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MEMORANDUM

TO: **Delilah Walsh, City Manager**

FROM: **Mitch Seaver**
City Attorney

DATE: **April 4, 2023**

SUBJECT: **Removal of Library Materials**

1. **Introduction**. Pursuant to your request this memo concerns the legal principles involved in concerning the removal of books from the public library as relates to minors.

2. **Summary**. Minors have a First Amendment right to receive information through the library. However, minors can be protected from materials that are obscene for minors even though they are not obscene for adults. Under Alaska Statute AS 11.61.128 for material to be obscene or "harmful to minors," it must meet the following criteria:

> (1) the average individual, applying contemporary community standards would find that the material appeals to the prurient interests in sex for persons under 16 years of age;
>
> (2) a reasonable person would find that the material taken as a whole, lack 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 of the adult community as a whole with respect to what is suitable for persons under 16 years of age.

This memo also discusses court cases concerning content and viewpoint discrimination and restrictions on access to library materials by minors.

3. Obscenity. First Amendment free speech protections extend to children and young adults. This includes the right to receive information through the library. As stated by the Supreme Court in *Erzanick v. City of Jacksonville*, 422 U.S. 205 (1975):

> Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas that a legislative body thinks unsuitable for them. *Id* at 213-14.

In respect to obscenity, the First Amendment rights of minors differ from those of adults. In the leading case of *Ginsberg v. New York*, 390 U.S. 629 (1968) (plurality opinion) the Supreme Court held that states can determine that certain materials are obscene for minors even though they may not be for adults. *Ginsberg* involved a New York statute that prohibited the sale of materials "harmful to minors," to those under 17 years of age.[1]

The Court upheld the constitutionality of the statute on the basis that material is obscene as to minors if it is: (1) "patently offensive to prevailing standards of the adult community as a whole with respect to what is suitable material for minors;" (2) "predominately appeals to the prurient interest of minors;" and (3) "is utterly without redeeming social importance to minors." *Id* at 633.

In *Miller v. California,* 413 U.S. 15 (1973), the Supreme Court re-examined the standards for obscenity and held that a work may be subject to state regulation where that work, taken as a

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[1]New York Penal Law § 484 defined, "harmful to minors," as follows:

> (f) 'Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
> (I) predominantly appeals to the prurient, shameful or morbid interest of minors, and
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
> (iii) is utterly without redeeming social importance for minors.

whole, appeals to the prurient interest in sex; portrays sexual conduct as specifically defined by the applicable state law in a patently offensive way; and taken as a whole does not have serious literary, artistic, political or scientific value.

Alaska has enacted AS 11.61.128 which reflects the *Miller-Ginsburg* test:

> (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;
>
> (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 12.63 or a similar law of another jurisdiction.

Therefore, before material can be found harmful to minors, an ordinary member of the community would need to find that, taken as a whole, it appeals to the prurient interest in sex for persons under 16; that a reasonable person would find that the material lacks serious literary, artistic, educational, political or scientific value for persons under 16, and that the material depicts sexual conduct in a way that is patently offensive to prevailing standards in the adult community as what is suitable for those under 16 years of age. Thus, while the prurient interest and patently offensive factors are based on contemporary community standards, the serious literary, artistic, educational, political or scientific value is determined on the basis of whether a reasonable person would find serious value, even if the community as a whole, or the "average" member of the community would not. *Pope v. Illinois*, 481 U.S. 497 (1987); *American Book Seller v. Webb*, 919 4 F. 2d 1493 (11th Cir. 1990).[2]

4. Access. As mentioned above, apart from obscene materials, freedom of speech cannot be suppressed solely to protect young persons from ideas that a legislative body thinks are unsuitable. *Erzanick, supra* at 422 U.S. 213-14. Furthermore, subjecting speech to unequal restrictions based on the opinions or ideas expressed is viewpoint based discrimination which violates the First Amendment. In other words, government regulation of speech must be viewpoint neutral. For example, where the category of the content is sexuality, an expression of support for heterosexual perspectives over LGBTQ perspectives is a viewpoint. Thus, removing content that favors one viewpoint is unconstitutional. *Parent, Families, and Friends of Lesbians and Gays Inc. v.. Camden R-III School Dist*, 853 F. Supp. 2d 888 (W. D .Mo. 2012); *Case v. Unified School Dist. No. 233*, 908 F. Supp.864 (D. Kansas 1995).

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[2] As stated by the court in *American Booksellers v. Webb, supra* at 1504:

> [I]f a work is found to have a serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole

Where access to library books has been restricted because government officials simply dislike the ideas contained in those books, courts have found that the First Amendment has been violated even though the books were not removed from the library. In *Counts v. Cedarville School Dist,.* 295 F. Supp.2d 996 (W.D. Ark., 2003), the court held that a school district regulation requiring parental permission for checking out Harry Potter books from the school library violated a student's First Amendment right to access to books, even though the student owned the books and the parents had signed a permission slip. The court based its decision on the fact that the books had been stigmatized which stigmatized those that read them and that the student had to endure additional procedures before being allowed access to the books. The case arose in a school setting and while the court recognized that students' First Amendment rights may be restricted where necessary to avoid material and substantial interference with schoolwork or discipline, there was no evidence that any disobedience resulted from reading the books.

To similar effect is the court's decision in *Sund v. City of Wichita Falls,* 121 F. Supp. 2d 530 (N.D. Texas 2000). In that case, the city had adopted a resolution that gave 300 library card holders who signed a petition the right to censor children's books by having books moved from the children's area of the library to the adult section. The court held that the resolution was an unlawful delegation of governmental authority to private citizens and that it violated the First Amendment.

The court found placing the books in the adult library placed a significant burden on gaining access to those books. It reasoned that the children and parents looking for those books in the children's areas will be unable to locate them. The book challengers argued that the resolution was justified by "parents rights." The court rejected that argument because even if the petition was signed by a parent, that parent would mandate what information another parent's children may or may not receive:

> Thus, the Altman Resolution can hardly be said to support "parent's rights," as it permits a non-parent to dictate what someone else's children may read and allows one parent to suppress material not only for her own children, but for all others in the community.
>
> Moreover, if a parent wishes to prevent her child from reading a

> particular book, that parent can and should accompany the child to the Library, and should not prevent all children in the community from gaining access to constitutionally protected materials. Where the First Amendment rights are concerned, those seeking to restrict access to information should be forced to take affirmative steps to shield themselves from unwanted materials; the onus should not be on the general public to overcome barriers to their access to fully-protected information. *Id* at 551.

The court found that the resolution was unconstitutional because it would burden protected speech on the basis of content and viewpoint and place a burden on the general public to overcome barriers in order to access protected information.