2024

Picking Apart Pico

Delaney Billy

Introduction

It is February 2023 and teachers in Manatee County, Florida are frantically working to either remove or cover books in their classrooms amidst their preparations for standardized tests.[1] At the end of January, the Manatee County School District sent out a directive to "remove or cover all materials that have not been vetted" in response to new state law requiring "that all books go through a formal approval process with a certified school librarian or media specialist before being made available to Florida public school students."[2] The directive warned the teachers that non-compliance could amount to a felony charge.[3] This is in reference to Florida statute 847.012, which prohibits "accounts of sexual excitement, or sexual conduct and that is harmful to minors."[4] The ambiguous language, meaning what equates to sexual, has led Manatee County teachers to err on the side of caution, hence, covering and removing books. Manatee County is not alone in removing and covering books that have not yet been vetted; it is estimated that a third of Florida counties have been given instructions similar to that of Manatee County.[5]

PEN America, a nonprofit organization that advocates for free expression through literature, defines a school book ban as "any action taken against a book based on its content and as a result of parent or community challenges, administrative decisions, or in response to direct or threatened action by lawmakers or other governmental officials, that leads to a previously

---

[1] Tesfaye Negussie and Rahma Ahmed, "Florida Schools Directed to Cover or Remove Classroom Books That Are Not Vetted," ABC News (ABC News Network, February 6, 2023), https://abcnews.go.com/Politics/florida-schools-directed-cover-remove-classroom-books-vetted/story?id=96884323.

[2] Julia Reinstein, "Florida's School Book Bans Have Teachers 'Walking on Eggshells,'" BuzzFeed News (BuzzFeed , February 22, 2023), https://www.buzzfeednews.com/article/juliareinstein/florida-school-book-bans-teachers-confusion.

[3] Charles Bethea, "Why Some Florida Schools Are Removing Books from Their Libraries," The New Yorker, February 7, 2023, https://www.newyorker.com/news/letter-from-the-south/why-some-florida-schools-are-removing-books-from-their-libraries.

[4] Fla. Stat. § 847.012 (2022).

[5] Charles Bethea, "Why Some Florida Schools Are Removing Books from Their Libraries," The New Yorker, February 7, 2023, https://www.newyorker.com/news/letter-from-the-south/why-some-florida-schools-are-removing-books-from-their-libraries.

accessible book being either completely removed from availability to students, or where access to a book is restricted or diminished."[6]

It is not just Manatee County banning books in public schools, and it is not just Florida. Florida is one of at least seven states with pending or passed legislation that promotes book bans in public schools. [7] Most of them contain ambiguous language that is difficult, if not impossible, to comply with, especially regarding language concerning sex, gender, and race. Challenges to books are at an all-time high with the America Librarian Association reporting that in the first eight months of 2022, there 681 challenges to library resources in which "1,651 unique titles were targeted. In 2021, ALA reported 729 attempts to censor library resources, targeting 1,597 books, which represented the highest number of attempted book bans since ALA began compiling these lists more than 20 years ago."[8] More than "70 percent of the 681 attempts to restrict library resources targeted multiple titles. In the past, the vast majority of challenges to library resources only sought to remove or restrict a single book." [9] Part of this increase can be attributed to the increase of parent and community advocacy groups that push for the bans and encourage others to do the same, framing the bans as parental rights issues.[10] Additionally, the increasing prevalence of social media helps these groups spread their ideologies and methodologies with ease.[11]

---

[6] Jonathan Friedman, "Banned in the USA: The Growing Movement to Censor Books in Schools", PEN America, September 19, 2022, https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/.
[7] Madison Hall, "At Least 7 State Legislatures Are Proposing 'Book Ban' Legislation, Prompting Concern from Civil Liberty Advocates," Business Insider (Business Insider, February 28, 2022), https://www.businessinsider.com/state-legislatures-across-the-country-are-proposing-book-ban-bills-2022-2.
[8] Shawnda Hines, "American Library Association Releases Preliminary Data on 2022 Book Bans," News and Press Center, September 16, 2022, https://www.ala.org/news/press-releases/2022/09/ala-releases-preliminary-data-2022-book-bans.
[9] Alexandra Alter and Elizabeth A. Harris, "Attempts to Ban Books Are Accelerating and Becoming More Divisive," The New York Times (The New York Times, September 16, 2022), https://www.nytimes.com/2022/09/16/books/book-bans.html.Id.
[10] Friedman, "Banned in the USA."
[11] Id.

