

SUPREME COURT OF THE STATE OF NEW YORK  
WAYNE COUNTY

In the Matter of the Appeal of  
MOMS FOR LIBERTY, INC. OF WAYNE  
COUNTY and REVEREND JACOB  
MARCHITELL,

Index No. \_\_\_\_\_

VERIFIED ART. 78 PETITION

(Oral argument requested)

Petitioners,

-against-

STATE OF NEW YORK  
STATE EDUCATION DEPARTMENT;  
BOARD OF EDUCATION OF CLYDE-SAVANNAH  
CENTRAL SCHOOL DISTRICT,

Respondents,

**Verified Article 78 Petition**

By and through Counsel, Petitioners, pursuant to Article 78, NY C.P.L.R. § 7801 et. seq., bring this petition from Decision 18,402 of the Commissioner of the New York State Education Department (“NYSED Op.”), affirming the decision of the Board of Education (“Board”) of the Clyde-Savannah Central School District (“District”) to retain certain books within its Library collection. The Board exceeded its authority in arbitrarily deciding to retain these books, which contain obscene depictions of sexually explicit acts. The Board’s action, and the Commissioner’s affirmation of the same was arbitrary, an abuse of discretion, and based on a misapplication of the First Amendment. Petitioners seek a judgment under Article 78 of the Civil Practice Law and Rules and for a preliminary injunction and permanent injunction.

**Parties**

1. Petitioner Moms for Liberty, Inc. of Wayne County (hereinafter “Moms for Liberty”) is a registered, not-for-profit incorporated entity<sup>1</sup> in the state of New York and has 266 members – 192 of whom are taxpayers and/or parents of students enrolled in public schools that are located throughout Wayne County, New York.

2. At time of the events in this Petition, at least five (5) registered members of Moms for Liberty are parents of students currently enrolled in the Clyde-Savannah School District. All five of these members’ children will be exposed and/or have access to these lewd and sexually explicit materials when they visit the District’s Jr./Sr. High School Library and as such, their interests are the same and fully and adequately represented in this petition.

3. Moms for Liberty’s mission seeks to ensure that “parents and community members in Wayne County . . . have a seat at the table in making decisions for our children’s education.”

4. Moms for Liberty has consistently opposed sexually explicit books in school libraries and will continue to advocate for the removal of these books from school libraries, as well as encourage policy changes to prohibit the inclusion of sexually explicit books in school libraries. In accordance with this mission, members of Moms for Liberty regularly attend Board of Education meetings throughout Wayne County involving this issue.

5. Also in accordance with its mission and directly relating to the issue of sexually explicit books in school libraries, Moms for Liberty maintains a private Facebook page and regularly posts information relating to this issue for its Facebook members – eighteen (18) of which are parents of children currently enrolled in the District.

---

<sup>1</sup> Proof of Incorporation, etc., is attached to this Petition as Exhibit A.

6. Moms for Liberty fully and adequately represents the interests of each individual member with a child currently enrolled in the District; accordingly, participation by each individual member and/or parent is not required in this litigation.

7. Petitioner Reverend Jacob Marchitell, a taxpayer, local pastor, and community leader, has direct relationships with many parents and children in the Clyde-Savannah School District. Reverend Marchitell first filed written requests for reconsideration of library materials in April and May 2023 requesting the removal of five sexually explicit books from the library which resulted in the events at the center of this petition.

8. The District’s Board of Education (“Board”) is the governing body of the Clyde-Savannah Central School District organized and existing under Article 37 of the Education Law, and has the authority under N.Y. Educ. Law § 1709 to manage the library collection in the District. It is a “body” subject to judicial review pursuant to Article 78 of New York’s Civil Practice Law and Rules. *See* C.P.L.R. § 7802(a). The Board’s principal office is located at 215 Glasgow Street, Clyde, New York, located in Wayne County, New York.

9. The New York State Education Department (“NYSED”) is the administrative agency governing the actions of the Board and rendering final administrative decisions concerning the Board’s decisions. It is a “body” subject to judicial review pursuant to Article 78 of New York’s Civil Practice Law and Rules. *See* C.P.L.R. § 7802(a).

**Jurisdiction and Venue**

10. Under C.P.L.R. § 7801 et. seq., this Court has jurisdiction to review the actions by New York bodies or officers who have made a determination in violation of state law and/or whose actions were arbitrary, capricious, or an abuse of discretion.

11. This Court has jurisdiction over the matter because the New York Commissioner of Education's ("Commissioner") denial of the Petitioners' appeal cannot be further "reviewed by appeal to a court or to some other body or officer." C.P.L.R. § 7801[1].

12. Venue is proper in Wayne County pursuant to §§ 7804(b) and 506(b), because the material events in this case and the original decision of the Board occurred in Wayne County.

13. As a resident and taxpayer in the District who initiated the initial challenge against the obscene books at issue here, Reverend Jacob Marchitell has standing to appeal.

14. As an organization with members who are residents, taxpayers, and parents of children attending the District's School, Moms for Liberty has standing to bring this appeal.

15. The Commissioner found that the Petitioners have standing to prosecute this proceeding, as the District's "Objection to Instructional Materials and Controversial Issues" Policy allows "[d]istrict community members" to submit objections against schoolbooks to the district. "Given Petitioner Marchitell's status as a district resident and taxpayer, I find that he has standing to challenge the denial of his objection." NYSED Comm. Decision 18,402, at 3 n.2.

16. Petitioners timely commenced this Article 78 proceeding within four months of the Commissioner's decision. *See* C.P.L.R. § 217.

### **Introduction**

17. This case presents the Court with important questions of law relating to the knowing and intentional exposure of minor students as young as twelve years old to excessive pornographic or sexually explicit materials in school libraries. Specifically, Petitioners ask this Court to affirm – in accordance with long-standing precedent – that school boards maintain the authority to remove sexually explicit books from school libraries, and that neither students nor teachers have a First Amendment right to share and/or access sexually explicit content in school libraries.

