

Joshua Block*
Leslie Cooper*
ACLU Foundation, Inc
125 Broad Street, Floor 18
New York, New York 10004
Telephone: (212) 549-2600
Facsimile: (212) 549-2650
jblock@aclu.org
lcooper@aclu.org

John Mejia (USB No. 13965)
Leah Farrell (USB No. 13696)
ACLU of Utah Foundation, Inc.
355 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 521-9862
Facsimile: (801) 532-2850
jmejia@acluutah.org
lfarrell@acluutah.org

*Application for admission
pro hac vice to follow

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,

Plaintiffs,

v.

DAVIS SCHOOL DISTRICT,

Defendant.

)
) Case No. 1:12-cv-242 EJF
)
)
) PROPOSED CLASS ACTION
) COMPLAINT FOR
) DECLARATORY JUDGMENT,
) INJUNCTIVE RELIEF, AND
) NOMINAL DAMAGES
)
)

PROPOSED CLASS ACTION COMPLAINT

1. *In Our Mothers' House*, by Patricia Polacco, is a children's book about three adopted children and their two mothers. In response to complaints from a subset of parents that the book "normalizes a lifestyle we don't agree with," Davis School District (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. 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.

2. Over 30 years ago, the Supreme Court held that school officials may not remove books from school library shelves because they or their constituents disagree with the ideas those books contain. The District can respect the wishes of parents who disagree with *In Our Mothers’ House* by allowing parents to place limits on their own children’s ability to check out particular books. But the District cannot constitutionally use the personal views of some parents to restrict access to books for the entire school community. By restricting access to *In Our Mothers’ House* based on the fact that the book depicts a family with same-sex parents, the District has placed a discriminatory burden on students’ ability to access fully protected speech. Even worse, restricting access to *In Our Mothers’ House* and segregating it from the rest of the library collection places an unconstitutional stigma on the ideas contained in the book and the students who wish to read it.

3. Individually and on behalf of a class of those similarly situated, Plaintiffs complain against Defendant as follows:

PARTIES

4. Plaintiffs A.W. and C.W. bring their claims by and through their mother, Tina Weber. Plaintiffs are students at one of the elementary schools in Davis School District where *In Our Mothers' House* was previously on the library shelves and available to be checked out without restrictions. Plaintiffs attended that elementary school in the 2011-12 school year and continue to attend the school for the 2012-13 school year.

5. Defendant Davis School District (the "District") is a school district that provides public education to school-aged students within Davis County, Utah. The District is a public school system organized and maintained under the laws of the State of Utah.

6. The Davis School District Board of Education (the "School Board") is an elected body responsible for the educational policy of the District.

7. The School Board has delegated to Superintendent Bryan Bowles the power to enforce the general policies of the School Board as part of the administration of schools in the District.

8. Pursuant to the School Library Media Policies dated June 2011, the School Board has also "delegate[d] authority for the selection of library resources and materials to library media professionals. The secondary library media teacher or elementary library media specialist is, therefore, responsible for the selection and acquisition of all materials for the library media center." (Ex. A at 4.)

9. Pursuant to the School Library Media Policies, the District Library Media Committee is vested with final authority to decide requests by parents to remove or restrict access to library materials. The School Library Media Policies do not provide any mechanism for appealing the committee's decision.

JURISDICTION AND VENUE

10. This Court has federal-question jurisdiction over Plaintiffs' claims arising under the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. Jurisdiction is therefore proper under 28 U.S.C. § 1331 (general federal question jurisdiction) and § 1343 (civil rights actions). This Court has jurisdiction to render the declaratory relief requested under 28 U.S.C. §§ 2201 and 2202.

11. Venue is proper in this district under 28 U.S.C. § 1391 because Defendant resides in this district and the action arose in this district.

FACTUAL ALLEGATIONS

In Our Mothers' House

12. Patricia Polacco is a highly regarded author of children's books. She has received numerous literary awards for her work, including the Sydney Taylor Book Award, the International Reading Association Award, the Society of Children's Book Writers and Illustrators Golden Kite Award for Illustration, three Parent's Choice Honors, the North Dakota Library Association Children's Book Award, the Jo Osborne Award For Humor in Children's Literature, the Missouri Association of School Librarians Show Me Readers Award, the West Virginia Children's Book Award, and the Mid-South Independent Booksellers for Children Humpty Dumpty Award.

