No. 13 - 38

IN THE

Supreme Court of the United States

677 NEW LOUDON CORP., d/b/a NITE MOVES,

Petitioner,

—V.—

STATE OF NEW YORK TAX APPEALS TRIBUNAL AND JAMIE WOODWARD, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of New York

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., COMIC BOOK LEGAL DEFENSE FUND, ENTERTAINMENT MERCHANTS ASSOCIATION, AND FREEDOM TO READ FOUNDATION AS *AMICI CURIÆ* IN SUPPORT OF PETITIONER

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American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Entertainment Merchants Association, and Freedom to Read Foundation respectfully submit this brief as *amici curiæ* in support of Petitioner.[1]

INTEREST OF *AMICI CURIÆ*

Amici and their members ("*Amici*") publish, produce, distribute, sell, and manufacture books, magazines, home videos, sound recordings, motion pictures, interactive games, and printed and electronic materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining.[2] Libraries and librarians whose interests are represented by *Amicus* Freedom to Read Foundation (FTRF) provide such materials to readers and viewers, whose First Amendment rights FTRF also defends.

Amici have a significant interest in preventing

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiæ*, their members, their counsel, and Media Coalition Inc. (a 40-year old trade association of which *amici* are members) made a monetary contribution to its preparation or submission.

Pursuant to Rule 37(2)(a) of the Rules of this Court, counsel of record for *Amici* gave notice to counsel of record for all parties of *Amici*'s intent to file this brief, at least 10 days before the due date of this brief. The parties' written consents to the filing of this brief are being filed with the Clerk of the Court.

[2] A description of each of *Amici* is attached as Appendix A.

the imposition of unconstitutional governmental limitations on the content of their First Amendment-protected communicative materials — whether directly, by censorship, or indirectly, by content-based taxation, labeling requirements, restrictions on manner of sale, or other means.

Amici have brought actions in both federal and state courts to assert the unconstitutionality of laws that infringe First Amendment rights.[3] These cases include *Brown v. Entertainment Merchants Ass'n,* 131 S. Ct. 2729 (2011), in which this Court held unconstitutional a California law requiring the labeling of video games with violent content, and prohibiting the sale of such games to minors. That decision reaffirmed the principle that "the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has

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[3] *See, e.g.*, *Ashcroft v. American Civil Liberties Union,* 542 U.S. 656 (2004); *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010); *Am. Booksellers Found. v. Strickland,* 601 F.3d 622 (6th Cir. 2010); *PSINet Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001), *aff'd,* 362 F.3d 227 (4th Cir. 2004); *Am. Booksellers Found. v. Sullivan,* 799 F. Supp. 2d 1079 (D. Alaska 2011); *American Booksellers Found. v. Coakley,* 2010 WL 4273802 (D. Mass., Oct. 26, 2010); *Am. Booksellers Found. v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002), *aff'd,* 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D. N.M. 1998), *aff'd,* 194 F.3d 1149 (10th Cir. 1999); *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008); *Am. Libraries Ass'n v. Pataki,* 969 F. Supp. 160 (S.D.N.Y. 1997); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

never 'include[d] a freedom to disregard these traditional limitations.'" 131 S.Ct. at 2733. That decision was ignored by, and that principle is threatened by, the decision below, which holds that a State may impose discriminatory taxation on protected speech—not in one of the "few limited areas" subject to restrictions—based on its content.

Amici also have filed a number of *amicus* briefs in this Court addressing First Amendment issues.[4] *Amici* believe that it is particularly important to present the perspective of mainstream creators, producers, distributors, retailers, and consumers when—as in this case—an important First Amendment issue arises involving speech that many may view as being outside of the mainstream.

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[4] *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *Brown v. EMA,* 131 S. Ct. 2729 (2011); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *United States v. Stevens*, 130 S. Ct. 1577 (2010); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *United States v. Playboy Entm't Grp.*, 529 U.S. 803 (2000); *Denver Area Educ. Telecomms. Consortium v. FCC.*, 518 U.S. 727 (1996).

