

**INTHEUNITEDSTATESDISTRICTCOURT  
FORTHEWESTERNDISTRICTOFARKANSAS  
FORTSMITHDIVISION**

BILLYRAYCOUNTS,	)	
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LibraryCommitteemember,	)	
andMARYNELLCOUNTS,	)	CaseNo.02 -2155
bothasp arentsofDAKOTACOUNTS,	)	
	)	
Plaintiffs	)	
	)	
-vs-	)	
	)	
CEDARVILLESCHOOLDISTRICT,	)	
	)	
Defendant	)	

**BRIEFOF AMICICURIAE**  
**AMERICANBOOKSELLERSFOUNDATIONFORFREEEXPRESSION,  
AMERICANSUNITEDFORSEPARA TIONOFCHURCHANDSTATE,THE  
ASSOCIATIONOFAMERICANPUBLISHERS,THEASSOCIATIONOF  
BOOKSELLERSFORCHILDREN, JUDYBLUME, THECENTERFORFIRST  
AMENDMENTRIGHTS,INC.,CHILDREN’SBOOKCOUNCIL,INC.,FEMINISTS  
FORFREEEXPRESSION,FREEDOMTOREADFOUNDATION ,T HENATIONAL  
COALITIONAGAINSTCE NSORSHIP, PEACEFIRE, PENAMERICANCENTER,  
PEOPLEFORTHEAMERI CANWAYFOUNDATION, STUDENTPRESSLAW  
CENTER, WASHINGTONAREALAWY ERSFORTHEARTS  
INSUPPORTOFP LAINTIFFS’MOTIONFORSUMMARYJUDGMENT**

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**INTERESTOF AMICICURIAE**

Amici,throughcounsel,respectfullysubmitthisbriefinsupportofplaintiffsBillyRay  
Counts,MaryNellCounts,andDakotaCounts(“plaintiffs”). Amici,authors,booksellers,  
librarians,publishers,andothergroupsdedicatedtothepreservat ionoffreeandopenexpression,  
areprofoundlyconcernedbytheCedarvilleSchoolDistrict’seffortstocensorJ.K.Rowling’s  
HarryPotter series.Caseslikethisone,involvingthecensorshipofacriticallyacclaimedbook

credited with motivating thousands of children to read, are particularly egregious and of acute concern to Amici.

Amici urge the Court to issue a permanent injunction to prevent this ongoing violation of the First Amendment, a violation that has caused irreparable harm to the plaintiff and to freedom of expression generally.

Amicus THE AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION (“ABFFE”) was founded in 1990 by the American Booksellers Association, the leading association of general interest bookstores in the United States. ABFFE strives to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship, and to promote and protect the free expression of ideas, particularly the freedom to choose reading materials.

Amicus AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE (“Americans United”) is a national, nonsectarian public interest organization based in Washington, D.C. that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or amicus in many of the leading church-state cases decided by the U.S. Supreme Court (most recently in Zelman v. Simmons-Harris, 536 U.S. 639 (2002)) and by the U.S. Court of Appeals for the Eighth Circuit (most recently in ACLU v. City of Florissant, 186 F.3d 1095 (8th Cir. 1999)). Americans United is composed of more than 60,000 members nationwide, including thousands within the jurisdiction of this Court. Members of Americans United adhere to various religious faiths, with some holding no religious affiliation. They are united, however, in their commitment to the long-standing American principle of church-state separation.

Amicus THE ASSOCIATION OF AMERICAN PUBLISHERS (“AAP”) is the national trade association of the United States book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Amicus THE ASSOCIATION OF BOOKSELLERS FOR CHILDREN (“ABC”) is a national trade association made up of hundreds of independent booksellers, publishers, authors, illustrators, and librarians. The association offers a support network for professional independent children’s booksellers who share the goal of encouraging quality and service within the children’s book industry. ABC provides specific professional support services and information to the large variety of member booksellers to enable them to achieve their business goals. The Association also works to increase awareness of the importance of children’s literature as a vital path to literacy, pleasure, knowledge, and success.

Amicus JUDY BLUME is an internationally acclaimed author of books both for children and adults, including, among others, Are You There God? It’s Me, Margaret, Blubber, and Summer Sisters. She has won more than ninety awards for her books, which have been translated into twenty languages. Judy Blume is one of the most frequently challenged authors in the United States. She is the editor of Places I Never Meant To Be: Original Stories By Censored Writers, an anthology of writings by censored authors.

