# THE ROAD TO HELL IS PAVED WITH GOOD INTENTIONS: HOW *PICO'S* FOCUS ON THE INTENT BEHIND BOOK BANS HAS FAILED PUBLIC SCHOOL STUDENTS

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## INTRODUCTION

In *Island Trees School District v. Pico*, the U.S. Supreme Court held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[1] In reviewing *Pico*, which dealt with a New York school board's decision to remove nine "objectionable" books from the public school library,[2] the 1982 Court found that the First Amendment rights of New York public school students depended upon the motivation behind the school board's actions.[3] The Court concluded, "[i]f petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution."[4] However, over forty years later, the Court's once provocative holding now rings hollow.

From July 2021 to June 2022, there were around 2,532 instances of individual books being banned, affecting 1,648 unique book titles.[5] While books were once banned for their narratives on sex and secularism, today's banned books are often targeted for their discussions of gender identity, sexual orientation, and racial diversity.[6] Of the 1,000-plus books banned between July 2021 and June 2022, 41% directly included LGBTQ+ themes or characters, 40% had main characters of color, and 21% directly addressed issues of "race and racism."[7]

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[1] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982) (citation omitted).

[2] *Id.* at 856.

[3] *Id.* at 871.

[4] *Id.* (italics omitted).

[5] Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sep. 19, 2022), https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/.

[6] Christian Thorsberg, Matt Stiles & Anna Deen, *Book Banning in U.S. Schools Has Reached an All-Time High: What This Means, and How We Got Here,* MESSENGER (May 26, 2023), https://themessenger.com/grid/book-banning-in-us-schools-has-reached-an-all-time-high-what-this-means-and-how-we-got-here.

[7] Friedman & Johnson, *supra* note 5.

Behind these book bans are at least fifty groups ranging from local Facebook groups to national organizations like Moms for Liberty, which currently has over 200 chapters.[8] While many of these groups have mission statements that focus on general parental rights or religious or conservative views, some mission statements go so far as calling for the exclusion of materials that touch on race or LGBTQ+ themes.[9] As a whole, these groups represent a "rapidly growing and increasingly influential" conservative movement.[10]

In revisiting *Pico*, it is hard to reconcile today's conservative book ban movement with the Court's assertion that school boards cannot exercise the discretion that is afforded with their positions in "a narrowly partisan or political manner."[11] As these conservative groups fill school board positions, fund campaigns, endorse candidates, and create political action committees, it is increasingly difficult to separate the discretion exercised by school board members from partisan politics.[12] This Note examines how the *Pico* Court's focus on the intent or motivation behind a school board's removal of books weakened students' First Amendment right to receive ideas and resulted in a largely unchecked political movement to control our nation's public school libraries.

First, this Note analyzes *Pico* and examines students' narrow First Amendment right to receive ideas in public school libraries. Second, this Note analyzes the impact of the Court's ruling in *Pico*, albeit a non-binding plurality, on subsequent book removal cases. Finally, this Note explores ways to better protect students' right to access particular books within their libraries, including reimagining *Pico*'s current legal test and enacting laws that serve as check on school boards' discretionary power and conservative book banning groups' influence.

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[8] *Id.*
[9] *Id.*
[10] Elizabeth A. Harris & Alexandra Alter, *A Fast-Growing Network of Conservative Groups Is Fueling a Surge in Book Bans,* N.Y. TIMES (Jan. 10, 2023), https://www.nytimes.com/2022/12/12/books/book-bans-libraries.html#:~:text=1.1k,A%20Fast%2DGrowing%20Network%20of%20Conservative%20Groups%20Is%20Fueling%20a,funded%2C%20effective%20%E2%80%94%20and%20criticized.
[11] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870 (1982).
[12] *See* Harris & Alter, *supra* note 10 (noting that 272 candidates backed by Moms for Liberty won their school board seats and are now the majority in the more than a dozen districts in states like New Jersey, Florida, and North and South Carolina).

## I. *PICO* AND STUDENTS' NARROW FIRST AMENDMENT RIGHT TO INSTRUCTIONAL MATERIALS

In September 1975, Richard Ahrens, Frank Martin, and Patrick Hughes attended a conference sponsored by Parents of New York United (PONYU), a conservative organization "concerned about education legislation in the State of New York."[13] At the time of their attendance, Ahrens was the President of the Board of Education of the Island Trees Union Free School District, No. 26, Martin was the Vice President, and Hughes was a Board Member.[14] At the conference, PONYU provided a a list of books thought to be inappropriate for students.[15] After reviewing the list, the Board determined that a number of these books were within their district's school libraries.[16] While Ahrens described the books on the list as "objectionable" and Martin described the books as "improper fare for school students,"[17] both conceded later that the books were not obscene.[18]

In a February 1976 meeting with the Superintendent and principals of the High School and Junior High School, the Board directed that the listed books be removed from the schools' library shelves and delivered to the Board, so that its members could read them.[19] In response to the subsequent publicity of their actions, the Board issued a press release that described the removed books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy," and argued that "[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers."[20] Notably, these removed books included a Pulitzer Prize winner,[21] a Martin Luther King Prize winner,[22] several

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[13] *Pico*, 457 U.S. at 856.
[14] *Id.*
[15] Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist., 474 F. Supp. 387, 389 (E.D.N.Y. 1979), *rev'd sub nom.* Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26, 638 F.2d 404 (2d Cir. 1980), *aff'd sub nom.* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, (1982).
[16] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 857(1982).
[17] *Id.*
[18] *Id.* at 856 n.2.
[19] *Id.* at 857.
[20] *Id.* at 857.
[21] Brief on Behalf of Ass'n of Am. Publishers et al. as Amici Curiae Supporting Respondents at 6, Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (no. 80-2043) [hereinafter Amici Brief].
[22] Amici Brief, *supra* note 21, at 7.

