NOTES

REREADING *PICO* AND THE EQUAL PROTECTION CLAUSE

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More than forty years ago, in Board of Education v. Pico, *the U.S. Supreme Court considered the constitutionality of a school board's decision to remove books from its libraries. However, the Court's response was heavily fractured, garnering seven separate opinions. In the plurality opinion, three justices stated that the implicit corollary to a student's First Amendment right to free speech is the right to receive information. Thus, the plurality announced that the relevant inquiry for reviewing a school's library book removal actions is whether the school officials intended to deny students access to ideas with which the officials disagreed. The plurality's reliance on the "right to receive information" drew strong opposition from the dissenting justices, who stressed that the plurality had fashioned a new right by encouraging judicial intervention in school book removal decisions.*

Today, the Court's fractured opinion in Pico *leaves many questions unanswered for students affected by school library book removals. Using* PEN American Center v. Escambia County School Board *as a case study, this Note explores the current First Amendment and Equal Protection Clause arguments used by students challenging school book removals. In that case, Escambia County removed ten books featuring themes about race, gender, or sexuality from its school libraries. The plaintiff students alleged that the school board violated their First Amendment right to receive information and their equal protection rights. In light of* Pico*'s progeny and existing equal protection doctrine, this Note argues that the defendant school board's actions in* PEN American Center *violated the First Amendment and Equal Protection Clause. Using the facts of* PEN American Center*, this Note suggests how courts reviewing similar book removal cases should analyze students' First Amendment and equal protection claims.*

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INTRODUCTION

During the 2022–2023 school year, the Escambia County School Board, a school board in Florida, removed ten books from its public school libraries.[1] Over 200 other books have been targeted for removal.[2] Among these books

1. *See* Amended Complaint at 36, PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23-CV-10385 (N.D. Fla. Jan. 12, 2024), ECF No. 25-1.
2. *See id.* at 36.

are *And Tango Makes Three*, a children's picture book about two male penguins who create a family together; *When Aidan Became a Brother*, a children's picture book about a transgender boy; and *The Bluest Eye*, a novel by Toni Morrison about a young African-American girl growing up in the Great Depression.[3] For all ten books, the Escambia County School Board voted to remove or restrict access to the books against the recommendation of the district's review committee,[4] which was comprised of two high school media specialists, two high school teachers, one high school administrator, one parent of a student, and one community member.[5]

The Escambia County School Board is not alone in this decision. During the 2021–2022 school year, there were book restrictions[6] in at least thirty-two states.[7] Of these restricted books, 41 percent featured LGBTQ+ themes, protagonists, or prominent secondary characters, and 40 percent featured protagonists or prominent secondary characters that were Black, indigenous, or a person of color (BIPOC).[8] During the 2022–2023 school year, book restrictions increased across the county, with Florida, Missouri, South Carolina, Texas, and Utah having the highest number of book restrictions.[9]

Book removals are typically initiated by community members or school officials submitting a request (a "book challenge") that the school board remove the specified book or books.[10] However, some states have pursued book removals through new legislation restricting access to materials containing "sexual" content.[11] In response, several parties, including students affected by book removals, have initiated lawsuits challenging

3. *See id.* at 39–41, 44–45.

4. *See id.* at 2.

5. *See id.* at 19.

6. The terms "book restrictions," "book removals," and "book bans" are used throughout this Note. The difficulty in singularly naming these actions reflects the contested nature of this area of discussion. More specifically, however, the phrase "book removals" refers to books removed from school libraries pursuant to a formal decision, whereas the phrase "book restrictions" refers to books that are temporarily removed or moved to an area with restricted access while pending review.

7. *See* Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sept. 19, 2022), https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/ [https://perma.cc/D653-ZAZR].

8. *See id.*

9. *See* Kasey Meehan & Jonathan Friedman, *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AM. (Apr. 20, 2023), https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/ [https://perma.cc/HRH9-95Z5]. Texas had over 400 book restrictions; Florida and Missouri each had over 300; and South Carolina and Utah each had over 100. *See id.*

10. *See Book Bans: Frequently Asked Questions*, PEN AM., https://pen.org/book-bans-frequently-asked-questions/ [https://perma.cc/GTC4-CCGQ] (last visited Feb. 9, 2024).

11. *See, e.g.*, 2023 Fla. Laws ch. 105. (prohibiting school and classroom library materials that depict or describe sexual conduct); 2022 Mo. Laws 1041 (creating criminal penalties for school officials who assign, provide, or supply sexual materials to students); H.B. 900, 88th Leg., Reg. Sess. (Tex. 2023) (prohibiting "sexually explicit material" and requiring book vendors to issue ratings regarding a book's sexual content). The U.S. Court of Appeals for the Fifth Circuit affirmed the preliminary injunction of Texas's vendor rating system. *See* Book People, Inc. v. Wong, No. 23-50668, 2024 WL 175946, at *1 (5th Cir. Jan. 17, 2024).

school book removal decisions.[12] These students allege that the removals are "book bans" that violate their rights under the First Amendment and Equal Protection Clause.[13]

Although book removals, and legal challenges to them, are not new,[14] the U.S. Supreme Court has not provided much guidance as to the constitutionality of book removals in public school libraries.[15] Only one Supreme Court case, *Board of Education v. Pico*,[16] has addressed the issue directly.[17] However, *Pico* resulted in a plurality opinion,[18] leaving lower courts without clear precedent to follow.[19]

This Note seeks to illuminate the constitutional issues raised by recent public school library book removals[20] that remain ambiguous after *Pico*. Part I will discuss the history of book bans and introduce the First Amendment and equal protection doctrines relevant to understanding book removals. Part II will use *PEN American Center v. Escambia County School Board*[21] as a case study to discuss various arguments over whether book removals may be successfully challenged under the First Amendment or Equal Protection Clause. Finally, Part III will suggest how a court reviewing the claims in *PEN American Center*, and other courts reviewing similar book removal cases, should analyze the students' First Amendment and equal protection rights. This Note concludes that book removals like those in *PEN American Center* run afoul of the First Amendment and Equal Protection Clause.

I. THE BACKSTORY OF BOOK REMOVALS

The U.S. Supreme Court "has long recognized that local school boards have broad discretion in the management of school affairs."[22] Nevertheless,

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12. *See* Elizabeth A. Harris & Alexandra Alter, *Authors and Students Sue Over Florida Law Driving Book Bans*, N.Y. TIMES (June 20, 2023), https://www.nytimes.com/2023/06/20/books/book-bans-florida-tango-makes-three.html [https://perma.cc/MYA9-DYZS].

13. *See* Amended Complaint, *supra* note 1, at 75–78.

14. *See* Constance Grady, *How the New Banned Books Panic Fits into America's History of School Censorship*, VOX (Feb. 17, 2022, 7:30 AM), https://www.vox.com/culture/22918344/banned-books-history-maus-school-censorship-texas-harold-rugg-beloved-huck-finn-dr-seuss [https://perma.cc/VG4K-YBTY].

15. *See* Jensen Rehn, Note, *Battlegrounds for Banned Books: The First Amendment and Public School Libraries*, 98 NOTRE DAME L. REV 1405, 1409, 1417 (2023). *See generally* Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion).

16. 457 U.S. 853 (1982) (plurality opinion).

17. *Id.* at 863.

18. *See generally id.* A plurality opinion is one in which no single opinion garners a majority vote from the court. In such cases, the controlling opinion is that of the "'position taken by those Members who concurred in the judgments on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

19. *See infra* Part II.B.

20. This Note will only address book removals in school libraries, as opposed to book removals in mandatory class curriculums. However, this Note takes the position that, although the considerations impacting book removal decisions in school libraries and classrooms are different, the constitutional rights at issue are the same. *See infra* Parts II.B–C.

21. No. 23-CV-10385, 2024 WL 133213, at *1 (N.D. Fla. Jan. 12, 2024).

22. *See Pico*, 457 U.S. at 863.

the Supreme Court has also recognized that this discretion is subject to certain constitutional limits.[23] Although the First Amendment can serve as a constraint on schools' discretion,[24] it is difficult for courts to determine whether a school's decision to remove books is unconstitutional.[25] Further, the Court has not addressed what rights students have in the school library book removal context, if any, under the Equal Protection Clause.

Part I.A of this Note will discuss past and current efforts to remove books from public schools. Parts I.B and I.C will provide a general overview of the relevant First Amendment and equal protection doctrines, respectively.

A. Past and Present Book Removals

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[26] Yet, in the United States, censorship in the form of book removals has occurred since the colonial era.[27] In schools specifically, book restrictions date back to the Jim Crow era, when textbooks that were not sympathetic enough to the Confederacy and children's books encouraging interracial marriage were targeted for removal in schools.[28]

Prior to 1999, the most commonly stated reason for seeking the removal of a book was sexual content or obscene language.[29] Thereafter, the most commonly cited reason for book challenges shifted to religious concerns and the promotion of witchcraft—for which the *Harry Potter* series topped the list as the most challenged book from 2000 to 2009.[30] Some books, such as *The Adventures of Huckleberry Finn*, a classic American novel, have faced school bans since their publication.[31] The challenges against *The Adventures of Huckleberry Finn* have changed over time—the book was first removed from many schools after its publication in 1885 for portraying a friendship between a Black man and white boy, whereas in the twentieth century, it has been removed from schools due to its abundant use of the N-word.[32]

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23. *See id.* at 861, 864.

24. *See id.* at 872 ("[L]ocal school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books . . . .").

25. *See* Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1200 (11th Cir. 2009); *infra* Part II.B.

26. Texas v. Johnson, 491 U.S. 397, 414 (1989).

27. *See* Erin Blakemore, *The History of Book Bans—and Their Changing Targets—in the U.S.*, NAT'L GEOGRAPHIC (Apr. 24, 2023), https://www.nationalgeographic.com/culture/article/history-of-book-bans-in-the-united-states [https://perma.cc/K7UU-AWAB].

28. *See id.*

29. *See* Pat Peters, *Harry Potter and 20 Years of Controversy*, OFF. FOR INTELL. FREEDOM AM. LIBR. ASS'N: INTELL. FREEDOM BLOG (Aug. 28, 2017), https://www.oif.ala.org/harry-potter-20-years-controversy/ [https://perma.cc/RMS6-QRDK].

30. *See id.*

31. *See* Justine McDaniel, *Schools Continue to Grapple with 'Huckleberry Finn'*, PHILA. INQUIRER (Dec. 11, 2015, 3:01 AM), https://www.inquirer.com/philly/education/20151211_Schools_continue_to_grapple_with__Huckleberry_Finn_.html [https://perma.cc/PB9G-K7C8].

32. *See id.*

Since 2020, book challenges and removal decisions have increasingly focused on books discussing issues of race, sexuality, and gender.[33] Every one of the top ten most challenged books of 2022 was challenged for containing sexual content, and the second most cited reason was "LGBTQIA+ content."[34] Two examples include *And Tango Makes Three*, a children's picture book based on the real story of two male penguins who raised a chick as their own at the Central Park Zoo in New York City—which was one of the most banned picture books of the 2021–2022 school year[35]—and Toni Morrison's *The Bluest Eye*, which was banned in twenty-two school districts during the same time period.[36]

Today, book challenges and removals continue to proliferate across the country.[37] The American Library Association reported 695 book challenges between January 1 and August 31 of 2023—a 20 percent increase from the same time period in 2022.[38] In the latter half of 2022, book removals and restrictions occurred in twenty-one states.[39] Texas has more book bans than any other state.[40] In Texas, the book ban movement took off in late 2021 when state representative Matt Krause sent Texas school superintendents a list of 850 books[41] to be reviewed for content that might "make students feel discomfort, guilt, anguish" due to race or sex.[42] Shortly thereafter, Texas Governor Gregg Abbott called for the investigation of pornography in school libraries.[43] Like the majority of books challenged since 2020, the majority of the books on this list discuss race, gender, or sexual orientation.[44]

In reaction to such pressure by state lawmakers and legislation, some schools have preemptively removed books from their shelves.[45] Such

33. *See Book Ban Data*, BANNED & CHALLENGED BOOKS, https://www.ala.org/advocacy/bbooks/book-ban-data [https://perma.cc/G37V-8LFQ] (last visited Feb. 9, 2024); Friedman & Johnson, *supra* note 7.

34. *See Top 13 Most Challenged Books of 2022*, BANNED & CHALLENGED BOOKS, https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10 [https://perma.cc/62VT-6GVQ] (last visited Feb. 9, 2024).

35. *See The Most Banned Picture Books of the 2021–2022 School Year*, PEN AM., https://pen.org/banned-picture-books-2022/ [https://perma.cc/7R2A-QHWX] (last visited Feb. 9, 2023).

36. *See* Friedman & Johnson, *supra* note 7.

37. *See id.*

38. *See Book Ban Data*, *supra* note 33.

39. *See* Meehan & Friedman, *supra* note 9.

40. *See* Friedman & Johnson, *supra* note 7.

41. *See Krause Booklist*, TEX. TRIB., https://static.texastribune.org/media/files/94fee7ff93eff9609f141433e41f8ae1/krausebooklist.pdf?_ga=2.11573559.2091958781.1635513476-272773625.1635513476 [https://perma.cc/BU6B-HGTD] (last visited Feb. 9, 2024).

42. *See* Michael Powell, *In Texas, a Battle Over What Can Be Taught, and What Books Can Be Read*, N.Y. TIMES (Dec. 10, 2021), https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html [https://perma.cc/V7WV-QFZQ].

43. *See id.*

44. *See* Andrew Solomon, Essay, *My Book Was Censored in China. Now It's Blacklisted—in Texas*, N.Y. TIMES (Nov. 23, 2021), https://www.nytimes.com/2021/11/23/books/review/far-from-the-tree-matt-krause-texas-book-blacklist-ban.html [https://perma.cc/HS3H-F8RS].

