

Pico, LGBTQ+ Book Bans, and the Battle for Students' First Amendment Rights

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The Supreme Court addressed book removals in school libraries in the 1982 case Island Trees Board of Education v. Pico,¹ but the complex opinion did not craft a rule to bind lower courts. Nonetheless, lower courts have used Pico as a guide in addressing censorship in school (and public) libraries, but that era of deference appears to be coming to an end. With book challenges at historic highs, anti-censorship advocates should anticipate relying not on Pico, but on broader First Amendment principles.

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I. INTRODUCTION

Book bans are back. As part of the wave of anti-LGBTQ+ legislation currently sweeping the country, the victories in the fight for LGBTQ+ equality have rekindled an old fight: access to books in school libraries.

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1. 457 U.S. 853 (1982).

The American Library Association sounded the alarm in November, 2021, warning that a dramatic uptick in bans for books addressing LGBTQ+ issues was an omen of things to come.² Sure enough, by early 2022, states across the country were grappling with a coordinated and unprecedented push to ban books with LGBTQ+ characters or themes, especially in school libraries.³ Conservative parents, political activists, and state officials have attacked books with LGBTQ+ themes as obscene, inappropriate, overly sexual, and more.⁴ While some efforts target particular books—such as the award-winning work *Gender Queer*—others categorically demand the removal of LGBTQ+-themed books. In a 2022 report, PEN America found 2,532 individual book bans—1,648 unique book titles—across the country, affecting 5,049 schools.⁵ Forty-one percent of those books had LGBTQ+ characters or subject matter.⁶

What makes these efforts particularly worrisome is the current state of the law regarding book removals from school libraries. In 1982, the United States Supreme Court addressed the issue in *Island Trees Union Free Sch. Dist. No. 26 v. Pico*⁷ in a plurality opinion. In the forty years since *Pico*, federal courts have largely abided by its holding: that books may be removed from school libraries for “a lack of educational suitability” or due to “excessive vulgarity,” but may *not* be removed simply because the school board dislikes the ideas contained within it.⁸

2. *The American Library Association Opposes Widespread Efforts to Censor Books in U.S. Schools and Libraries*, AMERICAN LIBRARY ASSOC., (Nov. 29, 2021), <https://www.ala.org/news/press-releases/2021/11/american-library-association-opposes-widespread-efforts-censor-books-us>.

3. Marisa Dellatto, ‘Unprecedented’ Book Ban Attempts in 2021—Many with LGBTQ Themes—Library Group Reports, FORBES, (Apr. 4, 2022, 11:46 AM), <https://www.forbes.com/sites/marisadellatto/2022/04/04/unprecedented-book-ban-attempts-in-2021-many-with-lgbtq-themes-library-group-reports/?sh=5ccd24235b52>.

4. Neal Broverman, ‘Filth,’ ‘Obscene’: GOP Attacks Books About LGBTQ+ Kids, Racism, THE ADVOCATE, (Feb. 1, 2022, 02:45 PM) <https://www.advocate.com/exclusives/2022/2/01/filth-obscene-gop-attacks-books-about-lgbtq-kids-racism>.

5. Jonathan Friedman & Nadine F. Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AMERICA, (Sept. 19, 2022), <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/>.

6. *Id.*

7. 457 U.S. 853 (1982).

8. This central holding of *Pico* has been tested over the last forty years. The opinion’s more expansive vision of student First Amendment rights has been noted as “fractured and splintered” after application by lower courts, and more recent decisions suggest that its run its course. See Marielle Elisabet Dirkx, *Big Brother Is Reading: An Examination of the Texas Textbook Controversy and the Legacy of Pico*, 17 U.C. DAVIS J. JUV. L. & POL’Y 29, 63 (2013).

The current deference to *Pico* should not be assumed, however, as two more recent cases make clear.⁹

With a federal judiciary packed with anti-LGBTQ+ judges by President Donald Trump during his term,¹⁰ First Amendment defenders challenging school officials for LGBTQ+ book removals may find themselves arguing before judges who see no reason to defer to *Pico*. In Part II, this Comment explains the decision in *Pico*. Part III surveys how federal courts have understood and applied the decision in the last forty years, noting recent changes to its reception. In Part IV, this Comment discusses how courts will likely evaluate student First Amendment claims (in light of a recent decision from the Eastern District of Missouri), and map out strategies for building and affirming student First Amendment rights in a post-*Pico* judiciary.

II. *PICO*—THE SUPREME COURT REVIEWS BOOK REMOVALS IN SCHOOL LIBRARIES

Pico the leading case concerning school library “book bans,” where school officials decide to remove certain books from school libraries based on their content. The case began in the United States District Court for the Eastern District of New York in *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.* In 1979, high school students took action to defend their First Amendment right to receive information after a group of parents successfully pressured their board of education to remove books from the school library. The parents had previously attended a conservative political conference where they received a list of eleven books that the conference deemed offensive.¹¹ The board agreed to review the books, releasing a press statement justifying review on the grounds that the books were “anti-American” and “anti-Christian.”¹²

A committee reviewed the books and found that four of them should be retained.¹³ For the remaining books, the committee could not agree about two of them, took no position on one, and restricted access with

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

10. Dan Avery, *Trump Stacked Courts With Judges ‘Hostile’ Toward Gays, Rights Group Says*, NBC NEWS, (Jan. 6, 2021, 03:30 AM), <https://www.nbcnews.com/feature/nbc-out/trump-stacked-courts-judges-hostile-toward-gays-rights-group-says-n1252899>.

11. *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.*, 474 F. Supp. 387, 389 (E.D.N.Y., 1979).

12. *Id.* at 390.

