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**MEMORANDUM**

**TO:** Utah State Board of Education

**FROM:** Utah Attorney General Sean D. Reyes; Utah Solicitor General Melissa A. Holyoak; Education Division Director Meb W. Anderson

**DATE:** June 1, 2022

**RE:** Official Memorandum—Laws Surrounding School Libraries

**Introduction**

This memorandum provides analysis regarding HB 374, *Sensitive Materials in Schools*, and its prohibition of obscenity in school libraries. This memorandum supersedes any prior memorandum or other information previously provided by the Office of the Utah Attorney General (AGO) on the question of removing pornographic books from school libraries, including a May 4, 2022 memorandum from AGO Education Division Counsel (May 4 Memo), titled “Laws surrounding school libraries.” Any conflict or inconsistency between this document and any prior pronouncement from the AGO should be resolved in favor of the analysis herein. Any relevant part of the May 4 Memo not inconsistent with this document is incorporated by reference.

This memorandum has been personally written, reviewed, and approved by the Utah Attorney General and senior executive leadership of the AGO and constitutes the official position of the AGO (Official Memo). Our office was asked by the Utah State Board of Education (Board) and local education agencies (LEAs) to address issues limited to removal of inappropriate books in school libraries. Thus, the Official Memo does not address broader issues of appropriate classroom materials or other school curricula and focuses solely on school library books.<sup>1</sup> The focus and emphasis on these materials should not, therefore, be interpreted as the sum of AGO analysis on all issues relating to HB 374. The AGO is available to provide analysis

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<sup>1</sup> The May 4 Memo similarly does not address these broader issues because the AGO was only asked about the limited question of books in school libraries.

to the Board and LEAs on these broader issues if we are asked to do so as contemplated by state statute.

### **Background**

With access and addiction to pornography increasing among Utah children, the average age of first exposure and addiction to pornography among young people reaching pre-pubescent levels, and an increasing online threat of porn to the health, development, and welfare of youth, the Utah State Legislature has taken very positive and proactive measures to address the threat of pornography to schoolchildren. Parenthetically, through the multiple programs of the AGO, including its Internet Crimes Against Children Taskforce (ICAC), Children's Justice Centers (CJCs), Secure Strikeforce, and online training resources, the AGO is at the front line every day of protecting vulnerable Utah children from exposure to and exploitation from pornography. In cases we investigate and prosecute, we witness the devastation to child victims and survivors of pornography exploitation and exposure.

Among other measures to combat pornography's detrimental impact on children, the Utah Legislature recently passed HB 374 which addresses "sensitive materials" that the Legislature intends to prohibit in the school setting and designates exceptions for certain instructional materials. The State of Utah has recognized that pornography in Utah is a public health crisis and that the school settings are places where "pornographic or indecent materials" will not be allowed. Because HB 374 applies to both textbooks used to deliver curriculum and material used to support a student's learning in the school setting, it applies to library books in public schools.

### **Executive Summary**

Library books in Utah public schools are prohibited if they are pornographic or indecent as defined under one of three state statutes. The Board must create model policies consistent with such statutes, including HB 374, for LEAs. In turn, LEAs must follow such policies to comply with state statutes. As is the case with most laws that implicate the First Amendment of the United States Constitution, HB 374 will likely be subject to legal challenge. If the law is challenged, the AGO will vigorously defend the law.

As further detailed below, there are actions the Board and LEAs may take in complying with HB 374 to mitigate the risk of legal challenge. The first is to immediately remove books from school libraries that are categorically defined as pornography under state statute. This will help protect the LEAs from potential lawsuits brought by parents or groups alleging the school failed to comply with state laws.

The second mitigation action comes into play as LEAs remove pornographic materials from libraries. In such instances, any legal challenge to that removal will be analyzed under both

Utah statute (including HB 374) and federal law.<sup>2</sup> However, under federal law, there are some conflicts as to the appropriate standard and there is no definitive United States Supreme Court precedent governing removal of library books. Because under federal law, categorical exclusions alone may not be sufficient, the LEAs can further mitigate risk regarding their removal decision by engaging in analysis as to any overall value the materials may have that might forestall removal. Undertaking such an analysis in good faith significantly increases the likelihood of overcoming a legal challenge to the removal of the book.

Nothing in the legal analysis contained in the May 4 Memo or Official Memo should be read to undermine the legislative goals or the laws which aim to initiate and bring about the proactive removal of obscenity from school libraries. The AGO views the Board's responsibility as creating model policies for LEAs to strictly comply with HB 374.

While the AGO cannot determine on a book-by-book basis which materials should be removed, the office supports schools and the Board as they execute their duties in evaluating what materials can be removed under state and federal law. The AGO has, therefore, provided analysis on the standards found in statute and in case law, but declines to designate which books are likely to survive legal challenge if removed from public school library shelves.