Amicus CENTER FOR FIRST AMENDMENT RIGHTS, INC. (“CFAR”), a public educational foundation founded in 1993, is designed to enhance the understanding of and the

appreciation for the First Amendment of the U.S. Constitution and serves primarily the New England states and as a resource for First Amendment issues and information. CFAR from time to time participates in litigation as appropriate and necessary and also is available to mediate First Amendment disputes.

Amicus CHILDREN'S BOOK COUNCIL, INC. ("CBC" or "Council") is the U.S. professional association of publishers and packagers of trade books and related materials for young people. The Council, a nonprofit organization, works closely with educators, librarians, and booksellers to make the reading and enjoyment of children's books an essential part of our national educational and social agenda. Supporting freedom of speech and access to materials for all young people is a cornerstone of CBC policy.

Amicus FEMINISTS FOR FREE EXPRESSION ("FFE") is a national not-for-profit organization of diverse feminist women and men who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, and produce expressive materials free from government intervention. Since 1992 FFE has worked actively to oppose the misapprehension that censorship may sometimes be in the interest of women and others who feel unequally treated by society, believing that the goal of equality is inextricably linked with the values enshrined in our Constitution's free speech clause.

Amicus FREEDOM TO READ FOUNDATION ("FTRF") is a nonprofit membership organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen, to support the rights of librarians to include in their collections and make available to the public any work they may legally acquire, and to set legal precedent for the freedom to read on behalf of all citizens.

Amicus THE NATIONAL COALITION AGAINST CENSORSHIP (“NCAC”) is an alliance of 50 national non-profit organizations, including religious, educational, professional, artistic, labor, and civil rights groups, committed to defending freedom of thought, inquiry, and expression.

Amicus PEACEFIRE was founded in 1996 to support the First Amendment rights of minors, particularly with regard to Internet censorship.

Amicus PEN AMERICAN CENTER (“PEN”) is an organization of over 2,500 novelists, poets, essayists, translators, playwrights, and editors. As part of international PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. American PEN has taken a leading role in attacking rules that limit freedom of expression in this country.

Amicus PEOPLE FOR THE AMERICAN WAY FOUNDATION (“PeopleFor”) is a nonpartisan, education-oriented citizens’ organization established to promote and protect constitutional liberties and civil rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation’s heritage of tolerance, pluralism, and liberty, PeopleFor now has 600,000 members and supporters nationwide. PeopleFor has had a long history of fighting censorship in the public schools and defending the rights of students and others to receive valuable information and explore ideas particularly in a library setting. PeopleFor joins this brief to vindicate these important principles at stake in this case.

Amicus STUDENT PRESS LAW CENTER (the “Center”) is a national, non-profit, non-partisan organization created in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the free expression rights of student journalists. As the only national organization in the country devoted exclusively to defending the

legal rights of the student press, the Center is concerned about any effort to limit the application of the First Amendment in the schools.

Amicus WASHINGTON AREA LAWYERS FOR THE ARTS (“WALA”) is the largest provider of pro bono legal services for arts-related matters in Washington, D.C. and the entire states of Maryland and Virginia. WALA’s individual and institutional clients have a vital interest both in reaching their audiences and in access to the work of other creators unimpeded by government censorship.

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## INTRODUCTION

This action challenges the constitutionality of the removal of Harry Potter and the Sorcerer’s Stone, Harry Potter and the Chamber of Secrets, Harry Potter and the Prisoner of Azkaban, and Harry Potter and the Goblet of Fire, highly acclaimed children’s books (the “books”), from the open shelves of the public school libraries in the Cedarville School District (the “District”). Plaintiffs oppose the District’s unlawful removal of the books and its ongoing denial of student access absent written parental permission.