National Book Award nominees,[23] and a book later named by TIME Magazine as one of "The 100 Best YA Books of All Time."[24] These award-winning banned books included Kurt Vonnegut's *Slaughterhouse-Five*, Richard Wright's *Black Boy*, and Langston Hughes' curated anthology, *Best Short Stories by Negro Writers*.[25]

Shortly after the press release, the Board created a "Book Review Committee," consisting of four parents and four members of the school staff, to read the removed books and determine whether the books should remain off the school shelves.[26] In particular, the Board tasked the Book Review Committee with considering the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level."[27] By July 1976, the Committee recommended that the Board keep two of the books off the school library shelves, with five books deemed by the Committee to be permissible for students.[28] In regards to the remaining four books, the Committee could not agree on two, took no position on another, and recommended that the final book be made available only to students who had prior parental permission.[29] Despite the Committee's recommendations, the Board ultimately decided that only one book should be returned to the high school library without restriction, another should be available only subject to parental approval, and the remaining nine books should "be removed from elementary and secondary libraries and [from] use in the curriculum."[30] Notably, the Board did not provide a justification for their rejection of the Committee's recommendations.[31]

Following the Board's permanent removal of the nine books from their school libraries, four high school students and one junior high school student brought a lawsuit against the Board.[32] Claiming that the Board's actions violated their First Amendment rights, the students requested that the United States

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[23] *Id.* at 6–7.
[24] Annabel Gutterman & Megan McCluskey, *The 100 Best YA Books of All Time,* TIME MAG., https://time.com/collection/100-best-ya-books/ (last visited Aug. 24, 2023).
[25] Amici Brief, *supra* note 21, at 7.
[26] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 857 (1982).
[27] *Id.*
[28] *Id.* at 857–58.
[29] *Id.* at 858.
[30] *Id.* (citation omitted).
[31] *Id.*
[32] *Id.* at 856, 858.

District Court for the Eastern District of New York declare that the Board's actions were unconstitutional and to order the Board "to return the nine books to the school libraries and refrain from interfering with the use of those books in the schools' curricula."[33] In their complaint, the students alleged that the Board had "ordered the removal of the books from school libraries and [proscribed] their use in the curriculum because particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value."[34]

In response, the district court granted summary judgment for the Board, finding that the parties agreed about the motivation behind the Board's actions.[35] As the court noted, "the [B]oard acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students."[36] Furthermore, the court rejected the students' claim that their First Amendment rights had been violated, based on statutes, history, and precedent that provide schools boards with discretionary power to craft educational policy.[37] As the court concluded, the judiciary should not "intervene in 'the daily operations of school systems' unless 'basic constitutional values' were 'sharply implicate[d].'"[38]

On appeal, the Second Circuit reversed the district court, with each of the judges on the three-judge panel filing a separate opinion.[39] Judge Sifton found that the case involved, "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters" and concluded that the Board was required to "demonstrate a reasonable basis for interfering with [the students'] First Amendment rights."[40] Judge Newman concurred, viewing the case as "turning on the contested factual issue of whether petitioners' removal decision was motivated by a justifiable desire to remove books containing vulgarities and sexual

[33] *Id.* at 859.
[34] *Id.* at 858–59.
[35] *Id.* at 859.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at 860.
[40] *Id.*

explicitness, or rather by an impermissible desire to suppress ideas."[41] Upon the Board's petition for certiorari, the U.S. Supreme Court granted review.[42]

Finding that there remained a genuine issue of material fact as to the credibility of Board's justifications for removing the books, the U.S. Supreme Court affirmed the Second Circuit's decision to reverse and remanded the district court's judgment.[43] Additionally, in considering the students' First Amendment claim, the Court held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[44] Thus, the Court concluded, if the Board *intended* to deny students access to books purely on the basis of disagreeing with the ideas in the books, instead of removing the books based on their vulgarity, the Board would violate the Constitution.[45]

Notably, the Court's recognition of the students' First Amendment rights to access ideas is very narrow and context specific.[46] In the opening text of the plurality opinion, Brennan was very careful to acknowledge that federal courts traditionally defer to the discretion of school boards when it comes to the daily operations of school affairs.[47] However, Brennan distinguished this public school library case from other cases where school boards were found to have absolute discretion.[48] Unlike the "compulsory environment of the classroom," Brennan noted that public school libraries are subject to the "the regime of voluntary inquiry."[49] Thus, Brennan protects students' right to access ideas when engaging in the "self-education" context of a school library, while leaving school boards' "absolute discretion in matters of curriculum" intact.[50]

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[41] *Id.* at 861.
[42] *Id.*
[43] *See id.* at 875.
[44] *Id.* at 872 (citation omitted).
[45] *Id.* at 871.
[46] *See id.* at 866–68.
[47] *Id.* at 863–64. ("The Court has long recognized that local school boards have broad discretion in the management of school affairs… and that federal courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation of school systems.'").
[48] *Id.* at 869.
[49] *Id.*
[50] *Id.*

In addition to narrowing its examination of the Board's discretion in the context of school libraries, the Court was also quick to acknowledge an additional fact-specific element in this case.[51] The plurality, in its holding, did not deny that "local school boards have a substantial legitimate role to play in the determination of school library content."[52] Instead, the Court's First Amendment inquiry in this case was limited to the Board's discretion to *remove* books from school libraries.[53] In reaching its conclusion that school boards may not remove books based on partisan or political motivations, the Court was explicitly clear that its decision in no way affects a school board's direction to *add* books to its district's school libraries.[54]

Writing separately, Justice Blackmun found that the principle involved in this case is simpler and narrower than the plurality's focus on the "right to receive information."[55] Blackmun found that the plurality's emphasis on the context of school libraries and the affirmative obligation of schools to provide students with ideas to be both irrelevant and misguided.[56] He instead settled on the pre-existing First Amendment principle that "certain forms of state discrimination *between* ideas are improper" – especially when that discrimination is based on partisan or political reasons.[57] Blackmun acknowledged that there are instances in which school officials must be able to choose one book over another for a number of politically neutral reasons, including financial and space limitations, offensive language, or a belief that one subject is more important or deserving of emphasis.[58] However, Blackmun believes that the school board must be able to show that such book removals are "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[59] To allow school officials to act otherwise, Blackmun concluded, "hardly teaches children to respect the diversity of ideas that is fundamental to the American system."[60]

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[51] *Id.* at 870.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 871.
[55] *Id.* at 878 (Blackmun, J., concurring).
[56] *Id.* at 878–79.
[57] *Id.*
[58] *Id.* at 880.
[59] *Id.* (citation omitted).
[60] *Id.*

However, the narrower standard proposed by Blackmun would not have been of any solace to the dissenting members of the Court. In his dissent, Justice Powell not only described "the right to receive ideas" as meaningless generalization, but also noted that preventing school boards from making decisions based on partisan or political ideas was a "standardless standard that afford[ed] no more than subjective guidance to the school boards."[61] In addition to the plurality's subjective standards, Powell took issue with the effect the Court's decision could have on the governing power of local school boards.[62] By exposing school board members to liability for their decisions to remove books from the library, Powell noted that the plurality's ruling would likely corrode both the school board's authority and effectiveness.[63] In defending the decision-making power of school boards, Powell reflected that these governing bodies are "uniquely local and democratic institutions" and there was "no single agency of government at any level . . . closer to the people whom it serves than the typical school board."[64]