13. Polacco's children's books feature an array of families from different races, religions, ethnicities, cultures, and backgrounds, including families who are Jewish, Christian, Asian-American, interracial, and Amish.

14. Polacco wrote *In Our Mothers' House* in 2009. The book is published by Philomel Books, a division of Penguin Young Readers Group.

15. *In Our Mothers' House* tells the story of three adopted children and their two mothers.

16. Polacco was inspired to write *In Our Mothers' House* after sitting in on a student writing class while visiting an elementary school as a guest speaker. As part of the class, students were asked to write an essay on the topic of "My Family" and read their essays aloud. When one of the students who had two same-sex parents stood up to read her essay, the teacher's assistant in the classroom told her: "No, sit down. You don't come from a real family." After witnessing that event, Polacco started writing *In Our Mothers' House*.

17. School Library Journal's review of *In Our Mothers' House* states:

Grade 1–4 —This gem of a book illustrates how love makes a family, even if it's not a traditional one. The narrator, a black girl, describes how her two Caucasian mothers, Marmee and Meema, adopted her, her Asian brother, and her red-headed sister. She tells about the wonderful times they have growing up in Berkeley, CA. With their large extended family and friends, they celebrate Halloween with homemade costumes, build a tree house, organize a neighborhood block party, and host a mother-daughter tea party. The narrator continually reinforces the affectionate feelings among her mothers and siblings, and the illustrations depict numerous scenes of smiling people having a grand time. Most of the neighbors are supportive, except for one woman who tells Marmee and Meema, "I don't appreciate what you two are." Eventually, the children grow up, marry heterosexual spouses, and return home to visit their aged parents with their own children. Is this an idealized vision of how a gay couple can be accepted by their family and community? Absolutely. But the story serves as a model of inclusiveness for children who have same-sex parents, as well as for children who may have questions about a "different" family in their neighborhood. A lovely book that can help youngsters better understand their world.

18. The book's publisher and School Library Journal recommend *In Our Mothers' House* for readers in grades 1 through 4.

Elementary School Libraries in the District

19. Elementary schools in the District serve students in grades K through 6.

20. At the time the events underlying this Complaint occurred, the policies for school libraries in the District, including the policy for removal of library books, were set forth in the School Library Media Policies, dated June 2011 (attached as Ex. A).

21. Until recently, the School Library Media Policies were publicly available on the District's website. After the events underlying this litigation took place, the District removed the School Library Media Policies from the website and posted a message in its place stating: "The Davis District Library Media Policies are undergoing review at this time."

22. In the School Library Media Policies, the District holds itself out as following the principles of intellectual freedom and viewpoint neutrality that have been adopted by the American Library Association and the American Association of School Librarians.

23. The School Library Media Policies state that the District supports several statements from the American Library Association, including: "Library Bill of Rights," "The Freedom to Read," "Libraries: An American Value," and "Access to Resources and Services in the School Library." (Ex. A at 1.) Those statements from the American Library Association include the following principles:

- a. Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval. (Library Bill of Rights, Policy II)
- b. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas. (Library Bill of Rights, Policy IV)

- c. It is in the public interest for publishers and librarians to make available the widest diversity of views and expressions, including those that are unorthodox, unpopular, or considered dangerous by the majority. (The Freedom to Read, Proposition 1)
- d. Publishers, librarians, and booksellers do not need to endorse every idea or presentation they make available. It would conflict with the public interest for them to establish their own political, moral, or aesthetic views as a standard for determining what should be published or circulated. (The Freedom to Read, Proposition 2)
- e. We defend the constitutional rights of all individuals, including children and teenagers, to use the library's resources and services. (Libraries: An American Value)
- f. We value our nation's diversity and strive to reflect that diversity by providing a full spectrum of resources and services to the communities we serve. (Libraries: An American Value)
- g. We celebrate and preserve our democratic society by making available the widest possible range of viewpoints, opinions and ideas, so that all individuals have the opportunity to become lifelong learners—informed, literate, educated, and culturally enriched. (Libraries: An American Value)
- h. The school library media program plays a unique role in promoting intellectual freedom. It serves as a point of voluntary access to information and ideas and as a learning laboratory for students as they acquire critical thinking and problem-solving skills needed in a pluralistic society. Although

the educational level and program of the school necessarily shape the resources and services of a school library media program, the principles of the Library Bill of Rights apply equally to all libraries, including school library media programs. (Access to Resources and Services in the School Library)

