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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

NORTHWEST ASSOCIATION OF INDEPENDENT SCHOOLS, SUN VALLEY COMMUNITY SCHOOL, INC., FOOTHILLS SCHOOL OF ARTS AND SCIENCES, INC., THE COMMUNITY LIBRARY ASSOCIATION, INC., COLLISTER UNITED METHODIST CHURCH, INC., MARY HOLLIS ZIMMER, MATTHEW PODOLSKY, JEREMY WALLACE on behalf of his minor child, A.W., and CHRISTINA LEIDECKER on behalf of herself and her minor child, S.L.,

Plaintiffs,

v.

Case No. 24-cv-00335-REP

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, A TEMPORARY RESTRAINING ORDER

RAÚL LABRADOR, in his capacity as the Attorney General for the State of Idaho, JAN BENNETTS, in her capacity as Prosecuting Attorney for Ada County, Idaho, and MATT FREDBACK, in his capacity as Prosecuting Attorney for Blaine County, Idaho,

Defendants.

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INTRODUCTION

Idaho House Bill 710 (2024) ("H.B. 710" or the "Act"), which took effect on July 1, 2024, makes it unlawful for schools and libraries (including private schools and privately funded public libraries) to "promote, give, or make available" to minors any material that is, in the State of Idaho's view, "harmful to minors." The Act authorizes Defendants to seek injunctions against private schools and privately funded libraries for allegedly violating its overbroad and vague provisions, and it contains a citizen enforcement provision that offers a cash bounty to encourage the most sensitive Idahoans to sue schools and libraries for making available constitutionally protected, non-obscene works if they believe members of their community may find them offensive. On its face, the Act is a patently unconstitutional effort by the State to control the dissemination of constitutionally protected information that the State and some Idahoans do not like.

The scope of H.B. 710 turns on its vague and overbroad definition of "harmful to minors," which extends well beyond the State's limited authority to restrict the materials that private entities may provide to minors. Indeed, on its face, H.B. 710 flouts nearly a century of binding precedent from *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925), *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Ginsberg v. State of New York*, 390 U.S. 629 (1968), *Miller v. California*, 413 U.S. 15, 16 (1973), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975), through *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), *Video Software Dealers Association v. Schwarzenegger,* 556 F.3d 950 (9th Cir. 2009), *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010), and *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020). It is contrary to the proposition, central to the First Amendment, that "[s]peech 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," *Erznoznik*, 422 U.S. at 213–14, and it infringes the rights of Idaho parents and students to receive constitutionally protected information.

Plaintiffs are private independent schools,[1] privately funded public libraries,[2] and Idaho parents and minors who value and rely on those institutions as alternatives to State-controlled channels of communication. They are all directly, immediately, and substantially harmed by the State's egregious overreach in H.B. 710. Under H.B. 710, private schools are prohibited from providing their students with constitutionally protected, non-obscene works of significant cultural, historical, literary, and scientific import that are central to an informed education: health and science education textbooks, images of canonical works of art like Michealangelo's *David*, significant works of literature like Toni Morrison's *The Bluest Eye*, and even the Bible, if a Defendant or citizen complainant believes the work offends local mores. The State's unconstitutional interference with private schools and privately funded libraries in turn infringes Idaho parents' fundamental right to direct the education and upbringing of their children, free from undue interference from the State, and minors' First Amendment right to receive information that private institutions and their parents wish to make available to them.

The issues raised by Plaintiffs' claims are simple, straightforward, and supported by binding caselaw. The length of Plaintiffs' complaint and this memorandum requesting injunctive relief reflect the myriad constitutional deficiencies of H.B. 710, not their complexity. Put

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[1] Sun Valley Community School, Inc., an Idaho non-profit corporation ("SVCS"), and Foothills School of Arts and Sciences, Inc. ("Foothills"). Both SCVS and Foothills are members of Plaintiff Northwest Association of Independent Schools ("NWAIS").

[2] The Community Library, Inc. ("The Community Library") and Collister United Methodist Church, Inc. ("Collister").

simply, the Constitution does not permit the State to engage in content-based censorship to mollify its most censorious citizens or communities. *See Pope v. Illinois*, 481 U.S. 497, 500 (1987) ("[T]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.").[3] For the reasons set forth herein, the Court should preliminarily enjoin or temporarily restrain enforcement of the Act before the 2024-25 school year begins on August 19, 2024.[4]

STATEMENT OF FACTS

I. The Act

In April 2024, the Idaho legislature enacted H.B. 710, which created a new civil enforcement mechanism to regulate the distribution of material that is "harmful to minors." The law does not distinguish on its face between material that is constitutionally protected and material that is not. The law went into effect on July 1, 2024, and it is now codified in sections 18-1514 and 18-1517B of the Idaho Code.[5]

The Act regulates the conduct of public and private K-12 schools as well as libraries that are open to the public. §§ 18-1514(11), 18-1517B(2). Although other states have attempted in recent years to regulate the distribution of "harmful" materials by public schools and publicly

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[3] Internal quotation marks, citations, and alterations are omitted from all case quotations except where otherwise noted.

[4] August 19, 2024 is the first day of the 2024-25 school year at Foothills. (Cofod Decl. ¶ 3). The first day of the 2024-25 school year at SVCS is August 26, 2024. (Pettit Decl. ¶ 3).

[5] For ease of reference, citations to H.B. 710 herein are generally to the codified version of the statute in the Idaho Code.

funded libraries, H.B. 710 is the only such law, to Plaintiffs' knowledge, that also attempts to regulate the conduct of private schools and privately funded public libraries.

Section 1 of the Act (hereinafter, the "Definitional Provision") defines some, but not all, of the terms used in the Act and is codified in § 18-1514 of the Idaho Code. Among its eleven definitions, it establishes a constitutionally deficient standard for identifying materials that schools and libraries may not make available to minors because they are "harmful to minors." § 18-1514(6). Many of the other ten definitions in the Definitional Provision are vague, overbroad, or incomprehensible, including the definitions of "minor," "sexual conduct," "material," "performance," and "promote." § 18-1514(1)–(5), (7)–(11). (*See* Compl. ¶¶ 93–118). The Definitional Provision is reproduced in full as Exhibit 12 hereto.

Section 2 of the Act includes the Act's substantive prohibition (hereinafter, the "Substantive Prohibition") and is codified in § 18-1517B(2). It prohibits schools and libraries from "promot[ing], giv[ing], or mak[ing] available" to minors any material that falls within the scope of the Act. § 18-1517B(2). The Substantive Prohibition is reproduced in full as Exhibit 12 hereto.

Section 2 also contains the Act's enforcement provisions and is codified in § 18-1517B(2)–(5), (7). The Act requires that schools and libraries create a "policy and readily accessible form" by which "a person"—any person, including persons not affiliated with the private school or privately funded public library—may "request review of material the person considers to be harmful to minors" (hereinafter, the "Review Provision"). § 18-1517B(7). Further, the Act provides private citizens with a cause of action and a financial incentive—a cash bounty of $250 and "actual damages"—to sue entities for alleged violations of the Act (hereinafter, the "Citizen Enforcement Provision"). § 18-1517B(3)–(4). The Act also provides

the Attorney General and county prosecutors with a cause of action to enjoin parties from violating the Act (hereinafter, the "Government Enforcement Provision"). § 18-1517B(5). The Act contains no scienter requirement that would separate culpable and non-culpable conduct.

II. The Effect of the Act on Plaintiffs

The Plaintiffs consist of a membership association of private schools, two private independent schools in Idaho, two privately funded public libraries in Idaho, and parents and students that attend or are patrons of private schools and privately funded public libraries in Idaho. H.B. 710 irreparably harms each of them by depriving them of their constitutional rights.

