UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
NORTHERN DIVISION

A.W. and C.W., by and through their mother Tina Weber, individually and on behalf of others similarly situated,	)	Case No. 1:12-cv-242 EJF
Plaintiffs,	)	
v.	)	MOTION FOR CLASS CERTIFICATION AND SUPPORTING MEMORANDUM OF LAW
DAVIS SCHOOL DISTRICT,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND SUPPORTING MEMORANCUM OF LAW

Pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2), plaintiffs A.W. and C.W., by and through their mother, Tina Weber, ask this Court to certify a class of plaintiffs as follows: all current and future students in the elementary schools where Davis School District (the "District") removed *In Our Mothers' House* from library shelves and restricted access to the book (the "proposed class"). Federal courts routinely grant class certification in cases challenging the restriction of access to library materials in order to provide classwide relief to all students affected by the unconstitutional restrictions. *See, e.g.*, *Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn.*, 670 F.2d 771 (8th Cir. 1982); *Salvail v. Nashua Bd. of Ed.*, 469 F. Supp. 1269 (D.N.H. 1979); *Minarcini v. Strongsville City Sch. Dist.*, 384 F. Supp. 698 (N.D. Ohio 1974), *aff'd in part and rev'd in part*, 541 F.2d 577 (6th Cir. 1976) (affirming class certification, reversing on other grounds). For the following reasons, plaintiffs' motion for class certification should be granted in this case as well.

STATEMENT OF PRECISE RELIEF SOUGHT AND GROUNDS FOR RELIEF

Pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2), plaintiffs ask this Court to certify a class of current and future students in the elementary schools where Davis School District removed *In Our Mothers' House* from library shelves and restricted access to the book. On behalf of themselves and the proposed class, plaintiffs seek the following injunctive and declaratory relief:

> A. A permanent injunction requiring the District to return copies of *In Our Mothers' House* to the elementary school library shelves and requiring the District to allow students to access the book on the same terms and conditions as other books in the library at a comparable reading level;
>
> B. A permanent injunction prohibiting the District from removing or restricting access to additional books in the school libraries based on a purported concern that the library books contain "homosexual themes" or "advocacy of homosexuality";
>
> C. A declaratory judgment finding that the District's actions violate Plaintiffs' and the Class's First Amendment rights under the United States Constitution, as applied to the states through the Fourteenth Amendment;
>
> D. A declaration that the District may not rely upon U.C.A. 1953 § 53A-13-101 to remove or restrict access to library books that purportedly contain "homosexual themes" or "advocacy of homosexuality"

(Compl. ¶¶ A-D.) Class certification pursuant to Federal Rule of Procedure 23 is appropriate because (1) the class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately protect the interests of the class, *see* Fed. R. Civ. P. 23(a)(1)-(4), and because (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole, *see* Fed. R. Civ. P. 23(b)(2).

BACKGROUND AND STATEMENT OF FACTS[1]

In Our Mothers' House, by Patricia Polacco, is a children's book about three adopted children and their two mothers. (Compl. ¶¶ 1, 15.) The librarians for four elementary schools in the District purchased copies of In Our Mothers' House for their library collections. Those elementary schools are: Parkside Elementary School, Snow Horse Elementary School, South Weber Elementary School, and Windridge Elementary School. (Compl. ¶ 40.) According to the District's publicly available enrollment figures, a total of approximately 3,000 students are currently enrolled in these four elementary schools. *See* Davis County School District, *2012 District Enrollment Counts Report*, attached as Exhibit A. *See also* (Compl. ¶ 78) (factual allegations about number of students in each of the four elementary schools).

In response to complaints from a subset of parents that the book "normalizes a lifestyle we don't agree with," the District has instructed its elementary school librarians to remove all copies of *In Our Mothers' House* from the library shelves and place the book behind a counter where students must have written parental permission to read it. (Compl. ¶¶ 1, 40-59.) The District does not dispute that it restricted access to *In Our Mothers' House* because of the ideas the book contains; indeed, the District's primary justification for removing the book from the shelves is that, by telling the story of children raised by same-sex parents, the book constitutes "advocacy of homosexuality," in purported violation of Utah's sex-education laws. (Compl. ¶¶ 1, 54, 61, 65.)

Plaintiffs A.W. and C.W. are students at an elementary school in the Davis School District (the District) where *In Our Mothers' House* was removed from the library shelves.