REASONS FOR GRANTING THE PETITION
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THE FIRST AMENDMENT PROHIBITS STATES FROM SELECTIVELY TAXING SPEECH BASED ON THE STATE'S PERCEPTION OF ITS VALUE OR CONTENT

I. A State May Not Tax Tickets to *Mamma Mia* and Exempt Tickets to *Rigoletto*

May a State impose a sales tax on tickets to the Broadway musical *Mamma Mia,* while exempting tickets to *Rigoletto*? Or may a State impose a sales tax on the videogame *Mortal Kombat,* while exempting *Super Mario Bros.?*

The Court of Appeals of New York answered these questions, "yes." The First Amendment and unequivocal decisions of this Court compel the answer, "no." "[O]fficial scrutiny of the content of [speech] as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987). See also *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,* 460 U. S. 575, 591-92 (1983).

To be sure, the Court of Appeals was not addressing the relative value of musicals, operas, videogames, or other media; it was instead evaluating the content of a non-obscene nude dance performance that was denied a sales tax exception statutorily granted to "dramatic or musical arts performances" including dance performances. But the constitutional principle is the same: A State may not decide to grant or withhold a sales tax exemption based upon the content of speech, or based upon whether the State legislature or a State tax

administrator perceives that the speech has sufficient cultural or artistic value. As Judge Smith stated in his dissent in the Court of Appeals, joined by Chief Judge Lippman and Judge Read:

> Like the majority and the Tribunal, I find this particular form of dance unedifying—indeed, I am stuffy enough to find it distasteful. Perhaps for similar reasons, I do not read Hustler magazine; I would rather read the New Yorker. I would be appalled, however, if the State were to exact from Hustler a tax that the New Yorker did not have to pay, on the ground that what appears in Hustler is insufficiently "cultural and artistic." That sort of discrimination on the basis of content would surely be unconstitutional.

(A-9).[5]

The prohibition of content-based taxation of speech, whatever some may consider its value, is intrinsic to the principle that "'From 1791 to the present,' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'" *Brown v. EMA,* 131 S. Ct. at 2733 (quoting *United States v. Stevens,* 130 S. Ct. 1577, 1584 (2010) and *R.A.V. v. City of St. Paul, Minn.,* 505 U.S. 377, 382-83 (1992) (internal quotation marks and citations omitted)). These limited exceptions—such as obscenity,

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[5] Citations to (A-__) are to the Appendix to the Petition.

incitement, and fighting words—are not at issue in this case. While the government may impose non-discriminatory, non-confiscatory taxes on media, it may not impose discriminatory taxes by, for example, choosing to tax some newspapers, but not others, based on their size, *Minneapolis Star,* 460 U.S. at 591-92, or choosing to tax some magazines, but not others, based on an evaluation of their content. *Arkansas Writers' Project,* 481 U.S. at 229 (holding unconstitutional sales tax exemption granted to religious, professional, trade, and sports magazines published in Arkansas, but not to other magazines).

To avoid discriminatory taxes, *Amici*'s members should not have to consider whether State or local officials will think that what they publish, distribute, and sell has cultural or artistic value. The First Amendment protects them from such a duty. The readers and viewers of media created, published, and distributed by *Amici* should not have to pay a tax based on the content of the media which they choose to purchase, read, or view. The First Amendment protects them from such a burden.

II. Despite This Court's Clear Prohibition of Content-Based Taxation, State Courts and Legislatures Need Further Guidance from this Court

This Court's clear precedents should have foreclosed the decision below. But, unfortunately, the decision below is not an aberration. State supreme courts in Illinois, Utah, and Texas have similarly approved content-based, discriminatory taxation of speech, by misapplying or flouting this Court's decisions. In so doing, some of the State supreme

courts reversed their own intermediate appellate courts which held the taxes unconstitutional. And bills have been introduced in state legislatures across the country that would impose new content-based taxes.

A. The Court of Appeals of New York Decided This Important, Recurring Constitutional Question Contrary to This Court's Decisions

Without addressing the constitutional issues, the Court of Appeals in this case made clear that it was deciding the case by deferring to the Tax Tribunal's subjective evaluation of the content of the dance performances at Petitioner's establishment—and did so in language evidencing its disdain for that content:

> Clearly, it is not irrational for the Tax Tribunal to decline to extend a tax exemption to every act that declares itself a "dance performance." If ice shows presenting pairs ice dancing performances, with intricately choreographed dance moves precisely arranged to musical compositions, were not viewed by the legislature as "dance" entitled a tax exemption, surely it was not irrational for the Tax Tribunal to conclude that a club presenting performances by women gyrating on a pole to music, however artistic or athletic their practiced moves are, was also not a qualifying performance entitled to exempt status.