NWAIS is an association of private schools, including Idaho-based members SVCS and Foothills. (Crotty Decl. ¶¶ 3–4). SVCS and Foothills (the "Private School Plaintiffs") have a constitutional right to provide constitutionally protected, non-obscene materials to their minor students. SVCS and Foothills wish to continue making those materials available to their minor students even though some of those materials may fall within the scope of H.B. 710. (Pettit Decl. ¶ 6; Cofod Decl. ¶ 7).

For example, in SVCS's science, humanities, and health education courses, SVCS makes available to its students certain textbooks and materials that contain "nudity" and "sexual conduct" as those terms are defined in H.B. 710. (Pettit Decl. ¶¶ 7–9). Foothills also makes such material available to its students, including in celebrated works of art and literature. (Cofod Decl. ¶¶ 10–12). To reflect and celebrate the diverse experiences of its community of parents and students, Foothills also makes available to its students certain materials that depict same-sex characters engaged in non-sexual and non-obscene activities, including parenting. (*Id.* ¶¶ 8–9). SVCS and Foothills wish to continue making these materials (and others like them) available to their students without undue interference by the State and without a pending threat of litigation. (Pettit Decl. ¶¶ 6, 10–12; Cofod Decl. ¶¶ 6, 13–15). SVCS and Foothills also want to remain

accredited by NWAIS and H.B. 710 threatens their ability to maintain their accreditation status. (Pettit Decl. ¶ 13; Cofod Decl. ¶ 16).

The Community Library and Collister (the "Library Plaintiffs") maintain privately funded public libraries and have a constitutional right to provide constitutionally protected, non-obscene material to their patrons. The Community Library is committed to the principles of free inquiry and independent thinking. (Davidson Decl. ¶ 4). It was founded in 1955 as a private institution that would not be dependent on funding from, or subject to undue oversight by, the State. (*Id.* ¶¶ 3–4). It makes available to its patrons, including its minor patrons, a variety of materials that appear to fall within the scope of H.B. 710, including books with LGBTQ+ characters, books addressing sexual assault, and science and art books that contain nudity. (*Id.* ¶ 15). Collister is a Reconciling Ministry that is committed to achieving LGBTQ+ justice and full inclusion in its life and leadership. (Hirst Decl. ¶ 4). To that end, it has created a lending library that makes available to congregants and members of the public, including minors, a variety of non-obscene books that focus on LGBTQ+ people and topics and that contain "act[s] of . . . homosexuality" as that term is broadly used in H.B. 710. (*Id.* ¶¶ 5, 8). The Community Library and Collister wish to continue providing these materials to their communities without undue interference by the State and without a pending threat of litigation. (Davidson Decl. ¶¶ 4, 14–16; Hirst Decl. ¶¶ 9–11, 13).

Ms. Zimmer, Mr. Podolsky, and Ms. Leidecker (the "Parent Plaintiffs") are parents who want their children to be able to access constitutionally protected, non-obscene materials. (Zimmer Decl. ¶ 8; Podolsky Decl. ¶ 6; Leidecker Decl. ¶ 8; *see also* Wallace Decl. ¶¶ 3, 5). That includes material with LGBTQ+ characters and themes (Zimmer Decl. ¶ 6; Podolsky Decl. ¶ 4; Leidecker Decl. ¶ 7); materials that accompany basic health and sexual education

curriculums (Zimmer Decl. ¶ 5; Podolsky Decl. ¶ 5); and great works of art and literature that contain nudity or sexual conduct (Zimmer Decl. ¶ 5; Podolsky Decl. ¶ 4; Leidecker Decl. ¶ 6). These parents trust the judgment of the private institutions they have selected for their children to make determinations about the appropriateness of particular materials for their children without undue interference from the State. (Zimmer Decl. ¶¶ 4, 8; Podolsky Decl. ¶¶ 3, 6; Leidecker Decl. ¶ 4; *see also* Wallace Decl. ¶ 2). As an adult patron of The Community Library, Ms. Leidecker also wants to be able to access such materials for herself free from stigma. (Leidecker Decl. ¶¶ 9–10).

A.W. and S.L. (the "Minor Plaintiffs") are minors who want to be able to receive constitutionally protected, non-obscene materials from private entities that are subject to H.B. 710. (A.W. Decl. ¶¶ 1, 9; S.L. Decl. ¶¶ 1, 9). A.W. and S.L. are both avid readers who believe that reading introduces them to new ideas and perspectives and helps them better understand the world. (A.W. Decl. ¶ 3; S.L. Decl. ¶¶ 2, 6). A.W. wishes to continue to access those materials from her Idaho private school and S.L. wants to continue to access those materials from The Community Library. (A.W. Decl. ¶ 9; S.L. Decl. ¶ 9). They wish to do so without undue interference by the State. (A.W. Decl. ¶ 9; S.L. Decl. ¶ 9).

ARGUMENT

H.B. 710 is a patently unconstitutional effort to prohibit the Private School Plaintiffs and the Library Plaintiffs (together, the "Private Entity Plaintiffs") from making available to their minor students and patrons constitutionally protected, non-obscene books, works of art, recordings, and other materials that contain content that the State seeks to suppress. The Act infringes the First Amendment rights of the Private Entity Plaintiffs and Minor Plaintiffs and the Fourteenth Amendment rights of the Parent Plaintiffs. As set forth below, the law is facially inconsistent with nearly a century of binding precedent and the Court should preliminarily enjoin

or temporarily restrain its enforcement before the 2024-25 school year begins on August 19, 2024.

I. Legal Standard for Preliminary Relief

Plaintiffs are entitled to a preliminary injunction or, in the alternative, a temporary restraining order, to preserve the status quo in advance of the new school year. Both forms of relief are governed by identical standards. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). For either, a moving party must show "(1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest." *Idaho v. Coeur d'Alene Tribe*, 49 F. Supp. 3d 751, 762 (D. Idaho 2014). The court may apply a sliding scale test, balancing these elements "such that a stronger showing of one element may offset a weaker showing of another." *Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th Cir. 2017).

The first factor is "the most important" in the Court's analysis. *N. D. v. Reykdal*, 102 F.4th 982, 992 (9th Cir. 2024). In the First Amendment context, the first factor overlaps substantially with the second because irreparable harm "is relatively easy to establish . . . by demonstrating the existence of a colorable First Amendment claim." *CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 851 (9th Cir. 2019) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Further, where, as here, "the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

II. Plaintiffs Are Likely to Succeed on the Merits of Their Constitutional Claims

Each of Plaintiffs' constitutional claims are supported by decades of binding precedent. For the reasons set forth below, the Plaintiffs are likely to succeed on each of their claims and the Court should therefore grant the requested preliminary injunction or temporary restraining order.

A. The Private Entity Plaintiffs' First Amendment Claims

i. The Private Entity Plaintiffs Are Protected by the First Amendment

The First Amendment to the U.S. Constitution, incorporated through the Fourteenth Amendment, guarantees the rights to free speech, assembly, association, and petition. U.S. Const. amends. I, XIV. The "First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010); *see also Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018).

