VIA ELECTRONIC MAIL

October 17, 2023

City Council
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648
SupplementalComm@Surfcity-hb.org
City.Council@surfcity-hb.org

Re: Resolution No. 2023-41

Dear City Council Members:

The First Amendment Coalition, the ACLU of Southern California, and the Freedom to Read Foundation strongly oppose Resolution No. 2023-41 ("Resolution"), which would impose an unconstitutional censorship regime on the people's right to access library books and materials protected by the First Amendment. Since the founding of this nation, public libraries have been havens for free inquiry and expression. The government has no business interfering with the decisions of parents, families, and minors about what library books to read and how they may access them. We urge you to reject the Resolution in the strongest possible terms.

The Resolution's sweep is breathtaking. It would prohibit any city library from allowing access to "any content of a sexual nature" for anyone under 18 years of age without consent of a parent or guardian, regardless of "whether the books or materials are intended for children or adults." Resolution ¶ 1(a)–(b). Taken literally, it would cover "countless literary works," *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 247 (2002), including the Bible, *Romeo and Juliet*, *The Great Gatsby*, *1984*, *Beloved*, *I Know Why the Caged Bird Sings*, and *Introduction to Plant Reproduction*, to name only a few examples of commonly read books.

The Resolution would also impair access to educational materials on gender identity and expression, sexual orientation, and reproductive health. Indeed, speech discussing gender identity and expression or sexual orientation is often a prime target of measures such as the Resolution. While some minors can and do seek parental guidance or support on such matters, others are unable to do so safely. Free access to these educational materials helps ensure that LGBTQ youth feel safe and supported.

In addition, the Resolution would subject the future acquisition of any "children's books and other materials" containing unspecified "sexual references" or "sexual content" to the arbitrary veto of a "review board" appointed by city council members and guided by nothing more than undefined "community standards of acceptance." Resolution ¶ 2. The review board could also require libraries to restrict access to any "book or material currently in circulation" which "does not meet community standards." *Id.* ¶ 2(d).

The Resolution would violate the fundamental right to freedom of speech. The First Amendment protects not only the right to speak but also "the public's interest in receiving information." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986) (citations omitted); *see also Board of Education v. Pico*, 457 U.S. 853, 867–68 (1982) (noting 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 explaining that "students too are beneficiaries of this principle"); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (noting that the "right to read or observe" is "fundamental to our scheme of individual liberty"); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (stating "[t]he right of freedom of speech . . . includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read") (citation omitted).

This right is especially salient in a public library, "the 'quintessential' locus for the exercise of the right to receive information and ideas." *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1256 (3d Cir. 1992). The founders of this nation "understood the necessity of public libraries for a well-functioning democracy," and "[f]or more than a century, librarians have curated the collections of public libraries to serve diverse viewpoints." *Fayetteville Pub. Libr. v. Crawford County*, No. 5:23-CV-05086, 2023 U.S. Dist. LEXIS 131427, *10 (W.D. Ark. July 29, 2023). The decision as to what library materials minors may read or view and how they may do so belongs to their parents and them, not to the government.

The literature, art, music, films, and other materials covered by the Resolution are the essence of speech protected by the First Amendment. *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

Speech is not unprotected merely because it contains some alleged "sexual content." *Ashcroft*, 535 U.S. at 245; *Reno v. ACLU*, 521 U.S. 844, 875 (1997). Under the First Amendment, speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975).[1]

[1] The Resolution goes far beyond materials deemed legally obscene as to adults or minors, or child sexual abuse material produced with actual minors, all of which may be restricted without violating the First Amendment and creation or distribution of which is already prohibited by California law, making it unavailable in libraries. *Miller v. California*, 413 U.S. 15 (1973); *Ginsberg v. New York*, 390 U.S. 629 (1968); *New York v. Ferber*, 458 U.S. 747 (1982); Cal. Penal Code §§ 311-313.5.

As the Supreme Court has said, "one man's vulgarity is another's lyric," and "because governmental officials cannot make principled distinctions in this area," the Constitution leaves to individuals the right to decide what protected speech to view or read. *Cohen v. California*, 403 U.S. 15, 25 (1971); *cf. Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952) ("It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.").

Above all else, the First Amendment prohibits the government from discriminating based on viewpoint, and the grant of unbridled discretion to restrict access to speech inherently creates an unacceptable risk of viewpoint discrimination. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995); *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012).

The terms "content of a sexual nature" or "sexual references" are so inherently subjective as to be entirely arbitrary. The Resolution is devoid of "sufficiently definite and objective" standards "to prevent arbitrary or discriminatory enforcement" of "the policy as a pretext for censorship." *Amalgamated Transit Union Loc. 1015 v. Spokane Transit Auth.*, 929 F.3d 643, 654 (9th Cir. 2019). This risk is especially acute in the case of elected officials or their surrogates, who are "the object of political pressures" that often "run contrary to the protections that the first amendment affords political and other controversial forms of expression." *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575 (9th Cir. 1984).

Therefore, if adopted, the Resolution would violate the First Amendment by licensing censors to exercise unbridled discretion to curtail access to protected speech based on vague standards amounting to little more than the arbitrary whims of a minority. While no one can be forced to read a library book to which they object, no one has the right to subject, through force of government, the entire community to their narrow and arbitrary view of what books are acceptable for minors of any age to read.

Unsurprisingly, courts have rejected similar misguided attempts to restrict access to library books. *See, e.g., Fayetteville Pub. Libr.*, 2023 U.S. Dist. LEXIS 131427 at *46–48 (enjoining enforcement of law prohibiting the furnishing of books or materials allegedly "harmful to minors" that included "a broad category of protected speech" such as "any material with any amount of sexual content" of any kind, which "would likely impose an unnecessary and unjustified burden on any older minor's ability to access free library books appropriate to his or her age and reading level"); *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 549 (N.D. Tex. 2000) (holding that a resolution conferring on residents "the power to remove from the children's section any books they find objectionable" was unconstitutional because it "effectively permitt[ed] them to veto lawful, fully-protected expression simply because of their adverse reaction to it"); *cf. Cline v. Fox*, 319 F. Supp. 2d 685, 692 (N.D. W. Va. 2004) (holding that even in prison, First Amendment does not allow a policy that "prohibits all books, magazines, paintings, and photographs that contain even one depiction of sexual intercourse," such as "literary classics like George Orwell's 1984 and religious texts like the Bible," regardless of "the context of the depiction or the content of the work as a whole").

The City Council would far better serve the people of Huntington Beach by respecting their right to freedom of expression and turning its attention to critical public services instead of

stoking division by adopting an arbitrary and unconstitutional censorship regime. For all these reasons, we object to the Resolution and strongly urge the City Council to reject it.

Sincerely,

s/David Loy
Legal Director
First Amendment Coalition

s/Jonathan Markovitz
Free Expression and Access to Government Staff Attorney
ACLU Foundation of Southern California

s/Deborah Caldwell-Stone
Executive Director
Freedom to Read Foundation