45. *See* Powell, *supra* note 42.

legislation includes Florida's so-called "Don't Say Gay" laws—H.B. 1557[46] and H.B. 1069[47]—which have faced criticism for their potential use in banning books.[48] Some see Florida's recent legislation as a reflection of Governor Ron DeSantis's push to prohibit discussion of topics such as critical race theory, feminism, and gender diversity in schools.[49] H.B. 1069, which amends parts of H.B. 1557 and took effect on July 1, 2023, prohibits classroom instruction—which would include books—on sexual orientation or gender identity from pre-K through eighth grade, as well as books that "depict[] or describe[] sexual conduct" for all grade levels, unless required for health education classes.[50]

Still, most book challenges and removals occur on the local level.[51] In response to book challenges from community members, many schools have decided to remove books from school libraries.[52] Opponents of these book removals have raised constitutional concerns when removal decisions appear motivated by discrimination, such as in Texas's Granbury Independent School District, where the superintendent was captured on a recording directing library staff to pull books about "the transgender, LGBTQ, and . . . sexuality" from the shelves.[53] Specifically, opponents have raised both First Amendment and Equal Protection Clause claims.[54]

B. The First Amendment: An Overview of the Freedom of Speech

The Free Speech Clause of the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[55] Although freedom of speech is not absolute and may be regulated to a certain degree,[56]

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46. 2022 Fla. Laws ch. 22.

47. 2023 Fla. Laws ch. 105.

48. *See* Solcyre Burga, *What to Know About Florida's New 'Don't Say Gay' Rule That Bans Discussion of Gender for All Students*, TIME (Apr. 20, 2023, 11:45 AM), https://time.com/6273364/florida-dont-say-gay-expansion/ [https://perma.cc/YVW5-LMXG].

49. *See* Charles Bethea, *Why Some Florida Schools Are Removing Books from Their Libraries*, NEW YORKER (Feb. 7, 2023), https://www.newyorker.com/news/letter-from-the-south/why-some-florida-schools-are-removing-books-from-their-libraries [https://perma.cc/38PA-NS2Z].

50. *See* Fla. Stat. § 1006.28(2)(a)(2)(b)(II) (2023).

51. *See How Do Books Get Banned?*, FIRST AMEND. MUSEUM, https://firstamendmentmuseum.org/how-do-books-get-banned/ [https://perma.cc/8LQX-RSMR] (last visited Feb. 9, 2024).

52. *See* Friedman & Johnson, *supra* note 7.

53. Jeremy Schwartz, *North Texas Superintendent Orders Books Removed from Schools, Targeting Titles About Transgender People*, TEX. TRIB. (Mar. 23, 2022, 12:00 PM), https://www.texastribune.org/2022/03/23/north-texas-superintendent-targets-books-about-transgender-people/ [https://perma.cc/6HRY-Q9AV].

54. *See* Amended Complaint, *supra* note 1, at 75–78.

55. U.S. CONST. amend. I. The Fourteenth Amendment makes the First Amendment applicable to the states. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

56. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1273 (8th ed. 2010).

there are constitutional limits to state regulation of speech.[57] This section provides an introduction to Free Speech Clause doctrine, which informs the constitutionality of book removals under the First Amendment.

1. Regulating Speech Under the First Amendment

Whether a law unconstitutionally restricts speech depends on whether the regulation is based on the content of the speech or the viewpoint expressed in the speech.[58] Content-related regulations of speech are divided into two categories—content-based or content-neutral.[59] Content-based regulations are restrictions on speech "because of its message, its ideas, its subject matter or its content."[60] Content-based regulations are presumptively unconstitutional.[61] Content-neutral regulations are those that aim to limit the unfettered exercise of speech rather than the speech's content; such regulations are generally constitutional if they are justified by a legitimate government interest.[62]

If a regulation is content-based, courts will apply strict scrutiny.[63] Under strict scrutiny, the regulation on the speech will not be upheld unless the Government can meet the burden of proving that its regulation is narrowly tailored to achieve a compelling state interest.[64] However, the Supreme Court has applied a standard less rigorous than strict scrutiny to content-based regulations in certain circumstances, including regulations of "unprotected speech," such as obscenity.[65] In particular, the Court has upheld some content-based regulations in the context of schools, including permitting the regulation of vulgarity.[66]

Viewpoint-based regulations are a special kind of content-based regulation that restricts speech based on its "specific motivating ideology" or the speaker's "opinion or perspective."[67] The Government cannot discriminate based on viewpoint even when it regulates speech that it could permissibly proscribe.[68]

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57. *See id.* at 1273–74.

58. *See id.* at 1253.

59. *See id.* at 1273–74; Samantha Mitchell, Note, *First Amendment Speech Protections in a Post-*Dobbs *World: Providing Instruction on Instructional Speech*, 91 FORDHAM L. REV. 1521, 1528 (2023).

60. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972); *see* Mitchell, *supra* note 59, at 1528.

61. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

62. *See* NOWAK & ROTUNDA, *supra* note 56, at 1255.

63. *See id.* at 1253.

64. *See id.*

65. *See* Ginsberg v. New York, 390 U.S. 629, 641 (1968) (holding that the constitutional definition of obscenity may vary for adults and minors); VICTORIA L. KILLION, CONG. RSCH. SERV., IF12308, FREE SPEECH: WHEN AND WHY CONTENT-BASED LAWS ARE PRESUMPTIVELY UNCONSTITUTIONAL 2 (2023).

66. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

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

68. *See* Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

2. The First Amendment and Government Speech

Although most First Amendment cases involve government regulation of private speech, there are occasions when the Government speaks for itself.[69] The Free Speech Clause restricts government regulation of private speech but does not regulate speech by the Government.[70] Nothing in the First Amendment requires the Government to speak neutrally.[71] Thus, when the Government speaks, it can freely promote the views it desires.[72] The Supreme Court has stated that "imposing a requirement of viewpoint-neutrality on government speech would be paralyzing."[73] However, government speech is not subject to any heightened scrutiny by the Supreme Court, and thus the Government can even engage in viewpoint-based discrimination when it speaks for itself.[74] Government speech is, however, still subject to other constitutional limits, such as the Establishment Clause[75] and, perhaps, the Equal Protection Clause.[76]

Applying the government speech doctrines from the Supreme Court's decisions in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[77] and *Pleasant Grove City v. Summum*,[78] lower courts have adopted a three-part test to determine whether speech constitutes government speech.[79] The *Walker*/*Summum* test considers whether: (1) the forum in which the speech occurs has historically been used for government speech, (2) the public would interpret the speech as being conveyed or endorsed by the Government, and (3) whether the Government maintains control over the speech.[80] For example, in *Walker*, the Court concluded that Texas's specialty license plates were government speech.[81] The Court considered the *Walker*/*Summum* factors, finding that license plates were historically used to convey messages from the state, that the license plate designs were closely identified with the state in the public's mind, and that Texas maintained sole control over the design of the license plates.[82]

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69. *See* NOWAK & ROTUNDA, *supra* note 56, at 1282–84.
70. *See id.* at 1284.
71. *See id.*
72. *See id.*
73. *See* Matal v. Tam, 582 U.S. 218, 234 (2017).
74. *See* Shurtleff v. Boston, 596 U.S. 243, 247–48 (2022).
75. *See* NOWAK & ROTUNDA, *supra* note 56, at 1284. The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.
76. U.S. CONST. amend. XIV § 1; *see infra* Part II.B.3.b.
77. 576 U.S. 200 (2015).
78. 555 U.S. 460 (2009).
79. *See* Christine Bacon, Annotation, *Application of First Amendment Speech Protection to Governmental Entities: Government-Speech Doctrine*, 67 A.L.R. Fed. 3d Art. 4, § 2 (2021).
80. *See* Flores v. Bennett, 635 F. Supp. 3d 1020, 1032 (E.D. Cal. 2022).
81. *See Walker*, 576 U.S. at 208.
82. *See id.* at 210–13.

3. Students' Free Speech Rights in Public Schools

This section briefly explores First Amendment doctrine in the context of schools. On several occasions, the Supreme Court has defined the extent of students' First Amendment rights in public schools.[83] Although the Court has long recognized the broad discretion given to local school boards in managing school affairs and transmitting community values,[84] the Court has also stressed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[85]

In schools, the Government can play two different roles related to speech—that of a regulator and that of a speaker.[86] The Government's role as a speaker is most important as it pertains to book removals because a finding that the Government is acting as a speaker is "tantamount to holding that its conduct is constitutional."[87]

The Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*[88] highlights this distinction. In *Hazelwood*, the Court considered the extent of a school's ability to exercise control over its curriculum in a manner that restricted a student's freedom of speech.[89] *Hazelwood* concerned the actions of a school principal who removed pages of two articles in the school's newspaper, *Spectrum*, which was run by students in an elective class.[90] The principal routinely reviewed the issues prior to publication.[91] One of the articles described three students' experiences with pregnancy and the other discussed the impact of divorce on students at the school.[92] To justify his decision, the principal claimed to be concerned that the pregnant students would be identifiable (despite the use of aliases) and that "the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school."[93] He was also concerned because the divorce story included information about a student's parents' relationship.[94] Thereafter, the students sued the school district,

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83. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that schools may not compel students to salute the flag or recite the pledge); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510–11 (1969) (holding that a school may not ban students from wearing expressive symbols for the purpose of conveying certain views unless it materially and substantially interferes with the operation of the school); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (holding that although students retain First Amendment rights in school, those rights may be restricted in light of the special characteristics of the school environment); Epperson v. Arkansas, 393 U.S. 97, 103 (1968) (striking down a state statute prohibiting the teaching of evolution in public schools).

84. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 863–64 (1982) (plurality opinion).

85. *See id.* at 865 (quoting *Tinker*, 393 U.S. at 506).

86. *See supra* Parts I.A.1–2; Josh Davis & Josh Rosenberg, *Government as Patron or Regulator in the Student Speech Cases*, 83 ST. JOHN'S L. REV. 1047, 1056 (2009).

87. *See* Davis & Rosenberg, *supra* note 86, at 1059.

88. 484 U.S. 260 (1988).

89. *See id.* at 262.

90. *Id.*

91. *Id.* at 263.

92. *Id.*

93. *Id.*

94. *Id.*

contending that the school violated their First Amendment rights by deleting their stories.[95]

In its opinion, the Supreme Court first recognized that although students have First Amendment rights even when in school, these rights must be "applied in light of the special characteristics of the school environment."[96] The Court determined the relevant question to be whether a school is required to *promote* student speech.[97] In doing so, the Court recognized that this case was not about the school as a regulator, but rather as an educator or speaker, due to the amount of control that the school retained over the newspaper.[98] For instance, the school selected the editors, scheduled the publication dates, and edited stories, among many other tasks.[99] Moreover, each issue had to be approved by the principal.[100] Further, the Court found that the newspaper "bear[s] the imprimatur of the school" and "may fairly be characterized as part of the school curriculum."[101] In contrast to the school's role as a regulator, the Court reasoned that schools are entitled to exercise greater control over promoted student speech for a variety of reasons—including to ensure that readers or listeners are not exposed to material that is inappropriate for their maturity level and that the views of the speaker are not erroneously attributed to the school.[102]

Ultimately, the Court found that the principal's concerns were legitimate pedagogical concerns and that his decision to delete the stories was reasonable.[103] Thus, when a school is acting as a speaker or educator, it may exercise greater editorial control over student speech so long as it has a legitimate pedagogical purpose to control students' expression.[104]

4. The First Amendment and Book Removals: *Board of Education v. Pico*

In another school case, *Board of Education v. Pico*, the Court addressed the removal of books in a school library.[105] Decided in 1982, *Pico* is the first and only Supreme Court case addressing this issue.[106]

In September 1975, three members of the Island Trees Board of Education attended a conference sponsored by a politically conservative organization

95. *Id.* at 262.
96. *Id.* at 266 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
97. *See id.* at 269–71.
98. *See id.* at 268.
99. *See id.*
100. *See id.* at 269.
101. *Id.* at 271.
102. *See id.*
103. *See id.* at 276.
104. *See id.* at 272–73; Dylan Saul, Note, *School Curricula and Silenced Speech: A Constitutional Challenge to Critical Race Theory Bans*, 107 MINN. L. REV. 1311, 1334 (2023).
105. *See generally* Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion).
106. *See* Andrew Perry, Comment, Pico*, LGBTQ+ Book Bans, and the Battle for Students' First Amendment Rights*, 32 TUL. J.L. & SEXUALITY 197, 199 (2023).

of parents concerned about the state of education in New York.[107] At the conference, the school board members received a list of books that were "objectionable" and "improper" for students.[108] The board members later determined that nine of the listed books were available at the high school,[109] one was available at the junior high school libraries,[110] and another was included in the twelfth-grade curriculum.[111] In February 1976, the board instructed the superintendent, as well as the high school and junior high school principals, to remove the offending books from the library shelves and deliver them to the board's offices so that the board members could read them.[112]

Thereafter, the board issued a press release in which it labeled the removed books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy," and it insisted that "[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers."[113] The board then appointed a book review committee, made up of four Island Tree parents and four school staff members, to read the books and recommend whether the books should be retained.[114]

In July 1976, the committee recommended that the board retain five of the books[115] and that one book be made available to students with parental approval.[116] Still, without explaining its reasoning, the board mostly rejected the committee's recommendations, deciding to only return one book to the high school library,[117] requiring parental approval for another,[118] and removing the other nine from all school curriculums and libraries.[119]

Students from the junior high and high schools subsequently filed suit, alleging a violation of their First Amendment rights.[120] The Supreme Court granted certiorari and issued a heavily fractured opinion.[121] Justice William J. Brennan, Jr., writing for the plurality, began his opinion by detailing the limited nature of the question—that the case did not involve required curricular materials, but rather only library books, which were *optional*

