September 12, 2023

Honorable Richard Durbin, Chairman
Senate Judiciary Committee
United States Senate
Washington, DC. 20510

Dear Mr. Chairman,

The EveryLibrary Institute NFP is a national public policy organization focused on libraries. Our network includes the librarians, staff, and boards of public libraries and the certified school library media specialists and aids who staff school libraries across the country. We are respectfully submitting written comments to the Senate Judiciary Committee today to inform its discussions during the hearing of September 12, 2023, on “Book Bans: Examining How Censorship Limits Liberty and Literature.”

We appreciate the attention that the Committee is paying to the topic of book bans and censorship. We agree with the theme of the hearing that the current climate of censorship restrains liberty and also negatively impacts the culture of reading and learning in the United States. We would like to offer our perspective on five key issues affecting public libraries and school libraries that are informed by our work supporting public policy issues around the country.

Conflicts Between the Right to Petition and Free Speech in Libraries

The First Amendment guarantees several fundamental rights, one of which is “the right of the people...to petition the Government for a redress of grievances.” While the freedom of speech and the press often overshadow it, the right to petition holds significant implications for democratic engagement, enabling citizens to voice their concerns and seek remedies from the government. This right to petition is being stress-tested during the ongoing debate over book bans and material reviews in public libraries and schools.

Many petitioners use their right to petition to challenge content that they find offensive. When the petitioner approaches a challenge with sincere belief or concern while also participating in the process, the right to petition is properly applied. However, in many schools and public libraries across several states, the legitimacy of the petition should be questioned. In June 2023, Hannah Natson at the Washington Post analyzed over 1,100 book ban petitions and found that “Nearly half of filings — 43 percent — targeted titles with LGBTQ characters or themes, while 36 percent targeted titles featuring characters of color or dealing with issues of race and racism.”
The top reason people challenged books was “sexual” content; 61 percent of challenges referenced this concern.

Ms. Natson goes on to report that the “majority of the 1,000-plus book challenges analyzed by The Post were filed by just 11 people… Each of these people brought 10 or more challenges against books in their school district; one man filed 92 challenges. Together, these serial filers constituted 6 percent of all book challengers — but were responsible for 60 percent of all filings.” She coined the term “serial filer” to describe these petitioners.

The concept of what is appropriate or inappropriate is hotly debated at board meetings, on social media, and in the public square. One of the three tests within the Miller Test requires that a book violates contemporary community standards to be considered obscene. When only eleven people across the country are driving most book ban petitions, no reasonable person should consider their viewpoint to be pervasive within the American community, however defined. And yet, these eleven petitioners utilized their First Amendment rights to define a narrow concept of “appropriateness” for schools and libraries across the country.

When petitioners challenge a book or request its removal, they are formally expressing their grievances or concerns about its content, and they are asking the library or school to take specific actions in response. This process is essentially a way of seeking a remedy or redress from a government-affiliated body. However, it's worth noting that while individuals have the right to express their concerns and challenge materials, the library or school also has a responsibility to uphold principles of intellectual freedom, ensuring broad access to diverse ideas and materials. As such, petitions do not always result in the removal of the material. The decision involves a careful review process and considerations of First Amendment rights, professional guidelines, and the institution’s commitment to intellectual diversity.

While this is within any American’s right to petition, it is important to balance this right to petition with other First Amendment principles. Public libraries are institutions that aim to provide diverse materials to promote intellectual freedom and the free exchange of ideas. School libraries are uniquely positioned to not only support the curriculum but also empower students’ independent reading and discovery. Book bans run the risk of limiting access to a range of perspectives and voices. It is important to exercise the right to petition judiciously to ensure that the broader goals of the First Amendment are upheld, and a well-informed and free society is fostered.

Again, as the Washington Post reported, only eleven serial petitioners are responsible for 60 percent of the book ban requests. This could be seen as a form of the “heckler’s veto” on free expression and the right to read. Essentially, it is a situation where the schools or public libraries limit or restrict speech to avoid potential disturbances and disruptions rather than because the speech itself is unlawful. When a single individual files dozens or even hundreds of book ban requests, the sheer volume of these requests is meant to overwhelm the system, leading to de facto suppression of certain materials simply due to bureaucratic inefficiencies. One could argue that it is an agenda-driven way to suppress speech.
Threats to Pico

