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This Comment Is Gay: How Banning LGBTQ-Themed Books Violates First Amendment Rights

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Michael Karam

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“There is some hysteria associated with the idea of reading that is all out of proportion to what . . . in fact happens when one reads.”

–Toni Morrison¹

Introduction

By removing these books, it creates a sense and feeling of not being accepted, or to have the right to be a part of the communities. I personally get a feeling that with the schools removing these books, it opens a feeling of shame. It silences these groups, these communities, these people, resulting in making them not feel valid, or even humanized.²

I was 11 or 12 years old the first time I can remember fantasizing about having a penis. I was lying, fully clothed, on a hillside under an open sky. I held a folded handful of grass between my legs. Safe in the knowledge that, if discovered, I could release my imaginary member and it would disintegrate back into scattered stalks. For years my standard method of masturbation was stuffing a sock into the front of my pants and manipulating The Bulge. This would evolve into hip-thrusting while thinking of my lastest [*sic*] gay ship... Memorably, I got off once while driving just by rubbing the front of my jeans and imagining getting a blow job.³

¹ PEN America, An Evening of Forbidden Books, **YouTube** (Apr. 5, 1982), <https://youtu.be/vI-YssY2NrE>.

² The New York Times asked students across the country what they thought about challenges from parents, activists, and lawmakers that some books do not belong in the school library. This response is from Kyler at Reeths-Puffer Highschool in Michigan. The Learning Network, What Students Are Saying about Banning Books from School Libraries, **N.Y. Times** (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/learning/students-book-bans.html>.

³ **Maia Kobabe**, **Gender Queer: A Memoir** 64-65 (Deluxe ed. 2022).

Across the United States, parents, activists, school board officials, and lawmakers are challenging books at an unprecedented rate.⁴ Because the Supreme Court case that deals with book bans in public school libraries is not even binding precedent, courts adjudicating such bans have applied the law inconsistently.⁵ While challenges to books are not new, their frequency and the tactics employed have changed, with a fresh focus on books related to race, gender, and sexuality.⁶

According to PEN America, a nonprofit organization that works at the intersection of literature and human rights to protect open expression in the United States and worldwide,⁷ there were at least 1,477 attempts to ban 874 individual book titles in the first half of the 2022-2023

⁴ Elizabeth A. Harris & Alexandra Alter, Book Ban Efforts Spread Across the U.S., **N.Y. Times** (Jan. 30, 2022), <https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html>.

⁵ Infra Part I.B.2.

⁶ Harris & Alter, supra note 4. See generally Jonathan Friedman & Nadine Farid Johnson, Banned in the USA: Rising School Book Bans Threaten Free Expression and Students' First Amendment Rights, **PEN America** (April 2022), <https://pen.org/banned-in-the-usa/>.

⁷ About Us, **PEN America**, <https://pen.org/about-us/> (last visited Aug. 17, 2023).

academic year.⁸ More than a quarter of the titles included LGBTQ+ characters or themes.⁹ PEN America's Index of School Book Bans, which tracked book bans from July 1, 2021 through June 30, 2022, shows that 33% of the titles (379 of 1,586 bans) explicitly address LGBTQ+ themes or have main or secondary characters who are LGBTQ+, and 283 titles contain various sexual

⁸ Richard Hall & Alex Woodward, The book ban surge gripping America's schools and libraries, **The Independent** (Apr. 24, 2023), <https://www.independent.co.uk/news/world/americas/book-bans-censorship-lgbt-b2325804.html> (marking a nearly 30% spike from book challenges over the past year).

⁹ Leila Rafei, How LGBTQ Voices are Being Erased in Classrooms, **ACLU** (June 27, 2022), <https://www.aclu.org/news/lgbtq-rights/how-lgbtq-voices-are-being-erased-in-classrooms-censorship>.

content, including novels with sexual encounters¹⁰ and informational books on puberty,¹¹ sex,¹² and relationships¹³.¹⁴ According to the American Library Association, Gender Queer was 2022's and 2023's most challenged book.¹⁵

¹⁰ This includes titles such as **All Boys Aren't Blue** by George M. Johnson, **Lawn Boy** by Jonathan Evison, and **This Book is Gay** by Juno Dawson. See PEN America's Index of School Book Bans (July 1, 2021 - June 30, 2022), **PEN America**, https://docs.google.com/spreadsheets/d/1hTs_PB7KuTMBtNMESFEGuK-0abzhNxVv4tgpI5-iKe8.

¹¹ Id. **Celebrate Your Body 2: The Ultimate Puberty Book for Preteen and Teen Girls** was banned in April 2022 in Walton County School District, Florida, pending an investigation, and **Sex, Puberty, and All That Stuff: A Guide to Growing Up** was banned in libraries in North East Independent School District in Texas in December 2021. Id.

¹² Id. Some of the informational books on sex banned in more than one school district include **Doing It!: Let's Talk About Sex; Doing It Right: Making Smart, Safe, and Satisfying Choices About Sex; Safe Sex 101: An Overview for Teens; It's Perfectly Normal: Changing Bodies, Growing Up, Sex, and Sexual Health; and Trans+: Love, Sex, Romance, and Being You.** Id.

¹³ Id. Examples of informational books on relationships that were banned include **Dating, Relationships, and Sexuality: What Teens Should Know; Wait, What?: A Comic Book Guide to Relationships, Bodies, and Growing Up; Friendship, Dating, and Relationships**

The way these book challenges have played out is as varied as the tactics involved. Officials in Llano County, Texas had removed at least twelve books from public libraries because of their LGBTQ+ content before a federal judge ordered the books to be returned to the shelves

(Teens: Being Gay, Lesbian, Bisexual, or Transgender); and It Doesn't Have to Be Awkward: Dealing with Relationships, Consent, and Other Hard-to-Talk-About Stuff. Id.

¹⁴ Richard Hall & Alex Woodward, The book ban surge gripping America's schools and libraries, **The Independent** (Apr. 24, 2023), <https://www.independent.co.uk/news/world/americas/book-bans-censorship-lgbt-b2325804.html>.

¹⁵ Teresa Nowakowski, American Library Association Names 2022's Most Banned Books, **Smithsonian Mag.** (Apr. 25, 2023), <https://www.smithsonianmag.com/smart-news/american-library-association-names-2022s-most-banned-books-180982048/>.

within twenty-four hours.¹⁶ In New Jersey, a group sought to remove six LGBTQ+ books from Glen Ridge Public Library until a library trustee board unanimously voted to keep them.¹⁷

Some state officials have even turned to their legislature to remove certain books en masse or ban entire discussion topics. In Oklahoma, a bill¹⁸ was introduced to prohibit public school libraries from carrying books focused on sexual activity, sexual identity, or gender

¹⁶ Little v. Llano Cnty., No. 1:22-CV-424-RP, 2023 WL 2731089 at *8, *11, *13 (W.D. Tex. Mar. 30, 2023) (recognizing a First Amendment right to access to information in libraries that applies to book removal decisions and finding that the removal in this case is content-based discrimination subject to a strict scrutiny analysis, but leaving the decision about proper placement of the books to the library); Alaa Elassar, Taylor Romine & Andy Rose, Judge orders books removed from Texas public libraries due to LGBTQ and racial content must be returned within 24 hours, CNN (Apr. 1, 2023, 12:09 PM), <https://www.cnn.com/2023/04/01/us/texas-book-ban-removed-library-replaced-judge/index.html>.

¹⁷ Glen Ridge Public Library votes to keep 6 LGBTQ+ books after request to remove them, **ABC 7 NY** (Feb. 9, 2023), <https://abc7ny.com/glen-ridge-public-library-lgbtq-books-removal-trustee-board/12786117/>.

¹⁸ S.B. 1142, 2023 Reg. Sess. (introduced, Okla. 2023).

identity.¹⁹ In Florida, the Individual Freedom Act,²⁰ the official name of Governor DeSantis’s legislative proposal, the “Stop Wrongs to Our Kids and Employees (W.O.K.E.) Act,” bans workplaces, schools, and universities from discussing concepts related to race, color, national origin, or sex.²¹

¹⁹ Brooke Migdon, Oklahoma lawmaker introduces book-banning bill with \$10,000-a-day penalty, **The Hill: Changing America** (Dec. 28, 2021), <https://thehill.com/changing-america/respect/diversity-inclusion/587517-oklahoma-lawmaker-introduces-book-banning-bill/>. The bill passed through the Oklahoman Senate Education Committee on March 1, 2022. Ben Felder & Nuria Martinez-Keel, Oklahoma legislative committee advances school library book ban bill, **Oklahoman** (Mar. 2, 2022), <https://www.oklahoman.com/story/news/2022/03/02/oklahoma-education-committee-approves-book-ban-bill-public-schools/6979214001/>.

²⁰ H.B. 7, 93d Sess. (Fla. 2022).

²¹ See Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22CV304-MW/MAF, 2022 WL 16985720 at *1, n. 2 (N.D. Fla. Nov. 17, 2022); Divya Kumar, Florida universities still may not enforce Individual Freedom act, appeals court says, **Tampa Bay Times** (Mar. 16, 2023), <https://www.tampabay.com/news/education/2023/03/16/individual-freedom-bill-judge-mark-walker-gov-ron-desantis/>.

More broadly, these bans reflect the backlash and ongoing debates surrounding the teaching and discussion of LGBTQ+ identities and sexual education in schools.²² These bans are occurring in tandem with an unprecedented and dangerous spike in anti-LGBTQ+ bills across the country, prompting the Human Rights Campaign to declare a state of emergency warning.²³ In one example of political pressure to ban books in public school libraries, Republican State Representative Matt Krause sent a letter to some Texas school districts in October 2021 asking the school districts to investigate and report which books from a list of 850 were held in libraries

²² Bans have also targeted books with protagonists of color. See Jonathan Friedman & Nadine Farid Johnson, Banned in the USA: Rising School Book Bans Threaten Free Expression and Students' First Amendment Rights, **PEN America** (April 2022), <https://pen.org/banned-in-the-usa/> (The most banned titles are **Gender Queer: A Memoir** by Maia Kobabe, **All Boys Aren't Blue** by George M. Johnson, **Lawn Boy** by Jonathan Evison, **Out of Darkness** by Ashley Hope Perez, **The Bluest Eye** by Toni Morrison, and **Beyond Magenta: Transgender Teens Speak Out** by Susan Kuklin.).

²³ See Hannah Schoenbaum, LGBTQ+ Americans are under attack, Human Rights Campaign declares in state of emergency warning, **AP News** (June 6, 2023), <https://apnews.com/article/lgbtq-emergency-human-rights-campaign-guidebook-5a1195f8a6759bdfd37cd7f5a6c5ee34>. Many bills seek to ban or restrict gender-affirming healthcare for transgender youth; in Louisiana, lawmakers passed legislation banning public school employees from discussing gender identity or sexual orientation in the classroom, similar to Florida's "Don't Say Gay" bill. Id.

or classrooms.²⁴ In November 2021, Texas Governor Greg Abbott sent a letter to the Texas Association of School Boards asking it to remove allegedly “pornographic” or “obscene” materials²⁵ from public school libraries.²⁶ After the Texas Association of School Boards responded that it had no regulatory authority over the school districts, Abbott sent a second letter to state agencies requesting they develop transparent standards about the material in the

²⁴ Brian Lopez, Texas House committee to investigate school districts’ books on race and sexuality, **The Texas Tribune** (Oct. 26, 2021), <https://www.texastribune.org/2021/10/26/texas-school-books-race-sexuality>. In a notice to the Texas Education Agency, Krause did not specify which school districts were being investigated. Id. His book list is available at <https://static.texastribune.org/media/files/94fee7ff93eff9609f141433e41f8ae1/krausebooklist.pdf>. Id.

²⁵ The obscenity doctrine has been the subject of robust discussion, analysis, and critique, including, as noted by Elizabeth M. Glazer in her essay When Obscenity Discriminates, with respect to how the doctrine fails to align with nondiscriminatory treatment of LGBTQ+ representation, and has long been used to censor LGBTQ+ content. See generally Elizabeth M. Galzer, When Obscenity Discriminates, 102 **Nw. U. L. Rev.** 1379 (2008).