### Analysis

This Official Memo is provided to clarify certain points of law discussed in the May 4 Memo and to assure appropriate context on certain matters.

#### **1. The purpose of the May 4 Memo and this Official Memo is to provide analysis of HB 374 with respect to library books only.**

Generally, the May 4 Memo was written in response to the requirement in HB 374 that the Board, in consultation with the AGO, "provide guidance and training to support public schools in identifying instructional materials that meet the definition of sensitive materials under" Section 53G-10-103. More specifically, the May 4 Memo was for LEAs relating only to library books. (The first sentence of the Memo states that it "outlines the law as it pertains to school library books in Utah.") In fact, LEAs throughout Utah had requested information relating specifically to the handling of school library books pursuant to HB 374. Like the May 4 Memo, this Official Memo does not address course material. This Official Memo does not contain the AGO's discussions and analysis to the Board on other issues relating to HB 374. It is limited to the questions posed relating to the removal of certain books from library shelves due to reports of pervasively vulgar material, identified as sensitive materials under HB 374. The AGO will

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<sup>2</sup> The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." It applies to the States by virtue of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The Supremacy Clause of the U.S. Constitution directs state courts that they "must not give effect to state laws that conflict with federal law[ ]." *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324 (2015). Accordingly, federal court decisions inform the analysis here.

continue to consult with the Board relating to both school library books and other school course materials.

## 2. Utah Law prohibits “sensitive material” in the school setting.

HB 374 (Section 53G-10-103) references three applicable definitions of “pornographic or indecent material.” HB 374 creates a new legislative approach to identify “sensitive materials” in a school setting under Utah statute. Under HB 374, pornographic or indecent material means any material defined as harmful to minors in Section 76-10-1201, described as pornographic in Section 76-10-1203, or described in Section 76-10-1227. Under HB 374, if a school library book meets the definition of *any* of these three standards then the book should be removed from a school library.<sup>3</sup> We reiterate our view that these definitions and standards are legally defensible. The relevant definitions are:

- a. **Utah Code Ann. § 76-10-1201:** “Harmful to minors” means that quality of any description or representation, in whatsoever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it:
  - (i) taken as a whole, appeals to the prurient interest in sex of minors;
  - (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
  - (iii) taken as a whole, does not have serious value for minors.

As described in the May 4 Memo, if a school library book in Utah were identified and removed from a library shelf as vulgar or obscene based on this standard, it is **likely to pass constitutional review** in a subsequent legal challenge.

- b. **Utah Code Ann. § 76-10-1203:** Any material or performance is pornographic if:
  - (a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex;
  - (b) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and
  - (c) Taken as a whole it does not have serious literary, artistic, political or scientific value.

As described in the May 4 Memo, if a school library book in Utah were identified and removed from a library shelf as vulgar or obscene based on this standard, it is **likely to pass constitutional review** in a subsequent legal challenge.

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<sup>3</sup> HB 374, as codified at Section 53G-10-103, defines “sensitive material” as an instructional material that is pornographic or indecent material as that term is defined in Section 76-10-1235, *Accessing pornographic or indecent material on school property*. When citing to the language of Section 1235 in the May 4 Memo, there was a citation error (i.e., it stated 1217 instead of 1227). To be clear, Section 76-10-1235 states that in a school setting or on school property in Utah, “Pornographic or indecent material” means any material: “(i) defined as harmful to minors in Section 76-10-1201; (ii) described as pornographic in Section 76-10-1203; or (iii) described in Section 76-10-1227.”

- c. **Utah Code Ann. § 76-10-1227:** “Description or depiction of illicit sex or sexual immorality” means:
- (i) human genitals in a state of sexual stimulation or arousal;
  - (ii) acts of human masturbation, sexual intercourse, or sodomy;
  - (iii) fondling or other erotic touching of human genitals or pubic region; or
  - (iv) fondling or other erotic touching of the human buttock or female breast.

Section 1227(2)(a) states that subject to Section 1227(2)(c), “this section and Section 76-10-1228 do not apply to any material which, when taken as a whole, has serious value for minors.” Section 1227(2)(c) states conclusively that subsections (i), (ii) and (iii) of 1227(1)(a) “ha[ve] no serious value for minors.”

Section 1227(2)(c) can be read as a legislative directive that no description of illicit sex in subsections (i-iii) could have serious literary, artistic, political, or scientific value. Under that interpretation, if a book contains any of the material listed in subsections (i), (ii), or (iii), HB 374 requires the book to be removed from a school library. Such an interpretation creates categorical exclusions or a “bright line” rule. A decisionmaker that removes library books based on these defined categories directly complies with state statute. Other materials under category (iv), as per the plain language of the statute, can be assessed under a “taken as a whole analysis” to further comply with state statute.