In the last Congress, Representative Jamie Raskin chaired two hearings of the House Subcommittee on Civil Rights and Civil Liberties on free speech issues. In his opening remarks during the “Free Speech Under Attack: Book Bans and Academic Censorship” hearing, he observed that:

“In Pico, Justice Brennan found that the Constitution protects not just the right to speak but “the right to receive information and ideas.” The First Amendment plays the central role in “affording the public access to discussion, debate, and the dissemination of information and ideas.” Freedom of inquiry, the Court ruled, extends to school libraries, and the selective removal of books from libraries because someone considers the content offensive “directly and sharply” implicates students’ freedom of speech and thought. In school libraries, “the regime of voluntary inquiry holds sway.” The answer to books whose content or viewpoint you oppose—check out this powerful logic—is to not read them or to write a negative review or even, shades of Voltaire, to write your own book in answer.”

As a Constitutional scholar and author, Representative Raskin knows he is correct in his assertion that Pico provides a positive, affirmative framework for the application of the First Amendment in school libraries. The Pico ruling affirmed that students’ First Amendment rights do not end at the schoolhouse door, emphasizing that school officials cannot remove books from school libraries simply because they disagree with their content. This landmark decision underscored the principle that school environments should foster critical thinking and diverse viewpoints, rather than enable censorship based on personal or political beliefs.

Unfortunately, we are beginning to see an erosion of the role that Pico plays in supporting student self-determination in their reading and learning. In Wentzville, a recent case in Missouri, plaintiffs sought to enjoin the Wentzville R-IV School District from following a policy that allows parents, guardians, or students to initiate challenges to library materials. The judge for the Eastern District of Missouri ruled against the plaintiffs, in part because of his belief that Pico no longer applies in the modern era.

“The plurality in Pico eschewed the idea of schools denying students "access to ideas." Today, though, denying students access to a particular book at a school library does not deny them access to the book or its ideas. The forty years since the Court decided Pico have allowed for easier and greater access to ideas more so than perhaps any other forty-year period since the invention of the printing press.” (C.K.-W v. Wentzville R-IV Sch. Dist., No. 4:22-cv-00191-MTS, 2022 U.S. Dist. LEXIS 139554, 29 E.D. Mo. Aug. 5, 2022).

We disagree with the judge’s interpretation. There is no substantive difference between the negative impact of removing books based on viewpoint today then it was forty years ago. Also, the judge’s characterization that restrictions within schools are not harmful today because
students live in a world where information is easily accessible and exchanged on the internet is a straw man. Internet access in schools is required by federal e-rate regulations to be filtered. Likewise, in Missouri, Secretary of State and State Librarian Jay Ashcroft recently promulgated rules for public libraries that limit access, among other provisions, to “age-inappropriate materials in any form” (15_CSR_30_200_015) without providing an actionable definition of what constitutes appropriate or inappropriate.

If state and federal courts continue to look at Pico with a suspicious eye, Congress should act to reinforce the core principles of Pico. In this Congress, Sen. Jack Reed introduced S. 1307, the Right to Read Act of 2023, which would, among other provisions, amend 20 U.S.C. 7901 at SEC. 8549D by adding a section on “Protecting Constitutional Rights in School Libraries”. This new section would “[P]rotect the First Amendment rights of students in school libraries and will affirmatively further the right to receive information”. The EveryLibrary Institute supports the aims and objectives of the Right to Read Act and hopes that Congress will consider this legislation this session.

Threats to the Miller Test

The Miller Test, stemming from the Supreme Court's decision in Miller v. California (1973), provides the standard for determining what constitutes obscenity, which the First Amendment does not protect. This three-part benchmark assesses whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The Miller Test is foundational in guiding lower courts on matters of obscenity in various forms of media.

The Miller Test also influences how local public library boards and school boards conduct materials reviews after a challenge, but its application in these contexts can be nuanced. While the Miller Test primarily addresses issues of obscenity in broader legal contexts, library and school board decisions often revolve around more general considerations of appropriateness, educational value, and community standards. When library or school materials are challenged, often due to perceived inappropriate content, boards will generally evaluate the content based on its educational merit, the accuracy of the information, its relevance to the curriculum (in the case of school materials), and its potential to enrich readers’ experiences. However, if an item is specifically challenged for its sexual content, the principles of the Miller Test might be referenced, especially the third prong about lacking serious literary, artistic, political, or scientific value.