[1] "[P]recedent is clear that at the class certification stage a district court must generally accept the substantive, non-conclusory allegations of the complaint as true." *Vallario v. Vandehey*, 554 F.3d 1259, 1265 (10th Cir. 2009).

(Compl. ¶ 4.) By and through their mother, Tina Weber, plaintiffs have filed a class action complaint alleging that the restrictions placed on *In Our Mothers' House* violate their First Amendment rights to access ideas in a school library without viewpoint discrimination. Plaintiffs seek nominal damages and prospective relief under 42 U.S.C. § 1983, including an injunction requiring the District to return copies of *In Our Mothers' House* to elementary school library shelves and make them available to students on the same terms as other books at a comparable reading level. (Compl. ¶¶ A-E.)

Because the District's decision to restrict access to *In Our Mothers' House* applies generally and on equal terms to all students enrolled in the four elementary schools where *In Our Mothers' House* was previously available, plaintiffs seek to bring this action on behalf of a class of current and future students in District elementary schools where *In Our Mothers' House* was removed from the shelves Plaintiffs are represented by counsel at the American Civil Liberties Union and the ACLU of Utah, who are experienced in civil rights and class-action litigation and who will adequately represent the interests of the proposed class. *See, e.g.*, *Parents, Families, & Friends of Lesbians & Gays, Inc. ("PFLAG") v. Camdenton R-III Sch. Dist.*, No. 2:11–CV–04212 (W.D. Mo.) (plaintiff and proposed class in school library censorship case represented by Joshua Block and Leslie Cooper from ACLU); *Collins v. United States*, No. 10–778C (Ct. Cl.) (plaintiff and certified class represented by Joshua Block and Leslie Cooper from ACLU); and *Utah Coalition of La Raza v. Herbert*, 2:11-cv-401 (D. Utah) (class action suit brought by ACLU of Utah and others challenging Utah immigration statute).

ARGUMENT AND SUPPORTING AUTHORITY

I. All Current and Future Students Attending Elementary Schools Where *In Our Mothers' House* Was Restricted Have Standing to Challenge the Restrictions.

Under *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982), the First Amendment does not require public schools to purchase particular books for their libraries, but it does prohibit schools from removing books that are already on the library shelves based on the viewpoints the books contain. *Id.* at 871-72 (plurality); *see Cummins v. Campbell*, 44 F.3d 847, 853 n.4 (10th Cir. 1994); *Parents, Families, & Friends of Lesbians & Gays, Inc. ("PFLAG") v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 901 (W.D. Mo. 2012). The injury caused by unconstitutional book restrictions is not merely the limitation on access to the book, but also the stigmatizing effect of the restriction, which can chill students from seeking to access the book in the first place. *See PFLAG*, 853 F. Supp. 2d at 897; *Pratt*, 670 F.2d at 779; *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 999 (W.D. Ark. 2003).

Students have standing to challenge unconstitutional restrictions on school library materials if they are enrolled at a school where library materials were restricted. *See Case v. Unified Sch. Dist. No. 233, Johnson County, Kan.*, 157 F.3d 1243, 1251 (10th Cir. 1998) (noting, in decision affirming award of attorney's fees in library book censorship case, that "the plaintiffs with standing were intuitively those who use a school library and, thus, could allege an injury: students and teachers"). It does not matter whether the student ever sought access to the book before it was restricted, and it does not matter whether the student has parental permission and can therefore access the book despite the restrictions that have been put in place. *See Counts*, 295 F. Supp. 2d at 999-1000 (finding standing to challenge requirement that students have parental permission to check out *Harry Potter* books even though plaintiff had parental

permission); *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 867 (D. Kan. 1995) (finding standing even though "[t]he evidence does not show that anyone checked out or read the District's copies of [the book] prior to the dispute involved in this case"); *Right To Read Def. Comm. of Chelsea v. Sch. Comm. of City of Chelsea*, 454 F. Supp. 703, 715 n.19 (D. Mass. 1978) (finding First Amendment violation even though defendant's argued that "plaintiffs did not prove that a single living person has ever exhibited an interest in reading this material and has been prevented from doing so by the actions of the Chelsea School Committee").

