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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE KURT VONNEGUT ESTATE,
CAGED BIRD LEGACY, LLC, *et al.*,

Plaintiffs,

v.

ATTORNEY GENERAL DEREK BROWN,
in his official capacity as Attorney General
for the State of Utah, *et al.*,

Defendants.

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS**

Case No. 2:26-cv-10-RJS-CMR

Judge Robert J. Shelby

Magistrate Judge Cecilia M. Romero

INTRODUCTION

This case challenges a content-based, non-discretionary state law (the “**Book Removal Law**”) requiring Utah’s Local Education Agencies (“**LEAs**”) to remove a range of literature from every public school library in the State. As alleged, the Book Removal law does that by fiat absent any consideration of literary merit, educational value, or individual student need. *See* First Am. Compl., Dkt. 98. Under well-established precedent, that law violates the First Amendment.

Defendants’ (Amended) Motion to Dismiss (“**Motion**”) (Dkt. 109) does not attack these core allegations. Rather, the Motion argues, the Author Plaintiffs lack standing per an absence of constitutional injury-in-fact. But that injury arises from abridgement of their First Amendment interest in reaching and communicating with their intended audience (i.e., young readers). *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989); *Bantam Books v. Sullivan*, 372 U.S. 58, 64 & n.6 (1963). As alleged, the Book Removal Law forecloses an existing and constitutionally protected setting (i.e., public school libraries) where the Author Plaintiffs previously and lawfully reached those readers. *Penguin Random House v. Gibson*, 796 F. Supp. 3d 1052, 1069-71 (M.D. Fla. 2025).

Banning *and* removing their works from that setting constitutes an injury-in-fact to them. The Author Plaintiffs also allege that the Book Removal Law injures them by imposing financial hardship and stigma on their professional reputations and published works by branding them as “pornography” or unsuitable for children. Collectively, these allegations satisfy the low standard applied when considering injury-in-fact at the pleading stage.

Defendants also raise a government speech and government subsidy defense to the Author Plaintiffs' claims. But most courts have found that banning and removing books from public school libraries are not forms of government speech. *See, e.g., id.* (collecting cases and citing *Shurtleff v. City of Boston*, 596 U.S. 243, 252-53 (2022) applying three-factor test). And the Author Plaintiffs' claims do not give rise to a government subsidy request because, among other things, their books were *already* on public school library shelves. In fact, the government's action here works exactly to the contrary: It subsidizes *repression* of certain existing speech.

Defendants last argue that Plaintiffs may not name as Defendants individuals acting in their official capacity and that the Kurt Vonnegut Estate lacks capacity to sue. But a Rule 12 motion promoting the former argument is premature when distinct relief is pled as to those individuals, as it is here. *See Byron v. Univ. of Utah*, No. 20-00290, 2021 WL 4427481, at *2 (D. Utah 2021). And the latter argument fails to contend with Federal Rule of Civil Procedure 17(b)(3) and Utah law, permitting noncorporate entities like the Vonnegut Estate to vindicate constitutional claims under 42 U.S.C. § 1983. Should the Court find some procedural deficiency in the Estate's pleading on that subject, the appropriate remedy is to allow Plaintiffs to substitute the real party in interest.

BACKGROUND

The Book Removal Law's Two Categorical Prohibitions

First, Plaintiffs challenge the Book Removal Law's "objective sensitive material" mandate that prohibits in all school settings (including libraries) any book that contains a single description or depiction of sex under the non-discretionary standards described

in subsections 76-5c-207(1)(a)(i)(A), (B), or (C) of Utah’s criminal code.¹ First Am. Compl. ¶ 7; UTAH CODE ANN. § 53G-10-103(1)(e). Plaintiffs refer to this non-discretionary prohibition as the “**Per Se Ban**.” The Per Se Ban automatically prohibits this entire category of books for all Utah Students, kindergarten through twelfth grade alike, without allowing LEAs or librarians any discretion to consider the value of any individual book as a whole, in violation of longstanding First Amendment jurisprudence. First Am. Compl. ¶ 9; see also *Miller v. California*, 413 U.S. 15, 24 (1973); *Gibson*, 769 F. Supp. at 1075-76 (M.D. Fla. 2025) (using the *Miller*-for-minors test by modifying the standard *Miller* prongs to account for minors). The Per Se Ban also fails to include any consideration of local or community standards.