The books, authored by J.K. Rowling, tell the story of Harry Potter, a young boy who is raised by his stifling aunt and uncle in England until he discovers that he is the son of a great witch and wizard and enrolls in an academy for young witches and wizards. The books have drawn accolades from educators and critics alike, who celebrate the books’ originality, humor, elegant writing, and power to motivate young readers. The books have sold well over 100 million copies and appear on countless recommended book lists for adults as well as children. As an editorial in Christianity Today raved, “Rowling’s series is a ‘Book of Virtues’ with a pre-adolescent funny bone. Amidst the laugh-out-loud scenes are wonderful examples of compassion, loyalty, courage, friendship, and even self-sacrifice.” Why We Like Harry Potter, January 10,

2000, available at <http://www.christianitytoday.com/ct/2000/001/29.37.html>. Booklist magazine, which reviews children's books, called the books "expertly crafted" and the story "utterly captivating." Booklist, May 15, 1999, available at <http://www.ala.org/booklist/v95/youth/my2/57rowlin.html>; id., September 15, 1998, available at <http://www.ala.org/booklist/v95/youth/se2/57rowlin.html>. And commenting on the phenomenal surge in reading among children, former Congresswoman Pat Schroeder, president and CEO of the Association of American Publishers, noted, "[Harry Potter] turns TV - watchers and video - game players into readers right under their parents' noses." Press Release, Pat Schroeder and the Association of American Publishers, A Modest Proposal: Banish Harry Potter? (Jan. 27, 2000). See also, e.g., Turner Expert Report, at 7 -8 (attached at Tab A hereto ).

The Board's decision to censor these excellent books strangles the students' fundamental right to receive information and ideas. The removal of the books from the open library shelves violates the First Amendment to the Constitution, impermissibly restricting students' ability to explore, to learn, and to enjoy a "regime of voluntary inquiry" in their school libraries. Board of Educ., Island Trees Union Free Sch. Dist. v. Pico 457 U.S. 853, 869 (1982) (plurality opinion).

### STATEMENT OF THE CASE

In June 2002, a parent of two children in the Cedarville School District filed a complaint objecting to the presence of Harry Potter and the Sorcerer's Stone in the school library. In her written complaint, the parent argued that the book should be withdrawn from all students because of its central message that "parents/teachers/rules are stupid or something to be ignored. That magic will solve your problems. That there are 'good witches' and 'good magic.'" See Reconsideration Request Form, at question 3 (attached at Tab B hereto). Her statement

continued, “Idon’t believe witchcraft or sorcery needs to be available for study especially in the schools...” Id. at question 8.

As required by the Cedarville School District’s “Selection Procedures for Media Center,” the Library Committee examined the material and voted 15 to 0 to deny the parent’s request for removal of the books. The Cedarville School Board disregarded the decision of the Library Committee, mandating by a vote of 3 to 2 that all the Harry Potter books be removed from the shelves and held in librarians’ offices. The evidence on record unambiguously shows that the Cedarville School Board removed the books on constitutionally impermissible grounds, seeking to squelch the books’ message and to impose religious orthodoxy. In addition, the Board decided that the books would be made available only to students with written parental permission for checkout and removed from the Accelerated Reader list. See School Board Minutes, June 17, 2002 (attached as Tab Chereto).

## **ARGUMENT**

In order to obtain a permanent injunction, a litigant must achieve success on the merits and must demonstrate that irreparable harm will occur if an injunction does not issue. See, e.g., Bank One, N.A. v. Guttau, 190 F.3d 844, 847-48 (8th Cir. 1999). Petitioners Billy Ray, Mary Nell, and Dakota County surely meet that test. The Cedarville School District’s policy banishing all Harry Potter books to an inaccessible location within the library and forbidding students from checking out the books without parental permission violates the plaintiffs’ First Amendment right to receive information and ideas. Pico, 457 U.S. at 867-68. The removal of the books unlawfully burdens fully protected speech solely on the basis of the Board’s disagreement with the perceived viewpoint and message of the books. Id. at 872. These were, ongoing constitutional injury to the plaintiffs outweighs any potential harm to the defendants if the injunction were granted.

**I. THE CEDARVILLE SCHOOL DISTRICT' S REMOVAL OF THE HARRY POTTER BOOKS FROM THE OPEN SHELVES OF THE SCHOOL LIBRARY IMPERMISSIBLY BURDENS PLAINTIFFS' FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION AND IDEAS.**

**A. The First Amendment Right to Receive Information and Ideas Is Vigorously Enforced in the School Library.**

The First Amendment guarantees the right to receive information. Renov. ACLU, 521 U.S. 844, 874 (1997). The Supreme Court has emphasized that minors as well as adults enjoy this right. See, e.g., Pico, 457 U.S. at 867 -68 (holding that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom" and that "students too are beneficiaries of this principle"). "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

Although schools have an inculcative function that allows them some discretion in the management of school affairs, it is well settled that students do not "shed their constitutional rights of freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969). As the Supreme Court has explained, "Boards of Education... have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); see also, e.g., Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027 (9th Cir. 1998) ("[T]he school board's discretion 'in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.'") (quoting Pico, 457 U.S. at 864).