²⁶ See Rachel Treisman, Texas governor decries school library books with ‘pornographic or obscene material’, **National Public Radio** (Nov. 2, 2021), <https://www.npr.org/2021/11/02/1051471236/texas-governor-abbott-calls-for-removal-of-obscene-school-library-books> (Abbott’s letter provided no specific examples of such content.).

classroom and libraries.²⁷ He singled out **Gender Queer: a Memoir**, by Maia Kobabe and **In the Dream House**, by Carmen Maria Machado as describing “overtly sexual and pornographic acts.”²⁸ The week before, state representative Jeff Cason wrote that **Gender Queer: A Memoir**, by Maia Kobabe was “not appropriate for school libraries and may even be criminal for its representation of minors participating in sexual activities” in his call on Texas’s attorney general to investigate sexually explicit materials in public schools.²⁹

In a plurality opinion, the Supreme Court in Board of Education, Island Trees Union Free School District No. 26 v. Pico³⁰ decided that the First Amendment indeed imposes some limits upon the discretion of school officials to remove library books from school libraries.³¹ While the

²⁷ Cassandra Pollock, Gov. Greg Abbott tells state agencies to develop standards to block books with “overtly sexual” content in schools, **The Texas Tribune** (Nov. 8, 2021), <https://www.texastribune.org/2021/11/08/greg-abbott-books-schools-texas/>.

²⁸ Id.

²⁹ Id.; Asher Price, Texas Republican lawmakers equate LGBTQ+ books with porn, **Axios Austin** (Nov. 1, 2021), <https://www.axios.com/local/austin/2021/11/01/texas-republican-lawmakers-lgbtq-books-porn>; see also Maia Kobabe, Opinion, Schools are banning my book. But queer kids need queer stories., **Wash. Post.** (Oct. 29, 2021), <https://www.washingtonpost.com/opinions/2021/10/29/schools-are-banning-my-book-queer-kids-need-queer-stories/> (describing their experience as the book was challenged and denounced in multiple states).

³⁰ 457 U.S. 853 (1982).

³¹ Id. at 870-71.

problem of book banning and increased censorship is “most evident” in public school libraries,³² the bans have involved books in curricula,³³ in public school libraries,³⁴ and in public libraries³⁵

³² Greg Gonzalez, Amid ‘avalanche of censorship,’ federal lawmakers introduce resolution recognizing Banned Books Week, **FIRE** (Sept. 23, 2022), <https://www.thefire.org/news/amid-avalanche-censorship-federal-lawmakers-introduce-resolution-recognizing-banned-books-week>.

³³ See, e.g., Sam Britten, McMinn County residents talk to school board following “Maus” being pulled from curriculum, **FOX Chattanooga** (Feb. 10, 2022), <https://foxchattanooga.com/news/local/mcminn-county-residents-share-concerns-over-maus-ban-at-school-board-thursday> (school board in McMinn county voting to remove **Maus** by Art Spiegelman from the eighth-grade curriculum at the request of a board member); Patrick Varine, Franklin Regional ‘pauses’ teaching of novel about Iranian Revolution after complaints, **Trib Total Media** (Mar. 7, 2022), <https://triblive.com/local/westmoreland/franklin-regional-pauses-teaching-of-novel-about-iranian-revolution-after-complaints> (following parents’ complaints, administrators for the Franklin Regional School District in Pennsylvania paused teaching of **Persepolis** in the district’s ninth-grade honors English classes).

³⁴ See, e.g., Hannah Natanson, Fairfax school system pulls two books from libraries after complaints over sexual content, **Wash. Post.** (Sept. 28, 2021), https://www.washingtonpost.com/local/education/fairfax-schools-remove-books-lgbtq/2021/09/28/a3bae2fc-1fc3-11ec-9309-b743b79abc59_story.html.

³⁵ See, e.g., Drew Hawkins, With heated opposition, St. Tammany library board keeps challenged books on shelves, **Louisiana Illuminator** (Mar. 28, 2023),

and have been driven by community members,³⁶ concerned parents, and local officials.³⁷ While the plurality in Pico is not binding precedent, procedural safeguards have been designed to protect the First Amendment rights of students in public schools and to ensure that districts follow transparent, unbiased, and established procedures, in reviewing library holdings.³⁸ This Comment focuses on public school libraries that have departed from these established procedures.³⁹

<https://lailluminator.com/2023/03/28/with-heated-opposition-st-tammany-library-board-keeps-challenged-books-on-shelves/>.

³⁶ Of the 17 book challenges submitted to St. Lucie County schools in Florida in 2021, a retiree with no children of her own enrolled in the schools filed every single one of them. Katie LaGrone, After historic year of book challengers, FL’s prolific book challengers explain why they’re doing it, **ABC Action News** (June 3, 2022), <https://www.abcactionnews.com/news/local-news/i-team-investigates/after-historic-year-of-book-challengers-fls-prolific-book-challengers-explain-why-theyre-doing-it>.

³⁷ See Jonathan Friedman & Nadine Farid Johnson, Banned in the USA: Rising School Book Bans Threaten Free Expression and Students’ First Amendment Rights, **PEN America** (April 2022), <https://pen.org/banned-in-the-usa/> (describing a shift in bans now coming from state officials or elected lawmakers as opposed to local community members).

³⁸ Friedman & Farid Johnson, supra note 37.

³⁹ See id. (“Of 1,586 bans listed in the Index, PEN America found that the vast majority (98%) have involved various departures from best practice guidelines outlined by the National Coalition Against Censorship (NCAC) and the American Library Association (ALA).”).

This Comment argues that banning books with LGBTQ+ themes and character violates the First Amendment. Part I of this Comment grapples with how to define a book ban and discusses a line of cases that build First Amendment jurisprudence in educational settings, including Pico, which focuses on the right to receive information and ideas in public school libraries.⁴⁰ Part I then gives some background on the heckler’s veto and how it could apply in the public school context, explains the public forum doctrine, and shares some research on the impact on students of having LGBTQ+ books in school libraries.⁴¹ Part II argues that while public schools have broad discretion, a public-school library is a nonpublic forum where viewpoint discrimination is only constitutionally permitted when it is necessary to serve a compelling state interest.⁴² In cases where public school libraries deviate from established procedures and best practices in removing LGBTQ+ themed books from the shelves, they are violating students’ First Amendment rights. For a court to hold otherwise is to permit a heckler’s veto, whereby folks who are offended by the “controversial” material within these books have the ultimate say in what goes (or does not go) on a public-school library’s shelves.⁴³ To that end, this Comment concludes with suggestions for public school libraries faced with a request to remove LGBTQ+ books.⁴⁴

I. Background

⁴⁰ Infra Parts I.A. and I.B.

⁴¹ Infra Parts I.C., I.D., and I.E.

⁴² Infra Part II.B.

⁴³ Infra Part II.C.

⁴⁴ Infra Part II.D.

Before determining how a court should evaluate a ban on LGBTQ+ themed books in public school libraries, this Comment examines the unique framework in which these bans operate. This Part discusses the different definitions of book bans and how courts have grappled with defining a book ban.⁴⁵ This Part then examines free speech in schools, the right to receive information and ideas, and the student speech doctrine.⁴⁶ Next, this Part provides the elements of a heckler’s veto and discusses the different types of public forums.⁴⁷ Lastly, this Part describes some of the value derived from having LGBTQ+ themed books in public school libraries.⁴⁸

A. Defining a Book Ban

Since debates in education usually act as a proxy for arguments about which values will shape the future, the trend in book challenges tends to “reflect trends in social tensions over time.”⁴⁹ While book challenges and subsequent book bans are not new, the definitions employed by different nonprofit organizations and the courts’ understanding of book bans vary.⁵⁰

⁴⁵ Infra Part I.A.

⁴⁶ Infra Part I.B.

⁴⁷ Infra Parts I.C. and I.D.

⁴⁸ Infra Part I.E.

⁴⁹ **Andrew Hartman, A War for the Soul of America: A History of the Culture Wars** 200 (University of Chicago Press, 2015); Christine A. Jenkins, Book Challenges, Challenging Books, and Young Readers: The Research Picture, 85(3) **Language Arts** 228, 229 (2008).

⁵⁰ Infra parts A.1 & A.2.

Most book bans start with a book challenge, which is a request “by members of the public to remove, relocate, or restrict books from or within institutions.”⁵¹ The formal process to challenge a book typically begins with the person who is objecting to the book, whether in a library or a classroom, submitting a written complaint that then triggers an institutional review and a final decision to retain, restrict, relocate, or remove a book.⁵² In some cases, the

⁵¹ **Emily J.M. Knox, *Book Banning in 21st-Century America* 3** (Rowman & Littlefield, 2015). While there is no specific way a book ban can occur, generally, a parent, a community member, or more recently, an elected official unrelated to the school, discovers that a certain book is available to young readers at the public school’s library. Nadia Ford, ***Book Banning*, Duke University: Unsuitable** (2017) <https://sites.duke.edu/unsuitable/book-banning/>.

⁵² See Richard S. Price, ***Navigating a doctrinal grey area: Free speech, the right to read, and schools***, 55:2 **First Amendment Studies** 79, 80 (2021) (explaining that generally, public libraries require a challenger to be a patron, but that schools have varying policies); Ford, ***supra*** note 51.

complainant has not even read the full work.⁵³ Nonetheless, more and more book challenges have been brought by government officials themselves or are a result of political pressure.⁵⁴

1. Common Day Definitions

According to PEN America, a book ban is

any action taken against a book based on its content and as a result of parent or community challenges, administrative decisions, or in response to direct or threatened action by lawmakers or other governmental officials, that leads to a previously accessible book being either completely removed from availability to students, or where access to a book is restricted or diminished.⁵⁵

Following this definition of a book ban, a book temporarily taken off a shelf pending an investigation, a book moved to a different section, for example from the children's section to the adult section in the library, and a book requiring parental approval to check out, are all

⁵³ See, e.g., Steve Buchiere, Book Ban Debate Comes to C-S, **Finger Lakes Times** (June 24, 2023), https://www.fltimes.com/news/the-book-ban-debate-comes-to-clyde-savannah/article_28ffd93c-106c-11ee-af13-578488660b38.html (“Although the community member stated that he did not read the books in their entirety, he read enough to launch a complaint.”); LaGrone, supra note 36.

⁵⁴ Friedman & Farid Johnson, supra note 37 (“Of all bans listed in the Index, 41% (644 individual bans) are tied to directives from state officials or elected lawmakers to investigate or remove books in schools.”).

⁵⁵ Friedman & Farid Johnson, supra note 37.

considered banned.⁵⁶ These bans either result in diminished access to literature among young readers or diminish the ability of librarians or teachers to use them.⁵⁷

In its definition of book censorship, Lambda Literary, a nonprofit organization that promotes and supports LGBTQ+ books and authors,⁵⁸ provides that

[b]ook banning, a form of censorship, occurs when private individuals, government officials, or organizations remove books from libraries, school reading lists, or bookstore shelves because they object to their content, ideas, or themes. Those advocating a ban complain typically that the book in question contains graphic violence, expresses disrespect for parents and family, is sexually explicit, exalts evil, lacks literary merit, is unsuitable for a particular age group, or includes offensive language.⁵⁹

Unlike Pen America’s definition, Lambda Literary’s definition of book banning goes beyond the education setting to include bookstores as well.⁶⁰ This definition also mentions typical reasons behind banning the books.⁶¹

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Mission & History, **Lambda Literary**, <https://lambdaliterary.org/history-mission/> (last visited Sept. 16, 2023).

⁵⁹ Banned Book Resources, **Lambda Literary**, <https://lambdaliterary.org/banned-book-resources/> (last visited Sept. 16, 2023).

⁶⁰ Id.

⁶¹ Id.

FIRE, the Foundation for Individual Rights and Expression, an advocacy organization that promotes free speech and free thought,⁶² does not offer a definition for book bans.⁶³ Rather, FIRE casts the widest net, focusing on book challenges instead of book bans, and offers a broad definition, “A book is challenged when calls are made for it to be banned or removed from the public’s access.”⁶⁴ For FIRE, a call to ban a book is as much a challenge as actually removing the book from the public’s access.⁶⁵

2. Court definitions

Courts that have adjudicated books bans, however, have not applied a uniform definition. This Part will discuss the different ways courts in Texas, Missouri, and Florida have considered book bans.

While Sund v. City of Wichita Falls, Texas⁶⁶ and Little v. Llano County⁶⁷ are about a public library, rather than a public school’s library, the courts’ reasoning in defining a book ban is

⁶² FIRE Home Page, <https://www.thefire.org/> (last visited Sept. 16, 2023). Recently, FIRE is mostly known for its College Free Speech Rankings, an annual report about college students’ free speech on campus. Id.

⁶³ Banned Books, **FIRE**, <https://www.thefire.org/research-learn/banned-books> (last visited Sept. 16, 2023).

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Sund v. City of Wichita Falls, Tex., 121 F. Supp. 2d 530 (N.D. Tex. 2000).