Recent efforts by state legislatures have the potential to undermine the core principles of the Miller Test. State criminal codes broadly address obscenity, focusing on commercial actions and personal behavior, whereas "Harmful to Minors" statutes typically concern the conduct, accessibility, and distribution of materials to young individuals or students. Various bills have
been introduced and passed to refine state descriptions of obscenity or materials viewed as
detrimental to young people. These legislative measures often aim to limit access to certain
materials in public and school libraries deemed obscene or harmful to minors, with the
definitions of such materials varying, sometimes including explicit content, nudity, or depictions
that cater to sexual interests. Some propose age verification for accessing particular content,
aiming to shield minors. This gives certain authorities, like attorneys general, the power to
monitor and implement these rules, and in some cases, funding may be denied to institutions
not compliant with these protective measures.

In Kentucky, SB5 (2023) introduces a section about Harmful to Minors in the educational code.
It adopts elements from the criminal code but gives school principals the authority to decide on
the appropriateness of materials. Schools must adopt a compliant complaint process, with
appeals directed to the local school board, and decisions disclosed online and in local papers.
South Carolina's S0506 (2023) proposed changes to the Miller Test, removing certain
exemptions and adding "profane language" to potential harm indicators.

In Idaho, the legislature in H0314 (2023) removed the Miller Test-compliant condition of
“prevailing standards in the adult community, with respect to what is suitable for minors” from its
state obscenity laws. The Governor subsequently vetoed the bill. Likewise, in Iowa, the state
legislature proposed SF305/HF361 (2023), to amend the state education code to include
definitions of “hard-core pornography” and prohibit the distribution thereof by “(1) An
administrator shall not knowingly provide hard-core pornography to a student in a library
operated by the school, in a school classroom, or in any other area on school property.” This is
despite a lack of evidence that any school anywhere in the state is providing obscene, harmful,
or pornographic content under any definition.

North Dakota's HB1205 (2023) mandates public libraries exclude sexually explicit children's
books. It modifies the Miller Test's community standards component, necessitating materials be
reviewed based on North Dakota's adult community's standards regarding suitable content for
minors. The law also necessitates the library to regularly ensure the absence of explicit sexual
content. Early consideration of SB2360 (2023) proposed removing the term “contemporary”
from “contemporary North Dakota standards” for the state's Miller Test alignment language. The
final law, which was passed over the Governor’s veto, instead introduced a new nuance to
determine if an item is "Explicit sexual material": “Is patently offensive under prevailing
standards in the adult community in North Dakota as a whole with respect to what is suitable
material for minors.”

By embedding criminal definitions into educational code, states are encouraging arbitrary book
challenges, possibly leading to subjective, bias-driven decisions. Legislative efforts that attempt
to redefine obscenity contradicting the Miller Test's principles clash with constitutionally
protected speech rights. Ambiguous terms like "patently offensive" can cause biased
implementation due to their open-ended nature. Such ambiguities, coupled with potential First
Amendment infringements, underline the constitutional dilemmas these proposed laws might
face. These bills are examples of state efforts to use the current censorship crisis to water down the Miller Test, thus making it easier for local administrators to remove or relocate materials based on viewpoint. This Committee should be vigilant to states attempting to alter the aims, purposes, and goals of the Miller Test through state legislation.

Attempts to Criminalize Libraries and Educational Institutions

Several states made significant attempts to criminalize librarianship and education under state obscenity laws during the 2023 session. These bills seek to remove existing exemptions that protect librarians and educators from criminal prosecution under state obscenity laws. This movement is happening alongside the debate over what content in books and other materials is considered obscene or harmful. The definition of "appropriateness" is often subjective and varies from person to person, which makes it difficult to establish clear guidelines.

In 2023, several states passed or attempted to pass criminalization bills targeting educators and librarians. In Arkansas, SB81 (2023) passed. It removed the historic defense from prosecution exemption from public libraries and museums. That provision was recently enjoined by the Western District of Arkansas. In Indiana, HB1447 (2023) removes the defense from prosecution guarantee from educational settings. That bill goes into force on January 1, 2024. These and similar bills all share provisions that seek to eliminate historic defenses from prosecution under state obscenity laws. This can lead to spurious prosecutions of teachers and librarians over materials that make certain individuals uncomfortable.

Some special interest groups and conservative commentators are calling for more expansive definitions of criminal offenses and new prosecutorial powers. However, changing obscenity statutes to subject educators and librarians to prosecution would be a significant disruption to the stability and continuity of our institutions. There is no pressing need to remove these institutional or professional exemptions, and states should be cautious before making such a significant change to the criminal code.