Public school libraries are a favored forum for the culture war, the bitter clash between the left and the right in the United States.[12] Both the right and left utilize book bans as weapons, however, many of the book challenges seen in recent years are directly linked to conservative talking points.[13] It is important to note that book challenges and reconsiderations are a part of how libraries function. Patrons are encouraged to be invested in libraries, it is "essential for their viability" but lately, this is not normal feedback because (1) it comes from the top down, meaning it is coming from legislators, (2) it is focused on books that involve race and queer identities and frames these books as harmful to children.[14]

Banning books that include aspects of identity, such as race, sexuality, and gender, has a negative effect on students. Deborah Caldwell-Stone, the director of intellectual freedom at the American Library Association, said that these bans are acts "of erasure, a very stark message that you don't belong here, your stories don't belong here." This erasure can lead to "racial trauma", a disconnect from students' home lives to the classroom because their "learning isn't contextualized in ways that help them make sense of their actual experiences outside of school", and rising tension amongst students because they have less access to literature that informs them of the experiences of others.[15]

The rise in book removals and challenges in public schools illuminates a glaring dearth of judicial guidance. The Supreme Court decided Board of Education, Island Trees Union Free

---

[12] Nancy Jo Lambert, "Collections under Fire: When the Culture War Comes for the School Library," *American Libraries* 53, no. 6 (June 1, 2022): p. 59, https://doi.org/https://search.ebscohost.com/login.aspx?direct=true&AuthType=sso&db=edsgac&AN=edsgac.A704829157&site=eds-live.
[13] Alter, "Attempts to Ban Books are Accelerating."
[14] Lambert, "Collections under Fire."
[15] Daniel D. Liou and Kelly Deits Cutler, "A Framework for Resisting Book Bans." *Educational Leadership* 80, no. 5 (2023): 48–53. https://search.ebscohost.com/login.aspx?direct=true&AuthType=sso&db=mih&AN=161725276&site=eds-live.

School District No. 26. v. Pico in 1982 and there has been no further guidance from the Supreme Court since. Furthermore, Pico is certainly no paradigm of clear judicial guidance. Due to the lack of legal guidance on book bans, local officials, and other state officials, are free to circumvent students' First Amendment rights and are given free rein to remove books. This is a judicial failing that requires immediate remedy.

The first part of this paper will address Pico generally, its flaws, and its application. The second part of this paper will look to the future of Pico and book removal cases in the United States.

I. Pico's Legacy

Pico came into the world amorphous and imperfect over forty years ago, barely reaching a plurality. It is nonbinding, yet it is the only on point guidance from the Supreme Court regarding book removals from public school libraries. It is a weak foundation upon which other book removal cases build, but they struggle to do so, leading to various interpretations of the standards introduced in Pico, with no clear correct interpretation.

1. Background

Pico was born in New York in 1975 after a group of school board members, including the president and vice president, from the Board of Education of the Island Trees Union Free School District No. 26 (the Board) went to a conference held by the politically conservative organization Parents of New York United, whose main concern was New York education legislation.[16] PONYU gave the board members a list of books deemed as "objectionable". [17]The High School contained nine of those books and the Junior High contained one.[18] In 1976, the Board issued a

[16] Bd. of Educ. v. Pico, 457 U.S. at 856 (1982).
[17] Id.
[18] Id.

directive which mandated the removal of the books from the library and the delivery of the books to their offices, where they proceeded to read them.[19] The directive was made public and the Board justified their actions by deeming the books "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 as surely as from physical and medical dangers."[20] The Board created a Book Review Committee made up of four parents and four members of staff, who recommend that only one book be removed.[21] However, the Board rejected the Committee's conclusion and removed nine: *Slaughterhouse-Five* by Kurt Vonnegut; *The Naked Ape* by Desmond Morris; *Down These Mean Streets* by Piri Thomas; *Best Short Stories of Negro Writers* edited by Langston Hughes; *Go Ask Alice* by Anonymous*; A Hero Ain't Nothin' but A Sandwich* by Alice Childress; *A Reader for Writers* edited by Jerome Archer; *The Fixer* by Bernard Malamud; and *Soul on Ice* by Eldridge Cleaver.[22]

Students in both the high school and middle school brought action under 42 U. S. C. § 1983, claiming that the Board's actions denied them their rights under the First Amendment.[23] They requested a declaration that the Board's actions "were unconstitutional, and for preliminary and permanent injunctive relief ordering the Board to return the nine books to the school libraries and to refrain from interfering with the use of those books in the schools' curricula."[24]

The main issue in this case was whether the First Amendment imposed any limitations upon the discretion of petitioners, the Board, to remove library books from the Island Trees High

---

[19] Id. at 857.
[20] Id.
[21] Id.
[22] David French, "The Dangerous Lesson of Book Bans in Public School Libraries," *Reason* Vol. 54, no. 4 (September 2022): 22-25.
[23] Pico 457 U.S. at 859.
[24] Id. at 859.