107. *See Pico*, 457 U.S. at 856.
108. *See id.*
109. The nine books were: *Slaughterhouse-Five*, *The Naked Ape*, *Down These Mean Streets*, *Best Short Stories of Negro Writers*, *Go Ask Alice*, *Laughing Boy*, *Black Boy*, *A Hero Ain't Nothin' but a Sandwich*, and *Soul on Ice*. *Id.* at 856–57 n.3.
110. This book was *A Reader for Writers*. *Id.*
111. This book was *The Fixer*. *Id.*
112. *See id.* at 857.
113. *See id.* (alterations in original) (quoting Pico v. Bd. of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982)).
114. *Id.*
115. The five books were: *The Fixer*, *Laughing Boy*, *Black Boy*, *Go Ask Alice*, and *Best Short Stories by Negro Writers*. *Id.* at 858 n.5.
116. This book was *Slaughterhouse-Five*. *Id.* at 858 n.9.
117. This book was *The Laughing Boy*. *Id.* at 858 n.10.
118. This book was *Black Boy*. *Id.* at 858 n.11.
119. *See id.* at 858.
120. *See id.* at 858–59.
121. *See id.* at 853–55.

reading materials.[122] He emphasized that the Court had long recognized the constitutional limits that curtailed the power of the state in controlling school curriculums, but he reasoned that this case did not require reentry into that "difficult terrain."[123] Justice Brennan further highlighted the limitations of the Court's decision by emphasizing that the Court was not required to address the constitutional considerations involving the *acquisition* of classroom or library books—rather, this case only involved the *removal* of school books.[124]

In assessing the nature of the plaintiff students' First Amendment rights, the plurality stated that the First Amendment not only guarantees a student's right of free speech, but also the corollary of that right, which is the right to receive information and ideas.[125] The plurality reasoned that the right to receive information encompasses two constitutional protections.[126] First, it includes the *sender's* First Amendment right to send information, as the sender's dissemination of ideas "can accomplish nothing if otherwise willing addressees are not free to receive and consider them."[127] Second, it includes the *recipient's* right to meaningfully exercise their own free speech rights, because without access to knowledge, the recipient cannot meaningfully exercise their rights of speech, press, and political freedom.[128] Although the plurality recognized the discretion afforded to school boards regarding educational matters, as well as the dangers of judicial intervention in the operation of school systems, the plurality found that the students' rights were "directly and sharply implicate[d]" by the board's decision to remove the books.[129]

The plurality further found that there are special characteristics of school libraries that make them "especially appropriate for the recognition of the First Amendment rights of students."[130] Relying on precedent that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding," the Court described the school library as "the principal locus of such freedom."[131] The plurality relied on the fact that use of the school libraries was "completely voluntary" and "wholly optional."[132] Additionally, because the students' selection of books was "entirely a matter of free choice," the school board's insistence that they had a duty to reinforce community values failed.[133] Still, the plurality recognized that this duty

122. *See id.* at 861–62.
123. *See id.* at 861.
124. *See id.* at 862.
125. *See id.* at 867.
126. *See id.*
127. *See id.* (quoting Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring)).
128. *See id.* at 867–68.
129. *See id.* at 864, 866.
130. *Id.* at 868.
131. *Id.* at 868–69.
132. *Id.* at 869.
133. *Id.*

"might well defend [the school board's] claim of absolute discretion in matters of *curriculum*."[134]

Nevertheless, the plurality stated that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[135] Thus, the plurality held that whether the book removals denied the students their First Amendment rights depended on whether the board *intended* to deny them access to ideas with which the board disagreed and whether this intent was the decisive factor in the board's decision.[136] The plurality found that—despite the board's insistence that it only restricted access to books that it believed to be vulgar—the board had ignored the advice of the review committee, literary experts, and the superintendent, as well as the guidance of publications that rate books for junior and senior high school students.[137] Further, the plurality found that the record supported the claim that the board's decisions were based solely on the fact that the books were listed on the politically conservative organization's list of objectionable books.[138] Thus, the Court held that there was sufficient evidence to raise a genuine issue of material fact over whether the board exercised its discretion to remove library books in a manner that "exceeded constitutional limitations."[139]

Concurring in part, Justice Harry A. Blackmun wrote separately and rejected the plurality's principle of the "right to receive information," as well as the plurality's claim that students' rights rested on the peculiar nature of the school library.[140] Instead, Justice Blackmun recognized as key the First Amendment principle that the state may not "single out an idea for disapproval and then deny access to it."[141] Justice Blackmun reasoned that "the State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficiently compelling reasons."[142]

Justice Blackmun explained that "this is a narrow principle"—schools must be able to choose one book over another for reasons such as relevance, literary merit, the exclusion of offensive language, appropriateness for age groups, or the decision to emphasize one subject over another.[143] He even recognized that a book could be removed solely because "the ideas it advances are 'manifestly inimical to the public welfare.'"[144] In essence,

134. *Id.*
135. *Id.* at 872 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
136. *See id.* at 871.
137. *See id.* at 874.
138. *See id.*
139. *Id.* at 872.
140. *See id.* at 878 (Blackmun, J., concurring).
141. *Id.* at 879 n.2.
142. *See id.* at 877.
143. *See id.* at 880.
144. *See id.* (quoting Pierce v. Soc'y of Sisters, 269 U.S. 510, 534 (1925)).

schools may instill certain values, but they may not "shield students from certain ideas that officials find politically distasteful."[145]

Justices Warren E. Burger, Lewis E. Powell, Jr., and Sandra Day O'Connor, as well as Chief Justice William Rehnquist, dissented, each writing separate opinions.[146] The four dissenters took issue with differing portions of the plurality's opinion, including the principle of the "right to receive information"[147] and the plurality's rejection of the board's permissible content-based removal decisions about the appropriateness of the books.[148]

The Court's fractured decision in *Pico* has left lower courts with neither binding precedent to follow nor a clear understanding of when book restrictions run afoul of the First Amendment.[149]

C. The Fourteenth Amendment: An Overview of the Equal Protection Guarantee

The Equal Protection Clause of the Fourteenth Amendment mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[150] The equal protection guarantee requires that similarly situated persons be treated similarly.[151] However, the Equal Protection Clause only regulates government (or state) action, not private action.[152] Thus, all governmental actions that classify individuals into groups for different benefits or burdens under the law must abide by the equal protection guarantee.[153] Although the Government is permitted to classify people into groups, the classification cannot be drawn for the purpose of disadvantaging a group; rather, the classification must advance a state interest.[154]

The Supreme Court evaluates equal protection cases using one of three "tests" of judicial review—strict scrutiny, intermediate scrutiny, and rational basis review.[155] Strict scrutiny is the most rigorous form of judicial review.[156] To overcome strict scrutiny, "the government must prove that the challenged action furthers a 'compelling governmental interest' and is

145. *See id.* at 882.

146. *See id.* at 885 (Burger, C.J., dissenting); *id.* at 893 (Powell, J., dissenting); *id.* at 904 (Rehnquist, J., dissenting); *id.* at 921 (O'Connor, J., dissenting).

147. *See id.* at 888 (Burger, C.J., dissenting); *see id.* at 895 (Powell, J., dissenting); *see id.* at 910 (Rehnquist, J., dissenting).

148. *See id.* at 889 (Burger, C.J., dissenting); *see id.* at 917 (Rehnquist, J., dissenting).

149. *See infra* Part II.B.

150. U.S. CONST. amend. XIV, § 1.

151. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.1 (5th ed. 2012).

152. *See id.*

153. *See id.*

154. *See* 16B AM. JUR. 2D *Constitutional Law* § 845, Westlaw (database updated February 2024).

155. *See* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 401, 403 (2016).

156. *See* Jessica Mitten, Leanne Aban, Lilia Abecassis, Gabriela Garcia-Bou, Carter Man, Jessica Pacwa, Talia Plofsky, Tate Schneider, Katie Wiese, Shelby Young & Yiruo Zhang, *Equal Protection*, 23 GEO. J. GENDER & L. 267, 271 (2022).

'narrowly tailored.'"[157] Strict scrutiny is almost always fatal—that is, when strict scrutiny is applied, the governmental action at issue will likely be found unconstitutional.[158] For example, in *Brown v. Board of Education*,[159] a law that forced Black people and white people to use separate facilities was subject to strict scrutiny and found unconstitutional.[160]

Intermediate scrutiny is generally applied when "legislation categorizes people based on irrelevant stereotypes instead of individual capability or culpability."[161] Intermediate scrutiny generally applies to classifications based on gender and, to survive this level of scrutiny, the Government must show that the classification is substantially related to achieving a sufficiently important governmental interest.[162] Although the Supreme Court has not squarely held that sexual orientation is a protected characteristic that gives rise to heightened scrutiny under the Equal Protection Clause, the Supreme Court has treated sexual orientation similarly to gender, reviewing such classifications seemingly with intermediate review or, at least, "heightened" rational basis review.[163]

Finally, judicial scrutiny at the level of rational basis review requires only that the state action be "rationally related to a legitimate state interest."[164] This is a deferential standard. Still, under rational basis review, the government action must bear some rational relation to a legitimate governmental purpose, so it cannot be an arbitrary classification.[165] For example, if a state prohibited all left-handed children from going to public schools, this would almost certainly fail even the highly deferential rational basis review, as no state would be able to proffer a connection between the classification and a legitimate governmental purpose.[166] Nevertheless, most state actions reviewed under rational basis review are upheld if the law neither burdens a fundamental right nor targets a suspect class.[167]

Overall, whether a classification is found by the courts to violate the Equal Protection Clause largely depends on the degree of scrutiny exercised by the reviewing court.[168] The Supreme Court is generally hesitant to engage in heightened scrutiny and overturn state actions because doing so "assume[s]

157. *See id.* (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).
158. *Id.*
159. 347 U.S. 483 (1954).
160. *See id.* at 483.
161. *See* Mitten et al., *supra* note 156, at 275.
162. *See id.*; *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).
163. *See* Romer v. Evans, 517 U.S. 620 (1996) (finding no rational basis for Colorado's constitutional amendment barring municipal antidiscrimination laws based on homosexuality); Peter J. Jenkins, *Morality and Public School Speech: Balancing the Rights of Students, Parents, and Communities*, 2008 BYU L. REV. 593, 606.
164. *See City of Cleburne*, 473 U.S. at 440.
165. *See id.* at 446; Mitten et al., *supra* note 156, at 276.
166. 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.45 (5th ed. 2013).
167. *See Romer*, 517 U.S. at 631; Cain Norris & Whitney Turk, *Equal Protection*, 14 GEO. J. GENDER & L. 397, 405–06 (2013).
168. *See* 3 ROTUNDA & NOWAK, *supra* note 151, § 18.3(a)(i).

the power to override [the] democratic process."[169] Thus, the Supreme Court will use rational basis review and defer to the legislature's decisions unless (1) the governmental action classifies people in terms of their ability to exercise a fundamental right or (2) the governmental action distinguishes individuals based on a suspect classification.[170]

When an action does target a suspect class, however, the Court will apply strict scrutiny. Suspect classes refer to groups that have historically faced discrimination or are defined by an "immutable characteristic."[171] The Supreme Court has held that race, alienage, and national origin are suspect classes.[172] Thus, the Equal Protection Clause prohibits any state action that denies any individual the equal protection of the laws on the basis of race.[173] Although the Supreme Court has not held that any other classifications are subject to strict scrutiny, the Court has found classifications based on gender to be quasi-suspect and thus subject to intermediate scrutiny.[174]

Even if state action does not discriminate based on a suspect classification, it may run afoul of the Equal Protection Clause if it infringes on a fundamental right.[175] Actions that infringe on a fundamental right are also subject to strict scrutiny.[176] The Supreme Court has held that fundamental rights are those that are found explicitly in the text of the Constitution or are "implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition."[177] In *San Antonio Independent School District v. Rodriguez*,[178] the Supreme Court declined to recognize a fundamental right to education.[179] Thus, government action regulating access to education will not be subject to strict scrutiny.[180]

Furthermore, when a regulation or practice is facially neutral (that is, the plain language does not classify a specific group of people) but disproportionally affects an identifiable group adversely, the Court has held that such actions only violate the Equal Protection Clause if that disparate impact can be traced to a discriminatory purpose or animus.[181] A plaintiff raising an equal protection claim must prove that the decision-maker had a discriminatory purpose in selecting or pursuing a particular course of action.[182] The discriminatory animus requires more than just an awareness

169. *See id.*
170. *See id.* § 18.3(a)(iii).
171. *See* Mitten et al., *supra* note 156, at 272.
172. *See id.* at 271.
173. *See* 16B AM. JUR. 2D *Constitutional Law*, *supra* note 154, § 820.
174. *See* Mitten et al., *supra* note 156, at 275.
175. *See id.* at 273.
176. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
177. *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).
178. 411 U.S. 1 (1973).
179. *See id.* at 37.
180. *See* 3 ROTUNDA & NOWAK, *supra* note 151, § 18.1.
181. *See* Washington v. Davis, 426 U.S. 229 (1976); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).
182. *See Feeney*, 442 U.S. at 276; 16B AM. JUR. 2D *Constitutional Law*, *supra* note 154, § 828.

of the consequences; rather, purposeful discrimination requires that the decision-maker acted at least in part "because of," not merely "in spite of," the adverse effects on an identifiable group.[183] Determining whether the Government was motivated by discriminatory animus requires "a sensitive inquiry into . . . circumstantial and direct evidence" that evinces an invidious intent.[184] However, even if there is discriminatory intent, a state actor only violates the Equal Protection Clause if there is also a disparate impact.[185] That is, one group must be arbitrarily denied a benefit while another group is supplied that benefit.[186]

Ultimately, the Equal Protection Clause might constrain the discretion of schools and states in removing and restricting students' access to books. The level of scrutiny that a court would apply to such actions would depend on the type of classification targeted or affected by the state's action. However, courts have not decided the constitutionality of book removals based on the Equal Protection Clause; instead, they have attempted to rely on *Pico*'s fractured First Amendment analysis.[187] As book removals are increasingly challenged, courts will have to address equal protection claims.[188]

II. EXPLORING WHETHER BOOK REMOVALS VIOLATE THE FIRST AMENDMENT AND EQUAL PROTECTION CLAUSE

This part explores the current landscape of book ban litigation. Part II.A provides an overview of an ongoing suit challenging the book removals discussed in the introduction of this Note. Part II.B will assess what type of First Amendment analysis might be relevant to book removals. Part II.C explores the arguments pertaining to challenging book removals as invidious discrimination under the Equal Protection Clause.