Second, Plaintiffs challenge the Book Removal Law’s statewide ban requiring every LEA to automatically prohibit and remove from their libraries any book deemed “objective sensitive material” by at least three LEAs or two LEAs and five charter schools (the “**Statewide Ban**”). First Am. Compl. ¶ 10; UTAH CODE ANN. § 53G-10-103(7)(b).

Legislative History

The Legislature first enacted the Book Removal Law in 2022 via House Bill 374 (“**HB 374**”). Codified at Section 53G-10-103 of the Utah Code, HB 374 prohibited “sensitive materials” in the school setting, including public school libraries, and declared by legislative fiat that any material deemed “sensitive” is automatically pornographic material. First Am. Compl. ¶ 106; UTAH CODE ANN. § 53G-10-103(g)(i) (2022). HB 374 created a non-discretionary, categorical bright-line rule that prohibited every public

¹ For clarity, Plaintiffs cite to the current sections and numbering of the Utah Code, as amended by the 2025 legislative session, except as expressly noted.

school library in Utah from carrying any book that contains a single description of sexual content and declared, as a matter of law, that such books have no value for minors.

Following the enactment of HB 374, the Utah Attorney General's Office ("**AGO**") issued two guidance memoranda revealing the fundamental conflict between the Book Removal Law and the requirements of the First Amendment. First Am. Compl. ¶ 120. The first guidance memorandum ("**AGO Guidance Memo #1**") stated that the *Miller*-for-minors test must be applied when deciding whether to remove a book to avoid violating the First Amendment. *See* First Am. Compl. ¶ 102; *see also* First Am. Compl. Ex. C1 at 1, 2. Under apparent political pressure, the AGO then issued a second guidance memorandum ("**AGO Guidance Memo #2**") less than one month later. First Am. Compl. ¶ 127; *see* First Am. Compl. Ex. C2. Despite partly reversing course, AGO Guidance Memo #2 still warned LEAs that failing to consider a book as a whole before removal conflicts with federal law and that First Amendment jurisprudence does not favor bright-line rules in obscenity cases. First Am. Compl. ¶¶ 126-129; First Am. Compl. Ex. C2 at 3.

Under HB 374, Utah LEAs, at least in theory, had the ability to consider the value of a book as a whole before removal. First Am. Compl. ¶ 119. That is no longer the case. *Id.* The Legislature responded to the AGO's concerns, not by remedying the First Amendment deficiencies, but by codifying the bright-line, non-discretionary nature of the Per Se Ban's content-based, categorical prohibition and by creating the sweeping Statewide Ban through the passage of House Bill 29 ("**HB 29**") in 2024. First Am. Compl. ¶ 130-132. HB 29 clarified the Legislature's intent and made clear that LEAs have no

discretion in determining whether to remove a book from their libraries' shelves if it runs afoul of the Per Se Ban or is part of the Statewide Ban. First Am. Compl. ¶ 132.

Each Author Plaintiff has had one or more of their published works banned and removed from one or more Utah public school libraries and branded as pornographic pursuant to the Per Se Ban. First Am. Compl. ¶¶ 146-50, 153-54, 161-63, 172-177. The Author Plaintiffs' published works were removed under the Per Se Ban absent any consideration of their value as a whole or for their literary, scientific, artistic, medical, or political value, and without consideration of the age and individual needs of specific readers. First Am. Compl. ¶¶ 150, 157, 160, 167, 181.

Moreover, pursuant to the Statewide Ban, six published works by the Author Plaintiffs were removed from every public school library in Utah, again absent any consideration of their value as a whole, and without consideration of the age and individual needs of specific readers.² None of the books authored by the Author Plaintiffs, including those removed from Utah public school libraries pursuant to the Per Se and Statewide Bans, constitute pornography. First Am. Compl. ¶ 140.