School and Junior High School.[25] The Court held that, while "all First Amendment rights accorded to students must be construed 'in light of the special characteristics of the school environment"' per Tinker v. Des Moines School Dist., "the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students."[26] They explained that the "'students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.' The school library is the principal locus of such freedom."[27] They also emphasized that school libraries were a place for students to learn outside of the set curriculum and expand on ideas learned in and outside of school.[28] The Board had "significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner."[29] Therefore, the determination of whether the Board exceeded their limitation rested on their intentions: "If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution."[30]

The Court points to "educational suitability" and "pervasively vulgar" as permissible criteria for book removal. [31] "Educational suitability" is frequently cited in book challenges and bans today.[32]

2. Pico's Flaws

[25] Id. at 863.
[26] Id. at 868.
[27] Id. citing Keyishian v. Board of Regents, 385 U.S. 589 (1967)
[28] Id. at 869.
[29] Id. at 870.
[30] Id. at 871.
[31] Id. at 873.
[32] Ryan L. Schroeder, How to Ban a Book and Get Away With It: Educational Suitability and School Board Motivations in Public School Library Book Removals, 107 Iowa L. Rev. 363, 365 (2021).

Pico has been on shaky ground since the beginning. There was barely a plurality and it produced seven different opinions. The guidance Pico offers is negligible. Justice Burger's dissent, which was joined by O'Connor, Rehnquist, and Powell, explains that,

> The plurality concludes that under the Constitution school boards cannot choose to retain or dispense with books if their discretion is exercised in a "narrowly partisan or political manner." Ante, at 870. The plurality concedes that permissible factors are whether the books are "pervasively vulgar," ante, at 871, or educationally unsuitable. Ibid. "Educational suitability," however, is a standardless phrase. This conclusion will undoubtedly be drawn in many -- if not most -- instances because of the decisionmaker's content-based judgment that the ideas contained in the book, or the idea expressed from the author's method of communication are inappropriate for teenage pupils…The plurality also tells us that a book may be removed from a school library if it is "pervasively vulgar." But why must the vulgarity be "pervasive" to be offensive? Vulgarity might be concentrated in a single poem or a single chapter or a single page, yet still be inappropriate. Or a school board might reasonably conclude that even "random" vulgarity is inappropriate for teenage school students. A school board might also reasonably conclude that the school board's retention of such books gives those volumes an implicit endorsement. Cf. FCC v. Pacifica Foundation, 438 U.S. 726 (1978)… there is no guidance whatsoever as to what constitutes "political" factors. This Court has previously recognized that public education involves an area of broad public policy and "'[goes] to the heart of representative government.'" Ambach v. Norwick, supra, at 74. As such, virtually all educational decisions necessarily involve "political" determinations.[33]

Burger hits the nail on the head here. "Educational suitability" could mean a variety of things or nothing. The standards are too vague and ambiguous to offer a usable precedent or way to apply Pico.[34] Moreover, Pico is old. It was decided before the age of social media, which provides a vehicle for advocacy groups to connect nationwide and before legislators became big players in public school book ban controversies. It was also decided before information was readily available outside of the school libraries by way of the internet, putting into question the degree to

[33] Pico, 457 U.S. at 890 (Burger, J., dissenting).

[34] Kelley R. Taylor, "Are Book Bans a Civil Rights Violation? A Federal Investigation into a Texas District Will Decide," School Library Journal, January 28, 2023, https://www.slj.com/story/Are-Book-Bans-a-civil-Rights-Violation-A-Federal-Investigation-into-a-Texas-District-Will-Decide.

which book removals from public school libraries infringe on students' rights to receive information.