A. PEN American Center: A Case Study of a Current Legal Challenge to Book Removals

Given the increased number of book challenges and book removals, book ban opponents have begun to challenge them in court.[189] In one suit, PEN America (a nonprofit organization dedicated to protecting free expression),[190] publisher Penguin Random House, authors whose books were

183. *See Feeney*, 442 U.S. at 279.

184. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); *see* 16B AM. JUR. 2D *Constitutional Law*, *supra* note 154, § 829.

185. *See* Palmer v. Thompson, 403 U.S. 217, 220 (1971) (holding that a city's decision to close all public pools, as opposed to racially integrating them, did not violate the Equal Protection Clause because there is no constitutional right to public pools and access was denied to all groups, not just one group).

186. *See id.*

187. *See* Perry, *supra* note 106, at 203–11 (detailing how federal courts have decided public school library book removal cases post-*Pico*).

188. *See infra* Part II.A.

189. *See supra* Part I.A.

190. *See PEN America Files Lawsuit Against Florida School District Over Unconstitutional Book Bans*, PEN AM. (May 17, 2023), https://pen.org/press-release/pen-

removed or subject to restricted access, and parents of affected children alleged that Florida's Escambia County School Board violated the First and Fourteenth Amendments by disproportionately removing and restricting access to books by or about BIPOC and LGBTQ+ people.[191] In *PEN American Center*, Vicki Baggett, a language arts teacher at one of the district's high schools,[192] submitted a "Request for the Reconsideration of Educational Media" form to her employer, the high school, objecting to the inclusion of *The Perks of Being a Wallflower* as optional class reading for high school seniors.[193] The school formed a panel made up of school administrators, faculty, and staff, as well as one parent, to review Baggett's challenge.[194] After reading the book, the panel ultimately voted four-to-three to keep the book as optional study material, explaining that Baggett's concerns regarding sex and sexuality[195] were outweighed by the book's literary value and the potential class discussions.[196]

Baggett appealed the panel's decision.[197] The Assistant Superintendent then put together a district review committee made up of two high school media specialists, two high school teachers, one high school administrator, one parent of a student, and one community member.[198] After considering the book itself, several book reviews, Baggett's complaint, and lesson plans related to the book, the district review committee voted four-to-three to retain the book for high school seniors.[199] The district review committee also approved a parental opt-out form for the book.[200] Baggett again appealed the decision, this time to the district's school board.[201] The school board ultimately voted to remove the book as an optional novel for all twelfth-grade English Language Arts courses, going against the district review committee's recommendation.[202]

Meanwhile, as *The Perks of Being a Wallflower* review process progressed, Baggett submitted over 100 challenges to books available in the district's school libraries.[203] Baggett challenged books such as *New Kid*—a graphic novel about a twelve-year-old African-American boy and his

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america-files-lawsuit-against-florida-school-district-over-unconstitutional-book-bans/ [https://perma.cc/EB4L-SKWP].

191. *See* Amended Complaint, *supra* note 1, at 1–2.

192. Baggett is actively involved in the effort to remove books from schools and has spoken at events for Moms for Liberty, a "politically conservative organization that is focused on combating . . . the 'woke' influence in public schools." *See id.* at 18.

193. *See id.* at 19.

194. *Id.*

195. In a letter appealing the panel's decision to retain *The Perks of Being a Wallflower*, Baggett cited the book's sections on "masturbation, beastiality [sic], and teenage sex and lesbianism." *Id.* at 102.

196. *Id.* at 19.

197. *Id.* at 20.

198. *Id.*

199. *Id.*

200. *See id.* at 107.

201. *Id.* at 36.

202. *See id.*

203. *Id.* at 22.

experience with culture shock after enrolling in a private school—for "race-baiting."[204] Baggett also challenged *When Aiden Became a Brother* and *And Tango Makes Three*[205] for "LGBTQ indoctrination."[206]

The district review committee solicited input from Escambia County schools for almost all of the ten removed books, and most of the input was positive.[207] As of December 2023, ten books have been removed or restricted by the school board against the district review committee's recommendation.[208]

The plaintiffs in *PEN American Center* allege that the school board has disproportionately removed books that discuss racial issues or LGBTQ+ themes.[209] Thus, the plaintiffs contend that the school board's removal of these books is based on ideological, rather than pedagogical, objections to the books' contents; thus, the removals constitute viewpoint discrimination and a denial of the students' right to receive information, which contravenes the First Amendment.[210] In support of this contention, PEN America's complaint identifies various statements by board members made during appeal meetings evincing "ideological bases for the removals."[211] For instance, during a board meeting reviewing the appeal of *And Tango Makes Three*, a board member stated: "The fascination is still on that it's two male penguins raising a chick . . . so I'll be voting to remove the book."[212]

The plaintiffs also raised an equal protection challenge, alleging that the board's disproportionate removal and restriction of books with racial or LGBTQ+ themes constitutes discriminatory animus that prevents non-white

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204. *Id.* at 44.

205. *See supra* note 3 and accompanying text.

206. *See* Amended Complaint, *supra* note 1, at 41, 45.

207. *See id.* at 23 (providing a spreadsheet of all challenged library books and the related review committee materials).

208. *See id.* at 36. These books are: *The Perks of Being a Wallflower*, *All Boys Aren't Blue*, *Bluest Eye*, *And Tango Makes Three*, *Drama*, *Lucky*, *New Kid*, *Push*, *The Nowhere Girls*, and *When Aidan Became a Brother*. *See id.* at 36–37. The students also allege that the school board's policy of restricting access to books pending adjudication of a challenge is unconstitutional. *See id.* at 70. This Note will only focus on the books that were removed after a final decision and generally takes the position that a policy of restricting books pending review, so long as such a review is viewpoint-neutral and consistently applied, is presumptively constitutional. *See* PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist., No. 23-CV-10385, 2024 WL 133213, at *2 n.12 (N.D. Fla. Jan. 12, 2024).

209. *See* Amended Complaint, *supra* note 1, at 60 ("Of the 10 books permanently removed from one or more libraries by the School Board, . . . 9 address themes relating to race or LGBTQ identity, or feature prominent non-white and/or LGBTQ characters.").

210. *See id.* at 76.

211. *Id.* at 40; *see also* PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist., No. 23-CV-10385, 2024 WL 133213, at *2 (N.D. Fla. Jan. 12, 2024) (stating that the plaintiffs sufficiently alleged that the book removal decisions were based on ideological objections to survive a motion to dismiss).

212. Amended Complaint, *supra* note 1, at 40. In another instance, the school board chair indicated that he was relying on Baggett's assessments of the books, stating "I'm not gonna sit here and read 125 books. Fortunately, it don't take long, particularly with this English teacher because she's identified every page in there. I don't have to read a smut book all the way from the very beginning to the very end." *Id.* at 33.

or LGBTQ+ students from accessing books that reflect their identities.[213] Accordingly, the plaintiffs are seeking an injunction ordering the school board to return the removed books to the school libraries consistent with the district review committee's recommendation and their previous status.[214]

The Escambia County School Board filed a motion to dismiss.[215] In January 2024, the U.S. District Court for the Northern District of Florida denied the school board's motion to dismiss the First Amendment claims and granted dismissal of the students' equal protection claims.[216] Parts II.B and II.C will discuss the First Amendment and equal protection arguments, respectively, that courts may rely on to address these claims, including those which the district court relied on in ruling on the Escambia County School Board's motion to dismiss.

B. What First Amendment Standard Applies?

Pico is not binding, and this has left courts and litigants without clear precedent to resolve questions arising from library book removals. This section will discuss whether the *Pico* standard applies to book removals today. Then this section will discuss possible alternative standards.

1. *Pico* and the Right to Receive Information

Although students challenging book removals often cling to *Pico*'s plurality opinion, schools often raise *Pico*'s lack of precedential effect, arguing that there is no recognized right to receive information and urging courts to abandon the *Pico* standard.[217]

Although *Pico* is the only Supreme Court case to recognize the right to receive information in the school library context, the right has roots in the Court's precedent in a variety of contexts.[218] In *Stanley v. Georgia*,[219] in which plaintiffs challenged a state statute criminalizing the private possession of obscene materials, the Court stated: "It is now well established that the Constitution protects the right to receive information and ideas."[220] Further, in *Kleindienst v. Mandel*,[221] the Court stated that this right is "'nowhere more vital' than in our schools and universities."[222] There, university academics sued the U.S. Attorney General for allegedly denying a Marxist scholar entry into the United States because of his political views. Thus, although these cases discuss the right to receive information in

213. *Id.* at 79.
214. *Id.* at 79–80.
215. *See* Defendant's Dispositive Motion to Dismiss Amended Complaint, PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23-CV-10385 (N.D. Fla. Jan. 12, 2024), ECF No. 28.
216. *See PEN Am. Ctr., Inc.*, 2024 WL 133213, at *2–3.
217. *See* Defendant's Dispositive Motion to Dismiss Amended Complaint, *supra* note 215, at 31–32.
218. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion).
219. 394 U.S. 557 (1969).
220. *Id.* at 564.
221. 408 U.S. 753 (1972).
222. *Id.* at 763 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

different contexts, a court might reasonably find that "all that was novel in *Pico* was applying that right to the school-library setting."[223]

Additionally, lower federal courts have consistently applied *Pico* when reviewing book removal challenges.[224] For example, in *Campbell v. St. Tammany Parish School Board*,[225] the U.S. Court of Appeals for the Fifth Circuit applied *Pico* in reviewing a school board's decision to remove *Voodoo & Hoodoo*, a book about the two African religions.[226] Like in *Pico*, the Fifth Circuit recognized that school libraries play a "special role" in allowing students to explore diverse ideas and stated that the board's decision to remove the book raised the inference that the board wanted to prevent students from exploring different ideas.[227] Further, the court found that many of the board members did not read the book, relied only on excerpts selected by the Louisiana Christian Coalition, and failed to consider the reviewing committee's recommendation to keep the book—the Court considered these factors to evince an unconstitutional motive.[228]

Similarly, in *Case v. Unified School District*,[229] the U.S. District Court for the District of Kansas applied *Pico* and held that a school's removal of a book was unconstitutional because the board's substantial motivation to remove the book was the board's disagreement with the book's "promotion" of homosexuality.[230] In *Case*, the school board sought to remove *Annie on My Mind*, a novel depicting a fictional romance between two teenage girls, from its junior high and high school libraries.[231] After receiving media coverage of the book being available in the schools, including reports that protestors burned copies of the book in front of the school district's offices, the Assistant Superintendent instructed the district's high school librarians to review the book.[232] Despite the librarians' finding that the book was appropriate for high school students and of literary merit, the Assistant Superintendent decided to remove all the copies from the schools, citing the

223. *See* Plaintiff's Opposition to Defendant's Motion to Dismiss at 26, PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23-CV-10385 (N.D. Fla. Jan. 12, 2024), ECF No. 40.

224. *See* Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 185 (5th Cir. 1995); Case v. Unified Sch. Dist., 908 F. Supp. 864, 875–76 (D. Kan. 1995); Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 999 (W.D. Ark. 2003); Am. C.L. Union v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1217 (11th Cir. 2009) (analyzing a school library book removal case under the *Pico* plurality standard despite declining to find the standard binding); C.K.-W. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 919 (E.D. Mo. 2022) (analyzing a school library book removal case under the *Pico* plurality standard despite declining to find the standard binding).

225. 64 F.3d 184 (5th Cir. 1995).

226. *See id.* at 185.

227. *See id.* at 190.

228. *See id.* Although these circumstances indicated an unconstitutional motive, the Fifth Circuit could not determine the board's motivation as a matter of law and remanded the case to the trial court to develop the record of the board members' testimonies. *See id.*

229. 908 F. Supp. 864 (D. Kan. 1995).

230. *See id.* at 869, 875–76.

231. *See id.* at 867.

232. *See id.*

protests and community concerns.[233] He further stated that "introduction of information about homosexuality" was creating controversy and removing the book would keep the district from being "embroiled into this situation."[234] The school board voted four-to-two to support the Assistant Superintendent's decision.[235]

Upon judicial review, the district court held that the book removal violated the students' First Amendment rights as outlined in *Pico*.[236] The court reasoned that there was nothing in the record that indicated that the board meant "anything other than their own disagreement with the ideas expressed in the book" when they said that they removed the book due to its "educational suitability."[237] To this point, several of the board members testified that they voted to remove the book because it promoted a "gay lifestyle."[238] Thus, when a school board's reasoning merely raises "educational suitability," but does not explain that reasoning with anything other than a personal distaste for the ideas contained within the books, courts following the *Pico* standard will likely find the book removals unconstitutional.

The *Case* court also highlighted that the board failed to follow its procedures and requirements in considering the book, failed to discuss the educational merit of the book, and ignored the recommendations of the librarians.[239] *Campbell* and *Case* suggest that a court may consider a school board's decision to remove books against a committee recommendation, and thus, may find that this is indicative of personal disapproval and a desire to deny students access to the ideas contained within the books.

In *PEN American Center*, the Escambia County School Board also argued that the books were not "banned" because they are available to students through public libraries or online retailers.[240] Notably, the *Case* court rejected this argument, finding that the availability of *Annie on My Mind* from other sources did not cure the school board's improper motivation in removing the book.[241] Further, in *Counts v. Cedarville School District*,[242] in which the school district placed the *Harry Potter* series under restricted access requiring parental consent, the U.S. District Court for the Western District of Arkansas held that, although the plaintiff student had parental

233. *See id.* However, the district had not received any written complaints about the book. *See id.*

234. *Id.* at 869.