- i. Members of the school community involved in the collection development process employ educational criteria to select resources unfettered by their personal, political, social, or religious views. Students and educators served by the school library media program have access to resources and services free of constraints resulting from personal, partisan, or doctrinal disapproval. School library media specialists resist efforts by individuals or groups to define what is appropriate for all students or teachers to read, view, hear, or access via electronic means. (Access to Resources and Services in the School Library)

24. The School Library Media Policies also state that the school librarians should, among other things, “provide equal access to the library media center for all members of the school community,” “offer a variety of materials in formats to enhance curriculum instruction and to provide accurate, authoritative and balanced informational views,” “provide for recreational reading,” and “empower students and teachers with life-long learning skills as outlined in *Standards for the 21st-Century Learner*, AASL, 20007.” (Ex. A at 3-4.)

25. *Standards for the 21st-Century Learner* is published by the American Association of School Librarians. *Standards for the 21st-Century Learner* sets forth several learning skills for students, including:

- a. Solicit and respect diverse perspectives while searching for information, collaborating with others, and participating as a member of the community. (Standards for the 21st-Century Learner § 3.3.1)
- b. Respect the different interests and experiences of others and seek a variety of viewpoints. (Standards for the 21st-Century Learner § 3.3.2)
- c. Use knowledge and information skills and dispositions to engage in public conversation and debate about issues of public concern. (Standards for the 21st-Century Learner § 3.3.3)
- d. Create products that apply to authentic real-world contexts. (Standards for the 21st-Century Learner § 3.3.4)
- e. Respect the principles of intellectual freedom. (Standards for the 21st-Century Learner § 3.3.7)
- f. Read widely and fluidly to make connections with self, the world, and previous reading. (Standards for the 21st-Century Learner § 4.1.2)
- g. Maintain openness to new ideas by considering divergent opinions, changing opinions or conclusions when evidence supports the change, and seeking information about new ideas encountered through academic or personal experiences. (Standards for the 21st-Century Learner § 4.2.3)
- h. Show an appreciation for literature by electing to read for pleasure and expressing an interest in various literary genres. (Standards for the 21st-Century Learner § 4.2.4)
- i. Recognize the limits of own personal knowledge. (Standards for the 21st-Century Learner § 4.4.2)

- j. Interpret new information based on cultural and social context. (Standards for the 21st-Century Learner § 4.4.4)
- k. Evaluate own ability to select materials that are engaging and appropriate for personal interests and needs. (Standards for the 21st-Century Learner § 4.4.6)

26. The collections of elementary school libraries in the District contain a wide array of books dealing with family-life issues, including books about adoption, divorce, remarriage, death, and the birth of brothers and sisters.

27. The collections of elementary school libraries in the District contain a wide array of books about diverse religious and cultural beliefs, including children's books about the stories and customs of families that are Christian, Jewish, Muslim, and Hindu.

28. The collections of elementary school libraries in the District contain many of Polacco's other children's books, including: *Appelmando's Dreams*; *The Art of Miss Chew*; *Aunt Chip and the Great Triple Creek Dam Affair*; *Babushka Baba Yaga*; *Babushka's Doll*; *Babushka's Mother Goose*; *The Bee Tree*; *Betty Doll*; *Boat Ride With Lillian Two Blossoms*; *The Butterfly*; *Chicken Sunday*; *Christmas Tapestry*; *Emma Kate*; *Firetalking*; *For the Love of Autumn*; *Ginger and Petunia*; *The Graves Family*; *The Graves Family Goes Camping*; *I Can Hear the Sun*; *In Enzo's Splendid Gardens*; *January's Sparrow*; *John Phillip Duck*; *Junkyard Wonders*; *Just Plain Fancy*; *The Keeping Quilt*; *The Lemonade Club*; *Luba and the Wren*; *Meteor!*; *Mommies Say Shhh!*; *Mr. Lincoln's Way*; *Mrs. Katz and Tush*; *Mrs. Mack*; *My Rotten Redhead Older Brother*; *Oh, Look!*; *My Ol' Man*; *An Orange for Frankie*; *Picnic at Mudsock Meadow*; *Pink and Say*; *Rechenka's Eggs*; *Rotten Richie and the Ultimate Dare*; *Some Birthday!*; *Someone for Mr. Sussman*; *Something About Hensley's*; *Thank you, Mr. Falker*; *Thunder Cake*;