13. *Id.* at 391.

borrowing subject to parental approval on another.¹⁴ Nonetheless, the board only allowed one book to be returned to the libraries and one retained subject to parental approval; the remaining books were removed.¹⁵

Students filed a 42 U.S.C. § 1983 action alleging that the board removed the books based on their own moral and political views, not on the books' educational content, and the Eastern District of New York agreed.¹⁶ However, the court nonetheless held that an educator's admitted content-based removal of books was not an infringement of the First Amendment.¹⁷

The United States Court of Appeals for the Second Circuit reversed and remanded the district court's decision, holding that the students had made a *prima facie* First Amendment violation and that the school board had failed to demonstrate they did not violate it.¹⁸ Concurring in the result, Judge Jon O. Newman wrote that the central question was fact-based; namely, whether the book removal was truly motivated by a desire to suppress ideas.¹⁹

The case came before the United States Supreme Court. Writing for a plurality of the Supreme Court, Justice Brennan outlined the specific issues before the court. First, the case raised only the narrow issue of removal of books already in school libraries; it did not discuss curriculum (or any books that students would be *required* to read), nor did it address whether school boards could be compelled to purchase books not yet on the shelves.²⁰ Second, Justice Brennan outlined the procedural posture of the case and how it constrained the Court's analysis. The Court could only reverse the Second Circuit's holding if it found that there was no genuine issue of material fact as to whether the officials abused their discretion.²¹ As Justice Brennan summarized:

In sum, the issue before us in this case is a narrow one, both substantively and procedurally. It may best be restated as two distinct questions. First, does the First Amendment impose any limitations upon the discretion of

14. The committee could not come to agreement on two of the books and took no position at all on the remaining book. *Id.*

15. *Id.*

16. *Id.* at 392.

17. *Id.* at 397.

18. *Pico v. Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26*, 638 F.2d 404, 419 (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).

19. 638 F.2d at 438 (Newman, J., concurring).

20. *Pico*, 457 U.S. at 862.

21. *Id.* at 863.

petitioners to remove library books from the Island Trees High School and Junior High School? Second, if so, do the affidavits and other evidentiary materials before the District Court, construed most favorably to respondents, raise a genuine issue of fact whether petitioners might have exceeded those limitations?²²

In answering the first question, the plurality held that the First Amendment prevented school board officials from exercising their discretion “in a narrowly partisan or political manner.”²³ While school boards possess “broad discretion” in determining the content of curriculum, as part of their prerogatives to transmit the values of their communities, that discretion “must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.”²⁴ School boards can remove books for a lack of “educational suitability,” or if the books were “pervasively vulgar.” But, citing the famous First Amendment language of *Tinker v. Des Moines Independent Community School District*, the Court reiterated its view that officials may not infringe on students’ First Amendment rights, as they do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[.]”²⁵

The Court acknowledged that it should not intervene in regular school operations unless constitutional rights were “directly and sharply implicated.”²⁶ But here, the Court found sufficiently direct implication to intervene: the First Amendment protects not only student expression but “the right to receive information and ideas,” and that right is a predicate to the meaningful exercise of the expressive rights of speech, press, and political freedom.²⁷

The Court recognized that the school library is a student’s “principal locus” of the exercise of their freedom to gain knowledge.²⁸ Unlike curricular requirements, which transmit community values to students, libraries are places of voluntary inquiry—a place of “self-education and individual enrichment that is wholly optional.”²⁹ As such the school

22. *Id.*

23. *Id.* at 870.

24. *Id.* at 864.

25. *Id.* at 867; see *Tinker v. Des Moines Ind. Comm’y Sch. Dist.*, 393 U.S. 503, 506 (1969).

26. *Id.* at 866.

27. *Id.* at 867.

28. *Id.* at 868.

29. *Id.* at 869.

board's discretion in libraries is more limited than its discretion in determining curriculum.

The Court also concluded that the board was not entitled to summary judgment as a matter of law. The Court refused to reject the Second Circuit's conclusion that the board had acted highly irregularly and held that there was a genuine issue of material fact as to the motivations behind the school board's actions.³⁰ Accordingly, the Court affirmed the Second Circuit's ruling.

Without a majority opinion to govern analyses of school library book removal, the concurring opinions in *Pico* took on special significance for the interpretation of the decision. Justice Blackmun, concurring in part, disagreed with the Court on the nature of school libraries and the right to receive information, arguing more narrowly that state discrimination between ideas is improper.³¹ Justice Blackmun's rule would state that officials may not deny access to ideas because they disagree with those ideas, though they may reject them due to their suitability, relevance, or vulgarity.³²

Justice White took a simpler position in his concurrence. In his view, the case turned on the justification for the book removal, a question of fact the Second Circuit had already answered.³³ Further analysis by this Court, he argued, was inappropriate, as the Court should not answer a constitutional question when it was not necessary to do so.³⁴

Four Justices dissented in the case: Chief Justice Warren Burger's dissent was joined by Justices Powell, Rehnquist, and O'Connor, and found no infringement of First Amendment rights. Students could find the books elsewhere, like public libraries and bookstores; as a result, the students could receive and discuss the ideas contained within them through alternative means.³⁵ Chief Justice Burger characterized the plurality holding as creating a "new" right to receive information in school libraries, forcing school officials to justify their curation decisions while at the same time not defining the standards by which actions would be permissible.³⁶

30. *Id.* at 875.

31. *Id.* at 878 (Blackmun, J., concurring).

32. *Id.* at 880.

33. *Id.* at 883 (White, J., concurring).

34. *Id.* at 884.

35. *Id.* at 886 (Burger, C.J., dissenting).

36. *Id.* at 892-93.

Justice Powell's dissent focused on the democratic nature of school boards.³⁷ In his view, school boards are the institutions entrusted by communities with educating young people, meeting with parents and visiting schools in the course of their duties.³⁸ The school board's ability to exercise its authority would necessarily be infringed by its exposure to liability.³⁹ He also criticized the Court's holding as a "standardless" rule, lamenting the overruling a school board doing its job—as in this case, removing books he described as "vulgar or racist"—as a "debilitating encroachment upon the institutions of a free people."⁴⁰

Justice Rehnquist's dissent was direct—he found that the books were vulgar and could be removed.⁴¹ He rejected the plurality's construction of students' right to receive ideas, with characterizations such as: it was described by the plurality as only existing in school libraries; it was not implicated by the refusal to buy (as opposed to decision to remove) a book; and it blocked removing books from school libraries if the school board did not like the ideas they communicate, but not for any other reason.⁴² Actions taken by elementary and high school officials' actions should be less strictly reviewed than officials at colleges and universities.⁴³

III. COURTS AFTER *PICO*: HOW FEDERAL COURTS HAVE RULED ON BOOK REMOVALS IN SCHOOL LIBRARIES

A. *Pico* Protection in Louisiana School Libraries

Over the past forty years, multiple courts have deferred to *Pico*'s standard in a variety of scenarios, evaluating book removals in school libraries for First Amendment validity.⁴⁴ One such case is *Campbell v. St. Tammany Parish School Board*.⁴⁵ Parents in Louisiana filed suit after the

37. *Id.* at 894 (Powell, J., dissenting).

38. *Id.*

39. *Id.* at 895-96.