235. *See id.* at 869–70.

236. *See id.* at 875–76.

237. *See id.* at 875.

238. *See id.* at 870.

239. *See id.* at 872.

240. *See* Defendant's Dispositive Motion to Dismiss Amended Complaint, *supra* note 215, at 2. Although the district court did not directly address this issue when ruling on the motion to dismiss, the fact that the court denied the motion as to the First Amendment claims suggests that the court was unpersuaded by this argument. *See* PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist., No. 23-CV-10385, 2024 WL 133213, at *2 (N.D. Fla. Jan. 12, 2024).

241. *See Case*, 908 F. Supp. at 876.

242. 295 F. Supp. 2d 996 (W.D. Ark. 2003).

permission and could access the books, the restriction still constituted sufficient injury because it burdened her right to access the books.[243] The court elaborated that "access in one forum is not a constitutional substitute for access in another."[244] Similarly, in *Kleindienst*, the Supreme Court declined to accept that the existence of alternative means of accessing ideas extinguishes a constitutional interest in a particular form of access.[245]

By contrast, in *American Civil Liberties Union v. Miami-Dade County School Board*,[246] the U.S. Court of Appeals for the Eleventh Circuit agreed with the school board that books removed from school libraries are not "banned," highlighting that the removed book at issue could still be found in a public library or purchased online.[247] Similarly, in *C.K.-W. v. Wentzville R-IV School District*,[248] another school library book removal case, the U.S. District Court for the Eastern District of Missouri stated that the plaintiffs' First Amendment claim was weak because the students were able to access the books outside of school and the school district did not prohibit any student from reading or discussing the book in school.[249] Responding to the *Pico* plurality's emphasis that book removals deny students access to ideas, the district court stated that "[t]oday, though, denying students access to a particular book at a school library does not deny them access to the book or its ideas."[250] Thus, it is not clear how courts will resolve these issues when removed books are available through other means or when students are permitted to bring the books to school.

If courts apply *Pico* to claims like those raised in *PEN American Center*, they will likely have to address whether a school's removal decision was based on a desire to suppress particular viewpoints about race and sexuality[251] or on a finding that the removed books are educationally unsuitable.[252] The concern about educational unsuitability can broadly be described as a concern about harm to minors caused by exposure to sexual content or graphic language.[253] Thus, a court will have to determine whether removed books are educationally unsuitable because of the alleged harm proffered by a school.

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243. *See id.* at 999.
244. *See id.*
245. *See id.* at 765.
246. 557 F.3d 1177 (11th Cir. 2009).
247. *See id.* at 1217.
248. 619 F. Supp. 3d 906 (E.D. Mo. 2022).
249. *See id.* at 919.
250. *Id.*
251. *See, e.g.*, C.K.-W. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 911 (E.D. Mo. 2022).
252. *See, e.g.*, Amended Complaint, *supra* note 1, at 21.
253. It is worth noting that "harm to minors" is also used in the context of "variable obscenity" laws, which modify the Supreme Court's obscenity doctrine as applied to minors. *See* Ginsberg v. New York, 390 U.S. 629, 638–39 (1968). In this Note, "harm to minors" includes the variable obscenity definition from *Ginsberg* but also refers more broadly to harm that does not rise to this level. That is, this Note does not assume that the only harm that schools may regulate is that arising from materials that are obscene as to minors.

In *Fayetteville Public Library v. Crawford County*,[254] the U.S. District Court for the Western District of Arkansas struck down a state law that would have required public libraries to remove books that are "harmful to minors"—that is, too obscene for minors—but made no distinction based on age and maturity.[255] Thus, the law required that "librarians . . . apply the test for what is harmful to minors to what is harmful to a 5-year-old without regard to the fact that that may not be harmful to a 17-year-old."[256] There, the court found that an older child's inability to access books appropriate to their age and reading level was an unjustified burden and restricted the older child's constitutionally protected speech.[257]

In line with this principle, in a school book removal case decided a few months before *Pico*, the U.S. District Court for the District of Maine reasoned that the legitimacy of a book removal decision ultimately depended on whether the book could rationally be harmful to students.[258] There, the court stated that a rational reason concerning harm to students must take into account their age and maturity and that "it is not an acceptable *assumption* that all students, regardless of their age or maturity, might be harmed."[259]

Even if schools are concerned about the harm to minors who read books discussing race, gender, or sexuality, schools may have to take into consideration the students' age when deciding that books are unsuitable and should be removed.[260] That is, schools may not be able to remove books due to harm to the "youngest . . . or most sensitive members of the class,"[261] which, in the context of book removals, may be elementary-aged students. Thus, a court may consider whether a school's book removal decisions take into account the age of the students who can access the book when finding that a book is educationally unsuitable. For instance, a court could consider whether removed books are geared toward high school students, like many of those in *PEN American Center*, and find that books that are harmful for younger students may not be harmful for older students.[262]

Outside of the book restriction context, the Supreme Court's decision in *Meyer v. Nebraska*[263] might also provide guidance for courts. In *Meyer*, the Court struck down a state law that prohibited schools from teaching

254. No. 23-CV-05086, 2023 U.S. Dist. LEXIS 131427, at *1 (W.D. Ark. July 29, 2023).
255. *See id.* at *54.
256. *See id.* at *46 n.25.
257. *See id.* at *48.
258. *See* Sheck v. Baileyville Sch. Comm., 530 F. Supp. 679, 691 (D. Me. 1982).
259. *Id.*
260. *See* Commonwealth v. Am. Booksellers Ass'n, Inc., 372 S.E.2d 618, 623–24 (Va. 1988) (explaining in response to certified question from the Supreme Court that books that have serious value for older adolescents, but are unsuitable for young children, are not considered "harmful to minors" under a state statute regulating obscene materials for minors).
261. *Id.* at 623.
262. *See, e.g.*, *id.* However, this does not suggest that books cannot be harmful to older students. *Cf.* Brown v. Bd. of Regents of Univ. of Neb., 640 F. Supp. 674, 680 (D. Neb. 1986) ("Justification for guarding junior high and high school students from material thought to be offensive is more easily found than for guarding college students and the general public from it.").
263. 262 U.S. 390 (1923).

languages other than English.[264] There, the Court reasoned that, although the state had the discretion to promote American ideals within schools, the danger of knowing a language other than English "cannot reasonably be regarded as harmful."[265] Thus, the Court held that the state's desired goals could not be achieved in contravention of the rights of parents and children.[266] *Meyer* suggests that a school's proffered "harm to minors" justification may be examined by courts even outside of the context of harm rising to the level of obscenity as to minors. Similarly, if removed books may not reasonably be regarded as harmful to students who previously had access to these books, a court may have reason to overturn the school's decision. Still, schools may argue that *Meyer* should be distinguished because, in that case, the Court found that the parents had a fundamental right to dictate their child's rearing, including exposing them to foreign languages.[267] By contrast, access to education is not a fundamental right.[268]

As for books that merely feature BIPOC or LGBTQ+ characters but do not discuss sexual or graphic themes, a court may more easily find that such books do not harm students.[269] The U.S. Court of Appeals for the First Circuit, for example, upheld a school's refusal to allow parents of kindergarten, first grade, and second grade students to exempt their children from class when they were reading books that depicted families with parents of the same gender,[270] suggesting that mere awareness of or exposure to LGBTQ+ topics in books is not harmful, even despite parental disapproval.

Nevertheless, determining which books are harmful to minors, even those who are older, is difficult. In *C.K.-W*, the Missouri district court stated that, although a librarian or school board could reasonably conclude that books containing sexual content[271] were suitable for older students, a court could not conclude that the opposite determination is a pretense absent actual evidence that the real decisive reason for the removal was to deny students access to certain ideas.[272]

Finally, courts following the *Pico* plurality's right to receive information might be concerned that a school's book removal decisions will chill

264. *See id.* at 403.
265. *See id.* at 400.
266. *See id.* at 402.
267. *See id.* at 400.
268. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).
269. *See* Nancy Tenney, Note, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1649 (1995) (arguing that "no reasonable nexus exists between . . . anti-gay curriculum restrictions [that ban even age-appropriate discussions] and any legitimate educational goal").
270. *See* Parker v. Hurley, 514 F.3d 87, 95 (1st Cir. 2008); *see also* Mahmoud v. McKnight, No. CV-23-1380, 2023 WL 5487218, at *1, *21 (D. Md. Aug. 24, 2023) (upholding a school's decision to implement a policy prohibiting opt-outs for an elementary English curriculum based on parents' objection to LGBTQ+ characters).
271. This is what Baggett alleged to be harmful to children in *PEN American Center*. *See* Amended Complaint, *supra* note 1, at 21.
272. *See* C.K.-W. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 917 (E.D. Mo. 2022); Tenney, *supra* note 269, at 1642.

students' constitutionally protected speech.[273] This chilling effect could arise from either signaling to students that discussions related to the ideas contained within the removed books are prohibited or from preventing students from developing the knowledge necessary to participate in such conversations.[274] As discussed, the *Pico* plurality held that a student's right to receive information was the corollary of a student's freedom of speech.[275] Thus, if the student's access to books is restricted, then their speech may also be restricted, and First Amendment doctrine prohibits measures that chill constitutional speech.[276]

2. The *Hazelwood* Alternative

Some courts might also consider using a *Hazelwood* analysis, which offers a less rigorous standard than the one offered by the *Pico* plurality, when reviewing library book removal cases.[277] The *Hazelwood* standard would provide a school with the authority to censor viewpoints, so long as the school could proffer a legitimate pedagogical concern.[278] For example, the *Hazelwood* Court accepted the school's explanation for removing the student newspaper articles due to concerns that the discussions about pregnancy and birth control were inappropriate for younger students.[279] Similarly, with books that discuss sensitive topics about race or sexual orientation, a court might find that schools may remove such books because they have a responsibility to protect young students from exposure to mature or difficult content.[280]

However, if courts follow *Hazelwood*, they would have to classify school library books as curricular, as opposed to optional, materials.[281] A school could do so by arguing that the books on the library shelves "bear the imprimatur of the school," so the school should be able to exercise editorial control over such school-sponsored expressive activity.[282] In *Miami-Dade*, the Eleventh Circuit left open the possibility of applying *Hazelwood*'s standard to a school library book removal challenge, reasoning that the

273. *See, e.g.*, PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist., No. 23-CV-10385, 2024 WL 133213, at *2 n.6 (N.D. Fla. Jan. 12, 2024).

274. *See* Tenney, *supra* note 269, at 1646–47; Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 223 (1983).

275. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion).

276. *See* DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2.7 (2012); Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

277. *See supra* Part I.B.3.

278. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–73 (1988).

279. *See id.* at 271.

280. *See* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1031–32 (9th Cir. 1998) (stating that decisions about the appropriateness of books discussing topics such as racism are best left to school boards); Katherine Flore, Note, ACLU v. Miami-Dade County School Board*: Reading* Pico *Imprecisely, Writing Undue Restrictions on Public School Library Books, and Adding to the Collection of Students' First Amendment Right Violations*, 56 VILL. L. REV. 97, 108 (2011).

281. *See* Flore, *supra* note 280, at 108.

282. *See Hazelwood*, 484 U.S. at 271.

situations might be sufficiently analogous even though the book removal at issue was not part of a course in the school's curriculum.[283]

Further, although *Hazelwood* involves student speech—and the book removals at issue here do not—courts have extended *Hazelwood* to cover non–student speech cases. In *Arce v. Douglas*,[284] the U.S. Court of Appeals for the Ninth Circuit followed the Eleventh Circuit's lead from *Virgil v. School Board of Columbia County*[285] and extended *Hazelwood*'s test to students' First Amendment claims that did not involve their right to speak. In *Arce*, the Tucson Unified School District Governing Board eliminated the Mexican American Studies (MAS) program in the district's schools.[286] The Ninth Circuit found that the school board was motivated to eliminate the MAS program because they believed it promoted "ethnocentrism and reverse racism."[287] The court held that *Hazelwood*'s reasoning could be extended, such that state limitations on school curriculums that restrict a student's access to materials that were previously available may be upheld only when they are reasonably related to legitimate pedagogical concerns, "especially in a context such as this, where the local school board has already determined that the material at issue adds value to its local school curriculum."[288] Thus, using a *Hazelwood* analysis like the Ninth Circuit did in *Arce* suggests that courts might find that the fact that the school boards previously determined that the removed books were appropriate and valuable raises the difficulty of satisfying *Hazelwood*'s "legitimate pedagogical concern" requirement.

Further, the government speech doctrine was developed by the Supreme Court after its decision in *Hazelwood*, and since then there has been less reliance on *Hazelwood* and more on the government speech doctrine.[289] For example, the Fifth Circuit has held that the selection of curricular textbooks constitutes government speech and, therefore, *Hazelwood* does not apply.[290]

Upon denying the dismissal of the *PEN American Center* students' First Amendment claims, the district court did not decide whether the relevant First Amendment standard was that of *Pico*, that of *Hazelwood*, or neither.[291] Instead, the court stated that the common theme expressed in any potentially relevant First Amendment standard is that book removal decisions are not

283. *See* Am. C.L. Union v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1202 (11th Cir. 2009). In *Miami-Dade*, the Eleventh Circuit declined to determine whether *Pico* or *Hazelwood* was the appropriate standard to assess the school board's removal of *Vamos a Cuba*. *See id.* The majority found that the board was not improperly motivated because the book presented a false picture of life in Cuba. *See id.* at 1221.

284. 793 F.3d 968 (9th Cir. 2015).

285. 862 F.2d 1517 (11th Cir. 1989).

286. *See Arce*, 793 F.3d at 973.

287. *Id.*

288. *See id.* at 983.