The Trees of the Dancing Goats; Tikvah Means Hope; Uncle Vova's Tree; Welcome Comfort; and When Lightning Comes in a Jar.

Procedure for Removing or Restricting Library Books

29. According to the School Library Media Policies, the District's Board of Education has "delegate[d] authority for the selection of library resources and materials to library media professionals. The secondary library media teacher or elementary library media specialist is, therefore, responsible for the selection and acquisition of all materials for the library media center." (Ex. A at 4.)

30. According to the School Library Media Policies, the Library Media Steering Committee is a standing committee that exists to promote library media programs, provide professional development, recommend policies and procedures, and address library issues. (Ex. A at 2.) The Library Media Steering Committee meets on a monthly basis and consists of librarians from elementary and secondary schools. The Library Media Steering Committee does *not* play any role in deciding whether a challenged book should be removed or restricted.

31. Under the School Library Media Policies, in order to trigger the process for removing or restricting a book, a complainant must submit a completed Request for Reconsideration of Materials Form. (Ex. A at 5.)

32. The School Library Media Policies provide that when a school library book is challenged, the complaint is initially reviewed by a School Library Media Committee. Each school in the District has a school library media committee, which is chaired by the school librarian, and may include an administrator, department chair, teacher, parent representative, or student representative. (Ex. A at 2.)

33. If a complainant wishes to appeal the decision of the School Library Media Committee, the appeal is heard by the District Library Media Committee, which is chaired by the district library media supervisor and may include a superintendent, school board member, parent representative, curriculum development director, and student representative. (Ex. A at 2.)

34. There is no standing District Library Media Committee; members are selected on an ad hoc basis. Until the events underlying this litigation occurred, the District had not convened a District Library Media Committee to review a book challenge in many years.

35. The decision of the District Library Media Committee on whether to remove or restrict access to a book is the final decision on the issue and may not be reconsidered for three years. The School Library Media Policies do not provide any further mechanism for review. (Ex. A at 6.)

36. The District's policy for reviewing complaints about library books is separate and distinct from the District's policy for reviewing complaints about "instructional materials," which is set forth in Policy 4I-200.

37. Challenges to instructional materials are (1) initially heard by the teacher using the materials and then appealed to (2) a conference with the teacher, department head, and a school administrator, (3) the department for the relevant subject matter, (4) a district committee chaired, and (5) the Assistant Superintendent for Curriculum.

38. Policy 4I-200 defines "instructional materials" as "systematically arranged text materials, in harmony with the Core framework and required by students or teachers or both as principal sources of study and which cover any portion of the course."

39. Library books are not "instructional materials" as defined by Policy 4I-200.

Removal of *In Our Mothers' House* from the Library Shelves

40. 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.

41. At least one of those school librarians purchased *In Our Mothers' House* because a student at the school has same-sex parents and the librarian wanted the student to feel included and welcome.

42. At some point during the 2011-12 school year, a parent with a kindergartener at Windridge Elementary School complained that her child had come home from school with a copy of *In Our Mothers' House*. The parent filled out a form to request that the school remove the book from the library shelves.

43. On January 27, 2012, the Windridge School Library Media Committee met to consider the parent's request. The minutes of the meeting are attached as Exhibit B. The committee consisted of the school media specialist/librarian, the district library media supervisor, the Windridge Elementary School Principal, two teachers at Windridge, and a parent representative. At the meeting, the Windridge School Library Media Committee decided to move the book from the "Easy Reading" section to the "Fiction" section, which is designed for students in grades 3 to 6.