Because the constitutional violation does not depend on the specific factual circumstances of individual students, courts have repeatedly certified class actions in book censorship cases on behalf of all students at the institution where the censorship or restriction occurred. *See, e.g.*, *Pratt*, 670 F.2d at 771, 773 (complaint brought on behalf of three students and all those similarly situated); *Salvail*, 469 F. Supp. at 1272 (class of all students at Nashua High School); *Minarcini*, 384 F. Supp. at 707-08 (class of "all students enrolled in the schools operated and maintained by the Strongsville City School District"). As discussed below, there is no reason why class certification should not be granted in this case as well.

II. The Proposed Class Satisfies All Rule 23(a) Requirements for Class Certification.

Federal Rule of Civil Procedure Rule 23(a) establishes four criteria that must be satisfied when a plaintiff seeks class certification:

> (1) numerosity (a "class [so large] that joinder of all members is impracticable");
> (2) commonality ("questions of law or fact common to the class");
> (3) typicality (named parties' claims or defenses "are typical ... of the class"); and
> (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997); *see also Shook v. El Paso County*, 386 F.3d 963, 971 (10th Cir. 2004). The proposed class of students meets all four requirements in this case.

A. The Number of Current and Future Students in the Proposed Class Satisfies the Numerosity Requirement Under Rule 23(a)(1).

There is "no set formula" to determine whether Rule 23(a)(1)'s numerosity requirement is satisfied." *Rex v. Owens ex rel. Okla.*, 585 F.2d 432, 436 (10th Cir.1978). Rather, class certification should be granted where the number of class members is large enough to make joinder "impracticable." Fed. R. Civ. P. 23(a)(1). *See also* 1 Newberg on Class Actions § 3:14 (5th ed.) (noting that plaintiffs need only to demonstrate that it would be "extremely difficult" to join all class members); *Pueblo of Zuni v. United States*, 243 F.R.D. 436, 444 (D.N.M. 2007) (stating that party seeking class certification "need not show that joinder of all members is impossible, only that it is impracticable" and adding that plaintiffs need not "identify the exact number of class members involved").

The number of current and future students in the proposed class easily satisfies the numerosity requirement. *Cf. Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982) (a class of current and future students in a single school satisfied the numerosity requirement). Approximately 3,000 students are currently enrolled in the four elementary schools where the District removed *In Our Mothers' House* from library shelves. *See* Davis County School District, *2012 District Enrollment Counts Report*, attached as Exhibit 1. It would certainly be "impracticable" to join all 3,000 students as separate plaintiffs in this litigation.

Joinder is also impracticable here because the proposed class includes future students who will enroll in the four elementary schools and become subject to the book restriction. As a general rule, "[n]umerosity is met where . . . the class includes individuals who will become

members in the future. As members in futuro, they are necessarily unidentifiable, and therefore joinder is clearly impracticable." *Skinner v. Uphoff*, 209 F.R.D. 484, 488 (D. Wyo. 2002). *See also Phillips v. Joint Legislative Comm.,* 637 F.2d 1014, 1022 (5th Cir. 1981) (holding numerosity requirement clearly met when "the alleged class includes future and deterred applicants, necessarily unidentifiable . . . . joinder of unknown individuals is certainly impracticable") (citation and internal quotation marks omitted).

Because the class contains 3,000 current students and an unidentifiable number of future students, the proposed class satisfies the numerosity requirement of Rule 23(a)(1).

B. The Proposed Class Shares Common Questions of Law and Fact Under Rule 23(a)(2).

The proposed class also shares common questions of fact and law, satisfying Rule 23(a)(2)'s requirement of at least "a single question of law or fact common to the entire class." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010) (citation omitted); *see also JB ex rel. Hart v. Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999). "[E]very member of the class need not be in a situation identical to that of the named plaintiff" to satisfy commonality. *Stricklin*, 594 F.3d at 1195.

Without question, the proposed class shares a common question of law: Did the District's decision to restrict access to *In Our Mothers' House* violate the First Amendment? The class also shares common questions of fact, including: the District's motivation and justification for restricting access to the book and the objective burdens that the District's restriction places on students' ability to access the book.

These common questions of fact and law are more than sufficient to satisfy the commonality requirement of Rule 23(a)(2).

C. Plaintiffs' Claims Are Typical of the Claims of the Class.

Plaintiffs' claims are typical of the proposed class's claims because their claims are all based on the same legal theory and set of facts. For all members of the class, the claim identical: that the District's restriction of *In Our Mothers' House* is a violation of the students' First Amendment rights. *See Milonas*, 691 F.2d at 938 (finding typicality where the claims of the named plaintiffs and the class were based on the same legal theory that defendants' practices violated class members' constitutional rights).