Impact of the Book Removal Law

To date, hundreds, if not thousands, of books have been removed from school libraries across the State pursuant to the Per Se Ban and twenty-eight titles have been removed from every public school library in Utah pursuant to the Statewide Ban. The pace

² *Id.* ¶ 139 (alleging five books authored by Author Plaintiffs were banned statewide at time of filing Amended Complaint); see also Kelly Jensen, *Utah Bans 28th Book for All Pub. Sch. Students*, BOOK RIOT (Mar. 16, 2026), [https://bookriot.com/utah-bans-28th-book/#:~:text=Before%20you%20go%2C%20sign%20up,Breathless%20by%20Jennifer%20Niven%20\(2020\)](https://bookriot.com/utah-bans-28th-book/#:~:text=Before%20you%20go%2C%20sign%20up,Breathless%20by%20Jennifer%20Niven%20(2020)) (showing sixth book authored by Author Plaintiffs being added to Statewide Ban List on March 2, 2026).

of removals is not slowing. In fact, there have been six books removed statewide since Plaintiffs filed their original complaint. These include Kurt Vonnegut's anti-war masterpiece, *Slaughterhouse-Five*; Nobel Prize winner Toni Morrison's *The Bluest Eye*; Khaled Hosseini's New York Times Best Seller, *The Kite Runner*; Elana K. Arnold's National Book Award finalist in young people's literature, *What Girls Are Made Of*; and Maya Angelou's *I Know Why the Caged Bird Sings*, a work nominated for a National Book Award and authored by a Presidential Medal of Freedom recipient.

LEGAL STANDARD

Article III of the Constitution limits the judicial power of the United States to the resolution of "cases" or "controversies." *Valdez v. Nat'l Sec. Agency*, 228 F. Supp. 3d 1271, 1278 (D. Utah 2017). As the parties invoking the court's jurisdiction, Plaintiffs have the burden of establishing their standing. *Id.* To establish standing under Article III's case or controversy requirement, Plaintiffs must "make three showings: first, that they have suffered an injury in fact which is concrete and particularized, and actual or imminent; second, that there is a causal connection between the injury and the challenged conduct; and third, that the injury is likely to be redressed by a favorable decision." *Id.* (citing *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1176 (10th Cir. 2009)).

At the motion to dismiss stage, plaintiffs must establish standing and the court's jurisdiction under the pleading standards found in Rule 8(a)(1) of the Federal Rules of Civil Procedure. *Id.* Rule 8(a)(1) requires only that a complaint contain "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. Pro. 8(a)(1); *see also Valdez*, 228 F. Supp. 3d at 1278. The Tenth Circuit instructs that "at the outset of a case

it is enough to allege the facts . . . establishing standing” and that “[g]eneral allegations suffice at the pleading stage.” *Id.* (citing *Predator Int’l. Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1184 (10th Cir. 2015)). If the allegations supporting standing are challenged, “then the facts have to be litigated.” *Id.*

Rule 12(b)(1) motions to dismiss may take two forms, facial and factual. *U.S. v. Rodriguez–Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001) (citing *Holt v. U.S.*, 46 F.3d 1000, 1002 (10th Cir. 1995)). To survive a 12(b)(1) facial challenge, a plaintiffs’ complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Valdez*, 228 F. Supp. 3d at 1278. To benefit from the general assumption of truth, the allegations must be well-pleaded and amount to more than legal conclusions or bare assertions that are a formulaic recitation of the elements of a claim. *Id.*

When assessing standing, courts in this circuit assume the Plaintiffs’ claim has legal validity. *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc) (“Where the plaintiff presents a nonfrivolous legal challenge, alleging an injury to a protected right such as free speech, the federal courts may not dismiss for lack of standing on the theory that the underlying interest is not legally protected.”). For First Amendment claims, the “injury requirement is most loosely applied” because of “the fear that free speech will be chilled even before the law, regulation, or policy is enforced.” *Hallandale Pro. Fire Fighters Loc. 2238 v. City of Hallandale*, 922 F.2d 756, 760 (11th Cir. 1991). When First Amendment protections are implicated, courts apply most loosely the injury-in-fact requirement lest free speech be chilled. *Gibson*, F. Supp. 3d at 1075-76.