289. *Compare* Case v. Unified Sch. Dist., 895 F. Supp. 1463, 1469 (D. Kan. 1995) (school board arguing for review under the *Hazelwood* standard), *with* Defendant's Dispositive Motion to Dismiss Amended Complaint, *supra* note 215, at 23–26 (school board arguing for review under the government speech doctrine).

290. *See* Chiras v. Miller, 432 F.3d 606, 616 (5th Cir. 2005).

291. *See* PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist., No. 23-CV-10385, 2024 WL 133213, at *2 (N.D. Fla. Jan. 12, 2024).

permissible if they are ideologically based content removals, as opposed to pedagogically reasoned decisions.[292] Thus, the lack of binding precedent in this area remains at issue.

3. The Government Speech Argument

Schools may urge that neither *Pico* nor *Hazelwood* apply to book removals because school library book removals are government speech.[293] Accordingly, schools may urge courts to accept the proposition that book removals are not subject to review under the Free Speech Clause or the Equal Protection Clause.[294] Part II.B.3.a will discuss whether the government speech doctrine can apply to school book removals. Part II.B.3.b will discuss whether the Free Speech Clause or Equal Protection Clause may provide constitutional limitations to government speech.

a. Government Speech and Book Removals

If school book removal decisions like those at issue in *PEN American Center* are government speech, then courts could not apply scrutiny to the decisions.[295] Importantly, the *PEN American Center* district court rejected the board's contention that their removal decisions constituted government speech.[296] In rejecting the school board's government speech argument, the court reasoned that the presence of books in school libraries cannot reasonably be viewed as government endorsement of the views expressed in the books because the "traditional purpose of a library is to provide information on a broad range of subjects and viewpoints."[297]

There are further reasons why book removal decisions might not constitute government speech. First, courts have held that non-curricular book removal decisions are subject to greater First Amendment scrutiny than removal decisions of curricular materials.[298] Second, courts have previously scrutinized school book removal decisions.[299] That courts have scrutinized book removal decisions suggests that they do not constitute government speech. Additionally, no court that has reviewed a school book removal

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292. *See id.*

293. *See* Defendant's Dispositive Motion to Dismiss Amended Complaint, *supra* note 215, at 23–26.

294. *See id.* at 32.

295. *See* Flores v. Bennett, 635 F. Supp. 3d 1020, 1032 (E.D. Cal. 2022) (quoting Shurtleff v. Boston, 142 S. Ct. 1583, 1587 (2022)).

296. *See* PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist., No. 23-CV-10385, 2024 WL 133213, at *2 (N.D. Fla. Jan. 12, 2024).

297. *See id.*

298. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 861–62 (1982) (plurality opinion); Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 189 (5th Cir. 1995); Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 875–76 (D. Kan. 1995).

299. *See Pico*, 457 U.S. at 861–62; *Campbell*, 64 F.3d at 189; *Case*, 908 F. Supp. at 875–76.

claim has classified the school's removal decisions as government speech.[300] Further, even if library books were considered curricular materials, this does not address the government speech issue, because not all courts agree that a school's curricular decisions constitute government speech.[301]

Moreover, using the *Walker/Summum* test,[302] it is not clear that a school library meets the standards for government speech. The endorsement factor is the most troubling. In *Summum*, the Supreme Court held that permanent monuments in a public park constituted government speech.[303] The Court reasoned that the Government has long used monuments to communicate a message to the public and that a reasonable person would believe that the monuments convey a message on the Government's behalf.[304] Discussing the endorsement factor, the Court highlighted the latter point by stating that "It certainly is not common for property owners to . . . install[] permanent monuments that convey a message with which they do not wish to be associated."[305]

On the one hand, a court reviewing book removal decision could find that, similarly, a reasonable person would not believe that the school endorses all of the books in its library collection. Library books are often perceived to express a diversity of opinions.[306] Thus, unlike in the case of public park statues, reasonable people do not believe that the Government endorses all ideas expressed in library books. On the other hand, a court might be persuaded by the fact that there is a sense of school endorsement in the selection of school library books. That is, that the school endorses the library books as suitable for the students in that school.

Schools may argue that the government speech doctrine necessarily applies to school libraries so that they can adequately fulfill their inculcative function.[307] Further, schools may argue that not all viewpoints may be expressed in a library for practical reasons, such as budgetary and physical space restraints.[308] Thus, schools must necessarily engage in viewpoint discrimination in selecting which materials to choose. Because viewpoint discrimination is only permitted under the government speech doctrine, schools may argue that such decisions are government speech and thus

300. *See* Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1202 (11th Cir. 2009); *Campbell*, 64 F.3d at 189; *Case*, 908 F. Supp. at 875–76.

301. *Compare* Chiras v. Miller, 432 F.3d 606, 616–17 (5th Cir. 2005) (applying a government speech analysis to the selection of curricular textbooks), *with* Virgil v. Sch. Bd. of Columbia Cnty., 862 F.2d 1517, 1521 (11th Cir. 1989) (applying a *Hazelwood* analysis to a school's decision about its curriculum).

302. *See* Bacon, *supra* note 79; Flores v. Bennett, 635 F. Supp. 3d 1020, 1032 (E.D. Cal. 2022).

303. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009).

304. *See id.* at 470.

305. *Id.* at 471.

306. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982) (plurality opinion) (describing the "unique role" of the school library).

307. *See id.* at 865; Ambach v. Norwick, 441 U.S. 68, 76–77 (1979).

308. *See Pico*, 457 U.S. at 880 (Blackmun, J., concurring).

constitutional.[309] Nevertheless, no court has accepted that school library books constitute government speech, so it is unlikely that library book removal decisions will be considered government speech.

b. Government Speech and Its Constitutional Limitations

If book removal decisions *are* found to be government speech, however, the constitutional limitations on a school's decisions seem minimal. Although the Supreme Court has stated that government speech is not without limitation, the Court has not identified any constitutional limitation beyond the Establishment Clause.[310] In *Summum*, the Court explicitly rejected the contention that government speech is restricted by the Free Speech Clause.[311] In this same vein, Professor Mark Yudof argues that a constitutional right to curb government speech would unduly burden the Government and that the federal judiciary is not well-suited to determine the limits on government speech.[312]

Still, the Court has not foreclosed the possibility that there might be other constitutional restraints on government speech.[313] Professor Yudof proposes that courts consider "the degree to which the Government has captured its audience" in determining the limitations of government speech.[314] Thus, students may seek to restrain government speech through the Equal Protection Clause by portraying students as a sort of captive audience and stressing the importance of not "strangl[ing] the free mind at its source."[315] Because there exists a presumption that the Equal Protection Clause does not restrain government speech, this section begins with an overview of those arguments and will then address scholarly arguments that challenge this presumption.

Several circuit courts have rejected equal protection challenges to government speech.[316] The Ninth Circuit has held that private citizens "have no personal interest in government speech on which to base an equal protection claim"[317] because "[i]t is the very business of government to favor

309. Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 267 (2013).

310. *See Summum*, 555 U.S. at 468.

311. *See id.* at 469.

312. *See* Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 876–82 (1979).

313. *See Summum*, 555 U.S. at 468 (naming the Establishment Clause as merely an *example* of potential restraints on government speech).

314. Yudof, *supra* note 312, at 902.

315. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 865 (1982) (plurality opinion) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

316. *See* New Doe Child #1 v. Cong. of the U.S., 891 F.3d 578, 594 (6th Cir. 2018); Moore v. Bryant, 853 F.3d 245, 250 (5th Cir. 2017); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 970, 975 (9th Cir. 2011); Fields v. Speaker of the Pa. House of Representatives, 936 F.3d 142, 161 (3d Cir. 2019).

317. *Johnson*, 658 F.3d at 970.

and disfavor points of view."[318] Further, courts reason that exposure to the Government's speech, even if discriminatory, is not an equal protection violation because exposure to a discriminatory message does not necessarily entail the denial of equal treatment.[319] Accordingly, courts have rejected equal protection challenges to depictions of the Confederate flag on the Mississippi state flag,[320] to only accepting certain holiday displays and not others on city property,[321] and to the motto "In God We Trust" on U.S. coins.[322]

Nevertheless, the U.S. Courts of Appeals for the First and D.C. Circuits have suggested that the Equal Protection Clause might apply to government speech.[323] Further, in his concurrence in *Summum*, Justice John Paul Stevens said that the Government was bound by both the Establishment and Equal Protection Clauses when it acted as a speaker.[324]

Some scholars also argue that the Equal Protection Clause applies to government speech. Professor Nelson Tebbe argued that the Government's expressive discrimination can sometimes trigger constitutional consequences.[325] Before the Supreme Court's decision in *Obergefell v. Hodges*,[326] Professor Tebbe contended that the Equal Protection Clause would prohibit states from restricting civil marriages to different-sex couples only because "that exclusion communicates disregard for members of same-sex couples and for LGBT citizens generally."[327] In fact, the Supreme Court reasoned that this very disrespect and subordination violated the Equal Protection Clause.[328]

Professor Helen Norton similarly argued that the Equal Protection Clause can restrain the government speech doctrine.[329] Professor Norton argued that the Court's approach to the Establishment Clause vis-à-vis the government speech doctrine is applicable to the Equal Protection Clause's potential limitations on government speech.[330] For one, Professor Norton argued that the Establishment Clause doctrine's focus on whether the Government's

318. *Id.* at 975 (quoting Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring)).

319. *See Moore*, 853 F.3d at 250.

320. *See id.*

321. *See* Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 6 n.13 (1st Cir. 2010).

322. *See* New Doe Child #1 v. Cong. of the U.S., 891 F.3d 578, 594 (6th Cir. 2018).

323. *See* Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 331 n.9 (1st Cir. 2009) ("The Establishment Clause is another restraint on government speech, and the Equal Protection Clause may be as well." (citation omitted)); People for the Ethical Treatment of Animals, Inc. v. Gittens, 414 F.3d 23, 28 (D.C. Cir. 2005) (noting that the Equal Protection Clause might limit the Government as a speaker).

324. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 482 (2009) (Stevens, J., concurring).

325. *See* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 679 (2013).

326. 576 U.S. 644 (2015).

327. *See* Tebbe, *supra* note 325, at 681.

328. *See Obergefell*, 576 U.S. at 675.

329. *See* Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY. L. REV. 159, 159 (2012).

330. *See id.* at 194.

speech impermissibly coerces or influences behavior in a discriminatory way might be paralleled in the equal protection context.[331] That is, the Equal Protection Clause might similarly prohibit government speech that expresses discrimination in a way that would cause adverse and discriminatory behavioral changes, such as speech "discouraging class members from pursuing a government job or petitioning the legislature because they reasonably conclude that their efforts would be pointless."[332] In the context of school book removals, government speech might discourage students from discussing the topics addressed in the removed books, which is constitutionally protected speech, out of fear that the topics are off-limits.[333]

Professor Norton also argues that the Government's expression might violate the Equal Protection Clause when it communicates exclusion or inferiority.[334] Tying this back to Professor Nelson's argument and the Court's decision in *Obergefell*, the Government's very expression of discrimination alone may constitute discriminatory treatment.[335] To be sure, the exclusion of same-sex couples from civil marriage in *Obergefell* is not mere exposure to discriminatory messaging, but rather discriminatory treatment, because same-sex couples were denied government benefits arising from civil marriage.[336] However, Justice Anthony Kennedy's opinion in *Obergefell* is not limited to the disparate treatment in marital benefits, but also focuses on the subversiveness of the classification's expressive effect.[337]

Thus, although some circuit courts reject the idea that exposure to the Government's discriminatory message is discriminatory treatment, courts might have reason to reject this contention and find that the Equal Protection Clause serves as a limit on government speech.

C. Invidious Discrimination Under the Equal Protection Clause

Regardless of whether the Equal Protection Clause may limit government speech, it can otherwise be used to challenge book removals. The plaintiffs in *PEN American Center* raised a discriminatory animus and disparate effect claim under the Equal Protection Clause.[338]

The book removals in *PEN American Center* were the result of facially neutral decisions.[339] That is, the book removals were not made as a result of a measure explicitly seeking to remove all books about BIPOC or LGBTQ+ people. Instead, the *PEN American Center* plaintiffs alleged that despite the

331. *See id.*
332. *See id.* at 195.
333. *See* Tenney, *supra* note 269, at 1646–47; van Geel, *supra* note 274, at 223.
334. *See id.* at 196.
335. *See* Tebbe, *supra* note 325, at 681; Obergefell v. Hodges, 576 U.S. 644, 675 (2015).
336. *See Obergefell*, 576 U.S. at 670.
337. *See id.* at 673.
338. *See* Amended Complaint, *supra* note 1, at 79.
339. *See id.*; *see also* C.K.-W. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 920 (E.D. Mo. 2022) (describing the school district's book removal policy as "facially neutral").

facially neutral book removal policy, the school board's removal actions disproportionally impacted BIPOC and LGBTQ+ students and were motivated by invidious discriminatory intent.[340] Students challenging similar actions will have to show that the school board's actions (1) had a disparate impact on a protected group and (2) were substantially motivated by discriminatory intent.[341] If students challenging such actions can prove this, then the policy will be subject to strict scrutiny review.[342] Otherwise, the policy will be subject to rational basis review.[343]

On the students' equal protection claim, the district court in *PEN American Center* reasoned that the students failed to prove disparate impact because: (1) they failed to distinguish between non-white and LGBTQ+ impacted individuals as distinct classes; (2) they attributed the animus of the book challenger (Baggett) to the school board; and (3) the court could not conclude that the removal of a *book* discussing BIPOC or LGBTQ+ themes or characters constitutes intentional discrimination against a *person* in those protected classes.[344]

Although the district court in *PEN American Center* dismissed the students' equal protection claims,[345] this section will discuss how other courts may potentially assess such a claim.