⁶⁷ Little v. Llano Cnty., No. 1:22-CV-424-RP, 2023 WL 2731089 (W.D. Tex. Mar. 30, 2023), appeal filed (Apr. 4, 2023).

informative. Sund involved the censorship of two children’s picture books, **Heather Has Two Mommies**, by Leslea Newman and **Daddy’s Roommate**, by Michael Willhoite, written for young children about children who have gay and lesbian parents.⁶⁸ The Wichita Falls Public Library in Texas had purchased two copies of each.⁶⁹ After the Library Advisory Board followed its own established processes in assessing complaints it received, it decided to keep the books in the Youth Non-Fiction section of the Library.⁷⁰ The complainants then turned to the Wichita Falls City Council.⁷¹ Finally giving in to the “relentless pressure,”⁷² the City Council passed Resolution No. 16-99 which gave people with library cards the right to petition to remove books, such as **Heather Has Two Mommies** and **Daddy’s Roommate**, from the children’s section to the adult book section.⁷³ The District Court for the Northern District of Texas held that the resolution was unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 8 of the Texas Constitution.⁷⁴ The court reasoned that while the books were not entirely banned from the Library, the forced removal to a different section of

⁶⁸ 121 F. Supp. 2d at 531-32.

⁶⁹ Id. at 533.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ Id. at 533-35. On July 15, 1999, the Library Administrator indeed moved the two books from the Youth Non-Fiction section to the adult section of the library after receiving petitions signed by 300 people with library cards, meeting the required number of signatories. Id.

⁷⁴ Id. at 551.

the Library placed a significant burden on patrons' ability to access the books and still treated the action as censorship.⁷⁵ The relocation of the books to the adult section of a public library was still a book ban and amounted to censorship for being a content-based restriction.⁷⁶

In Little, members of the community complained to the Llano County Library System's director about books in the children's sections or otherwise highly visible areas that promote acceptance of LGBTQ+ views and discuss critical race theory.⁷⁷ The community members described some of these books as "pornographic filth."⁷⁸ The library system's director then

⁷⁵ While the court conceded that speech was not altogether being silenced, the Supreme Court has given "the most exacting scrutiny to regulations that *suppress, disadvantage, or impose differential burdens* upon speech because of its content." Id. at 549-50 (citing Turned Broadcasting, Inc. v. FCC, 512 U.S. 622, 641 (1994) (emphasis added)). See also, e.g., Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 809 (1996) (Kennedy, J., concurring in part and dissenting in part) ("[T]he possibility the Government could have imposed more draconian limitations on speech never has justified a lesser abridgement. Indeed, such an argument almost always is inevitable; few of our First Amendment cases involve outright bans on speech.").

⁷⁶ 121 F. Supp. 2d at 534 (N.D. Tex. 2000) (explaining that removal of books to adult section limits ability to access the books because children and the parents of children searching for them or just browsing in the children's areas will be unable to find them).

⁷⁷ Little v. Llano Cnty., No. 1:22-CV-424-RP, 2023 WL 2731089, at *2 (W.D. Tex. Mar. 30, 2023).

⁷⁸ Id.

ordered two members of the Llano County Commissioners Court to immediately pull from the shelves books that were on a list provided by one of the complainants.⁷⁹ The Commissioners Court then voted to dissolve the existing library board.⁸⁰ The community members that were instrumental in removing the books were subsequently appointed to the new board, and the new board instituted a policy mandating its approval of all future book purchases.⁸¹ The District Court for the Western District of Texas held that while public libraries' discretion is "broad,"⁸² it is not absolute and applies only to selecting library material.⁸³ Following the Fifth Circuit's holding in Campbell,⁸⁴ the court reasoned that removal decisions are subject to the First

⁷⁹ Id. at *2. The books removed from Llano Library Branch shelves included, for example, **Caste: The Origins of Our Discontents, They Called Themselves the K.K.K.: The Birth of an American Terrorist Group, Being Jazz: My Life as a (Transgender) Teen, and Spinning.** Id.

⁸⁰ Id. at *3.

⁸¹ Id.

⁸² Id. at *7 (citing United States v. Am. Library Assn., Inc., 539 U.S. 194, 205 (2003) (plurality)).

⁸³ See id. ("In fact, the Fifth Circuit, adopting the Supreme Court's plurality in Pico, has recognized a 'First Amendment right to receive information' which prevents libraries from 'remov[ing] books from school library shelves 'simply because they dislike the ideas contained in these books.'" (citing Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 189 (5th Cir. 1995) (quoting Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982) (plurality))).

⁸⁴ 64 F.3d at 190.

Amendment, evaluating them based on whether the governments' motivation in the removal was discriminatory.⁸⁵ The court, however, refused to find that plaintiffs were entitled to books being returned to their original locations, as not to "invade the prerogative of the Library with regard to proper placement of books or restrictions on access."⁸⁶

In American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board,⁸⁷ a parent objected to the school library's circulation of **Vamos a Cuba!**, a book on post-Castro Cuba, on the grounds that it was factually inaccurate.⁸⁸ The parent filed a "Citizen's Request for Reconsideration of Media" to have the book removed from the library at Marjory Stoneman Douglas Elementary School.⁸⁹ After he was dissatisfied with the school district's four-tiered administrative procedure, the parent appealed, lastly, to the school board, which ordered to remove the book in a 6-3 vote.⁹⁰ The district court held that the school board violated the First

⁸⁵ Little v. Llano Cnty., No. 1:22-CV-424-RP, 2023 WL 2731089, at *7 (W.D. Tex. Mar. 30, 2023).

⁸⁶ Id. at *13 ("Plaintiffs focused on book removals, not on relocations.").

⁸⁷ Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177 (11th Cir. 2009).

⁸⁸ Id. at 1183-84. The book is part of "A Visit to" series that follows a formulaic format to offer young readers superficial introductions to other countries. Id.

⁸⁹ Id. at 1183.

⁹⁰ Id. at 1184-88. The four-tiered process started with a request to review the book and then included an appeal to the school committee, to the district superintendent, and finally to the district committee. Id.

Amendment by removing the books.⁹¹ The 11th Circuit, however, found that there is no constitutional right to have books with factually inaccurate information on school library shelves and denied the request for injunctive relief as to the removal of the book.⁹² In reversing the lower court's decision, the 11th Circuit refused to apply Pico and held that the school board was acting within its purview to remove books.⁹³ The 11th Circuit rejected the characterization of the book removal as a "book ban," describing that characterization as "overwrought," and criticized the district court's holding that the factual inaccuracies were a convenient pretext for banning a book for political reasons.⁹⁴ Following this logic, the definition of a book ban is extremely narrow: the State would have to prohibit anyone from ever owning, possessing, or reading the book for there to be a book ban; any action less than that would not be a book ban.⁹⁵

⁹¹ Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 439 F. Supp. 2d 1242, 1283 (S.D. Fla. 2006), vacated and remanded, 557 F.3d 1177 (11th Cir. 2009).

⁹² 557 F.3d at 1202, 1230.

⁹³ Id. at 1200, 1202.

⁹⁴ Id. at 1217-18.

⁹⁵ See id. at 1218 (holding that the removal was not a book ban when the Board had not prohibited anyone else from owning, possessing, or reading the book and had simply removed a book that it had purchased with Board funds from its libraries).

The District Court for the Eastern District of Missouri in C.K.-W. by and through T.K. v. Wentzville R-IV School District⁹⁶ followed the same reasoning as the 11th Circuit.⁹⁷ Eight books were each the recipient of at least one complaint pursuant to school board regulation in the Wentzville R-IV School District.⁹⁸ According to the plaintiffs, all eight books showcase the viewpoint of an author or protagonist who is non-white, LGBTQ+, or part of another minority group.⁹⁹ The plaintiffs alleged that the books were removed with the “intent and purpose of preventing all students from accessing” them, and that the decisive factor in their removal was the “dislike of the ideas or opinions contained in the books.”¹⁰⁰ Even though the court applied

⁹⁶ C.K.-W. by & through T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906 (E.D. Mo. 2022), appeal dismissed, No. 22-2885, 2023 WL 2180065 (8th Cir. Jan. 17, 2023).

⁹⁷ Id. at 909-10.

⁹⁸ Id. at 909-11. Some of these books were removed for exceeding age sensitivity, some were reviewed while under review, and one book was returned to the shelves once the review was complete. Id.

⁹⁹ Id. at 910.

¹⁰⁰ Id. at 911.

Pico,¹⁰¹ the court held that the case “d[id] not involve banning books”¹⁰² because the school district had not “prohibited anyone from reading, owning, possessing, or discussing any book.”¹⁰³

In a nutshell, courts have disagreed in whether a book being banned from a public school library after it has already been placed on the shelf is a book ban *per se* and have leveraged whichever definition they have adopted to inform whether the removal itself violated the First Amendment.

B. Education and First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹⁰⁴

¹⁰¹ The opinion asserted that schools may “even remove books *partly* because they intend to deny students access to ideas with which they disagree.” See id. at 915 (“Only if the officials ‘intended by their removal decision to deny [students] access to ideas with which [the officials] disagreed, and if this intent was the *decisive factor* in [their] decision’ does the removal violate the First Amendment.”) (citing Pico at 871).

¹⁰² Id. at 909.

¹⁰³ Id. (“So, the ‘overwrought rhetoric about book banning has no place’ in this case.”) (citing ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1218 (11th Cir. 2009)).

¹⁰⁴ **U.S. Const.** amend. I.

Beyond the restrictions imposed by the First Amendment on the federal government and the states,¹⁰⁵ the Supreme Court has a history of recognizing certain constitutional limits upon the state in controlling the classroom or the curriculum.¹⁰⁶ While school officials may determine the content of their libraries, this power may not be exercised in a narrowly partisan or political manner because public schools are “the nurseries of democracy.”¹⁰⁷ The Supreme Court has long

¹⁰⁵ See Police Dept. 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.”); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (applying this prohibition to the states, as “[f]reedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution.”).

¹⁰⁶ See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a state law that forbade the teaching of modern foreign languages in public and private schools); Epperson v. Arkansas, 393 U.S. 97 (1968) (declaring unconstitutional a state law that prohibited the teaching of the Darwinian theory of evolution in any state-supported school); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) (holding that under the First Amendment a student in a public school could not be compelled to salute the flag).

¹⁰⁷ Mahanoy Area Sch. Dist. v. B. L. by & through Levy, 141 S. Ct. 2038, 2046 (2021); see Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870 (1982); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (“[S]tate-operated schools may not be enclaves of totalitarianism. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.”)

recognized that First Amendment rights, within the special characteristics of the school environment, are still available to teachers and students.¹⁰⁸

However, the Court has emphasized the need to affirm the state’s and school officials’ comprehensive authority to prescribe and control conduct in schools.¹⁰⁹ Conflicts that arise in the daily operation of school systems are not within the courts’ purview unless basic constitutional values are implicated in these conflicts.¹¹⁰ In Hazelwood School District v. Kuhlmeier,¹¹¹ the Court afforded full discretion to school officials in determining the contents of the curriculum.¹¹² The next three parts discuss a line of Supreme Court cases that inform First Amendment jurisprudence in education settings.

1. School Free Speech and Tinker

The Supreme Court established the controlling standard for assessing First Amendment rights in the school environment in Tinker v. Des Moines Independent Community School

¹⁰⁸ See 393 U.S. at 506; Keyishian v. Bd. of Regs. Of Univ. of State of N.Y., 385 U.S. 589, 603 (The First Amendment does not “tolerate laws that cast a pall of orthodoxy over the classroom.”).

¹⁰⁹ Epperson v. Arkansas, 393 U.S. 104 (1968).

¹¹⁰ 393 U.S. at 104.

¹¹¹ Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

¹¹² Id.; accord Searcey v. Harris, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989) (allowing content-based discrimination in curricular decisions, but not viewpoint-based discrimination).

District.¹¹³ The Court expressed the need to strike a balance between safeguarding students' First Amendment rights and the goals and needs of educators and the community.¹¹⁴

In Tinker, high school principals had banned students from wearing black armbands in protest against the United States' actions in Vietnam.¹¹⁵ The Court, in contrast to the lower courts' decision not to reinstate suspended students who violated the ban, introduced a test for weighing the application of the First Amendment in schools.¹¹⁶ According to the Court, First Amendment rights, when considered within the unique context of the school environment, apply to both teachers and students.¹¹⁷ Despite these protections, the Court affirmed the broad authority of states and school officials, in line with fundamental constitutional safeguards, to regulate and manage conduct in schools.¹¹⁸ In summary, school authorities can limit expression to prevent disruptions to school activities or material interference with the requirements of discipline, but

¹¹³ Tinker v. Des Moines School Dist., 393 U.S. 503 (1969). Before Tinker, the Supreme Court had held that students in public schools are entitled to some constitutional protection. See, e.g., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

¹¹⁴ Compare 393 U.S. at 506 (Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”) with 393 U.S. at 507 (“affirming the comprehensive authority of . . . school officials . . . to prescribe and control conduct in schools”).