All of the Private Entity Plaintiffs are 501(c)(3) non-profit corporations that "have speech rights under the First Amendment." *Naruto v. Slater*, 888 F.3d 418, 426 n.9 (9th Cir. 2018) (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010)). Moreover, beyond the First Amendment protections enjoyed by the Private Entity Plaintiffs as corporate entities, they have additional First Amendment protections arising from the critical role they play in their communities' intellectual life. Private schools, like the Private School Plaintiffs, "are highly expressive organizations, as their philosophy and values are directly inculcated in their students," *Circle Schs. v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004), and they "have a First Amendment right to academic freedom," *Asociación de Educación Privada de P.R., Inc. v. García-Padilla*, 490 F.3d 1, 11 (1st Cir. 2007); *see also Pierce*, 268 U.S. at 535 (explaining that the state's authority "excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only"). Similarly, libraries, including privately funded

public libraries like The Community Library and Collister, "speak[] through [their] selection of which books to put on the shelves and which books to exclude," because the "compilation of the speech of third parties is a communicative act." *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 28–30 (D.C. Cir. 2005).

ii. The First Amendment Prevents States from Imposing Restrictions on the Private Entity Plaintiffs' Distribution of Non-Obscene Material

H.B. 710 is facially inconsistent with decades of binding precedent holding that the State may not restrict the distribution of non-obscene materials, including to minors. This unbroken line of authority dates back at least to *Ginsberg* 390 U.S. 629, *Miller*, 413 U.S. 15, and *Erznoznik*, 422 U.S. 205, and extends to *Video Software Dealers Ass'n*, 556 F.3d 950, *Powell's Books*, 622 F.3d 1202, and *Brown*, 564 U.S. 786. For some 50 years, federal courts have repeatedly reaffirmed that "[s]peech 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." *Erznoznik*, 422 U.S. at 213–14. "[T]he values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Id.*; *Powell's Books*, 622 F.3d at 1215 ("[T]he state may not restrict adults from sharing material with minors that is not obscene for minors.").[6]

The test announced by the Court in *Miller* establishes the outer limit of the State's authority to regulate obscenity. The State may only restrict the distribution of materials as "obscene" or "harmful to minors" if all three of the following conditions are met with respect to the entirety of a particular work:

[6] *See also, e.g.*, *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2407 (2024) ("[A] State may not interfere with private actors' speech to advance its own vision of ideological balance."); *Brown*, 564 U.S. at 794 (explaining that the power to protect minors "does not include a free-floating power to restrict the ideas to which children may be exposed").

> (a) . . . the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[7]

Miller, 413 U.S. at 24; *United States v. Schales*, 546 F.3d 965, 971 (9th Cir. 2008) (explaining that "statutes that proscribe conduct *only* with respect to material that is obscene under the *Miller* test are not overbroad." (emphasis added)); *United States v. Obscene Mags., Book & Advert. Materials*, 653 F.2d 381, 382 (9th Cir. 1981) ("The coalescence of all three elements of the [*Miller*] test is required to support a determination that a work is obscene."). The Serious Value Requirement is "particularly important because" it is an objective test, "not judged by contemporary community standards." *Reno v. ACLU*, 521 U.S. 844, 873 (1997); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006) ("[T]he entire point of the *Miller* third prong is to free individuals from the possibility of prosecution solely on the basis of widely divergent local standards.").[8]

iii. H.B. 710 Is Overbroad in Violation of the First Amendment

H.B. 710 flagrantly ignores the unbroken line of authority limiting the State's ability to restrict the distribution of non-obscene materials. It fails to place any meaningful limitation on

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[7] The third element of the *Miller* test is referred to as the "Serious Value Requirement" in the Complaint (*see* Compl. ¶ 75) and herein. *Miller*'s requirement, expressed in the first and third elements, that any challenged work must be "taken as a whole," is referred to herein as the "Taken as a Whole Requirement."

[8] There is some uncertainty about how to apply the Serious Value Requirement to material intended for minors, though that uncertainty does not affect Plaintiffs' claims. *See Powell's Books*, 622 F.3d at 1213 (discussing *Miller* and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Com. of Mass.*, 383 U.S. 413, 418 (1966) (hereinafter, "*Memoirs*")). Here, as in *Powell's Books*, the challenged statute fails to satisfy the standard articulated in *Miller* and it therefore necessarily fails to satisfy the earlier standard articulated in *Memoirs*. *See Powell's Books*, 622 F.3d at 1213.

its core definition of "harmful to minors"; it fails to incorporate *Miller*'s Serious Value and Taken as a Whole Requirements; it restricts descriptions and depictions of innocuous, non-obscene, and non-sexual conduct, including non-sexual descriptions and depictions of same-sex couples; and it deprives older minors and adults access to constitutionally protected material.

Because H.B. 710 fails to incorporate the constitutional safeguards described in *Miller* and its progeny, it prohibits a staggering amount of protected speech. *See NetChoice,* 144 S. Ct. at 2394 (describing overbreadth analysis); *Matsumoto v. Labrador*, No. 1:23-CV-00323-DKG, 2023 WL 7388852, at *18 (D. Idaho Nov. 8, 2023) (same). Precisely because the Act fails to incorporate critical components of the *Miller* test, it is useless as a mechanism for identifying truly regulable obscene speech and conduct, and it therefore has no "legitimate sweep" against which to measure its extraordinary scope. Against this background, the Private Entity Plaintiffs face an immediate and substantial threat of enforcement in violation of their First Amendment rights. For the reasons described below, H.B. 710's "overbreadth impinges on the rights of all individuals to legitimately share and access non-obscene materials without the interference of the state" and the Court should preliminarily enjoin or temporarily restrain its enforcement. *Powell's Books*, 622 F.3d at 1215.

a. <u>The Act Fails to Impose Any Discernible, Much Less Objective, Limitation on the State's Ability to Restrict Non-Obscene Material, Including by Omitting *Miller*'s Serious Value Requirement</u>

Contrary to *Miller* and its progeny, H.B. 710 imposes no discernible limitation on the State's authority to restrict the dissemination of non-obscene materials beyond Defendants' and citizens' perceptions of local mores. First, H.B. 710's central definition of "harmful to minors" describes only what that phrase "*includes* in its meaning," not what it "means." § 18-1514(6) (emphasis added). Moreover, § 18-1514(6)(b), which corresponds to *Miller*'s "patently

offensive" prong, explains that it "includes, *but is not limited to*" the "patently offensive representations" described in § 18-1514(6)(b)(i) and (ii) (emphasis added). This word choice was plainly intentional—the other ten definitions in H.B. 710 explain what each defined term "means," *see* § 18-1514(1)–(5), (7)–(11), as does Idaho's definition of obscenity as to adults, *see* § 18–4101(A) ("'Obscene material' means . . . .").

"[I]n terms of statutory construction, use of the word 'includes' does not connote limitation" and it "is frequently, if not generally used as a word of extension or enlargement rather than as one of limitation or enumeration." *In re Yochum*, 89 F.3d 661, 668 (9th Cir. 1996); *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) ("[W]hen an exclusive definition is intended the word 'means' is employed . . . whereas here the word used is 'includes.'"). Although *Miller* makes clear that the State may *only* regulate material that satisfies all three prongs of the obscenity test, H.B. 710 imposes no such restriction on the Defendants or citizens authorized to enforce the statute. Rather, to the extent H.B. 710 includes certain (incomplete) aspects of the *Miller* test in § 18-1514(6)(a) ("prurient interest"), (b) ("patently offensive"), it treats those aspects of *Miller* as merely the beginning of the State's regulatory authority, rather than its outermost limit. *But see, e.g.*, *Hamling v. United States*, 418 U.S. 87, 114 (1974) ("[T]here is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases.").

Second, H.B. 710 fails to incorporate *Miller*'s Serious Value Requirement. The second sentence of § 18-1514(6)(b)(ii) includes phrases that echo *Miller*'s Serious Value Requirement, but the provision plainly does not offer the protection required by *Miller*. *Miller*, for example, requires that every obscenity analysis consider the "*work*, taken as a whole," rather than just an

allegedly obscene portion of a work. *See Miller*, 413 U.S. at 15. Section 18-1514(6)(b)(ii), by contrast, ambiguously applies to "any matter"—"matter" is not a defined term in the Act—and leaves the Private Entity Plaintiffs to guess what it means to "include or proscribe" a "matter."