It is clear that the Court did not want book removals to be motivated by political views and wanted to prevent the suppression of ideas, but Pico does not have the teeth required to combat those threats. Advocates of book removals and book bans are aware of and take advantage of Pico's ambiguity. Pico is merely something for school boards to work around, it does not have to force to protect students from infringements on their First Amendment rights.[35] Pico "sets a weak precedent that allows boards to assert issues of factual accuracy that may sometimes substitute for suppressing an author's speech."[36]

3. Pico Applied

Despite its shortcomings, courts across the country have applied Pico, looking to the motivation of school officials behind book removals. However, courts repeatedly criticize Pico's lack of clear guidance and unbinding nature. When the motivations behind book removals are not blatantly obvious, courts tend to afford deference to school officials and accept an ever-expanding view of what "educational suitability" means.

a. Case v. Unified Sch. Dist. No. 233

Case v. Unified Sch. Dist. No 233 is a case coming out of Kansas taking place in 1993-1994 in the Olathe School District. In Case, Robert Birle, on behalf of the Gay and Lesbian Alliance Against Defamation/Kansas City and Project 21, offered to donate two books: *Annie on My Mind* by Nancy Garden and *All American Boys* by Frank Mosca, both of which contained gay or lesbian story lines.[37] *Annie on My Mind* was already available in three of the high school

[35] Shane Morris, THE FIRST AMENDMENT IN SCHOOL LIBRARIES: USING SUBSTANTIAL TRUTH TO PROTECT A SUBSTANTIAL RIGHT, 13 Drexel L. Rev. 787, 819 (2021).
[36] Id.
[37] Case v. Unified Sch. Dist. No. 233, 895 F. Supp. 1463, 1466 (D. Kan. 1995).

libraries and two of junior high libraries for students to check out.[38] The assistant superintendent of Olathe School District had the school librarians review *Annie on My Mind* and *All American Boys* and informed the school board of the reviews. The librarians "agreed that [*Annie on My Mind*] was appropriate and suitable for high school students and that it should be included in the District library system."[39] Their review of *All American Boys*, on the other hand, was unfavorable. However, Dr. Wimmer, the superintendent, refused to accept any of the book donations and removed the copies of *Annie on My Mind* from the school libraries. [40] The school board convened and voted in favor of Wimmer's removal. The plaintiffs in this case, students, parents and a teacher, sought "injunctive and declaratory relief for violations of their constitutional rights under the First and Fourteenth Amendments… connection with the removal of Annie on My Mind from the District's school libraries."[41]

In applying Pico, the Kansas District Court explained that "The major difficulty the court faces in applying Pico to the case now before it is that it is a plurality opinion, and no clear legal rule emerges from it."[42] The court's only clear guidance was that they must evaluate the school board's motivation in the removal, which five justices agreed on, and that per the plurality "the motivations were unconstitutional if school officials 'intended by their removal decision to deny respondents access to ideas with which [the officials] disagreed, and if this intent was the decisive factor in [the removal] decision.' Removal may be permissible if based on vulgarity or 'educational suitability.'"[43] The court found that there was an issue of fact regarding the Board's intentions behind the removal and refused to grant summary judgement.

---

[38] Id.
[39] Id.
[40] Id.
[41] Id. at 1467.
[42] Id. at 1468 citing United States v. Friedman, 528 F.2d 784 (10th Cir. 1976)
[43] Id. at 1468-1469, citing Pico, 457 U.S. at 871.

Upon further fact-finding, the court held that the motivations were impermissible and, therefore, the removal of *Annie on My Mind* was unconstitutional.[44] One board member stated that the book was "glorification of the gay lifestyle" and that keeping the book would mean the Board "endorsed and approved "a homosexual lifestyle."[45] Another board member, Hinkle, voted for removal because he felt the book was not realistic "because it didn't deal with some of the practicalities that homosexuals have to deal with and face. Again, in reference to potential disease, potential death (sic). It just didn't even address those issues, let alone broken relationships with family, friends, et cetera."[46] Hinkle also threw in that he thought the book was not well-written because "It seemed to have one goal . . . to say that it's okay to be gay, don't worry about it… And in that sense, I didn't think the book was well written."[47] Hinkle testified "that it is not 'okay' to be gay, 'because engaging in a gay lifestyle can lead to death, destruction, disease, emotional problems.'" Hinkle concluded that one of the basic reasons he did not think the book was educationally suitable was because it promoted or glorified the "homosexual lifestyle", which "does not meet the basic moral standards of the community."[48] Simpson, another Board member, voted for removal claiming the book was educationally unsuitable because "it glorified homosexuality as a lifestyle," which Simpson found to be "unnatural."[49] She believed it was her duty to the "patrons in the District to remove the book because it conflicted with the District's values, which are 'traditional family values.'"[50] The other two Board members who voted for removal voted on free speech and First Amendment grounds.[51]

---

[44] Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 865 (D. Kan. 1995).
[45] Id. at 870.
[46] Id.
[47] Id.
[48] Id.
[49] Id.
[50] Id. at 871.
[51] Id.