40. *Id.* at 897.

41. *Id.* at 907.

42. *Id.* at 916.

43. *Id.* at 920. In short, Justice Rehnquist rejected the idea of a student's right to receive information in elementary and high schools.

44. As many have noted, *Pico* leaves unanswered the question of what to do with the refusal to acquire books. Some argue that the analysis would be the same—that is, it would require showing a persistent practice motivated by disagreement with ideas. See *W. Bernard Lukenbill, Censorship: What Do School Library Specialists Really Know?*, SCHOOL LIBRARY MEDIA RSCH. (Dec. 2007), https://www.ala.org/aasl/sites/ala.org.aasl/files/content/aaslpubsandjournals/slr/vol10/SLMR_Censorship_V10.pdf.

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

St. Tammany Parish School Board removed the book *Voodoo & Hoodoo* from public school libraries.⁴⁶ The book was a treatment of the religion's history, including a section of traditional hoodoo and voodoo practices.⁴⁷ A parent filed a formal complaint with a school assistant principal, asserting that the book would encourage students to attempt to perform voodoo and/or hoodoo.⁴⁸ After reviewing the complaint, the school decided to keep the book on its shelves but require students to provide written parental permission before they could check out the book.⁴⁹ The parent appealed the committee's decision to the parish school board, which, after hearing complaints from a Christian organization that the inclusion of the book constituted promotion of another religion, voted 12-2 to remove all copies of the book.⁵⁰

Other parents in the parish filed suit against the school board in defense of their children's First Amendment rights. The Eastern District of Louisiana granted the parents' motion for summary judgment after finding no genuine issue of material fact concerning the school board's motivation, namely, that the school board "intended to deny students access to the objectionable ideas contained in the book, particularly the descriptions of voodoo practices and religious beliefs."⁵¹

The school board appealed, and the United States Court of Appeals for the Fifth Circuit reversed the district court, remanding the case after citing *Pico*'s standard centering on the motivation behind the ban.⁵² The Fifth Circuit recognized the students' First Amendment right to receive information, and that officials may not use their authority to remove books simply because they dislike the ideas contained within them.⁵³ But based on their *de novo* review of the record, the court found that it needed more information to evaluate the facts under the *Pico* standard; it "simply did not have a full picture of the reasons why the School Board members

46. *Delcarpio v. St. Tammany Par. Sch. Bd.*, 865 F. Supp. 350, 354 (E.D. La. 1994), *rev'd sub nom.* *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184 (5th Cir. 1995).

47. See JIM HASKINS, *VOODOO & HOODOO: THE CRAFT AS REVEALED BY TRADITIONAL PRACTITIONERS*(1990).

48. 865 F. Supp. at 353.

49. *Id.*

50. When the parent first appealed to the school board, it established a committee to review the issue. The committee voted to uphold the school's decision by a 6-1 vote. When the parent appealed that decision again, it went before the school board at large for another vote to remove all copies of the book 12-2. *Id.* at 354.

51. 865 F. Supp. at 363.

52. *Campbell*, 64 F.3d at 191.

53. *Id.* at 188.

constituting the majority voted to remove the book.”⁵⁴ Thus, under *Pico*, the court must be able to discern the justification for the book removal.

In striking language, the Fifth Circuit further noted that the school board’s decision to remove a book that had been in the catalog for some time without complaint suggested an attempt to “strangle the free mind at its source.”⁵⁵ Many of the school board members did not read the book at all before casting their votes, and the board completely disregarded the recommendation that the book could be restricted to students with parental permission.⁵⁶ Taken together, the evidence indicated that the book removal was not motivated by a legitimate governmental purpose.

B. Pico Protection in Kansas Public School Libraries

A federal court specifically addressed school library book removals of LGBTQ+ themed books in *Case v. Unified School District No. 33, Johnson County, Kansas*.⁵⁷ In that case, students, parents, and former students of a school district sued after school officials removed two books with central queer themes—*Annie on My Mind* and *All American Boys*—from a school library’s catalog.⁵⁸

Local media coverage sparked intense debate after a LGBTQ+ rights organization donated copies of *Annie On My Mind* and *All American Boys* to the school library catalog.⁵⁹ Copies of *Annie On My Mind* were even burned on the steps of the school district in protest of its presence in school libraries.⁶⁰ In response, the district superintendent for content and instruction, along with the district’s media specialists, compiled reviews of the books, and separately reviewed them as well, to determine whether the books were suitable for school libraries.⁶¹ They found that *Annie On My Mind* was an appropriate book for school libraries while *All American Boys* was not, as it was generally considered to be of lower quality.⁶² During their research, one media specialist additionally discovered that copies of *Annie On My Mind* had already been in the school’s catalog for

54. *Id.* at 190.

55. *Id.*

56. *Id.*

57. 908 F. Supp. 864 (D. Kan. 1995).

58. *Id.* at 869.

59. *Id.*

60. Asked about the incident, the author of *Annie On My Mind*, Nancy Garden, stated, “Burned? I didn’t think people burned books anymore. Only Nazis do that.” She became a vocal opponent of censorship. See Victoria Brownworth, *In Remembrance: Nancy Garden*, LAMBDA LITERARY (Jun. 24, 2014), <https://lambdaliterary.org/2014/06/in-remembrance-nancy-garden>.

61. 908 F. Supp. at 867.

62. *Id.* at 868.

years.⁶³ The superintendent decided to refuse the donation of both books, and further, to remove all copies of *Annie On My Mind* from the library's catalog.⁶⁴ The superintendent claimed that this action was a response to "community concerns," although no written formal complaints had been received.⁶⁵

The superintendent removed the books, in part, because he believed that the donation was part of an attempted "introduction of information about homosexuality into the curriculum."⁶⁶ The school board subsequently held a public meeting to discuss the books.⁶⁷ Prior to the meeting, the school district's counsel advised the school board that any actions taken must align with the First Amendment, and explained that the removal would only be permissible if the decisive factor in removal was "educational suitability," following *Pico*. The board voted 4-2 to remove the books, but the superintendent later told the students that the books were removed to in order to keep the school board out of the controversy.⁶⁸

Moreover, multiple board members testified that the motivation behind their vote to remove the books was due to their "glorification of the gay lifestyle" and homosexuality.⁶⁹ In jarring language, one board member testified that the books failed to address LGBTQ+ people's likelihood of "potential disease, potential death," adding that it was not "okay" to be gay, and that in order to meet the community's moral standards, students should learn that heterosexuality was compulsory.⁷⁰ Notably, the two board members who voted to keep the books did so out of respect for the First Amendment.⁷¹

In its decision, the United States District Court for the District of Kansas highlighted that in its removal of *Annie On My Mind*, the school board failed to follow their own normal procedure for book removal.⁷² While the school board established an ad hoc committee by convening the schools' media specialists, the media specialists themselves

63. *Id.* at 867.