Moreover, because they seek non-monetary relief, Plaintiffs need only demonstrate that one party has standing to pursue their claims. See *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 & n.2 (2006).

ARGUMENT

The Court should deny Defendants' Motion. The Author Plaintiffs have pled sufficient facts giving rise to standing to challenge the Book Removal Law on constitutional grounds. These Plaintiffs' claims do not request a government subsidy and the government speech doctrine does not apply. The Kurt Vonnegut Estate is a proper plaintiff (if not, Plaintiffs should be permitted to substitute the real party in interest) and dismissal of the individual school board defendants is premature.

I. The Author Plaintiffs Have Standing to Challenge the Book Removal Law

Defendants frame this case as a government spending dispute. It is not. Rather, this case concerns the exercise of fundamental First Amendment rights.

As alleged, the Per Se and Statewide Bans purged the Author Plaintiffs' constitutionally protected books and hundreds like them from library shelves across Utah under sweeping, categorical legislative mandates. As a result, the government branded the Author Plaintiffs' works as pornography absent any actual consideration of their value as a whole or the age or individual needs of the reader. This is exactly the type of suppression of speech that the First Amendment forbids—and that Utah's own AGO warned against in two separate memoranda.

A. The Author Plaintiffs Suffered Cognizable Injury-In-Fact

Contrary to Defendants’ contentions, the Author Plaintiffs have First Amendment rights attendant to their works subsisting in public school libraries.

Unquestionably, publishers and authors have the constitutionally protected right to promulgate their literary works and therefore have standing to challenge a restriction like the Book Removal Law impacting those rights. *Thornburgh*, 490 U.S. at 401 (holding that publishers could challenge prison regulations limiting access to written materials); *Bantam Books*, 372 U.S. at 71 (rejecting as unconstitutional content-based restriction on publishers’ right to distribute books). See also *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (publishers and authors treated as “interchangeable” in making First Amendment challenges to laws imposing content-based restrictions).

Likewise, students have the constitutionally protected right to access and read those works via their public school libraries and therefore have standing to challenge a restriction impacting those rights. *Gibson*, F. Supp. 3d at 1075-76 (finding that student plaintiffs had standing for First Amendment challenge to statute requiring removal of school library books); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 583 (6th Cir. 1976) (same). Importantly, students’ right to challenge the Book Removal Law—which the State does not challenge—follows “ineluctably” from the publisher’s or author’s right in the first instance. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality).

The Author Plaintiffs therefore possess a constitutionally protected right to speak to students via public school libraries free from unreasonable content-based government censorship of their literary works. In this, a state’s power to protect children from harm “does not include a free-floating power to restrict the ideas to which children may be exposed.” *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 794 (2011) (rejecting ban on selling violent video games to minors).

The Author Plaintiffs’ well-pled allegations establish: (1) that each Author Plaintiff had one or more of their published works removed from one or more Utah public school libraries and branded as pornographic pursuant to the Per Se Ban, First Am. Compl. ¶¶ 146-50, 153-54, 161-63, 172-177; and (2) that six of the Author Plaintiffs’ books were removed from every public-school library in Utah pursuant to the Statewide Ban. *Id.* The removal of their works, pursuant to the Per Se and Statewide Bans, deprived the Author Plaintiffs of the ability to communicate with their intended student readers and brands their books as pornography, giving rise to financial hardship and professional and reputational harm to their literary legacies. First Am. Compl. ¶ 55, 142, 212. These concrete and particularized harms arise from operation of the Book Removal Law on the Author Plaintiffs’ constitutional rights and constitute injury-in-fact for each such Plaintiff.

B. The Author Plaintiffs’ Injuries are Traceable to Defendants and Redressable by This Court

The Author Plaintiffs’ books were removed from school libraries because of the Book Removal Law’s Per Se and Statewide Bans, as enforced by Defendants. For example, Defendant Davis explained removal of *I Know Why the Caged Bird Sings* in a single line:

“Therefore, according to [the Book Removal Law], the book has no serious value for minors, and it has been removed from school library circulation.” First Am. Compl. ¶ 126-129, 147.