Furthermore, the District diverted from normal procedure in removing *Annie on My Mind*, ignoring its usual thirteen-step written procedure to address concerns about library materials.[52] It simply created new procedure for donated books and used those guidelines to justify the removal of *Annie on My Mind*. Then the Board and District did not follow its "reconsideration policy, which requires that challenged materials be evaluated according to the District's established criteria for the selection of library materials. There was no discussion by the Board concerning the literary or educational merit of the book."[53]

Applying Pico, the court explained that "if the decisive factor behind the removal of *Annie on My Mind* was the school board members' personal disapproval of the ideas contained in the book, then under Pico the removal was unconstitutional."[54] Based on the neglect of procedure, failure to look for alternatives to banning, statements of the Board, it was determined that there was "no basis in the record to believe that these Board members meant by 'educational suitability' anything other than their own disagreement with the ideas expressed in the book. Here, the invocation of 'educational suitability' does nothing to counterbalance the overwhelming evidence of viewpoint discrimination."'[55] The court found that the school district exceeded the "limitations upon the discretion of school officials to remove library books from high school and junior high libraries."[56]

Ultimately, the departure from procedure and statements from Board members were indicative of their intent in banning *Annie on My Mind*. The Court applied Pico but emphasized that plurality opinion was not binding and that they applied it because it was the only Supreme

---

[52] Id.
[53] Id.
[54] Id. at 875
[55] Id.
[56] Id. at 874.

Court case to address book removal in public school libraries and that the Tenth Circuit had no on point cases to offer guidance.[57] Furthermore, the departure from procedure was obvious and the statements from the board offered clear insight into their intent, but oftentimes book removal cases are murkier than this. Here, the board attempted to justify their removals under the veil of "educational suitability" and take advantage of Pico's vagueness.

b. Counts v. Cedarville Sch. Dist.

Counts came to be when an Arkansas school district required students to have parental permission to access the *Harry Potter* books in school libraries. [58] Following the Library Committee's rejection of a Reconsideration Request Form requesting the removal of *Harry Potter and The Sorcerer's Stone*, the Cedarville School Board voted to restrict access to all *Harry Potter* books, regardless of the Library Committee's findings.[59] For the restriction on the students' access to be constitutional, the court asserted that the restriction must be justified, or it is an infringement of students' First Amendment rights.[60]

The first justification the Board offered was "that the *Harry Potter* books might promote disobedience and disrespect for authority."[61] While, per Tinker v. Des Moines, First Amendment rights of students may be limited "where 'necessary to avoid material and substantial interference with schoolwork or discipline,"' these limits are sharply circumscribed. [62] There was no evidence the Board was "aware of any actual disobedience or disrespect that had flowed from a reading of the Harry Potter books…Such speculative apprehensions of possible disturbance are not sufficient to justify the extreme sanction of restricting the free exercise of First Amendment

---

[57] Id. at 875.
[58] Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 1001 (W.D. Ark. 2003).
[59] Id. at 1001.
[60] Id. at 1002.
[61] Id.
[62] Id. citing Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511(1969)

rights in a public-school library."[63] It is worth noting that only one Board member had read a *Harry Potter* book.[64]

The second justification offered by the Board offered was that three Board members were concerned that "Harry Potter books deal with 'witchcraft' and 'the occult'. The Court noted that all three men appear to strongly disapprove of 'witchcraft' and 'the occult.'"[65] The court cited Pico in refuting this justification, explaining that despite personal feelings about "witchcraft" and "occult", "it is not properly within their power and authority as members of defendant's school board to prevent the students at Cedarville from reading about it."[66]

Counts is reminiscent of Case in that both boards spoke blatantly about their opposition to the books in question—be that because of "witchcraft"[67] or "the gay lifestyle. "[68] One does not have to infer their motivations because they are not hiding them, but they do try to frame their motivations as issues of "educational suitability", rather than dislike of the books' contents.

c. Campbell v. St. Tammany Parish Sch. Bd.

