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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

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Notes

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

"What a school thinks about its library is a measure of what it feels about education."—Harold Howe II

I. INTRODUCTION

As a corollary to the insight articulated by Harold Howe II, the former Commissioner of Education, callous restrictions on school library collections jeopardize schools' educational value and impede students' learning. The ideals libraries promote—intellectual growth and the exchange of ideas—are essential aspects of a well-functioning society. Thus, there is a great risk that society's progress will be deterred when the government inhibits access to library materials. It is particularly harmful and repugnant to the First Amendment when the government restricts access to ideas to intentionally suppress their message.

In the public school setting, libraries enable students to access ideas unavailable in the school curriculum and provide a means for students to


5. See DUPRE, supra note 4, at 129 (arguing that deliberate restrictions on ideas by government violates constitutional guarantees). As governmental actors, public libraries must act in accordance with the First Amendment. See Anne Klinefelter, First Amendment Limits on Library Collection Management, 102 LAW LIBR. J. 343, 349 (2010) (explaining that public libraries are government actors and must abide by First Amendment guarantees).
independently expand their knowledge outside of the classroom. To support students' education, it is crucial that those with authority to restrict access to public school library materials do so in accordance with the First Amendment. Yet, the appropriate breadth of First Amendment protections in public schools is enigmatic. In scholastic settings, exposure to a wide variety of views is crucial for intellectual development, but public schools also serve as forums in which the government has a significant role in preparing students for participation in society. The tension between intellectual freedom and the government's academic agenda is especially problematic in public school libraries, where school officials can exercise discretion to restrict the range of permissible materials.

This tension fueled the controversy in a recent case from the Eleventh Circuit, American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board. The Eleventh Circuit addressed a dispute that arose when a school board ordered the removal of a book from a public school library that the board alleged was factually inaccurate. When deciding to remove the book, however, school board members expressed personal disdain for the book's subject matter. The district court determined that the school board removed the book to prevent access to ideas the book contained—a violation of the First Amendment as articulated by the Supreme Court in Board of Education, Island Trees Union Free School District No.

6. See Pico, 457 U.S. at 868-69 (discussing value of public school libraries); see also Salvai v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1275 (D. N.H. 1979) ("The student who discovers the magic of the library is on the way to a life-long experience of self-education and enrichment. . . . [and] learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom."); Richard J. Peltz, Pieces of Pico: Saving Intellectual Freedom in the Public School Library, 2005 BYU Educ. & L.J. 103, 107 (describing important role of public school libraries in providing students with freedom to access resources unavailable in classroom).

7. See Pico, 457 U.S. at 869 (requiring acknowledgment of students' First Amendment rights in public school libraries).

8. See Heins, supra note 3, at 158-59 (explaining that nature of public schools makes it difficult to determine how First Amendment should apply in schools); see also DUPRE, supra note 4, at 110 (characterizing extent of certain First Amendment rights in schools as "bewildering"). See generally NAT'L COAL. AGAINST CENSORSHIP, The First Amendment in Schools: An Introduction, http://www.ncac.org/education/schools/index.cfm (last visited Apr. 7, 2011) (discussing relationship between First Amendment and schools). For a further discussion on the role of the First Amendment in public schools, see infra note 28.


10. See Pico, 457 U.S. at 863-64 (discussing school officials' authority to use discretion in managing school affairs).

11. 557 F.3d 1177 (11th Cir. 2009), cert. denied 130 S. Ct. 659.

12. See Miami-Dade, 557 F.3d at 1182-90 (providing details of dispute).

13. See id. at 1184-87 (explaining circumstances of deliberations).
26 v. *Pico*.14 The Eleventh Circuit reversed, determining instead that the board removed the book because it was not educationally suitable and, therefore, acted permissibly under *Pico*.15

This Note argues that the Eleventh Circuit’s decision in *Miami-Dade* unduly impeded students’ First Amendment rights.16 The court’s interpretation of *Pico* demonstrates that assessing a public school library book removal decision based solely on the book’s educational suitability is insufficient because that analysis overlooks the potential that improper factors motivated the removal decision.17 To more adequately protect students’ First Amendment rights, this Note advocates interpreting *Pico* to prohibit a book removal upon a showing that improper factors influenced the removal decision.18 Establishing that improper factors influenced the decision refutes the possibility that the sole factor motivating the decision was the book’s educational suitability.19

Part II of this Note discusses libraries’ role in public schools and provides an overview of court decisions concerning public school library book removals.20 Part III examines the Eleventh Circuit’s reasoning in *Miami-Dade*.21 Part IV argues that the Eleventh Circuit erroneously endorsed a First Amendment violation by concluding that the Miami-Dade school board’s removal decision was valid under *Pico*.22 Part V discusses the implications of the Eleventh Circuit’s decision and argues that future courts should interpret *Pico* differently to more adequately protect students’ First Amendment rights.23

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14. See 457 U.S. 853 (1982) (plurality opinion); *Miami-Dade*, 557 F.3d at 1189-90 (discussing district court’s findings under *Pico*).
15. See *Miami-Dade*, 557 F.3d at 1222-27 (reversing district court’s decision on First Amendment issue).
16. For a discussion of why the Eleventh Circuit’s decision is unwarranted and how it may have grave implications for the future, see infra notes 151-207 and accompanying text.
17. For a discussion of why assessing only the educational suitability of a challenged book is insufficient, see infra notes 188-91 and accompanying text.
18. For a discussion of the importance of prohibiting an improperly motivated book removal decision, see infra notes 192-207 and accompanying text.
19. For a discussion of how pretextual motivations motivating book removal decisions violate the First Amendment, see infra notes 184-207 and accompanying text.
20. For a discussion of public school libraries’ role in public schools and case law pertaining to public school library book removals, see infra notes 24-108 and accompanying text.
21. For a discussion of the facts and procedural posture of *Miami-Dade* as well as the Eleventh Circuit’s reasoning, see infra notes 109-50 and accompanying text.
22. For a discussion of why the Eleventh Circuit’s decision is flawed, see infra notes 151-83 and accompanying text.
23. For a discussion of the impact of the Eleventh Circuit’s decision, see infra notes 184-207 and accompanying text.
II. THE "UNIQUE ROLE OF THE SCHOOL LIBRARY" 24

A. The Story of Public School Libraries

Advancement in American society largely depends upon contributions made by informed citizens.25 To foster a well-informed citizenry, the government endeavors to instill in students values that promote effective participation in society through the public school system.26 To accomplish this goal, local school boards have the authority to make discretionary decisions involving the public education system.27 Yet, such discretion must not be exercised in a manner that unduly impedes First Amendment freedoms.28

25. See id. at 876 (Blackmun, J., concurring in part and concurring in judgment) (explaining that "[t]he Constitution presupposes the existence of an informed citizenry prepared to participate").
26. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) ("Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic."); see also SAUNDERS, supra note 9, at 86 (explaining that society has responsibility to ensure that children will mature into "responsible adults, capable of functioning in society").
27. See Pico, 457 U.S. at 894 (Powell, J., dissenting) (describing role of school boards in public education system); see also STEPHEN B. THOMAS ET AL., PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 4-6 (6th ed. 2009) (describing role of local school boards); Munic, supra note 4, at 224 (explaining that through local school boards, communities "transmit societal values to students via public education"). Commentators explain that students in primary and secondary schools "are not fully mature intellectually or emotionally." See DUPRE, supra note 4, at 132; SAUNDERS, supra note 9, at 86-90 (providing that children are not as developmentally advanced as adults). As such, educators and school officials endeavor to transmit social values and information to young students in a manner that is particularly sensitive to students' maturity levels. See DUPRE, supra note 4, at 132 (noting that schools must carefully present material to students); SAUNDERS supra note 9, at 95-103 (justifying society's responsibility to transmit values and information to students).
28. See Pico, 457 U.S. at 863-64 (plurality opinion) (explaining that school boards may use discretion to manage education system but must nevertheless comport with First Amendment). The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. The Supreme Court instructs that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" Pico, 457 U.S. at 865 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)) (affirming that students have First Amendment rights). Nevertheless, students' First Amendment rights are not boundless and must be "applied in light of the special characteristics of the school environment." Id. at 866 (quoting Tinker, 393 U.S. at 506). Yet, the Supreme Court also mandates that schools "may not be run in such a manner as to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" Id. at 876 (Blackmun, J., concurring in part and concurring in judgment) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)) (expressing that there are limits to educators' inculcative function); see also Kuhlmeier, 484 U.S. at 285-86 (Brennan, J., dissenting) ("[T]he state educator's undeniable, and undeniably vital, mandate to inculcate moral and political values
Public libraries are valuable resources through which the government strives to provide citizens the opportunity to expand their knowledge. Public libraries benefit society by supporting free scholarship and public discourse. Public officials can diminish libraries' value when they remove materials from library shelves, because removal effectively restricts access to ideas. When officials intentionally remove books with which they disagree, such action constitutes an imposition of authorities' personal ideologies upon the citizenry and violates constitutional guarantees.

In the public school context, the extent of educators' authority to restrict library materials is a particularly contentious issue. Libraries have a unique role in the public school system because they operate within the school environment but outside of the classroom. This context provides a general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position.


Pico, 457 U.S. at 868-69 (providing that removing books from libraries creates risk of impeding access to ideas); Sarabyn, supra note 29, at 388 (arguing that restricting library materials disrupts acquisition of knowledge); Kristin Huston, Note, "Silent Censorship": The School Library and the Insidious Book Selection Censor, 72 UMKC L. Rev. 241, 241 (2003) (discussing detrimental effects of restricting materials in libraries). Individuals often contest certain books' inclusion in library collections. See Am. Library Ass’n, About Banned & Challenged Books, http://www.ala.org/ala/issuesadvocacy/banned/aboutbannedbooks/index.cfm (last visited Apr. 7, 2011) (explaining contests to library collections). A book "challenge" occurs when one makes an "attempt to remove or restrict materials, based upon the objections of a person or group." Id. When challenged materials are removed from a library, a book "banning" occurs. See id. When materials are removed from libraries, there is a risk that citizens' opportunities to access to ideas will decrease. See Pico, 457 U.S. at 868-69 (expressing that removing books from libraries reduces opportunities for voluntary educational inquiry).