18. Studies have determined that “increased exposure to sexually explicit materials ‘can lead to exaggerated beliefs of sexual activity among peers, sexually permissible attitudes, and sexual callousness, including more negative attitudes toward sexual partners.’” National Coalition to Prevent Child Abuse and Exploitation, *Impact of Exposure to Sexually Explicit and Exploitative Materials*, National Sexual Violence Resource Center (Dec. 2013), [publications\\_nsvrc\\_factsheet\\_impact-of-exposure-to-sexually-explicit-and-exploitative-materials.pdf](#). Females are especially prone to the normalization of sexual promiscuity, which heightens their risk of being victims of unwanted sexual violence and of sexually transmitted diseases. *Id.*

19. Unlike movies, television programs, music, and video games which contain ratings to warn parents and viewers of graphic and explicit content, as well as settings on computers, phones and other electronics allowing parents to restrict their child’s access to sexually explicit materials, books are different and do not contain any ratings.

20. Parents and readers (including young children) remain unaware of the sexually explicit content that has made its way into books marketed to minors and sitting on school library shelves. Unlike a community public library, parents do not have the opportunity to accompany their children in a school library to assist in choosing an age and developmentally appropriate book during the school day.

21. Accordingly, the job of school librarians in selecting age and developmentally appropriate material is more important than ever, and parents should be able to trust that the books selected by their children’s librarians do not contain pornography or sexually explicit material, excessive profanity, and other lewd or vulgar content.

22. Astoundingly, however, librarians across the country are being encouraged by

library associations not only to include sexually explicit content in school libraries but also to oppose the removal of these books in the face of legitimate concerns raised by parents and members of the community when the sexually explicit content is discovered.

23. In 2020, the American Library Association (ALA) hosted a webinar on book challenges. In that webinar, legal counsel for ALA, Deborah Caldwell-Stone, instructed that when book challenges arise due to inappropriate content, “the thing that needs to happen most is sustained messaging that reframes this issue that takes it away from the idea that these are inappropriate for minors or are sexually inappropriate for minors and promote them as diverse materials and programming that are about inclusion and fairness and protection of everyone’s right to see themselves.” ALA Office for Intellectual Freedom, *Webinar: Banned Books Uncensored: LGBTQIA+ Stories & Gender Identify*, YouTube (May 21, 2020).

<https://www.youtube.com/watch?v=J-hyIwgXA8k&t=2106s> .

24. In response to the rapid influx of pornographic or sexually explicit content in books being added to school library shelves, several states have already taken action to address this issue and protect students.

25. In the case at hand, the Board attempted to do the same by removing five (5) books from its Jr/Sr High School Library containing excessive pornographic and/or sexually explicit material as well as profanity.

26. Almost immediately, however, the Board was falsely accused of acting in bad faith and “book banning,” and was threatened with legal action. In a matter of days, the Board reversed course and while stating on the record again that these books were inappropriate, it nonetheless reinstated the sexually explicit materials to the school library.

27. As demonstrated below, the content in the books challenged in this case contain

sexually explicit content (or pornography<sup>2</sup>) – content that normalizes violence and abuse of women and children, depicts rape, equates violence and pain with pleasure, encourages and normalizes early sexual activity among minors.

28. Petitioners challenge the Board’s reversal and reinstatement of the sexually explicit books.

### **Statement of Facts**

#### **A. Petitioners’ Challenge to the Sexually Explicit Library Materials**

29. Time and time again, federal and state laws have emphasized the important role and compelling interest of public schools in protecting children from exposure to lewd and obscene content.

30. The Supreme Court of the United States has made clear that there is no First Amendment right to broadcast or speak vulgarity or obscenity. As the Court further elaborated:

These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: “[Such] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky v. New Hampshire*, 315 U.S., at 572.”

*Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

31. The Supreme Court has also made quite clear that public schools have a widespread “interest in protecting minors from exposure to vulgar and offensive spoken language.” *Id.* at 684

32. Similarly, the Court unanimously recognized that school boards “ha[ve] the authority to remove books that are vulgar” or otherwise inappropriate. *Id.* at 658 (“***all Members of the Court, otherwise sharply divided, acknowledged that the school board has the***

---

<sup>2</sup> Pornography is defined as “pictures, movies, or writing that show or describe sexual behavior for the purpose of exciting people sexually.”

**authority to remove books that are vulgar.’** *Pico*, 457 U.S. at 871-872; *id.*, at 879-881 (BLACKMUN, J., concurring in part and in judgment); *id.*, at 918-920 (REHNQUIST, J., dissenting).”).

33. The state of New York defines obscene or indecent material as that which is “*explicit or detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse* and which, taken as a whole, is *harmful to minors.*” N.Y. Penal Law § 235.21 (emphasis added).

34. In certain contexts, New York law prohibits the selling or loaning of indecent material as defined above when it would be harmful to minors. N.Y. Penal Law § 235.21.

35. New York Penal Law § 235.20(6) defines content that is “harmful to minors” as follows:

“Harmful to minors” means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

- (a) Considered as a whole, appeals to the prurient interest in sex of minors; and
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (c) Considered as a whole, lacks **serious** literary, artistic, political and scientific value for minors.

Emphasis added.

36. “Minor” is defined as “any person less than seventeen years old.” N.Y. Penal Law § 235.20(1).

37. “Sexual conduct” is defined as “acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks or, if such a person be a female, breast.” N.Y. Penal Law § 235.20(4).

38. In early 2023, Reverend Marchitell began the process to challenge five (5) library books included in the District's Jr./Sr. High School Library due to the excessive pornographic or sexually explicit content, as well as numerous profanities contained therein.

39. The Jr./Sr. High School Library is accessible to both middle and high school-aged students ranging from the age of 12 to 18 years.

