FIRE
Foundation for Individual Rights and Expression

June 2, 2025

Mitchell County Board of Commissioners
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Dear Commissioners:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit that defends free speech, is concerned by the agreement to establish the Toe River Valley Regional Library System ("Regional Library"). Several provisions in the agreement would violate the First Amendment and must be revised or removed.

I. The Proposed Agreement

The Agreement and Contract ("Agreement") between Mitchell County, Avery County, and the Town of Spruce Pine establishes a seven-member Board of Trustees to govern the Regional Library.[1] It states, in relevant part:

> The Board of Trustees shall review, upon the recommendation of the Library Director, any proposed material acquisitions. No materials shall be acquired without an affirmative vote of a majority of the Board of Trustees, nor shall any materials [be] acquired which violate standards for community decency.[2]

The Agreement further authorizes the Board to appoint a Library Director, who shall "[n]ot become involved in party politics, nor engage in discussion or debate of political issues, except to the extent necessary to advise the Board whether any of its actions would be in violation of State or Federal law, or other administrative rule."[3]

[1] CNTY. OF AVERY, CNTY. OF MITCHELL, AND THE TOWN OF SPRUCE PINE, CONTRACT FOR THE TOE RIVER VALLEY REGIONAL LIBRARY § III(a)-(b) (on file with author).
[2] *Id.* § III(c)(ii).
[3] *Id.* § III(c)(iii)(1)(e).

The Library Director must also:

> [n]ot allow displays of a political nature or dealing with matters of current political events (including but not limited to political, social, religious, anti-religious, or culturally charged topics) to be displayed within the Library System or local member library. The Library Director shall ensure that member libraries are not seen as endorsing a viewpoint or lifestyle choice related to any such issues.[4]

The Agreement is set to go into effect on July 1, 2025.

II. The "Community Decency" Standard Violates Library Patrons' First Amendment Rights

The Agreement's requirement that library materials not "violate standards for community decency" is both unconstitutionally vague and viewpoint discriminatory.

It is a "bedrock principle underlying the First Amendment" that the government cannot restrict speech simply because some find it "offensive or disagreeable."[5] The "recognition that viewpoint discrimination is uniquely harmful to a free and democratic society" lies at "the heart of the First Amendment's Free Speech Clause."[6] The government "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[7]

These principles apply to restrictions on both self-expression and access to information. The Supreme Court has long recognized that the First Amendment protects not only the right to speak, but also the "right to receive information and ideas."[8] This right includes access to information in public libraries, the "quintessential locus of the receipt of information."[9]

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[4] *Id.* § III(c)(iii)(1)(f).

[5] *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

[6] *NRA of Am. v. Vullo*, 602 U.S. 175, 187 (2024).

[7] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

[8] *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

[9] *Neinast v. Bd. of Trs. of Columbus Metro. Libr.*, 346 F.3d 585, 591 (6th Cir. 2003); *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992); *see also Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866 (1982) (plurality op.) (The "First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."); *GLBT Youth in Iowa Schools Task Force v. Reynolds*, 114 F.4th 660, 668 (8th Cir. 2024) (plaintiffs had standing to bring First Amendment claim against state law restricting school library materials); *Virden v. Crawford Cnty.*, No. 2:23-CV-2071, 2024 WL 4360495, at *4 (W.D. Ark. Sept. 30, 2024) (recognizing First Amendment right to receive information in public libraries); *Miller v. N.W. Region Libr. Bd.*, 348 F. Supp. 2d 563, 570 (M.D.N.C. 2004) ("The First Amendment includes the positive right of public access to information and ideas," including information in public libraries.); *Armstrong v. D.C. Pub. Libr.*, 154 F. Supp. 2d 67, 75 (D.D.C. 2001) (recognizing the "First Amendment right to receive information and ideas, and this right's nexus with access to public libraries"); *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000) ("The right to receive information is vigorously enforced in the context of a public library."). It appears only one court has broken from this overwhelming weight of authority. *See Little v. Llano Cnty.*, ___ F.4th ___, 2025 WL 1478599