It is important to defend the integrity of schools and public libraries and prevent librarians and educators from being brought up on politically motivated charges. Criminalization bills undermine the principles of a harassment-free workplace and attack the dignity of work in schools and libraries. Professionals should be able to perform their duties without the threat of spurious prosecution. It would be more appropriate to handle issues related to education policy through regulatory processes rather than through the criminal code.

Conflating the First Amendment and the Publishing Sector

An operative principle of the First Amendment is that of viewpoint neutrality. As noted by the Free Speech Center at Middle Tennessee University, "Viewpoint discrimination is a form of content discrimination particularly disfavored by the courts. When the government engages in content discrimination, it is restricting speech on a given subject matter. When it engages in viewpoint discrimination, it is singling out a particular opinion or perspective on that subject
matter for treatment unlike that given to other viewpoints.” While public libraries are required by the First Amendment to remain viewpoint-neutral, the publishing industry that supplies books, databases, audiobooks, and other materials is not, as private actors, bound by the First Amendment to publish in a viewpoint-neutral way.

Penguin Random House, the largest publishing house in the United States, clearly understands the location of censorship within the publishing industry. An April 2018 memo from its legal counsel titled “Protecting Our Authors’ Right to Freedom of Speech and Expression” lays out the difference between government interference and marketplace pressures on its choices to publish.

“Under the American legal system and the constitutional protections of the First Amendment, the predominant system of censorship is financial. Because our Constitution outlaws so-called “prior restraints” (judicial suppression of written material), plaintiffs can threaten only monetary damages. Unfortunately, the cost of litigation is so high that defending a lawsuit can cost hundreds of thousands of dollars, regardless of whether one wins or loses. For many authors and publishers, legal threat is too great a financial risk to withstand. Our lawyers and editors are mindful of these risks and the costs that can arise when legal challenges are asserted. We work closely with our authors to avoid or minimize legal risks while maintaining a firm and steadfast commitment to pursuing the fundamental truth and integrity of the books we publish.

Unlike in the marketplace, the role of public libraries is to make collection development decisions based on the relevance of a title to readers (in a viewpoint-neutral way). Unfortunately, many Americans do not understand that the First Amendment only applies to the role of government limiting or imposing speech or viewpoints and not to the publishing sector. According to a 2023 survey from the National Constitution Center, “Most Americans do not know that the First Amendment applies only to the government limiting rights. Just under one-quarter (24%) know that private workplace policies are not bound by the First Amendment.” In trade publishing, the decision to publish or not is located within the editorial department and marketing department. In public libraries, the economic viability of a title is not relevant to its collection development policies.

Confusing consumer behavior with public library collection development policy is pernicious. Individual readers have the absolute right to not purchase titles or authors with whom they disagree. However, when individual readers believe that a library collection should reflect their own views and not offend their own comfort, they misunderstand the role of the public library as a limited public forum. The line between public and private can sometimes be blurred, especially in institutions that receive both federal funding and private donations. Public libraries, as government entities, must uphold First Amendment free speech rights even in the face of pressure from readers with a particular viewpoint.
Conclusion

The Supreme Court's decision in Pico affirmed the crucial role that schools play in nurturing free minds. This decision implicitly supports the idea that our schools should be free from censorship. The Miller Test continues to provide a framework for evaluating speech and obscenity, emphasizing the importance of contextual and community-based evaluations. This standard recognizes the value of diverse perspectives and the critical role that libraries and schools play in presenting a wide array of materials.

As a society, we must continue to support the principles of free thought, expression, and the exchange of ideas. Nowhere is this more important than in our public libraries and schools. These institutions are part of the basic civil infrastructure of knowledge, critical thinking, and democratic engagement. It is imperative that Congress continue to support public policy that opposes the arbitrary removal of books from public libraries and school libraries.

Beyond legal precedents and tests lies the culture of reading. Encouraging a robust culture of reading is more than an educational goal; it is a commitment to preserving the democratic ideals that our nation holds dear. As this Committee considers issues related to the First Amendment, we must remember the pivotal role of our public libraries and schools. Their integrity, independence, and commitment to fostering a culture of reading are integral to the health of our democracy. Protecting their ability to serve as centers of free thought and exploration ensures that future generations will continue to engage in the kind of informed and critical thinking that our nation needs.

Respectfully submitted,

John Chrastka,
Executive Director
EveryLibrary Institute NFP
john.chrastka@everylibrary.org