64. *Id.* at 868.

65. *Id.*

66. *Id.* at 869.

67. *Id.*

68. *Id.* at 870.

69. *Id.*

70. *Id.* at 871.

71. *Id.*

72. The normal procedure required submission of an initial formal complaint (which the school board never received) and review by a committee appointed to consider the book's removal. That process was not followed in this case. *See id.* at 872.

recommended accepting the donation—a recommendation the school board ignored.⁷³ The school board further ignored its own incorporation of the American Library Association's Library Bill of Rights, which emphasized the need for diversity in library catalogs to help students develop “intellectual integrity in forming judgment.”⁷⁴ The school board also ignored its own policy requiring challenged materials to be reviewed for literary or educational merit.⁷⁵

In ruling on the First Amendment claim, the court cited *Pico* and eviscerated the credibility of the board members' asserted belief that the book was “educationally unsuitable.”⁷⁶ The court noted that board members simply disagreed with the book's ideas—namely, positive portrayals of young lesbian girls—as evidenced by “the highly irregular and erratic manner” in which the school board removed it.⁷⁷ The court ordered the school board to return the book to the shelves and to make the book available according to the normal terms of the district's library policies.⁷⁸ As in other jurisdictions, the court in *Case* highlighted the need to drill down into the true justification for the book removal based on the evidentiary record, and did not merely accept the stated justifications from officials.

C. *Pico Prevention of Restricted Book Access in an Arkansas School Library*

In 2003, the United States District Court for the Western District of Arkansas applied *Pico* to evaluate restrictions imposed by a school district on the popular *Harry Potter* books. In *Counts v. Cedarville School District*, parents brought suit on their daughter's behalf under 42 U.S.C. § 1983 after a school district restricted access to the books in response to complaints from another parent and that parent's pastor.⁷⁹ They followed normal school library procedure, filling out a “reconsideration request form” to remove *Harry Potter and the Sorcerer's Stone* from the school library.⁸⁰ In accordance with its policies, the school formed a committee

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 876.

77. *Id.*

78. *Id.* at 877.

79. 295 F. Supp. 2d 996, 997-98 (W.D. Ark. 2003).

80. As the American Library Association notes, the *Harry Potter* series marked a shift in book challenges—while prior to the series most challenges centered on sex or inappropriate language, after *Harry Potter*, book challenges took on an anti-occult/religious focus. See Pat

to review the book, which unanimously agreed to keep the book in circulation.⁸¹ After the librarian presented about the matter to the school board (on which the complaining pastor served as a member), the board voted 3-2 to restrict access to the book, as well as to the rest of the series.⁸² The board's vote led the school principal to remove the books from library bookshelves to a prominent place, but to restrict them to students who presented a signed parental permission slip.⁸³

The court held that requiring parental permission for students to access library books infringes on the students' right to access information.⁸⁴ In the absence of a sufficient justification, this restriction constituted an infringement of children's First Amendment rights.⁸⁵ The court found the school's justification lacking: opponents of the books suggested that the books promoted disobedience and a lack of respect for authority.⁸⁶ However, they produced no evidence to the board for this assertion. In addition, only one opponent had actually read the book, and that opponent provided no evidence that any disobedience resulted from the availability of the book.⁸⁷

Those seeking to restrict access to *Harry Potter* also told the board that they dealt with "witchcraft" or, broadly, the occult.⁸⁸ The court held that attempting to justify restrictions on access to books because of the board's disapproval of the (supposed) religion it contains was beyond the school's authority.⁸⁹ As a result, the court concluded it was obvious that *Sorcerer's Stone* and the *Harry Potter* books were restricted in a manner that violated the Constitution.⁹⁰

D. *Vamos a Cuba! and Pico under Siege*

Pico's vulnerability is highlighted in *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board*, an opinion that, in hindsight, shows that *Pico* and the deference it has enjoyed are

Peters, *Harry Potter and 20 Years of Controversy*, AMERICAN LIBRARY ASSOC. OFFICE OF INTELLECTUAL FREEDOM (Aug. 28, 2017), <https://www.oif.ala.org/oif/harry-potter-20-years-controversy>.

81. 295 F. Supp. 2d at 1001.

82. *Id.*

83. *Id.*

84. *Id.* at 1002.

85. *Id.*

86. *Id.*

87. *Id.* at 1003.

88. *Id.* at 1004.

89. *Id.* at 1005.

90. *Id.*

endangered.⁹¹ A parent objected to the school library's circulation of a book about post-Castro Cuba on the grounds that it was factually inaccurate.⁹² The book, *Vamos a Cuba!*, was part of a larger series of books aimed at teaching children about other countries.⁹³ The parent followed the normal process to request review of the book; being dissatisfied with the school's response to his request, he appealed to the school committee, then to the district superintendent and, later, a district committee, all of whom recommended keeping the book.⁹⁴

Undeterred, the parent appealed again, this time to the school board. School board members discussed the book, with some arguing that it ought to be replaced due to its inaccurate portrayal of life in Cuba.⁹⁵ But others raised concerns with how the process actually played out: one member noted the discussion was inappropriate for an institution charged with exercising administrative functions within the limits of the First Amendment. Another member highlighted threatening emails he'd received, attempting to keep him from voting his conscience.⁹⁶ In a 6-3 vote, the board agreed to remove the book.⁹⁷

The American Civil Liberties Union of Florida, Greater Miami Chapter, sued along with a parent (and member of the ACLU chapter), who filed suit on his own behalf and as next friend of his son.⁹⁸ Ruling on the First Amendment challenge to the school board's actions, the district court held in favor of the ACLU and enjoined removal of any books in the *Vamos a* series.⁹⁹ The court rejected the argument that the book removal was based on the book's inaccuracies, finding instead this was

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

92. *Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 439 F. Supp. 2d 1242, 1247 (*S.D. Fla.* 2006), *vacated and remanded*, 557 F.3d 1177 (11th Cir. 2009).

93. *Id.* at 1248. The book had both an English and Spanish edition, and the objecting parent claimed to be a former Cuban political prisoner, stating that he found the book to create an impression of "a life in Cuba that does not exist."