The conjunctive clauses that follow do not add clarity. The first clause instructs that the "matter" be "considered as a whole," while the second clause instructs that the "matter" be "considered . . . in context in which it is used." The latter instruction to consider the "matter . . . in context" suggests that the term "matter" refers to the specific "description or representation" of disfavored content, rather than to the "work" in which that content is found (an instruction to consider a complete book or movie "in context" is a nonsequitur under *Miller*). What follows is that § 18-1514(6)(b)(ii) impermissibly ignores the "work, taken as a whole," and instead extends First Amendment protection to specific "description or representation" of disfavored content *only* if the challenged "description or representation" *itself* has "serious literary, artistic, political or scientific value for minors." This violates the First Amendment. *See, e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 n.11 (1985) (noting that the Court previously "rejected a standard of obscenity that allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons"); *Armstrong v. Asselin*, 734 F.3d 984, 990 (9th Cir. 2013) ("To be 'obscene,' [the challenged book] would have to satisfy the Supreme Court's *Miller* standard . . . . Without examining the work as a whole, the standard cannot be applied.").

Even if the second sentence of § 18-1514(6)(b)(ii) were coherent and consistent with *Miller*'s Serious Value Requirement (it is neither), it would still not save H.B. 710. The first sentence of § 18-1514(6)(b)(ii) concerns only "representations or descriptions" of "[m]asturbation, excretory functions or lewd exhibitions of the genitals or genital area." The second sentence therefore does not apply to any of the other categories of disfavored content

described in the statute. Moreover, the State views application of the second sentence as optional, insofar as § 18-1514(6)(b) merely "includes, but is not limited to," the provisions found in (b)(i) and (ii).[9]

b. The Act Omits *Miller*'s Taken as a Whole Requirement and Authorizes Defendants and Citizens to Enforce the Act Against Specific Depictions and Descriptions, Without Regard to their Context

H.B. 710's failure to incorporate the Serious Value Requirement is consistent with the statute's myopic—and unconstitutional—focus on particular depictions and descriptions of disfavored content without regard to "work[s], taken as a whole." The Taken as a Whole Requirement long predates *Miller* and is central to the protections offered by the First Amendment. *See, e.g.*, *Memoirs*, 383 U.S. at 418; *Roth v. United States*, 354 U.S. 476, 489 & n.26 (1957). It ensures that the First Amendment protects a work unless "the work, taken as a whole, appeals to the prurient interests" *and* "the work, taken as a whole," lacks serious value. *Miller*, 413 U.S. at 24–25; *Powell's Books*, 622 F.3d at 1213; *United States v. Tupler*, 564 F.2d 1294, 1297 (9th Cir. 1977) ("A single photographic print or 'out take' . . . could never establish probable cause to believe that the film 'taken as whole, lacks serious literary, artistic, political, or scientific value'" under *Miller*). This is clear from *Kois v. Wisconsin,* in which the Supreme Court declined to evaluate individual pictures that the state asserted were obscene "because in the context in which [the pictures] appeared in the newspaper[,] they were rationally related to an article that itself was clearly entitled to [constitutional] protection." 408 U.S. 229, 231 (1972);

[9] The State's decision to limit application of this provision to § 18-1514(6)(b)(ii) was intentional. Idaho's definition of obscenity as to adults, found in Idaho Code § 18-4101(A), contains this same deficient version of the Serious Value Requirement, but the structure of that statute makes clear that it applies to the entire definition of "obscene materials." In other words, the State knows how to draft a statutory exemption, and it simply declined to do so in H.B. 710.

see also United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705, 706–07 (2d Cir. 1934) (explaining that, if *Ulysses* were to be restricted because of specific passages, "Venus and Adonis, Hamlet, Romeo and Juliet, . . . as well as many other classics, would [also] have to be suppressed").

H.B. 710 ignores this critical constitutional safeguard, even beyond its omission of the Serious Value Requirement. For example, the definition of "'harmful to minors' includes in its meaning" any individual "description or representation" of disfavored content that "[a]ppeals to the prurient interest of minors," without regard to whether the "work, taken as a whole" appeals to the prurient interest of minors. § 18-1514(6). *But cf. Kois*, 408 U.S. at 230; *Powell's Books*, 622 F.3d at 1213; *Imperial Sovereign Ct. of Mont. v. Knudsen*, 684 F. Supp. 3d 1095, 1103 (D. Mont. 2023) (holding Montana statute facially invalid under the First Amendment in part because it "contain[s] no requirement that, 'taken as a whole' and 'applying contemporary community standards' the regulated conduct 'appeals to the prurient interest.'").

H.B. 710's Substantive Prohibition confirms the Act's focus on specific descriptions and depictions, rather than "work[s], taken as a whole." Section 18-1517B(2)(a) prohibits the Private Entity Plaintiffs from "promot[ing], giv[ing], or mak[ing] available" to minors "[a]ny picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body" that contains disfavored content, without regard to whether the disfavored content is found within a broader work, or the role the content plays in a broader work. The deficiency of this provision is especially stark with respect to "motion picture film[s]," which H.B. 710 identifies as regulable in their entirety if they contain even a single "depict[ion]" of disfavored content that a Defendant or citizen believes could be offensive to members of their community.

The following section, § 18-1517B(2)(b), renders the Substantive Prohibition vague with respect to a vast amount of constitutionally protected material. Section 18-1517B(2)(b) refers to "book[s], pamphlet[s], magazine[s], printed matter however reproduced, or sound recording[s]" that contain disfavored content, and it instructs that such a work is regulable if "taken as a whole" it is "harmful to minors." But that admonition conflicts directly with the preceding paragraph's prohibition on the dissemination of "*[a]ny* picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body," whether found in "book, pamphlet, magazine, printed matter . . . or sound recording" or elsewhere. In any event, the "as a whole" clause in § 18-1517B(2)(b) does nothing to limit the unconstitutional scope of the Act because it simply refers back to the definition of "harmful to minors," which is impermissibly focused on specific depictions and descriptions and omits *Miller*'s Serious Value and Taken as a Whole Requirements.

c. The Act's Deviation from *Miller* Renders it Vague under the First Amendment and Authorizes Enforcement against Non-Sexual, Non-Erotic and therefore Non-Obscene Content

The Act's failure to incorporate *Miller*'s Serious Value and Taken as a Whole Requirements, coupled with the Act's expansive enforcement provisions, authorize Defendants and citizens to challenge protected works based on their perception (real and imagined) of their particular community's standards, without regard to *Miller*. To some Idahoans, this highly variable standard encompasses non-sexual content like kissing (Compl. ¶ 154), LGBTQ characters (*id.* ¶¶ 154, 160, 161), merely "androgynous" characters (*id.* ¶ 154), and images in health and sex-education materials (*id.* ¶ 157), that is plainly not obscene under the First Amendment. One prominent group in Idaho has prepared a list of purportedly obscene books

found in Idaho schools and libraries that includes a work that the Ninth Circuit has already held is *not* obscene. (*Id.* ¶¶ 154–57[10]).