A judgment declaring the Per Se and Statewide Bans unconstitutional and enjoining the Book Removal Law’s enforcement in the manner described in the operative pleading would redress the Author Plaintiffs’ injuries by permitting their books to be restored to public school libraries in the State of Utah and in reach of their intended audience in Utah schools. *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1157 (10th Cir. 2005) (redressability satisfied where favorable judgment would remove challenged legal prohibition).

II. Defendants’ Government Benefit Argument Misconstrues the Nature of Plaintiffs’ Suit

None of the Plaintiffs’ claims involve compelling the State of Utah to purchase the Author Plaintiffs’ books. They were already there *before* the Book Removal Law took effect.

And while Defendants may be correct that the Constitution does not require the government to assist in funding the expression of particular ideas, *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 356 (2009), for example, by “storing” (or, more accurately, “restoring”) the Author Plaintiffs’ works, they ignore the concomitant principle that “the Government may not deny a benefit to a person on a basis that infringes his constitutionally protected [] freedom of speech even if he has no entitlement to that benefit.” *Agency for Int’l Dev. v. Open Soc’y Int’l*, 570 U.S. 205, 214 (2013). “Differential subsidization of First Amendment speakers raises constitutional concerns when it

threatens to suppress the expression of particular ideas or viewpoints, or if it targets a small group of speakers.” *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

The majority of cases Defendants rely on involved limiting government funds or resources to their authorized purpose. In *Rust v. Sullivan*, 500 U.S. 173, 173 (1991), the challenged federal statute provided funding to private parties for family planning methods and services. In *U.S. v. Am. Libr. Ass’n*, 539 U.S. 194, 194 (2003), federal funding for public libraries was the challenged action. And in *Regan v. Tax’n With Representation of Washington*, 461 U.S. 540, 540 (1983), suit was brought by a nonprofit organization seeking tax benefits after denial by the I.R.S.

The only case Defendants rely on that does *not* involve government payments is *Ysursa*, 555 U.S. at 356. But that case is distinguishable. In *Ysursa*, Idaho passed a law preventing public unions from making payroll deductions for political purposes and unions sued because employers could previously deduct union dues and fees for public union political purposes. *Id.* Critical to the Supreme Court’s holding was that the public unions were not prevented from making political speech and local governments were not obligated to “aid . . . their political activities.” *Id.* at 359. The Court emphasized that state law at issue was not aimed at the suppression of dangerous ideas but was instead justified by the state’s interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics. *Id.* Here, the speech at issue is being restricted based only on its content, which, as the *Ysursa* Court acknowledged, implicates First Amendment protections. *Id.* at 358.

When the government restricts speech on its property, courts typically assess those restrictions based on the nature of the forum and the type of speech restricted. *See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). Within nonpublic forums, content-based restrictions must be (1) reasonable in light of the purpose of the forum and (2) viewpoint-neutral. *Id.* at 806; *see also Minn. Voters All. v. Mansky*, 585 U.S. 1, 12, 16 (2018) (holding that state “must articulate some sensible basis for distinguishing what [speech is allowed] from what [speech is not allowed]”). Accordingly, the State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Currently, there is a living landscape of court decisions across the country concerning the appropriate legal standards to apply in school library book removal cases. As Plaintiffs urge this Court to do, courts have analyzed book removals using the same principles used in nonpublic forum analyses or otherwise apply the *Miller*-for-minors test. *See, e.g., Nw. Ass’n of Indep. Schs. v. Labrador*, 166 F.4th 1148, 1165–66 (9th Cir. 2026) (applying the *Miller*-for-minors test in an overbreadth challenge); *Gibson*, 796 F. Supp. 3d at 1074 (discussed in more detail below). The Eighth Circuit recently held public school libraries constitute “school-sponsored” speech and book removals are analyzed under a legitimate pedagogical concern standard. *Penguin Random House, LLC v. Robbins*, No. 25-1819, 2026 WL 924132, at *3 (8th Cir. Apr. 6, 2026). But at least one Tenth Circuit district court has rejected applying the school-sponsored speech standard to book removals. *Crookshanks as next friend of C.C. v. Elizabeth Sch. Dist.*, No. 24-

03512, 2025 WL 1000774, at *3–4 (D. Colo. Apr. 3, 2025) (determining that school library book removals were neither government nor school-sponsored speech). At any rate, Defendants here have not argued that the Book Removal Law is school-sponsored speech.