This is particularly true in the context of the school library, which, as the Court held in Pico, is “especially appropriate for the recognition of the First Amendment rights of students.” 457 U.S. at 868. As the Court explained, “[a] school library, no less than any other public library, is ‘a place dedicated to quiet, to knowledge, and to beauty.’” Brown v. Louisiana, 383 U.S. 131, 142 (1966) (opinion of Fortas, J.). Keyishian v. Board of Regents, 385 U.S. 589 (1967), observed that ‘students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.’ The school library is the principal locus of such freedom.” Pico, 457 U.S. at 868–69. Accordingly, the First Amendment rights of students – including the plaintiff here – are “directly and sharply implicated by the removal of books from the shelves of a school library.” Id. at 866. Echoing the teachings of Pico, lower courts consistently apply exacting scrutiny to a school board’s decision to remove books from a school library. See, e.g., Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 190–91 (5th Cir. 1995); Case v. Unified Sch. Dist., 908 F.Supp. 864, 874–76 (D. Kan. 1995).

**B. The District Removed the Harry Potter Books from the Shelves for Unconstitutional Reasons.**

The Cedarville School District may not restrict access to books “simply because they dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’” Pico, 457 U.S. at 872 (citing Barnette, 319 U.S. at 642). As the court held in Minarcin v. Strongsville City School District, 541 F.2d 577, 581 (6th Cir. 1976), “A library . . . is an important privilege created by the state for the benefit of students in the school. That privilege is not subject to being withdrawn by succeeding school boards whose members might desire to ‘winnow’ the library for books the content of which occasioned their displeasure or disapproval.” The constitutionality of a school library book removal thus turns on the motivation of the school officials. “If petitioners intended

by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." Pico, 457 U.S. at 871 (emphasis in original). See also, e.g., Campbell, 64 F.3d at 190 (5th Cir. 1995); Case, 908 F.Supp. at 875 -76. The deposition testimony of the Cedarville Board members makes their unlawful motivations abundantly clear. The decisive factor for each was a desire to restrict access to ideas and views they disliked.

Board member Mark Hodges admitted that he objected to the Harry Potter books and voted to remove them from the school library shelves because they exposed Cedarville students to the religion of witchcraft. Hodges Dep., at 36:8 -10 (attached at Tab D hereto). Board member Jerry Shelly, who also voted to banish the books, stated that books should be removed "if they are related to the occult." Shelly Dep., at 81:22 (attached at Tab E hereto). Later in the deposition he testified, "I don't like it, witchcraft and stuff." Id. at 88 :16-17. Gary Koonce, who cast the third vote in favor of restricting access to the books, stated in his deposition, "it does teach about witchcraft, and I have seen the results of witchcraft." Koonce Dep., at 106:6 -11 (attached at Tab F hereto). He later conceded that the fact that the book exposed children to witchcraft – which he believed is a religion – was one of the decisive factors in his vote to censor the book. Id. at 108:1 -6.

The School Board members also objected to other content presented in the books, first and foremost the message that Harry challenged authority. Koonce testified, "I just thought it had something in it that taught kids how to disrespect people, and how that they could get by with disobeying people." Koonce Dep., at 106 :6-11. Hodges agreed: "That book... actually testifies to the kids that they shouldn't be obeying any teacher. They should not be obeying rules. The teacher doesn't matter. He gets rewarded for doing wrong... That's one basis. The

other basis is witchcraft. The other thing [is that] it's not fiction." Hodges Dep., at 33:9 -18.

Shelly, who had not read the books, noted that "not obeying" was one of his objections to the books. Shelly Dep., at 89:6 -7.

These excerpts illustrate that the Cedarville School District's action is a textbook example of viewpoint-based discrimination. Because three board members perceived that the Harry Potter books—which, for the most part, they had not read—imparted pro-magic and anti-authority views and they disagreed with those messages, the Board imposed significant burdens on students' access to the books. The First Amendment forbids such action.