The Supreme Court rejected this crabbed approach to the First Amendment in *Reno v. ACLU*. 521 U.S. at 873–74. The Court held that a law, like H.B. 710, that incorporates only the "community standards" portions of the *Miller* test, and not the Serious Value and Taken as a Whole Requirements, will have an "uncertain sweep" that will "unquestionably silence[] some speakers whose messages would be entitled to constitutional protection" in violation of the First Amendment. *Id.* (invalidating portions of the Communications Decency Act). Laws purporting to regulate obscenity are unconstitutional if they fail to incorporate the *Miller* test in its entirety precisely because such laws invite enforcement against a wide range of non-sexual, non-erotic, and therefore non-obscene speech and conduct. *See, e.g.*, *Imperial Sovereign Ct. of Mont.*, 684 F. Supp. 3d at 1103 (enjoining challenged statue because, inter alia, it omits *Miller*'s Serious Value and Taken as a Whole Requirements).[11] As the Court explained in *Reno v. ACLU*, this kind of "vagueness . . . is a matter of special concern" in the First Amendment context "because of its obvious chilling effect on free speech." 521 U.S. at 871–72.

d. <u>The Act Regulates Non-Sexual and Non-Erotic Content on its Face</u>

Even putting H.B. 710's deviations from *Miller* aside, the Act includes within its scope non-sexual and non-erotic content that is not obscene as a matter of law and is protected by the

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[10] Blaine Conzatti, PORNOGRAPHY IN PUBLIC SCHOOLS AND LIBRARIES: A STATEWIDE PROBLEM (Idaho Family Policy Center, 2023), https://idahofamily.org/wp-content/uploads/2023/03/PornographySchoolsLibrariesREPORT_ v2.pdf.

[11] *See also, e.g.*, *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 848 (S.D. Tex. 2023) (same); *Entm't Software Ass'n*, 404 F. Supp. 2d at 1080 (same); *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932, 945 (S.D. Ohio 2002) (invalidating law as overbroad because it failed to "define 'harmful to juveniles' in accordance with the three-part test as adopted in *Miller*").

First Amendment. *Miller* makes clear that the test it announced extends only to materials that depict or describe sex. *See Imperial Sovereign Ct. of Mont.*, 684 F. Supp. 3d at 1103. *Ginsberg* "simply adjust[ed] the definition of obscenity to . . . permit[] the appeal of this type of material to be assessed in terms of the sexual interests of . . . minors." *Video Software Dealers Ass'n*, 556 F.3d at 959. In *Erznoznik*, the Court explained that "under any test of obscenity as to minors not all nudity would be proscribed. . . . [T]o be obscene such expression must be, in some significant way, erotic." 422 U.S. at 214 n.10. In short, "[t]he Supreme Court has carefully limited obscenity to sexual content." *Video Software Dealers Ass'n*, 556 F.3d at 959.

H.B. 710 violates this constitutional limitation through its inclusion of "any act of . . . homosexuality" in its definition of "sexual conduct." § 18-1514(3). "Sexual conduct" is defined in full to "mean any act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, public area, buttocks, or, if such person be a female, the breast." Because this definition expressly includes "sexual intercourse" and various forms of "physical contact," and because a statute must be interpreted to give effect "to all the words of the statute if possible, so that none will be void, superfluous or redundant," *State v. Hart*, 25 P.3d 850, 854 (Idaho 2001), the phrase "any act of . . . homosexuality" must encompass acts *other* than same-sex "sexual intercourse" or same-sex "physical contact."[12] This conclusion is supported by the omission of "acts of heterosexuality" from the definition; such acts are only

[12] The canon of noscitur a sociis (i.e., "a word is known by the company it keeps," *State v. Schulz*, 264 P.3d 970, 974 (Idaho 2011)) does not elucidate the meaning of "acts of homosexuality," because interpreting "acts of homosexuality" to mean "acts of homosexual sexual intercourse" or "acts of homosexual physical contact" impermissibly leads back to the original problem of superfluity. *Cf. Hart*, 135 Idaho at 831 ("The rule ejusdem generis must be considered in connection with the rule of construction that effect must be given to all the words of the statute if possible, so that none will be void, superfluous or redundant").

encompassed in the definition to the extent they involve heterosexual "sexual intercourse" and heterosexual "physical contact."

What follows is that H.B. 710's definition of "sexual conduct" appears to include innocuous and non-sexual "acts of homosexuality" like kissing, holding hands, dating, cohabitating, and coparenting, to name just a few examples. H.B. 710 authorizes Defendants and citizens to enforce the Act against any such descriptions or depictions if they offend local mores, and without regard to their sexual content, their context, or their value to minors. After the complaint was filed this matter, H.B. 710's sponsor corroborated this understanding of the Act, asserting that a person "has every right to ask" that a depiction of two men kissing "be moved" from view.[13] The First Amendment does not permit the State to exercise that authority. *See, e.g.*, *Video Software Dealers Ass'n*, 556 F.3d at 960 (explaining that obscenity concerns only "sex material").[14]

e. <u>The Act Deprives Older Minors and Adults Access to Constitutionally Protected Material</u>

H.B. 710 is also overbroad insofar as it prevents the Private Entity Plaintiffs from providing non-obscene materials to older minors and adults, and prevents those older minors and adults from receiving constitutionally protected material that is not obscene as to them. *See Ginsberg*, 390 U.S. at 636 ("[T]he concept of obscenity or of unprotected matter may vary

[13] Ian Max Stevenson, *Private schools file suit to challenge 'government interference' of Idaho library law*, IDAHO STATESMAN (July 25, 2024), https://www.idahostatesman.com/news/politics-government/state-politics/article290422804.html.

[14] In *Downs v. L.A. Unified Sch. Dist.*, the Ninth Circuit held that "a school board . . . may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides." 228 F.3d 1003, 1014 (9th Cir. 2000). It follows from *Downs* that non-governmental entities, including the Private Entity Plaintiffs, have at least an equally robust right to decide to "advocate . . . tolerance" through the non-obscene materials it selects for its curriculum, classrooms, and book stacks.

according to the group to whom the questionable material is directed or from whom it is quarantined."). H.B. 710 defines "minors" to mean "any person less than eighteen (18) years of age" without distinguishing between younger minors and older minors. § 18-1514(1). Consequently, under H.B. 710, schools and libraries, including the Private Entity Plaintiffs, are limited when creating their curricula and curating their library collections by the standard applicable to their youngest minor patrons. "[T]he only way the [Private Entity Plaintiffs] could comply with the law would be to keep minors away from any material considered obscene as to the youngest minors," which "impose[s] an unnecessary and unjustified burden on any older minor's ability to access . . . books appropriate to his or her age and reading level." *Fayetteville Pub. Library v. Crawford Cnty., Ark.*, 684 F. Supp. 3d 879, 903 (W.D. Ark. 2023). This failure to distinguish between older minors and younger minors "stifles the access of . . . older minors to . . . material they are entitled to receive and view" and "its restrictions on constitutionally protected speech are therefore unjustified." *Id.*; *see also ACLU v. Ashcroft*, 322 F.3d 240, 253–54 (3d Cir. 2003) (holding that statute defining "minor" to mean "any person under 17 [seventeen] years of age" applied "to an infant, a five-year old, or a person just shy of age seventeen," and the court could not "rewrite Congress's definition of 'minor'" to reduce the statute's infirmities under the First Amendment), *aff'd and remanded*, 542 U.S. 656 (2004) (affirming preliminary injunction).

H.B. 710 similarly stifles the access of adults, including Ms. Leidecker, to materials in The Community Library to which adults are constitutionally entitled. *See Fayetteville*, 684 F. Supp. 3d at 903. It is well established that even if there is a "governmental interest in protecting children from harmful materials . . . that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno v. ACLU*, 521 U.S. at 875; *see also Am.*

Booksellers Found. for Free Expression v. Sullivan, 799 F. Supp. 2d 1078, 1082 (D. Alaska 2011) ("The Government may not reduce the adult population to only what is fit for children."). Because The Community Library cannot create a section within its library that can be accessed only by adult patrons (Davidson Decl. ¶¶ 24–28), its adult patrons will be unconstitutionally denied access entirely to materials the library is forced to remove as a result of H.B. 710, even if those materials are constitutionally protected as to adults.