(A-5).

If the test were merely whether the distinction is rational, then this Court would have upheld the

distinction made by the sales tax exemption at issue in *Arkansas Writers' Project* between religious, professional, trade, and sports magazines published in Arkansas (exempt from the tax) and general interest magazines published in Arkansas (not exempt from the tax). There is a rational distinction between these magazines; each reader makes that distinction when he or she decides what to buy and what to read. But the First Amendment does not permit a State legislature or State taxing authorities to make that distinction in applying the tax laws. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.,* 468 US 641, 648-49 (1984). *See also Police Dep't. of Chicago v. Mosley,* 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

This bedrock principle against the regulation of content applies even when (indeed, especially when) a government official may view the expression as "not very important," "shabby, offensive, or even ugly." *United States v. Playboy Entm't Grp.,* 529 U.S. 803, 826 (2000).

The tax's violation of the First Amendment is not lessened by the Court of Appeals' stating that, under a State tax regulation, New York denies "ice shows" the exemption even though they may contain "intricately choreographed dance moves precisely arranged to musical compositions." (A-2, *citing* 20 N.Y.C.R.R. 527.10; A-5). The State cannot justify content-based taxation by pointing out that others were also subject to discriminatory taxes. A State

could not justify its denial of the tax exemption to *Mamma Mia* by pointing out that, even though *Rigoletto* is granted the exemption, *The Merry Widow* is not.

Moreover, as Judge Smith pointed out in his dissent, the State statute does not exclude ice shows containing dance from the tax exemption and if the regulation does so, "that is a problem with the regulation."(A-8). Indeed, Respondent Commissioner of Taxation and Finance of New York apparently recognizes that problem with the regulation, because the Commissioner has issued an Advisory Opinion that ice shows are entitled to the sales tax exemption as dance performances. N.Y. Dept. Tax Fin. Advisory Opinion TSB-B-11(18)S, 2011 WL 7113836 (May 23, 2011) (citing *Metromedia, Inc. v. State Tax Comm'n.,* 75 A.D.2d 341, 430 N.Y.S.2d 698 (3d Dept, 1980)).

Nor is the violation of the First Amendment negated by the fact that the issue presented was whether the performances at Petitioner's establishment came within an "exception" or an "exemption" from the sales tax. If the State of New York so chose, it could have omitted the exception from its sales tax law, so that admissions to all dramatic and musical performances (including all dance performances) would be subject to the sales tax. *Leathers v. Medlock*, 499 U.S. 439, 447 - 449 (1991) (upholding application of generally-applicable sales tax to cable television which did not apply to newspapers and magazine sales, because the "sales tax is not content based"). Having decided to provide an exception from the sales tax for dramatic and musical performances, the legislature cannot craft that exception, and the tax administrators cannot apply that exception, in a manner that picks and

chooses among different performances based on their content.

B. Other State Supreme Courts Have Decided the Same Question Contrary to This Court's Decisions, Even When Intermediate State Appellate Courts Properly Applied this Court's Decisions

The supreme courts of Illinois, Utah, and Texas have, similarly, approved discriminatory, content-based taxes. In two of these cases, an intermediate State appellate court had held the tax unconstitutional. In the third, the State's Chief Justice dissented, and would have held the tax unconstitutional. Despite this Court's clear decisions on the unconstitutionality of content-based taxes, the disparate way in which the State courts have applied those decisions warrants this Court's intervention.

Chicago and Cook County, Illinois do not tax admissions to "small venues" offering "live performance[s]" of "the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings" but do tax such performances at "adult entertainment cabarets," defined as venues which feature nude entertainers. The Appellate Court of Illinois – First District, in reliance on *Arkansas Writers' Project* and other decisions of this Court, held the tax unconstitutional:

> The language of the definitions from the [ordinances], * * * on their face, discriminate based on content. * * * One cannot determine whether the operative criteria of the adult entertainment cabaret exclusions apply to a

> particular small venue without considering the content of the small venue's featured speech or expressive conduct.