Direct compliance with HB 374 and removal of books under state statutes 76-10-1201, 1203, and 1227 will likely insulate LEAs from lawsuits for violations of state statute.

### **3. Federal Law may require more than application of a bright line rule.**

Even when removal of library books meets strict compliance with HB 374 and related state statutes, a legal challenge will invite application of federal First Amendment jurisprudence, a body of cases which have not favored bright line rules in obscenity cases. *See, e.g., Home Box Off., Inc. v. Wilkinson*, 531 F. Supp. 987, 996 (D. Utah 1982) (“It is elementary that merely calling something obscene doesn’t make it so.”).<sup>4</sup>

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<sup>4</sup> The U.S. Supreme Court has long held that “the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). Simply put, while HB 374 provides very specific categories of materials to be removed, in federal jurisprudence, there is no bright line rule regarding the removal of books from library shelves in public schools under the U.S. Constitution.

A federal court might plausibly read Section 1227(2)(c) not as a bright line rule, but as a rebuttable presumption. That is, descriptions or depictions of things set forth in 1227(1)(a)(i), (ii), and (iii) presumably have no serious value for minors, *unless* the school proactively determines that such materials have serious literary, artistic, political, or scientific value. This is akin to the “taken as a whole” analysis that removal under subsection (iv) requires under Section 1227(2)(a) and (b). Failure to consider library materials “as a whole” may present risk of conflict with federal law. *State v. Watts*, 498 P.3d 365, 374-75 (Utah 2021) (citing *Miller v. California*, 413 U.S. 15, 18 (1973)).<sup>5</sup>

For example, removing a school library book because it contains a sole description or depiction of an act of “sexual intercourse” or “fondling” (or other forbidden depiction specified under Section 1227) may be subject to increased risk of legal challenge if the book would not otherwise be removed under Sections 1201 or 1203, or 1227 (iv), when taken as a whole.

A cardinal rule of statutory interpretation is that when a statute is susceptible to two plausible interpretations, it should be interpreted to avoid the constitutional conflict. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 381-82 (2005); *see also Hernandez v. Carrreera-Carlson*, 547 F.3d 1237, 1251 (10th Cir. 2008) (“[E]ven after a court has construed a statute to avoid constitutional doubts, an agency remains free to interpret the same statute in a different manner so long as its subsequent interpretation is reasonable and avoids serious constitutional questions”).

Accordingly, to further protect the bright line removal decisions made under state statute from any legal challenge, LEAs analyzing material under subsections (i), (ii), and (iii) of 1227(1)(a) may consider further analyzing the material under the “serious value” definition found in 1227(2)(b). Under 1227(2)(b) a book that otherwise violates 1227(1)(a) should remain on the shelves if it has “serious literary, artistic, political, or scientific value for minors, taking into consideration the ages of all minors who could be exposed to the material.” This is not intended as a formula to avoid implementation of HB 374 but to bolster the removal decisions and assure there has been a thoughtful process to determine whether there is any redemptive value in the offending material.

In other words, even if the material is specifically listed in subsections (i), (ii), and (iii), the decisionmaker may consider independently analyzing whether such material has serious value for minors under 1227(2)(b). And, to further validate the removal decision under federal law, decisionmakers may consider assessing the materials “as a whole” when analyzing materials under Section 1227.

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<sup>5</sup> The possible ambiguity between bright line and rebuttable presumption of Section 1227(2)(c) is amplified by the fact that Section 1227 is generally meant to apply to indecent *public* displays. The First Amendment’s obscenity analysis for public displays may differ from its obscenity analysis for library materials but is not addressed herein.

Any decision or attempt to resist removal of offending material under Section 1227 based on “serious value” or “as a whole,” is fraught with its own risks and potential legal challenge by parents who believe the decision is too permissive and contrary to state statute. *Cf. United States v. Stevens*, 559 U.S. 460, 478 (2010) (“But the text says ‘serious’ value, and ‘serious’ should be taken seriously.”). *Serious* value does not mean *any* value. Of crucial note, this risk of lawsuits by parents only increases for libraries in elementary or middle schools versus high schools. See Utah Code § 76-10-1227(2)(b) (“‘serious value’ ... taking into consideration the ages of all minors who could be exposed to the material”).