¹¹⁵ Id. at 504.

¹¹⁶ Id. at 514.

¹¹⁷ Id. at 506.

¹¹⁸ Id. at 507.

such limitations must be justified by more than a simple desire to avoid discomfort and unpleasantness associated with an unpopular viewpoint.¹¹⁹

This reasoning was upheld, for example, by the district court in Counts v. Cedarville School District.¹²⁰ In Counts, three Board members at Cedarville School District removed books from the **Harry Potter** series from the library because they did not want to expose students to “witchcraft religion.”¹²¹ Absent any proof of disruptions to school activities or discipline, the Court held that the School District could not restrict access on the basis of the ideas in the books.¹²²

2. Pico and the Right to Receive Information

In Pico, students who attended public schools in New York’s Island Trees School District sued the Board of Education (“Board”) after the Board removed certain books for being “anti-

¹¹⁹ Id. at 509. See also Papish v. Bd. of Curators, 410 U.S. 667 (1973) (state university could not expel a student for using “indecent speech” in campus newspaper). But cf. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (upholding two-day suspension and revoking of privilege of speaking at graduation for student who used sexual metaphor in speech delivered to high school assembly).

¹²⁰ Counts v. Cedarville School Dist., 295 F. Supp. 2d 996, 1004 (2003).

¹²¹ Id.

¹²² Id. at 1005.

American, anti-Christian, anti-Semitic, and just plain filthy.”¹²³ The District Court for the Eastern District of New York had found that the removal was clearly “content-based,” but that there was no constitutional violation of the requisite magnitude for courts to intervene in school operations.¹²⁴ The Supreme Court reviewed the case on a motion for summary judgment.¹²⁵

Justice Brennan’s plurality opinion narrowed the parameters of the case: the books in question were optional reading, rather than required reading or in the curriculum, and the case focused only on the removal of books, rather than their acquisition.¹²⁶ While this was not the first time the Court discussed the right to receive information and ideas, it features prominently in Justice Brennan’s opinion as an “inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.”¹²⁷ The right to receive information and ideas follows

¹²³ Pico v. Bd. of Ed., Island Trees Union Free Sch. Dist., 474 F. Supp. 287, 390 (E.D.N.Y. 1979), rev’d sub nom. Pico v. Bd. of Ed., 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) (“It 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.”).

¹²⁴ Id. at 396-97.

¹²⁵ Pico, 457 U.S. at 862-63.

¹²⁶ Id. at 862.

¹²⁷ Id. at 867; see, e.g., Stanley v. Georgia, 394 U.S. 557 (1969) (for Court’s earlier discussion of the right to receive information and ideas); cf. Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *13 (N.D. Fla. Nov. 17, 2022) (“It

ineluctably from the *sender's* First Amendment right to send them.¹²⁸ Additionally, the right to receive information and ideas is a necessary predicate to the *recipient's* meaningful exercise of their own rights of speech, press, and political freedom.¹²⁹ Not only do students enjoy this right,¹³⁰ but this principle also unequivocally applies to educational settings.¹³¹

logically follows that a university student's First Amendment right to receive a professor's viewpoints should flow from that professor's First Amendment right to express those viewpoints, for the former cannot be said to exist without the latter. If both claims were viewed and analyzed independently under facts such as this, that analysis could potentially lead to an illogical result—namely, that university students have an independent right to viewpoints that their professors do not have a right to share.”)

¹²⁸ Pico, 457 U.S. at 867

¹²⁹ Id.; accord Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *12 (N.D. Fla. Nov. 17, 2022).

¹³⁰ See Pico, 457 U.S. at 868 (“As we recognized in Tinker, students too are beneficiaries of this principle: ‘In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.... [S]chool officials cannot suppress ‘expressions of feeling with which they do not wish to contend.’”) (citing Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969)).

¹³¹ See West Virginia Board of Education v. Barnette, 319 U.S. 642 (1942) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . If there are any circumstances which permit an exception, they do not now occur to us.”).

The Court found that motive matters most: if the Board intended by its removal to deny students access to disfavored ideas, and if this intent was the decisive factor in the Board’s decision, then the Board violated the Constitution.¹³² As Justice Blackmun wrote in his concurrence, “the State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas” without sufficiently compelling reasons.¹³³ The Court thus held that local school boards may not “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion” by removing books from school library shelves simply because those local school boards dislike the ideas contained within.¹³⁴ Books may be removed, though, based on “educational suitability” or for being “pervasively vulgar.”¹³⁵ Outside these two exceptions, Justice Brennan noted the irregular and ad hoc removal process in the case: had the Board employed established, regular, and facially unbiased procedures for the review of controversial material, the removal would have been less suspect.¹³⁶

The four dissenters argued that the Constitution did not prohibit the Board from expressing community values by removing library books, regardless of its motivation.¹³⁷ Chief Justice Burger thought the plurality was wrong: the government does not have to aid the speaker

¹³² See Pico, 457 U.S. at 871.

¹³³ Id. at 877 (Blackmun, J., concurring).

¹³⁴ Pico, 457 U.S. at 872 (citing Barnette at 642).

¹³⁵ Id. at 871.

¹³⁶ Id. at 874.

¹³⁷ Justice Rehnquist wrote the principal dissent. Id. at 904 (Rehnquist, J., dissenting); see also id. at 858 (Burger, C.J., dissenting), 893 (Powell, J., dissenting), 921 (O’Connor, J., dissenting).

in their communication to the recipient.¹³⁸ He questioned why the Court would require *greater* scrutiny in deciding whether *optional* books can be removed and expressed concerns about how the First Amendment principles described in the plurality opinion could equally require that some books *be acquired* by a library.¹³⁹

Justice White, finding a lack of facts pointing to the reasoning behind the school board's removal of the books, concurred only in the judgment.¹⁴⁰ With no majority opinion and seven opinions in total, most courts that have applied Pico have applied it on the narrowest grounds, taking the plurality opinion as not binding and White's opinion as controlling.¹⁴¹ Other cases have applied the plurality differently.¹⁴² In C.K.-W. by and through T.K. v. Wentzville R-IV School District, for example, the court chose to follow Justice Brennan's approach: a First

¹³⁸ Pico, 457 U.S. at 887, 889 (Burger, C.J., dissenting) (“not a hint in the First Amendment, or in any holding of this Court, of a “right” to have the government provide continuing access to certain books.”)

¹³⁹ Id. at 892 (Burger, C.J., dissenting).

¹⁴⁰ Id. at 883 (White, J., concurring).

¹⁴¹ See, e.g., Griswold, 616 F.3d at 57 (explaining that “Justice White concurred in [Pico’s] judgment without announcing any position on the substantive First Amendment claim”); Muir v. Ala. Educ. Television Comm’n, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982) (en banc) (finding Justice White’s opinion had the narrowest grounds for the judgment and therefore concluding the Court did not decide the “extent” or even the “existence” of “First Amendment implications in a school book removal case”).

¹⁴² See, e.g., 557 F.3d at 1200, 1202 (refusing to apply Pico).

Amendment violation occurs when a school board removes materials because that school board disagrees with the materials.¹⁴³ However, the district court reasoned that the facts in this case failed the test because the intent to deny was not the “*decisive*” factor, and evidence to that mens rea requirement was lacking.¹⁴⁴

3. Tinker, but: Building upon the Student Speech Doctrine with Hazelwood

In Tinker v. Des Moines, the Court had held that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁴⁵ Despite its limitations, Justice Brennan’s opinion in Pico still built upon the student speech doctrine.¹⁴⁶ In 1988, only a few years after Pico, the Court, “carv[ing] a large exception out of Tinker,”¹⁴⁷ held in Hazelwood that a school has largely unlimited power to censor student’s speech in activities sponsored by

¹⁴³ C.K.-W. by & through T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d at 913-16 (E.D. Mo. 2022).

¹⁴⁴ Id.

¹⁴⁵ Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969).

¹⁴⁶ See Richard S. Price, Navigating a doctrinal grey area: Free speech, the right to read, and schools, 55:2 **First Amendment Studies** 79, 81 (2021) (explaining that the two limitations are (i) decision to remove a book based on pervasive vulgarity or its educational unsuitability is likely constitutional, and (ii) there is no binding precedent with a plurality decision).

¹⁴⁷ Price, supra note 146 at 82.

the school.¹⁴⁸ In Hazelwood, the Court emphasized the school’s role in determining the school’s curriculum,¹⁴⁹ and the extent of this discretion appears to have no limits.¹⁵⁰

Utilizing a public forum analysis,¹⁵¹ the Court held that editorial control and censorship of a student newspaper sponsored by a public high school only needed to be “reasonably related to legitimate pedagogical concerns.”¹⁵² Differentiating the circumstances in Hazelwood from those in Tinker, the Court explained that the question of whether the First Amendment requires a school to tolerate specific student speech, as in Tinker, differs from whether the First Amendment obliges a school to actively promote certain student speech, as in this case.¹⁵³ The student newspaper in question had been established by school authorities as part of the school’s educational curriculum and served as a supervised learning opportunity for journalism students.¹⁵⁴ Because the newspaper did not qualify as a public forum, school officials had the

¹⁴⁸ See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

¹⁴⁹ Id.; accord Pico, 457 U.S. at 869 (The school board “might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values.”) (emphasis added).

¹⁵⁰ **Catherine Ross, Lessons in Censorship: How Schools and Courts Subvert Students’ First Amendment Rights** 52 (Harvard University Press, 2015) (“Hazelwood almost always functions as the equivalent of a ‘get out of jail free’ card for administrators.”).

¹⁵¹ Infra Part I.D.

¹⁵² 484 U.S. at 273.

¹⁵³ Id. at 270-71.

¹⁵⁴ Id. at 270.

right to maintain editorial control as long as their actions were “reasonably related to legitimate pedagogical concerns.”¹⁵⁵ Consequently, the Court upheld the principal’s decision to remove an article discussing student pregnancy in a manner deemed unsuitable for younger students and another article critical of a named parent in a divorce context.¹⁵⁶

4. The Public-School Library

The Supreme Court, in United States v. American Library Association,¹⁵⁷ held that a public library, to fulfill its mission of “facilitating learning and cultural enrichment,” must have broad discretion to decide what material to provide, with a focus, not to providing “universal coverage” but collecting only materials deemed to have “requisite and appropriate quality.”¹⁵⁸ A library does not have to, and will never, carry every single book possible.¹⁵⁹

In fulfilling this role, libraries have to decide what goes or does not go on their shelves. Many school libraries follow the “Continuous Review, Evaluation and Weeding,” or CREW, method, which is an established weeding guide to keep book collections up to date and make space for new acquisitions.¹⁶⁰ To decide which books to weed out of the collection, the CREW

¹⁵⁵ Id. at 273.

¹⁵⁶ Id. at 276.

¹⁵⁷ United States v. Am. Libr. Ass’n, Inc., 539 U.S. 194 (2003).

¹⁵⁸ Id. at 204.

¹⁵⁹ See id.

¹⁶⁰ Weeding the School Library, California Dep’t of Educ.,

<https://www.cde.ca.gov/ci/cr/lb/documents/weedingbrochure.pdf>; Little v. Llano Cnty., No. 1:22-

method suggests using the following factors, collectively referred to as “MUSTIE,” Misleading, Ugly, Superseded, Trivial, Irrelevant, and Elsewhere.¹⁶¹ PEN America notes that when books are deaccessioned from libraries following best practices of collection, maintenance, and “weeding” that are content-neutral, this regular update to the collection is not a ban.¹⁶²

Public school libraries have evolved from being regarded as an appendage to the educational process to an integral part of it: the school library is the “information base of the school.”¹⁶³ For students, school libraries serve as both a point of “voluntary access to information and ideas” and as a “learning laboratory” to assist them in “acquir[ing] critical thinking and problem-solving skills.”¹⁶⁴

CV-424-RP, 2023 WL 2731089, at *1 (W.D. Tex. Mar. 30, 2023); see also United States v. Am. Library Ass’n. Inc., 539 U.S. 194, 205 (2003) (“Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.”)

¹⁶¹ Little, 2023 WL 2731089, at *1.

¹⁶² See Friedman & Farid Johnson, supra note 37.

¹⁶³ See Michi, J.S. & Holton, B.A., America’s Public School Libraries: 1953-2000, U.S. Dep’t of Educ. NCES 2005-234, at 1 (2005) <https://nces.ed.gov/pubs2005/2005324.pdf>.