Pooh-Bah Enters., Inc. v. County of Cook, 378 Ill. App. 3d 268, 275, 881 N.E.2d 552, 560 (Ill. App. 1st Dist., 5th Div. 2007), *rev'd,* 232 Ill. 2d 463 (2009), *cert. denied*, 130 S. Ct. 258 (2009). The Supreme Court of Illinois reversed, rejecting an argument of discriminatory taxation, holding, "Here, all that has happened is that defendants have enacted a government program believed to be in the public interest—encouraging fine arts performances in small venues—and have defined the program in such a way that will achieve its ends." 232 Ill. 2d at 496. But that reasoning of the Supreme Court of Illinois was precisely the argument that this Court had rejected in *Arkansas Writers' Project*. At issue there was a government program believed by the State legislature to be in the public interest—encouraging the publication of magazines in Arkansas—defined in such a way that would achieve the legislature's ends (that is, limited to religious, professional, trade, and sports magazines). This Court held that to be unconstitutional content-based taxation.

Utah imposes a special ten percent gross receipts tax on businesses where employees or independent contractors perform nude or partially nude for 30 days or more per year—a statute targeted at establishments which offer nude dancing. The Supreme Court of Utah upheld the tax as "facially neutral because its application is triggered without reference to the content of any protected expression." *Bushco v. Utah State Tax Comm'n,* 225 P.3d 153, 160 (Utah 2009), *cert. denied sub nom. Denali L.L.C. v. Utah State Tax Comm'n,* 131 S. Ct. 455 (2010).

But, as Chief Justice Durham stated in her dissent:

> The Tax is a content-based regulation. It applies solely based on the narrow content of the business activity, namely, whether it involves nudity. While the Commission argues that the Tax could be applied conceptually to any type of business, this purported expansive reach does not make it content neutral. Just the opposite is true: it applies to exotic dancing but not to traditional ballet, an art exhibit, or a theatrical performance. In short, it is the content of expression that triggers the Tax.

225 P.3d at 173.

Texas imposes a five dollar admission fee to businesses which offer live nude entertainment and allow the consumption of alcohol.[6] The Texas Supreme Court upheld the fee. The Court of Appeals of Texas, Austin had applied this Court's decisions to hold the tax unconstitutional, holding:

> The … tax targets a small group of taxpayers engaged in expression protected by the First Amendment, even if only marginally so. See *Barnes [v. Glen Theatre, Inc.]*, 501 U.S. [560,] 566, 571 (1991) (plurality opinion). * * * A selective taxation scheme in which an entity's tax status depends entirely on the content of its speech is "particularly

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[6] The New York statute at issue here does not relate to the sale of alcohol and Petitioner's establishment, in this case, does not sell alcohol.

> repugnant to First Amendment principles." *Arkansas Writers' Project,* 481 U.S. at 229.

Combs v. Tex. Entm't Ass'n, *Inc.,* 287 S.W.3d 852, 859-60 (Tex.App.Austin 2009), *rev'd*, 347 S.W.3d 277 (Tex. 2011), *cert. denied*, 132 S. Ct. 1146 (2012).

These decisions of State appellate courts—intermediate appellate Courts which, in reliance on this Court's decisions, would hold the content-based taxes unconstitutional, and decisions of State supreme courts (over dissents) misapplying this Court's decisions to reach the contrary result—warrant certiorari.

C. Bills Introduced In State Legislatures Across the Country Would Impose Content-Based Taxes on Speech

The threat of discriminatory taxes is also apparent in bills introduced in legislatures across the country which would tax video games, music, and media generally, based on an evaluation of their content. Some of these bills focus on violent content. Others focus on non-obscene, mature content. All are an attempt to use content-based taxation to avoid this Court's consistent decisions—including its most recent decision in *Brown v. EMA,* in which *Amicus* EMA was plaintiff—that Congress and State legislatures may not impose restrictions on the content of speech outside of narrow historic areas, such as obscenity, incitement, and fighting words.