44. The complaining parent was unhappy with the decision of the School Library Media Committee and appealed to the District Library Media Committee. In connection with the appeal, the parent submitted complaint forms from 25 other parents who also wanted the book removed. The reasons given by the parents for removing the book included:

- a. “I believe it glamorizes and normalizes something that is a sensitive issue. I also view it as propaganda on this subject. This is propaganda because it puts forth an idea, then makes it look attractive and normal.” (Ex. C.)
- b. “The entire book promotes homosexuality and makes the reader feel that life inside a homosexual home is great, wonderful & with no problems. I believe that the author is wanting us to accept homosexuality as a norm. It is not a norm! She made it seem like there is only 1 person that does not accept it.” (Ex. D.)
- c. “I don’t agree that wholesome complete parenting can be done by lesbians without a father role. It’s not a natural process to have a complete family without a male & female. This book makes it sound OK and brainwashes very young children when these issues should be decided by the parents. It’s too controversial of a subject for children under 18 who’s [sic] brains are still being developed.” (Ex. E.)
- d. “I object to a homosexual lifestyle but even more to allowing couples who decide to live together a homosexual life to adopt children. Homosexuality is a very sensitive topic one that brings much heartache and sadness, unfortunately this book does not explain more of the psychological and emotional hurt that these people go through. It paints a picture of false happiness. It says it is ok for a homosexual couple to adopt and raise children and even when they mention about one person as not accepting of them, there are more issues that affect negatively a child who grows up in this kind of environment.” (Ex. F.)

- e. “The purpose of this material is to make the choice homosexuality normal and fun. The child’s mothers went to great effort to be fun & exciting – in a loving neighborhood everyone dreams of living. . . . This book makes a homosexual lifestyle seem fun and exciting – lots of parties, costumes & events with children who grow up to having successful high paying careers. It normalizes a lifestyle we don’t agree with.” (Ex. G.)

45. The District Library Media Committee met on April 30, 2012 to decide the parent’s appeal. The minutes of the meeting are attached as Exhibit H.

46. The District had no formal mechanism for choosing members of the committee. The committee included only one person with a background in librarianship: a high school library media teacher. (Ex. H at 1.) The rest of the committee consisted of the District’s Supervisor of Gifted and Talented Programs, a teacher who currently serves as president of the District’s teacher’s union, a sixth-grade mathematics teacher, the District’s Elementary School Director, a parent representative, and the District’s Legal Issues Specialist. (Ex. H at 1.) The District Library Media Supervisor did not sit on the committee. (Ex. H at 1.)

47. The composition of the District Library Media Committee did not comply with the School Library Media Policies. The School Library Media Policies state that the committee should be chaired by the District Library Media Supervisor, but in this case the District Library Media Supervisor did not even sit on the committee. (Ex. A at 2; Ex. H at 1.) The School Library Media Policies also state that other members of the committee may include a superintendent, school board member, parent representative, curriculum development director, and student representative. (Ex. A at 2.) In this case, however, the committee included a parent representative but did not include a superintendent, school board member, curriculum

development director, or a student representative. (Ex. H at 1.) The School Library Media Policies do not authorize district directors, teachers, or legal issues specialists to serve as members of the committee.

48. The District did not provide advanced notice to the school community and the public at large that a District Library Media Committee would be meeting to decide whether to remove or restrict access to *In Our Mothers' House*.

49. Three parents appeared before the committee and explained why they wanted *In Our Mothers' House* removed. Among other things, the parents stated that “the book was too controversial for young children” and that “the book did not reflect their community’s morals and values.” (Ex. H at 2.)

50. The parents also said they were “dismayed to discover how much autonomy the media specialist [at each individual school] has in ordering books for the school.” (Ex. H at 2.)

51. A committee member asked the parents if they were aware that instead of removing the books from the shelves, they could fill out a form requesting that their own children not be allowed to check out certain books. (Ex. H at 2.) The parents said they were not aware of that option, but they said that even if their children could not check out the book, the parents would still be concerned that their children would be able to read that book at school without the parent knowing about it. (Ex. H at 2.)

52. During deliberations, the school Legal Issues Specialist, who was a member of the committee and ultimately voted to restrict access to the book, gave two reasons for removing or restricting access to *In Our Mothers' House*.

