

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

FAYETTEVILLE PUBLIC LIBRARY,
a political subdivision in the City of Fayetteville, *et al.*,
Plaintiffs-Appellees,

Hayden Kirby,
Plaintiff,

Leta Caplinger, *et al.*,
Plaintiffs-Appellees,

v.

CRAWFORD COUNTY, ARKANSAS, *et al.*,
Defendants,

TODD MURRAY, each in his or her official capacity as a prosecuting
attorney for the State of Arkansas, *et al.*,
Defendants-Appellants,

TIM GRIFFIN, in his official capacity as Attorney General of Arkansas,
Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Arkansas
No. 5:23-cv-05086 (Hon. Timothy L. Brooks)

**BRIEF OF AMICUS CURIAE
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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INTEREST OF *AMICUS CURIAE*¹

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended freedom of expression without regard to the speakers’ views through public advocacy, strategic litigation, and *amicus curiae* filings. Given our decades of experience combating censorship, FIRE is all too familiar with the constitutional, pedagogical, and societal problems presented by silencing minority or dissenting viewpoints. FIRE strongly opposes attempts to restrict access to information. Informed by our unique history, FIRE has a keen interest in ensuring that censorship does not spread to public libraries and private bookstores.

¹ No counsel for a party authored this brief in whole or in part. Further, no person other than *amicus*, its counsel, and its members contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

No librarian or bookseller should fear jail time for making *Romeo and Juliet* readily accessible for a seventeen-year-old Arkansan. Yet that is just one of many disastrous threats posed by Arkansas Act 372. The district court thus properly held Sections 1 and 5 of Act 372 use impermissibly vague and overbroad terms to empower nearly anyone to request that libraries or bookstores remove books entirely or segregate them into “adults-only” sections based on content. Such a regime is unconstitutional for several reasons.

At its core, Act 372 compromises the First Amendment’s protection of our “right to receive information and ideas.” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality op.) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). It is a “bedrock principle underlying the First Amendment” that officials cannot limit expression simply because someone “finds [it] offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Sections 1 and 5 of Act 372 ignore these principles under the pretense of protecting youth.

Section 1 impermissibly prohibits dissemination of constitutionally protected speech. Under this provision, a librarian, bookseller, or any

other person faces a criminal misdemeanor charge with up to one year in jail if they “furnish[], present[], provide[], make[] available, give[], lend[], show[], advertise[], or distribute[]” to a minor any material deemed “harmful to minors.” Ark. Code Ann. § 5-27-212(b)(1). The statute also incorporates Arkansas’s variable obscenity standard. *Id.* § (a)(1), (4)(A), (4)(B)(iii) (incorporating by reference definitions in Ark. Code Ann. § 5-68-501(2)). In *Shipley, Inc. v. Long*, the Arkansas Supreme Court interpreted this standard as treating all individuals under eighteen the same, thus barring librarians and booksellers from offering works appropriate for older minors—like high school students—that might be objectionable only for the youngest children. 359 Ark. 208, 219 (2004) (hereinafter *Shipley I*). This standard was previously held unconstitutional, and Act 372 does nothing to make the standard any less offensive to the First Amendment. *See Shipley, Inc. v. Long*, 454 F. Supp. 2d 819, 829–830 (E.D. Ark. 2004) (hereinafter *Shipley II*) (striking down law similar to Act 372 as “effectively stifl[ing] the access of adults and older minors to communications and material they are entitled to receive and view”).

Section 5’s content-based restriction on access to library materials is equally problematic in compelling libraries to adopt policies that allow “any person affected” by a book or other material to challenge its “appropriateness.” Act 372, § 5(c)(1). When a challenge succeeds, the library must remove the work from the general collection or relocate it to an area “not accessible to minors.” *Id.* § 5(c)(7)(B), (11)(A). The statute offers no definition of “appropriateness” or “accessible,” forcing libraries to guess how they might comply, and inviting removals based on viewpoint. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Worse, the law imposes a one-way ratchet favoring censorship by granting appeal rights to challengers seeking book removal while denying the same rights to those seeking retention. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642–43 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”). By empowering hecklers to cull public library collections while silencing those who would defend retention, Section 5 imposes an unconstitutional, one-sided burden on free expression.

The Defendants’ attempt to save Section 5 by characterizing curation of public libraries as government speech flies in the face of this Court’s recent holding in *GLBT Youth in Iowa Sch. Task Force v. Reynolds*, 114 F.4th 660, 667–668 (8th Cir. 2024). Repetition of that argument here is no more persuasive. That is because public libraries’ role as nonpolitical repositories of public knowledge emerged from the hard lessons of history.