94. Prior to the issue's review at school district level, a school board member attempted to intervene extraordinarily to "protect" children from the ideas contained in the book, specifically arguing that the book's characterization of life in Cuba was insulting to the Cuban exile community and to the Cuban people living under the Castro regime. *Id.* at 1251.

95. *Id.* at 1258-9.

96. The board member felt that if the board failed to remove the books, they'd "find a bomb" under their cars. *Id.* at 1260.

97. 557 F.3d. at 1188.

98. 439 F. Supp. 2d. at 1246.

99. 557 F.3d. at 1190.

simply a pretext to justify enforcing the political orthodoxy of South Florida, which was heavily influenced by the Cuban exile community.¹⁰⁰

The Eleventh Circuit reversed.¹⁰¹ Noting that the plaintiffs sought to apply the *Pico* standard, the court rejected *Pico* as a “non-decision so far as precedent is concerned. It establishes no standard.”¹⁰² Instead, the court held that establishing a standard was unnecessary in this case as the school board acted within its purview to remove inaccurate books.¹⁰³

The court highlighted several passages in *Vamos a Cuba!* that were completely apolitical, but factually incorrect. Experts on both sides of the controversy admitted the book contained many inaccuracies.¹⁰⁴ While the court did not grant any precedential value to *Pico*, it found that these factual inaccuracies suggested that the board’s actions fit within their determination of “educational suitability,” and thus met the *Pico* standard.¹⁰⁵ The court gave weight to inaccuracies both mundane (such as misidentifying the origins of certain murals and traditions) and, in the court’s view, more substantial (asserting that the life of a Cuban child is very similar to the life of an American child).¹⁰⁶

The court criticized the district court’s holding that the factual inaccuracies were a convenient pretext for banning a book for political reasons on the grounds that the inaccuracies were undisputed by both parties, and that the book was still available to children in public libraries.¹⁰⁷ It rejected the characterization of the book removal as a “book ban,” describing that characterization as “overwrought.”¹⁰⁸ In explaining how *Pico* did not fit the facts of the case, the court separated “interest” from “motive,” stating that Cuban Americans may have an interest in having accurate books on the shelves of school libraries, but that that in itself does not show an unconstitutional motivation any more than Jewish Americans have an interest in having accurate depictions of Nazi Germany in school libraries.¹⁰⁹ The book’s inaccuracies, the court noted,

100. Moreover, statements by members of the board and the irregular way in which the board attempted to ensure the books were removed suggested to the court that the removal was constitutionally infirm. *See Id.* at 1286.

101. 557 F.3d at 1202.

102. *Id.* at 1200. The court declined to decide which student speech standard ought to be applied to school library book removals.

103. *Id.* at 1202.

104. *Id.* at 1215.

105. *Id.* at 1227.

106. *Id.*

107. *Id.* at 1217.

108. *Id.* at 1218.

109. *Id.* at 1224.

were the heart of the controversy; the “asserted motive of the Board, which is to paint Castro’s regime in its naturally bad light, does not exist apart from the factual inaccuracy of the book.”¹¹⁰

IV. CHALLENGING BOOK BANS IN 2022

A. *The End of Deference to Pico*

While past legal battles over access to materials in school libraries were largely local, today, conservative organizations are pushing for book removals nationwide.¹¹¹ The concerted push to remove books has shocked organizations that monitor such censorship and even spurred congressmen to introduce the Right to Read Act to reaffirm students’ First Amendment rights.¹¹² But today, although *Pico* federal courts have usually viewed the school library as a special place for students’ free inquiry, the nonbinding nature of the decision means that the principles it established could (and likely will) be disregarded, especially on LGBTQ+ issues. While *Pico* should certainly be the starting point of any First Amendment challenge to these proposed book bans, the First Amendment rights of students in school libraries can and must be defended in a broader way.

A recent case foreshadows how anti-censorship advocates can anticipate school book removals returned to the federal courts in *C.K.-W. by & through T.K. v. Wentzville R-IV School District*.¹¹³ Plaintiffs filed suit when their school district removed eight books, some permanently, after receiving challenges from parents.¹¹⁴ The plaintiffs alleged that the complaints were part of a targeted campaign designed to remove books with LGBTQ+ themes, as well as themes related to people of color.¹¹⁵

The United States District Court for the Eastern District of Missouri rejected the constitutional challenge and denied their requested injunction. Noting that the plaintiffs cited the plurality opinion in *Pico*, Judge Schelp characterized *Pico* as “a case that sharply divided” the

110. *Id.* at 1225.

111. Adam Gabbatt, *US Conservatives Linked to Rich Donors Wage Campaign to Ban Books From Schools*, THE GUARDIAN (Jan. 24, 2022, 05:00 AM) <https://www.theguardian.com/us-news/2022/jan/24/us-conservatives-campaign-books-ban-schools>.

112. Legislators Introduce Right to Read Act to Fund School Libraries, Literacy Efforts, SCHOOL LIBRARY JOURNAL (Oct. 10, 2022), <https://www.slj.com/story/legislators-introduce-right-to-read-act-to-fund-school-libraries-literacy-efforts-news-bites>.

113. No. 4:22-CV-00191-MTS, 2022 WL 3138989, at *1 (E.D. Mo. Aug. 5, 2022).

114. *Id.* at *2.

115. *Id.* at *3.

Supreme Court and failed to produce a rule.¹¹⁶ Rejecting the relevance of the plurality, Judge Schelp held that the only controlling law from *Pico* was Justice White's concurrence in which he stated that he did not think it appropriate to disturb the court of appeals findings of fact.¹¹⁷

Nonetheless, turning to a pre-*Pico* Eighth Circuit case that was "in tune" with *Pico* in its view of student First Amendment rights, the district court in the *Wentzville* case reasoned (with explicitly stated reservations) that it should analyze whether the officials removed the eight books because they disagreed with their viewpoints.¹¹⁸ The court found that the "age sensitivity" policy for book removal fit squarely within the *Pico* language for removal based on excessive vulgarity, which included sexual content that also fit within *Pico*'s criteria.¹¹⁹ Notably, the court rejected outright the characterization that the removal policy was a "book ban," citing the language in the Eleventh Circuit's *Miami Dade County School Board* opinion.¹²⁰

It is safe to assume that deference to *Pico* can no longer be taken for granted. While in the past, anti-censorship advocates could largely assume that judges would defer to the *Pico* plurality opinion as a guide, today courts are likely to take a more *Wentzville* analysis: rejecting the plurality's First Amendment right to access information in public school libraries and giving wide discretion to school officials that seek to remove books.¹²¹

B. *A Way Ahead After Pico*

Today, organized conservative groups are pressuring school boards to remove books they disagree with, with sympathetic public officials making clear their opposition to the viewpoints expressed in the targeted books. *Gender Queer*, by Maia Kobabe, presents an illustrative example.¹²² *Gender Queer* is a graphic novel and coming-of-age memoir

116. *Id.* at *4.