In a separate dissent, Chief Justice Burger, joined by Justices Powell, Rehnquist, and O'Connor, similarly expressed concerns about the judiciary interfering with an elected school board and the "standardless" guidance announced by the plurality (with the Burger dissent particularly focusing on the vagueness of "educational suitability," in addition to "political factors").[65] In addition to these concerns, Burger also took issue the plurality's basic premise that students have the "right to receive ideas." [66] Burger interpreted this right as providing students with an enforceable entitlement "to have access to *particular* books within a school library"[67] and require "the government [to] provide continuing access to *certain* books."[68] Burger expressed concern with this possibility, albeit premised on an exaggerated focus on *specific* information instead of the plurality's general right to information.[69] In controlling the contents of a school library, Burger noted, the government is not *prohibiting* a student from expressing their views, but instead is

[61] *Id.* at 895 (Powell, J., dissenting).
[62] *Id.* at 894.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 890 (Burger, J., dissenting).
[66] *Id.* at 887.
[67] *Id.* at 886 (emphasis added).
[68] *Id.* at 889 (emphasis added).
[69] *Id.*

choosing "not to be the conduit for that particular information."[70] In supporting a school board's right to control the contents of its district's libraries, Burger reasoned that removing a book from a school library is not a restraint on student speech or expression and that students are always free to retrieve the books in question from public libraries and bookstores.[71]

While Burger exaggerated the premise of the plurality's holding and failed to acknowledge potential issues of accessibility when suggesting that students just go buy the book or go to their local public library instead, both his and Powell's critiques of the plurality's "political or partisan" emphasis are valid. Despite Burger's fears about the plurality's newly established "entitlement," *Pico* leaves students with a very limited First Amendment right to receive information. Based on the narrow holding of the *Pico* plurality, school boards only violate students' First Amendment rights when books are *removed* from *school libraries* and the justifications for a book's removal are based on the Board's desire to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[72] Thus, students appear to have no cause of action in instances where the Board removes books from a school's *curriculum* or refrains to *add* books to the school library based on partisan motivations.[73] Furthermore, even in instances where a school board *removes* books from a *school library*, students are tasked with showing that such a decision is based on partisan or political motivations, instead of vulgarity or educational suitability.[74] As conservative organizations, like the Florida Citizens Alliance, list books like *And Tango Makes Three* (a book about two male penguins who adopt a baby penguin) to their "2021 Porn in Schools Report" for "indecent and offensive

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[70] *Id.*

[71] *Id.* at 886.

[72] *Id.* at 872 (majority opinion) (citation omitted).

[73] *Id.* at 864, 872 (noting that "[w]e are therefore in full agreement with petitioners that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values'" and that "nothing in our decision today affects in any way the discretion of a local school board to choose books to add to the libraries of their schools").

[74] *See id.* at 890 (Burger, J., dissenting) ("The plurality concedes that permissible factors are whether the books are 'pervasively vulgar,' or educationally unsuitable. 'Educational suitability,' however, is a standardless phrase. This conclusion will undoubtedly be drawn in many—if not most—instances because of the decisionmaker's content-based judgment that the ideas contained in the book or the idea expressed from the author's method of communication are inappropriate for teenage pupils.").

material,"[75] students now have the nearly impossible task of establishing that many boards' definitions of vulgarity are primarily motivated by their political and religious ideologies.

## II. THE IMPACT OF *PICO* IN THE UNITED STATES JUDICIAL SYSTEM

Over forty years later, the Supreme Court has yet to revisit *Pico* or even rule on how school boards choose which books to *add* in school libraries. However, following the Court's ruling in *Pico*, the removal of books from school libraries was brought before lower courts in the following cases.

### *A.* Campbell v. St. Tammany Parish School Board *(5th Cir. 1995)*

In 1993, parents of children enrolled in St. Tammany Parish School filed a complaint against the school board, claiming that the school board's removal of *Voodoo & Hoodoo* from their children's public school library violated the students' First Amendment rights.[76] The Board removed the book from the school library after receiving a formal complaint from Kathy Bonds, who found a copy of the book in her daughter's possession and objected to the book's contents.[77] Despite the Fifth Circuit describing the book as a "facially serious and scholarly" account of the current religious practice of voodoo and hoodoo, the parent complained to the school principal that the book "heightened children's infatuation with the supernatural and incited students to try the explicit 'spells,' which she believed to be dangerous."[78] In response, the principal organized a committee to review the book in question.[79]

After considering Bonds' complaint, the school committee unanimously voted to keep the school's copy of *Voodoo & Hoodoo* on a "reserve" shelf of the school library, available only to eighth grade students who had parental permission.[80] In recommending to keep the book, the committee noted that the book was both "educationally suitable" and "fulfill[ed] the purpose for which it was selected, that is, to offer supplemental information/explanation to a topic included in the approved 8th grade Social Studies curriculum."[81] Not satisfied

[75] Harris & Alter, *supra* note 10.
[76] Campbell v. St. Tammy's Par. Sch. Bd., 64 F.3d 184, 187 (5th Cir. 1995).
[77] *Id.* at 185.
[78] *Id.* at 186.
[79] *Id.*
[80] *Id.*
[81] *Id.*

with this response, Bonds appealed the school-level committee's decision to the Superintendent, who put together a seven-person, district-wide committee to review the school-level committee's recommendation.[82] Similar to the school-level committee, all but one member of the appeals committee recommended to keep the book (with restricted access).[83] In response to this recommendation from the appeals committee, Bonds yet again appealed the decision, this time to the school board.[84]

During the meeting in which the school board reviewed the committees' recommendations to keep *Voodoo & Hoodoo*, a member of the Louisiana Christian Coalition gave a speech and presented "a petition containing 1,600 signatures urging removal of the [b]ook from the parish school libraries."[85] After hearing a presentation from the appeals committee regarding their recommendation to keep the book, a school board member, who was also the lone dissenter on the appeals committee, made a motion to remove *Voodoo & Hoodoo* from the all the libraries within the school system.[86] Ultimately, the school board voted 12-2 in favor of removing the book from the libraries altogether, without stating the reasoning for its removal or expressing its opinion on the merits of the recommendations from the two earlier committees.[87]

A separate group of parents filed a lawsuit alleging the removal of *Voodoo & Hoodoo* violated their children's First Amendment rights and later made a motion for summary judgment.[88] The district court granted summary judgment for the this group of parents and stated the school board's removal of *Voodoo & Hoodoo* from its district libraries "intended to deny students access to the objectionable ideas contained in the book, particularly the descriptions of voodoo practices and religious beliefs."[89] In addition to granting the parents' motion for summary judgment, the district court also ordered the school board to replace all removed copies of *Voodoo & Hoodoo* to the public school libraries.[90]

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[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* at 187.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*