Even if The Community Library *could* create a section that was only accessible by adults, H.B. 710 would still impermissibly burden its adult patrons' First Amendment rights. As Ms. Leidecker explained, her First Amendment rights would be burdened if The Community Library were to create a segregated section of its library only accessible by adults because such sections stigmatize the works within them and the adults who enter them. (Leidecker Decl. ¶ 9). *Cf., e.g.*, *Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 754 (1996) (holding that statute requiring cable subscribers to notify cable company in writing if they wished to watch certain programs that were non-obscene as to adults violated First Amendment because of stigma associated with request); *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 551 n.23 (N.D. Tex. 2000) ("In addition, because the only children's books located in the adult sections of the Library will be those removed under the [challenged] Resolution, the Resolution attaches an unconstitutional stigma to the receipt of fully-protected expressive materials.").

The "adults only" segregation demanded by H.B. 710 is far more than an incidental imposition on the First Amendment rights of adults or a permissible time, place and manner restriction. States may, of course, insist that materials that are, in fact, obscene as to minors under *Miller* be segregated or concealed without impermissibly burdening adults' First Amendment right to access those materials. *Cf., e.g.*, *Upper Midwest Booksellers Ass'n v. City*

of Minneapolis, 780 F.2d 1389, 1394–94, 1399 (8th Cir. 1985) (upholding law that required distributors of certain sexually explicit material to distribute the material in "sealed wrappers" with an "opaque cover" notwithstanding the resulting "incidental" burden on adult access). But where, as here, the challenged law sweeps within its ambit materials that are constitutionally protected as to minors, the burden on adult access cannot be justified under the First Amendment. *Cf. id.* (concluding that certain dissemination restrictions were permissible because "[a]ny burden here [on adult access] is the result of the permissible regulation of material that is obscene as to minors"); *Am. Booksellers v. Webb*, 919 F.2d 1493, 1503 (11th Cir. 1990) (finding a requirement that certain material that is "harmful to minors" be placed on "blinder racks" was a permissible time, place and manner restriction where the definition of "harmful to minors" was consistent with *Ginsberg*'s formulation); *Athenaco, Ltd. v. Cox*, 335 F. Supp. 2d 773, 783 (E.D. Mich. 2004) (upholding display and dissemination restrictions concerning sexually explicit materials because "material[] must meet all three (3) aspects of the *Miller* test in order to be subject to the . . . restrictions").

f. The Act Regulates a Staggering Amount of Protected Speech and Conduct

For the reasons described above, H.B. 710 deviates dramatically from the *Miller* standard and regulates speech and conduct far beyond the limits established by the First Amendment. As set forth below, there is little doubt that H.B. 710's "unconstitutional applications substantially outweigh its constitutional ones." *NetChoice*, 144 S. Ct. at 2397. Indeed, H.B. 710's failure to adhere to *Miller* means that it has *no* "no plainly legitimate sweep" against which to measure its dramatic impact on the Private Entity Plaintiffs' protected speech and conduct. The Court should therefore enjoin its enforcement.

Miller establishes both the core of the government's authority to regulate obscenity and its outermost limit. That is because *Miller*'s test for obscenity is binary: if material satisfies all three elements, it may be regulated as obscene; if material does not satisfy all three elements, it may not be regulated as obscene. It follows that any effort to regulate obscene material that deviates from *Miller* is necessarily inadequate and unconstitutional for that purpose.[15] *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) ("[A] State is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected speech.").

Because H.B. 710 deviates substantially from *Miller*, it is incapable of distinguishing regulable obscene works from constitutionally protected non-obscene works. There is, in other words, "no core of easily identifiable and constitutionally proscribable conduct that [H.B. 710] prohibits." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965–66 (1984); *Flores v. Bennett*, No. 22-16762, 2023 WL 4946605, at *1 (9th Cir. Aug. 3, 2023) (unpublished decision) (affirming preliminary injunction against college policy regarding bulletin board postings). "The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally

[15] *See, e.g.*, *Reno v. ACLU*, 521 U.S. at 873 (striking down federal statute that failed to incorporate "critical[] limits" from the *Miller* test and that potentially encompassed "discussion[s] about birth control practices [and] homosexuality"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240, 247–48 (2002) (striking down statute that "ma[de] no attempt to conform to the *Miller* standard" and that appeared to apply to renaissance paintings, award-winning films . . ., and *Romeo and Juliet*); *Powell's Books*, 622 F.3d at 1207 (striking down law that "fail[ed] to satisfy the first two prongs of *Miller*/*Ginsberg*" and that appeared to "sweep up a host of material entitled to constitutional protection, ranging from standard sexual education materials to novels for children and young adults"); *Dworkin v. Hustler Mag. Inc.*, 867 F.2d 1188, 1199–200 (9th Cir. 1989) ("By asking us to apply a less restrictive standard than *Miller*, appellants and amici ask us to permit the suppression of speech that does possess 'serious literary, artistic, political, or scientific value.' . . . We refuse to do so.").

mistaken premise" about what constitutes obscenity and is therefore regulable under the First Amendment. *Joseph H. Munson Co.*, 467 U.S. at 966. Consequently, H.B. 710 has no "plainly legitimate sweep" against which to measure its application to constitutionally protected materials. *See Lerman v. Bd. of Elections in City of N.Y.*, 232 F.3d 135, 153 (2d Cir. 2000) (holding that challenged statute had "no plainly legitimate sweep at all" and was therefore overbroad).

Even if H.B. 710 had a legitimate sweep, it would be overwhelmed by the statute's application to constitutionally protected speech and conduct. *See United States v. Stevens*, 559 U.S. 460, 473, 481 (2010) (holding federal statute overbroad because whatever regulable content it encompassed was "dwarfed" by the constitutionally protected materials within its scope). Subject only to local mores and the subjective views of individual Idahoans, H.B. 710 reaches basic health and sex education curriculums that address topics like puberty, pregnancy, and sexually transmitted infections (Pettit Decl. ¶ 8; Cofod Decl. ¶¶ 11–12); books and other materials that address even non-sexual descriptions and depictions of homosexuality (Davidson Decl. ¶ 15; Cofod Decl. ¶ 8); renowned works of literature that address sexual assault like Toni Morrison's *The Bluest Eye* or Maya Angelou's *I Know Why the Cage Bird Sings* (A.W. Decl. ¶ 5); canonical works of art that include nudity like Michealangelo's *David* (Compl. ¶ 11); and even the Bible (*id.*). H.B. 710 sweeps within its scope, for example, "any uncovered buttocks or breasts, irrespective of context or pervasiveness" and would therefore apply to a work "containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous," *Erznoznik*, 422 U.S. at 213–14, if Defendants or a citizen believed they were contrary to local mores, and irrespective of their context or value to minors. The Act's failure to define a "full covering" in its definition of nudity "might prohibit . . . shots

of bathers on a beach." *Id*. The Act also appears to sweep within its ambit works that the Ninth Circuit has already held are *not* obscene, "like *Forever*, a coming-of-age novel written by Judy Blume," which "certainly contains serious artistic or literary value as to minors as a whole," and "*It's Perfectly Normal*[,] . . . a sexual education book containing simple line drawings that include non-obscene but unmistakable images of sexual intercourse and masturbation" that "does not lack serious scientific value even for children under the age of thirteen." *Powell's Books*, 622 F.3d at 1213–14. "These examples are hardly exotic," *id.*, and they demonstrate that H.B 710 encompasses a vast array of works that are not obscene as to minors.

g. The Act is Not Readily Susceptible to a Limiting Construction

Finally, H.B. 710 is not "readily susceptible to a limiting construction" that would save it from the constitutional infirmities described above. *Powell's Books*, 622 F.3d at 1208. "The open-ended character of [H.B. 710] provides no guidance what ever for limiting its coverage," *Reno v. ACLU*, 521 U.S. at 884, and, in fact, "[t]o satisfy the *Miller*/*Ginsberg* requirements, [the Court] would have to insert language" into the law, which Courts are "not permitted to do," *Powell's Books*, 622 F.3d at 1215. The Court may not "rewrite [H.B. 710] to conform it to constitutional requirements." *Id.*

iv. H.B. 710 Is a Content-Based Restriction on Speech that Fails to Satisfy Strict Scrutiny