Libraries are "specially dedicated to broad dissemination of ideas," not merely those ideas approved by the government.[10]

That is not to say public libraries lack discretion in managing their collections. They may add or remove materials based on a variety of factors, such as currentness, relevance, physical condition, and patron interest. But this discretion is not a license to censor; it "may not be exercised in a narrowly partisan or political manner," as "[o]ur Constitution does not permit the official suppression of ideas."[11] Government officials and employees may not ban books from 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.'"[12]

The "community decency" provision fails constitutional scrutiny for two independent reasons. First, it discriminates based on viewpoint by excluding materials that diverge from undefined moral standards. The Supreme Court invalidated a similar restriction on "immoral" or "scandalous" trademarks, explaining that it was viewpoint discriminatory because it distinguished "between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation."[13] While the ideas contained in a library book might offend some in the community, the "point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."[14]

Second, the term "community decency" is unconstitutionally vague because it provides no meaningful guidance to those applying it, inviting arbitrary and viewpoint-based enforcement based on personal interpretations.[15] The term is left undefined, and nothing else in the Agreement guides officials' determinations of what materials violate this subjective, nebulous standard.

(5th Cir. May 23, 2025) (holding First Amendment right to receive information is not implicated by public library's removing books).

[10] *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 583 (6th Cir. 1976).

[11] *Pico*, 457 U.S. at 870–71; *see also id.* at 879–80 (School authorities "may not remove books [from libraries] for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved.") (Blackmun, J., concurring in part and concurring in the judgment).

[12] *Id.* at 871–72 (plurality op.) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Courts have repeatedly held that government efforts to purge library shelves of disfavored ideas violate the First Amendment. *See, e.g.*, *Minarcini*, 541 F.2d at 582; *Virden*, 2024 WL 4360495 at *3; *Crookshanks v. Elizabeth Sch. Dist.*, No. 1:24-CV-03512-CNS-STV, 2025 WL 863544, at *16 (D. Colo. Mar. 19, 2025); *Sund*, 121 F. Supp. 2d at 552.

[13] *Iancu v. Brunetti*, 588 U.S. 388, 394 (2019); *see also Sund*, 121 F. Supp. 2d at 552 ("There simply is no interest, let alone a compelling one, in restricting access to non-obscene, fully-protected library books solely on the basis of the majority's disagreement with their perceived message.").

[14] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

[15] *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

III. The Restrictions on the Library Director's Private Speech Are Unconstitutional

The Agreement's prohibition on the Library Director's involvement in "party politics" or "discussion or debate of political issues" sweeps too broadly.

Although government employers have authority to regulate employees' speech when they speak pursuant to job duties, public employees retain a robust First Amendment right to speak as citizens on matters of public concern.[16] A government employer may discipline employees for speaking in their personal capacity on public issues only when it can prove its interest "in promoting the efficiency of the public services it performs through its employees" outweighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern."[17] To prove as much, the public employer "must, with specificity, demonstrate the speech at issue created workplace disharmony, impeded the [employee's] performance or impaired working relationships. Mere allegations the speech disrupted the workplace or affected morale, without evidentiary support, are insufficient."[18] Employers may not censor employee speech merely because they disapprove of its content or viewpoint.[19]

This standard requires a contextual, evidence-based evaluation of what the employee said and the effect it had on the employer's operation (if any). The Agreement, however, imposes a blanket ban on "political" speech, even when expressed off duty, and even if it causes little to no actual disruption to the library's provision of public services. This goes well beyond what the First Amendment allows.

IV. The Ban on "Political" Displays Raises Serious First Amendment Concerns

The Agreement's prohibition on "displays of a political nature or dealing with matters of current political events" could also violate the First Amendment if applied to displays created by members of the public. The Agreement should, at minimum, clarify the meaning of "display."