For thousands of years, as civilizations rose and fell, censoring religious and political enemies’ works was the norm. Our Founders aimed to end this vicious cycle. They adopted a Bill of Rights with a First Amendment guarantee that “Congress shall make no law ... abridging the freedom of speech, or of the press,” U.S. Const. amend. I, and established libraries to promote widespread dissemination of information on all subjects. Of course, book censorship persisted after the Constitution’s ratification, including periods when the government empowered puritanical zealots like Anthony Comstock to enforce Victorian-era standards of obscenity. However, over time, First Amendment jurisprudence emerged from those disputes to prevent the kind of censorship of libraries now happening in Arkansas and elsewhere.

Thanks to our robust First Amendment jurisprudence, the government cannot create a repository of information designed to include even unorthodox and unpopular views, dedicate it to serving all members of the community, and then leave it to the unbounded discretion of political decision-makers who “distort its usual functioning.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2000). Just as the government “could not elect to use a broadcasting network or a college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems,” *id.* at 544, the First Amendment likewise prevents politicians from turning a public library into a repository solely for state-approved messages.

Because Act 372 violates core First Amendment principles by threatening jail time for librarians, this Court should affirm.

ARGUMENT

I. The First Amendment Protects the Robust Marketplace of Ideas Against Impeding Adult Access to Materials.

Libraries and bookstores exist to give citizens access to a wide range of materials, appealing to both high-brow tastes and their opposite. In this country, the choice of what to read is one “for the individual to make, not for the Government to decree, even with the mandate or approval of

a majority.” *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817 (2000). A quarter-century ago, Judge Richard Posner identified “the danger of allowing government to control the access of children to information and opinion,” because “[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.” *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2000). And the Supreme Court has long prohibited “quarantining the general reading public against books in order to ... shield juvenile innocence,” because such measures “burn the house to roast the pig.” *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Act 372 fails to heed these constitutional lessons.

A. First Amendment jurisprudence emerged out of a history of attempts to suppress controversial materials.

The Constitution’s promise of protecting free expression was not fulfilled overnight. Before the Civil War—and decades before the emergence of First Amendment jurisprudence—some states banned abolitionist literature, with harsh punishments for violating the law. The 1851 publication of Harriet Beecher Stowe’s *Uncle Tom’s Cabin* sparked

book-burnings in slave-holding states.² Merely owning a copy could lead to ten years in jail, as it did for Samuel Green, a free black man living in Maryland.³ In 1857, three men in Arkansas were hanged simply for possessing Hinton R. Helper’s *The Impending Crisis of the South: How to Meet It*.⁴

The First Amendment likewise posed little obstacle when the moralist crusaders of the nineteenth century gained power. Far from “the age when Benjamin Franklin wrote his ‘Advice to a Young Man on Choosing a Mistress’” and “Madison admonished against any ‘distinction between the freedom and licentiousness of the press,’” a new breed of puritanical censor emerged. *United States v. 12 200-Foot Reels of Super*

² Erin Blakemore, *The history of book bans—and their changing targets—in the U.S.*, Nat’l Geographic (Sep. 20, 2024), <https://www.nationalgeographic.com/culture/article/history-of-book-bans-in-the-united-states>.

³ *Id.*; see also *The Perils of Reading: Samuel Green and Harriet Beecher Stowe’s Uncle Tom’s Cabin*, Md. St. Archives, <https://msa.maryland.gov/msa/stagser/s1259/121/6180/html/0000.html> (last visited Sept. 27, 2025).

⁴ Eric Berkowitz, *Dangerous Ideas: A Brief History of Censorship in the West, from the Ancients to Fake News* 155 (2021); see also Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper’s Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 Chi.-Kent L. Rev. 1113 (1993).

8mm. Film, 413 U.S. 123, 133–34 (1973) (Douglas, J., dissenting). It was during the Victorian era that a highly censorial obscenity test emerged in a prosecution under Britain’s 1857 Obscene Publications Act. *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868).