See Pico, 457 U.S. at 871 (“Our Constitution does not permit the official suppression of ideas.”); Sarabyn, supra note 29, at 388 (discussing unconstitutionality of removing books from libraries to deny access to ideas).


See Pico, 457 U.S. at 869 ("[U]se of . . . school libraries is completely voluntary on the part of students. . . . [S]election of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional."); see also Joelle C. Achtman, Note, Pico Takes a Visit to Cuba: Will Pretext Become Precedent in the Eleventh

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vokes tension between the competing educational ideals of instilling community values and students' intellectual freedom.\textsuperscript{35}

Whether the school library is subject to the same controls school officials have over the curriculum is currently a matter of debate.\textsuperscript{36} Classifying public school libraries as curricular suggests that authorities may exercise broad discretion to restrict students' access to library materials.\textsuperscript{37} Conversely, the Supreme Court endorsed the opposing view in \textit{Pico}, providing that the school library operates separately from the curriculum.\textsuperscript{38} Under this view, a school library is not subject to the same constraints that educators may exert over the classroom.\textsuperscript{39}

\textsuperscript{35} See \textit{Thomas}, supra note 27, at 85 (explaining that there is tension between competing values of students' acquisition of knowledge and "instilling basic community values" in public school libraries); see also Elizabeth M. Gamsky, \textit{Note, Judicial Clairvoyance and the First Amendment: The Role of Motivation in Judicial Review of Book Banning in the Public Schools}, 1983 U. ILL. L. REV. 731, 731 (1983) ("Few traditions are as well-entrenched in American society as local control over public education. . . . [F]ew notions are as anti-democratic as library censorship." (footnote omitted)); \textit{Munic}, supra note 4, at 217 (discussing tension between inculcation and students' free inquiry).

\textsuperscript{36} See Achman, supra note 34, at 948 (noting uncertainty as to whether school libraries are curricular). \textit{Compare Pico,} 457 U.S. at 869 (classifying public school library as distinct from school curriculum), \textit{and Roberts v. Madigan,} 702 F. Supp. 1505, 1513 (D. Colo. 1989) ("[T]he school library must be distinguished from the classroom library."); \textit{aff'd,} 921 F.2d 1047 (10th Cir. 1990), \textit{with Pico,} 457 U.S. at 915 (Rehnquist, J., dissenting) ([School libraries] serve as supplements to [schools'] inculcative role. . . . [E]lementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas.), \textit{and Jane L. Wexton, Comment, Board of Education, Island Trees Union Free School District No. 26 v. Pico,} 12 HOUSTON L. REV. 561, 589-90 (1984) (arguing that distinguishing school library from school curriculum is misguided).

\textsuperscript{37} See \textit{Pico,} 457 U.S. at 915 (Rehnquist, J., dissenting) (arguing that school library does not operate separately from curriculum and that educators can permissibly control library materials); see also Virgil v. Sch. Bd., 862 F.2d 1517, 1520 (11th Cir. 1989) ("In matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity."); \textit{Peltz,} supra note 6, at 107-08 (arguing that distinguishing school library from curriculum is vital to prevent restrictions from interfering with students' learning opportunities).

\textsuperscript{38} See \textit{Pico,} 457 U.S. at 869 (plurality opinion) (maintaining that school library is distinct from school curriculum).

\textsuperscript{39} See id. (establishing that educators' role in school library differs from authority over school curriculum).
B. Supreme Court Guidance on a “Novel” Issue


_Pico_, decided in 1982, is the sole Supreme Court decision to date involving the removal of books from public school libraries. In 1975, members of the Board of Education of the Island Trees Union Free School District No. 26 acquired a list of nine books deemed unsuitable by a politically conservative organization and directed the removal of the books from the school libraries. The school board “characterized the removed books as ‘anti-American, anti-Christian, anti-[Semitic], and just plain filthy,’ and concluded that ‘[it] is our duty, our moral obligation, to protect the children in our schools from this moral danger.’” Although a book review committee evaluating the books’ educational value advised retaining several of the books, the school board hastily rejected the recommendation. In response, students brought suit, alleging that the school board’s actions violated their First Amendment rights. The district court granted summary judgment in the school board’s favor, finding that the


41. See _Pico_, 457 U.S. at 856-58 (describing circumstances leading to board’s removal decision).


43. See _id._ at 858 (noting that board did not follow book review committee’s advice).

44. See _id._ at 858-59 (providing plaintiffs’ allegations).
removal did not unduly infringe upon students' rights.\textsuperscript{45} The Second Circuit disagreed and reversed, and the Supreme Court granted certiorari.\textsuperscript{46}

Writing for the Supreme Court plurality, Justice Brennan acknowledged that school boards have wide discretion when promoting the educational purpose of schools, but stressed that this authority is limited and must not intrude upon First Amendment guarantees.\textsuperscript{47} Thus, judicial intervention is necessary when school authorities unduly interfere with constitutional rights available to students.\textsuperscript{48} Maintaining that constraints upon access to ideas offend the First Amendment, the Court proclaimed that "the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."\textsuperscript{49} In contrast to the mandatory classroom context, school libraries provide students the opportunity to voluntarily access ideas and, therefore, merit special First Amendment protection.\textsuperscript{50}

The Court determined a school board violates First Amendment rights where a "substantial factor" in the board's decision to remove a book from school library shelves was to intentionally restrict access to ideas with which they disagreed; restricting access in this manner would amount to an unjust imposition of officials' ideological views.\textsuperscript{51} Yet, a removal

\begin{itemize}
\item \textsuperscript{45} See \textit{id.} at 859-60 (noting that district court determined that school board had "broad discretion to formulate educational policy" and that court should not intervene in absence of constitutional violation).
\item \textsuperscript{46} See \textit{id.} at 860-61 (describing procedural posture of case).
\item \textsuperscript{47} See \textit{id.} at 863-66 (providing that school board's discretion is not unlimited). The Court affirmed that students have the rights of freedom of speech and expression guaranteed under the Constitution. See \textit{id.} at 865 (maintaining that students have First Amendment rights). As a result, "local school boards must discharge their [discretion] within the limits and constraints of the First Amendment." \textit{Id.} (noting that school boards must remain cognizant of constitutional guarantees). When addressing the constitutional issue, Justice Brennan emphasized that the case did not concern the school curriculum, but only the public school library. See \textit{id.} at 862 (clarifying that decision applies to school libraries and not school curricula).
\item \textsuperscript{48} See \textit{id.} at 866 (expressing that courts should intervene in school affairs when school authorities violate constitutionally protected rights).
\item \textsuperscript{49} \textit{Id.} at 866-68 (explaining that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom" and that "the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students"). Although whether the government has an affirmative obligation to provide information in public libraries is contested, once the government makes information available in a public library, "removal of that material must meet First Amendment doctrinal tests because that removal could constitute abridgement" of First Amendment guarantees. See \textit{Klinefelter, supra} note 5, at 350-51 (explaining how removal of library materials implicates First Amendment).
\item \textsuperscript{50} See \textit{Pico}, 457 U.S. at 869 (distinguishing "regime of voluntary inquiry" in school library from "compulsory environment" of school classroom).
\item \textsuperscript{51} See \textit{id.} at 871, 871 n.22 (deciding that First Amendment violation would occur if school board removed book from library to prevent others from accessing ideas with which board members disagreed).
\end{itemize}
would be permissible if the book was "pervasively vulgar" or if the "removal decision was based solely upon the 'educational suitability'" of the book.\footnote{Id. at 871 (emphasis added) (explaining that constitutional violation would not occur if school board removed book because it was vulgar or solely because it was not educationally suitable).} As a result, the Court held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"\footnote{Id. at 872 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)) (holding that school boards cannot remove books from public school library shelves out of disagreement with ideas in books or to suppress access to ideas contained in books).} In light of the board's disregard of proper book removal procedures and of recommendations to retain the books, the Court concluded that there was a genuine issue of material fact as to whether the board removed the books for constitutionally valid reasons and affirmed the Second Circuit's decision.\footnote{See id. at 874-75 (affirming appellate court's decision because genuine issue of material fact existed as to whether school board removed books for valid reasons). The Court clarified that its decision would be different "if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials. . . . [But] petitioners' removal procedures were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivations." Id. (justifying conclusion that board's decision could have been improperly motivated). After the Supreme Court's decision, the need for additional litigation subsided because the parties reached a private settlement outside of court under which the school board returned the books to the school library. See Peltz, supra note 6, at 130-31 (explaining that parties settled outside of court).}

\textit{Pico} did not produce a binding majority opinion: three Justices joined the plurality, two Justices concurred, and four Justices dissented.\footnote{See \textit{Pico}, 457 U.S. 853 (providing plurality, concurring, and dissenting opinions). Justice Blackmun, concurring in part and concurring in the judgment, essentially agreed with the plurality, but reasoned that the First Amendment concern at issue was less so the restriction on the right to receive information, but rather the state officials' attempt to deny students' access to ideas with which they disagreed. \textit{See id.} at 875-82 (Blackmun, J., concurring in part and concurring in judgment) (stressing that First Amendment violation occurs when officials restrict access to ideas of which they disapprove). Justice White, concurring in the judgment, did not contest the plurality's reasoning, but asserted that as a procedural matter it was appropriate to remand the case to further develop the facts underlying the motivation for the book removal decision. \textit{See id.} at 883-84 (White, J., concurring in judgment) (expressing that "unresolved factual issue" required further findings). In dissent, Chief Justice Burger's opinion maintained that the plurality wrongfully constructed a First Amendment right to receive information and that the plurality's decision would lead to court intervention into educational policy decisions that rather should be made by individuals more aware of students' needs, such as school administrators. \textit{See id.} at 885-93 (Burger, C.J., dissenting) (disagreeing primarily with plurality's allowance of excessive court intervention). Also questioning the plurality's analysis of the First Amendment right to receive information, Justice Powell dissented and stressed that the plurality's decision destabilized school}
Court did, however, reach a consensus that a decision to remove a book to deny access to its ideas would be unconstitutional. Nevertheless, as a plurality decision, *Pico* is not binding precedent, but still maintains significant influence as persuasive authority. This has caused uncertainty as to boards' traditional responsibility to make educational decisions. See id. at 893-97 (Powell, J., dissenting). In another dissent, Justice Rehnquist challenged the plurality's analysis of students' rights to receive information and asserted that the school board acted within its authority because the books at issue were not appropriate for students. See id. at 904-20 (Rehnquist, J., dissenting). Finally, Justice O'Connor dissented, advocating that the school board properly decided to remove the books in accordance with its special responsibility over educational concerns. See id. at 921 (O'Connor, J., dissenting) (condoning school board's actions).