53. First, the Legal Issues Specialist said that books in the elementary school library should be treated as part of the curriculum. The Legal Issues Specialist said that the Supreme

Court's decision in *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982), which prohibits school officials from restricting library books based on the ideas the books contain, did not involve an elementary school library. The Legal Issues Specialist said that elementary school libraries should be treated as part of the school curriculum because elementary school students' library time is more structured than library time for students in junior and senior high schools. (Ex. H at 2-3.)

54. Second, the Legal Issues Specialist said that keeping the book on the library shelves would violate Utah's sex-education law, U.C.A. 1953 § 53A-13-101, which prohibits sex-education curricula from using instructional materials that contain "advocacy of homosexuality." The Legal Issues Specialist told the committee that because an elementary school library should be treated as part of the curriculum, leaving *In Our Mothers' House* on the library shelves would violate the ban on "advocacy of homosexuality." (Ex. H at 3.)

55. After the Legal Issues Specialist spoke, the committee discussed options for restricting access to *In Our Mothers' House* without removing the book from the school libraries completely. (Ex. H at 3.)

56. During the deliberations, none of the committee members suggested that *In Our Mothers' House* was vulgar or educationally unsuitable for an elementary school audience. The minutes of the meeting state without attribution that: "Removing the book completely is not a good option. We all know many non-traditional families. Kids ask questions. This book could help to answer questions by peers in the school situation. It could help those children in same sex families see their family in a book."

57. At the end of the discussion, the committee voted 6-1 to remove *In Our Mothers' House* from the shelves of all elementary school libraries in the district and place the book

behind the librarian's desk where it could be checked out only with written parental permission. (Ex. H at 3.) The dissenting vote was cast by the school library media teacher, who did not think the book should be restricted. (Ex. H at 3.)

58. The minutes of the meeting do not explain why the committee concluded that placing *In Our Mothers' House* behind the librarian's desk addressed the purported concern that the book constituted instructional material containing "advocacy of homosexuality," in violation of Utah's sex-education laws.

59. The only portion of the minutes that addresses why restricting access to the book would be the optimal solution is an unattributed statement that: "Restricting the book and requiring parent signature would cause the issue to be buried." (Ex. H at 3.)

Other Books With "Homosexual Themes"

60. On May 23, 2012, the District Library Media Committee's decision was reported to the Library Media Steering Committee, which – unlike the District Library Media Committee – is comprised of trained librarians.

61. The Library Media Steering Committee was told that the decision to remove *In Our Mothers' House* was based on the determination by the Legal Issues Specialist that elementary school libraries are part of the curriculum and that books with "homosexual themes" could therefore not be included in the elementary school libraries.

62. The Library Media Steering Committee was further instructed that librarians should proactively restrict access to any book containing "homosexual themes."

63. The Library Media Steering Committee was told that it is important to proactively address this issue because a group of parents were ready to challenge more books and take away the power of individual school librarians to make their own collection decisions.

64. The District also held a meeting with elementary school librarians to inform them that they should proactively remove from the shelves any books that have “homosexual themes.”

65. On May 31, 2012, the Salt Lake Tribune reported that the District had restricted access to *In Our Mothers’ House*. (Ex. I.) The article quotes District Spokesman, Chris Williams, stating: “State law says schools can’t have anything in the curriculum that advocates homosexuality. That is why it is now behind the counter.”

66. Williams also told the Salt Lake Tribune that “he’s heard rumblings that some parents in the district are also concerned about *And Tango Makes Three*. But so far, those concerns haven’t reached the level of organizing a panel to discuss the book’s content.” *And Tango Makes Three* is a children’s book about two male penguins that hatch an egg and raise the baby penguin together.

67. In a follow-up story published on June 1, 2012, the Salt Lake Tribune reported that school librarians had been instructed to proactively remove other books with “homosexual themes” from the library shelves. (Ex. J.) One of the librarians told the paper that she felt like she was in the McCarthy era and being asked to “name names.”