III. The Government Speech Doctrine Does Not Shield the Book Removal Law from First Amendment Scrutiny

The government speech test considers three factors: (1) “the history of the expression at issue;” (2) “the public’s likely perception as to who (the government or a private person) is speaking;” and (3) “the extent to which the government has actively shaped or controlled the expression.” *Shurtleff*, 596 U.S. at 252-53 (collecting and discussing prior decisions in *Matal v. Tam*, 582 U.S. 218, 238 (2017); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209-14 (2015); and *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 472 (2009)).

Courts “must exercise great caution” before deeming the speech at issue as government speech, *Matal*, 582 U.S. at 234, a critical admonishment as government speech does “not normally trigger the First Amendment rules designed to protect the marketplace of ideas.” *Walker*, 576 U.S. at 207. Defendants have not met their burden to show that the Book Removal Law is government speech for the simple reason that they fail to address the government speech test *at all*.

Defendants rely on *Summum* without acknowledging that in reaching its holding the Supreme Court considered “such content-based factors as esthetics, history, and local culture factors” and whether the government meant to “convey and have the effect of conveying a government message.” 555 U.S. at 472. In short, “removal of [public school] library books without consideration of their overall value,” just as alleged here, “cannot

be expressive activity amounting to government speech.” *Gibson*, 796 F. Supp. 3d at 1069-71.

In *Summum*, the Supreme Court held that a city’s refusal to place a privately donated statue in a public park did not violate the Free Speech Clause of the First Amendment. 555 U.S. at 464. But while park statues may convey a comprehensible government message, a school library collection, like the hundreds of flag displays in *Shurtleff*, contains “a dizzying and contradictory array of perspectives that cannot be understood to express the message of a single speaker.” 596 U.S. at 272–73. (Alito, J., concurring).

Defendants’ reliance on *Arkansas Educ. Television Com’n v. Forbes* to support their government speech argument is similarly misplaced. Plaintiffs agree that nonpublic forum principles should apply in this case. First Am. Compl. ¶¶ 198-201. In *Forbes*, the issue was whether a state-owned television station must allow all political candidates on a televised debate. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 669 (1998). The Court held the First Amendment is not violated when the government excludes a speaker from a nonpublic forum when using a “reasonable, viewpoint-neutral exercise of journalistic discretion.” *Id.* at 682-83. The Court was careful in its forum analysis to consider the purpose of the government property and the type of speech at issue. *Id.* at 673-76.

Here, the Book Removal Law is not a reasonable, viewpoint-neutral exercise of discretion that considers the purpose of public school libraries. School libraries are the “principal locus” where students can “explore the unknown and discover areas of interest

and thought not covered by the prescribed curriculum” and are “free to inquire, to study and to evaluate, to gain new maturity and understanding.” *Pico*, 457 U.S. at 868-69 (plurality opinion) (citation modified). The Book Removal Law undermines this purpose by removing books allowing students to independently explore new ideas and to gain new understanding outside of coursework.

Defendants also assert the plurality opinion in *American Library Association* supports their government speech arguments. That case dealt with federal assistance programs that required public libraries to block obscenity and pornography with internet filters to secure federal funding for internet access. *U.S. v. Am. Libr. Ass’n*, 539 U.S. at 199. The Court considered the traditional role of public libraries to provide material “for education and informational purposes” which “traditionally excluded” pornography. *Id.* at 211-12. The Court determined Congress, for program funding purposes, could require internet filters since it helped libraries fulfil their traditional role and reflected their traditional practices. *Id.* Here, however, the Book Removal Law does not concern funding and it interferes with public school library’s ability to perform its traditional role in providing books with literary value that are age-appropriate for students.

