

TO: Central Arkansas Library System Board of Directors
FROM: John T. Adams
DATE: May 23, 2023
RE: Act 372 of 2023 - Constitutionality and Application to CALS

This memorandum summarizes the key provisions of Act 372 of 2023 affecting the Central Arkansas Library System (“CALS”) and the reasons why I recommend that CALS seek a determination from a federal court that those provisions violate the First Amendment to the U.S. Constitution. It also lists other parties who will join with CALS in this litigation.

Furnishing Materials Harmful to Minors

The first section of Act 372 establishes a Class A misdemeanor criminal offense (which may result in up to one year of imprisonment and a fine of up to \$2,500) for making available to a minor an item “harmful to minors” (the “Availability Provision”). It provides that:

[a] person commits furnishing a harmful item to a minor if, knowing the character of the item involved, the person knowingly. . .presents, provides, makes available. . .[or] advertises, to a minor an item that is harmful to minors.

The term “item” encompasses every form of expressive material that one could expect to find in a public library or bookstore, including books, magazines, and motion pictures.

Act 372 incorporates the definition of “harmful to minors” from an earlier Arkansas statute. The definition covers substantially more material than the constitutional category of obscenity applicable to adults.¹ The 2003 version of that statute made it a Class B misdemeanor to:

*(1)(A) Display material that is harmful to minors in such a way that the material is exposed to the view of a minor as part of the invited general public. ****

*(2)(A) Sell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor with or without consideration any material that is harmful to minors****

¹ The definition is: “[T]hat quality of any description, exhibition, presentation, or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when the material or performance, taken as a whole, has the following characteristics: (1) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors; (2) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement, or sadomasochistic abuse in a manner that it patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and (3) The material or performance lacks serious literary, scientific, medical, artistic, or political value for minors.” Ark. Code Ann. § 5-68-501(2).

The Arkansas Supreme Court interpreted the term “minor” in this context to refer to all minors, not just younger minors. *Shipley, Inc. v. Long*, 359 Ark. 208, 216, 195 S.W.3d 911, 915 (2004) (“Because the statute defines a minor as ‘any person under the age of eighteen,’ the statute is obviously intended to protect *all* minors from exposure to material deemed ‘harmful to minors.’”). In 2004, the United States District Court Judge G. Thomas Eisele ruled that the “display” prohibition in the 2003 statute was “facially unconstitutional under the First and Fourteenth Amendments to the United States Constitution because such provisions are overbroad and impose unconstitutional prior restraints on the availability and display of constitutionally protected, non-obscene materials to both adults and older minors.” *Shipley, Inc. v. Long*, 454 F. Supp. 2d 819, 831 (E.D. Ark. 2004).

In Act 372 of 2023, Arkansas enacted a content-based restriction very similar to, and broader than, the one found unconstitutional in *Shipley*. The Availability Provision would subject CALS staff to criminal liability for “mak[ing] available,” “providing[ing]” or “show[ing]” the same category of material the State cannot, consistent with the First Amendment, criminalize “display[ing].” On its face, the prohibition sweeps exceedingly broadly. For example, a book found harmful to a seven-year-old would be illegal to loan to a 17-year-old, and illegal for CALS even to “make available” by keeping on the shelves in areas accessible to patrons under the age of 18.²

The Availability Provision seeks to further the state’s interest in protecting minors, but it regulates First Amendment-protected materials in an overbroad and vague way. Because it is not narrowly drawn to further the legislative purpose, the provision violates the First Amendment by imposing an unconstitutional prior restraint on the availability of constitutionally-protected, non-obscene material to both adults and older minors.

Materials Challenge Procedure

The fifth section of Act 372 provides that Arkansas public libraries must establish a policy governing the selection, relocation, and retention of physical materials that are available to the public. This policy must provide a method whereby a library employee or a “person affected by the material to be challenged” can challenge the “appropriateness” of material in the library and seek to have the material moved from the main collection to an area inaccessible to minors (the “Challenge Procedure”). The process begins with an informal meeting between the challenger and the library staff. If the challenger is unsatisfied by the outcome of the meeting, he or she may file a formal written challenge seeking an internal review by a committee of library employees.

The Challenge Procedure does not define “appropriateness” or set forth specific criteria beyond “appropriateness” for libraries to use in deciding whether to relocate challenged materials. The committee of library employees is directed to view materials in their entirety, and not to relocate materials based solely on the viewpoints contained therein. The process includes an opportunity for the challenger to present his or her case in person. No opportunity is provided for objectors to the challenge to present a countervailing case. The committee of library personnel then votes to determine whether the material should be relocated to an adults-only section of the library.³ The challenger receives a written summary of the reasons for the committee’s decision in a “reasonable” but unspecified amount of time.

² CALS Board Policy 400 allows minors eleven years of age and older to be at the library without a caregiver if their behavior complies with the library’s Rules of Conduct.

³ CALS facilities do not have adults-only sections.

If the committee decides not to relocate the material, the challenger can appeal the decision to the city board or quorum court of the city or county primarily supporting the public library. For CALS, this would be the Little Rock Board of Directors. That local governing body considers five pieces of information before rendering its decision: (1) the material being challenged; (2) the challenger's request that the material be relocated; (3) the committee's decision; (4) a written summary of the reasons for the committee's decision; (5) a recommendation from the executive head of the county or city if the executive chooses to include one. Again, no opportunity is provided for proponents of the material to present a countervailing case. Act 372 requires a decision of the city board or quorum court within 30 days and describes that decision as "final."

Under Act 372, libraries may choose to leave materials available pending a challenge or remove the materials while the process plays out. As a practical matter, CALS may be forced to purchase additional copies of challenged materials for use by its review committees and Little Rock Board of Directors, or the materials may not be available for a substantial period of time.

The Challenge Procedure violates the First Amendment in that it: (i) imposes an unconstitutional prior restraint on the availability of constitutionally-protected, non-obscene material to both adults and older minors; (ii) is a de facto licensing scheme that denies aggrieved library patrons an adequate opportunity to obtain prompt judicial review of local governing bodies' orders to relocate library materials to an area that is not accessible to minors; and (iii) is unconstitutionally vague in that it vests undue discretion in local governing bodies to make these decisions without criteria or a record of their reasoning.

Co-Plaintiffs

Several organizations are working with CALS to challenge Act 372, including the Fayetteville Public Library, Arkansas Library Association, Advocates for All Arkansas Libraries, American Booksellers Association, Association of American Publishers, Inc., Author's Guild, Inc., Comic Book Legal Defense Fund, and Freedom to Read Foundation, Inc. Wordsworth Books in Little Rock and Pearl's Books in Fayetteville have agreed to be plaintiffs. The individual co-plaintiffs will include Nate Coulter; Adam Webb, a librarian from Garland County; Olivia Farrell, an adult CALS patron; and Hayden Kirby, a 17-year-old CALS patron, along with Hayden's mother, Jennie Kirby.