56. See Heins, supra note 3, at 162 (arguing that majority of *Pico* justices agreed that action by state officials that denies access to ideas with which they disagree is constitutionally impermissible). The plurality opinion clearly asserted that such action violates constitutional guarantees. See *Pico*, 457 U.S. at 872 (plurality opinion) (providing that removing books to deliberately deny access to ideas is unconstitutional). Justice Blackmun's concurrence expresses the same sentiment. See id. at 879 (Blackmun, J., concurring in part and concurring in judgment) ("[O]ur precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons."). Moreover, Justice White's concurring opinion does not reject this principle. See id. at 883-84 (White, J., concurring in judgment) (refraining from disagreeing with plurality's assessment). Even three out of the four dissenters embraced this notion, for Justice Rehnquist, joined by Chief Justice Burger and Justice Powell, purported that on the notion that official suppression of ideas is not constitutional, "I can cheerfully concede . . . ." Id. at 907 (Rehnquist, J., dissenting) (recognizing that Constitution does not condone suppression of ideas by officials).

57. See Dupre, supra note 4, at 121-22 (explaining that *Pico* is not binding because it is plurality decision). Essentially, a plurality opinion "lack[s] enough judges' votes to constitute a majority, but receiv[es] more votes than any other opinion." BLACK'S LAW DICTIONARY 1125 (8th ed. 2004). As a result, plurality decisions do not necessarily carry the same precedential weight as majority decisions. See *Marks* v. United States, 430 U.S. 188, 193 (1977) (differentiating application of plurality opinions from that of majority opinions). The Supreme Court articulated an approach for courts to adopt when applying a plurality opinion, stating that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Id. (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)) (directing how to apply plurality decisions). This rule aims to provide predictable applications of the law by lower courts. See Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 763 (1980) (explaining Supreme Court's objective in *Marks*). Yet, the Supreme Court also acknowledged that in some cases, "[t]his test is more easily stated than applied" and that when attempting to apply the standard, lower courts are often left "baffled and divided." Nichols v. United States, 511 U.S. 738, 745-46 (1994) (describing disadvantages of *Marks* approach). Lower courts maintain considerable discretion when applying plurality decisions, and often struggle to determine which concurring opinion in a plurality decision should apply. See Linas E. Ledebur, Comment, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN ST. L. REV. 899, 905 (2009) (describing problems associated with plurality decisions). In spite of the confusion that surrounds the application of such cases, Supreme Court plurality decisions remain available to courts as valuable per-
whether lower courts should apply *Pico* in public school library book removal cases. Although the *Pico* plurality is commonly applied in these cases, whether to apply another standard instead is currently contested.


The uncertainty surrounding *Pico*'s applicability to public school library book removal cases escalated when the Supreme Court decided *Hazelwood School District v. Kuhlmeier*. In 1983, a high school principal objected to the content of two student-authored articles for publication in the school-sponsored newspaper involving teenage pregnancy and divorce. Believing that there would not be enough time to edit the articles before the scheduled publication date, the principal omitted the articles out of concern that the subject matter would be inappropriate for students. The Court found that the principal validly censored the mature content; distinguishing the category of school-sponsored, expressive activities, the Court held that educators can exercise editorial control over student speech when the measures taken are "reasonably related to legitimate pedagogical concerns." In reaching its decision, the Court emphasized that preserving educators' editorial authority over curricular activities is essential to maintain schools' integrity.

58. See *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1202 (11th Cir. 2009) (questioning *Pico*'s precedential value), cert. denied, 130 S. Ct. 659. For further discussion of how lower courts have applied *Pico*, see infra notes 77-150 and accompanying text.

59. See *Miami-Dade*, 557 F.3d at 1202 (contemplating propriety of applying *Pico*).


62. See *Kuhlmeier*, 484 U.S. at 263 (discussing facts of case).

63. See *id.* at 263-64 (providing facts of case).

64. *Id.* at 273 (holding that educators can exercise editorial control over curricular matters because of educational concerns). The Court reasoned, "It is only when the decision to censor a . . . vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[ed]' as to require judicial intervention to protect students' constitutional rights." *Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)) (clarifying scope of students' protection against censorship).

65. See *id.* at 271 (explaining that content of curriculum is subject to control by educators).
maintain curricula that are educationally suitable for students.\textsuperscript{66} Also, schools have a responsibility to protect students from exposure to mature content.\textsuperscript{67} Moreover, schools should not be held responsible for student viewpoints that are not morally or politically neutral.\textsuperscript{68} In effect, \textit{Kuhlmeier} provides educators with authority to censor, but the reach of this power is limited to curricular matters and must be justified by legitimate educational concerns.\textsuperscript{69}

Presently, it is unclear whether \textit{Kuhlmeier} should apply in public school library book removal cases.\textsuperscript{70} Because \textit{Pico}'s precedential value is not binding, \textit{Kuhlmeier} may be applied instead.\textsuperscript{71} Yet, doing so might prove problematic, as classifying public school libraries as curricular is contested.\textsuperscript{72} Because of this uncertainty, courts have not definitively determined the governing standard.\textsuperscript{73}

\textbf{C. Lower Court Additions to the “Collection” of Public School Library Book Removal Cases}

Although challenges to the removal of public school library books are frequent, most are not publicized and only a handful have been addressed

\textsuperscript{66} See \textit{id.} (stressing importance of educationally suitable curriculum). The Court directed that a school need not endorse “speech that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices.” \textit{Id.} at 271-72 (footnote omitted).

\textsuperscript{67} See \textit{id.} at 272 (providing reasoning for holding).

\textsuperscript{68} See \textit{id.} (justifying decision).

\textsuperscript{69} See \textit{id.} at 272-73 (describing holding).

\textsuperscript{70} See Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd., 557 F.3d 1177, 1202 (11th Cir. 2009) (considering applying \textit{Kuhlmeier} in case concerning public school library book removal), \textit{cert. denied}, 130 S. Ct. 659; Brownstein, \textit{supra} note 61, at 724 (noting uncertainty in applying \textit{Kuhlmeier} standard to student free speech claims); Love, \textit{supra} note 61, at 618 (questioning whether \textit{Kuhlmeier} should apply in place of \textit{Pico}).

\textsuperscript{71} See \textit{Miami-Dade}, 557 F.3d at 1202 (postulating that \textit{Kuhlmeier} could apply in place of \textit{Pico} because \textit{Pico}'s value as precedent is not definite).

\textsuperscript{72} See Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 189, 189 n.29 (5th Cir. 1995) (differentiating school library from curriculum and implying that \textit{Kuhlmeier} does not apply in school library context); Case v. Unified Sch. Dist. No. 233, 895 F. Supp. 1463, 1469 (D. Kan. 1995) (maintaining that \textit{Kuhlmeier} pertains only to school curriculum and should not apply in public school library removal cases), \textit{aff'd in part, rev'd on other grounds in part}, 157 F.3d 1243 (10th Cir. 1998). For a further discussion of the propriety of classifying public school libraries as curricular, see \textit{supra} notes 36-39 and accompanying text.

\textsuperscript{73} See \textit{Miami-Dade}, 557 F.3d at 1202 (noting that it is unsettled whether \textit{Kuhlmeier} or \textit{Pico} is correct standard to apply); Brownstein, \textit{supra} note 61, at 724 (“[C]ourts struggle to determine when [\textit{Kuhlmeier}'s] legitimate pedagogical concern standard should be applied in reviewing student free speech claims.”); \textit{see also} Roberts v. Madigan, 702 F. Supp. 1505, 1513 (D. Colo. 1989) (asserting that school library and classroom are distinguishable and that “[t]his distinction mandates different constitutional results”), \textit{aff'd}, 921 F.2d 1047 (10th Cir. 1990).
in court since the Supreme Court decided *Pico*. In light of the confusion surrounding how to address school library book challenges, each decision provides valuable guidance for future courts confronting the issue. Significantly, every court addressing this issue has elected to apply *Pico*—notwithstanding its status as a plurality decision.

After *Kuhlmeier* and *Pico*, the issue of public school library book removal was next addressed in a Fifth Circuit decision, *Campbell v. St. Tammany Parish School Board*. In 1992, the St. Tammany Parish School Board removed a book about African religions entitled *Voodoo and Hoodoo* from its schools’ libraries. After a parent challenged the book’s inclusion in her child’s school library, a school review committee determined that the book was educationally suitable but recommended requiring parental permission to access the book and placing it on a reserve shelf. The board subsequently voted to remove the book from school library shelves, but did not provide any justification for its decision. In response, students’ parents filed a lawsuit alleging that the removal violated the students’ First Amendment rights, and the district court granted summary judgment in favor of the plaintiffs. The district court reasoned that the board objected to the book’s content and deliberately denied students’ access to its ideas.