¹⁶⁴ Marilyn L. Miller, Statement of Dr. Marilyn L. Miller, Immediate Past President, American Association of School Librarians, a Division of the American Library Association, Before the Subcommittee on Education, Arts, and Humanities, Senate Labor and Human Resources Committee on Reauthorization of Chapter 2, Education Consolidation and Improvement Act, 16 School Library Media Quarterly, 122, July 16, 1987.

Public school libraries, in particular, are a unique environment for constitutional analysis.¹⁶⁵ Although public schools have an “inculcative function,” affording school boards greater discretion in curricular matters,¹⁶⁶ public school libraries do not serve the same functions as the rest of the school and are instead “designed for freewheeling inquiry.”¹⁶⁷ Generally, the books in a public school’s library are not part of the school curriculum and are optional reading.¹⁶⁸ The public school’s library is the locus of a student’s freedom “to inquire, to study

¹⁶⁵ See Pico, 457 U.S. at 868 (plurality) (“First Amendment rights accorded to students must be construed ‘in light of the special characteristics of the school environment’ (citation omitted)”); accord Chiras v. Miller, 432 F.3d 606, 619-20 (5th Cir. 2005) (holding that school officials’ discretion is particularly broad for book selection in public school libraries because of schools’ traditional function of selecting a curriculum); see also Sund, 121 F. Supp. 2d at 548 (“public library is a place dedicated to quiet, to knowledge, and to beauty,” and “[a] library is a might resource in the free marketplace of ideas.”).

¹⁶⁶ Pico, 457 U.S. at 846.

¹⁶⁷ Id. at 915 (Rehnquist, J., dissenting). But see Mark G. Yudof, Personal Speech and Government Expression, 38 **Case W. Res. L. Rev.** 671, 687 (1987) (“Even in the school library, the librarian must normally implement the board’s decisions, and certainly the writers of the books do not have a constitutional right to determine what books will be acquired.”)

¹⁶⁸ See, e.g., Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 189 (5th Cir. 1995) (Students at the public schools were not required to read the books in the libraries and the faculty did not supervise what books they chose to read.).

and to evaluate, [and] to gain new maturity and understanding.”¹⁶⁹ The American Library Association’s Bill of Rights states that all libraries are forums for information and ideas.¹⁷⁰ While the Library Bill of Rights is not law, its articles advise against excluding materials because of the origin, background, or views of contributors and require libraries to challenge censorship in the “fulfillment of their responsibility to provide information and enlightenment.”¹⁷¹

C. Heckler’s veto

Most recently, the term “heckler’s veto” has been used to describe “instances in which vocal audiences seek to silence offensive or controversial speech by putting pressure on institutions that control the private forums that host the speech.”¹⁷² However, the principle of a heckler’s vote took shape in six cases,¹⁷³ spanning 1940 to 1969, a period which saw the

¹⁶⁹ Pico, 457 U.S. at 868 (citing Keyishian v. Board of Regents, 385 U.S. 589 (1967)).

¹⁷⁰ Library bill of rights, **American Library Association**, <http://www.ala.org/advocacy/intfreedom/librarybill> (last visited Oct. 13, 2023).

¹⁷¹ Id.

¹⁷² Brett G. Johnson, The Heckler’s Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech, 21 **Comm. L. & Pol’y** 175 (2016).

¹⁷³ The first three cases pre-dated the civil rights movement, and the next three, which moved the Court away from its exceptional Feiner decision and towards protecting speech in the face of hostile opposition, were from the civil rights era: Cantwell v. Connecticut, 310 U.S. 296 (1940); Terminiello v. Chicago, 337 U.S. 1 (1949); Feiner v. New York, 337 U.S. 1 (1949); Edwards v.

expansion of free speech rights and was a watershed for the civil rights movement.¹⁷⁴ These six cases decided by the Supreme Court dealt with speakers who confronted audiences that were hostile to their messages.¹⁷⁵ Generally, these “hostile audience cases” share two common elements: (1) two or more groups with conflicting views meet in a public forum, and (2) police are required to keep the peace despite the fact that the controversial speech is what is stoking hostility among the groups.¹⁷⁶ The last three of the civil rights era cases, for example, all involved groups of African Americans who marched on public property to protest segregation

South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 372 U.S. 229 (1963); Gregory v. Chicago, 394 U.S. 111 (1969).

¹⁷⁴ See generally, Harry Kalven, Jr., **The Negro and the First Amendment** (1965); Gerald N. Rosenberg, **The Hollow Hope: Can Courts Bring About Social Change?** (2008); Lillian R. BeVier, Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment, 59 **Wash. & Lee L. Rev.** 1075 (2002).

¹⁷⁵ For a discussion on how the cases played a role in forming the principle of a heckler’s veto, see generally Brett G. Johnson, The Heckler’s Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech, 21 **Comm. L. & Pol’y** 175 (2016).

¹⁷⁶ Ashutosh Bhagwat, Associational Speech, 120 **Yale L.J.** 978, 1011 (2011) (arguing that hostile audience cases are “best understood as preventing not a heckler’s veto against lone, unpopular speakers, but societal vetoes of unpopular associations).

and encountered large crowds of angry whites.¹⁷⁷ In each case, some protestors were arrested and charged with violating disorderly conduct or breach of the peace statutes, with police officers testifying that they made the arrests because the crowds were becoming increasingly agitated.¹⁷⁸

Based on this jurisprudence, a heckler's vote is more classically defined as "the suppression of speech by the government [] because of the possibility of a violent reaction by hecklers."¹⁷⁹ It occurs when "the state [hides] behind the unpleasant reaction of some portions of the public in order to silence a speaker" through the use of the law.¹⁸⁰ Typically, there is the possibility of a heckler's veto when some variation of the following three elements exists: (1) a

¹⁷⁷ Brett G. Johnson, The Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech, 21 **Comm. L. & Pol'y** 175, 186-87 (2016).

¹⁷⁸ Id.

¹⁷⁹ Ronald B. Standler, Heckler's Veto, (Dec. 4, 1999), <http://www.rbs2.com/heckler.htm>; see also Berger v. Battaglia, 779 F.2d 992, 1001 (4th Cir. 1985) (defining the heckler's veto as "the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order").

¹⁸⁰ Cheryl A. Leanza, Heckler's Veto Case Law as a Resource for Democratic Discourse, 35 **Hofstra L. Rev.** 1305, 1306 (2007).

potential or actual speaker; (2) an audience, at least part of which is hostile to the speaker or their speech; and (3) some actual or potential security presence.¹⁸¹

For a heckler's veto to apply, the underlying speech has to be legally permissible and create a risk that disorder will arise because the audience does not like what the speaker is saying and wishes to stop it.¹⁸² In the abstract, the state does not have the power to silence the speaker, but in a heckler's veto situation, the state can claim neutrality.¹⁸³ By granting law enforcement significant latitude to stop the speaker due to the audience's hostility, the state essentially "transfers the power of censorship to the crowd."¹⁸⁴ When a heckler's veto is in effect, the hecklers have successfully censored or silenced the controversial speech via government action.¹⁸⁵

¹⁸¹ See, e.g., Terminiello v. City of Chicago, 337 U.S. 1, 3-5 (1949) (applying the doctrine of the heckler's veto to a speaker in an auditorium, protected by policy, while a large protest formed outside).

¹⁸² See **Harry Kalven, Jr., A Worthy Tradition** 89-90 (1988).

¹⁸³ Id. at 90.

¹⁸⁴ Id.

¹⁸⁵ Id.

1. In the public school context generally

Tinker links the public school context with the heckler's veto.¹⁸⁶ In Tinker, high school students were banned from wearing black armbands to protest the Vietnam War at school.¹⁸⁷ The Supreme Court held that, even in the public school context, undifferentiated fear or apprehension of disturbance is insufficient to override freedom of expression.¹⁸⁸ To justify restricting speech, school officials must have grounds to expect that the speech to be restricted "would substantially interfere with the work of the school or impinge upon the rights of other students."¹⁸⁹

Referencing the heckler's veto logic of Terminiello v. Chicago,¹⁹⁰ the Court writes:

Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk. . . ; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength . . . in this relatively permissive, often disputatious, society.¹⁹¹

While the hostile reaction to actual or anticipated speech does not need to take the form of violent rock-throwing for there to be a heckler's veto, the permissibility of what is

¹⁸⁶ See R. George Wright, The Heckler's Veto Today, 68 **Case W. Res. L. Rev.** 159, 173-74 (2017).

¹⁸⁷ Tinker v. Des Moines School District, 393 U.S. 503, 504 (1969).

¹⁸⁸ Id. at 508.

¹⁸⁹ Id.

¹⁹⁰ Terminiello v. Chicago, 377 U.S. 1 (1949).

¹⁹¹ 393 U.S. at 508-09.

claimed to be a heckler’s veto in the public school has been disputed in case law.¹⁹² The choice, alas, is between ignoring possible audience reactions to speech and allowing “the will of the mob to rule our schools.”¹⁹³

2. In the book banning context specifically

Of the cases on book banning that have been mentioned so far, only a few discuss a heckler’s veto.¹⁹⁴ In Sund, the district court held that the resolution in dispute “unconstitutionally confers a ‘heckler’s veto’”¹⁹⁵ on patrons who find books in the children’s section objectionable,

¹⁹² See Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 766-67 (9th Cir. 2014) (O’Scannlain, J., dissenting from denial of rehearing en banc) (arguing that in allowing the heckler’s veto in schools, the majority “creates a split with the Seventh and Eleventh Circuits and permits the will of the mob to rule our schools”); see also Katherine M. Portner, Tinker’s Timeless Teaching: Why the Heckler’s Veto Should Not Be Allowed in Public Schools, 86 **Miss. L.J.** 409 (2017) (discussing the circuit split on the heckler’s veto in the context of public schools).

¹⁹³ Dariano, 767 F.3d at 766 (O’Scannlain, J., dissenting from denial of rehearing en banc).

¹⁹⁴ See e.g., Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *46 n. 59 (N.D. Fla. Nov. 17, 2022) (explaining how Representative Avila’s view of what type of professor’s speech violates the Individual Freedom Act is effectively a heckler’s veto to the professor’s students, forcing professors “to walk on eggshells when discussing certain topics to avoid upsetting the most sensitive or unreasonable student in class”).

¹⁹⁵ Sund v. City of Wichita Falls, Tex., 121 F. Supp. 2d 530, 549 (N.D. Tex. 2000).

“effectively permitting [library patrons] to veto lawful, fully-protected expression simply because of their adverse reaction to it.”¹⁹⁶ The resolution in this case allowed people with library cards to petition to remove a book.¹⁹⁷ The court emphasized that the Supreme Court has repeatedly held regulations that confer a heckler’s veto as antithetical to the First Amendment at its core.¹⁹⁸

In C.K.-W. by and through T.K. v. Wentzville R-IV School District, however, the district court did not accept the plaintiffs’ argument that removing the materials from the library amounts to a heckler’s veto.¹⁹⁹ The court elaborated that this concept belongs solely to the freedom of speech and expression arena and does not translate to the arena of the right to information and ideas.²⁰⁰ Citing to Black’s Law Dictionary, the court sets forth the following definition for a

¹⁹⁶ 121 F. Supp. 2d at 549.

¹⁹⁷ Id. at 533-35.

¹⁹⁸ Id. ; see, e.g., Reno v. American Civil Liberties Union, 521 U.S. 844, 880-81 (1997) (noting that “heckler's veto” gives “broad powers of censorship” to “any opponent of indecent speech”); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) (“Speech cannot be ... burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”).

¹⁹⁹ C.K.-W. by & through T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 918 (E.D. Mo. 2022), appeal dismissed, No. 22-2885, 2023 WL 2180065 (8th Cir. Jan. 17, 2023) (“[I]t is not banning protected speech. And no one argues it removed these books because it feared they would provoke a violent response. This is not a case of a heckler's veto.”).

²⁰⁰ Id. at 918.

heckler's veto: "government's restriction or curtailment of a speaker's right to freedom of speech when necessary to prevent possibly violent reactions from listeners."²⁰¹

D. Public Forum Doctrine

While the Court has established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," students' rights under the First Amendment can be different in the classroom than in the school library.²⁰² The three categories of public forums, as outlined in Perry Education Association v. Perry Local Educators' Association,²⁰³ provide a framework that can help draw the lines around this analysis.²⁰⁴ These three categories are a traditional public forum, a limited public forum, and a nonpublic forum.²⁰⁵ While the distinction may be difficult to ascertain, whether a speech restriction will be reviewed under strict scrutiny or reasonableness can turn in part on whether the government has "intentionally open[ed] a nontraditional forum for public discourse" and thus created a limited public forum.²⁰⁶

²⁰¹ Id. (citing to Heckler's Veto, **Black's Law Dictionary** (11th ed. 2019)).