Courts in the U.S. adopted the *Hicklin* test in the late nineteenth century to govern the then-new law of obscenity.⁵ *Hicklin* set forth an expansive standard that allowed condemning an entire work based on a single passage, or even its title.⁶ No amount of literary value could offset the danger of a work’s perceived tendency to “corrupt and deprave.”⁷

The *Hicklin* test provided an ideal vehicle for Anthony Comstock, who, as founder of the New York Society for the Suppression of Vice and as a government agent, made it his life’s work to stamp out “vice.”⁸ Describing *Hicklin* as “one of the most remarkable cases on record,” Comstock saw to the entrenchment of this capacious test in case law

⁵ *United States v. Bennett*, 24 F. Cas. 1093 (2d Cir. 1879). See Robert Corn-Revere, *The Mind of the Censor and the Eye of the Beholder: The First Amendment and the Censor’s Dilemma* 23 (Cambridge Univ. Press 2021).

⁶ Corn-Revere, *supra* note 5, at 23.

⁷ *Id.*

⁸ *Id.* at 20.

through prosecutions he spearheaded.⁹ At the end of Comstock’s four-decade-long career, he boasted of having seized over *160 tons* of literature, jailing more than 3,600 people, and driving at least fifteen to suicide.¹⁰ Even long after Comstock’s death in 1915, the government’s war on “evil reading” still continued.¹¹

One byproduct of this long period of repression was the eventual emergence of robust First Amendment jurisprudence. The excesses of Comstock and the “anti-vice societies” forced free speech advocates to sharpen their arguments, and courts began to respond.¹² The Supreme Court abandoned the *Hicklin* test in 1957, finally making clear that “sex and obscenity are not synonymous.” *Roth v. United States*, 354 U.S. 476, 487 (1957). The Court explained that sex is “a great and mysterious motive force in human life [that] has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.” *Id.* After rejecting

⁹ *Id.* at 23.

¹⁰ *Id.* at 19–20.

¹¹ See generally Amy Sohn, *The Man Who Hated Women: Sex, Censorship, & Civil Liberties in the Gilded Age* (2021).

¹² Corn-Revere, *supra* note 5, at 68–78.

Hicklin, the Court set out to carefully create tests for obscenity that complied with the spirit of the First Amendment.

In doing so, the Supreme Court established specific guidelines regarding the regulation of sexually oriented literature, especially concerning minors. In *Ginsberg v. New York*, 390 U.S. 629, 633 (1968), the Court recognized the state’s limited power to restrict minors’ access to such material, emphasizing that it remains constitutionally protected for adults. Later, in *Miller v. California*, 413 U.S. 15, 24 (1973), the Court formulated a rigorous three-part test to determine whether material is obscene: (1) whether the average person, applying contemporary community standards, would find that the work appeals to prurient interests; (2) whether the work depicts or describes sexual conduct in a patently offensive manner as defined by law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

In *Virginia v. American Booksellers Ass’n, Inc.*, 484 U.S. 383 (1988), the Court underscored the constitutional hazards of statutes that, in the name of protecting minors, risk chilling access to protected speech. The statute at issue—a law prohibiting the “display” of certain sexually

explicit material deemed “harmful to juveniles”—was facially overbroad and threatened to suppress a wide range of constitutionally protected works, including classic literature. *Id.* at 391. It survived only because, on remand, Virginia’s Supreme Court imposed a narrowing construction.

The court clarified that the statute would apply only to works meeting the *Miller/Ginsberg* “harmful to minors” standard. *Virginia v. Am. Booksellers Ass’n, Inc.*, 372 S.E.2d 618, 623–24 (Va. 1988). “Harmful” was to be judged according to the sensibilities of “normal, older adolescents,” not the youngest or most vulnerable child. *Id.* Additionally, the “display” prohibition applied only to the act of knowingly placing harmful material where juveniles were invited to browse, not to the mere presence of such books on shelves. *Id.* Without this narrowing construction, the law would have been unconstitutionally overbroad and vague.

However, as explained in more detail *infra* in Section I.C., this narrowing construction is not available under Arkansas law. The Arkansas Supreme Court adopted a much broader interpretation of “harmful to minors” in *Shipley I*, 359 Ark. at 219, which a federal district held unconstitutional. *Shipley II*, 454 F. Supp. 2d at 829. Because Act

372 incorporates that more expansive definition, it cannot pass constitutional muster. Add. 19; App. 1116; R. Doc. 126 at 19.

B. In recent FIRE cases, courts have rejected states' overly zealous attempts to censor speech in the name of protecting children.