On appeal, the Fifth Circuit acknowledged *Pico*’s recognition that public school libraries are distinct from public school curricula and thus are afforded greater constitutional protections. The *Campbell* court determined that *Pico* was the appropriate standard to apply in public school

74. See DuPRE, supra note 4, at 136 ("Challenges to books in school libraries have continued unabated since the *Pico* case."); Achtman, supra note 34, at 963-68 (summarizing lower court decisions that have applied *Pico*); Robert P. Doyle, *Think For Yourself and Let Others Do the Same: Books Challenged or Banned in 2009-2010*, at 2 (2010), http://www.ala.org/ala/issuesadvocacy/banned/bannedbooksweek/ideas andresources/free_downloads/2010banned.pdf (explaining that most library book challenges are not reported).

75. See id. at 958 (explaining that cases concerning public school library book removals exemplify how other courts should approach issue).

76. See id. at 963 (providing that lower courts that have addressed public school library book removals applied *Pico*). For a further discussion of lower court cases concerning public school library book removals, see infra notes 77-105 and accompanying text.

77. 64 F.3d 184 (5th Cir. 1995).

78. See id. at 185 (providing circumstances leading to dispute).

79. See id. at 185-86 (describing facts of case). A second review committee also advised retaining the book. See id. at 186 (explaining appeal of committee’s determination).

80. See id. at 187 (describing school board’s actions).

81. See id. (providing procedural posture of case).

82. See id. (discussing district court’s holding).

83. See id. at 187-88 (recognizing *Pico*’s distinction between school library and curriculum).
library book removal cases.84 Because Pico is a plurality decision, the court elected to apply Pico’s narrowest concurring opinion; thus, the court agreed with the plurality that a removal decision would be unconstitutional if the decisive factor behind the decision was the school officials’ intent to deny access to ideas with which they disagreed.85 The court noted that because many school board members did not read the book and disregarded the review committee’s recommendations, the members might have had improper motives when they decided to remove the book.86 Yet, the court determined that there was insufficient evidence to grant summary judgment, and remanded the case to further develop the record.87

A public school library book removal again raised controversy in Case v. Unified School District No. 233.88 In 1993, the donation of a book with a homosexual story line, entitled Annie on My Mind, to the Olathe School District’s libraries provoked media attention and public outrage.89 The controversy prompted a review of the book’s suitability after which educators determined that the novel was appropriate to include in the library collections.90 Unsatisfied by the decision, the superintendent independently prepared a set of guidelines concerning book donations, declared that Annie on My Mind did not satisfy the requirements, and mandated the book’s removal from the school libraries.91 The school board upheld the removal, emphasizing that the book’s glorification of homosexuality rendered the book educationally unsound.92 In response, students brought suit against the school district, alleging violations of their First Amendment rights.93

84. See id. at 187-89 (deciding to apply Pico).
85. See id. at 188-89 (applying narrowest concurring opinion in Pico).
86. See id. at 190 (explaining likelihood of improper motivation behind book removal).
87. See id. at 191 (remanding case). After the court remanded the case, the parties reached a settlement, thus eliminating the need for further proceedings. See Notable First American Court Cases, AM. LIBRARY ASS’N, http://www.ala.org/ala/aboutala/offices/oif/firstamendment/courtcases/courtcases.cfm (last visited Apr. 7, 2011) (noting that parties reached settlement outside of court).
89. See id. at 866-67 (describing situation leading to controversy). Prior to the donation, several copies of the novel were already included in the library collection. See id. at 867 (providing details of case). The school also received a donation of a second novel entitled All American Boys, but chose not to accept the donation upon determining that its content was not inappropriate. See id. at 867-68 (describing facts of case).
90. See id. at 867-68 (explaining circumstances of book review). The court noted that the book “contain[ed] no vulgarity, offensive language, or explicit sexual content.” Id. at 867 (providing results of book review).
91. See id. at 868 (describing book removal decision).
92. See id. at 870-72 (explaining removal decision).
93. See id. at 865 (explaining procedural posture of case).
The *Case* court recognized that the Supreme Court directly addressed the public school library book removal issue in *Pico*, and determined that it was appropriate to apply the plurality decision in the absence of a more fitting alternative. 94 Although the board asserted that it removed the book as educationally inappropriate, the court concluded that the board violated *Pico* by endorsing the removal based on member disagreement with the ideas represented in the book. 95 The court found overwhelming evidence that the board engaged in viewpoint discrimination, including the board's statements expressing disagreement with the book's content, the board's disregard for proper library book challenge procedures, and the board's failure to consider alternatives before removing the novel. 96 Accordingly, the court held that the board's actions violated the First Amendment and ordered the book's return to the library. 97

Restrictions upon public school library materials also raised constitutional concerns in *Counts v. Cedarville School District*. 98 In response to a complaint regarding the inclusion of the book *Harry Potter and the Sorcerer's Stone* in the Cedarville School District's libraries, a library committee reviewed the book and concluded that it should remain in circulation. 99 The school board instead voted to remove the book from the library shelves and to require signed parental permission to access the entire *Harry Potter* series, alleging that it restricted access to the books out of fear that the series might cause student disobedience, and because the books involved witchcraft. 100 A student and her parents brought suit, claiming that the restrictions violated the First Amendment. 101

The *Counts* court acknowledged that *Pico* instructs that First Amendment rights directly correlate with the right to receive information in books and provides enhanced protection for the exercise of this right in public school libraries. 102 Applying *Pico*, the court determined that the

94. See id. at 875 (determining that *Pico* is correct standard to apply in public school library book removal cases).
95. See id. at 875–76 (dismissing school board's alleged reasons for book removal).
96. See id. (reasoning school board removed book because members disagreed with book's content). The court explained that the school board's authority to exercise discretion in removing library books did not permit removals predicated upon "their personal social, political, and moral views." Id. at 876. The court also determined that the notion that the book was available outside of the school library did not justify the book's removal. See id. (stating that argument regarding availability of book outside school fails to address improper motivation for removal).
97. See id. at 877 (holding that school board removed book impermissibly).
99. See id. at 1000–01 (describing circumstances of controversy).
100. See id. at 1001–02 (explaining that school board restricted access to books).
101. See id. at 997 (providing procedural posture of case).
102. See id. at 999 (recognizing *Pico*'s acknowledgement of special rights in public school library context).
board's allegations were speculative, as most board members had not read the challenged book and no board members had read the other books in the series. The court found that the board endeavored to restrict access to materials believed to promote a religion with which its members disagreed. Accordingly, the court held that the board violated the student's First Amendment rights.

Presently, courts lack definitive guidance on how to analyze public school library book removal cases. Nevertheless, lower court decisions reveal a consensus that Pico is the correct standard to apply, and that it is essential to assess the reasoning behind a removal decision to discern whether the removal is truly justified. When considering the propriety of a book removal, courts should apply Pico and interpret it to require a thorough inquiry into the motivating factors behind the removal decision.

III. THE ELEVENTH CIRCUIT "CHECKS OUT" PICO

A. Facts and Procedural Background

The Miami-Dade controversy arose during the 2006 school year when library shelves in the schools of the Miami-Dade County Public School District contained several copies of the children's book series A Visit to . . . Each book in the series provided a basic introduction to the geography and culture of a particular country. Juan Amador, the father of a Miami-Dade elementary school student and a former political prisoner of Cuba, complained that the book A Visit to Cuba should be removed from

103. See id. at 1003-04 (finding that school board acted impermissibly under Pico).
104. See id. at 1004 (reasoning that school board members intentionally acted to deny access to ideas that they disagreed with).
105. See id. at 1005 (holding that board's decision violated constitutional guarantees).
106. See Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd., 557 F.3d 1177, 1202 (11th Cir. 2009) (acknowledging that it is uncertain how courts should analyze public school library book removal cases), cert. denied, 130 S. Ct. 659.
107. See Achtman, supra note 34, at 963 (explaining that courts addressing public school library book removals regularly apply Pico). For a further discussion of how lower courts have applied Pico in public school library book cases, see supra notes 77-105 and accompanying text.
109. See Miami-Dade, 557 F.3d at 1182 (describing circumstances leading to dispute). The libraries' collections also included Spanish versions of certain books in the series. See id. at 1183 (detailing nature of disputed books). The Spanish version of the English book A Visit to Cuba was entitled ¡Vamos a Cuba! See id. (describing challenged books).
110. See id. at 1182-83 (explaining books' content).
his daughter's school library. Mr. Amador asserted that the book distorted Cuba and he advocated replacing it with one that explicitly conveyed the trials of Cuban life.

In accordance with the school district's procedure for library book challenges, Mr. Amador requested a formal review of the book. The school's book review committee acknowledged that the book was educationally significant and appropriate, and advised the superintendent to retain the library book. Mr. Amador appealed to a second review committee that also voted in favor of retaining the book after evaluating the text for educational significance, appropriateness, and accuracy. Dissatisfied, Mr. Amador appealed to the Miami-Dade County School Board (the Board). The Board agreed with Mr. Amador's opinion that the book failed to sufficiently convey the difficulties of Cuban life. Significantly, several Board members also expressed that they found the book personally offensive. Disregarding the prior evaluations of the book,

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111. See id. at 1188 (providing circumstances of dispute). The school district had an established procedure in place to address requests to remove books from the schools' libraries. See id. at 1184 (acknowledging school district's book challenge procedure). First, the complaint was to be reviewed by the school principal, who then was to either provide an explanation of the book's inclusion in the library collection or require a formal request to have the book removed. See id. (explaining book challenge procedure). Next, an ad hoc review committee comprised of members of the school community was to review the challenged book to recommend to the principal whether or not the book should be removed from the library. See id. (describing school district's book challenge process). To make its decision, the review committee was to consult reviews of the text by professionals and library experts and also consider "fifteen criteria for selecting library materials: educational significance, appropriateness, accuracy, literary merit, scope, authority, special features, translation integrity, arrangement, treatment, technical quality, aesthetic quality, potential demand, durability, and lack of obscene material." Id. One could challenge the review committee's decision by appealing to the superintendent, who had the discretion to follow the review committee's recommendation or have the book reviewed by a second review committee. See id. (explaining book challenge process). Finally, one could appeal the superintendent's decision for a final review of the book by the school board. See id. (describing how book challenge reaches school board).