Other district courts have rejected arguments that book removal in public school libraries is government speech. *See, e.g., Crookshanks*, 775 F. Supp. 3d at 1175 (“Courts generally hold that the placement and removal of books in public school libraries is not government speech.”) (emphasis in original); *PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, 711 F.Supp.3d 1325, 1331 (N.D. Fla. 2024) (failing to see “how any reasonable person

would view the contents of a school library . . . as the government’s endorsement of the views expressed in the books on the library’s shelves.”).

In *Penguin Random House LLC v. Gibson*, a case with very similar facts as here, the court considered arguments where “[d]efendants frame this case broadly as the government curating the selection of books in the library and argue that is government speech.” 796 F.Supp.3d at 1068. The court rejected this argument, distinguishing the Fifth Circuit’s plurality opinion in *Little v. Llano Cnty.*, 138 F.4th 834 (5th Cir. 2025), which considered librarians’ discretion to remove books rather than a nondiscretionary ban. *Id.* at 1069. The court reasoned that the laws in question did not involve government discretion in curating library collections as in *Little*; rather, “the statute here mandates the removal of books that contain even a single reference to the prohibited subject matter, regardless of the holistic value of the book individually or as part of a larger collection.” *Id.* The court concluded that “[a] blanket content-based prohibition on materials, rather than one based on individualized curation, hardly expresses any intentional government message at all. Slapping the label of government speech on book removals only serves to stifle the disfavored viewpoints.” *Id.* at 1071.

As in *Gibson*, Defendants argue that they are merely curating school library collections while actually removing all books with a single reference to sensitive materials regardless of the literary value and age-appropriateness of the book as a whole. The admonishment in *Matal* is apt here: While “the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse.” 582 U.S. at 235. Courts have consistently rebuffed attempts to misuse the government

speech doctrine as a cloak to conceal First Amendment violations. This Court should do the same.

IV. The Kurt Vonnegut Estate Should Not Be Dismissed

Section 1983 suits that vindicate a deceased individual's constitutional rights are properly brought by the decedent's estate. See *Berry v. City of Muskogee, Okl.*, 900 F.2d 1489, 1506–07 (10th Cir. 1990). The Kurt Vonnegut Estate (“**the Estate**”) is a proper plaintiff to bring this lawsuit. If this Court finds a deficiency in the Estate as the real party in interest, the proper remedy is allowing reasonable time to add the appropriate party rather than dismissal. Fed. R. Civ. P. 17(a)(3) (“The court may not dismiss for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action.”).

State law may control whether an entity can sue in federal court (Fed. R. Civ. P. 17(b)(3)), but in Section 1983 suits, “[a]pplication of state law, at least in some instances, will be inconsistent with the predominance of the federal interest.” *George v. Beaver Cnty. by & through Beaver Cnty. Bd. of Comm’rs*, No.16-1076, 2017 WL 782287, at *2 (D. Utah Feb. 28, 2017) (citing *Berry*, 900 F.2d at 1506). “[T]he estate of a deceased victim is the only real party in interest in a § 1983 action.” *Id.* In *George*, the plaintiffs brought claims on behalf of themselves, the decedent's minor children, and as successors in interest. *Id.* On the defendant's motion to dismiss, the court determined the decedent was the real party in interest rather than the plaintiffs themselves and permitted the plaintiffs to amend their complaint to add the decedent's estate. *Id.*

Here, the Estate and the individual members that comprise the estate—Nanette Vonnegut, Lily Vonnegut, Mark Vonnegut, and Edith Vonnegut-Squibb—are named in the Amended Complaint. First Am. Compl. ¶ 32. If the court finds that to establish standing more information about the Estate member’s authority is needed or that a personal representative is required, Plaintiffs respectfully request a reasonable amount of time to amend their First Amended complaint to do so. Fed. R. Civ. P. 17(a)(3).

V. *The Individual Defendants Named in Their Official Capacity Should Not be Dismissed*

Dismissal of all individual members or officers of Defendant school boards sued in their official capacity should be denied because Defendants fail to apply the facts of this case to the cited law. Additionally, there are defenses that could preclude relief from Defendant entities but not individuals named in their official capacity.

