Comment of the Foundation for Individual Rights and Expression on the Missouri Secretary of State Proposed Rule 15 CSR 30 200.015 Library Certification Requirement for the Protection of Minors to The Office of the Missouri Secretary of State

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Introduction

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to free speech and free thought — the essential qualities of liberty.

The American Library Association (ALA) has stated that as part of its core values, it believes that:

> A democracy presupposes an informed citizenry. The First Amendment mandates the right of all persons to free expression, and the corollary right to receive the constitutionally protected expression of others. The publicly supported library provides free and equal access to information for all people of the community the library serves.[1]

Missouri Secretary of State Jay Ashcroft similarly understands the importance of libraries, having been quoted as saying libraries "expand opportunity and unleash potential" in the communities they serve.[2] We agree with the ALA and, on this point, Secretary Ashcroft. However, we write today because the proposed rule threatens to impose censorship within Missouri's public libraries by creating sharp limits and heavy burdens on what books Missourians can access—and what events they may host—in their community libraries.

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[1] *Core Values of Librarianship*, AM. LIBR. ASS'N (January 2019), https://www.ala.org/advocacy/intfreedom/corevalues.

[2] *Library Jeopardy Funding In Jeopardy*, CASS CNTY. PUB. LIBR. (March 24, 2017), https://www.casscolibrary.org/library-funding-in-jeopardy/.

Analysis

I. Proposed Rule 15 CSR 30 200.015(1)(B) would bar state public libraries from purchasing books intended for adults.

Proposed Rule 15 CSR 30 200.015(1)(B) would restrict certain libraries, including public libraries, from using state funds to "purchase or acquire materials in any form that appeal to the prurient interest of any minor." This requirement runs counter to Supreme Court precedent.

Public libraries, literature, and speech cannot be childproofed. In 2011, the Supreme Court in *Brown v. Entertainment Merchants Association* stated that "[e]ven where the protection of children is the object, the constitutional limits on governmental action apply."[3] The Court in *Erznoznik v. Jacksonville* concluded that expression "that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[4]

The Supreme Court has further made clear that the government cannot restrict adults to "reading only what is fit for children."[5] In *Butler v. Michigan*, the Court struck down a Michigan law that prohibited the distribution of publications that contributed "to the corruption of the morals of youth."[6] The Court found that the law "curtails one of those liberties of the individual . . . that history has attested as the indispensable conditions for the maintenance and progress of a free society."[7]

Courts have likewise rejected governmental attempts to prevent adults from accessing information in public libraries on the basis that the information is unsuitable for children.[8] Nor does the government have a legitimate interest in "restricting access to non-obscene, fully-protected library books solely on the basis of the majority's disagreement with their perceived message."[9] A public library at the mercy of state censorship loses its power as "the quintessential locus of the receipt of information."[10]

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[3] 564 U.S. 786, 804–05 (2011).

[4] 422 U.S. 205, 213–14 (1975).

[5] *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

[6] *Id.* at 381.

[7] *Id.* at 384.

[8] *See, e.g.*, *Mainstream Loudoun v. Bd. of Trs. of Loudoun*, 2 F. Supp. 2d 783 (E.D. Va. 1998).

[9] *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530 (N.D. Tex. 2000).

[10] *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992).

Given this precedent, we urge the Secretary of State's office to abandon this proposed requirement.

II. Proposed Rule 15 CSR 30 200.015(1)(C) is unclear, which may lead to impractical applications by public libraries in order to comply.

Proposed Rule 15 CSR 30 200.015(1)(C) would prohibit librarians from "knowingly grant[ing] access to any minor any material in any form not approved by the minor's parent or guardian." This language is vague. It could be interpreted to allow parents or guardians to limit their own children's access to certain materials. But, if that is the case, there are far less restrictive means of ensuring that parents can limit their own children's access to materials they find objectionable. Problematically, the plain language of the rule can also be read literally to require affirmative authorization from a parent or guardian to access any material. Librarians, therefore, would be required to refuse access to each and every book or other material until it is approved by a parent. This is as unwise as it is impractical.