112. See id. at 1182 (explaining why Mr. Amador challenged book).

113. See id. at 1184 (noting that formal book review took place).

114. See id. at 1185 (explaining results of book review).

115. See id. (providing details of second book review).

116. See id. at 1185 (describing Mr. Amador's response to committee's recommendations). The Board held a public hearing to receive input from the community to aid in its assessment of the book. See id. (explaining Board's hearing process).

117. See id. at 1185-88 (describing Board's assessment of book).

118. See id. at 1185-87 (providing circumstances of Board's deliberations). The Board's chairman openly declared that "it's in [the book's] lack of information that I think we as the Cuban community are offended." Id. at 1185 (quoting Transcript of Record at 13, Miami-Dade, 557 F.3d 1177 (No. 06-14633)). Another member asserted that the book was "extremely offensive." Id. at 1186 (quoting Transcript of Record at 17, Miami-Dade, 557 F.3d 1177 (No. 06-14633)). For a
the Board alleged that *A Visit to Cuba* was factually inaccurate and decided to remove the series from the school libraries.\textsuperscript{119}

In response, the American Civil Liberties Union and Miami-Dade County Student Government Association filed a complaint in the Southern District of Florida seeking declaratory and injunctive relief against the Board and the superintendent, alleging violations of their First Amendment and due process rights.\textsuperscript{120} The court determined that: *A Visit to Cuba* was educationally suitable for children; the Board pretextually alleged that the book was factually inaccurate; and the Board removed the books to prevent access to their ideas.\textsuperscript{121} Therefore, the Board acted impermissibly under *Pico*.\textsuperscript{122} Concluding that the plaintiffs were likely to succeed on their claims, the court issued a preliminary injunction requiring the Board to return the books to the libraries and prohibiting future removals of the books.\textsuperscript{123}

The Board subsequently appealed the district court’s decision.\textsuperscript{124} The Eleventh Circuit vacated the district court’s decision and remanded the case, finding that a preliminary injunction was not warranted because the plaintiffs were unlikely to succeed on their claims.\textsuperscript{125} The court denied rehearing, and the Supreme Court denied certiorari.\textsuperscript{126}

\section*{B. The Eleventh Circuit's Reasoning}

\subsection*{1. The Majority Opinion}

In *Miami-Dade*, the central issue before the Eleventh Circuit was the propriety of the district court’s decision to issue the preliminary injunction.\textsuperscript{127} Accordingly, the court proceeded to assess whether the plaintiffs

\textsuperscript{119} See *Miami-Dade*, 557 F.3d at 1188 (explaining Board’s decision).

\textsuperscript{120} See *id.* (providing procedural posture of case). After the defendants filed a motion to dismiss for lack of standing, the plaintiffs amended their complaint to include Mark Balzli as an individual and on behalf of his son Aidan, a student in the Miami-Dade County School District. *See id.* at 1188-89 (explaining procedural posture of case).

\textsuperscript{121} See *id.* at 1203, 1225 (providing district court’s findings).

\textsuperscript{122} See *id.* at 1189-90 (describing district court’s decision). For a discussion of *Pico*, see *supra* notes 40-59 and accompanying text.

\textsuperscript{123} See *Miami-Dade*, 557 F.3d at 1189-90 (explaining district court’s result).

\textsuperscript{124} See *id.* at 1190 (providing procedural posture of case).

\textsuperscript{125} See *id.* at 1230 (describing Eleventh Circuit’s decision). For a discussion of the Eleventh Circuit’s reasoning in *Miami-Dade*, see *infra* notes 127-50 and accompanying text.

\textsuperscript{126} See *Miami-Dade*, 346 F. App’x 574 (11th Cir. 2009) (denying rehearing en banc), cert. denied, 130 S. Ct. 659.

\textsuperscript{127} See *Miami-Dade*, 557 F.3d at 1198 (explaining issues court needed to address). Before addressing the preliminary injunction issue, the Eleventh Circuit assessed the threshold requirement of whether the plaintiffs had standing to bring the action. *See id.* at 1189 (analyzing plaintiffs’ standing). To have standing, it is required that the plaintiff “suffered, or must face an imminent and not merely
demonstrated a "substantial likelihood of success on their claims." The court explained that to do so, it was necessary to review de novo the district court's legal conclusions necessitating the preliminary injunction as well as the essential constitutional facts at issue.

The court determined that the plaintiffs satisfied the requirements for standing as to *A Visit to Cuba*, but not for the remaining books in the series. See id. at 1197-98 (explaining findings on standing issue). The court found that the individual plaintiff, Mr. Balzli, satisfied the requirements for standing as to *A Visit to Cuba* because he and his son intended to check out the book from the library on the first day of the upcoming school year and the removal of the book from the library would impede his legal right to access the book. See id. at 1194-95 (providing court's reasoning). As a result, the court decided that it was unnecessary to determine whether the other plaintiffs also had standing. See id. at 1195 (explaining rationale as to standing of other plaintiffs). Yet, because Mr. Balzli only intended to check out *A Visit to Cuba*, the plaintiffs did not satisfy the standing requirements for the remaining books in the series. See id. at 1197-98 (providing findings on standing issue). Therefore, the plaintiffs could challenge the removal of *A Visit to Cuba*, but could not challenge the removal of the other books in the series. See id. (explaining determination of plaintiffs' standing).

Preliminary injunctive relief is warranted when a movant demonstrates:

1. it has a substantial likelihood of success on the merits;
2. irreparable injury will be suffered unless the injunction issues;
3. the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and
4. if issued, the injunction would not be adverse to the public interest.

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To determine how to review the district court's decision, the *Miami-Dade* court assessed the nature of other courts' reviews in First Amendment cases. See id. at 1209-06 (discussing other courts' treatment of standards of review). For instance, the Supreme Court upheld an appellate court's determination that there was insufficient evidence that a publishing company published an article containing a false fact with actual malice in *Bose Corp. v. Consumers Union of United States, Inc.* See 466 U.S. 485, 514 (1984) (affirming appellate court's decision). The Court held that the appellate court correctly reviewed the record independently to assess the actual malice issue and that the appellate court was not limited to reviewing the district court's findings for clear error. See id. at 513-14 (explaining proper stan-
standard of review on appeal). The Court reasoned that "in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Id. at 499 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964)) (explaining that constitutional issues merit different review standard). Yet, the Court stressed the need to independently review evidence strictly concerning "the dispositive constitutional issue." Id. at 508 (clarifying proper scope of review). Further, the Court provided that it was necessary to engage in "an independent assessment only of the evidence germane to the . . . determination." Id. at 514 n.31 (providing guidance on nature of review).

The Miami-Dade court also turned to the case Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995). See Miami-Dade, 557 F.3d at 1205 (considering Supreme Court's Hurley case). In that case, the Supreme Court assessed whether a parade sponsor had the right to deny a homosexual organization authorization to march in the sponsor's private holiday parade. See Hurley, 515 U.S. at 560-66 (describing facts of case). The Court concluded that the lower court's determination that the state's mandate for the parade sponsor to permit the organization to participate violated the sponsor's First Amendment rights. See id. at 566 (holding that constitutional violation occurred). To assess the First Amendment issue, the Court conducted an independent examination of the record, stressing that the Court was "obliged to make a fresh examination of crucial facts pertaining to the constitutional issue." Id. at 567 (explaining need to examine essential constitutional facts independently).

The Miami-Dade court also turned to prior Eleventh Circuit cases for guidance. See Miami-Dade, 557 F.3d at 1198-206 (examining other cases within circuit). For example, the Eleventh Circuit reversed a district court's decision that a city's regulation that prohibited the display of multiple portable signs violated the First Amendment in Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1051-54 (11th Cir. 1987) (reversing district court's decision). The district court in Don's Porta Signs found that the city's portable and permanent signs were similarly unattractive, and that the restriction on portable signs only would not greatly enhance the government's interest because the permanent signs would also disrupt the community's aesthetic quality. See id. at 1053 (providing district court's findings). On appeal, the Eleventh Circuit maintained that under Bose Corp., it had the authority to independently examine the record because the case concerned a First Amendment claim. See id. at 1053 n.9 (providing court's reasoning). The court determined that the regulation was part of a "comprehensive effort to improve the City's appearance" and that because the portable signs were unattractive, the regulation "furthered the City's interest in improving the visual character of the City." Id. at 1053 (explaining court's findings). In its independent review of the record, the court limited its review to the specific constitutional issue of whether the regulation furthered the city's interest and not the specific factual matter of whether the portable signs were more aesthetically pleasing than the permanent signs. See id. (describing standard of review used by court).

Finally, the Miami-Dade court considered Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301 (11th Cir. 2000). See Miami-Dade, 557 F.3d at 1205 (examining Coal. for the Abolition of Marijuana Prohibition case to guide court's reasoning). In that case, the Eleventh Circuit assessed whether an ordinance that enabled a city to deny a marijuana advocacy group a permit to hold an outdoor festival violated the group's First Amendment rights. See Coal. for the Abolition of Marijuana Prohibition, 219 F.3d at 1305-06 (describing issue before court). Although the district court found that the ordinance did not infringe upon the group's constitutional rights, on appeal the Eleventh Circuit engaged in a de novo review of constitutional facts. See id. at 1316-17 (determining to review constitutional facts de novo). The court found that the ordinance was constitutional after reviewing de novo the specific constitutional requirements that the ordinance be
First, the court addressed the plaintiff's First Amendment claim. The plaintiffs maintained that *Pico* was the proper standard to apply, while the Board contended that *Kuhlmeier* should be applied. The court acknowledged the uncertainty in the law regarding which standard governs in public school library book removal cases. Nevertheless, the court applied the *Pico* standard, which prohibits a school board book removal decision based on board members' personal disagreement with the ideas expressed. Recognizing that "the Board's motive is the ultimate fact upon which the resolution of the constitutional question depends," the court determined to review the Board's motive de novo.