The record is completely devoid of any evidence that the School Board based its decision on constitutionally justifiable grounds. In Pico, the Court noted that removal of books due to their "pervasive vulgarity" or lack of "educational suitability" might not violate the First Amendment. Pico, 457 U.S. at 871. But as the sworn depositions in this case illustrate, the three board members who voted to ban the books from the open shelves did not allege that the books were pervasively vulgar or educationally unsuitable. In fact, only one of the three board members who voted in favor of the restrictions had actually read Harry Potter and the Sorcerer's Stone in its entirety. Board member Shelly did not read any of the books and Board member Koonce conceded that he had read only snippets of one book. See Shelly Dep., at 92:9; Koonce Dep., at 105:3 -106:3. None of the three decision makers could point to explicit sexual material or profanities contained in any of the books. In fact, it is undisputed that the books contain no vulgarity whatsoever. See Turner Expert Report, at 8.

The Board members' comments on the "educational unsuitability" of the material reflected their disapproval of the ideas presented in the Harry Potter books, not a reasoned conclusion based on the age appropriateness of the material, the accepted selection criteria for children's books. Turner Expert Report, at 2. As in Case, there is nothing in the record to lead

one “to believe that these Board members meant by ‘educational unsuitability’ anything other than their own disagreement with the ideas expressed in the book.” 908 F.Supp. at 875. Board member Shelly’s deposition baldly illustrated this point. He admitted, “If it promoted Christianity, I wouldn’t have an objection to it.” Shelly Dep., at 88:25 – 89:1.

The record in this case clearly provides a “full picture of the reasons why the School Board members constituting the majority voted to remove the book[s],” justifying a summary judgment decision. Campbell, 64 F.3d at 190. The three Cedarville School Board members forming the majority in this case stated completely uniform, almost verbatim, reasons for voting to censor the Harry Potter series. Here, we do not have “nebulous questions of motivation,” but clear statements from decision makers about their intent and reasoning. Honore v. Douglas, 833 F.2d 565, 569 (5th Cir. 1987). Those in controversy clearly stated statements confirm that the board members acted with impermissible motivation.

**C. Removal of A ll J.K.Rowling’s Works from the School Library Shelves Violated the Cedarville School Board’s Own Procedures Governing Removal of Books.**

In addition to the Board members’ impermissible motives in censoring the Harry Potter books, the Board members eschewed their own procedures designed to protect against arbitrary removal of materials. At the request of a concerned parent, the Library Committee read Harry Potter and the Sorcerer’s Stone. Committee members reviewed only that one book for educational suitability and vulgarity, and returned a unanimous verdict that the book should stay on the shelves. Three board members, only one of whom had read any of the Harry Potter books, ignored the recommendation of the expert committee and instead removed all of the Harry Potter books from the shelves, basing their votes on hearsay, innuendo, and assumptions as to the books’ contents.

The official policy of the Cedarville School District states that “the selection of books

and materials shall be guided by the principle expressed in the American Library Association's Library Bill of Rights "(attached at Tab G hereto). Item I of the Library Bill of Rights states, "Materials should not be excluded because of the origin, background, or views of those contributing to their creation." The record indicates that the Cedarville School District removed the remaining Harry Potter books, Harry Potter and the Chamber of Secrets, Harry Potter and the Prisoner of Azkaban, and Harry Potter and the Goblet of Fire, from the shelves based on the views attributed to their author, J.K. Rowling. Hodges testified in his deposition, "Like I said, I study occult. I looked up - I studied J.K. Rowling." Hodges Dep., at 34:1 -2. When asked to comment on the presence or absence of profanity or vulgarity in the books, Hodges stated, "I read the first book. I mean I told you I studied Ms. Rowling... So I do know what the rest of the books were supposedly going to be about." Id. at 39:1 -13. When asked if he was aware of any profanity in the fourth book, Shelly answered, "I have heard," after admitting that he had not read the book. Shelly Dep., at 86:12 -13.

The Cedarville Board of Education's failure to follow its own procedures raises "suspicion that the motivation of the school board was unconstitutional." Case, 908 F. Supp. at 874 (citing Barnette, 319 U.S. at 637). The District removed three Harry Potter books from the open shelves without submitting the books to any review procedure whatsoever. The Board's utter disregard for its own outlined procedures "has the appearance of 'the antithesis of those procedures that might tend to allay suspicions regarding [the School Board's] motivation.'" Campbell, 64 F.3d at 190 (quoting Pico, 457 U.S. at 875). And, as in Campbell, the evidence here indicating that the school board members had not even read the book before voting reinforces the possibility that the action might "be an unconstitutional attempt to 'strangle the free mind at its source.'" Id. (quoting Barnette, 319 U.S. at 637).