²⁰² Tinker v. Des Moines School District, 393 U.S. 503, 506 (1969).

²⁰³ Perry Educ. Ass'n v. Perry Local Educatos' Ass'n, 460 U.S. 37 (1983).

²⁰⁴ Id. at 45-46.

²⁰⁵ Id.

²⁰⁶ Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985); see also United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 206 (2003) (plurality opinion) ("To create such a [designated public] forum, the government must make an affirmative choice to open up its

To enforce a content-based exclusion in a traditional public forum, the state must show that its regulation is necessary to serve a compelling state interest and that the regulation is narrowly drawn to achieve that end.²⁰⁷ In such forums, a state may enforce regulation on time, place, and manner of expression when this regulation is content-neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.²⁰⁸

Public property opened for use by the public as a place for expressive activity is considered a limited public forum.²⁰⁹ As long as the property retains its open character, it is bound by the same standards as in a traditional public forum: reasonable time, place, and manner

property for use as a public forum.”); United States v. Kokinda, 497 U.S. 720, 727 (1990) (plurality opinion) (holding certain sidewalks were a nonpublic forum because the government owner had not “expressly dedicated” them “to any expressive activity”); cf. Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 814 (1984) (“Appellees’ reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks. . . .”).

²⁰⁷ 460 U.S. at 45-46.

²⁰⁸ Id.

²⁰⁹ Id.

regulations are permissible, and content-based prohibitions must be narrowly drawn to effectuate a compelling state interest.²¹⁰

Lastly, a nonpublic forum is a public property which is not by tradition, or by designation, a forum for public communication.²¹¹ In a nonpublic forum, time, place, and manner regulations are permitted, and the forum may be reserved for intended purposes, as long as the regulation on speech is reasonable.²¹² Implied in the concept of a nonpublic forum is the state's right to make distinctions in access based on subject matter and speaker identity.²¹³

In applying this doctrine in Perry, the Court held that a school district had not established a public forum through its internal school mail system because the district had not, either through policy or actual practice, made the mail system available for unrestricted use by the general public.²¹⁴ Consequently, the Court determined that the school district had the authority to appropriately exclude a teacher's association from utilizing the mail system.²¹⁵ The school district could permit a different teacher's association, which served as the exclusive

²¹⁰ Id.

²¹¹ Id.

²¹² Id.

²¹³ Id.

²¹⁴ Id. at 47.

²¹⁵ Id. at 50-51.

representative for teachers, to use the mail system because the school’s policy was reasonable and consistent with the forum’s purposes.²¹⁶

1. The First Amendment still prohibits certain restrictions even in nonpublic forums

Content-based regulation of speech is presumptively unconstitutional and subject to strict scrutiny.²¹⁷ A content-based restriction is one that, on its face, draws distinctions based on the message a speaker conveys.²¹⁸ A facially neutral restriction is content-based if it can only be justified with reference to the content of the regulated speech or if it were adopted by the government because of disagreement with the message the speech conveys.²¹⁹

Viewpoint discrimination is a distinct subset of content discrimination, which the Supreme Court considers to be “an egregious form of content discrimination.”²²⁰ Viewpoint-

²¹⁶ Id.; see also Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 269-70 (1988) (holding that a student newspaper created as part of “a supervised learning experience” was not a public forum).

²¹⁷ Amdt1.7.4.1 Overview of Viewpoint-Based Regulation of Speech, Legal Information Institute, Cornell Law School, <https://www.law.cornell.edu/constitution-conan/amendment-1/overview-of-viewpoint-based-regulation-of-speech>.

²¹⁸ Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *5 (N.D. Fla. Nov. 17, 2022) (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

²¹⁹ Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

²²⁰ Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

based regulation is driven by specific motivating ideology or the opinion or the perspective of the speaker.²²¹ Only in limited circumstances may the government differentiate among viewpoints.²²² Regardless of the forum, though, restrictions on content must be viewpoint-neutral to comply with the First Amendment.²²³ While Hazelwood may allow a school official to discriminate based on content, it does not offer “any justification for allowing educators to discriminate based *on viewpoint*.”²²⁴ For instance, in Florida, the Individual Freedom Act banned professors from expressing disfavored viewpoints in university classrooms yet permitted the

²²¹ Id.; accord Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *6 (N.D. Fla. Nov. 17, 2022).

²²² See, e.g., Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding that a high school principal may “restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use”). Even when the speech is otherwise proscribable, the government still cannot permit some viewpoints and prohibit others. See R.A.V. v. City of St. Paul, 505 U.S. 377, 388-91 (1992) (majority opinion) (holding that the law violated the First Amendment because it drew additional distinctions between different types of “fighting words” based on viewpoint).

²²³ Compare Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (no viewpoint discrimination permitted in limited forum) with Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985) (speech regulation must be reasonable in a nonpublic forum).

²²⁴ Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 439 F. Supp. 2d 1242, 1279 (S.D. Fla. 2006), vacated and remanded, 557 F.3d 1177 (11th Cir. 2009).

expression of the opposite viewpoints.²²⁵ In Pernell, the district court held that this speech-based restriction amounted to viewpoint discrimination.²²⁶

In Good News Club v. Milford Central School,²²⁷ sponsors of a private Christian club for children submitted a request to hold weekly afterschool meetings in Milford Central School in New York.²²⁸ The school denied the request because the proposed use of the space was equivalent to religious worship, which was prohibited by the community use policy.²²⁹ After the club sued, the district court held that the denial was permissible because the school had not permitted any other religious group to use its limited public forum.²³⁰ The court reasoned that the school had not engaged in unconstitutional viewpoint discrimination.²³¹ The Second Circuit affirmed, holding that the school's policy was constitutional subject discrimination, not unconstitutional viewpoint discrimination.²³² The Supreme Court, however, reversed because a

²²⁵ Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *1 (N.D. Fla. Nov. 17, 2022).

²²⁶ Id. at *39.

²²⁷ Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

²²⁸ Id. at 103.

²²⁹ Id.

²³⁰ Good News Club v. Milford Cent. Sch., 21 F. Supp. 2d 147, 154 (N.D.N.Y. 1998), aff'd, 202 F.3d 502 (2d Cir. 2000), rev'd, 533 U.S. 98 (2001).

²³¹ Id.

²³² Good News Club v. Milford Cent. Sch., 202 F.3d 502, 510-11 (2d Cir. 2000), rev'd, 533 U.S. 98 (2001).

restriction on speech, even in a limited public forum, must not discriminate based on viewpoint and must be reasonable in light of the forum’s purpose.²³³ Here, the school discriminated against the Christian organization because of its religious viewpoint.²³⁴ Allowing the organization to speak on school grounds would actually ensure neutrality toward religion, not threaten it.²³⁵ Justice Thomas refused the school’s suggestion that this discrimination should be allowed to avoid any risk that small children perceive an endorsement of the religion.²³⁶ The danger that they would misperceive the endorsement of religion is not greater “than the danger that they would perceive a hostility toward the religious viewpoint if the Club was excluded from the public forum.”²³⁷

The Court compared this case to Lamb’s Chapel v. Center Moriches Union Free School District,²³⁸ where a school district prohibited a private group from showing movies at the school solely because the films had a religious viewpoint.²³⁹ In Lamb’s Chapel, the Court held that this

²³³ 533 U.S. at 106-107 (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) and Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985)).

²³⁴ Id. at 120.

²³⁵ Id. at 114.

²³⁶ Id. at 119.

²³⁷ Id. at 118.

²³⁸ Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

²³⁹ Id. at 394.

denial was unconstitutional viewpoint discrimination.²⁴⁰ There was no realistic danger of the community perceiving that the school was endorsing a particular religion because the movies would not have been screened during school hours, would not have been sponsored by the school, and would have been accessible to the public rather than just church members.²⁴¹

In Parents, Families, and Friends of Lesbians & Gays, Inc. v. Camdenton R-III School District,²⁴² the school district implemented an internet filtering software that blocked websites with a positive viewpoint towards LGBTQ+ individuals.²⁴³ Students could access the information by requesting access to the blocked websites.²⁴⁴ The district court held that this was viewpoint discrimination even though a small list of websites was still “open” and was not blocked by the software.²⁴⁵ The software systematically burdened access to this positive

²⁴⁰ Id. at 392-93 (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”) (citing Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985)).

²⁴¹ Id. at 395.

²⁴² Parents, Fams., & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888 (W.D. Mo. 2012).

²⁴³ Id. at 890.

²⁴⁴ Id. at 891.

²⁴⁵ Id. at 892. But see Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 854, 877 (D. Kan. 1995) (suggesting that evidence of a school district considering or discussing less restrictive

viewpoint because students could not know what sites were unavailable if they were blocked and having to submit a request to access sites had a stigmatizing effect on the information.²⁴⁶ The district court reasoned that the internet access system in the school district’ library is a nonpublic forum, and the viewpoint discrimination was not narrowly designed to serve a compelling state interest.²⁴⁷ Under this analysis, as well as under the “right to receive information and ideas” from Pico, the school district was violating students’ First Amendment rights.²⁴⁸

E. Impact of LGBTQ+ Books on Students

Students both part of and not a part of the LGBTQ+ community benefit from books with LGBTQ+ characters.²⁴⁹ For students who are not a part of the community, these books increase their empathy and acceptance of others.²⁵⁰ For students who are a part of the community, studies show that they are healthier, happier, and feel more welcome in their public schools.²⁵¹ Even for

alternatives to complete removal of a banned book could allay concerns that the ban is viewpoint discrimination).

²⁴⁶ 853 F. Supp. 2d at 893-94.

²⁴⁷ Id. at 899-900.

²⁴⁸ Id.

²⁴⁹ The Benefits of LGBTQ+ Books for Kids, **HarperCollins Publishers**,

<https://www.harpercollins.com/blogs/harperkids/lgbtq-books> (last visited Sept. 6, 2023).

²⁵⁰ Id.; The Learning Network, supra note 2.

²⁵¹ See 2022 National Survey on LGBTQ Youth Mental Health, **The Trevor Project** (2022),

<https://www.thetrevorproject.org/survey-2022/>; Mike Hixenbaugh, Banned: Books on Race and

students who do not wish to tolerate or accept members of the LGBTQ+ community, these books allow future generations to truly understand and practice the well-known aphorism: “I disapprove of what you say, but I will defend to the death your right to say it.”²⁵²

II. Analysis

Banning books with LGBTQ+ themes and characters from public school libraries is a First Amendment violation. This Part will first explain how a public-school library is a nonpublic forum, a forum where the government enjoys the most freedom in restricting First Amendment rights.²⁵³ Nonetheless, this Part will then reason that limiting access to LGBTQ-themed books in a public-school library is unconstitutional viewpoint discrimination because the restrictions are not justified and do not serve a compelling government interest.²⁵⁴ As such, this type of discrimination is not allowed under First Amendment jurisprudence. To permit bans of books

Sexuality are Disappearing From Texas Schools in Record Numbers, **NBC News** (Feb. 1, 2022, 4:42 AM), <https://www.nbcnews.com/news/us-news/texas-books-race-sexuality-schools-rcna13886>. But see Matt Lavietes, From Book Bans to Don’t Say Gay bill, LGBTQ Kids Feel ‘Erased’ in the Classroom, **NBC News** (Feb. 20, 2022, 06:12 AM), <https://www.nbcnews.com/nbc-out/out-news/book-bans-dont-say-gay-bill-lgbtq-kids-feel-erased-classroom-rcna15819>; Christy Mallory, et al., The Impact of Stigma and Discrimination Against LGBT People in Texas, **The Williams Inst.** (April 2017), <https://williamsinstitute.law.ucla.edu/publications/impact-lgbt-discrimination-tx/>.

²⁵² Mahanoy Area Sch. Dist. v. B. L. by & through Levy, 141 S. Ct. 2038, 2046 (2021).

²⁵³ Infra Part II.A.

²⁵⁴ Infra Part II.B.

with LGBTQ+ themes and characters would open the floodgates to a heckler’s veto, giving “hecklers” the last say about what books go on the shelf.²⁵⁵ While Pico’s holding is not binding precedent, the plurality further supports the line of cases from Tinker to Hazelwood governing the special circumstances of the public school library and free speech.