On appeal, the Fifth Circuit first recognized that school boards have wide discretion in administering school affairs and that courts should sparingly interfere with a board's operation of its school system.[91] While the Fifth Circuit acknowledged that *Pico* was not binding on the court's decision, it nonetheless turned to the case for guidance and analyzed its "constitutional limitations on school officials' discretion to remove books from a school library."[92] While *Pico* ultimately resulted in a remand for further development of the record, the Fifth Circuit did not read *Pico* as "requiring a merits trial in *every* instance in which a court must decide the constitutionality of removal of a school library book."[93]

At first glance, the Fifth Circuit reasoned that the school board's discretion was limited in this case, given that the book was a part of the school library and not the school curriculum, and thus was subject to greater First Amendment scrutiny.[94] However, the court ultimately concluded that the record was not sufficiently developed enough to permit a summary judgment determination.[95] Specifically, the Fifth Circuit found that there was not enough evidence detailing the school board's reasons for removing *Voodoo & Hoodoo*.[96] Thus, the court could not conclude as a matter of law that there was not a genuine issue of material fact as to whether the school board's motive violated the students' First Amendment rights.[97]

While the Fifth Circuit ultimately remanded the case to the district court for further proceedings, the court nonetheless took the liberty of sharing its initial observations on the nature of the school board's decision.[98] In considering whether the school board's removal of the *Voodoo & Hoodoo* could be "an unconstitutional attempt to 'strangle the free mind at its source,'" the court noted that this possibility is supported by the record's revelation that many school board members had not even read *Voodoo & Hoodoo* before voting on its removal – with some only reading "several excerpts selected and furnished by a representative of the Louisiana Christian Coalition."[99]

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[91] *Id.* at 187–88.
[92] *Id.* at 189.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 190.
[96] *Id.* at 191.
[97] *Id.*
[98] *Id.* at 190.
[99] *Id.*

Furthermore, the court found the school board's failure to adopt, or even consider, the recommendations of *both* the school-wide committee and the district-wide appeals committee had "the appearance of 'the antithesis of those procedures that might tend to allay suspicions regarding [the School Board's] motivations.'"[100]

The Fifth Circuit's unsatisfactory conclusion in *Campbell v. St. Tammany Parish School Board* highlights both the limitations of *Pico* and a dangerous legal loophole available for school boards to take advantage of. While *Pico* does not stand for a *per se* rule requiring a merits trial in every case, as the Fifth Circuit noted, it still requires an inquiry into a school board's "substantial motivation in arriving at the removal decision."[101] Thus, a court adhering to *Pico* must not only ascertain the factors driving school officials' removal decisions, but also examine the validity of reasons provided by those officials (as it would be all too easy to provide a pretextual reason). By not putting into writing the reasons behind their removal of *Voodoo & Hoodoo*, the St. Tammany School Board effectively avoided summary judgment, despite all of the concerning evidence cited by the Fifth Circuit.[102] By making it a practice to keep all discussions of a book removal vote out of the meeting notes, future school boards can potentially avoid liability for their decisions, or at least prolong litigation – requiring extensive testimony and cross-examination, as called for by the Fifth Circuit in this case.[103]

*B.* Case v. Unified School Dist. No. 233 *(D. Kan. 1995)*

Just two months after *Campbell v. St. Tammany Parish School*, the U.S. District court for the District of Kansas ruled in a similar book removal case brought by parents and students seeking to compel the reinstatement of a book on First Amendment grounds. The facts of the case started in 1993, when the Kansas City chapter of the Gay and Lesbian Alliance Against Defamation (GLADD/KC) and Project 21 launched a book project to ensure that students in the Kansas City area had access to "diverse information regarding gender and sexual orientation."[104] As a part of these efforts, a representative on behalf of GLAAD/KC and Project 21 donated two books with

[100] *Id.* at 190–91.
[101] *Id.* at 190.
[102] *Id.*
[103] *See id.* at 190.
[104] Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 866 (D. Kan. 1995).

queer story lines, *Annie on My Mind* and *All-American Boys*, to each of the three high schools in the Olathe School District.[105] *Annie on My Mind*, a novel depicting a fictional relationship between two teenage girls, received an American Library Association award for "Best of the Best" books for young adults and contains no "vulgarity, offensive language, or explicit sexual content."[106]

In response to GLAAD/KC and Project 21's donation, the Olathe School District received extensive media coverage and several members of the public reached out to the school district's representatives.[107] At this time, a media specialist for one of the district's high schools notified the District's Assistant Superintendent for Curriculum and Instruction that the school district already had two copies of *Annie on My Mind*, prior to the GLAAD/KC and Project 21 donation.[108] Upon further inspection, it was determined that pre-donation copies of *Annie on My Mind* also existed in four other school middle and high schools within the district, with some copies dating back to the mid-1980s.[109] However, the school records showed that none of the copies had been checked out or read prior to the dispute in this case.[110] Additionally, no copies of *All-American Boy* were found in any of the schools within the Olathe School District prior to the donation.[111] In the wake of the media coverage, the Assistant Superintendent requested that all of the media specialists in the district read the donated books and advise if the books were educationally suitable for the district's school libraries.[112]

In providing a recommendation to the Assistant Superintendent, the media specialists advised that the school district keep the copies of *Annie on My Mind*, noting that it was "sensitive and realistic" and "had literary merit."[113] However, the specialists found *All-American Boys* to be "shallow and incomplete" and advised against keeping the donated copies of the book.[114] Upon the advice of the media specialists, the

[105] *Id.* at 866–67.
[106] *Id.* at 867.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 867–68.
[114] *Id.*

Assistant Superintendent notified the District's Superintendent that she would be returning the donated copies of *All-American Boys*.[115] In turn, the Superintendent informed Board of Education members of the decision and let them know that he had yet to receive any formal complaints from the District's parents.[116]

Prior to a scheduled meeting with the District's media specialists, the Superintendent put together a set of "Book Donation Guidelines" without seeking input in their preparation.[117] During the scheduled meeting, the Superintendent passed out his new guidelines and announced that both the donated and pre-existing copies of *Annie on My Mind* would be removed from the District's libraries.[118] While the District had yet to receive a written complaint from anyone about *Annie on My Mind*, the Superintendent cited the media coverage, numerous phone calls protesting the donations, and a belief that the Board of Education "would favor taking the book off the shelf" as justifications for his decision.[119] Notably, this meeting between the Superintendent and the Media Specialist did not include any discussion of the book's literary merit, educational suitability, subject matter, or removal alternatives (like placement on a restricted shelf).[120]