68. In response to the news stories, the District publicly denied that librarians in the District had been instructed to proactively remove other books from the shelves. Instead of publishing the original minutes from the May meeting of the Library Meeting Steering Committee on the District’s website, the District published amended minutes that were approved in July. (Ex. K.) The amended minutes state: “Davis School District has a policy and process for the restriction or removal of library materials. All librarians should strictly adhere to the DSD policy and process, located [on the District’s website] and not restrict or remove library materials unless that action is determined by the school or district media committee. Any

statements made to the contrary are the opinions of the committee member(s) and should not be considered district policy.” (Ex. K. at 1.)

69. The School Library Media Policies provide that when a library book is challenged, “[t]he material in question will remain in use during the reconsideration process. No item is to be removed from school use without the recommendation of the [school or district] library media committee.” (Ex. A at 5, 6.)

70. The amended minutes state that instead of proactively removing books with “homosexual themes,” librarians should leave the books in place until the books are challenged and the removal committees have made a final decision. But the amended minutes do not contradict reports that if complaints are received about other books with “homosexual themes,” those books would ultimately be similarly restricted in elementary school libraries based on the District’s interpretation of Utah’s sex-education law.

Harm Caused By District’s Restriction of *In Our Mothers’ House*

71. The District can respect the wishes of parents who disagree with *In Our Mothers’ House* by allowing parents to place limits on their own children’s ability to check out particular books. But the District cannot constitutionally allow the religious, political, or cultural preferences of some parents to dictate what other people’s children should and should not be allowed to read or place burdens on their ability to access fully protected ideas.

72. The District’s restrictions apply to all elementary school students through sixth grade.

73. Even though Ms. Weber has provided her children with parental permission to check out *In Our Mothers’ House*, the restrictions placed on the book unconstitutionally interfere with their ability to access the ideas and viewpoints contained in the book.

74. Even with parental permission, the District's restriction places a prior restraint on the ability of Plaintiffs and other students to read *In Our Mothers' House* that does not exist for comparable books. With other books, Plaintiffs and other students can access the book while browsing the library shelves, thumb through the book, and reread a favorite passage or look at a favorite picture without having to go through the process of checking the book out of the library. But before they can even open the covers of *In Our Mothers' House*, students must first get a written note from their parents, find the librarian, wait their turn to speak with the librarian, ask to check out the book, and wait while the librarian verifies that she has parental permission to do so. The First Amendment does not permit the government to place these unequal burdens on accessing particular books based on the books' viewpoint.

75. Even more importantly, the restriction of access places an unconstitutional viewpoint-based stigma on Plaintiffs and other students who wish to read the book. It sends the message to the school community that students who read *In our Mothers' House* are reading a "bad" book and that the ideas contained in the book are unacceptable and should not be discussed. The District's public statements that the book was removed because it has "homosexual themes" or constitutes "advocacy of homosexuality" reinforces that stigmatizing message.

76. Indeed, segregating *In Our Mothers' House* from other books about children's families directly undermines the book's message of inclusion and diversity. The parents who complained about *In Our Mothers' House* argued that including the book on the library shelves "normalized a lifestyle that we don't agree with." By appeasing those parents and segregating the book from stories about other families, the District conveys the message to all students –

including students who have same-sex parents and students who do not – that families with same-sex parents are not acceptable in the school community.

Class Action Allegations

77. Plaintiffs are members of a proposed class of current and future students in District elementary schools where *In Our Mothers' House* was removed from the shelves.

78. Approximately 600 students are enrolled in Parkside Elementary School; approximately 800 students are enrolled in Snow Horse Elementary School; approximately 840 students are enrolled in South Weber Elementary School; and approximately 700 students are enrolled in Windridge Elementary School.

79. There are questions of law and fact that are common to the Class, including, but not limited to, the factual and legal questions about whether the District's removal of *In Our Mothers' House* from the library shelves in those schools violates the First Amendment.

80. Plaintiffs' claims that the viewpoint-based decision to remove *In Our Mothers' House* from the library shelves violates their rights under the First and Fourteenth Amendment are typical of the claims of the Class.

81. As current students in a District elementary school where *In Our Mothers' House* was removed from the library shelves, Plaintiffs will fairly and adequately protect the interests of the Class.

82. The District's decision to remove *In Our Mothers' House* from the shelves of all elementary school libraries in the District and restrict student access to the book causes the District and its employees and agents to act on grounds generally applicable to the Class, thereby making it appropriate for this Court to grant injunctive relief and any corresponding declaratory relief to the Class as a whole pursuant to Federal Rule of Civil Procedure 23(b)(2).