A. The public-school library is a nonpublic forum

As discussed in Part I.D, restrictions on free speech in public forums are reviewed for reasonableness, and those in nonpublic forums are reviewed under strict scrutiny.²⁵⁶ In determining what type of forum a public-school library is, a court should examine the government’s purpose in creating the forum, the initial restrictions imposed on speakers’ access to the forum, and the nature of the forum.²⁵⁷

By creating a public-school library, the government creates a “learning laboratory” for students of the public school to acquire critical thinking and problem-solving skills.²⁵⁸ By design, a public school library is for freewheeling inquiry, studying, and evaluation.²⁵⁹ A public school library, in the same way a public library provides access to a wide collection of books, shares a

²⁵⁵ Infra Part II.C.

²⁵⁶ See Part I.D.

²⁵⁷ See Cornelius, 473 U.S. at 803; Perry Educ. Ass’n, 460 U.S. at 47-48.

²⁵⁸ Michi & Holton, supra note 163.

²⁵⁹ See supra notes 166-68.

mission of facilitating learning and cultural enrichment by providing access to books beyond what is assigned through the curriculum.²⁶⁰

In establishing the library of a public school, the government imposes initial and inherent restrictions on what books are offered and who can access these books.²⁶¹ Because only students of the public school where the library is created can check out books from that library, the public school library's policy creates a restriction based on the status of individual: in this case, they have to be a student of that public school.²⁶²

While a public school, at least to its students, can possess many of the characteristics of a traditional public forum, the public school environment differs in significant respects from public forums such as streets or parks because a public school has the authority to impose reasonable regulations compatible with its education mission upon the use of its facilities, including the library.²⁶³ In this respect, a public school library has a different mission than a public library,

²⁶⁰ Supra Part I.B.4; see Pico, 457 U.S. at 862 (books in question were optional reading, not required reading or in the curriculum, that were provided via the public school's library).

²⁶¹ See supra Part I.B.4. (explaining how the CREW method for selecting books functions).

²⁶² Cf. Perry, 460 U.S. at 49 (characterizing the access policy of the mailbox delivery system "as based on the *status* of the respective unions rather than their views," which is a right "[i]mplicit in the concept of the nonpublic forum").

²⁶³ Cf. Widmar v. Vincent, 454 U.S. 263, 267, n. 5 (1981) ("[T]he campus of a public university, at least for its students, possesses many characteristics of a public forum."). Compare Healy v. James, 408 U.S. 169, 181 (1972) (holding that students enjoy First Amendment rights of speech

which has consequences on the kind of forum the government has created.²⁶⁴ Following this analysis, a public school library is neither a traditional public forum nor a limited public form, and is a nonpublic forum.²⁶⁵ While the government has greater discretion to restrict First

and association on the campus) with Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (recognizing that First Amendment rights must be analyzed “in light of the special characteristics of the school environment”).

²⁶⁴ A public library is a limited public forum. Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1262 (3d Cir. 1992) (“[A]s a limited public forum, the Library is obligated only to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government’s intent in designating the Library as a public forum”); Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 24 F.Supp.2d 552, 563 (E.D.Va.1998); Sund v. City of Wichita Falls, Tex., 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000).

²⁶⁵ Cf. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 790, 804, 805 (holding that an annual charitable fundraising drive was a nonpublic forum when, despite the forum being open for solicitation by some charitable organizations, it was “neither [the government’s] practice nor its policy [was] consistent with an intent to designate the CFC as a public forum open to *all* tax-exempt organizations”); Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 47 (1983) (holding that the school district had not created a public forum with its system for internal school mail because it had not opened the mail system for indiscriminate use by the general public).

Amendment rights in nonpublic forums, certain restrictions are still prohibited.²⁶⁶ In a nonpublic forum, the government can still restrict speech “as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker’s view.”²⁶⁷

B. Limiting access to books with LGBTQ+ themes and characters is unconstitutional viewpoint discrimination because these restrictions are not justified and do not serve a compelling government interest

Books with LGBTQ+ themes and characters promote a perspective that encourages not only tolerance, but also acceptance of these identities. By banning only LGBTQ+ books related to sexuality and gender, but not all types of books related to sexuality and gender, this type of regulation is driven by a specific motivating ideology or the opinion or the perspective of the authors.²⁶⁸ Whether a book is moved to a different section where its access is limited or removed entirely off the shelves of the public school library, this Comment adopts the view that either way, a burden has been placed on an individual’s ability to access the book in question.²⁶⁹ Thus,

²⁶⁶ See, e.g., United States v. Am. Library Ass’n, Inc., 539 U.S. 194, 204-205 (2003) (plurality opinion).

²⁶⁷ Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1202 (11th Cir. 2009).

²⁶⁸ See supra note 221.

²⁶⁹ This follows the reasoning of the court in Sund. See discussion supra notes 68-76; cf. Reno v. American Civil Liberties Union, 521 U.S. 844, 880 (1997) (holding that “one is not to have the

this limitation on access amounts to viewpoint discrimination.²⁷⁰ In the next three sections, this Part will explain how these restrictions are not justified: the decisions do not fall under the curricular discretion of the school, are not part of established acquisition processes, and are not part of the exceptions in Pico.²⁷¹ Driven by a motivation to ban the viewpoint within these books, these bans are not narrowly tailored to serve a compelling government interest and negatively impact students.²⁷²

1. Decisions to ban LGBTQ+ books are not curricular

Generally, books in a public school’s library are not part of the school curriculum and are optional reading.²⁷³ As such, the Hazelwood test does not apply: these books may not “be fairly

exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”).

²⁷⁰ See, e.g., Parents, Fams., & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888, 892-93 (W.D. Mo. 2012) (finding viewpoint discrimination when the school district used a software that systematically blocked access to websites expressing a positive view toward LGBT individuals even if a small list of websites were still “open”). Some cases have stuck solely to a viewpoint discrimination analysis without discussing the type of scrutiny level required. See, e.g., Pernell at 1268-69 (applying test from Bishop which requires a “case-by-case inquiry into whether the legitimate interests of the authorities [were] demonstrably sufficient to circumscribe [the] teacher’s speech” without conducting a forum analysis).

²⁷¹ See infra Parts II.B.1-3.

²⁷² See infra Parts II.B.4-5.

²⁷³ Supra note 168.

characterized as part of the school curriculum,”²⁷⁴ and are not “supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”²⁷⁵ In Campbell, for example, the Fifth Circuit held that the School Board’s decision to remove **Voodoo & Hoodoo** concerned a non-curricular matter because the students at the public school were not required to read the books in the libraries, and the faculty did not supervise students’ selections.²⁷⁶

2. Decisions to ban LGBTQ+ books are not part of a library’s established acquisition methods

Ordinarily, a public-school library has substantial motivation to curate its collection and allow space for new volumes, granting it permission to cull and curate its collection as needed.²⁷⁷ When a public-school library follows best practices of collection, maintenance, and “weeding” that are content-neutral, these regular updates are not a ban and do not impose a limitation on a student’s access to these books.²⁷⁸ When making decisions about acquisitions and maintenance, librarians can make decisions about which material with LGBTQ+ themes is appropriate for

²⁷⁴ Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

²⁷⁵ Id. *But see*, Catherine Ross, **Lessons in Censorship: How Schools and Courts Subvert Students’ First Amendment Rights** 52 (Harvard University Press, 2015) (“Hazelwood almost always functions as the equivalent of a ‘get out of jail free’ card for administrators.”).

²⁷⁶ Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 189 (5th Cir. 1995).

²⁷⁷ *See, e.g.*, Weeding the School Library, **California Dep’t of Educ.**

<https://www.cde.ca.gov/ci/cr/lb/documents/weedingbrochure.pdf>.

²⁷⁸ *See* Friedman & Farid Johnson, supra note 37.

readers, and at what age.²⁷⁹ The type of decisions this Comment is focusing on, however, starts with a book challenge from a community member, rather than a librarian’s attempt to collect, maintain, or weed the library’s collection.

3. Decisions to ban LGBTQ+ books are not part of Pico exceptions

Justice Brennan, writing for the plurality in Pico, set forth that motivations of school officials to remove a book would be unconstitutional if their intention was to deny students access to ideas with which they disagreed, and if that intent was the decisive factor.²⁸⁰ School officials may not remove books from school library shelves simply because local school boards disliked the ideas contained therein and seek to “prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.”²⁸¹ In the types of book bans discussed in the introduction and in Part I, it seems that members of the community who are writing complaints to the school board are driven, at least partially, by a desire to deny students access to the ideas in

²⁷⁹ See, e.g., Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864 (D. Kan. 1995) (explaining how public school library never put **All American Boys** on its shelves because it “was not appropriate” and was “shallow and incomplete.”)

²⁸⁰ See Pico, 457 U.S. at 871. But see C.K.-W. by & through T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 915 (E.D. Mo. 2022), appeal dismissed, No. 22-2885, 2023 WL 2180065 (8th Cir. Jan. 17, 2023) (holding that “if an intent to deny must be the *decisive factor*, schools may even remove books *partly* because they intend to deny students access to ideas with which they disagree”).

²⁸¹ 457 U.S. at 872 (quoting West Virginia State Bd. Of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

these books.²⁸² When school boards are giving into these complaints and objections, they are acting as proxies to community members' dislike of the ideas contained in these books. They are thus prescribing what shall be considered *orthodox* in the public-school library.²⁸³

The Pico plurality further suggested that it might be acceptable to withdraw a book if it contained “pervasive vulgarity” or if it was “educationally unsuitable.”²⁸⁴ These exceptions do not apply to the types of book bans this Comment discusses. Even if a school board, or other school authorities, were to provide either as the stated reason for a ban—labeling a book, for example, as “obscene,” “pornographic,” “pervasively vulgar,” or “sexually explicit”—the school board is still not exempt from conducting a rigorous review via established processes.²⁸⁵ Notedly, publishers and librarians conduct a rigorous process in deciding whether to acquire a book in the

²⁸² See, e.g., Counts v. Cedarville School Dist., 295 F. Supp. 2d 996, 1004 (2003) (evidence before the court showing that the Board Members wanted to ban the books for promoting a particular religion, “witchcraft religion”).

²⁸³ See also 457 U.S. at 879-80 (Blackmun, J., concurring) (“[S]chool officials may not remove books for the purpose of restricting access to the political ideas or social perspectives discussed in them, when the action is motivated simply by the officials’ disapproval of the ideas involved.”).

²⁸⁴ 457 U.S. at 872.

²⁸⁵ See Friedman & Farid Johnson, supra note 37.

first place and what age it would be most appropriate for—a book does not become vulgar just because one person disagrees with its content or deems it so.²⁸⁶

4. Disagreeing with the viewpoint in these books is not a good enough reason

Even if a complainant disagrees with the viewpoint promoted by a certain book, the Supreme Court has held that “[o]ur representative democracy only works if we protect the ‘marketplace of ideas.’”²⁸⁷ In its role as an educator, the government, via its public schools, must facilitate an informed public opinion and protect unpopular ideas.²⁸⁸ In Tinker, the Court warned that schools may not prohibit speech because of “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”²⁸⁹ The Court recognized a very

²⁸⁶ See also Morse v. Frederick, 551 U.S. 393, 409 (2007) (refusing to stretch the meaning of the word “offensive” from Fraser because much political and religious speech might be perceived as offensive to some).

²⁸⁷ Mahanoy Area Sch. Dist. v. B.L. by & through Levy, 141 S. Ct. 2038, 2046 (2021). But see United States v. Am. Library Ass’n, Inc., 539 U.S. 194, 215 (Kennedy, J., concurring) (installing internet software in the public library to block images that constitute obscenity or child pornography per the Children’s Internet Protection Act is constitutional because “[t]he interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling”).

²⁸⁸ Id.

²⁸⁹ 393 U.S. at 509.

limited restriction where “necessary to avoid material and substantial interference with schoolwork or discipline.”²⁹⁰

Following this reasoning, the district court in Counts found that, with the lack of evidence of any actual disobedience or disrespect flowing from reading the **Harry Potter** books, Board members’ concerns were merely speculative.²⁹¹ Their justification for the restrictions on access did not bring them within the narrow exception of Tinker.²⁹² Similarly, in the case of book bans promoting a particular *view* of the LGBTQ+ identity, the school board does not have the property authority or power to prevent students from reading about it.²⁹³ A school board of a public school library cannot restrict access on the basis of the ideas expressed in these books, even if members of the school board do not approve of the content.²⁹⁴

As the Fifth Circuit noted, the public-school library has a special role where students may freely and voluntarily explore diverse topics.²⁹⁵ No matter the identity of the original

²⁹⁰ 393 U.S. at 511.

²⁹¹ Counts v. Cedarville School Dist., 295 F. Supp. 2d 996, 1004 (2003) (evidence before the court showing that the Board Members wanted to ban the books for promoting a particular religion, “witchcraft religion”).

²⁹² See id. at 1005.