When the government opens its property "for use by the public as a place for expressive activity," it creates a public forum where First Amendment protections apply.[20] A library might create a public forum by inviting community members to use meeting rooms, create exhibits for a display case, or display materials on bulletin boards or tables.

Courts have recognized different types of forums. A "designated public forum" is "government property that has not traditionally been regarded as a public forum" like a street or a park, but "is intentionally opened up for that purpose."[21] In such forums, reasonable time, place and

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[16] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

[17] *Id.*

[18] *Lindsey v. City of Orrick*, 491 F.3d 892, 900 (8th Cir. 2007).

[19] *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.").

[20] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

[21] *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

manner restrictions are allowed, but "any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on viewpoint are prohibited."[22] The government may also "create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects," in which case speech restrictions must be "reasonable and viewpoint-neutral."[23] Reasonableness "is judged in light of the purpose served by the forum."[24]

Thus, in any kind of forum, restricting speech to suppress a viewpoint is unconstitutional. And in a limited public forum, the "government's means and ends must both be reasonable."[25] Consequently, the government "must be able to articulate some sensible basis for distinguishing what may come in from what must stay out."[26] That requires "objective, workable standards,"[27] not "subjective or overly general criteria."[28] "Absent objective standards," there is an unacceptable risk that government officials will "use their discretion to interpret the policy as a pretext for censorship."[29]

Both the Supreme Court and the U.S. Court of Appeals for the Fourth Circuit—the decisions of which bind Mitchell County—have invalidated bans on "political" speech in public and nonpublic forums for lack of precise, objective definitions.[30] The same problem afflicts the Agreement's restriction on displays. In any type of forum, the undefined, amorphous, and subjective terms "political," "social," and "culturally charged" invite arbitrary and viewpoint-discriminatory enforcement. Would a Constitution Day exhibit be considered "political," "social," or "culturally charged"? What about a display honoring the Rev. Dr. Martin Luther King Jr.? Or a flyer advertising a military care package drive? The policy impermissibly gives library officials unchecked discretion to make these determinations.

The concern that some will perceive member libraries as "endorsing a viewpoint or lifestyle choice" is not a constitutional basis for restricting private expression in a public forum. A simple disclaimer clarifying that displays do not necessarily reflect the institution's views is a constitutionally sound alternative to censorship. We also note that, even as applied to library-curated displays, this policy is so broad and vague that it would effectively prohibit almost all book displays, as almost any title could reasonably be viewed by someone as "political, social, religious, anti-religious, or culturally charged."

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[22] *Id.* at 469–70.

[23] *Id.* The Supreme Court has also recognized the category of nonpublic forum, that is, "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry Educ. Ass'n*, 460 U.S. at 46. Even in nonpublic forums, speech regulations must be reasonable and viewpoint-neutral. *Id.*

[24] *White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th 179, 201 (4th Cir. 2022).

[25] *Id.*

[26] *Minn. Voters All. v. Mansky*, 585 U.S. 1, 16 (2018).

[27] *Id.* at 21.

[28] *Hopper v. City of Pasco*, 241 F.3d 1067, 1077 (9th Cir. 2001) (city violated artists' First Amendment rights by creating designated public forum and then excluding their artwork without compelling governmental interest; the city's "so-called policy of non-controversy became no policy at all because it was not consistently enforced and because it lacked any definite standards").

[29] *Id.*

[30] *Mansky*, 585 U.S. at 16–23; *White Coast Waste Project*, 35 F.4th at 199–202.

For these reasons, FIRE calls on Mitchell County to work with Avery County and the Town of Spruce Pine to revise the Agreement to ensure it complies with the First Amendment. We intend to raise these concerns with the Avery County Board of Commissioners and the Spruce Pine Town Council as well.

We respectfully request a substantive response by June 16, 2025.

Sincerely,

Aaron Terr
Director of Public Advocacy

Cc: Allen Cook, County Manager
Deidre McKinney, Clerk to the Board
Four Eggers, County Attorney