities, advantages, or privileges of the public accommodation will be refused, withheld from, or denied to a person of a certain race, color, age, religion, sex, familial status, disability, sexual orientation, gender identity, gender expression, or national origin; or
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> > (2) That the patronage of a person belonging to a particular race, color, age, religion, sex, familial status, disability, sexual orientation, gender identity, gender expression, or national origin is unwelcome, not desired or solicited.
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> (c) Notwithstanding subsection (a) of this section, a physical fitness facility may limit public accommodation to a single gender to protect the privacy interests of its users. Public accommodation may be limited under this subsection only to those rooms in the facility that are primarily used for weight loss, aerobic and other exercises, or for resistance weight training. Public accommodation may not be limited under this subsection to rooms in the facility primarily used for other purposes, including conference rooms,

> dining rooms, and premises licensed under AS 04.11. This subsection does not apply to swimming pools or golf courses.

Ketchikan Municipal Code Section 9.08.045 sets forth the following definitions:

> "Gender expression" means the external appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.
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> "Gender identity" means a person's gender-related self-identity appearance, expression, or behavior, regardless of the person's assigned sex at birth. A person's gender identity may be shown by evidence of medical history, care or treatment of the gender identity, consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held, core to a person's gender-related self identity, and not being asserted for an improper purpose.
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> "Place of public accommodation" means all places or businesses offering or holding out to the general public services or facilities for the comfort, health and safety of the general public, including *public places providing food, shelter, recreation and amusement.* (Emphasis added)

The Ketchikan Library's Mission Statement states:

> The purpose of the Ketchikan Public Library is to provide informational, educational, and recreational materials and services for the people of the City of Ketchikan and the Ketchikan Gateway Borough. This is accomplished through development, maintenance, and promotion of materials, physical spaces, and programs responsive to the diverse interests and needs of our community.

Thus, the Library could be considered a public accommodation under the Ketchikan Municipal Code because it provides recreational materials and services. Also, reading itself can be a form of recreation. A drag queen would presumably fall within the definition of "gender expression" or "gender identity" or both.

Ketchikan Municipal Code Section 9.08.030 prohibits unlawful intimidation or retaliation as follows:

> It shall be a prohibited discriminatory practice for a person, directly or indirectly, to discriminate, coerce, intimidate, threaten, interfere with, or retaliate against a person because the person has:
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> (1) Opposed any practice made unlawful by this chapter; or
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> (2) Exercised the person's rights, or encouraged another to exercise his or her rights, under this chapter.

Ketchikan Municipal Code Section 09.05.035 addresses aiding, abetting, or coercing a violation:

> It is unlawful for any person to aid, abet, incite, compel, or coerce the doing of an act forbidden under this chapter or to attempt to do so.

Ketchikan Municipal Code Section 9.08.040 provides that a private civil action can be brought by a person aggrieved by discriminatory practice prohibited by Ketchikan Municipal Code Chapter 9.08.

4. Alaska Human Rights Law - AS 18.80. Unlike a number of states and localities,[3] Federal and State of Alaska civil rights legislation does not expressly include gender identity or gender expression as protected categories.

In *Bostock v. Clayton* 140 S.Ct. 1731, 207 L.Ed 2d 218 (2020) the U.S. Supreme Court ruled based on the statutory text that an employee violates Title VII of the Civil Rights Act of 1964 which prohibits unlawful discrimination in employment when it discriminates because of a person's sex by firing an individual for being homosexual or being a transgender person. The

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[3] The municipalities of Juneau and Sitka have enacted ordinances which are virtually identical as Ketchikan Municipal Code Chapter 9.08, "Equal Rights." See CBJ Title 41, "Equal Rights;" SCC Title 24, "Non-Discrimination.

Court did not address what other practices or policies might constitute unlawful discrimination under other provisions of Title VII, stating that such matters, "are questions for future cases." 140 S.Ct. At 1753.

In light of the Bostick decision concerning the meaning of the phrase "because of sex," the Alaska Commission for Human Rights has determined that it is illegal to discriminate in employment, places of public accommodation, the sale or rental of real property, finances and credit card practices by the state or its political subdivisions because of sexual orientation/gender identity or expression.[4]

AS 18.80.255 concerning the state and its political subdivisions states that:

> It is unlawful for the state or any of its political subdivisions
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> > (1) to refuse, withhold from, or deny to a person any local, state, or federal funds, services, goods, facilities, advantages, or privileges because of race, religion, sex, color, or national origin;
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> > (2) to publish, circulate, issue, display, post, or mail a written or printed communication, notice, or advertisement that states or implies that any local, state, or federal funds, services, goods, fcilities, advantages, or privileges of the office or agency will be refused, withheld from, or denied to a physically or mentally disabled person or a person of a certain race, religion, sex, color, or national origin or that the patronage of a physically or mentally disabled person or a person belonging to a particular race, creed, sex, color, or national originis unwelcome, not desired, or solicited; it is not unlawful to post notice that facilities to accommodate the physically or mentally disabled are not available;

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[4] Website homepage, Alaska State Commission for Human Rights; telephone conversation Human Rights Field Representative, Angelica Lynn-Regier on 6/13/2022.

> (3) to refuse to deny to a person any local, state, or federal funds, services, goods, facilities, advantages, or privileges because of physical or mental disability.

AS 18.80.260 provides that it is unlawful for a person to aid, abet, incite, compel or coerce the doing of an act forbidden under AS 18.80 or to attempt to do so. AS 18.80.270 makes willful violation of AS 18.80, willful interference with the commission in its duties and willful violation of an order of the commission misdemeanors punishable by a fine not to exceed $500, up to 30 days in jail, or both.

Apart from any criminal liability, the Human Rights Commissions's staff accepts complaints, investigates those complaints and attempts conciliatory resolution of complaints where there is substantial evidence that the Alaska Human Rights law has been violated. Absent conciliation, the commission may order a person to refrain from the discriminatory practice and may order the person to take affirmative action to correct the discriminatory practice. Economic damages may be awarded in employment and housing discrimination cases AS 18.80.130.

The City is a political subdivision of the State. The terms "gender identity and/or expression" are not defined by state statute or regulation but appearing as a drag queen would seem to fall within that category as commonly understood.

5. Conclusion. Cancelling the Library's Drag Queen Story Time event risks litigation, administrative enforcement action or both being brought against the City for violation of civil rights on constitutional, statutory and ordinance grounds and the attendant legal exposure as discussed above. In comparison, considering the courts reasoning in *Christopher v. Lawson*, *supra* dismissing the lawsuit to terminate a drag queen story program, it is hard to see how a successful suit could be brought to stop such an event.