40. On or about April 12, 2023, at a meeting of the Board, Reverend Marchitell informed the Board of his concerns regarding three library books in the Jr/Sr High School Library: *People Kill People*, by Ellen Hopkins; *It Ends With Us*, by Colleen Hoover; and *All Boys Aren't Blue*, by George M. Johnson (a memoir).

41. Shortly thereafter, Reverend Marchitell submitted a formal written request to review these three library books due to their inappropriate and sexually explicit content for students served by the Jr./Sr. High School Library as young as 12 years old. A copy of Rev. Marchitell's April 2023 Request is attached hereto as Exhibit B.

42. In his requests for review, and in response to a question requesting "resources that provide . . . additional information," Marchitell directed school officials to booklooks.org which contains a comprehensive list of all profanities and sexual content contained with each book. *Id.*

43. As booklooks.org demonstrates, some of the books challenged by Marchitell contain more than ten single-spaced pages — of examples of graphic sexual content including sexual criminal acts, as well as hundreds of profanities. A copy of these reports is attached hereto as Exhibit C (all booklooks.org reports).

44. In May 2023, at another Board meeting, Reverend Marchitell informed the Board of two additional concerning books in the same library including *Red Hood* by Elana K. Arnold, and *Jesus Land: A Memoir* by Julia Scheeres.

45. Shortly thereafter, Reverend Marchitell submitted another formal written request for review of these two additional books, *Red Hood* and *Jesus Lane: A Memoir*. A copy of Rev. Marchitell's May 2023 Request is attached hereto as Exhibit D.

46. As Reverend Marchitell outlines in his formal requests, all five books contain pornography/sexually explicit content – i.e. printed material containing explicit descriptions of sexual activity intended to stimulate erotic feelings – involving both children and adults – some of which constitutes criminal sexual activity including rape.

47. As Reverend Marchitell explains in his request for review, *People Kill People* is a fiction novel containing graphic descriptions of anal sex. Just one example of sexual content contained within the book includes the following:

That part didn't hurt and, in fact, you were surprised that your wiener responded positively. Still, you knew it was wrong, so wrong, and you tried to get away. "Oh, no. Not yet." He said. The hand holding you gripped tighter while the other unzipped your pants and yanked them off in one swift, well-practiced motion. You struggled, but couldn't come near to matching his physical strength. He unbuttoned his own fly, freeing his sorry erection to worm its way between your butt cheeks. He slapped a hand over your mouth. "This might hurt a little if it's really your first time. Let's see if it is." He said. If there was one small saving grace, it was that he possessed a pencil dick. Still, when he drove it inside you, the pain was exquisite and you screamed into his filthy palm.

Exhibit B.

48. *People Kill People* contains at least 137 profanities, and several instances of pornography, as well as sexual innuendos and other lewd language. Exhibit C, at 44.

49. *It Ends With Us* is an adult romance fiction novel. Just one example of the sexual content contained within its covers includes the following:

He grips my hip with one hand while shoving my panties aside with the other. Then he pushes forward until he's all the way inside of me. His hand slides down my stomach and settles between my legs. I can no longer keep up with his rhythm. I can barely even stay on my knees. He's somehow holding makeup [sic] up with one hand and destroying me in the best possible way with his other hand.

Exhibit B.

50. *It Ends With Us* contains at least 105 profanities, and several instances of pornography including the criminal act of rape. Exhibit C, at 27.

51. *All Boys Aren't Blue*, a young-adult "memoir manifesto," similarly contains several instances of pornography including sexual molestation. One example includes a graphic description of anal sex on page 266 and reads as follows:

I put some lube on and got him up on his knees, and I began to slide into him from behind. I tried not to force it because I imagined that it would be painful; I didn't want this moment to be painful. So I eased in, slowly, until I heard him moan. . . . As we moved, I could tell he was excited and I was, too . . . I finally came and let out a loud moan . . . . I pulled out of him and kissed him while he masturbated. Then, he also came.

Exhibit B.

52. *All Boys Aren't Blue* also contains numerous profanities and lewd content. Exhibit C at 14.

53. *Red Hood*, a fantasy fiction book, likewise contains instances of pornography. Just one example can be found on page 105:

The tight black curls of his pubic hair surrounded his erection. It's wet-tipped and urgent, and you stroke it with your fingers . . . find his penis, and guide it toward the entrance of your vagina. It feels thick there, sort of scary, and there is a moment when you wonder how on earth it will fit inside, but James doesn't rush you, and you lower yourself onto him, his hands gentle on your hips, not trying to tell you what to do. His eyes are closed, his head is back, and you look at him through the soft curtain of your hair as you sink all the way down, as you feel a tear deep inside you, painful but not terrible, as you feel yourself full of him, of James. And then you move, careful and slow, your hands on his chest, his on your hips, your thighs, and it's not long before his face tightens up, he makes a low groan, and he shivers beneath you. You stay there, above him, for a moment longer, and inside you, you feel his penis beginning to soften.

Exhibit D.

54. The instances of pornography in *Red Hood* are numerous. Exhibit C, at 38.

55. In *Jesus Land: A Memoir*, another book marketed for adult interest – not for children, just one example of the sexually explicit content contained therein includes the following:

I open my eyes, and in a boozy blur, see his penis jutting from his shorts. He grabs it by the root. “Lick it,” he says in his thick voice, pressing my head toward it. I’ve heard of girls giggle about blow jobs at school; it’s something a boyfriend requires of you. I stare at Scott’s penis.

There’s a pearl balanced on the tan tip. It smells like liverwurst. “Like a lollipop,” he’s begging now, breathing hard. He wags the penis with his hand to get my attention. I close my eyes and stick out my tongue and it touches the side of it. “Open your mouth,” Scott says, and I do. He puts it between my lips and grabs my hair and pulls my head up and down on it. A moment later he groans and something slimy spurts into my mouth that tastes like pool water. Scott collapses onto his back on the mattress and I spit the slime onto my parents’ white bedspread and roll onto my back beside him.