#### **4. Circuit courts disagree on the precedential impact of the *Pico* case.**

In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982) (“*Pico*”), the U.S. Supreme Court was faced with a challenge to the removal of books from library shelves by the defendant board of education. “[T]he only books at issue in [*Pico*] are *library* books, books that by their nature are optional rather than required reading.” *Id.* at 862 (emphasis in original). The relevant question in *Pico* was whether the “First Amendment impose[s] any limitations upon the discretion of petitioners [the School Board] to remove library books from the Island Trees High School and Junior High School?” *Id.*

While *Pico* is the only case in which the Supreme Court has addressed the removal of books from library shelves, it is a plurality opinion—no part of the opinion garnered five votes. Justice Brennan’s view, joined by Justices Marshall and Stevens, was that if there was a finding that the removals were based on viewpoint, then the removals violated the First Amendment. *Id.* at 871-72. Justice Blackmun concurred, finding that schools cannot remove books if “motivated simply by the officials’ disapproval of the ideas involved.” *Id.* at 879-80 (Blackmun, J., concurring). Justice White also concurred solely as to remanding the matter for a trial on whether the school board removed the books based on viewpoint or vulgarity. *Id.* at 883 (White, J., concurring). The dissenting justices (Chief Justice Burger joined by Justices Powell, Rehnquist, and O’Connor) questioned the plurality’s recognition of the “right” of access to particular books: “It does not follow, however, that a school board must affirmatively aid the speaker in his communication with the recipient. In short the plurality suggests today that if a writer has something to say, the government through its schools must be the courier.” *Id.* at 887 (Burger, C.J., dissenting).

The *Pico* case is the closest the U.S. Supreme Court has come to providing guidance on the issue of removal of books from school library shelves and supports the notion that “pervasively vulgar” books can be removed. *Id.* at 871. The Court later acknowledged this holding: “all members of the [*Pico*] Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar.” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).

Opinions from the circuit courts of appeals on the precedential nature of *Pico* are as divided as the justices were. At least two federal circuit courts have issued opinions suggesting

that Justice Brennan’s *Pico* plurality opinion is the opinion of the High Court. *See, Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 & n.5 (9th Cir. 1998); *see also Turkish Coal. Of Am., Inc. v. Bruininks*, 678 F.3d 617, 623 (8th Cir. 2012). Neither of these cases directly addressed the issue of removal of books from library shelves and both distinguished *Pico* on those grounds. *Monteiro*, 158 F.3d at 1027; *Turkish Coal.*, 678 F.3d at 623.

Other circuits have held otherwise. The Fifth Circuit concluded that “*Pico* is of no precedential value as to the application of the First Amendment to these issues.” *Muir v. Alabama Educ. Television Comm’n*, 688 F.2d 1033, 1045 (5th Cir. 1982). Similarly, the Eleventh Circuit held that “[w]ith five different opinions and no part of any of them gathering five votes from among the nine justices [ ] *Pico* is a non-decision so far as precedent is concerned. It establishes no standard.” *Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1200 (11th Cir. 2009).

The Tenth Circuit—the case law that Utah is bound by—held that in “*Pico*, a plurality of the Supreme Court recognized a free speech ‘right to receive’ information and held unconstitutional a school board’s censorship of several books from a school library.” *Roberts v. Madigan*, 921 F.2d 1047, 1056 (10th Cir. 1990); *but see Cummins v. Campbell*, 44 F.3d 847, 853 n.4 (10th Cir. 1994) (noting that *Pico* did not produce a “majority opinion on the merits”). *Roberts* involved a students’ challenge of the opportunity to read the Bible. 921 F.2d at 1056. The Tenth Circuit recognized the similarity between the removal of the Christian books and the claims in *Pico*, but the court expressed no opinion as to the students’ “right to receive ideas” because the *Roberts*’ plaintiffs lacked standing. *Id.*

Even if the Tenth Circuit were to treat Justice Brennan’s plurality opinion in *Pico* as controlling, that opinion recognized that courts must apply the First Amendment “in light of the special characteristics of the school environment.” 457 U.S. at 868 (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969)). In *Pico*, Justice Brennan emphasized that the constitutionality of removal decisions “depends upon the motivation behind” the library book removals. *Id.* “[U]nconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar,” nor if “the removal decision was based solely upon the ‘educational suitability’ of the books in question.” *Id.* Following this reasoning, decisionmakers motivated to remove a book under an HB 374 challenge in order to protect youth from the public health crisis of pornography likely satisfy *Pico*’s constitutional motivation analysis.



## Conclusion

HB 374 prohibits pornographic or indecent material as defined as harmful to minors in Section 76-10-1201, described as pornographic in Section 76-10-1203, or described in Section 76-10-1227. School library books that meet any of these statutory definitions are prohibited from school libraries. Analysis under these statutory definitions, or strict application of the categorical exclusions in 1227(1)(a)(i), (ii), and (iii), is the way to directly comply with HB 374. To mitigate the risk of legal challenge relating to decisions under Section 1227, LEAs may also analyze the materials as a whole and determine whether the materials have any serious literary, artistic, political, or scientific value. While these are important considerations, nothing should prevent the Board and LEAs from proactively complying with state law in removing pornographic books from library shelves. Any decision to retain books in libraries that meet the definition of pornography is contrary to state statute and significantly increases the likelihood of a lawsuit against the LEA for non-compliance. The AGO will continue to consult with the Board and LEAs regarding analysis and compliance with other facets of HB 374.