From comic books to video games, dime novels to heavy metal, blaming artistic expression for society's ills and the perceived corruption of children is an old trope. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 797–98 (2011). Again and again, states have overreached under this banner, adopting vague and overbroad laws that unconstitutionally limit minors' and adults' access to constitutionally protected materials. FIRE's experience in direct litigation challenging such measures and as *amicus* in cases across the country illustrates why courts must be wary when legislatures justify sweeping restrictions on speech in the name of protecting children.

For example, in *Zoulek v. Hass*, FIRE represented plaintiffs challenging the Utah Minor Protection in Social Media Act that limited minors' access to social media and impeded adults' access to the same.

See Zoulek v. Hass, No. 2:24-cv-00031 (D. Utah Jan. 12, 2024).¹³ Although Utah claimed an interest in protecting children from adverse outcomes, the district court held the state lacked sufficient evidence these limitations ameliorate harms to children enough to satisfy strict or intermediate scrutiny. *Reyes*, 748 F. Supp. 3d at 1125 n.126.

In the same vein, in *NetChoice, LLC v. Fitch*, FIRE argued as *amicus* that a district court properly enjoined Mississippi’s Walker Montgomery Protecting Children Online Act because its sweeping age verification regime for minors using social media relied on vague and overbroad standards that impermissibly burdened both minors’ and adults’ access to protected speech. *Br. of Amicus Curiae Found. for Individual Rights and Expression in Support of Appellees*, No. 24-60341

¹³ The district court denied the *Zoulek* plaintiffs’ motion for a preliminary injunction based on standing but granted a preliminary injunction for a different plaintiff, NetChoice. *NetChoice, LLC v. Reyes*, 748 F. Supp. 3d 1105, 1132 (D. Utah 2024). The *Zoulek* plaintiffs subsequently filed an amended complaint to perfect standing, and the case is stayed pending the Tenth Circuit decision on appeal of the NetChoice preliminary injunction, in which the *Zoulek* plaintiffs filed an *amicus* brief. *Br. of Amici Curiae Hannah Zoulek, Jessica Christensen, Lu Ann Cooper, M.C., Val Snow, and Utah Youth Environmental Solutions in Support of Appellee NetChoice, LLC, NetChoice, LLC v. Brown*, No. 24-4100 (10th Cir. filed June 3, 2025), 2025 WL 1638109.

(5th Cir. filed Oct. 3, 2024), 2024 WL 4477355; *NetChoice, LLC v. Fitch*, No. 1:24-CV-170-HSO-BWR, 2025 WL 1709668, at *9 (S.D. Miss. June 18, 2025) (finding the statute likely violated the First Amendment on remand).¹⁴ Notably, Justice Kavanaugh opined that NetChoice is likely to succeed on the merits there because “enforcement of the Mississippi law would likely violate its members’ First Amendment rights under this Court’s precedents.” *NetChoice, LLC v. Fitch*, No. 25A97, 2025 WL 2350189, at *1 (U.S. Aug. 14, 2025) (citing *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024); *Brown v. Ent. Merchs. Ass’n.*, 564 U.S. 786 (2011); *Free Speech Coal., Inc. v. Paxton*, 606 U.S. — (2025)).

Similarly, in *Penguin Random House LLC v. Robbins*, FIRE urged this Circuit to affirm a district court’s holding that an Iowa law violated the First Amendment in forcing local educators to exclude “any material with descriptions or visual depictions of a sex act” from public school libraries. *Br. of Amicus Curiae Found. for Individual Rights and*

¹⁴ The Fifth Circuit vacated the district court’s initial injunction as it did not have an opportunity to perform the facial analysis under the Court’s *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) opinion, which came down the same day the district court issued its injunction. *NetChoice, LLC v. Fitch*, 134 F.4th 799, 808 (5th Cir. 2025).

Expression in Support of Appellees and Affirmance, No. 25-1819 (8th Cir. filed Aug. 1, 2025). As the district court explained there, the law ran afoul of the First Amendment because it made “no attempt to tether book removal requirements to the *Ginsberg* standard.” *Penguin Random House LLC v. Robbins*, 774 F. Supp. 3d 1001, 1025 (S.D. Iowa 2025).

Across all three cases—*Zoulek*, *Fitch*, and *Robbins*—the state attempted to restrict minors’ access to materials that are not obscene from their perspective under *Ginsberg*. The states stretched an asserted interest in child protection into a license for censorship. The Constitution does not permit the government to compromise the First Amendment’s guarantees “solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975). “Nowhere in *Ginsberg* ... does the Supreme Court suggest that the government’s role in helping parents to be the guardians of their children’s well-being is an unbridled license to governments to regulate what minors read and view.” *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 959–60 (8th Cir. 2003).