It is correct that Tenth Circuit courts regularly dismiss claims against employees in their official capacity when their employer is also a named defendant. *Bushy v. Med. Ctr. of Rockies*, No. 13-01467, 2014 WL 4627277, at *1 (D. Colo. Sept. 16, 2014) (collecting cases). This is done for judicial economy where there are identical claims and relief. *Id.* Here, Defendants fail to articulate that the specific claims and relief are identical for the individual official capacity school board members and their respective school boards. Moreover, this reasoning does not apply to all official capacity suits.

It is appropriate to keep individuals named in their official capacity as defendants when defenses or available relief differ from the entity. In *Byron v. Univ. of Utah*, the court denied dismissing state officials sued in their official capacity because prospective injunctive relief was available against them but barred against the university under the

Eleventh Amendment. *Byron*, 2021 WL 4427481, at *2. “Only a state or ‘arms’ of a state may assert the Eleventh Amendment as a defense to suit in federal court.” *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1232 (10th Cir. 1999). The Eleventh Amendment generally provides states immunity from lawsuits by their own citizens, but it does not protect state officers sued in their official capacity when seeking prospective relief. *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 760 (10th Cir. 2010). This exception exists if the state official has a duty to enforce an unconstitutional statute and a willingness to do so. *Id.*

In Utah, “State School Boards are arms of the state for purposes of the Eleventh Amendment.” *V.W. v. DaVinci Acad. of Sci. & the Arts*, No. 9-127, 2010 WL 3258326, at *3 (D. Utah Aug. 17, 2010). Thus, Utah State Board of Education (“USBE”) members named in their official capacity should not be dismissed because, like the defendants in *Byron*, prospective injunctive relief is available against them if otherwise barred against USBE.

Sutton noted the Tenth Circuit has held local school districts are not “arms of the state” under the relevant test when considering “(1) the characterization of the governmental unit under state law; (2) the guidance and control exercised by the state over the governmental unit; (3) the degree of state funding received; and (4) the governmental unit’s ability to issue bonds and levy taxes on its own behalf.” 173 F.3d at 1232. Courts have generally determined that the second factor cuts against local school districts as arms of the state. This is because the state lacks direct control of a district in various areas and a district is “independent, free of control by either municipal or county

governments, and has authority over all school property.” *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 996 (10th Cir. 1993).

The Book Removal Law, however, exercises complete state control in local school districts over book removal decisions and how the books (school property) are disposed of. First Am. Comp. ¶¶ 5-10, 74. This weighs in favor of finding that the local districts are arms of the state. Additionally, a local school district and its board members may be considered agents of the state in enforcing the Book Removal Law rather than enforcing the district’s own policy and customs. See *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 786-87, 793 (1997) (holding Alabama sheriffs enforcing state law receive Eleventh Amendment immunity because they are not acting as a county policymakers.); *Wood v. Fla. Dept. of Educ.*, 729 F. Supp. 3d 1255, 1269 (N.D. Fla. 2024), *vacated, remanded on other grounds*, 142 F.4th 1286 (11th Cir. 2025) (granting preliminary injunction against county-level school board members who enforced nondiscretionary state law by complying with it).

In either case, the burden is on the Defendants to establish whether any of the school boards are arms or agents of the state for Eleventh Amendment purposes. *Hennessey v. Univ. of Kansas Hosp. Auth.*, 53 F.4th 516, 532 (10th Cir. 2022). Defendants have not argued that the specific claims, defenses, and relief in this case are one and the same for the entity school boards and the individual board members sued in their official capacity. It is also uncertain whether they will assert if any school board is considered an arm or agent of the state to raise an Eleventh Amendment immunity defense. As such, it is at least premature to dismiss any of the individual defendants in their official capacity.

For the USBE board members named in their official capacity, they should not be dismissed because prospective relief is available against them if otherwise barred against USBE itself by the Eleventh Amendment.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court deny the Defendants' Motion to Dismiss.

DATED this 9th day of April, 2026.

/s/ Thomas J. Ford

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2026, a true and correct copy of the foregoing was served on all Defendants via this Court's CM/ECF system.

/s/ Thomas J. Ford
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