117. *Id.*

118. C.K.-W. by & through T.K. v. Wentzville R-IV School District, No. 4:22-CV-00191-MTS, 2022 WL 3138989, at *1 (E.D. Mo. Aug. 5, 2022). The court found sufficient similarities between the *Pico* plurality opinion and the Eighth Circuit's decision in *Pratt v. Independent Sch. Dist. No. 831, Forest Lake, Minn.*, 670 F.2d 771 (8th Cir. 1982). *Id.* at *5.

119. No. 4:22-CV-00191-MTS, 2022 WL 3138989, at *6 (E.D. Mo. Aug. 5, 2022).

120. *Id.* at *1.

121. See generally C.K.-W. by & through T.K. v. Wentzville R-IV School District, No. 4:22-CV-00191-MTS, 2022 WL 3138989 (E.D. Mo. Aug. 5, 2022).

122. MAIA KOBABE, *GENDER QUEER* (2022).

depicting the author's maturation as a nonbinary person.¹²³ The novel depicts Kobabe's grappling with their gender identity as a child, with their navigation of gender roles in school and college, and, finally, with their realization of nonbinary gender identity.¹²⁴ Kobabe's memoir contains several frank (though not prurient) depictions of experiences related to gender and sexual exploration, including menstruation, masturbation, and sex.¹²⁵ But the novel also highlights the difficulty of being young and LGBTQ+, finding pronouns that align with one's gender identity, and explaining one's gender identity to family and friends.¹²⁶

In 2021, *Gender Queer* was the most frequently challenged book in the United States.¹²⁷ Frequently, the challenges have grown out of local protests and attacks that are made national via social media.¹²⁸ In a piece for the *Washington Post*, Kobabe pointed out challenges in Virginia that were inspired by news about challenges in Texas, including the copying of charges that the book promotes pedophilia and pornography.¹²⁹

While written in part to explain the experience of being nonbinary to family and friends, in light of the role that LGBTQ+ characters played in Kobabe's maturation, Kobabe considers their memoir appropriate for high school readers, and upon publication its promotion targeted older teens and adults.¹³⁰ The book was critically acclaimed, winning awards including the Stonewall Honor in 2020.¹³¹ Inevitably, as commercial success increased the book's popularity, it became a target of conservative activists in political culture wars, from groups like Moms for Liberty to Republican lawmakers, seeking to ban the book.¹³²

Future advocates should think about "rebuilding" a new, fuller standard to protect books in school libraries using established First

123. Alexandra Alter, *How a Debut Graphic Memoir Became the Most Banned Book in the Country*, N.Y. TIMES, (May 1, 2022), <https://www.nytimes.com/2022/05/01/books/maia-kobabe-gender-queer-book-ban.html>.

124. *Id.*

125. *See* Kobabe, 35, 61.

126. *Id.* at 232.

127. Alter, *supra* note 122.

128. Maia Kobabe, *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>.

129. *Id.*

130. Alter, *supra* note 122.

131. *Stonewall Book Awards List*, AMER. LIBRARY ASSOC., <https://www.ala.org/rt/rrt/award/stonewall/honored>.

132. Brian Lopez and Cassandra Pollock, *How a YA Oral-Sex Scene Touched Off Texas' Latest Culture War* TEX. TRIB., (Nov. 12, 2021), <https://www.texastribune.org/2021/11/12/gender-queer-texas-books-investigation>.

Amendment law. As the Supreme Court recently recognized, schools are “the nurseries of democracy,” and the exchange of ideas within them is essential to the success of the American experiment.¹³³ While the plurality opinion was more expansive in its view of student First Amendment rights, *Pico* can still fit neatly within this traditional view by emphasizing that book removals are impermissible when they attempt to define orthodoxy or exclude unfavorable views.¹³⁴ Nonetheless, advocates should expect to structure their arguments under this test.

First, advocates should argue that removals of books with LGBTQ+ themes from school libraries due to their LGBTQ+ themes are not reasonable regulations of speech because they are not rationally related to any legitimate government interest. By definition, books in school libraries have already been procured through school district acquisition processes in order to provide resources for the students who use them, based on the professional judgment of trained librarians and educators. Regardless of any individual student’s gender identity or sexual orientation, books featuring LGBTQ+ characters or themes are often selected to increase empathy, representation, and acceptance of others.¹³⁵ There is also a government interest in facilitating the exchange of ideas and respect for others essential for democracy.¹³⁶

Removing already-cataloged books because of their LGBTQ+ themes (or, as framed in the current moment, because LGBTQ+ themes are “inappropriate for children”) will inevitably privilege the interests of anti-LGBTQ+ parents over LGBTQ+ parents and LGBTQ+-accepting parents. Moreover, promoting anti-LGBTQ+ views has tangible, real world consequences. For example, a 2015 study by the Williams Institute at the University of California Los Angeles School of Law found that LGB students in the Houston and Fort Worth, Texas, areas were more likely to be bullied than their peers; moreover, the 2015 U.S. Transgender

133. Although the Supreme Court affirmed that students do not shed their constitutional rights at the schoolhouse gate, they also reiterated that school officials are to be evaluated by courts in light of the particular nature of the school environment. Taken together, this suggests that the Court is unlikely to embrace a maximalist view of student rights in school libraries. See *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021).

134. *Id.*

135. *The Benefits of LGBTQ+ Books For Kids*, HARPERCOLLINS, <https://www.harpercollins.com/blogs/harperkids/lgbtq-books> (last visited Oct. 09, 2022),

136. See Jillian Lenson, *Litigation Primer Attacking State “No Promo Homo” Laws: Why “Don’t Say Gay” Is Not O.K.*, 24 TUL. J.L. & SEXUALITY 145, 157 (2015).