Alternatively, H.B. 710 is a presumptively invalid content-based regulation that is not narrowly tailored to serve a compelling state interest.[16] *Boyer v. City of Simi Valley*, 978 F.3d

[16] There is some uncertainty about whether a law, like H.B. 710, that purports to regulate obscenity is best analyzed using the "overbreadth" doctrine, or as a content-based restriction that is presumptively invalid unless it satisfies strict scrutiny. *Compare Powell's Books*, 622 F.3d at 1208 (striking down statute that restricted adults from providing non-obscene materials to minors on overbreadth grounds without addressing means-end scrutiny), *with Video Software Dealers Ass'n*, 556 F.3d at 961 (striking down statute restricting sale of certain violent video games to minors as impermissible content-based restriction, notwithstanding state's assertion that

618, 621 (9th Cir. 2020); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content based. . . ."). Laws purporting to regulate obscenity are obviously content based; obscenity, fighting words, and other constitutionally regulable categories of speech are regulable precisely "*because of their constitutionally proscribable content*." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (emphasis in original); *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996) (explaining that law aimed at protecting minors from material obscene as to adults is content based because it "distinguish[es] favored speech from disfavored speech."). "To determine whether a particular publication is 'harmful' under" laws like H.B. 710, those charged with enforcing it "must necessarily examine the content of the message that is conveyed . . . and make a judgment only on that basis." *Id.*; *see also id.* at 385 ("The statute is based only on the State's determination that reading the materials at issue will be 'harmful' to minors.").

The State has the burden to offer a constitutionally sufficient governmental interest for H.B. 710's extraordinary scope, *see Video Software Dealers Ass'n*, 556 F.3d at 964, and it cannot meet that burden. As a matter of law, the government does not have a valid interest, much less a compelling interest, in prohibiting minors from receiving non-obscene materials. *See Erznoznik*, 422 U.S. at 213–14.[17] Moreover, the State's valid interest in restricting minors'

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restricted content was a form of regulable obscenity); *see also Seals v. McBee*, 898 F.3d 587, 596 (5th Cir. 2018) (differentiating overbreadth analysis from content-based analysis and suggesting that the former applies to categories of unprotected speech, like obscenity, and the latter applies to other content-based restrictions). The Plaintiffs respectfully submit that the outcome under either approach is the same: H.B. 710 is unconstitutional and should be enjoined.

[17] *See also Interactive Digital Software Ass'n v. St. Louis Cnty., Mo.*, 329 F.3d 954, 959–60 (8th Cir. 2003) ("Nowhere *in Ginsberg* (or any other case that we can find, for that matter) 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."); *Imperial Sovereign Ct. of Mont.*, 2023 WL 6794043, at *15 ("State Defendants presented no evidence before the Court to indicate that limiting children's exposure to speech

access to obscene material can *only* be addressed by the limited authority described in *Miller* and its progeny. *See supra* at 24 & n.14 (collecting cases holding that the state may only regulate material as obscene if it satisfies all three prongs of the *Miller* test). A statute that purports to regulate obscenity cannot, as a matter of law, be "narrowly tailored" if it deviates from *Miller*. Because the Act is an impermissible content-based restriction, the Court should preliminarily enjoin or temporarily restrain its enforcement.

B. The Plaintiffs' Fourteenth Amendment Due Process Claims

i. H.B. 710 Infringes the Parent Plaintiffs' Substantive Due Process Rights to Control the Upbringing and Education of their Minor Children

H.B. 710 infringes the Parent Plaintiffs' fundamental right to direct their children's upbringing and education free of undue interference from the State. "The Due Process Clause [of the Fourteenth Amendment] specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Parent Plaintiffs have a fundamental liberty interest in directing the education of their children, including (in the case of Mr. Podolsky and Ms. Zimmer) by choosing to educate their children at a private school over a public school controlled by the State, and (in the case of Ms. Leidecker) by permitting and encouraging them to receive constitutionally protected materials from a privately funded library. *See, e.g.*, *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399–401; *Parents for Priv. v. Barr*, 949 F.3d 1210, 1229 (9th Cir. 2020) ("[T]he state cannot prevent parents from choosing a specific educational program."); *Guilfoyle v. Beutner*, No. 221CV05009VAPMRWX, 2021 WL 4594780, at *13

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and expression critical of gender norms or by gender non-conforming people bears any relationship to promoting children's welfare.").

(C.D. Cal. Sept. 14, 2021) ("The right to educate one's child at a private school is protected under the Due Process Clause.").

H.B. 710 impermissibly imposes the State's content-based preferences on the Parent Plaintiffs' fundamental right. Because the Act "burdens the exercise of a fundamental right," it is invalid unless it satisfies strict scrutiny. *Health Freedom Def. Fund, Inc. v. City of Hailey, Idaho*, 590 F. Supp. 3d 1253, 1266 (D. Idaho 2022). But H.B. 710 cannot survive strict scrutiny in this context, either. The State has no valid interest in depriving minors of non-obscene materials, and any effort to regulate truly obscene conduct begins and ends with *Miller*. Because H.B. 710 is neither directed at a compelling government interest, nor narrowly tailored, the Parent Plaintiffs are likely to succeed on the merits of their substantive due process claim and the Court should issue the requested injunction.

ii. H.B. 710 Is Unconstitutionally Vague in Violation of the Fourteenth Amendment

H.B. 710 is also unconstitutionally vague in violation of the Fourteenth Amendment with respect to the Private Entity Plaintiffs. "For laws implicating First Amendment freedoms, the void-for-vagueness doctrine has special purchase." *Butcher v. Knudsen*, 38 F.4th 1163, 1169 (9th Cir. 2022). This is because "vagueness concerns are more acute when a law implicates First Amendment rights, and, therefore, vagueness scrutiny is more stringent." *Id.* (collecting cases). In the First Amendment context, a statute must provide a "greater degree of specificity and clarity than would be necessary under ordinary due process principles." *Cal. Tchrs. Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001). "Consistent with these principles, courts have not hesitated to reject on vagueness grounds laws regulating speech protected by the First Amendment." *Butcher*, 38 F.4th at 1169.

For the reasons described above in connection with Plaintiffs' overbreadth challenge, H.B. 710 "fails to provide a person of ordinary intelligence fair notice of what is prohibited," and it is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Butcher*, 38 F.4th at 1169; *see also Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) ("[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines."). The unbounded reach of the Act's core definitional provision fails to provide "clarity" or "specificity," defects that are exacerbated by the uncertain scope of "community standards" and the Act's citizen enforcement provision.

Further, the Act is replete with incoherent clauses and provisions that make it impossible for the Private Entity Plaintiffs to discern its meaning. For example, the Act instructs regulated entities, including the Private Entity Plaintiffs, to segregate challenged material into, variously, "a section designated for adults only" and "an area with adult access only," § 18-1517B(3)(b)–(c), treating those phrases as interchangeable though they have plainly different meanings (Compl. ¶¶ 145–49). The Act also appears to prohibit a wide range of speech and conduct that does not involve a minor being exposed to, much less taking possession of, a work that contains material the State deems "harmful to minors." (*Id.* ¶¶ 112–18). The Act's definition of "material" is incorporated into the Substantive Prohibition's catchall provision, but its meaning is elusive given that "reading, observation or sound" are not "medi[a]," and something "tangible" cannot be "derived through reading, observation or sound. §§ 18-1514(7), 18-1517B(2)(c). (Compl. ¶¶ 103–05). The Act defines the term "performance," § 18-1514(8), and refers to performance in the definition of "harmful to minors," § 18-1514(6), thereby suggesting that "performances" fall within its scope, but the Substantive Prohibition makes no mention whatsoever of "performances" among the long list of materials and conduct it regulates, § 18-

1517B(2)(a)–(c). (Compl. ¶¶ 106–11). H.B. 710 piles ambiguities atop ambiguities, resulting in an incoherent statute that invites discriminatory enforcement by Defendants and citizens alike.