**D. The Court Should Be Especially Suspicious of the Cedarville School Board's Action Because the Harry Potter Books Are Not Part of the School Curriculum.**

School boards have substantial latitude to exercise control over curricula and textbooks. That latitude is considerably more limited, however, when a court's review extends "beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway." Pico, 457 U.S. at 869. A school board's decision to remove a book not included in the curriculum "must withstand greater scrutiny within the context of the First Amendment than would a decision involving a curricular matter." Campbell, 64 F.3d at 189. See, e.g., Virgil v. Sch. Bd. of Columbia County, 862 F.2d 1517, 1520 (11th Cir. 1989) ("In matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity"); Case, 908 F.Supp. at 874 ("Although local school boards have broad discretion in the management of school affairs, they must act within fundamental constitutional limits").

The Harry Potter books were not required reading and were not part of any curricular assignment. They represent exactly the kind of material that should be found in a school library, "a storehouse of knowledge" for children in the public schools. Minarcini, 541 F.2d at 581. The school library, "a place where students may freely and voluntarily explore diverse topics," Case, 908 F.Supp. at 875, should certainly include books that have inspired such unprecedented reading among children. These enthusiastic readers are the same children whom might otherwise have blanched at the sight of a 734-page book; Harry Potter gives them confidence as readers.

**E. Removal of Harry Potter from the Open Shelves Impermissibly Burdens Plaintiffs' Right to Information and Ideas.**

It is not significant for constitutional purposes that the School Board removed the books from the open shelves rather than banning them outright. United States v. Playboy Entm't

Group, Inc., 529 U.S. 803, 812 -13 (2000) (“It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree”); see also, e.g., Turner Broad., Inc. v. FCC, 512 U.S. 622, 642 (1994) (Supreme Court has given the “most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content”); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 809 (1996) (Kennedy, J. concurring in part and dissenting in part) (“[T]he possibility the Government could have imposed more draconian limitations on speech never has justified a lesser abridgement.”); Sund v. City of Wichita Falls, 121 F. Supp. 2d 530, 547 -49 (N.D. Tex. 2000) (although challenged books were “not banned entirely from the library, the burden on Plaintiffs’ First Amendment rights imposed by the [restriction] [we] re nontheless constitutionally objectionable ”) (emphasis in original).

In Sund, the trial court held that the removal of two books from the children’s area to the adult section of the public library violated plaintiffs’ constitutional right to receive information. In the scheme rejected in Sund, a determined child could still find the removed books on the open shelves by browsing the adult section. The step taken by the Cedarville District burdened speech even more egregiously by making it impossible for a child to access the Harry Potter books without adult intervention and assistance.

Removal of the Harry Potter books from the open shelves, placement in the librarian’s office, and limitation of checkout privileges to those with parental permission greatly restricts children’s access to these books. In their depositions, defendants admitted that these policies restrict access to the books and conceded that this was their intention. See Hodges Dep., at 25:18 - 21; Shelly Dep., at 84:21 - 25-85:1-6; Koonce Dep., at 101:15 - 17. Louise Turner, whose expert testimony remains un rebutted in this case, writes in her report, “Any restriction placed upon a child’s book is akin to censorship or banning of the book.” Turner Expert Report, at 5. She

notes that “children are more likely to be drawn to books that ‘catch the eye’ or can be seen from browsing the shelves.” Id. at 4 (citing Children’s Library Services Handbook, at 15).

For purposes of the First Amendment right to access information, the burdens imposed by the Cedarville School District are more than sufficient to establish a constitutional violation.

## **II. THE LOSS OF PLAINTIFFS’ CONSTITUTIONAL RIGHT TO RECEIVE INFORMATION AND IDEAS CAUSES IRREPARABLE HARM.**

It is undisputed that the loss of “First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury.” Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996) (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)). The Cedarville students undoubtedly will suffer irreparable harm unless this Court grants relief.

### **CONCLUSION**

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Barnette, 319 U.S. at 642. The defendants’ removal of the Harry Potter books from the Cedarville School District’s public school libraries’ shelves contravenes this constitutional axiom and should therefore be permanently enjoined.

Respectfully submitted,

By\_

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Dated: February 28, 2003

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