Prior to the next Board of Education meeting, the Superintendent provided the Board with a packet of materials, including a letter from the district's legal counsel.[121] In the letter, the counsel warned about the First Amendment implications of removing books from the District's libraries and suggested that "if the decisive factor for the removal decision was 'educational suitability' of the book in question, then its removal would be permissible."[122] In addition to the advice from the District's counsel, the Superintendent recommended that the Board not respond publicly to comments made at the upcoming meeting and adjourn to executive session in order to counsel its attorney before any vote on a book removal.[123]

At the January meeting, the Board of Education members did just that.[124] After permitting students and attendees to share

[115] *Id.* at 868.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 870.
[121] *Id.* at 869.
[122] *Id.*
[123] *Id.*
[124] *Id.*

their beliefs for and against the book's removal, the Board adjourned to an executive session, where they heard private presentations from the Superintendent and the Board's counsel.[125] At no time during this session did the Board discuss the educational suitability or literary merit of the book in question.[126] Upon returning from the executive session, the Board members voted four to two in favor of removing the book, without engaging in any public discussions of their views or addressing any of the comments made by the public in the open portion of the meeting.[127] While the Board refrained from sharing their motivations for the book removal, many members were motivated by outright homophobic beliefs and believed that the book would be in direct conflict with the District's religious and "traditional family values."[128]

Notably, both the Superintendent and Board of Education members acted in direct conflict with the District's media selection policy, neither waiting for a formal complaint before reconsidering its library materials nor appointing a committee to consider the removal decision itself.[129] Furthermore, the officials violated the District's media selection policy by failing to consider the recommendation of the media specialists and making no effort to discuss the educational merits of the book.[130] Finally, the District ignored the American Library Association's Library Bill of Rights, which was formally incorporated into the district's media selection policy and affirmed "the importance of having a diversity of ideas available in the library 'thereby enabling students to develop intellectual integrity in forming judgment.'"[131]

In ruling on the merits of the students' First Amendment claims, the Kansas District Court turned to both *Pico* and *Campbell* for guidance.[132] In considering the "credibility of [school officials'] justifications for their decision," as required by *Pico*, the District Court found the Board only invoked "educational suitability" as a pretextual reason for its strong disagreement with the content in the book and ultimately its own

[125] *Id.*
[126] *Id.*
[127] *Id.* at 869–70.
[128] *See id.* at 870–71.
[129] *Id.* at 872.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 875.

viewpoint discrimination.[133] In considering the *Campbell* court's note that a school board's failure to follow its own procedures raises suspicion, the district court also found the behavior of the Superintendent and Board in this case to be "highly irregular and erratic" and ultimately "persuasive evidence of improper motivation."[134] Finally, the court noted that the availability of *Annie on My Mind* from sources outside of school does not cure the District's improper motivations, as the removal of the book from the school library was a restraint that could not be "justified by the fact that there may be other times, places, or circumstances available for such expression."[135] Thus, the *Case* court concluded, the Olathe School District's removal of *Annie on My Mind* constituted a violation of students' First Amendment rights and was to be remedied by returning the books to the District's library shelves.[136]

*C.* Counts v. Cedarville School District *(W.D. Ark. 2003)*

Nearly ten years later, the Western District Court for Arkansas considered a book removal case – this time with a special twist. In *Counts v. Cedarville School District*, the books in question were not completely removed from the school library, but instead removed from the general access area and placed on a reserve shelf that required parental permission before accessing.[137] Furthermore, the student who brought this claim owned several of the restricted books in question and had a signed permission slip from her parents.[138] Nonetheless, the student and her parents argued that the school district violated the student's First Amendment rights by placing a burden on her right to access the books.[139]

The facts of the case first began in November 2001, after a pastor who was a member of the Cedarville School Board became concerned about the presence of the *Harry Potter* series in the District's school libraries.[140] The Board member, along with the District Superintendent, contacted the high school librarian about the matter and learned that school policy required them to complete a Reconsideration Request Form in order to change the

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[133] *Id.*
[134] *Id.* at 876.
[135] *Id.*
[136] *Id.* at 877.
[137] Counts v. Cedarville Sch. Dist., 295 F.Supp.2d. 996, 998 (W.D. Ark. 2003).
[138] *Id.* at 998–99.
[139] *Id.* at 999.
[140] *Id.* at 1000–01.

status of the book series.[141] After receiving a completed requesting the removal of *Harry Potter and the Sorcerer's Stone*, the District formed a Library Committee, consisting of representatives from the elementary, middle, and high schools, to consider the merits of the removal request.[142] Upon review, the Library Committee voted unanimously to keep the book in the school libraries without restriction.[143] In turn, the high school librarian presented the recommendations of the Library Committee to the Cedarville School Board.[144] However, the Board not only voted 3-2 in favor of restricting *Harry Potter and the Sorcerer's Stone*, but also went on to similarly restrict the other three books in the series as well.[145]

In analyzing the undisputed facts of the case, the district court noted that the board members' decision to restrict the first four books of the Harry Potter series was neither based on "concerns about profanity, sexuality, obscenity, or perversion in the books, nor out of any concern that reading the books had actually led to disruption in the schools."[146] Furthermore, only one of the three members who voted in favor of restricting the book series had even read *Harry Potter And The Sorcerer's Stone* and none of the three members had even read the other three books in the series.[147] Instead, the board members testified that their vote to restrict access to the series was solely based on their concern that "the books might promote disobedience and disrespect for authority" and "the fact that the books deal with 'witchcraft' and the 'occult.'"[148]

Notably, the *Counts* court found the Boards' concerns with disobedience and witchcraft to be unpersuasive.[149] In addressing the concerns about the disruptiveness of the book series, the Court noted that there was no evidence that any of the board members were aware of any *actual* disrespect or disobedience that resulted from the book series.[150] As the Court concluded, "[s]uch speculative apprehensions of possible disturbance are not sufficient to justify the extreme sanction of

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[141] *Id.* at 1001.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* at 1002.
[149] *Id.* at 1004.
[150] *Id.*

restricting the free exercise of First Amendment rights in a public school library."[151] The court similarly disposed of the Board members' concerns about witchcraft and the occult, noting that it is not within the Board members' power to prevent students from accessing such concepts.[152] Quoting *Tinker*, the court concluded that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[153]

In granting summary judgment in the student's favor, the *Counts* court ultimately found that the Board's decision to restrict access to the Harry Potter series was not authorized by the Constitution and thus infringed the First Amendment rights of the school's students.[154] In comparing this case to *Pico*, *Campbell*, and *Case*, *Counts* appears to extend students' First Amendment rights to receive ideas in two distinct ways. First, *Counts* stands for the premise that students have the right to receive *unrestricted access to* ideas. By treating book access hinged upon parental permission the same as a book that has been removed from a school library altogether, the *Counts* court considers the inability to simply pull a book off of a shelf and the potential stigmatization of reading a special access book to rise to the level of an unconstitutional burden on the First Amendment. Second, *Counts* stands for the premise that students have the right to receive ideas *in their public school libraries.* In finding that the student in this case had standing, despite the fact that she had direct, unrestricted access to the *Harry Potter* series in her own home, *Counts* represents a counterpoint to the common argument that students can always access banned books in bookstores and community libraries separate from the school system. Taken as a whole, *Counts* represents the belief that students have the right to unrestricted access of ideas, regardless of the accessibility of such ideas within their own homes and community.