Given the lack of clarity, it is foreseeable that with funding at stake, at least some public libraries will rationally choose the stricter interpretation, which could fundamentally alter the general public's physical access to material kept at the library. Rather than allowing patrons to freely enter a public library with unrestricted access to its materials, the proposed regulation would require libraries to create a partition to separate the public from accessing materials and maintain a policy that verifies information about each patron before granting them access.

The proposed regulation may require, for example, that a library check personal identification at access points to library materials to verify the age of each patron to determine whether they are minors. Whether under the narrow interpretation, by which only access to specified materials is to be withheld, or under the literal reading, by which no material may be provided to a minor without specific authorization, it's clear that minors may not have free reign over areas of libraries where at least some—and maybe even all content—is kept. This problem also means that libraries must police minors' access to computers or electronic devices which could be used to access content.

Even if the proposed rule intends only to authorize parents to instruct librarians not to give their children, including teenagers, "access" to certain "material" in the library, the proposed regulations are impermissibly vague regarding *how* the library must obtain authorization. Librarians, for example, could be at the mercy of a parent's uncertain or unclear verbal instruction, conflicting instructions from two parents, or untimely or inconsistent instruction.

For these reasons, FIRE opposes this requirement, and urges its removal from the proposed regulation.

III. Proposed Rule 15 CSR 30 200.015(1)(E) may unconstitutionally compel private actors to label their own materials and websites to participate in any event or presentation.

Under Proposed Rule 15 CSR 30 200.015(1)(E), any "event or presentation" must receive an "age-appropriate designation" that is "affixed" to any "publication, website, or advertisement for" the event. Because of the provision's grammar, the word "publication" could be read to require that every copy of a book (a "publication"), even those brought by the book signer or attendees to a book signing, have a warning attached to it.

The First Amendment prohibits laws that compel speech. Generally, laws that compel speech are subject to strict scrutiny because they "plainly alter [] the content of . . . speech."[11] Event organizers, for example, may disagree with the government's rating but would nevertheless be required to place that rating on event flyers.

FIRE opposes this provision and urges its removal from the proposed regulation.

IV. Proposed Rule 15 CSR 30 200.015(1)(F) is sufficiently broad to invite abuse.

Proposed Rule 15 CSR 30 200.015(1)(F) provides:

> The library has or will adopt a written, publicly-accessible library materials challenge policy by which any person may dispute or challenge the library's age-appropriate designation affixed to any presentation, event, material, or display in the library, and the results of any such dispute or challenge shall be disclosed to the public and published on the library's website.

While this provision authorizes libraries to formulate their own policies, the proposed rule still requires that if "any person" disagrees with a warning, that person can formally challenge it. Without any additional nexus between a person challenging the event and the event itself, the proposed rule would require libraries to address disputes lodged by a person outside of Missouri, a person who does not plan to attend the event, and a person who does not have a minor who plans to attend the event.

Absent clarification, this requirement invites abuse as any person could seek to censor an event. Imagine, for instance, a member of the Chinese Communist Party challenging books

[11] *Nat'l Ins. of Family and Life Advocs. v. Beccera*, 138 S. Ct. 2361, 2371 (2018); *see also W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

critical of China on the shelves of Missouri's public libraries. The proposed rule, taken literally, will foreseeably bog down libraries with petty or partisan disputes and distract from their mission of serving the public. In addition, libraries may need to delay an event or even access to materials to administer challenges, which could itself effectively function as *de facto* censorship.

FIRE opposes this provision and urges its removal from the proposed regulations.

Conclusion

FIRE opposes the proposed rule for the reasons described above, including the significant First Amendment concerns it poses by restricting access to information, compelling speech of private persons, and inviting abusive practices that may result in the censorship of events and materials.

Unfortunately, the proposed rule also advances a "soft ban" on books by making it more difficult for librarians to justify even having certain books available. "When the purpose and design of a statute is to regulate speech by reason of its content," the Supreme Court has observed, "special consideration or latitude is not afforded to the Government merely because the law can somehow be described as a burden rather than outright suppression."[12]
The policy language as it currently stands, if adopted, will seriously imperil First Amendment rights at Missouri's public libraries.

FIRE thanks the Secretary of State's office for its attention to these serious concerns. We are happy to discuss our opposition further at your convenience.

Respectfully submitted,

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[12] *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000).