Exhibit D.

56. Like the other challenged books, *Jesus Land* contains several examples of sexually explicit content and profanities. Exhibit C, at 33.

57. As Reverend Marchitell’s requests for review clearly demonstrated, the sexual content contained within these books is excessive and severely undermines any asserted literary value for the students given access to the school library.

B. Applicable School Board Policies

58. Pursuant to District Policy 8320, the school district is to “establish and maintain a library media center in each school which will contain library materials. The library media center in each District school will meet the needs of students and staff and *provide an adequate complement to the instruction program in the various areas of the curriculum.*” See Exhibit E, at 6 (emphasis added).

59. Pursuant to District Policy 8320, “[t]he Board delegates its authority to designate library materials to be used in the District to the school library media specialist(s). When appropriate, the school library media specialist(s) will work cooperatively with the Superintendent, other District administrators, instructional staff, the Board, students, and/or District community members to identify, order, and organize library materials.” *Id.* at 6.

60. Pursuant to Policy 8320, instructional material including library content must meet several criteria and must “support the District’s curriculum and instructional program, taking into consideration the varied interests, abilities and learning styles of students.” *Id.* at 7.

61. District Policy 8330 allows for community members to raise concerns about instructional materials and sets forth a procedure for evaluating any such criticism. *Id.* at 8.

62. District Policy provides that when an objection is raised:

The Superintendent will designate a review committee to investigate and evaluate the challenged instructional material. The committee will include, among others, the school library media specialist from the building where the objection originated and the building Principal. The committee will evaluate the challenged material according to the District’s criteria for the evaluation and selection of instructional materials.

The review committee will submit a written report of the results of their review to the Superintendent within 60 days of receipt of the formal written objection. Appeals of decisions by the review committee may be submitted in writing to the Superintendent who will then submit the appeal to the Board for action.”

*Id.* at 9.

63. District Policy 8330 makes clear that the Board is the final decision-maker on objections raised regarding the content of instructional material. *Id.* at 9.

C. The District’s Review of Petitioners’ Challenges to the Sexually Explicit Books

64. Reverend Marchitell’s requests that the books be removed were submitted to the Library Committee which, pursuant to Policy 8330, were supposed to investigate and evaluate the challenged library material.

65. The Library Committee then prepared “reviews” of each book challenged by Reverend Marchitell. These reviews consisted of a cutting and pasting of book reviews conducted by *outside* sources, as well as a conclusory statement for each book that it “has aligned their [sic] review of materials to BOE Policy 8320” and that “consideration was given to” these principles. A copy of the Committee’s review of each book is attached hereto as Exhibit F.

66. The Library Committee did not provide its own comments or reviews of the challenged books. *Id.*

67. The Library Committee did not dispute that the books at issue here contain all the concerning content identified by Reverend Marchitell and in the lists compiled by booklooks.org. *Id.*

68. The Library Committee’s reviews did not acknowledge the pornographic content of each book, nor the excessive profanities contained therein. *Id.*

69. The Library Committee did not identify any curriculum within the District that would be supported by the challenged books – a necessary factor when selecting appropriate material for the school library. *See* Policy 8320; *see also* Exhibit F (listing on the last page of each review the criteria for the school library when selecting books which includes “to provide materials **that will enrich and support the curriculum . . .**”).

70. The Library Committee did not include any discussion or explanation as to how these books are appropriate for the “maturity levels of the students served” by the library – another consideration when selecting appropriate material for the school library. *Id.*

71. Despite not following policy and procedure for review, the Library Committee voted to retain all five books and submitted its review of each book to the Board asserting that the books were educationally suitable.

72. On August 9, 2023, Reverend Marchitell's requests to remove the pornographic books were appealed to the Board.

73. Following the concerns raised by Reverend Marchitell and other parents within the District, the Board voted 5-3 to remove all five books from the library on the grounds that the books contained material inappropriate for children. A copy of the Minutes of the District's August 9, 2023, meeting is attached hereto as Exhibit G.

74. No evidence exists that the Board was motivated by a desire to deny students access to political, social, or religious ideas with which the Board disagreed.

75. Following its August 9, 2023, vote, the Board received legal threats from two members of the Library Committee who filed a petition with the NYSED Commissioner on September 8, 2023, challenging the Board's decision to remove the explicit materials from the library as arbitrary and capricious and arguing that the First Amendment required the Board to include the sexually explicit books in the school library. A copy of the now-rescinded petition is attached hereto as Exhibit H.

76. In their now-rescinded petition, select members of the Library Committee alleged that the Board's decision to remove the books was made in bad faith. *Id.* at 13.

77. The now-rescinded petition also alleged that the Board's decision to remove the books violated the academic freedom of the library media specialist to include the books containing pornography in the school library for children as young as 12 years old. *Id.* at 13.

78. The now-rescinded petition alleged that the Board's decision to remove the books violated parent's First Amendment right "to have their children access information and ideas within their school library." *Id.* at 15.

79. The now-rescinded petition also alleged that students have a First Amendment right to “receive information and ideas,” even when the information consists of pornographic content and other sexually explicit content and excessive profanities. *Id.* at 15.

80. The now-rescinded petition alleged that the Board’s removal of the books somehow “failed to ensure teaching and learning reflected principles of diversity, equity and inclusion (DEI), and failed to provide opportunities for all students to make educational progress through uses of materials that incorporate diverse perspectives.” *Id.* at 16.

81. The now-rescinded petition failed, however, to identify what specific “educational opportunities” students would be denied if the books were removed, and how those educational opportunities could not be served by the hundreds of other books remaining in the school library. *Id.* at 16.

82. On September 13, 2023, the Board held another meeting to discuss its August 9, 2023, decision to remove the books in light of the legal threats it had received. A copy of the Board’s Minutes is attached hereto as Exhibit I; see also Video of Board Meeting on September 13, 2023, available at [Exhibit J 9 13 23 BOE Meeting Part 1 \(youtube.com\)](#); [Exhibit J 9 13 23 BOE Meeting Part 2 \(youtube.com\)](#); [Exhibit J 9 13 23 BOE Meeting Part 3 \(youtube.com\)](#).