The Eleventh Circuit found that factual inaccuracies in the book motivated the Board's decision. By reviewing the book's educational suitability de novo, the court determined that "the book indisputably . . . contain[ed] inaccuracies." Also, the court found that the book did not accurately convey the harsh reality of life in Cuba. Based on its assessment of the book's factual inaccuracies, the court disregarded the district court's conclusion that the Board's decision was motivated by members' disagreement with the book's viewpoint. In light of these findings, the

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130. See *Miami-Dade*, 557 F.3d at 1199-200 (addressing First Amendment claim).

131. See *id.* (noting that parties disagreed on standard court should apply). For a discussion of *Pico* and *Kuhlmeier*, see *supra* notes 40-73 and accompanying text.

132. See *Miami-Dade*, 557 F.3d at 1202 ("The question of what standard applies to school library book removal decisions is unresolved.").

133. See *id.* (providing *Pico* standard). For a discussion of *Pico*, see *supra* notes 40-59 and accompanying text.

134. See *Miami-Dade*, 557 F.3d at 1204-06 (explaining that reason for Board's decision was core constitutional fact that needed to be reviewed de novo).

135. See *id.* at 1207-11 (determining book was factually inaccurate upon reviewing book's educational suitability de novo and that factual inaccuracy motivated Board's decision). *But see id.* at 1239-34 (Wilson, J., dissenting) (finding that factual inaccuracy allegations were pretextual and that Board's true motivation behind removal was to deny access to ideas in book). The majority reasoned that it was necessary to independently review the book's educational suitability because the Board's alleged motivation for removing the book pertained to the book's factual accuracy. *See id.* at 1211 (majority opinion) (determining to review de novo book's factual accuracy).

136. See *id.* at 1211 (finding that book contained factual inaccuracies). Particularly, the court reasoned that the book made imprecise assertions about Cuban cave paintings, traditional Cuban boat races, and Cuban clothing. *See id.* at 1212 (providing mistakes in book). The court also reasoned that the book inaccurately proclaimed that "People in Cuba eat, work, and go to school like you do." *Id.* (quoting Transcript of Record Exhibit A Visit to Cuba at 13, *Miami-Dade*, 557 F.3d 1177 (No. 06-14633)).

137. See *id.* at 1221 (concluding that book did not fully express difficulties of Cuban life).

138. See *id.* at 1217, 1225 (rejecting district court's findings). The Eleventh Circuit heavily criticized the district court's analysis. *See id.* at 1217-25 (finding
court found that the Board acted within its authority to make educational decisions and concluded that the plaintiffs were not likely to succeed on their First Amendment claim.139

Finally, the court addressed the due process claim.140 The court reasoned that the action taken to challenge A Visit to Cuba followed the school district’s established procedures.141 Accordingly, the plaintiffs had notice and an opportunity to be heard, therefore precluding a viable due process claim.142 Thus, finding neither a First Amendment nor a due process violation, the Eleventh Circuit determined that injunctive relief was inappropriate.143 The court vacated the preliminary injunction and remanded the case.144

2. The Dissenting Opinion

The dissent passionately objected to the majority’s analysis of the First Amendment claim.145 According to the dissent, the majority erroneously reviewed factual findings de novo that should have been reviewed only for clear error.146 Particularly, the majority should not have independently assessed the book’s factual accuracy and should have given greater deference to the district court’s findings that the book conveyed a simplified fault in district court’s reasoning). Unlike the district court, the Eleventh Circuit perceived the Board members’ experiences pertaining to Cuba as an “interest” in the situation and not as indicative of improper motivation behind the Board’s decision. See id. at 1224 (dismissing potential that Board members’ experience improperly influenced removal decision). The court also criticized the district court’s analysis by vigorously denying that removing the book from the library constituted book “banning.” See id. at 1217 (disagreeing with notion that removing book from library constitutes book banning). Further, the court expressed that books’ educational suitability is not a matter for courts to contemplate. See id. at 1225 (disapproving district courts’ involvement in educational matters).

139. See id. at 1225-27 (determining plaintiffs’ First Amendment claim was not likely to succeed).
140. See id. at 1228-30 (addressing plaintiffs’ due process claim). Due process requires “that one be given notice and an opportunity to be heard.” Id. at 1229 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)) (explaining due process requirements).
141. See id. at 1228-30 (assessing due process claim). The court also found that the Board reasonably interpreted its procedures regarding library book challenges. See id. (examining due process issue). For a further discussion of the school district’s procedure to address library book challenges and on how the challenge of A Visit to Cuba proceeded, see supra notes 110-18 and accompanying text.
142. See Miami-Dade, 557 F.3d at 1228-30 (finding that due process violation did not occur).
143. See id. at 1230 (concluding that plaintiffs were not likely to succeed on claims).
144. See id. (rejecting preliminary injunction decision).
145. See id. at 1230, 1232-55 (Wilson, J., dissenting) (“The First Amendment prevents the government from banning books from school libraries, except in limited circumstances not present here.”).
146. See id. at 1232 (“The majority overstep[ped] the applicable standard of review and engage[d] in de novo review with regard to many factual findings.”).
account of Cuba that was age-appropriate and politically neutral. 147 Under the clear error standard, the dissent maintained that the district court accurately found that the Board's actions violated the First Amendment. 148 Criticizing the majority for ignoring evidence in the record demonstrating the Board members' impermissible motives, the dissent argued that a thorough review of the record revealed that "the School Board engaged in viewpoint discrimination, and that . . . was the decisive factor in its motivation." 149 Thus, the dissent concluded that the Board's removal decision could not be justified. 150

IV. MIAMI-DADE: STUDENTS' RIGHTS PLACED "ON HOLD"

The Miami-Dade court erred by determining that the plaintiffs were unlikely to succeed on their First Amendment claim and, therefore, enabled an unconstitutional suppression of ideas. 151 Although the court showed promise by applying Pico, the court's analysis under the standard was flawed. 152 By not fully applying Pico's directives, by overlooking key aspects of the record, and by exceeding the proper scope of review, the court improperly determined that the Board decided to remove A Visit to Cuba because it contained factual inaccuracies. 153 As a result, the court denied access to constitutionally protected ideas. 154

147. See id. at 1223-35 (maintaining that district court's decision should have been given more deference).

148. See id. at 1234-48 (arguing that record contained sufficient evidence to uphold district court's decision). The dissent acknowledged that Kuhlmeier was "more lenient" than Pico, and further analyzed the removal under Kuhlmeier to demonstrate that the board's actions could not be justified even under a less strict standard. See id. at 1234 (analyzing case under Kuhlmeier).

149. Id. at 1233-34 (finding that record demonstrated Board made decision to deny access to ideas in book). The record showed that the Board expressed disagreement with the book's neutral portrayal of Cuba. See id. at 1240-43 (explaining that record showed that Board disfavored book's content). Further, the circumstances surrounding the decision revealed that the Board faced political and community pressure to remove the book, that the Board disregarded the advice of professional educators, and that the Board initially attempted to circumvent book removal procedures. See id. (reasoning that circumstances support finding that Board made improper decision).

150. See id. at 1234-48 (finding that Board's decision was illegitimate).

151. For a discussion of how the Miami-Dade court's analysis was flawed, see infra notes 164-82 and accompanying text.

152. For a discussion of why the court was correct to apply Pico, see infra notes 154-63 and accompanying text. For a discussion of the court's unsound review under Pico, see infra notes 164-82 and accompanying text.

153. For a discussion of the flaws in the court's analysis, see infra notes 164-82 and accompanying text.

154. See Miami-Dade, 557 F.3d at 1232 (Wilson, J., dissenting) (asserting that Miami-Dade majority result is unjustified); Achtman, supra note 34, at 997 (maintaining that Miami-Dade result is erroneous and does not accord with constitutional guarantees). For a discussion of how the court's decision is unwarranted, see infra notes 164-82 and accompanying text.
A. The Eleventh Circuit "Borrowed" from the Proper Supreme Court Standard

The Eleventh Circuit correctly selected *Pico* as the proper standard for public school library book removal cases.\(^{155}\) In similar cases, courts have consistently applied *Pico* as the authoritative legal standard.\(^ {156}\) Although its status as a plurality decision lessens its precedential value, *Pico* is considerably influential because it is the only Supreme Court case to directly address the issue.\(^ {157}\) Moreover, it is proper to apply the narrowest concurring opinion of a plurality decision, and *Pico*'s narrowest concurrence is consistent with the plurality's direction to assess a school board's motivation.\(^ {158}\) Accordingly, it is appropriate to apply *Pico* in the absence of a fitting Supreme Court majority decision.\(^ {159}\)

Although the Eleventh Circuit contemplated using *Kuhlmeier*, the court rightfully chose to instead apply *Pico*.\(^ {160}\) Unlike *Pico*, *Kuhlmeier* approaches the issue differently.

\(^{155}\) See Miami-Dade, 557 F.3d at 1199 (majority opinion) (applying *Pico* in public school library book removal case); see also Peltz, supra note 6, at 103 (characterizing *Pico* as "the Supreme Court's leading pronouncement upon and against censorship in public [school] libraries"). For a discussion of why the court was correct to apply *Pico*, see infra notes 156-64 and accompanying text.


\(^{157}\) See Campbell, 64 F.3d at 189 (asserting that although *Pico* is plurality decision, case still "may properly serve as guidance in determining whether the School Board's removal decision was based on unconstitutional motives"); Case, 908 F. Supp. at 875 ("[Pico] is the only Supreme Court decision dealing specifically with the removal of books from a public school library."); see also Thomas, supra note 27, at 84 (explaining that *Pico* is influential as only Supreme Court decision addressing censorship in public school libraries). For a further discussion of the propriety of applying plurality decisions, see supra note 57 and accompanying text.