1. Proving Disparate Impact

A court may find disparate impact when the official action "bears more heavily" on one group than on another.[346] In *Washington v. Davis*,[347] the Supreme Court held that there was a disparate impact when a higher percentage of Black people than white people failed a civil service test used for recruitment into the police force.[348] In *Arce*, the Ninth Circuit held that the school's ban of the MAS program had a disparate impact on students of Mexican descent who no longer had their ethnicity represented in the program despite the fact that the school permitted two other ethnic studies programs to continue.[349] Thus, the court concluded that there was a disproportionate impact on the Mexican students.[350]

Similarly, students across the country opposing book removals might be able to show that these removals have a disparate impact. For one, PEN America reports that 41 percent of book restrictions across the country were targeted at books about LGBTQ+ themes and 40 percent were targeted at

340. *See* Amended Complaint, *supra* note 1, at 78–79.
341. *See supra* notes 182–87 and accompanying text.
342. *See* Hunt v. Cromartie, 526 U.S. 541, 543, 546 (1999); *supra* Part I.C.
343. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); *supra* Part I.C.
344. *See* PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist., No. 23-CV-10385, 2024 WL 133213, at *3 (N.D. Fla. Jan. 12, 2024).
345. *Id.*
346. *See* Washington v. Davis, 426 U.S. 229, 242 (1976).
347. 426 U.S. 229 (1976).
348. *See id.* at 246.
349. *See* Arce v. Douglas, 793 F.3d 968, 978 (9th Cir. 2015).
350. *See id.*

books with BIPOC protagonists.[351] By relying on such numbers (assuming there are similar numbers for the school defendants), students may argue that they have been disparately impacted because their identities have disproportionately been eliminated from the school libraries, whereas those of other non-BIPOC and non-LGBTQ+ students have not.

However, courts may reject this argument like the district court did in *PEN American Center* if they also agree that the subject matter of a book is not a reliable proxy for its readers such that targeting books addressing BIPOC or LGBTQ+ issues is not the same as targeting BIPOC or LGBTQ+ persons.[352]

Further, schools may argue that there is no disparate impact because *all* students are unable to access the removed books. Schools may rely on the Supreme Court's decision in *Palmer v. Thompson*[353] to argue this point. There, the Supreme Court held that a city's decision to close all of the public pools, as opposed to racially integrating them, did not constitute a denial of equal protection.[354] The Court reasoned that, because *all* of the pools were closed for both Black and white people, the groups were not treated differently.[355] Thus, schools may similarly argue that the books were removed for all students, so there is no disparate impact. The district court in *PEN American Center* did not address this argument,[356] leaving open the possibility that it is a viable point.

Nevertheless, courts may distinguish *Palmer v. Thompson* because, unlike the city closing all of its public pools, the schools have not decided to close all of their school libraries. That is, if a school district chose to close all of its school libraries—even if the district was motivated by racial or anti-LGBTQ+ animosity—that would not constitute disparate impact and thus would not violate the Equal Protection Clause. Further, the Ninth Circuit's decision in *Arce* may once again prove helpful to students. There, once the MAS program was eliminated from the curriculum, it was eliminated for *all* students who might have been interested in taking the course.[357] Despite this, the court focused on whether the decision bore more heavily on one group of students than the others.[358] Thus, despite the fact that the course was removed for *all* students, the relevant inquiry is whether students of a certain class were disproportionately impacted.[359]

Thus, it is unclear whether students challenging book removals will be able to prove disparate impact. If a court does find that students affected by these

351. Friedman & Johnson, *supra* note 7.
352. *See* PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist., No. 23-CV-10385, 2024 WL 133213, at *3 (N.D. Fla. Jan. 12, 2024).
353. 403 U.S. 217 (1971).
354. *See id.* at 219.
355. *See id.* at 225.
356. *See PEN Am. Ctr., Inc.*, 2024 WL 133213, at *3.
357. *See* Arce v. Douglas, 793 F.3d 968, 978 (9th Cir. 2015).
358. *See id.*
359. *See id.*

book removals suffered a disparate impact, the students will also have to prove that the removals were motivated by invidious discrimination."[360]

2. Proving Discriminatory Intent

Determining whether discriminatory intent was a motivating factor calls for "a sensitive inquiry into such circumstantial and direct evidence of intent."[361] In addition to the "impact from the official action," reviewing courts are entitled to look to the "historical background" of the challenged policy, the "specific sequence of events leading up to [the policy]," any departures from normal procedures, and any "legislative or administrative history" pertaining to the policy.[362] Ultimately, students must show that a school board, as the decision-maker, removed the books "'because of,' not merely 'in spite of,'" its adverse effects upon an identifiable group."[363]

The Ninth Circuit's fact-intensive inquiry into the motivations of the removal of the MAS program in *Arce* is relevant here. There, the court relied extensively on the discriminatory statements of the superintendent who spearheaded the removal of the program.[364] The court also highlighted the fact that the superintendent rejected the recommendations of an independent auditor who observed that there was no evidence that the MAS classes or curriculum promoted resentment toward a race of people.[365]

Because many book removals are initiated by book challenges that have been submitted by community members,[366] like those in *PEN American Center*, students may attempt to rely extensively on the discriminatory statements of community members.[367] However, like the *PEN American Center* courts, some courts may be unwilling to attribute a community member's discriminatory animus to a school board.[368] On the other hand, courts have previously imputed the community's animus onto government actors when the Government has effectuated the community's racial animus, thereby adopting it.[369] The Second Circuit has stated that "a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens."[370] Additionally, the U.S. District Court for the Northern District of Illinois found that the City of Chicago adopted the community's racial motivation when the city amended its policy "in response

360. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).
361. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).
362. *Id.* at 266–68.
363. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).
364. *See Arce*, 793 F.3d at 979–81.
365. *See id.* at 980.
366. *See Book Bans: Frequently Asked Questions*, *supra* note 10.
367. *See, e.g.*, Amended Complaint, *supra* note 1, at 16–24.
368. *See* PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist., No. 23-CV-10385, 2024 WL 133213, at *3 (N.D. Fla. Jan. 12, 2024).
369. *See* Hodges *ex rel.* Hodges v. Pub. Bldg. Comm'n of Chi., 864 F. Supp. 1493, 1502 (N.D. Ill. 1994).
370. United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1224 (2d Cir. 1987).

to" the community's opposition.[371] Relying on this formulation, students may argue that a school board effectuates a community member's animus when it removes books in response to that person's challenge, despite the fact that the books were at one point deemed appropriate and that a review committee recommended against their removal.[372]

Still, schools may proffer a justification for their book removal decisions, and courts will have to assess whether the proffered reason was the motivating factor, not discriminatory animus.[373] Schools have often cited sexual content as the reason for book removals.[374] Book removal opponents argue that conflating LGBTQ+ identities with mature sexual themes is animus,[375] but no court has settled this issue. Still, it may be difficult for schools to defend removing only LGBTQ+ and BIPOC stories on the basis that such topics are wholly harmful or inappropriate.[376] Thus, drawing from the First Amendment doctrine in the equal protection context, courts may find that such a categorical (or almost categorical) ban is pretextual. Any attempt to justify book removals on these grounds would seem to run afoul of the Supreme Court's holdings in *Romer v. Evans*[377] and *Obergefell* that moral disapproval of homosexuality is not a legitimate government interest.[378] Thus, even under rational basis review, this type of classification would likely not bear a rational relation to the Government's legitimate interest in protecting minors.

III. THE FUTURE OF BOOK REMOVALS

It is unclear whether library book removals are unconstitutional under the current First Amendment and equal protection doctrines. The Supreme Court has not clearly defined the parameters of students' right to receive information in an extracurricular setting, nor has it defined the scope of constitutional limits on the government speech doctrine.[379] Further, the

371. *See Hodges*, 864 F. Supp. at 1502.

372. This was also the case in *PEN American Center*. *See* Amended Complaint, *supra* note 1, at 36.

373. *See* Washington v. Davis, 426 U.S. 229, 242 (1976); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

374. *See Book Ban Data*, *supra* note 33; Friedman & Johnson, *supra* note 7.

375. Cathryn M. Oakley, *Curriculum Censorship of LGBTQ+ Identity: Modern Adaptation of Vintage "Save Our Children" Rhetoric Is Still Just Discrimination*, 54 LOY. U. CHI. L.J. 641, 675 (2022).

376. *See* Sheck v. Baileyville Sch. Comm., 530 F. Supp. 679, 691 (D. Me. 1982) (holding that "it is not an acceptable assumption that all students, regardless of their age or maturity, might be harmed"); Fayetteville Pub. Libr. v. Crawford Cnty., No. 23-CV-05086, 2023 U.S. Dist. LEXIS 131427, at *54 (W.D. Ark. July 29, 2023) (striking down a law that required the removal of books that were harmful to minors in a public library but made no distinction based on age and maturity); Parker v. Hurley, 514 F.3d 87, 95 (1st Cir. 2008) (upholding a school's denial of an exemption for elementary school children from a class where they read books that depicted families with parents of the same gender); Mahmoud v. McKnight, No. CV-23-1380, 2023 WL 5487218, at *21 (D. Md. Aug. 24, 2023).

377. 517 U.S. 620 (1996).

378. *See id.* at 635; Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

379. *See supra* Part II.B.

equal protection doctrine is a heavily fact-intensive inquiry, and no court has addressed its applicability in the school book removal context.

This uncertainty has persisted since *Pico* was decided over forty years ago. *Pico* was meant to clarify the scope of students' rights, and yet, it left courts, students, and schools unsure of the path forward.[380] Today, book removals are heavily contested and political.[381] Now, more than ever, lower courts, students, and schools need to know where the Court draws constitutional lines.

This part will suggest how courts should assess claims like those raised by the students in *PEN American Center*. In doing so, this Note seeks to provide guidance for how other courts should assess students' constitutional book removal claims. This Note concludes that book removals like those at issue in *PEN American Center* should be considered unconstitutional under the First Amendment and Equal Protection Clause. Part III.A urges courts to recognize students' right to receive information and school libraries' unique role in education as recognized by the *Pico* plurality. Part III.B recommends that, even if courts do not follow the *Pico* plurality, under the Equal Protection Clause's animus doctrine, the book removals are unconstitutional.

A. Assessing Students' First Amendment Right to Read

Students, like those in *PEN American Center*, may raise the claim that a school's book removal decisions violate their First Amendment rights under *Pico*.[382] Specifically, they may allege that book removal decisions constitute viewpoint discrimination, thereby denying them the right to receive the information contained within the books.[383] The threshold question for a reviewing court will be whether to proceed under the *Pico* plurality standard or another First Amendment standard.[384] This Note recommends that courts apply the reasoning of the *Pico* plurality because it is the only case directly on point, and lower courts have generally applied it when assessing school library book removal cases even when they decline to find that *Pico* is binding.[385]

Further, the *Pico* plurality's decision that students have a right to receive information is supported by the Court's precedent recognizing that the right to receive information is a corollary to the First Amendment's protection of free speech.[386] Thus, the dissenting justices in *Pico* incorrectly disregarded the students' argument because they misconstrued the extent of the students'

380. *See supra* Part II.B.
381. *See supra* Part I.A.
382. *See* Amended Complaint, *supra* note 1, at 74–76.
383. *See id.* at 75–76.
384. *See* C.K.-W. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 914–15 (E.D. Mo. 2022) (discussing what standard to apply and proceeding under *Pico*).
385. *See supra* Part II.B.1; *supra* note 224 (listing federal lower court cases that have applied *Pico*).
386. *See supra* notes 218–23 and accompanying text.

First Amendment rights.[387] The right to receive information does not extend so far as to create an affirmative constitutional guarantee of access to education, as that would run afoul of the Court's holding that there is no fundamental right to education.[388] Rather, the *Pico* plurality recognized that, when a school chooses to provide access to information, that school may not engage in viewpoint discrimination.[389] Thus, although the school may engage in content-based discrimination,[390] such as removing books that contain inappropriate language or themes, the school cannot, for example, only remove inappropriate books that discuss race or sexual orientation.

Further, the right to receive information is not an absolute right. Even when such a right is recognized, like in *Kleinsdient*, there may be countervailing interests,[391] such as the school's interest in protecting children and inculcating values, that limit the students' right to a certain degree. In the school book removal context, such countervailing interests may warrant a school's choice to furnish the library with books about European history instead of world history, for example.[392] However, a school's interests in removing BIPOC or LGBTQ+ books that were previously deemed appropriate and that are not harmful to students is weak, if not nonexistent.

Justice Blackmun's concurrence is also based on the principle that a school may not engage in viewpoint discrimination in its book removal decisions.[393] However, unlike the plurality's opinion, Justice Blackmun's concurrence correctly acknowledges that the First Amendment rights at issue extend further than the school library walls.[394] This Note argues that the plurality's confinement of the right to receive information to the school library was inappropriate. Although curricular book removal decisions are outside the scope of this Note, the Court's recognition of First Amendment constraints on school officials' decisions[395] implies that students' right to receive information may also be recognized in the classroom. Still, this Note posits that the unique context of a library, where schools are more readily able to provide a wide range of books than in the context of in-class instruction, might necessitate greater protection of students' rights.

Although the rule resulting from the *Pico* plurality opinion should be expanded, *Pico*—as it exists today—suggests that book removal decisions

387. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 887 (1982) (Burger, C.J., dissenting) (suggesting that the right to receive information would require schools to be the "courier" of everything that a writer has to say).

388. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

389. *See supra* Parts I.B.1, I.B.3.

390. *See Pico*, 457 U.S. at 876–77 (Blackmun, J., concurring).

391. *See* Kleindienst v. Mandel, 408 U.S. 753, 765–70 (1972) (holding that the executive's power to prescribe conditions for entry into the country overrode the First Amendment rights of university students who wished to host a Marxist scholar for a conference).

392. *See Pico*, 457 U.S. at 880 (Blackmun, J., concurring) ("And, of course, school officials may choose one book over another because they believe that one subject is more important, or is more deserving of emphasis.").