In *Brown v. EMA*, this Court struck down a California law that prohibited the sale to minors of certain video games with violent content, and required that those video games be labeled "18." *Brown v. EMA*, 131 S. Ct. at 2732. This Court held that media with violent content—not one of the

narrow, historic areas in which speech may be restricted—are fully protected by the First Amendment and laws seeking to regulate them based on content are void unless they withstand strict scrutiny. *Id.* at 2738. The California law at issue in *Brown v. EMA* could not be "justified by a compelling government interest and [was not] narrowly drawn to serve that interest," *Id.* The numerous content-based tax bills pending across the country are similarly infirm.

A bill introduced in the New York State Assembly would impose a two dollar tax on purchases in New York of each copy of a magazine, video, DVD, or download from an Internet website registered in New York, the content of which "features nude pictures or nude performances." N.Y. A.B. 2912 (introduced Jan. 22, 2013). The bill is not limited to obscene media, or even to media intended to appeal to prurient interests.

A bill introduced in the Connecticut General Assembly would impose a ten-percent sales tax on video games rated "mature." Conn. H.B. 5735 (introduced Jan. 23, 2013). The bill does not define "mature." The bill would thus impose a content-based tax, which is unconstitutional under *Arkansas Writers' Project,* on protected speech not within the narrow historic exceptions recognized in *Brown v. EMA*.

A bill introduced in the Missouri General Assembly would impose a one dollar excise tax on each "violent" video game, defined as any video game rated "Teen, Mature, or Adults Only" by the Entertainment Software Rating Board ("ESRB"). Mo. H.B. 893 (introduced Mar. 26, 2013). This bill,

too, seeks to impose a content-based tax as a means to get around *Brown v. EMA.* And to avoid *Brown v. EMA*'s prohibition on State-mandated ratings, the bill would use the voluntary ratings system adopted by the video game industry and thus discourage video game producers and retailers from using that voluntary system.[7]

Absent a definitive decision from this Court, reiterating the constitutional impediment to selectively taxing speech based on its content, as set forth in *Arkansas Writers Project* and *Minneapolis Star,* and the principles against expanding the narrow historic exceptions to the First Amendment as set forth most recently in *Brown v. EMA,* legislatures will feel free to tax speech that they want to, but cannot, censor.

CONCLUSION

This case is all the more important because the speech at issue is, in the view of many, "not very important." *United States v. Playboy Entm't Grp.,* 529 U.S. at 826. This Court should grant the writ of certiorari so that it can address the critical threat to the First Amendment presented by the content-

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[7] The ESRB ratings system has seven ratings: Early Childhood, Everyone, Everyone 10+, Teen, Mature, Adults-Only, and Rating Pending. Videos rated "Teen"—one of the subjects of Missouri's proposed content-based tax, are defined: "TEEN: Content is generally suitable for ages 13 and up. May contain violence, suggestive themes, crude humor, minimal blood, simulated gambling and/or infrequent use of strong language." http://www.esrb.org/ratings/ratings_guide.jsp (visited July 26, 2013).

based taxation which was approved by the Court of Appeals of New York.

Dated: August 6, 2013

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APPENDIX

APPENDIX A

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AMICI CURIÆ

The following *amici curiæ* join this brief:

American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is 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 freedom in the choice of reading materials.

Association of American Publishers, Inc. ("AAP") is the national association of the U.S. 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, paperback, and electronic books in every field, scholarly and professional journals, 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.

Comic Book Legal Defense Fund ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has its principal place of business in New York, New York, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located

throughout the country and the world.

Entertainment Merchants Association ("EMA"), a prevailing party in *Brown v. EMA,,* 131 S. Ct. 2729 (2011), is the not-for-profit international trade association dedicated to advancing the interests of the $33 billion home entertainment industry. EMA-member companies operate approximately 40,000 retail outlets in the U.S. and 50,000 around the world that sell and/or rent DVDs, computer and console video games, and digitally distributed versions of these products. Membership comprises the full spectrum of retailers (from single-store specialists to multi-line mass merchants, and both brick and mortar and online stores), distributors, the home video divisions of major and independent motion picture studios, video game publishers, and other related businesses that constitute and support the home entertainment industry.

Freedom to Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.