The Supreme Court reaffirmed this principle just this past term in *Free Speech Coalition, Inc. v. Paxton*, 145 S. Ct. 2291 (2025), which confirmed that a statute restricting minors’ access to materials will escape strict scrutiny only if it is narrowly focused on hard-core pornography and employs only historically based incidental limitations on minors’ access. The Court held the age-verification scheme for online access to obscene for minors material fell within Texas’s “traditional power to prevent minors from accessing speech that is obscene *from their perspective*.” *Id.* at 2306 (emphasis added) (citing *Ginsberg*, 390 U.S., at 641). It specified that its application of intermediate First Amendment scrutiny in that limited context would not apply if the law at issue could “be read to cover, say, a PG–13- or R-rated movie.” *Id.* at 2306 n.7.

Like Act 372 here, the laws in *Zoulek*, *Fitch*, and *Reynolds* each ran afoul of the First Amendment because they restricted minors’ access to a broad variety of materials that do not meet the *Ginsberg* standard for obscenity for minors.

C. Act 372 exceeds Arkansas’s authority to regulate speech that is obscene as to minors.

As the district court correctly noted, Act 372 incorporates the Arkansas Supreme Court’s interpretation of “harmful to minors” from

Shiplely I, 359 Ark. at 219. Add. 19–20; App. 1116–17. R. Doc. 126 at 19–20. Yet, over twenty years ago, a federal district court held that interpretation rendered the statute at issue unconstitutionally overbroad. *Shiplely II*, 454 F. Supp. 2d at 820. Contrasting the competing interpretations of Virginia and Arkansas, the Eastern District of Arkansas in its 2004 opinion explained that it is unconstitutional to “effectively stifle[] the access of adults and older minors to communications and materials they are entitled to receive and view” because such material may be “harmful to the youngest of the minors.” *Shiplely II*, 454 F. Supp. 2d at 829–30. That is precisely what Act 372 attempts to do. It forces librarians and private booksellers to create “strict adults-only areas” for books like *Romeo and Juliet* and *Catcher in the Rye*, all because some might consider them harmful to the youngest minors. Add. 20; App. 1117; R. Doc. 126 at 20.

The starkly different interpretations of the “harmful to minors” standard by the Arkansas and Virginia Supreme Courts reveal Act 372’s First Amendment flaws. The district court fully explained how the Arkansas Supreme Court interpreted “harmful to minors” to mean materials that are harmful to *any* minor. Add. 18; App. 1115; R. Doc. 126

at 18. In contrast, the Virginia Supreme Court reached the opposite conclusion, narrowly construing the same phrase to mean only books deemed obscene as to older minors. Add. 17 (citing *Virginia*, 372 S.E.2d at 623); App. 1114; R. Doc. 126 at 17. As the district court observed, “the U.S. Supreme Court in *Virginia* advised that a ‘broader reading’ of harmful to minors ‘would raise correspondingly greater First Amendment questions.’” Add. 20 (quoting *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 395 (1988)); R. Doc. 126 at 20.

Thus, the district court correctly held here that Sections 1 and 5 of Act 372 are void for overbreadth and vagueness. Section 1 criminalizes furnishing materials “harmful to minors” but fails to define key terms such as “present,” “make[] available,” or “show,” leaving librarians and booksellers “unsure about whether shelving books they know contain sexual content may subject them to criminal liability.” Add. 22; App. 1119; R. Doc. 126 at 22. The statute “provides no clarity on what affirmative steps a bookseller or librarian must take to avoid a violation,” so citizens and government actors must “necessarily guess at its meaning and differ as to its application.” Add. 21–22.; App. 1119–20; R. Doc. 126 at 21–22.

Section 5 has the same defect. Its central term—“appropriateness”—is “susceptible to multiple interpretations and all but guarantees that the challenge process will result in the withdrawal or relocation of books based on their content or viewpoint.” Add. 31; App. 1128; R. Doc. 126 at 31. The law is so vague that even County Judge Keith admitted he “did not know what ‘appropriate’ meant ... [and] guessed it could mean ‘different thing[s] for different people.’” Add. 32; App. 1129; R. Doc. 126 at 32.