Discrimination survey found 73% of transgender students reported verbal, physical, or sexual harassment.¹³⁷

Thus, in promoting anti-LGBTQ+ views, these kinds of book removals stigmatize LGBTQ+ children and families.¹³⁸ In his landmark opinion in *Obergefell v. Hodges*, Justice Kennedy highlighted the fact that laws against same-sex marriage imprint the children of same-sex couples with “the stigma of knowing their families are somehow lesser [. . .] The marriage laws at issue here thus harm and humiliate the children of same-sex couples.”¹³⁹ This principle—that the marking of certain gender identities and sexualities as “somehow lesser” in marriage has a human cost—is demonstrably true in other areas, like schools. For example, a 2021 study by the Trevor Project surveyed LGBTQ+ youth and found several important data points.¹⁴⁰ Fifty percent of the surveyed youth received access to LGBTQ+-affirming spaces at school, compared to only thirty-four percent at home. Access to such affirming spaces, moreover, reduced the likelihood of suicide attempts.¹⁴¹ Transgender teens often described their high school libraries, where they can explore ideas without non-accepting parents watching them, as “safe havens.”¹⁴² LGBTQ+ youth reported feeling erased by legislators advancing anti-LGBTQ+ efforts.¹⁴³ As 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.”¹⁴⁴

137. Christy Mallory, et al., *The Impact of Stigma and Discrimination Against LGBT People in Texas*, THE WILLIAMS INST. (Apr. 2017), <https://williamsinstitute.law.ucla.edu/publications/impact-lgbt-discrimination-tx/>.

138. Sarah Prager, *LGBTQIA+ Books Are Under Attack as More Bills and Bans Take Them Out of Libraries and Classrooms—Here’s How Community Members are Fighting Back*, PARENTS, (Jan. 14, 2022), <https://www.parents.com/news/the-risks-of-banning-lgbtqia-books-and-how-school-board-members-are-fighting-back/>.

139. *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015).

140. *National Survey on LGBTQ+ Youth Mental Health*, THE TREVOR PROJECT (2021), <https://www.thetrevorproject.org/survey-2021/?section=AffirmingSpaces>.

141. *Id.*

142. Mike Hixenbaugh, *Banned: Books on Race and Sexuality are Disappearing From Texas Schools in Record Numbers*, NBC NEWS, (Feb. 1, 2022, 03:32 AM), <https://www.nbcnews.com/news/us-news/texas-books-race-sexuality-schools-rcna13886>.

143. Matt Lavietes, *From Book Bans to Don’t Say Gay bill, LGBTQ Kids Feel ‘Erased’ in the Classroom*, NBC NEWS, (Feb. 20, 2022, 05:12 AM), <https://www.nbcnews.com/nbc-out/out-news/book-bans-dont-say-gay-bill-lgbtq-kids-feel-erased-classroom-rcna15819>.

144. *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>.

Second, advocates should argue that anti-LGBTQ+ book removal efforts are manifestly viewpoint-based discrimination that trigger strict scrutiny.¹⁴⁵ The pretexts for these book removals—often highlighting the “appropriateness” of books for children of a given community—obfuscate the reality that book removal proponents choose to target certain books because of the views contained within them, namely, the acceptance of LGBTQ+ people and their identities. A cursory review of the books that are most often challenged shows that the challengers reject positive portrayals of LGBTQ+ characters.¹⁴⁶ As in *Pico*, support for these censorship efforts is often organized by conservative activist groups, which produce lists of books for others to attack.¹⁴⁷

Third, when confronted by new policies or legislation targeting school libraries, advocates challenging book removal proposals should raise the void for vagueness claim that can be brought based on the vagueness of the language used by proponents. When statutory language does not provide sufficient definitional guidance to instruct the persons affected by the statute on what they must do to comply with it, courts hold such language to be impermissibly vague, unless precision is impossible or impractical.¹⁴⁸ The authors of the children’s book *And Tango Makes Three*, which centers on a same-sex penguin couple, point out that legislative proposals that target books about “sexual orientation” or “gender identity” in school libraries are vague because they can be read to encompass any book that depicts any relationships between characters, or that addresses a character’s gender in any way.¹⁴⁹

Whether a book runs afoul of such vague prohibitions, then, becomes a subjective matter of opinion, often that of a complaining parent

145. Book removals have overwhelmingly targeted books with positive portrayals of LGBTQ+ characters or themes. In the alternative, advocates could argue that the bans function as content-based discrimination, that is, “regulation targeted at specific subject matter”—LGBTQ+ people. See *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 168-9 (2015).

146. Samantha Riedel, *Queer Book Bans Aren’t About Books At All*, THEM, (Feb. 9, 2022), <https://www.them.us/story/queer-lgbtq-book-bans-opinion-conversion-therapy-conservative-school-board-protests>.

147. Elizabeth A. Harris and 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>.

148. *Kolender v. Lawson*, 461 U.S. 352, 361 (1983).

149. Peter Parnell and Justin Richardson, *Avoiding Our ‘Gay Penguins’ Book? Better steer Clear of These Kids’ Classics, Too!*, WASH. POST, (Apr. 15, 2022), <https://www.washingtonpost.com/opinions/2022/04/15/florida-book-ban-law-gay-penguins-satire>.

or a deferential school board.¹⁵⁰ This is exactly the kind of arbitrary and unmoored standard that courts have held is impermissible in other contexts, and which creates an opportunity for legal challenge.¹⁵¹ For example, a proposed Georgia bill would make parental challenges to books that parents find “harmful to minors” easier and faster by overriding the existing processes governing book challenges.¹⁵² A proposed Idaho bill would impose fines and jail time for librarians and school officials who provide material deemed “harmful to minors,” removing the existing exemption for schools and libraries and leaving the standard open to the subjective interpretation of openly anti-LGBTQ+ activists.¹⁵³ Indeed, at public hearings, most examples of “harmful” material offered by the bill’s supporters were books with LGBTQ+ themes or characters.¹⁵⁴

In some communities, administrators and librarians are already removing books preemptively from school libraries to avoid controversy or punishment.¹⁵⁵ School officials and educators see value in having the challenged books in library collections; having already gone through the procurement phase, these books are definitionally approved by the school board’s experts. However, the fear of harassment from nationally-syndicated pundits is strong enough to push librarians to avoid the problem of contested book removals outright by removing the books before legislation passes or takes effect.¹⁵⁶

V. CONCLUSION

Books bans are resurgent around the country, and it is not hard to understand why. While attacks on school library books with LGBTQ+ themes are not new, an emboldened political movement frustrated by LGBTQ+ legal victories is seeking to undo the social and political

150. In some cases, the statutory language may also be vulnerable to an overbreadth challenge, i.e., a claim that the language of the statute encompasses a substantial amount of protected speech. See *U.S. v. Williams*, 553 U.S. 292 (2008).