### *D.* ACLU v. Miami-Dade County School Board *(11th Cir. 2009)*

As the last book banning case analyzed in this Note, *ACLU v. Miami-Dade County School Board* is arguably the most nuanced discussion of the educational suitability of a book. In fact, the majority dedicated an entire page of its opinion to distinguishing between book bans and removals, with an in-

[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.* at 1005.

depth analysis of how many times the various *Pico* opinions included the word "remove" (107 times) versus the word "ban" (0 times).[155] Despite the majority's at times misplaced fixation with semantics, the case largely grappled with the sufficiency of cultural representation in publicly accessible literature.

On April 4, 2006, Juan Amador, the father of a student at Marjory Stoneman Douglas Elementary School filed a request to have *A Visit to Cuba* removed from his daughter's school.[156] *A Visit to Cuba*, which the dissent describes as "an apolitical, superficial geography series" that is "26-sentences in length,"[157] is part of a nonfiction book series "which 'targets readers between the ages of four to eight-years-old, and [is] written to provide basic information about what life is like for a child' in various countries."[158] Amador, who identified as a former Cuban political prisoner, took specific issue with *A Visit to Cuba* because he found the book was not truthful and depicted "a life in Cuba that does not exist."[159] Writing in his complaint that the book also "aim[ed] to create an illusion and distort reality," Amador recommended that *A Visit to Cuba* be replaced with a book "that truly reflects the plight of the Cuban people of the past and present."[160]

Amador's "Citizen Request for Reconsideration of Media" was processed through an extensive four-tiered administrative process that included a review by the school materials review committee, the Principal, the District Superintendent, and the district-wide materials review committee.[161] This administrative process specifically considers the district's "fifteen criteria for selecting library materials: educational significance, appropriateness, accuracy, literary merit, scope, authority, special features, translation integrity, arrangement, treatment, technical quality, aesthetic quality, potential demand, durability, and lack of obscene material."[162] Here, both committees separately voted to retain *A Visit to Cuba*, with the school-wide committee finding the book to be "factually

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[155] ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1220 (11th Cir. 2009).
[156] *Id.* at 1183.
[157] *Id.* at 1234 (Wilson, J., dissenting).
[158] *Id.* at 1183 (majority opinion) (quoting ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd., 439 F.Supp.2d 1242, 1248 (S.D. Fla. 2006).
[159] *Id.* at 1184.
[160] *Id.*
[161] *Id.*
[162] *Id.*

accurate, apolitical, and appropriate for the group,"[163] and the district-wide committee finding the book to be part of a series of "formula books that contain the same type of information presented in the same formulaic manner."[164]

Despite each of the four administrative bodies recommending that the book be retained, the School Board ultimately voted six to three to remove *A Visit to Cuba*, along with the rest of the books in the series.[165] Each school board member discussed their views of *A Visit to Cuba* in the school board meeting that ultimately concluded with the 6-3 vote – with many members expressing the belief that removing the book would be an update to the library's materials and would ensure that the school is providing its students "the best education possible."[166] As Board Vice-Chair Perla Tabera Hantman explained, the Board's removal of *A Visit to Cuba* would not be an act of censorship or banning, but instead would be a matter concerning "accuracy and truth."[167]

On June 14, 2006, the Board issued a written order reflecting their final 6-3 vote at the school board meeting, noting that the removal was based upon the finding that "the book is inaccurate and contains several omissions."[168] Furthermore, the Board ordered that the book and the series at large be replaced throughout the district with "a more accurate set of books that is more representative of actual life in these countries."[169] Within a week, the American Civil Liberties Union of Florida, Inc. ("ACLU") filed a complaint alleging that the Miami-Dade County School District violated the First Amendment rights of an ACLU member.[170] More specifically, the complaint claimed that ACLU member Mark Balzli was unable to check out *A Visit to Cuba* in his son's elementary school library.[171] Concluding that Balzli and his son would "suffer imminent injury from the [book's] removal," both the District Court for the Southern District of Florida and the Eleventh Circuit found that the ACLU, on behalf of Balzli, had standing.[172]

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[163] *Id.* (internal quotations omitted).
[164] *Id.* at 1185 (internal quotations omitted).
[165] *Id.* at 1188.
[166] *Id.* at 1186–87.
[167] *Id.*
[168] *Id.* at 1188.
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 1195.

As part of their complaint, the ACLU argued that the Board's removal of *A Visit to Cuba* was act of viewpoint suppression.[173] The ACLU described *A Visit to Cuba* as "content neutral," "apolitical," and a book "in which the people of Cuba are portrayed as eating, working, and going to school like the students in the Miami-Dade County School District do."[174] Thus, it found the Board's conclusion that the book was inaccurate to be "nothing but a pretense for enforcing the politically orthodox view–especially prevalent in South Florida–that oppose[d] the Castro regime."[175] Ultimately granting a preliminary injunction for the plaintiffs, the District Court for the Southern District of Florida found that "the majority of the Miami-Dade County School Board members intended by their removal of the books to deny schoolchildren access to ideas or points-of-view with which the school officials disagreed, and that this intent was the decisive factor in their removal decision."[176] Similar to the argument presented by the plaintiffs, the district court concluded that the "School Board's claim of 'inaccuracies' is a guise and pretext for 'political orthodoxy.'"[177]

Alternatively, the Eleventh Circuit found the School Board's concern with inaccuracies to be legitimate and thus "the Board did not act based on an unconstitutional motive."[178] To the Eleventh Circuit, the record indicated that the Board did not simply dislike the ideas in the books and that "everyone, including both sides' experts, agree that the book contained factual inaccuracies."[179] Citing various experts and reports from the United States Department of State, the Eleventh Circuit analyzed each of the alleged factual inaccuracies in its majority opinion and provided contradictions to each of the book's assertions.[180] For example, the third sentence in *A Visit to Cuba* states, "People in Cuba eat, work, and go to school like you do."[181] However, the majority pointed out that this sentence is not accurate because "in Cuba food is rationed by the government," "in Cuba there is little private work," and

[173] *Id.* at 1202.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 1203 (internal quotation marks omitted).
[177] *Id.*
[178] *Id.* at 1207.
[179] *Id.*
[180] *Id.* at 1212.
[181] *Id.*