²⁹³ Cf. Counts, 295 F. Supp. 2d at 1004 (citing Pico which held that “[o]ur Constitution does not permit the official suppression of *ideas*”).

²⁹⁴ Cf. id. at 1005 (“nor can the defendant permissibly restrict access on the basis of the ideas expressed therein—whether religious or secular”).

²⁹⁵ Campbell v. St. Tammany Parish School Bd., 64 F.3d 184, 190 (1995).

complainant, a school board’s non-curricular decision to remove a book *after* it had been placed on the libraries’ shelves raises the issue of whether such an action could constitute an unconstitutional effort to “strangle the free mind at its source.”²⁹⁶ Public school authorities cannot use their “educational mission” as “a license to suppress speech on political and social issues” when they disagree with the viewpoint expressed.²⁹⁷ Thus, school authorities violate the Constitution when they ban books with LGBTQ+ themes and characters from the public school library.

The logic applied in the public library setting in Sund should equally be extended to the public school library, which is also an optional space: a party’s desire to not be exposed to a certain viewpoint cannot infringe on another’s right to be exposed to that viewpoint.²⁹⁸ In Sund, the City’s claim that the City had a compelling interest in “shielding minors from an influence of

²⁹⁶ Id. (quoting Barnette at 637).

²⁹⁷ Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J., concurring).

²⁹⁸ See Sund v. City of Wichita Falls, Tex., 121 F. Supp. 2d 530, 551 (N.D. Tex. 2000) (“Where First Amendment rights are concerned, those seeking to restrict access to information should be forced to take affirmative steps to shield themselves from unwanted materials; the onus should not be on the general public to overcome barriers to their access to fully-protected information.”); cf. Healy v. James, 408 U.S. 169, 180-81 (“The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’”).

literature that is not obscene by adult standards” was too broad of a restriction.²⁹⁹ Additionally, even when the regulation does not fully silence the speech in question, the Supreme Court has given “the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”³⁰⁰ When a book with LGBTQ+ themes or characters is being banned, the regulation is doing exactly that: suppressing, disadvantaging, and imposing a differential burden upon these books because of the viewpoint therein.

5. Impact of viewpoint discrimination on students

While people who challenge books believe they are operating with the best interest of children or the public in mind, limitations on access to these books have a stigmatizing effect on students. When students have to specifically request access to books with LGBTQ+ themes or do not even know these books exist because they are not on their public school library’s shelves, the library is effectively burdening a single viewpoint on LGBTQ+ issues, one of tolerance, acceptance, and celebration of LGBTQ+ identities and stories.³⁰¹ The public school library, thus,

²⁹⁹ 121 F. Supp. 2d at 552 (N.D. Tex. 2000) (holding that the interest in restricting access to these children’s books is not a compelling one and the City failed to make the argument that the targeted books were obscene to children in the legal sense); see also Couch v. Jabe, 737 F. Supp. 2d 561, 565 (W.D. Va. 2010) (sexually explicit materials not exempted from First Amendment protections).

³⁰⁰ 121 F. Supp. 2d at 549-50 (citing Turner Broadcasting, Inc. v. FCC, 512 U.S. 622, 642 (1994)).

³⁰¹ Cf. Parents, Fams., & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888, 893-95 (W.D. Mo. 2012).

is effectively weighing in on a conversation about LGBTQ+ identity and implicitly saying that positive speech about LGBTQ+ identity is not permitted.³⁰² The government is effectively speaking “through its selection of which books to put on the shelves and which books to exclude.”³⁰³ By removing books because of their LGBTQ+ themes or because such themes are “inappropriate for children,” officials are inevitably privileging the interests of anti-LGBTQ+ parents over those of LGBTQ+ parents and LGBTQ-accepting parents.³⁰⁴

Moreover, books with LGBTQ+ characters or themes are usually selected to increase empathy, representation, and acceptance of others, regardless of whether an individual student is part of the LGBTQ+ community.³⁰⁵ For students who identify as part of the LGBTQ+

³⁰² Cf. Morse v. Frederick, 551 U.S. 393, 409 (holding that some targeted viewpoint discrimination in a school setting is tolerated when it is against student advocacy of illegal drug use at school events); see also Pratt v. Indep. School Dist. No. 831, 670 F. 2d 771, 779 (8th Cir. 1982) (recognizing “chilling effect” of removing films from school curriculum, which clearly indicated that ideas contained in films were unacceptable and should not be discussed or considered).

³⁰³ PETA, Inc. v. Gittens, 414 F.3d 23, 28 (D.C. Cir. 2005).

³⁰⁴ See Andrew Perry, Pico, LGBTQ+ Book Bans, and the Battle for Students’ First Amendment Rights, 32 Tul. J. L. & Sexuality 197, 215 (2023).

³⁰⁵ HarperCollins Publishers, supra note 249.

community, the consequences are real and tangible.³⁰⁶ LGBTQ+ youth have shared that they feel erased by legislators pushing for anti-LGBTQ+ efforts.³⁰⁷ A 2022 study by the Trevor Project found that 55% of surveyed youth had access to LGBTQ-affirming spaces at school, compared to only 37% at home.³⁰⁸ This kind of access reduced the likelihood of suicide attempts.³⁰⁹ Some transgender teens described their school libraries as “safe havens” where they can explore ideas without non-accepting parents watching over them.³¹⁰

Thus, viewpoint discrimination against books with LGBTQ+ themes and characters is not justified to satisfy a compelling government interest under a strict scrutiny analysis. When these decisions are not part of the library’s established process to acquire and curate its collection, are not based in the school curriculum, do not qualify for the exceptions under Pico, and are driven by disagreement with the viewpoint itself, these bans are not justified; they are, therefore, impermissible infringements on students’ First Amendment rights.

³⁰⁶ See, e.g., Mallory, et al., supra note 251 (finding that LGBT students in Houston and Fort Worth, Texas are more likely to be bullied than their peers and that 73% of transgender students reported verbal, physical, or sexual harassment).

³⁰⁷ Lavietes, supra note 251. One student explained, “I personally get a feeling that with the schools removing these books, it opens a feeling of shame. It silences these groups, these communities, these people, resulting in making them not feel valid, or even humanized.” The Learning Network, supra note 2.

³⁰⁸ **The Trevor Project**, supra note 251.

³⁰⁹ See id.

³¹⁰ Hixenbaugh, supra note 251.

C. To permit the banning of LGBTQ+ books opens the floodgates to a heckler’s veto

The notion of a heckler’s veto is often used in First Amendment contexts where the audience reacts violently to the speech in question.³¹¹ However, a mechanism whereby anyone can challenge a book they disagree with based on viewpoint and get that book successfully removed from a public school library’s shelves creates an environment where the content of a public school library is decided by a mob of the loudest and most efficient complainants, rather than the librarians and educators.³¹² This mechanism is similar to a heckler’s veto. When a librarian or an educator is deciding what goes on the shelf, they are not driven by hostility to the content itself.³¹³

As discussed in Part I.C., a heckler’s veto exists when three elements are satisfied: there is a potential or actual speaker or speech, an audience which is hostile to the speaker or their

³¹¹ See C.K.-W. by & through T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 918 (E.D. Mo. 2022), appeal dismissed, No. 22-2885, 2023 WL 2180065 (8th Cir. Jan. 17, 2023) (refusing plaintiffs’ argument that policy limiting access to certain books created “an official heckler’s veto” because a heckler’s veto involves “the freedom of speech and expression, not the right of access to particular ideas”); accord Roe v. Crawford, 514 F.3d 789, 796 n.3 (8th Cir. 2008) (describing a heckler’s veto as “situations in which the government attempts to ban protected speech because it might provoke a violent response”).

³¹² When a librarian or educator is following established procedures in curating and maintaining their collection, they are not driven by hostility to the content itself in their decision-making. Thus, they are inherently not hecklers.

³¹³ See supra note 160-62.

speech, and a security presence of some kind.³¹⁴ First, in the case of a book challenge, the speech in question is the LGBTQ-themed book containing what the heckler has deemed to be controversial views. Second, the audience is the community members who have raised the concerns about this speech because it offends them and have acted upon this hostility to the book by challenging it. Lastly, the security presence in this case is the school board officials who succumb to these challenges when they have a duty to protect the speaker. By limiting access to the book in question, school officials have passed the power of censorship to the crowd rather than promote the conflict of ideas essential to our democracy.³¹⁵ In banning LGBTQ+ books, school officials are presumably making judgments on the content of the book, which is mechanically different from a traditional heckler's veto: In a traditional heckler's veto, the state actor removes the speech *without* making a judgment on the content of the speech. In both scenarios, though, the state actor is effectuating the heckler's intent and censoring the speech as a result.

The risk of allowing members of the community to act as a hostile mob ruling what is permitted on the shelves of public-school libraries is too great to allow bans of LGBTQ+ books to go unchecked. In sum, the public-school library is a non-public forum, where even viewpoint discrimination is examined under a strict scrutiny analysis. When a LGBTQ+ book is banned and that decision is neither based in the library's established procedures, in the school's curriculum,

³¹⁴ See Leanza, supra note 180.

³¹⁵ Cf. Kalven, supra note 182 at 90; R. George Wright, The Heckler's Veto Today, 68 **Case W. Res. L. Rev.** 159, 174 (2017) (explaining Tinker Court's explicit reference to the heckler's veto logic of Terminiello).

nor in either of the exceptions outlined in Pico, there is no justification to satisfy a compelling government interest. Disagreeing with the viewpoint in these books is not a good enough reason to deny students in public schools access to these books in the library.

D. Suggestions for public school libraries

Freedom of expression must be the bedrock of public schools in an inclusive, democratic, and inclusive society.³¹⁶ Nonetheless, challenges to books in the public-school library will persist. When faced with such challenges, a library should follow its established procedures in reviewing the complaint and assessing the challenge. Procedures that do not require a complainant or a reviewing committee to read the book in question in full, for example, are inherently suspect. A complete removal of the book can still be suspect, but a less restrictive alternative to the complete removal of the book might allay concerns that the restriction is unconstitutional viewpoint discrimination.³¹⁷

Conclusion

Book bans are not new to the United States and its history, and book bans will continue to affect public school libraries.³¹⁸ As polarization around LGBTQ+ identity, acceptance, and

³¹⁶ Friedman & Farid Johnson, supra note 37.

³¹⁷ See, e.g., Case v. Unified School Dist. No. 233, 908 F. Supp. 864, 875-75 (1995).

³¹⁸ The Witch Trials of J.K. Rowling, Chapter Two: Burn the Witch, **The Free Press**, at 43:12 (Feb. 21, 2023),

<https://open.spotify.com/episode/5KHjzG673oNEFPdJ5E4pJI?si=3b9b844eb4094a73> (“Things like this [book bans] are always going to happen. They always have in American history.”); Fred

tolerance deepens, communities across the country will continue to grapple with book complaints, book relocations, and book removals.

Banning a book with LGBTQ+ themes and characters from a public-school library violates students' First Amendment right to receive information and ideas.³¹⁹ Even as a nonpublic forum, the public school library is still a place where viewpoint discrimination is examined under strict scrutiny. When decisions to ban books with LGBTQ+ themes and characters are not part of the library's established process to acquire and curate its collection, are not based in the school curriculum, do not qualify for the exceptions under *Pico*, and are driven by disagreement with the viewpoint itself, these bans are not justified or narrowly tailored to promote a compelling government interest.

In the afterword of *Gender Queer*, Kobabe writes about the many messages from readers saying how much the book meant to them, that they had shared it with a parent, a sibling, a friend, or a child, and that it had opened up conversations about gender and identity they had not had before.³²⁰ Perhaps, as Ray Bradbury wrote in *Fahrenheit 451*, their book is feared because it

L. Pincus, Battles over book bans reflect conflicts from the 1980s, **The Conversation** (Mar. 7, 2022), <https://theconversation.com/battles-over-book-bans-reflect-conflicts-from-the-1980s-177888>; see, e.g., BANNED: Adventures of Huckleberry Finn, **PBS American Experience** (Sept. 2017), pbs.org/wgbh/americanexperience/features/banned-adventures-huckleberry-finn/ (explaining why Huckleberry Finn has consistently been on lists of challenged and banned books).

³¹⁹ See *supra* Part II.A.

³²⁰ Maia Kobabe, *Gender Queer: A Memoir* 246 (Deluxe ed. 2022).

“show[s] the pores in the face of life. The comfortable people want only wax moon faces, poreless, hairless, expressionless. We are living in a time when flowers are trying to live on flowers, instead of growing on good rain and black loam.”³²¹

³²¹ **Ray Bradbury, Fahrenheit 451** 79 (2011).