\(^{158}\) See Marks v. United States, 430 U.S. 188, 193 (1977) (instructing that it is appropriate to apply narrowest concurring opinion of plurality decision); Campbell, 64 F.3d at 189 ("Justice White's concurrence in *Pico* represents the narrowest grounds for the result in that case, and it does not reject the plurality's assessment of the constitutional limitations on school officials' discretion to remove books from a school library."); Achtman, supra note 34, at 982 (explaining that Justice White's concurring opinion in *Pico* supports majority's assertion that book removal mandated by school board with improper motivation violates Constitution and that removal decision is reviewable by court). For a further discussion of the *Pico* decision, see supra notes 47-56 and accompanying text. For a discussion of the application of plurality decisions, see supra note 57 and accompanying text.

\(^{159}\) See Case, 908 F. Supp. at 875 (applying *Pico* because it is only Supreme Court decision addressing public school library book removals); see also Achtman, supra note 34, at 982 (advocating that *Pico* plurality's direction to assess school board motivation in public school library book removal cases applies because narrowest concurring opinion corresponds with plurality's direction).

\(^{160}\) See Miami-Dade, 557 F.3d at 1202 (deciding to analyze facts of case under *Pico* instead of *Kuhlmeier*); see also Brownstein, supra note 61, at 755 (noting most courts apply *Pico* in public school library book removal cases).
plies only to curricular matters.\textsuperscript{161} \textit{Kuhlmeier} should not apply in cases concerning public school library book removals because school libraries are distinct from school curricula.\textsuperscript{162} Moreover, in similar public school library book removal cases, other courts have expressly declined to apply \textit{Kuhlmeier}.\textsuperscript{163} As such, \textit{Pico} remains the sole Supreme Court case that directly addresses public school library book removals and is the proper standard to apply in such cases.\textsuperscript{164}

\section*{B. The Miami-Dade Court “Read” \textit{Pico} Imprecisely}

Although the court properly decided to apply \textit{Pico}, it distorted the \textit{Pico} standard into one analogous to \textit{Kuhlmeier} by limiting its analysis to the book’s educational suitability.\textsuperscript{165} Upon determining that the book con-
tained factual inaccuracies, the court accepted this justification as the Board’s motivation without hesitation and quickly dismissed the potential that other factors provoked the decision. 166 Such a limited focus is inadequate, for it fails to fully contemplate the motivating factors behind a removal as *Pico* requires. 167 Moreover, interpreting *Pico* to allow alleged educational concerns to preclude assessment of other motivating factors is inconsistent with the consensus reached by several other courts in prior decisions, demonstrating the necessity of fully inquiring into the motivation behind a book removal. 168 Although the court purported to apply *Pico*, it in effect applied the *Kuhlmeier* standard and evaded necessary consideration of other potential motivating factors behind the Board’s decision. 169

Had the court properly applied *Pico* by continuing to inquire into the Board’s decision to ensure that the book’s educational suitability was the sole motivating factor, the court would have recognized that the Board’s decision could not be justified. 170 Although the court purported to fully examine the record, a thorough analysis of factors considered by the district court reveals that the majority disregarded statements indicative of Board members’ personal views that the book was offensive. 171

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166. *See Miami-Dade*, 557 F.3d at 1211 (accepting factually inaccuracies as adequate justification for book removal decision).

167. *See Pico*, 457 U.S. at 870-71 (plurality opinion) (requiring that intention behind decision to remove library book be taken into account).

168. *See*, e.g., *Campbell*, 64 F.3d at 188-90 (stressing importance of adequately analyzing motivation behind book removal decision); *Counts*, 295 F. Supp. 2d at 1004-05 (declining to accept alleged justifications for book removal and fully examining factors contributing to removal decision); *Case* 908 F. Supp. at 874-76 (assessing motivation behind removal in spite of allegations book was removed because it was educationally unsuitable).

169. *See Miami-Dade*, 557 F.3d at 1240 (Wilson, J., dissenting) (arguing that majority did not adequately assess motivation behind removal decision); *cf. Case*, 908 F. Supp. at 875 (continuing analysis to fully examine school board’s motivation for removal even after school board claimed to base removal decision on book’s educational suitability).

170. *See Miami-Dade*, 557 F.3d at 1233-48 (Wilson, J., dissenting) (“The record supports the conclusion that the School Board was not merely interested in removing a book full of inaccuracies; it was motivated to remove a book that symbolically represented something with which it disagreed.”); *see also* Saxe, *supra* note 165, at 930 (recognizing that court discounted information in record suggestive of improper motivation).

171. *See Miami-Dade*, 557 F.3d at 1233 (Wilson, J., dissenting) (explaining that majority “ignores various statements made by School Board members which suggest and sometimes even admit impermissible motives in the removal decision”); Achtman, *supra* note 34, at 995 (noting that court did not consider information from record revealing board members made personal and politically charged com-
larly at odds with Pico's directives, one Board member explicitly explained
that he voted to remove the book not because of its factual inaccuracies,
but rather "for the cause." The apparent political influence upon the
decision refutes the possibility that the book's educational suitability was
the sole factor that motivated the removal. Thus, the alleged basis of the
Board's decision was not legitimate under a proper application of Pico.

Furthermore, the dissent perceptively observed that the court based
its decision on an unwarranted determination that the book was educa-
tionally unsuitable. The court made clear that its de novo review of
ments during deliberations). The dissent observed that the Board's statements
effectively "demonstrate[ed] ideological opposition to the Castro regime. . . .
While [the Board members'] viewpoints may be correct, [there is] no support in
the law for the state requiring a book to carry a political viewpoint." Miami-Dade,
557 F.3d at 1238-39 (assessing Board members' statements). For example, Board
member Mr. Bolanos insistently maintained that the book distorted reality by as-
serting that "[t]he people of Cuba eat, work and study like you." Id. at 1239-40
(quoting Transcript of Record Exhibit A Visit to Cuba at 5, Miami-Dade, 557 F.3d
1177 (No. 06-14633)). He stressed that the only jobs available to Cubans were
those under the communist regime, that the communist party rationed food in
Cuba, and that Cubans were not able to freely practice their religions. See id. at
1238 (describing Mr. Bolanos's statement). Mr. Bolanos argued that by omitting
such information, the book was inaccurate, "hurtful[,] and insulting." Id. at 1239.

Other Board members demonstrated similar sentiments. See id. (describing
Board members' viewpoints). For example, Board member Ms. Logan noted her
desire to remove the book because she "suffered [in Cuba] firsthand." Id. (quoting
Transcript of Record at 20-22, Miami-Dade, 557 F.3d 1177 (No. 06-14633)).
Also, Board member Ms. Hantman justified her position in favor of removal by
noting that "[she] suffered and [her] family suffered with the rise of Fidel Cas-
tro." Id. (quoting Transcript of Record at 17-18, Miami-Dade, 557 F.3d 1177 (No.
06-14633)). Board member Ms. Perez proclaimed that the book was "especially
damaging to the sensibilities of this community." Id. (quoting Transcript of Re-
cord at 7-9, Miami-Dade, 557 F.3d 1177 (No. 06-14633)). Moreover, Board member
Mr. Barrera expressed that the book was "offensive to us as a community." Id. at
1239-40 (quoting Transcript of Record at 11-18, Miami-Dade, 557 F.3d 1177 (No.
06-14633)). Another Board member acknowledged, "We are rejecting the profes-
sional recommendation of our staff based on political imperatives . . . ." Id. at
1242 (quoting Transcript of Record at 5-15, Miami-Dade, 557 F.3d 1177 (No. 06-
14633)).

172. Id. at 1209 n.7 (majority opinion) (quoting Transcript of Record at 459-
60, Miami-Dade, 557 F.3d 1177 (No. 06-14633)); see id. at 1234 (Wilson, J., dissent-
ing) (asserting that record demonstrated Board's removal of Visit to Cuba was result
of viewpoint discrimination); see also Achtman, supra note 34, at 997 (maintaining
that Miami-Dade was decided wrongly because Board's decision was result of Board
members' political convictions).

(providing that educational suitability must be sole reason for removal).

174. See Miami-Dade, 557 F.3d at 1232 (Wilson, J., dissenting) (maintaining
that Board decided to remove book because it disagreed with book's viewpoint).
For a further discussion of why the Board's decision was not justifiable under Pico,
see supra notes 170-73 and accompanying text.

175. See Miami-Dade, 557 F.3d at 1234-35 (Wilson, J., dissenting) (arguing that
majority did not have authority to assess book's factual accuracy because it was
historical fact already determined by district court).
facts was limited to the Board's motivation. Yet, the court imprecisely extended this review and made de novo assessments of the book's factual accuracy, a finding of fact that should have been reviewed on appeal only for clear error. Under the proper standard, the district court's determination that the book was factually sound had ample support in the record and should have been upheld. Moreover, the majority stressed that its decision rested entirely upon its determination that the book contained factual inaccuracies. It follows that the court would not have concluded that factual inaccuracies motivated the Board's decision had the court given proper deference to the district court's finding that A Visit to Cuba was factually sound.

Predicated upon a flawed analysis, the Miami-Dade court's decision is tenuous. By distorting Pico, neglecting evidence on the record, and engaging in an overly broad review of the district court's decision, the court reached an unwarranted result under the First Amendment. Consequently, the Miami-Dade court permitted an unjustified removal of the book A Visit to Cuba from the Miami-Dade libraries' shelves.

176. See id. at 1198 (majority opinion) (explaining nature of de novo review). For a discussion of prior Supreme Court and Eleventh Circuit decisions that shed light on the limited breadth of de novo appellate review of constitutional facts, see supra note 129.

177. See Miami-Dade, 557 F.3d at 1232 (Wilson, J., dissenting) (disagreeing with standard of review used by majority); see also Saxe, supra note 165, at 928-29 (arguing that "the majority engaged in a de novo review of facts beyond the constitutional fact"). Although it was appropriate to review de novo the Board's motive for the removal decision, other findings of fact required greater deference. See Miami-Dade, 557 F.3d at 1292 (Wilson, J., dissenting) (explaining proper standard of review). The dissent maintained that the majority erroneously extended the de novo review to include facts beyond the Board's motive. See id. (explaining errors made by majority). Even if the majority disagreed with the district court's factual findings, the appellate court was not entitled to review de novo facts other than the Board's motive. See id. (characterizing majority's review as unwarranted). For further discussion of the appropriate scope of appellate de novo review of constitutional facts, see supra notes 129 and 176.