393. *See id.* at 876–77 (Blackmun, J., concurring).

394. *See id.*

395. *See supra* Parts I.B.3–4.

like those taken by the Escambia County School Board violate the First Amendment. As discussed, *Pico* states that the decisive factor in a school's decision to remove a library book cannot be the school board's own disagreement with the ideas expressed in the book, but it permits school officials to consider the book's educational suitability.[396] In determining the factors that were decisive in the school's decision, the court may consider the school board's proffered reasoning and the rigor of the inquiry leading up to the board's removal decision.[397]

When students can point to facts similar to those in *PEN American Center*, the students should prevail on their First Amendment claims. In *PEN American Center*, the fact that the removed books were previously selected for inclusion in the school libraries created a presumption that the books were educationally suitable. Further, in removing the ten books,[398] the school board went against the review committee's recommendation, supporting a finding that the board was motivated by a desire to remove ideas that they disliked rather than by their evaluation of the book's educational suitability.[399] For example, *The Perks of Being a Wallflower* went through two review committees, both of which recommended retaining the book as optional reading material for high school students.[400] In fact, the district committee went so far as to approve a parental opt-out form that teachers could provide students who elected to read the book,[401] and still, the school board rejected the committees' recommendations and removed the book.[402]

Additionally, the input that the district review committee solicited from the district's schools was mostly supportive of retaining all ten of the removed books.[403] Despite this, the school board removed the books.[404] By contrast, when the committee itself voted to remove books, it only voted to restrict access to the books to higher grade levels.[405] The only books that the review committee voted to remove from Escambia schools were those in the *A Court of Mist and Fury* series, which are described as "adult romance" novels.[406] Thus, in contrast to the school board's decisions, the committee votes for removal were plainly based on educational suitability and the students' age. Ultimately, when a school board disregards a review

396. *See supra* Part I.B.4.

397. *See Pico*, 457 U.S. at 873–74; *supra* notes 139, 229, 237–41 and accompanying text.

398. For a list of the books, see *supra* note 208.

399. Lower courts have suggested that a school board's dismissal of a reviewing committee's recommendation about a book can indicate an improper motive. *See supra* notes 228, 239 and accompanying text.

400. *See supra* text accompanying notes 193–202; Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 185 (5th Cir. 1995) (stating that the possibility of a school's unconstitutional motive in removing a book was reinforced by the fact that the board rejected two committees' recommendations that the book be restricted to eighth grade students with a written parental permission slip).

401. *See supra* note 200 and accompanying text.

402. *See supra* note 202 and accompanying text.

403. *See supra* note 207 and accompanying text.

404. *See supra* note 208 and accompanying text.

405. *See* Amended Complaint, *supra* note 1, at 23 (navigate to linked spreadsheet).

406. *See id.*

committee's recommendation to retain books, courts should view this as evidence that the board was improperly motivated.

Further review of the content of the removed books in *PEN American Center* supports the inference that the board was improperly motivated, and other courts should take notice. For example, the board removed *And Tango Makes Three* from all libraries even though it contains *no* sexual descriptions or other objectionable content—it merely references two male penguin parents.[407] Further evincing an improper motive, during the school board appeal of the book, a board member stated that he was voting to remove the book due to its "fascination" that the story was about two male penguins raising a chick.[408] Thus, there can be no allegation that the book was removed due to educational suitability. Courts should be on alert of similar potential unconstitutional motives when reviewing removal decisions affecting books that merely reference BIPOC or LGBTQ+ characters like *And Tango Makes Three*.

The Escambia County School Board's decision to remove books recommended for high schoolers further raises the inference that the board was improperly motivated. Although these books concededly contain sexual content,[409] high school students are better able to handle sensitive material and, each time, the review committee determined that, when taken as a whole, these materials were not harmful to high school students.[410] Thus, a school board's motivation in removing books geared toward older students must be investigated. Even the district court in *C.K.-W.* acknowledged that it could be reasonable for a school to determine that books containing sexual or otherwise sensitive materials are suitable for high school students and "merit[] inclusion" in the school library.[411] Thus, when a review committee recommends that such books are suitable for high school students despite sensitive content, courts should investigate a school board's motivation, lest claims of "sexual content" and "age inappropriateness" become pretext.

Like the school board in *Pico*,[412] the Escambia school board's decisions were mostly based on the impassioned objections of one high school teacher who submitted over 100 book challenges, evidenced by the board's consistent rejection of the review committee's recommendations in favor of the teacher's requests to remove the books.[413] Further, the board did not even contest that it was improperly motivated; instead, it argued that its actions, regardless of motivation, were shielded from review because they constituted government speech.[414]

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407. *See id.* at 39–40; *supra* text accompanying note 212.
408. *See* Amended Complaint, *supra* note 1, at 40.
409. *See id.* at 43, 47–49.
410. *See id.* at 39–51.
411. *See* C.K.-W. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 917 (E.D. Mo. 2022); *supra* note 272 and accompanying text.
412. *See supra* Part I.B.4.
413. *See* Amended Complaint, *supra* note 1, at 36.
414. *See* Defendant's Dispositive Motion to Dismiss Amended Complaint, *supra* note 215, at 23–25.

To this point, that the Supreme Court did not consider the school's editorial decision in *Hazelwood* to be government speech suggests that even curriculum-related speech is not government speech entitling a school to engage in viewpoint discrimination.[415] Additionally, every court that has reviewed school library book removal cases has declined to hold that the removal decisions constitute government speech.[416] Finally, school library books do not fit the *Walker*/*Summum* government speech test.[417] Specifically, the school library context fails to meet the historical use and endorsement prongs.[418] Firstly, unlike the license plates at issue in *Walker*,[419] there is no evidence that school libraries have been historically used to convey the Government's speech. Unlike the license plates, which can convey a singular message and thus have been used to convey such a message on behalf of a state, a school library necessarily conveys a multitude of messages, some of which may conflict.[420] Thus, it is difficult, if not impossible, to decipher what message the Government could even try to convey. Therefore, school libraries arguably fail the historical use prong.

Secondly, a reasonable person would likely not believe that a school endorses the messages in all of the books in its school library collection, as library books are often perceived to express a diversity of opinions.[421] Thus, unlike in the case of public park statues in *Summum*,[422] reasonable people would expect that a school would stock library books that contain ideas with which the school disagrees. Therefore, school libraries also likely fail the endorsement prong. Thus, as the *PEN American Center* court did,[423] courts should reject a school's argument that removal decisions constitute government speech.

Ultimately, when taken together, the Escambia school board's book removal actions suggest that the board was improperly motivated and engaged in viewpoint discrimination. Thus, the Escambia board's motives and their proffered reasons, like those of other schools engaging in similar actions, ought to be rigorously investigated by the reviewing court,[424] and courts should find that similar book removal decisions violate the First Amendment.

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415. *See supra* Part II.B.2. For a full discussion of *Hazelwood*, see *supra* Part I.B.3.

416. *See supra* note 300 and accompanying text.

417. *See supra* Part I.B.2.

418. *See supra* note 80 and accompanying text.

419. *See supra* notes 81–82 and accompanying text.

420. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 879 (1982) (plurality opinion) (describing the school board's efforts as eliminating "diversity of thought").

421. *See id.*

422. *See supra* notes 303–05 and accompanying text.

423. PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist., No. 23-CV-10385, 2024 WL 133213, at *2 n.12 (N.D. Fla. Jan. 12, 2024).

424. The courts in *Pico*, *Campbell*, *Case*, and *Counts* all scrutinized the school board's motivation. *See supra* Part II.B.1.

B. Assessing Students' Equal Protection Rights in the School Library

Students, like those in *PEN American Center*, may allege that despite a facially neutral book removal policy, a school board has disproportionally impacted BIPOC and LGBTQ+ students and was motivated by invidious discriminatory intent in its book removal decisions.[425] The students would have to show that the school board's policy: (1) had a disparate impact on certain groups and (2) was substantially motivated by discriminatory intent.[426]

Even if courts do not follow *Pico*'s precedent under the First Amendment, book removals are unconstitutional under the Equal Protection Clause's animus doctrine. Thus, a court reviewing facts similar to those in *PEN American Center* should find that the removal of the books constitutes disparate impact under equal protection doctrine. In *PEN American Center*, all ten removed books discussed themes relating to race, gender, and sexuality or portrayed BIPOC or LGBTQ+ characters.[427] Like the student plaintiffs in *Arce* who no longer had their ethnicity represented by the eliminated MAS program,[428] students affected by book removals like those in *PEN American Center* have been disproportionally impacted by having literary representations of their identities targeted for removal. Meanwhile, non-BIPOC and non-LGBTQ+ students continue to have their identities represented on the school library shelves. Unlike in *Palmer v. Thompson*, the school libraries remain open for all, and yet, schools are predominantly removing books depicting or discussing BIPOC or LGBTQ+ identities.[429] Despite the fact that all students are denied access to these books by these decisions, such removals bear more heavily on BIPOC and LGBTQ+ students. Thus, a reviewing court should find that students raising a claim involving such removals have proven that they have suffered a disparate impact.

As for proving discriminatory animus, students may be able to provide evidence proving that a school board was motivated by invidious discrimination. To begin, as in *Arce v. Douglas*, in which the superintendent rejected the recommendations of the independent auditor,[430] students may be able to prove discriminatory intent when a school board removes books against a review committee's recommendation.[431]

The historical background of book challenges and the sequence of events leading up to them may also be relevant for proving discriminatory

425. *See* Amended Complaint, *supra* note 1, at 77–78.
426. *See supra* Part II.C.
427. The books discuss such themes to varying degrees, depending on the intended age demographic. *See supra* Part III.A.
428. *See* Arce v. Douglas, 793 F.3d 968, 978 (9th Cir. 2015).
429. *See supra* notes 353–55 and accompanying text.
430. *See Arce*, 793 F.3d at 980.
431. *See* Amended Complaint, *supra* note 1, at 34.

animus.[432] Book removals across the country have disproportionately targeted books depicting or discussing BIPOC or LGTBQ+ themes.[433] Students may rely on the state's actions to contextualize the school's actions. For example, relevant to the *PEN American Center* students' claims if the district court's decision is appealed, Florida has the second highest number of book removals in the country, and the state has even passed legislation targeting the instruction of topics relating to the LGBTQ+ community from kindergarten through eighth grade.[434] Many books discussing gender or sexuality have been removed from schools in response to Florida's recent legislation prohibiting materials discussing sexual content for all grade levels outside of health classes.[435]

Further, the specific challenges in *PEN American Center* leading up to the book removals were all initiated by a teacher in one of the district's high schools[436] who was also involved in a politically conservative organization that urges people to challenge school books.[437] When book removals are initiated by non–board members, a reviewing court may find that a board effectuated any animus evinced in the challenger's complaint forms, thereby adopting it.[438] A court could do this when the non–board member's opposition was the only negative written input[439] and a board nevertheless decided to remove the books in contravention of a review committee's suggestions. Further, a community member's animus might be imputed to the board when the board chair indicates that they are relying on the individual's objections, such as in *PEN American Center*, in which a board member said that he was voting based on Baggett's identification of objectionable passages instead of "read[ing] 125 books."[440]

Furthermore, when a school board argues that books like those in *PEN American Center* were removed because they contain sexual content, and not based on animus, a court should find that this is pretextual.[441] In *PEN American Center*, three of the removed books that the district review committee determined were suitable for elementary school–aged students—*And Tango Makes Three*, *New Kid*, and *When Aidan Became a Brother*—do not portray any sex; they merely portray LGBTQ+ or BIPOC characters.[442] In *Drama*, a graphic novel about a middle schooler, a secondary character discusses liking another student of the same sex, and the book depicts two

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432. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977) (stating that courts are entitled to look to the historical background of a challenged policy and the sequence of events leading to the action when determining whether the policy was motivated by discriminatory animus).

433. *See supra* notes 37–43 and accompanying text.

434. *See supra* notes 9, 45–50 and accompanying text.

435. *See supra* notes 45–50 and accompanying text.

436. *See supra* notes 193–203 and accompanying text.

437. *See* Amended Complaint, *supra* note 1, at 34.

438. *See supra* notes 367–71 and accompanying text.

439. *See supra* note 207 and accompanying text.

440. *See supra* note 212.

441. *See supra* Part I.A.

442. *See* Amended Complaint, *supra* note 1, at 39–42, 44.

male characters kissing.[443] On review, the committee determined that "[t]here is no sex" in the book and that the illustration was age appropriate.[444] Meanwhile, the books that admittedly do contain sexual content were only available for high school students, except for *The Bluest Eye*, which was also available in the middle school libraries.[445] However, courts have generally considered high school students mature enough to be exposed to sexual content in books, so long as it is not obscene or "pervasively vulgar."[446] And, importantly, the review committee determined that the books were still educationally suitable and age-appropriate, permitting the inference that the Escambia school board's proffered justification is pretextual. Therefore, courts should find that similar book removal decisions violate the Equal Protection Clause.

If other book removals are litigated, courts should follow the analysis provided in this section, both for First Amendment and equal protection claims. If the facts of a particular case indicate a desire to remove books because of a school's disagreement with the ideas expressed therein and because of invidious discrimination—such as a discrepancy between the school's decision and a reviewing committee's recommendation, school board members' statements, or the removal of a disproportionate number of books discussing BIPOC or LGBTQ+ themes—courts should find that the school's removal decisions violate the free speech and equal protection guarantees. When courts investigate a school's alleged motives, they are likely to find that book removals like those in *PEN American Center* are unconstitutional.

CONCLUSION

The First Amendment protects a student's right to receive information, especially in the school library. The Equal Protection Clause protects students from being subject to school policies that disproportionately and invidiously target certain students' identities. Thus, courts can and should grant students relief from school and state efforts across the country that seek to selectively empty the shelves of school libraries.

443. *See id.* at 45.
444. *See id.* at 44, 168.
445. *See id.* at 23.
446. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982) (plurality opinion).