Likewise, the statute treats “withdraw” and “relocate” as equivalent, and requires placing challenged books in areas “not accessible to minors” without defining that phrase, further forcing libraries to “guess what level of security would be necessary.” Add. 33; App. 1130; R. Doc. 126 at 33. As the court emphasized, when a law “is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity.” Add. 21; App. 1118; R. Doc. 126 at 21. And because Act 372 is woefully general, it is unconstitutional.

II. The Court Should Again Reject Defendants’ Government Speech Argument.

Defendants assert that Section 5’s policy provision is government speech because it regulates the curation of public libraries. Defs.-Appellants’ Br. 28–36. But this Court has already rejected Defendants’ argument, heeding the Supreme Court’s “directive to ‘exercise great caution before extending our government-speech precedents.’” *Reynolds*, 114 F.4th at 668 (quoting *Matal v. Tam*, 582 U.S. 218, 235 (2017)). Undeterred, Defendants claim *Reynolds* is not binding because it “held only that plaintiffs had standing to assert a First Amendment claim despite an argument that the speech at issue was government speech.” Defs.-Appellants’ Br. 35 (citing *Reynolds*, 114 F.4th at 667–68). Defendants’ position is implausible, considering this Court emphasized “the Supreme Court has not extended the government speech doctrine to the placement and removal of books in public school libraries.” *Reynolds*, 114 F.4th at 667.

This was not a casual observation. In reaching its conclusion, this Court properly applied the Supreme Court’s “holistic inquiry” for whether expression is government speech. *Id.* at 667–68. Under this inquiry, courts consider the history of public libraries, the public

perception of who is speaking through their shelves, and the extent to which Arkansas uses school libraries to send a message. *See Shurtleff v. Boston*, 596 U.S. 243, 252 (2022). Properly considered, each factor shows that libraries are not “government speakers.” Thus, this Court should not accept Defendants’ invitation to revisit this issue; the *Shurtleff* factors confirm libraries must remain free to curate their collections without being considered government speech.

A. The rich history of public libraries serving an informed public weighs against government speech.

The Founders strove to promote an informed public—and especially sought to ensure public access to more than just government-approved ideas. *Whitney v. California*, 274 U.S. 357, 375 (1927) (“Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary.”) (Brandeis, J., concurring). This history suggests public libraries should not be confined to books communicating the State’s message. If that were the case, the contents of public libraries would change with the political winds. But that’s never been the case. A public library exists to give citizens access to a wide range of ideas and perspectives, which is impossible if the

government proscribes or limits materials “in a narrowly partisan or political manner.” *Pico*, 457 U.S. at 870.

Certain institutions the government owns and operates—such as universities, museums, public broadcast stations and libraries—are imbued with a “First Amendment aura” that limits political machinations concerning those bodies. Frederick Schauer, *Principles, Institutions and the First Amendment*, 112 Harv. L. Rev. 84, 116 (1998). Just as when it designates property as a public forum and must follow constitutional rules appropriate to that forum, *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981) (“The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.”), when the government creates a repository of books for the general dissemination of knowledge, it cannot then arbitrarily limit access to information based on the political whims of transient officeholders.

The government charters libraries to advance the spread of knowledge free from political interference. This historic and institutional purpose defines the constitutional rules under which public libraries operate. The government cannot create a repository of information

designed to include diverse ideas and dedicate it to serving all members of the community, then leave it to the arbitrary discretion of political decisionmakers who may “distort its usual functioning.” *Velazquez*, 531 U.S. at 543.

Just as the government “could not elect to use a broadcasting network or a college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems,” *id.* at 544, the First Amendment prevents it from restricting access to information using unconstitutional criteria. The First Amendment does not permit the government “to suppress speech inherent in the nature of the medium” or to “distort its usual functioning.” *Id.* at 543. In this regard, imagining public libraries as purveyors of *only* materials consistent with the government’s endorsed orthodoxy would be antithetical to the very institutional purpose of libraries. Cf. *Vidal v. Elster*, 602 U.S. 286, 295–96 (2024) (observing that trademark law’s historical reliance on content-based assessments justifies unique constitutional treatment while preserving the ban on viewpoint discrimination).

As governmentally owned or sponsored institutions, libraries are more like public broadcast stations and are governed by constitutional

doctrine defined by their purpose. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672–73 (1998). Much like libraries, public broadcasters are licensed as an alternative programming source to promote “freedom, imagination and initiative on both local and national levels” with programming decisions insulated from political control. Public Broad. Act of 1967, 47 U.S.C. §§ 396(a), 398(c).