83. Jennifer Williams, Chapter Chair for Moms for Liberty, along with several other members of Moms for Liberty, attended and spoke at the September 13, 2023, Board meeting and urged the District to stand by its original decision.

84. Reverend Marchitell also attended and spoke at the September 13, 2023, Board meeting.

85. At the September 13, 2023, Board meeting, the President of the Board, Pamela Anstee, stated on the record that the sexual and obscene content of the books are not appropriate for school-

aged children, but indicated that she felt obligated by law to restore the books. Board Meeting Video, Part 3 at 2:53-5:30, available at [Exhibit J 9 13 23 BOE Meeting Part 3 \(youtube.com\)](#).

86. As the President of the Board explained orally at the time, and just after an executive session with legal counsel, the legal advice that the Board had received was that the law required retention of the challenged books regardless of their inappropriate content. *Id.*

87. The Board then voted to reverse course and reinstate the books, by a vote of 6-2. Exhibit I.

88. The Board recorded that “after further consideration of the Committee’s written report, the basis for the prior vote and upon advice of legal counsel, the Board rescinds the prior vote to remove the Challenged Materials.” Exhibit I, at 7.

89. The record is devoid of any discussion or consideration by the Board as to how each challenged book compliments or supports the school curriculum – a necessary factor when selecting appropriate material for the school library. *See* Policy 8320; see also Exhibits I; Exhibit F (containing the library committee’s “review” of each book and listing on the last page of each review the criteria for the school library when selecting books which includes “to provide materials **that will enrich and support the curriculum . . .**”).

90. The record is also devoid of any discussion or consideration by the Board as to how any of these books were appropriate for the “maturity levels of the students served” by the library including students as young as 12 years old – another consideration when selecting appropriate material for the school library. Exhibits I and J.

D. Petitioners Appeal to the New York State Education Department and the Commissioner’s Decision on Appeal

91. Petitioners timely appealed to the NYSED on October 13, 2023.

92. Petitioners personally served their Notice of Petition and Application for Stay upon Mr. Timothy VanDuyne, a member of the Clyde-Savannah Central School District's Board of Education.

93. The District served a response in opposition to the request for a stay on October 20, 2023.

94. The Commissioner denied the stay request on October 27, 2023.

95. On November 2, 2023, the District served its Verified Answer.

96. Petitioners served their Verified Reply on December 18, 2023, and then their Memorandum of Law, which included an Application to Submit Additional Exhibits, on December 20, 2023.

97. On April 14, 2024, Petitioners were notified that the Commissioner had received and accepted into the record an amicus curia brief submitted by the New York Library Association (NYLA) in this matter (8NYCRR 275.17) which propelled the same narrative suggested by the ALA – *i.e.* that concerns regarding inappropriate sexual content were merely a pretext to intimidate and threaten schools and librarians into denying access to diverse content. NYSED Dec. 18402, at 7 (expressing agreement with NYLA on this point), attached hereto as Exhibit K.

98. Just a few days later, the Commissioner issued a final decision, Decision No. 18,402, on April 25, 2024, dismissing Petitioner's appeal.

99. That decision first concluded that Petitioners had failed to demonstrate that Respondent's determination was "unlawful on the basis that the challenged books are per se inappropriate." Exhibit K at 4.

100. The Commissioner applied the definition of "obscenity" and three-part test articulated in *Miller v. California*, 414 U.S. 15, 24 (1973), governing the regulation of commercial

distribution of hard-core sexual content to adults (not school library content for minors) and concluded that “[p]etitioners failed to demonstrate that the challenged books here lack ‘literary, artistic, political and scientific value.’” *Id.* at 5.

101. The Commissioner acknowledged “that each of the challenged books contain some vivid and detailed accounts of sexual interactions. But that alone is not enough to justify their censorship.” *Id.* at 5.

102. The Commissioner went on to conclude that the Board’s deference to its library committee’s argument for the books to be retained, cannot be considered arbitrary or capricious. *Id.* at 6.

103. The Commissioner did not acknowledge, however, that the Board’s reconsideration was prompted by legal threats.

104. The Commissioner did not discuss how these books did or did not meet the necessary factors – including how these books complimented school curriculum and/or how the books were appropriate for the various maturity levels of the students served by the library. *See generally id.*

105. While the Commissioner’s review is of the Board’s decision, it nonetheless noted and took issue with the fact that Marchitell’s objection to one book, “All Boys Aren’t Blue” constituted disagreement with the author’s “personal and political views.” *Id.* at 6.

106. The Commissioner did not identify any evidence in the record to demonstrate that the Board’s decision was based on personal or political views, rather than a desire to protect students from excessive sexually explicit content.

107. As the record demonstrates, and the Library Committee acknowledged, the five challenged books addressed a wide array of topics and issues. These topics included bullying,

overcoming adversity, race, gun violence, immigration, feminism, gender, adoption, masculinity and peer pressure. Exhibit H, paragraphs 29-34.

108. No common single political, cultural, or social issue is woven throughout all five books.

109. The Commissioner also suggested that Reverend Marchitell's objections to certain books were not sincere and instead "emblematic of a 'dangerous nationwide trend of accusations used to intimidate and threaten schools and librarians into denying access to books on the basis of their content and the identities of their authors.'" Exhibit K, at 6-7.

110. The Commissioner determined that long-time Supreme Court precedent governing a school board's compelling interest and authority to limit vulgar speech and content in schools "is inapposite as [the Board] has not proposed any restriction on speech." *Id.* at 7.

111. The Commissioner held that the real issue "at the heart of this dispute" is "the right to academic freedom, intellectual, and personal freedom . . . and school librarians, whose duties are educational in nature, enjoy academic freedom to the same extent as classroom teachers." *Id.* at 8.