Defendant may argue that plaintiffs' claims are not typical of the class because the plaintiffs obtained parental permission to the book while other students have not done so. Where, however, "the claims of the plaintiffs and the other class members are based on the same legal or remedial theory," factual differences between class members do not defeat typicality. *Penn v. San Juan Hosp., Inc.*, 528 F.2d 11814, 1189 (10th Cir. 1975); *see also Anderson v. Albuquerque*, 690 F.2d 796, 800 (10th Cir. 1982). Here, the constitutionality of the District's actions turns on the validity of the District's motivations and justifications. As discussed above in connection with the standing of class members, the individual circumstances of students, including whether they have accessed or want to access the book, are not relevant in resolving this issue. Typicality is therefore met in this case. [2]

D. Plaintiffs Are Adequate Class Representatives Under Fed. R. Civ. P. 23(a)(4).

In order to satisfy the adequacy requirements of Rule 23(a)(4), "[a] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prods.*, 521 U.S. at 625-26 (internal quotation marks and citation omitted).

[2] As discussed below in the context of the "adequacy" requirement, plaintiffs do not have to show that all other class members oppose the restrictions placed on *In Our Mothers' House* because the question for class certification is whether all the class members suffered a common injury, not whether all the class members wish to have that injury remedied.

As students in one of the elementary schools where copies of *In Our Mothers' House* were removed from the shelves, Plaintiffs easily meet this standard. Plaintiffs' interests are aligned with the rest of class members because all current and future students at elementary schools where copies of *In Our Mother's House* were removed suffered the same constitutional injury.

To be sure, some students may not oppose the District's decision to restrict access to the book. When plaintiffs are otherwise adequate representatives to vindicate constitutional claims, however, class certification should still be granted even "if some members of the class might prefer not to have violations of their rights remedied." *Lanner v. Wimmer*, 662 F.2d 1349, 1357 (10th Cir. 1981) (upholding class certification in First Amendment challenge to school policy even though some parents supported time-release program); *see also Salvail.*, 469 F. Supp. at 1272 (certifying a class of students to challenge school board's removal of a magazine from a school library, despite publicized disagreement about whether the magazine should be removed). As the district court explained when certifying a class of students challenging the book restrictions in *Minarcini*:

> Intervenors contend that plaintiffs' class designation is improper pursuant to Rule 23 for the reason that a majority of Strongsville students and parents thereof are not in sympathy with plaintiffs' views, and are, therefore, not 'similarly situated'. Intervenor's argument is without merit. All members of the purported class are affected by actions taken by the Board of Education of the Strongsville City School District. The Court need not speculate how many students therein may need or desire to invoke First Amendment protection against such action; the ultimate fact that each student is subject thereto is sufficient.

Minarcini, 384 F. Supp. at 707-08. The same is true here. All members of the proposed class have been subjected to the same unconstitutional restrictions on accessing *In Our Mothers' House* even if all members of the class do not necessarily seek to vindicate their First Amendment rights that protect them from these unconstitutional restrictions.

Plaintiffs' counsel has extensive experience in class actions and First Amendment issues, as set out in plaintiffs' motion, and there are no conflicts of interest between plaintiffs and the proposed class members. Plaintiffs and their counsel therefore satisfy Rule 23(a)(4)'s requirement that the named plaintiff will adequately represent the proposed class.

III. The Proposed Class Satisfies All Rule 23(b)(2) Requirements.

Under Rule 23(b)(2), if a proposed class satisfies the prerequisites for Rule 23(a), the Court should grant class certification for injunctive and declaratory relief where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate for the class as a whole." Fed. R. Civ. P. 23(b)(2). Because the proposed class meets all of the Rule 23(b)(2), requirements, class certification should be granted.

a. The Proposed Class Is Cohesive.

The Tenth Circuit has distilled Rule 23(b)(2) into a requirement that a proposed class must be "cohesive."

> Rule 23(b)(2) imposes two independent, but related requirements upon those seeking class certification. First, plaintiffs must demonstrate defendants' actions or inactions are based on grounds generally applicable to all class members. Second, plaintiffs must also establish the injunctive relief they have requested is appropriate for the class as a whole. Together these requirements demand cohesiveness among class members with respect to their injuries.