"academic freedom is restricted and revolutionary ideology and discipline are reinforced."[182]

Ironically, it is the last factual correction that the dissent premises its argument on.[183] Judge Wilson concluded his dissenting opinion with a quote from an article written by a Cuban American in *The Miami Herald*, lamenting that the removal of *A Visit Cuba* would result in "becom[ing] what we protest against – a totalitarian government."[184] In addition to First Amendment concerns, Judge Wilson focused his dissent on the education suitability of including the allegedly omitted information into children's books.[185] Citing experts provided by the plaintiffs, Judge Wilson noted that children between the ages of four and eight-years-old cannot grasp "the level of political thought implicit in these omitted facts."[186] Similarly, children in this age group do not understand the concept of "government."[187] Instead, these books seek to introduce young children to concepts like "community or culture . . . self, and how they fit in, and their understanding of these concepts is only the most basic at this age level."[188] Ultimately, Judge Wilson did not find omissions of additional contextual information to be sufficient for a book's removal, instead concluding that "[t]he answer to books that do not provide all the information a reader wants is to find another book."[189]

In many ways, the nuanced discussion in *ACLU v. Miami-Dade County School Board* is unlike many of the discussions occurring at school board meetings across our country today. In *ACLU v. Miami-Dade County School Board,* many of the school board members making the book removal decision had lived experiences that related to the banned book's contents.[190] Furthermore, these school board members were not advocating for an elimination of a subject or topic altogether, but instead calling for a replacement book that discusses the subject or topic *more in-depth*. Finally, the tension between the majority and dissenting opinions was not about the "appropriateness" of a particular lifestyle, life choice, or religion, but instead mainly

[182] *Id.* at 1212–13.
[183] *Id.* at 1252–53 (Wilson, J., dissenting).
[184] *Id.* at 1253.
[185] *Id.* at 1245.
[186] *Id.* (internal quotation marks omitted).
[187] *Id.*
[188] *Id.*
[189] *Id.* at 1248.
[190] *Id.* at 1185–88.

differed on the appropriate age for a child to learn about the history of totalitarian governments and whether a child should have access to an apolitical, generalized book that omits such histories in the meantime. Thus, in many ways, the crux of *ACLU v. Miami-Dade County School Board* is outside the concern and scope of this Note.

## III. RECOMMENDATIONS: REVISITING *PICO'S* INTENT TEST & REIMAGINING STATE POLICY

As seen in the book banning cases detailed above, *Pico* has largely left lower courts to fill in the gaps of the plurality's lofty "right to receive ideas" holding with inconsistent interpretations – leaving students' First Amendment rights both unprotected and ultimately violated. While the *Pico* plurality gave us an idealistic goal to strive for, our nation owes public school students a tangible, protective test that will hold state legislatures, school boards, and community members accountable. In the absence of further guidance from the Supreme Court, state legislatures should consider incorporating the *legal* definition of obscenity into future policies in order to create a more workable, widely recognized legal standard.

### *A. The Legal Definition of Obscenity*

The phrase "obscene" is not new to book-banning litigation. In *Pico*, the School Board initially defended their book removal decision with the explanation that "these books contain obscenities, blasphemies, brutality, and perversion beyond description."[191] While the Board later conceded that the books are "not obscene,"[192] this would not be the last time that "obscenity" would be used to justify removing books from a public school library.[193] Today, organizations like the Florida Citizen Alliance claim that nearly sixty books should be removed

[191] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 873 (1982).
[192] *Id.* at 921 n.2.
[193] Summer Lopez, *The Extreme New Tactic in the Crusade to Ban Books*, TIME MAG. (May 8, 2023) ("Across the country, charges of obscenity and 'porn in schools' are being used to ban classics like Toni Morrison's The Bluest Eye and Margaret Atwood's The Handmaid's Tale, claiming the presence of any sexual content in a book makes it illicit and harmful to minors. We have seen this with books by John Green and Jodi Picoult in Utah and Florida. Even Maus, Art Spiegelman's Pulitzer-prize winning graphic novel about the Holocaust, was banned in one Missouri district using this justification.").

from Florida schools because of content they characterize as "indecent," "inappropriate," "pornographic," and "obscene."[194]

Notably, courts and school boards have also used "obscenity" as a criterion in determining whether the removal of a book from a public school library is appropriate. In *Counts v. Cedarville School District,* the District Court for the Western District of Arkansas noted that the Board members restricting access to books "did not do so because of concerns about profanity, sexuality, obscenity. . ."[195] Furthermore, the Board in *ACLU v. Miami-Dade County School Board* included "lack of obscene material" among the fifteen criteria used for selecting library materials.[196]

Despite its frequent use, the term "obscenity" is typically only mentioned by courts and litigants in passing, with very little space dedicated to its legal definition in judicial opinions.[197] This omission is even more significant when one considers the fact that today's current legal test for obscenity predates *Pico* by nearly ten years.[198] In *Miller v. California*, the Supreme Court held that obscenity is not protected by the First Amendment and outlined "guidelines" so that jurors can determine whether a material is obscene.[199] As Chief Justice Warren explained, the three basic guidelines for obscenity must be:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[200]

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[194] Jonathan Friedman et al., *Book Banning in Walton County Based on Misleading "Porn in Schools Report" Illustrates Alarming Influence of Fringe Groups on Educational Censorship*, PEN AM. (April 29, 2022), https://pen.org/book-banning-in-walton-county-based-on-misleading-porn-in-schools-report-illustrates-alarming-influence-of-fringe-groups-on-educational-censorship/.

[195] Counts v. Cedarville Sch. Dist., 295 F. Supp.2d. 996, 1002 (W.D. Ark. 2003).

[196] ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1185 (11th Cir. 2009).

[197] *See Pico*, 457 U.S. 853, 873 (1982); *Counts* 295 F. Supp.2d 996, 1001 (W.D. Ark. 2003); *ACLU* 557 F.3d 1177, 1185. None of these cases provide a legal definition of obscenity nor cite to the obscenity standard established by Miller v. California.

[198] Miller v. California, 413 U.S. 15 (1973).

[199] *Id.* at 24, 37.

[200] *Id.* at 24.