112. Relying solely upon the Supreme Court's plurality decision in *Board of Ed., Island Trees Union Free School Dist. No. 26 v Pico*, 457 U.S. 853, 872 (1982), the Commissioner held that students have a First Amendment "right to receive information and ideas through school library materials" irrespective of any academic study demonstrating that early exposure to sexual content is harmful to children. *Id.* at 8.

113. The Commissioner further determined that the *Pico* Court held that "boards of education lack authority, under the First Amendment, to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion'" and likened a school's attempts to

expel students for failing to salute the flag to community concerns here of exposing young students to graphic sexual content. *Id.* at 8.

**ARGUMENT**

**First Cause of Action:**

**Respondents' Decision Was Arbitrary And Capricious,  
And Constitutes An Abuse Of Discretion**

114. The Petitioner repeats and realleges each paragraph above as if fully set forth herein.

115. This cause of action is brought pursuant to C.P.L.R. § 7803(3).

116. Under New York law, “[a]n action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.” *Ward v. City of Long Beach*, 20 N.Y.3d 1042, 1043 (2013) (quoting *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009)).

117. An agency abuses its discretion when it takes action without “sound basis in reason” or lacking a “rational basis.” *See Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 (1974).

A. **The Board Decision to Reinstate Sexually Explicit Books in Its School Library Flies in the Face of Its Stated Duty, Interests and Educational Mission.**

118. The Supreme Court has explained that “[i]t is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is compelling.” *New York v. Ferber*, 458 U.S. 747, 756-57 (1982).

119. In keeping with this compelling interest, courts have time and time again “sustained legislation aimed at protecting the physical and emotional well-being of youth *even when the laws have operated in the sensitive area of constitutionally protected rights.*” *Id.* (emphasis added).

120. The Supreme Court has also made quite clear that public schools have a widespread

“interest in protecting minors from exposure to vulgar and offensive spoken language,” and that the “fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions.” *Fraser*, 478 U.S. at 683 (internal quotations and citations omitted).

121. When evaluating student speech containing much milder content than what is contained within the books in this case, the Supreme Court quickly determined that sexual content – even sexual innuendos – in a school setting is “seriously damaging to less mature audiences consisting of 14 years olds [who are] on the threshold of awareness of human sexuality.” *Id.* at 683-84.

122. In New York, school boards of education have a “duty to ensure the safety of its students.” *Matter of Santer v. Bd. of Educ. of E. Meadow Union Free Sch. Dist.*, 23 N.Y.3d 251, 265 (2014). This duty stems from the “broad and well-settled principle” “that the State has a public policy in favor of protecting children.” *City Sch. Dist. of the City of New York v McGraham*, 17 N.Y.3d 917, 920 (2011); *see e.g., Villarín v Rabbi Haskel Lookstein Sch.*, 96 A.D.3d 1, 9 (N.Y. App. Div. 1999).

123. “[A] school has a duty of care while children are in its physical custody or orbit of authority, or if a specific statutory duty has been imposed.” *Chainani by Chainani v. Bd. of Educ.*, 87 N.Y.2d 370, 378 (1995).

124. Likewise, and as the New York State Education Department (NYSED) has also affirmed “the United States Supreme Court not only recognized the authority of the public schools to ban speech considered to be lewd or offensive, but also recognized the authority of the school

board to ban such speech *even when it might otherwise have been protected as ‘political expression.’*” *Matter of Parsons*, 1993 NY Educ. Dept. LEXIS 81, \*5-6 (emphasis added).

125. As the Commissioner for NYSED previously noted in another opinion, while it is true that “[s]tudents do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate (*Tinker v. Des Moines Independent CSD*, 393 U.S. 503, 21 L Ed 2d 731, 89 S. Ct. 733) . . . the right of free speech is not absolute and ‘. . . must be balanced against society’s countervailing interest in teaching students the boundaries of socially acceptable behavior.’” *Matter of Parsons*, 1993 NY Educ. Dept. LEXIS 81, at \*5 (citing *Fraser*, 478 U.S. at 681).

126. The District’s policy affirms the District’s obligation to protect children from harmful and obscene content and to only permit appropriate content that enhances the school’s educational mission.

127. District Policy 8271, relating to technology use and adopted “to ensure the safety of students,” requires that “technology protection measures apply to Internet access by both adults and minors with regard to visual depictions that are obscene, child pornography, or, with respect to the use of computers by minors, considered harmful to such students.” See Exhibit E, at 1.

128. District Policy 8271 makes clear that these protection measures are in place to achieve “the educational mission of the schools **including the selection of appropriate teaching/instructional materials and activities** to enhance the schools’ programs; and to help ensure the safety of personnel and students while online.” *Id.* (Emphasis added).

129. As the legal precedent and policies above demonstrate, the District and the Board have a duty to protect the students under its care, as well as a compelling interest in protecting minors from exposure to vulgar and obscene content because such content violates the educational mission.

130. The Board's decision to reinstate books containing excessive obscene or sexually explicit content flies in the face of its duty and its educational mission and constitutes an abuse of discretion.

B. The Board Failed to Follow Its Own Policies Governing the Selection of Appropriate Library Materials.

131. The federal, state, and local laws and policies cited above make abundantly clear that public schools and boards of education owe a duty of care and responsibility to students and that this duty includes careful consideration before *knowingly* and *intentionally* exposing minors to excessive sexually explicit content and profanities.

132. This duty and responsibility is carried out through the proper consideration of its own policies and procedures when selecting library materials, *see* Exhibit E (District Policy 8320), and to establish any legitimate pedagogical interest or other appropriate literary purpose for the obscene content.

133. As both District policy and the Library Committee's reviews affirm, library and other materials offered to students "**will enrich and support the curriculum, taking into consideration the varied interest, abilities and maturity levels of the students served.**" Exhibit E (District Policy 8320); Exhibit F (last page of each review outlines these necessary considerations).