Such stations may be owned by government entities and receive funding (at least in part) from certain government sources, but they are licensed to exercise “the ‘widest journalistic freedom’ consistent with their public responsibilities.” *Forbes*, 523 U.S. at 673 (citation omitted). For similar reasons, the government cannot censor those repositories of print publications it has sponsored and vested with independent editorial judgment. *E.g.*, *Stanley v. Magrath*, 719 F.2d 279, 280 (8th Cir. 1983) (cutting student newspaper’s funding because of disfavored content violates the First Amendment); *Kincaid v. Gibson*, 236 F.3d 342, 355 (6th Cir. 2001) (*en banc*) (confiscation of student yearbook violated the First Amendment).

The First Amendment bars the government from imposing restrictions contrary to an institution’s established purpose, such as

prohibiting public broadcasters from running editorials. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375–76 (1984). Likewise, measures that grant politicians an oversight role, allowing them to second-guess broadcasters’ programming choices, are unconstitutional. See *Community-Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1108–09 (D.C. Cir. 1978) (*en banc*). In other words, the government cannot “discriminate based on the viewpoint of private persons whose speech it facilitates.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995).

Act 372 pushes against this tide by suppressing speech inherent to libraries, distorting their usual functioning free from political interference. The law arms practically anyone from anywhere with a vaguely defined, overly broad authority to challenge books allegedly containing material harmful to minors. Add. 26; App. 1123; R. Doc. 126 at 26. The district court explained that the law “does not require that the book challenger be a patron of the library where the challenge is made. There is no Arkansas residency requirement either. All a challenger must do to initiate the challenge process is meet with a librarian to discuss the grievance.” Add. 23; App. 1120; R. Doc. 126 at 23.

Librarians who resist censorial demands must live in fear of criminal prosecution and jail time. Under these circumstances, “the only way librarians and booksellers will be able to comply with Section 1 and still allow those under the age of eighteen to enter their facilities is to keep them away from all books with sexual content.” Add. 20; App. 1117; R. Doc. 126 at 20. In other words, Act 372 ignores public libraries’ historic mission to provide a wide range of materials to the community by empowering individuals to request materials be removed because they disapprove of a book’s content. And even the most lion-hearted librarian will likely choose to remove the “objectionable books” for fear of being prosecuted.

As this Court correctly observed in *Reynolds*, a historical distinction exists between a city selecting monuments for a park, where “governments hav[e] used monuments to speak to the public since ancient times,” and public libraries, which have not usually served as government messengers. 114 F.4th at 668 (quoting *Matal*, 582 U.S. at 238 and distinguishing *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009)). The Court should reaffirm this obvious distinction.

B. The public does not perceive the government as speaking through the diverse and divergent array of books at a public library.

Defendants also ignore history and the purpose of libraries to claim “public libraries have long shaped their collections to express the government’s view regarding what materials are ‘edifying’ and would be likely to promote morality and civil virtue.” Defs.-Appellants’ Br. 32. Defendants’ argument relies on the Fifth Circuit’s discussion of the history of public libraries, which made such claims as “libraries’ collection decisions have traditionally expressed libraries’ own views about what constitutes worthwhile literature.” *Little v. Llano County*, 138 F.4th 834, 857–58 (5th Cir. 2025). This claim collapses based on history and common sense.

Placing a book on a public library’s bookshelf does not—as Defendants’ argument suggests—constitute governmental endorsement. *Id.* at 854. That is why eight Justices in *Pico* agreed the removal of books from a public school’s library shelves to silence disfavored ideas implicates the Speech Clause. *See Pico*, 457 U.S. at 870 (plurality op.). If, as Defendants suggest, libraries are mere repositories for government speech, removals of books based on viewpoint would be commonplace and

have no First Amendment implications. *Pico* confirms that has never been the law.

Defendants envision a world where every book in a public library bears the government's stamp of approval. But as this Court already noted, if placing books like Barack Obama's *The Audacity of Hope* and Hitler's *Mein Kampf* means the government is attributing worthiness to both books, then "the State 'is babbling prodigiously and incoherently.'" *Reynolds*, 114 F.4th at 668 (quoting *Matal*, 582 U.S. at 236 and highlighting the divergent political science books found at school libraries). Moreover, insofar as anyone from anywhere can challenge a book, it defies credulity to think the government endorses each and every one of those third parties' views. Nothing about the challenge system provides any support to the notion that a library's inventory is government speech.