Stricklin, 594 F.3d at 1200 (internal quotation marks, citations, and ellipses omitted).

> This cohesiveness, in turn, has two elements. First, plaintiffs must illustrate the class is sufficiently cohesive that any classwide injunctive relief satisfies Rule 65(d)'s requirement that every injunction "state its terms specifically; and describe in reasonable detail the act or acts restrained or required." Second, cohesiveness also requires that class members' injuries are sufficiently similar that they can be remedied in a single injunction without differentiating between class members.

Id. (internal quotation marks, citations, and ellipses omitted). The proposed class easily satisfies the requirements of cohesiveness.

The proposed class is cohesive because restricting *In Our Mothers' House* and other books containing "homosexual themes" affects each member of the proposed class by making it more difficult to access such books and by placing a stigma on the books and on students who read them. In addition, classwide injunctive relief would describe in reasonable detail the act or acts restrained or required and would not require the court to differentiate between class members. Plaintiffs seek:

A. A permanent injunction requiring the District to return copies of *In Our Mothers' House* to the elementary school library shelves and requiring the District to allow students to access the book on the same terms and conditions as other books in the library at a comparable reading level;

B. A permanent injunction prohibiting the District from removing or restricting access to additional books in the school libraries based on a purported concern that the library books contain "homosexual themes" or "advocacy of homosexuality";

C. A declaratory judgment finding that the District's actions violate Plaintiffs' and the Class's First Amendment rights under the United States Constitution, as applied to the states through the Fourteenth Amendment;

D. A declaration that the District may not rely upon U.C.A. 1953 § 53A-13-101 to remove or restrict access to library books that purportedly contain "homosexual themes" or "advocacy of homosexuality"

(Compl. ¶¶ A-D.) This injunctive and declaratory relief would address the entire proposed class's injuries without any need for differentiation between class members.

As demonstrated by other cases in which courts granted classwide injunctive and declaratory relief to remedy unconstitutional library book restrictions, *see, e.g.*, *Salvail*, 469 F. Supp. at 1272, the proposed class in sufficiently cohesive to provide injunctive and declaratory relief under Rule 23(b).

b. Class Certification Is Necessary to Prevent Mootness.

Although Rule 23 does not explicitly require that class certification must be "necessary" in order to grant meaningful relief, some courts have declined to certify a class where the plaintiff could obtain classwide relief without certification. *See Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Social & Rehabilitation Servs.*, 31 F.3d 1536, 1548 (10th Cir. 1994) (recognizing a line of authority indicating that class certification is sometimes unnecessary if all the class members will benefit from an injunction issued on behalf of the named plaintiff). *But See* 2 Newberg on Class Actions § 4:35 (criticizing courts' addition of a "necessity" requirement and arguing that such a requirement is inconsistent with the underlying premise of Rule 23(b)(2)). Plaintiffs contend that Rule 23(b) does not impose a "necessity" requirement. But even if a "necessity" requirement did exist, class certification would still be necessary in this case to avoid the possibility of mootness.

Federal courts – including the Supreme Court – have recognized that class certification is necessary in student-rights litigation to avoid the possibility that claims will become moot in the event that a plaintiff graduates. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003) (noting that "class-action treatment was particularly important in this case because 'the claims of the individual students run the risk of becoming moot'"); *Bd. of Sch. Com'rs of City of Indianapolis v. Jacobs*, 420 U.S. 128, 129 (1975) (holding that unless the action had been "duly certified" as a class action, the case against a school system was moot once the named plaintiffs had graduated); *Clay v. Pelle,* No. 10-CV-01840, 2011 WL 843920, at *1, *7 (D. Colo. Mar. 8, 2011) (holding that class certification for prisoners challenging a jail policy was appropriate in light of the danger of mootness from prisoners being transferred or released from the jail). Because of the potential risk of dismissal for mootness – particularly in light of the frequency of students graduating or relocating from schools – class certification is essential to ensure that the claims do

not become moot. Moreover, because the District's unconstitutional restrictions have inflicted only nominal damages and because only an injunction can restore access to the restricted library books for all class members, classwide injunctive and declaratory relief is the only remedy capable of fully protecting the rights of current and future students.

Because class certification is necessary to protect against mootness and provide meaningful classwide relief, certification should be granted even if a "necessity" requirement exists under Rule 23(b).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court grant their motion for class certification.

Dated: December 10, 2012

Respectfully Submitted,

/s/ John Mejia

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