Thus, in order to fall outside of First Amendment protection, the material at issue must fall outside community standards, offensively describe or depict sexual conduct *and* lack value. In failing to take the time to define obscenity in such a manner, courts have permitted the term "obscenity" to be used loosely and to be disassociated with its fairly rigorous three-pronged test. As a result, obscenity is being used as a catch-all in order to protect the school board's book removal decisions.[201]

*B. How Obscenity is Currently Being Weaponized by State Legislatures*

In addition to national organizations and school boards, state legislatures are now conflating LGBTQ+ content with "obscenity." As of now, two states have passed state obscenity laws that permit the criminal prosecution of librarians, and a number of states currently have similar legislation currently under review.[202]

In Arkansas, Senate Bill 81 removed existing language from Arkansas state law that protected library personnel and school employees from prosecution for distributing obscene material.[203] Furthermore, the bill, now signed into law by Arkansas Governor Sarah Huckabee Sanders, permits citizens to challenge the appropriateness of materials within school libraries, with the district school boards having the final say on the contested book matter.[204]

Similarly, House Bill 1447 in Indiana, signed into law by Governor Eric Holcomb, allows parents and community members to request that books be banned from school libraries

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[201] Friedman, *supra* note 196 ("Though there are cases where books on the list do include sexual content, it is also the case that many of them do not; they merely contain LGBTQ+ characters. The conflation of the two–arguing that LGBTQ+ content, even when it has no explicit reference to sexual conduct, is by its very nature "pornographic" or "obscene"– reflects a long-held animus toward gay, lesbian, bisexual, transgender, and queer stories and art, and calls back to a time, before the 1960s, when such content was routinely censored by government authorities.").

[202] *Monitoring State Legislation That Criminalizes Libraries, Schools, and Museums 2023*, EVERYLIBRARY (Apr. 8, 2023), https://www.everylibrary.org/state_obscenity_laws_23-24.

[203] Joseph Flaherty, *Head of Central Arkansas Library System Pledges to Defend Employees Who Might be Charged Under New State Law*, ARK. DEMOCRAT GAZETTE (Apr. 2, 2023), https://www.arkansasonline.com/news/2023/apr/02/head-of-central-arkansas-library-system-pledges/.

[204] *Id.*

on the basis of obscenity and harm to minors.[205] Additionally, librarians and school employees sharing books and materials with minors will no longer have the legal protections previously afforded to them on an educational basis.[206]

While not explicitly focused on obscenity, Florida recently passed a similar bill that requires public school librarians to remove material that contains "sexual conduct."[207] As a result, local school media-specialists are ditching "long-established methods" like the *Miller* test out of fear of breaking the law.[208] Laws like the ones coming out of Arkansas, Indiana, and Florida, coupled with a lack of guidance from the state's respective education department, has lead many media specialists and librarians to proactively remove books from shelves without any specific challenges.[209] As legislatures continue to distort state obscenity laws to intimidate school librarians and provide more control to community members, it's clear that a reimagining of *Pico* is of the utmost necessity.

### *C. How the Obscenity Test Better Protects Students' First Amendment Rights*

Ironically, the very obscenity laws that are currently being weaponized by many states could be students' best tool for protecting their access to contested books. As the test under *Pico* currently stands, "incanting the proper phrases may suffice to protect book removals unless other evidence suggests that the articulated reasons were a subterfuge for illegitimate goals."[210] However, by reimagining *Pico* as only permitting the removal of books that are considered obscene under the *Miller* test, students can poke holes in intellectually disingenuous arguments made by their district's school board.

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[205] Salome Cloteaux, *Indiana Gov. Eric Holcomb Signs School Book Banning Bill*, IND. DAILY STUDENT (May 10, 2023), https://www.idsnews.com/article/2023/05/indiana-governor-holcomb-bill-book-ban-school-library-minor.

[206] *Id.*

[207] H.B. 1069, 2023 Leg., Reg. Sess. (Fla. 2023).

[208] Douglas Soule et al., *To Be or Not to Be on the Shelf? New Florida School Book Law Could Restrict Even Shakespeare*, USA TODAY (July 15, 2023),https://www.usatoday.com/story/news/nation/2023/07/15/law-limits-florida-school-books/70414412007/.

[209] Eesha Pendharkar, *State Laws are Behind Many Book Bans, Even Indirectly, Report Finds*, EDUC. WEEK (May 19, 2023), https://www.edweek.org/teaching-learning/state-laws-are-behind-many-book-bans-even-indirectly-report-finds/2023/05.

[210] Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 62–63 (1987).

Arguably, each of the removed books outlined in the subsequent book ban cases featured in this note – *Voodoo & Hoodoo*, *Annie on My Mind, Harry Potter* and *A Visit to Cuba* - would be protected by the *Miller* test, as none of the books contained offensive sexual material and each offered value in their own right. Similarly, legal experts have concluded that currently targeted LGBTQ+ books like *Gender Queer* would have "clear literary, political, scientific, [and] probably artistic value, as well."[211] While there is typically some extra leeway for materials deemed obscene for minors, the definition of obscenity remains an "exceptionally high bar to meet" in school contexts.[212]

Finally, incorporating the *Miller* test into a reimagining of *Pico* would largely be consistent with the message conveyed throughout the plurality's opinion. As the *Pico* Court concluded, a school board can constitutionally remove books from a public school library based on a book's vulgarity, not its content or ideas.[213] By requiring a school board to adhere to the *Miller* test, school boards would no longer be able to use the phrase "obscenity" loosely as a pretext to remove certain content or ideas from a public library and the outcome imagined by the *Pico* plurality would become more fully realized.

To be clear, this reimagining of *Pico* is merely a stop-gap in the absence of further direction from the Supreme Court. Just like the *Pico* Court was flawed in their assumption that school boards would not ban books under the false pretenses of "vulgarity" and "suitability," the use of the *Miller* test as a protection against banned books inevitably has its flaws – as seen by two cases in Virginia last year, in which a resident initiated obscenity proceedings against two popular books.[214] While community members and school board members will continue to distort the definition of obscenity as a line of attack against

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[211] Lisa Worf & Gwendolyn Glenn, *Why is the Book 'Gender Queer' Being Removed from Public School Libraries, and is it 'Obscene?'*, WFAE (Nov. 18, 2021), https://www.wfae.org/race-equity/2021-11-18/why-is-the-book-gender-queer-being-removed-from-public-school-libraries-and-is-it-obscene.

[212] *Id.*

[213] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982).

[214] Joshua Block, Matt Calahan & Vera Eidelman, *It's 2022 and Two Books Are on Trial For 'Obscenity'*, ACLU (June 29, 2022), https://www.aclu.org/news/free-speech/bans-books-on-trial-for-obscenity (highlighting the lawsuit against *Gender Queer, a Memoir* by Maia Kobabe, an autobiographical graphic novel that depicts the author's experience as a non-binary and asexual person, and *A Court of Mist and Fury* by Sarah J. Maas, a fantasy novel).

beliefs, ideas, lifestyles they do not agree with, it is on the legal community to adhere to the legal test for obscenity and protect the First Amendment rights of our nation's public school students.