This Court's *Walls* decision provides further support for the proposition that the selection of books in a library is not government speech. *Walls v. Sanders*, 144 F.4th 995, 1004 (8th Cir. 2025). In *Walls*, this Court dealt "not with books in a library, but instead with in-classroom instruction and materials in a high school," holding the latter

is government speech. *Id.* In reaching this conclusion, this Court noted the Supreme Court in *Pico* “distinguished the school library from the classroom” recognizing “that the government has a ‘claim of absolute discretion in matters of *curriculum*’ and ‘the compulsory environment of the classroom’ to carry out its ‘duty to inculcate community values.’” *Id.* (quoting *Pico*, 457 U.S. at 862, 868–69).

Unlike public school curriculum, libraries are governed by constitutional doctrine defined by their purpose. As the Supreme Court observed in *Velazquez*, the First Amendment does not permit the government “to suppress speech inherent in the nature of the medium” or to “distort its usual functioning.” 531 U.S. at 543. Applying this principle, courts have, as noted, held the government cannot censor print publications it has vested with independent editorial judgment, *see supra* Section II.A (citing *Magrath*, 719 F.2d 279; *Kincaid*, 236 F.3d 342), prohibit public media from running editorials, *League of Women Voters of Cal.*, 468 U.S. at 375–76, nor second-guess programming choices, *Community-Service Broad. of Mid-America, Inc.*, 593 F.2d at 1108–09.

In other words, the public understands libraries exist to provide a wide range of materials not to be the government’s mouthpiece. Act 372

aims to degrade this very purpose by empowering individuals to force the removal of books based on their content. As this Court explained, “it is doubtful that the public would view the placement and removal of books in public school libraries as the government speaking.” *Reynolds*, 114 F.4th at 668. The State has offered no reason why the Court should retreat from this conclusion.

C. Arkansas does not actively control public library shelves to shape its messages.

Arkansas law does not subject school libraries to the whims of partisan control. Instead, they are local entities intended to be above the political fray. Each public school district in Arkansas is an independent governmental entity, governed by a locally elected board of directors vested with authority to “provide no less than a general, suitable, and efficient system of free public schools.” Ark. Code Ann. § 6-13-620.

In fact, the Arkansas legislature intentionally vested its public-school districts with broad autonomy. *See Crenshaw v. Eudora Sch. Dist.*, 362 Ark. 288, 299, 208 S.W.3d 206, 213 (2005). Instead of acting as arms of the state, Arkansas public school districts are “political subdivisions” chartered by the state. *Dermott Special Sch. Dist. v. Johnson*, 343 Ark. 90, 95, 32 S.W.3d 477, 480 (2000). Such political subdivisions “embrace a

certain territory and its inhabitants,” and are “organized for the public advantage” where “their chief design is the exercise of governmental functions.” *Id.* This includes providing education and making accessible a wide variety of materials through libraries—functions emblematic of its public-school libraries as well as community libraries. *See* Sec. II(A)–(B) *supra*.

Defendants’ reliance on *Moody v. NetChoice* is misplaced. Nothing in *NetChoice* supports classifying public library book decisions as “government speech.” Defs.-Appellants’ Br. 14, 30–33. In fact, *NetChoice* says nothing whatsoever about the government speech doctrine. To the contrary, it reaffirmed strong First Amendment protections for *private* actors “compiling and curating others’ speech” against *government* attempts to regulate their editorial discretion. *NetChoice*, 603 U.S. at 731–32.

As Madison explained, “the great object” of a bill of rights was “to limit and qualify the powers of government.” James Madison, Address Before Congress (June 8, 1789), *in* THE PENNSYLVANIA PACKET, June 16, 1789 (reporting on congressional session). That includes limiting the power to control ideas. Yet, Defendants ask the Court to

discard that foundational principle and condone a system in which the government can turn protection for private speech on its head to justify censorship.

If public institutions that exist to promote knowledge and ideas “could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.” *Matal*, 582 U.S. at 235. That result cannot be squared with the First Amendment, let alone our historical understanding of public libraries. But passing off arbitrary censorship at public libraries as “government speech” is what Defendants are trying to sell. This Court should continue to uphold the individual rights of Arkansans and reject this argument.

CONCLUSION

Act 372 goes too far. States have ample authority to protect children from harmful materials without degrading the First Amendment rights of adults. Arkansas chose not to follow that path, but, instead, seeks to push the boundaries of censorial power by threatening librarians with jail time. This Court should affirm the district court’s well-reasoned opinion that maintains the limits set by the Supreme Court.

Dated: September 29, 2025

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