178. See Miami-Dade, 557 F.3d at 1244 (Wilson, J., dissenting) (finding that review of record under clear error standard supports district court's conclusion). For a further discussion of the evidence in the record the dissent considered to determine that the district court's decision was not clearly erroneous, see supra note 171.

179. See Miami-Dade, 557 F.3d at 1227 (majority opinion) ("We find from the evidence in this record . . . that [factual] inaccuracies were what motivated the Board. If there had been no factual inaccuracies, the book would not have been removed.").

180. See id. at 1232 (Wilson, J., dissenting) (arguing that district court's finding that book was educationally appropriate should be upheld under clear error standard).

181. See id. (maintaining that majority's result is wrong).

182. For a further discussion of how the majority's decision in Miami-Dade is flawed, see supra notes 164-81 and accompanying text.

183. See Miami-Dade, 557 F.3d at 1232 (Wilson, J., dissenting) (maintaining that Miami-Dade's result is not warranted). For a further discussion of why the result in Miami-Dade is not justified, see supra notes 164-82 and accompanying text.
Miami-Dade demonstrates that the current standards available to assess public school library book removals risk enabling First Amendment violations. The educational suitability standard under Kuhlmeier should not be used because it does not consider motivating factors behind removal decisions. Although Pico directs that a school board’s motivation must be considered, Miami-Dade shows that Pico can be interpreted in a manner that enables school boards to construct a pretextual justification. In the future, courts should avoid reading Pico to afford such an opportunity in order to prevent jeopardizing students’ constitutionally protected rights. To adequately protect students’ First Amendment guarantees, it is crucial that future courts do not employ the same analysis as Miami-Dade. Allowing a public school library book removal solely because of educational unsuitability does not ensure the school board removed the book for proper reasons. Considering only whether a book is educationally suitable fails to discern whether improper motivation existed and thus could enable a pretextual explanation to justify an otherwise unlawful book removal. Therefore, the Kuhlmeier standard should not be used in

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184. For further discussion of the shortcomings of the current standards, see infra notes 185-207 and accompanying text.
185. For further discussion of how Kuhlmeier is inadequate, see infra notes 188-91 and accompanying text.
186. For further discussion of how Pico is susceptible to manipulation, see infra notes 192-95 and accompanying text.
187. For further discussion of why Pico should be read to prohibit a public school library book removal when the removal decision involves improper motivating factors, see infra notes 196-207 and accompanying text.
188. See Miami-Dade, 557 F.3d at 1230 (Wilson, J., dissenting) (arguing that majority decision did not accord with First Amendment guarantees); see also Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982) (plurality opinion) (“[T]he First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library.”).
189. See Pico, 457 U.S. at 870-71 (expressing need to examine for existence of factors in addition to educational suitability to assess propriety of public school library book removal); see also Brownstein, supra note 61, at 813 (stressing that prohibiting viewpoint discrimination does not accord with Kuhlmeier standard because educators’ viewpoints consistently influence decisions concerning in-school matters).
190. See Miami-Dade, 557 F.3d at 1244 (Wilson, J., dissenting) (noting that court neglected to fully analyze motivation behind removal by focusing on assessment of book’s educational suitability); see also Pico, 457 U.S. at 890 (Burger, C.J., dissenting) (“‘Educational suitability’ . . . is a standardless phrase. This conclusion will undoubtedly be drawn in many—if not most—instances because of the decisionmaker’s content-based judgment that the ideas contained in the book or the idea expressed from the author’s method of communication are inappropriate . . . .”); Gamsky, supra note 35, at 744 (advocating for motivation test when assessing removal decisions because improperly motivated school board could avoid accountability under objective test).
public school library book removal cases because it does not adequately ensure the legitimacy of removal decisions.¹⁹¹

In contrast, *Pico* rightfully requires courts to assess the motivation behind a school board’s removal decision.¹⁹² Nevertheless, as *Miami-Dade* demonstrates, *Pico* can be interpreted in a manner that does not sufficiently protect students’ right to access to information.¹⁹³ Enabling alleged educational concerns for a removal decision to preclude full judicial inquiry into other potential motivating factors fails to protect against illegitimate removals.¹⁹⁴ To avert the risk of constructed justifications, *Pico* should be read to prohibit a removal decision when substantial improper motivation is found even when a potentially legitimate justification is alleged.¹⁹⁵

With *Miami-Dade* as precedent for future courts, access to constitutionally protected ideas in public school libraries is at risk.¹⁹⁶ *Miami-Dade* affords school boards the opportunity to intentionally remove books from

¹⁹¹. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 288-90 (1988) (Brennan, J., dissenting) (arguing that *Kuhlmeier* majority test does not adequately protect students’ First Amendment rights because “school officials (and courts) can camouflage viewpoint discrimination” when censoring school materials); see also *Pico*, 457 U.S. at 871 (plurality opinion) (stating existence of First Amendment violation depends on motivation behind library book removals); Brownstein, supra note 61, at 775-76 (“[T]he range of concerns determined to be ‘legitimate’ and ‘pedagogical’ is so broad that one can only wonder whether anything meaningful is accomplished by requiring courts to ask and answer the question.”).

¹⁹². See *Pico*, 457 U.S. at 869 (requiring examination of motivating factors behind book removal decision to protect against unjustified unshelving).

¹⁹³. See *Achtman*, supra note 34, at 997 (arguing that *Miami-Dade* “perilously perverts the spirit of *Pico’s* First Amendment protections”); see also Brownstein, supra note 61, at 754 (noting that lower courts struggle to apply *Pico*); *Munic*, supra note 4, at 246 (stressing need for less ambiguous standard than *Pico* to protect against court decisions that enable illegitimate book removals). Although motive is considered under *Pico*, a court might find that a school board’s decision to remove a book is justified if the book is found to be educationally unsuitable, thus permitting “politically astute school boards [to] establish procedures and a process that can manipulate a facially rational process to camouflage the real motivations behind their actions.” Wexton, supra note 36, at 591 (asserting that *Pico* does not provide adequate guidance for lower courts and risks enabling unjustified removals); see also *Pico*, 457 U.S. at 890 (Burger, C.J., dissenting) (arguing that justifying removal decision on basis of “educational suitability” is insufficient standard). But see *Huston*, supra note 31, at 241 (asserting that *Pico* standard is sufficient to apply in cases concerning challenged book removals).

¹⁹⁴. See *Miami-Dade*, 557 F.3d at 1244 (Wilson, J., dissenting) (stressing need to fully assess motivation behind book removal decision).

¹⁹⁵. See *Gamsky*, supra note 35, at 750 (advocating need for greater scrutiny when shown that unconstitutional factors influenced removal decision); see also Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 Lewis & Clark L. Rev. 111, 116 (2008) (arguing that it is unacceptable to permit schools to justify viewpoint discrimination on grounds that discrimination is related to educational concerns); cf. *Munic*, supra note 4, at 245-46 (arguing for more stringent standard than *Pico*).

¹⁹⁶. See *Achtman*, supra note 34, at 997 (arguing that *Miami-Dade* sets dangerous precedent for students’ rights).
public school libraries solely to prevent others from accessing certain ideas. 197 Impermissibly constraining library collections limits the range of information available to students and inhibits independent learning opportunities. 198 Moreover, ideologically driven restrictions on library materials produce collections that offer only a particularized range of information based on school boards' private agendas. 199 In effect, limited book selections undermine the value of public school libraries by transforming students into "closed-circuit recipients of only that which the State chooses to communicate." 200 This restriction obstructs students' development of their own ideas as well-informed individuals and impedes students' knowledge. 201

In recent years, thousands of book challenges occurred in the United States, a great portion of which targeted books in public school libraries. 202 Because most challenges are not publicized and proceed uncontested, officials maintain significant control over school library collections. 203 As such, the legal standards that guide school boards are of paramount importance. 204 Entrusted with the responsibility to protect constitutional guarantees, it is crucial that school boards legitimately exercise their discretion. 205 Enabling an improperly motivated school board to construct a pretextual justification for a book removal sanctions an in-

197. See id. (warning of Miami-Dade's potentially harmful implications).


199. See Heins, supra note 3, at 167 (recognizing that ideologically driven restrictions upon school library materials impede students' education).


201. See SAUNDERS, supra note 9, at 252 (arguing that school "does [students] and the rest of society an injustice when it suppresses ... the debate" on variety of issues); Munic, supra note 4, at 243 ("Students need access to a wide variety of books ... to assure exposure to a vigorous presentation of various viewpoints.").


203. See Pico, 457 U.S. at 863 (plurality opinion) (describing influential role of school boards); DOYLE, supra note 74, at 2 (providing that most "challenges to library materials receive no media attention and remain unreported").

204. See Pico, 457 U.S. at 864 (explaining importance of careful exercises of discretion by school boards to avoid violating students' rights).

205. See id. (emphasizing need for school boards to act lawfully).
fringement of students' First Amendment rights. Such conduct must not be condoned, for unwarranted suppression of access to ideas in the public school library impedes students' independent intellectual growth, devalues the public education system, and deters society's future development.

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206. See Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1234-35 (11th Cir. 2009) (Wilson, J., dissenting) (describing implications of illegitimate book removal); see also Susan Nevelow Mart, The Right to Receive Information, 95 LAW LIBR. J. 175, 175 (2003) ("Although the First Amendment to the Constitution guarantees the right to free speech, if you can't get access to the speech, the value of the guarantee diminishes.").

207. See The Supreme Court, 1981 Term, 96 HARV. L. REV. 62, 151 (1982) (explaining that society's future progress depends on educating youth); see also SAUNDERS, supra note 9, at 228 ("'Children must learn ... to think critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens ... . [Because] people ... without a developed capacity for reasoning are ruled only by habit and authority, and are incapable of constituting a society of sovereign citizens.'" (quoting AMY GUTMANN, DEMOCRATIC EDUCATION 51 (1987))).

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