For all of these reasons, the Act lacks the clarity and specificity required in the First Amendment context, and the Court should preliminarily enjoin or temporarily restrain its enforcement.

C. The Minor Plaintiffs' First Amendment Claims[18]

H.B. 710 infringes the Minor Plaintiffs' First Amendment right to receive constitutionally protected, non-obscene information from their educational institutions, free of undue interference from the State. It is "well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Where a "willing speaker . . . exists . . ., the protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). The Ninth Circuit has repeatedly recognized this "right to receive" information, explaining that the "right to receive information . . . extends to educational settings." *Pac. Coast Horseshoeing Sch.*, 961 F.3d at 1069 (finding a student of a private vocational school in California had a "right to receive" the educational program the school wanted to provide him); *Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148, 1150 (9th Cir. 2004) (striking down a policy that prohibited prison inmates from receiving mail downloaded from the internet because it violated prisoners' "First Amendment right to receive information"). H.B. 710, which "regulates what kind of educational programs different institutions can offer to different students . . . squarely

[18] Parent Plaintiff Christina Leidecker's First Amendment claim is discussed in connection with H.B. 710's unconstitutional overbreadth. *See supra* at 21–23.

implicates the First Amendment" rights of the students to whom those programs are offered. *Pac. Coast Horseshoeing Sch., Inc.,* 961 F.3d at 1069.

The Minor Plaintiffs wish only to receive the constitutionally protected materials that their respective private institutions wish to make available to them. Specifically, S.L. wishes to receive the materials that The Community Library has chosen to make available to minor patrons (S.L. Decl. ¶ 9), and A.W. wishes to receive the materials that her private school has chosen to make available to its students (A.W. Decl. ¶ 9). S.L. and A.W. are entitled to receive those constitutionally protected materials from their respective private institutions—both of whom are "willing speakers," *see Va. State Bd. of Pharmacy*, 425 U.S. at 756—regardless of the "social worth" that the State and some Idahoans place on the material, *see Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 745 (9th Cir. 2021).[19]

H.B. 710 imposes a content-based restriction on the Minor Plaintiffs' ability to receive information that their institutions wish to provide to them, and it is therefore presumptively invalid unless it satisfies strict scrutiny. *Boyer*, 978 F.3d at 621. But H.B. 710 can no more survive strict scrutiny with respect to the Minor Plaintiffs than it can with respect to the Private Entity Plaintiffs. *See supra* at 27–28. The State has no interest, much less a compelling one, in depriving minors of non-obscene materials, and any effort to regulate truly obscene conduct begins and ends with *Miller*. Because H.B. 710 is neither directed at a compelling government interest, nor narrowly tailored, the Minor Plaintiffs are likely to succeed on the merits of their claim and the Court should issue the requested injunction.

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[19] *Cf. Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 1002 (W.D. Ark. 2003) ("[T]he stigmatizing effect of having to have parental permission to check out a [non-obscene] book [moved into a restricted area] constitutes a restriction on access.").

D. The Threat of Enforcement Is Immediate and Substantial

The Private Entity Plaintiffs face a substantial risk of enforcement, and infringement of their First Amendment rights, under the Act. *See Tingley v. Ferguson*, 47 F.4th 1055, 1066–67 (9th Cir. 2022) ("The unique standing considerations in the First Amendment context tilt dramatically toward a finding of standing when a plaintiff brings a pre-enforcement challenge."). Foothills' 2024-25 school year begins on August 19, 2024 and SVCS's begins the following week, and their curricula have in the past and will in the coming school year contain constitutionally protected scientific, artistic, historical, and literary materials that fall within the scope of H.B. 710. (Cofod Decl. ¶¶ 3, 7; Pettit Decl. ¶¶ 3, 6). For the Library Plaintiffs, their constitutionally protected purpose is to "promote, give, and make available" a wide range of works to patrons of varying ages—adults and minors—with a wide range of interests and abilities. They, too, have in the past and will continue in the future to make available to minors materials that fall within the scope of H.B. 710. (Davidson Decl. ¶ 15; Hirst Decl. ¶¶ 8, 9). The Private Entity Plaintiffs have plainly established "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [H.B. 710]." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014).

Plaintiffs have also established a "credible threat of prosecution" under H.B. 710. *Id.* Public officials have made patently false but inflammatory allegations about schools and libraries across the State (Compl. ¶¶ 152–54), groups in the State have publicly alleged that schools and libraries, including The Community Library, are providing minors with obscene materials (*id.* ¶¶ 155–63), and at least one group has engaged law enforcement in an effort to censor constitutionally protected books that they find offensive (*id.* ¶ 154). Against this backdrop, Defendants have failed to publicly disavow enforcement of H.B. 710, *see Tingley*, 47 F.4th at

1068; *see also Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021), and, in any event, the "authority to file a complaint" under H.B. 710 "is not limited to a prosecutor or an agency . . . who are constrained by explicit guidelines or ethical obligations," *Driehaus*, 573 U.S. at 164. The Private Entity Plaintiffs face a "genuine" and "realistic" threat of enforcement, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007), not one that is merely "imaginary or speculative," *Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 298 (1979).

Further, the Private Entity Plaintiffs are not merely asserting "moral outrage," *Smelt v. Cnty. of Orange*, 447 F.3d 673, 685 (9th Cir. 2006), or describing a theoretical risk attendant to some future action "which may never occur," *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1140 (9th Cir. 2000). Their core missions involve the dissemination of information to minors, including information that falls within the scope of H.B. 710. "The plaintiffs are engaged in affirmative, ongoing conduct . . . which requires them to make decisions regarding compliance with the Act *right now*," and they therefore have standing to challenge it. *Tennessee Educ. Ass'n v. Reynolds*, No. 3:23-CV-00751, 2024 WL 1942430, at *13 (M.D. Tenn. May 2, 2024); *Woodfin Suite Hotels, LLC v. City of Emeryville*, No. C 06-1254 SBA, 2006 WL 2739309, at *4 (N.D. Cal. Aug. 23, 2006).

III. Absent an Injunction or TRO Plaintiffs Will Suffer Irreparable Injury

Plaintiffs will suffer irreparable harm if the Court does not grant their request for a preliminary injunction or temporary restraining order. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam). "Irreparable harm is relatively easy to establish in a First Amendment case because the party seeking the injunction need only demonstrate the existence of a colorable First Amendment claim." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 694 (9th Cir. 2023).

Plaintiffs have demonstrated more than a colorable First Amendment claim for the reasons discussed above, and this factor weighs decidedly in favor of granting a preliminary injunction.

IV. The Balance of Equities and the Public Interest Favor Granting a Preliminary Injunction

When the government opposes the issuance of a preliminary injunction the final two preliminary injunction factors—the balance of the equities and the public interest—merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors weigh heavily in Plaintiffs' favor.

When a plaintiff "raise[s] serious First Amendment questions, that alone compels a finding that the balance of hardships tips sharply in [their] favor." *Fellowship of Christian Athletes*, 82 F.4th at 695. "Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012). Further, neither Defendants nor the public will suffer any harm if an injunction is granted, thereby preserving the status quo during the pendency of the case. Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 482 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1749 (2023).

CONCLUSION

For the above reasons, Plaintiffs respectfully ask this Court to preliminarily enjoin or temporarily restrain the enforcement of the Act.

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