151. *Kolender*, 461 U.S. at 357.

152. S.B. 226, Reg. Sess. (Ga. 2022).

153. H.B. 666, 66th Leg., 2nd Sess. (Ida. 2022.) <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2022/legislation/H0666.pdf>.

154. Trudy Ring, *Idaho Bill Would Jail Libraries, Teachers for LGBTQ+ Books*, THE ADVOCATE (Mar. 8, 2022), <https://www.advocate.com/politics/2022/3/08/idaho-bill-would-jail-librarians-teachers-lgbtq-books>.

155. Hannah Natason, *Schools Nationwide Are Quietly Removing Books from Their Libraries*, WASH. POST, (Mar. 22, 2022), <https://www.washingtonpost.com/education/2022/03/22/school-librarian-book-bans-challenges>.

156. *Id.*

recognition of LGBTQ+ identity to the greatest extent possible. The result is a nationwide, all-out push to mark LGBTQ+ people as “unsafe,” in schools and elsewhere.

This effort and its results are evident in news headlines. A social media account that captures social media posts and videos of LGBTQ+ educators and re-frames them to incite right-wing anger dominated right-wing media, both through its own account and through engagement from media outlets like Fox News and the New York Post.¹⁵⁷ That same account was linked to bomb threats and other targeted harassment of children’s hospitals and doctors.¹⁵⁸ Several conservative pundits (and one governor’s press secretary) attacked opponents of Florida’s so-called “Don’t Say Gay” bill—a bill which prohibits teachers from discussing LGBTQ+ identity in public schools—as “groomers,” a tired and slanderous attack labeling LGBTQ+ people as child predators.¹⁵⁹

Around the country, student athletes are navigating new laws that would require genital inspections and testimonials to menstrual history in order to compete.¹⁶⁰ States have also passed laws outlawing gender affirming care for transgender children.¹⁶¹ On June 11, 2022, thirty-one members of the white nationalist organization Patriot Front were arrested just outside an Idaho Pride celebration, charged with conspiracy to riot.¹⁶² More recently, the Jackson Tennessee Pride Committee was forced to

157. Taylor Lorenz, *Meet the Woman Behind Libs of TikTok, Secretly Fueling the Right’s Outrage Machine*, WASH. POST (Apr. 19, 2022), <https://www.washingtonpost.com/technology/2022/04/19/lib-of-tiktok-right-wing-media/>.

158. Shannon Bond, *Children’s Hospitals Are the Latest Target of Anti-LGBTQ Harassment*, NPR (Aug. 26, 2022), <https://www.npr.org/2022/08/26/1119634878/childrens-hospitals-are-the-latest-target-of-anti-lgbtq-harassment>.

159. Ben Mathis-Lilley, *How One Florida Woman With Twitter Problems Plunged Us Into a Nightmarish National Conversation About “Grooming,”* SLATE, (Apr. 21, 2022), <https://slate.com/news-and-politics/2022/04/christina-pushaw-ron-desantis-libsoftiktok-groomer.html>.

160. Anna Staver, *Fact check: Ohio Bill Banning Transgender Girls From Female Sports Could Require Genital Checks*, COLUMBUS DISPATCH (June 6, 2022), <https://www.dispatch.com/story/news/2022/06/07/bill-transgender-athletes-could-require-genital-checks-girls/7529718001>. See also Bruce Lee, *Florida High Schools Asking Female Athletes 5 Questions About Their Menstrual Periods*, FORBES (Oct. 5, 2022), <https://www.forbes.com/sites/brucelee/2022/10/05/florida-high-schools-are-asking-female-athletes-5-questions-about-their-menstrual-periods/?sh=dd3a4a517068>.

161. *Legislative Tracker: Youth Healthcare Bans*, Freedom for All Ams. (last visited Oct. 8, 2022), <https://freedomforallamericans.org/legislative-tracker/medical-care-bans>.

162. Odette Yousef, *31 Members of the White Nationalist Patriot Front Arrested Near an Idaho Pride Event*, NPR (June 12, 2022), <https://www.npr.org/2022/06/11/1104405804/patriot-front-white-supremacist-arrested-near-idaho-pride>.

move its pride festival from a public city park to the indoor civic center after receiving online threats.¹⁶³

The attacks on LGBTQ+ books in school libraries follow in the same vein. Implicit in the arguments for removing books with LGBTQ+ themes from school libraries is the idea that the very existence of LGBTQ+ people is information inappropriate for children to possess. Put more directly, the book removals suggest that LGBTQ+ people are not appropriate for children. By restricting access to books that feature LGBTQ+ characters or themes, the proponents of book removals seek to impose this view in their communities and in the next generation.

Without binding precedent to protect school libraries from the onslaught of anti-LGBTQ+ attack, defenders of students' First Amendment rights must be prepared to protect those rights anew. The *Pico* case provides useful guidance that would prohibit school officials from simply removing books they disagree with, but advocates should frame their arguments under the broader protections that align with nonpublic forum rules for speech restrictions that require viewpoint neutrality.

Removing approved books from schools without a concrete, neutral justification is unconnected to any government interest and inherently unreasonable. Worse, such removals constitute an attack on a safe haven for children who already experience bullying, depression, and suicidal ideations at a higher rate than their peers, and who may not have other affirming spaces. These removals are also nakedly partisan content and viewpoint discrimination, as these efforts uniformly target books that are supportive of LGBTQ+ themes and characters. The public statements of officials leading these efforts demonstrate that they seek to promote a particular anti-LGBTQ+ viewpoint, the pursuit of which is well beyond the discretion of state officials.

When viewed in light of Justice Kennedy's stirring words in *Obergefell*, it is clear that the book ban fight is not really about books at all—it is an attack on LGBTQ+ rights as a whole. If these book bans prevail in their goal—if the book removals successfully plant the idea that LGBTQ+ identity itself is in no way a suitable topic for children—these bans will likely be used as supporting arguments in undermining the legal victories that the LGBTQ+ community has achieved.

163. Jo Yurcaba, *Lawmaker Complaint Forces Tennessee Pride Festival Indoors*, NBC NEWS (Oct. 7, 2022), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/lawmaker-complaint-forces-tennessee-pride-festival-indoors-rcna51295>.