CLAIM FOR RELIEF
Against Davis School District

Civil Action for Deprivation of Constitutional Rights
Pursuant to 42 U.S.C. § 1983

83. Plaintiffs reincorporate the allegations of paragraphs 1-82 as this paragraph 83.

84. Pursuant to the School Library Media Policies, the District Library Media Committee had final policymaking authority for the District with respect to removing *In Our Mothers' House* from library shelves in the District.

85. Moreover, Superintendent Bowles, who has been delegated the power to enforce the general policies of the school board, has ratified and acquiesced in the decision of the District Library Media Committee to remove *In Our Mothers' House* from library shelves.

86. District agents and employees who removed *In Our Mothers' House* from library shelves in the District and restricted access to the book were acting pursuant to the District's policy, custom, or practice.

87. The District unconstitutionally removed *In Our Mothers' House* from the library shelves and restricted access to the book to appease constituents who disagree with the ideas contained in the book.

88. Utah's sex-education law, U.C.A. 1953 § 53A-13-101, does not provide a valid justification for removing *In Our Mothers' House* from the library shelves and restricting access to the book.

89. Utah's sex-education law, U.C.A. 1953 § 53A-13-101, does not require that *In Our Mothers' House* be removed from the library shelves because the elementary school library is not part of the school curriculum for purposes of the statute, books on the library shelves are

not “instructional materials” under the statute, and library books depicting a family with same-sex parents do not constitute endorsement or advocacy of homosexuality.

90. If Utah’s sex-education law, U.C.A. 1953 § 53A-13-101, did require that *In Our Mothers’ House* be removed from the library shelves, then the statute would be unconstitutional as applied because the statute facially discriminates on the basis of a book’s viewpoint; courts have held that such viewpoint discrimination is permissible in the context of curricular speech but is constitutionally impermissible in the context of a school library.

91. Removing *In Our Mothers’ House* from the library shelves and restricting access to the book has interfered with the ability of Plaintiffs and the Class to access the ideas contained in the book by, among other things, imposing additional hurdles on students who wish to read the book, preventing students from browsing through the book without going through the formal process of checking the book out, and stigmatizing the ideas contained in the book and the students who read it.

92. The District’s restriction on *In Our Mothers’ House* and its stated position that keeping the book on the library shelves would violate Utah’s sexual education law creates a credible threat that any other book that is deemed to contain “homosexual themes” will also be removed.

93. The District’s decision to remove *In Our Mothers’ House* from the library shelves and restrict access to the book violates the rights of Plaintiffs and the Class under the First Amendment, which is made applicable to the states through the Fourteenth Amendment.

94. Pursuant to 42 U.S.C. § 1983, the District is liable for, under color of state law, violating the rights of Plaintiffs and the Class under the First and Fourteenth Amendments.

95. Unless restrained by this Court, the District will continue to violate the First and Fourteenth Amendment rights of Plaintiffs and the Class.

96. Plaintiffs and the Class have no adequate remedy at law for this continuing violation of their federal constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, for the reasons stated above, Plaintiffs and the Class request that the Court enter judgment in their favor, and against the District, for full relief, including the following:

- 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";
- E. Nominal damages in the amount of \$1.00 for the violation of Plaintiffs and the Class's constitutional rights;

F. Plaintiffs' and the Class's costs and attorneys' fees herein pursuant to 42 U.S.C. § 1988; and

G. Such other relief as the Court deems just and appropriate under the circumstances.

Dated: November 13, 2012

Respectfully Submitted,

/s/ John Mejia

Joshua A. Block*
Leslie Cooper*
ACLU FOUNDATION, INC.
125 Broad Street, Floor 18
New York, New York 10004
Telephone: (212) 549-2600
Facsimile: (212) 549-2650
jblock@alcu.org
lcooper@aclu.org

John Mejia (USB No. 13965)
Leah Farrell (USB No. 13696)
ACLU OF UTAH FOUNDATION, INC.
355 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 521-9863
Facsimile: (801) 532-2850
jmejia@acluutah.org
lfarrell@acluutah.org

* Application for admission
pro hac vice to follow