134. Neither the Library Committee nor the Board identified how any of these books would enrich and support the curriculum offered by the Jr. and Sr. High Schools.

135. For example, how would the adult fiction romance novel, *It Ends With Us*, support the curriculum? Neither the Library Committee nor the Board considered this factor.

136. The Library Committee's "review" of each book merely consisted of the cutting and pasting of book reviews conducted by *outside* sources for the purposes of marketing, such as

the New York Times, Publishers Weekly and book vendors servicing both adults and children. *See* Exhibit F.

137. Neither the Library Committee nor the Board's consideration identifies how these sexually explicit books align with the maturity levels of the students as young as 12 years old who have access to the Jr./Sr. High School library.

138. Indeed, even the Library Committee's reviews affirm that at least two of the challenged books are recommended only for "adult" audiences – not for the middle or high school students who use the library. *See* Exhibit F, at 22 (noting that "Follett Titlewave, a vendor used by many school libraries, assigns *It Ends With Us* an audience of "adult" and further noting that the "Atria (Publisher) posts a recommended **age of 18+**"); Exhibit F, at 8 ("Follett Titlewave, a vendor used by many school libraries assigns *Jesus Land* an "adult" interest level.").

139. Further, appropriate ages for the other books varied widely depending on the publisher or vendor. *Id.*

140. In its haste to avoid a legal challenge, the Board failed to adequately evaluate and follow its own policies for selecting appropriate library materials.

141. Rather than evaluating each book to ensure it met the appropriate criteria, the Board reversed itself under the mistaken legal impression that it had no authority to protect students from excessive sexually explicit content and profanities when the books – at least in the Library Committee's opinion – contained some type of literary content and/or touched on controversial issues.

**Second Cause of Action:**  
**Respondents' Decisions Include Several Errors of Law**

142. The Petitioner repeats and realleges each paragraph above as if fully set forth herein.

143. This cause of action is brought pursuant to C.P.L.R. § 7803(3).

144. Both the Board's decision to reinstate the sexually explicit books, and the Commissioner's decision to uphold it, were affected by errors of law.

A. Respondents Misapplied and Misinterpreted Supreme Court Precedent And Erred in Concluding that The First Amendment Accords Students An Unfettered Right to Access Sexually Explicit Material.

145. Respondents misinterpreted and misapplied the *Pico* case to hold that students have an unfettered right to access sexually explicit books.

146. In upholding the Board's decision to reinstate the sexually explicit books, the Commissioner stated that "the right to academic, intellectual, and personal freedom lies at the very heart of this dispute," and that "boards of education lack authority, under the First Amendment, to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion' (*Pico*, 457 U.S. at 854)." NYSED Op., at 8.

147. First, and as demonstrated above, the record before the Commissioner fails to demonstrate that the Board sought to prescribe anything other than the excessive sexually explicit content contained within the books.

148. Second, the Commissioner's interpretation of *Pico*'s plurality as a holding of the Supreme Court is a clear error of law; Justice Brennan's plurality opinion is not binding. *Jones v. Jegley*, 947 F.3d 1100, 1106 n.3 (8th Cir. 2020); *see also Pico*, 457 U.S. at 885 (Burger, C.J., dissenting) ("Were [the plurality opinion] to become the law . . .").

149. Justice White's opinion (which did *not* contain any suggestion of the plurality principles the Commissioner relied on) represents the narrow grounds for judgment in *Pico* and is the controlling decision that governs First Amendment interpretation. *See Pico*, 457 U.S. at 883 (White, J., concurring in the judgment); *see also Griswold v. Driscoll*, 616 F.3d 53, 57 (1st Cir.

2010) (Souter, J.) (explaining “Justice White concurred in [Pico’s] judgment without announcing any position on the substantive First Amendment claim”); *Muir v. Ala. Educ. Television Comm’n*, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982) (en banc) (finding Justice White’s opinion had the narrowest grounds for the judgment and therefore concluding the Court did not decide the “extent” or even the “existence” of “First Amendment implications in a school book removal case”).

150. Justice White explained the precise scope of the Court’s true holding in *Pico*:

The unresolved factual issue, as I understand it, is the reason or reasons underlying the school board’s removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. Presumably this will result in a trial and the making of a full record and findings on the critical issues. The plurality seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no necessity for doing so at this point. . . . If, for example, the District Court concludes after a trial that the books were removed for their vulgarity, there may be no appeal.

*Pico*, 457 U.S. at 883 (1982) (Opinion of White, J.) (Emphasis added).

151. Accordingly, while the plurality in *Pico* held that “the Constitution protects the right to receive information and ideas,” 457 U.S. at 867, the Court also made clear that this right was not without limits and “that the school board has the authority to remove books that are vulgar.” *Fraser*, 478 U.S. at 684.

152. As the Court affirmed in *Fraser* (decided four years after *Pico*), “all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar.” *Id.* at 658 (citing *Pico*, 457 U.S. at 871-72; *id.*, at 879-81 (Blackmun, J., concurring in part and in judgment); *id.*, at 918-20 (Rehnquist, J., dissenting)).

153. Accordingly, rather than creating a right to vulgar or obscene speech, the true holding of *Pico* affirmed the responsibility of school districts to remove vulgarity from their schools.

154. Since *Pico*, the Supreme Court has again confirmed that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,” and “simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.” *Fraser*, 478 U.S. at 682 (*New Jersey v. T.L.L.*, 469 U.S. 325, 340-42 (1985)).

155. Indeed, “the First Amendment gives a high school student the classroom right to wear Tinker’s armband [a political message communicated without obscenity], but not Cohen’s jacket [a political message containing obscenity – *i.e.* ‘F\*\*\* the draft’].” *Id.* (citing *Thomas v. Bd. of Educ., Granville Central Sch. Dist.*, 607 F.2d 1043, 1057 (1979) (opinion concurring in result)).

156. The Supreme Court has also made abundantly clear that “[t]he First Amendment does **not** prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school’s basic educational mission.” *Fraser*, 478 U.S. at 685 (emphasis added).

157. Obscenity including “sexually explicit” and “vulgar and lewd” speech “is wholly inconsistent with the ‘fundamental values’ of public school education.” *Id.* at 685-86.

158. Respondents cannot present any case precedent to support their contention that the right to academic freedom includes the right by and through the public school system to access the type of sexually explicit content contained within the books challenged herein consisting of graphic and detailed descriptions of sex, anal sex, and rape involving both children and adults.

159. The Board likewise relied on the same flawed interpretation of the First Amendment when reversing its original decision to remove the books.

160. Various comments made by Board members at the meeting confirm that the Board

misunderstood its obligations under the law at the time it voted to rescind its prior vote removing the books. For example, the Board's President, Pamela Anstee, stated.

I personally think having these books in our school libraries is abhorrent . . . I do not know of any parent in their right mind who would have [their children] read graphic descriptions of [explicit sexual encounters regarding bodily fluids]. That kind of stuff has business in our public library. . . I am very much opposed to these books. But, I am an elected official . . . , and we all said we would follow the Constitution of the United States and the State of the New York . . . . We have to vote like a jury. What is legal? Is it legal to write trash like that? Yes. Is it legal for students to read trash like that? Yes. Is it legal for that to be in school libraries? Unfortunately.

...

Legal doesn't necessarily mean its right.

Board Meeting Video, Part 3 at 2:53-5:30, available at [Exhibit J 9 13 23 BOE Meeting Part 3 \(youtube.com\)](#).

161. Then, President Anstee stated, in casting her vote, “[s]ince the vote has already passed, I am going to vote my conscience, not legal, and say no.” *Id.* at 7:15-7:22.

162. In a later vote on whether to accept the library committee's recommendations and reinstate the challenged books, while obviously being conflicted, President Anstee repeatedly muttered to herself, “[v]ote like a jury, vote like a jury. Yes.” *Id.* at 15:35-15:50.

163. The Board's decision was clearly guided by, and dependent on, an erroneous interpretation of both federal and state law – i.e., that it would be impermissible for the Board to remove the sexually explicit books.

164. The Board was improperly informed that that *Pico's* plurality was binding precedent upon it.

165. The Board was also improperly informed and believed that the Supreme Court had created an enforceable “right to receive information and ideas” that are sexually explicit through school library materials. *Pico*, 457 US at 867.

B. The Commissioner Erroneously Determined that the Supreme Court's Decision in

Fraser Was Not Applicable or Persuasive.

166. The Commissioner also committed an error of law in concluding that *Fraser* or other case law “regarding a school board’s authority to limit speech is inapposite here as respondent has not proposed any restriction on speech (*see e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678 (1986)).” *Id.* at 7.

167. There is no legal authority to support the Commissioner’s opinion that a school board’s authority is limited only to regulating *student* speech that is lewd or vulgar, and that it holds no authority to limit the same speech (verbal or written) brought into the school by non-students in books or other content.

168. In *Fraser*, the Court made clear that the *Pico* opinion “recognize[d] the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children – especially in a captive audience – from exposure to sexually explicit, indecent, or lewd speech.” 478 U.S. at 684.

169. Further, and as already noted above, the *Fraser* court affirmed that the ruling in *Pico* confirmed that boards of education have authority to remove books that are – just like student speech – vulgar or inappropriate.

170. The principles outlined in *Fraser* affirming a school board’s authority to regulate and remove vulgar content is not limited only to words spoken by students. Such a misinterpretation of *Fraser* would eliminate a school’s ability to remove a non-student speaker with the same access to students within the school walls as a student.

C. Respondents Misinterpreted and Misapplied State Law Governing the Proper Selection of School Materials and Curriculum.

171. The Commissioner erroneously concluded that “school librarians . . . enjoy academic freedom,” NYSED Op. at 8, to expose students to books containing sexually explicit

content including sexual intercourse, anal sex, and rape – even those rated for adults only.

172. The Commissioner also erroneously concluded that a librarian’s right to academic freedom is equal to and/or takes precedence over a school board’s interest and authority to regulate vulgar content. NYSED Op., at 8 (further noting that “school librarians . . . enjoy academic freedom”).

173. Neither the United States Constitution (as demonstrated above) nor the law of the state of New York recognizes any such right to academic freedom. On the contrary, “[b]oards of education have the right to ‘establish and apply’ curricula” – not teachers. *Appeal of Rickson*, N.Y. Ed. Dept. Decision No. 18,211, 2022 NY Educ. Dept. LEXIS 140 at \*7-8 (November 22, 2022).

174. While the board of education’s selection of curriculum must be balanced against teachers’ right to academic freedom, see *Matter of Malvern Union Free Sch. Dist. v. Sobol*, 181 A.D.2d 371 (N.Y. App. Div. 1992), the right to academic freedom is not absolute. Teachers must first demonstrate that the instructional material (1) has educational value; (2) is relevant to the curriculum; and (3) is “suitable to the age and maturity of the students.” *Appeal of Rickson*, 2022 NY Educ. Dept. LEXIS 140 at \*8.

175. The Commissioner erred in concluding that the law protects the right of librarians to, and even necessities that, school officials include sexually explicit materials in school libraries in the name of celebrating “diverse viewpoints.” *Id.* at 8 (arguing that “the vocation of a librarian . . . requires the commitment to freedom of speech and the celebration of diverse viewpoints unlike that found in any other profession”) (citing unpublished opinion).

**WHEREFORE**, it is respectfully requested that the Commissioner grant this Petition in all respects and issue an order to:



[REDACTED]

Nathan J. Moelker\*

[REDACTED]

Jeffrey Ballabon

[REDACTED]

*\*Pro Hac Vice Motions Pending*