Campbell v. St. Tammany Parish Sch. Bd. came out of Louisiana in 1995 and was centered around the removal of *Voodoo & Hoodoo* by Jim Haskins from public school libraries in the parish.[69] In 1992, after discovering a copy of the book in her seventh grade daughter's bedroom from the school library, Kathy Bonds filed a complaint with the school principal, alleging that "the Book heightened children's infatuation with the supernatural and incited students to try the explicit 'spells,' which she believed to be potentially dangerous".[70] A school

---

[63] Id. at 1004.
[64] Id. at 1003.
[65] Id.
[66] Id. at 1004.
[67] Id.
[68] Case, 908 F. Supp at 870.
[69] Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 185 (5th Cir. 1995)
[70] Id. at 185-186.

committee was assembled and determined that the book was "educationally suitable" and provided a supplement to the eighth grade social studies curriculum, which is why they decided to keep the book in the library, but on a shelf for eighth graders with parental permission.[71] Bonds appealed and the Appeal Committee, once again, approved the book, with only one member, Robert Womack, dissenting.[72] Womack's reasoning was that the book "promotes extremely unhealthy practices that are not conducive to sound moral values" and that "at a time when there is a resurgent interest in the occult and the supernatural, we do not need books like *Voodoo and Hoodoo* in our libraries."[73]

Undeterred, Bonds appealed again with the Louisiana Christian Coalition in her corner. A member of the Coalition gave a presentation on the harms of voodoo on young people, gave the board "a written statement objecting to the Book's presence in the school libraries 'based on our belief that the manner in which the subject matter is presented constitutes an advocacy of practices of the voodoo religion,"' and "a petition containing 1,600 signatures urging removal of the Book from the parish school libraries."[74] The Appeals Committee also gave a presentation describing the procedures for challenging library materials and explaining their recommendation to keep the book on a shelf for eighth graders with parental permission.[75] Womack, the lone dissenter from the first appeal, moved to remove *Voodoo & Hoodoo* from all of the libraries in the St. Tammany Parish public school system.[76] The school board voted 12-2 to remove the book without discussing the Committees' recommendations or stating a reason for its removal of the book.[77] Parents of students in the district brought suit alleging that the removal violated their

---

[71] Id. at 186.
[72] Id.
[73] Id.
[74] Id.
[75] Id.
[76] Id. at 187.
[77] Id.

children's first amendment rights. The district court granted summary judgement in favor of the parents, however the Fifth Circuit reversed, finding that there was a genuine issue of material fact regarding the motivation behind the Board's removal of *Voodoo & Hoodoo*.[78]

The Fifth Circuit explained that while Pico's plurality was not binding, it served as guidance in determining if the Board acted on unconstitutional motivations.[79] Tammany came to the same conclusion as Pico—that there could be an issue of genuine material fact as to whether the Board's motivations infringed on students' First Amendment rights to freely to access ideas and receive information.[80]

However, the Fifth Circuit implied that the Board here had infringed on the rights of the students, pointing out that many members of the Board did not read the book, did not consider the merits or implement the Committees' suggestions, and did not follow the set procedures.[81] They wrote, "The circumstances surrounding the School Board's vote to remove the Book cannot help but raise questions regarding the constitutional validity of its decision."[82] However, they found that further fact-finding was required for the district court to issue a proper ruling.

d. ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd.

ACLU of Fla., Inc. v. Miami-Dade Country Sch. Bd. demonstrates how Pico can be manipulated and distorted in the absence of further judicial guidance. Miami-Dade comes out of the Eleventh Circuit in 2009 and concerns a children's book entitled *A Visit to Cuba* (*Vamos a Cuba* was the Spanish title of the book).[83] Juan Amador, the father of young girl attending an elementary school in the district with access to the book, filed a "Citizen's Request for

---

[78] Id. at 191.
[79] Id. at 189.
[80] Id. at 191.
[81] Id. at 190.
[82] Id. at 191.
[83] ACLU of Fla., Inc. v. Miami-Dade Country Sch. Bd., 557 F.3d 1177, 1183 (11th Cir. 2009)

Reconsideration of Media" to have *A Visit to Cuba* removed from the library at his daughter's school.[84] Amador said he was a former political prisoner of Cuba and that the book was untruthful and "portrays a life in Cuba that does not exist" and that he believed the book "aim[ed] to create an illusion and distort reality."[85]

The district had a four-step procedure, which Amador followed. First, the principal was informed of the complaint and explained the inclusion of the book in the school library. Amador was dissatisfied with the explanation, so the next step was to bring the challenge to the School Committee, which votes to keep the book in accordance with fifteen criteria they used in their determinations. Amador appealed to the superintendent, who submitted the appeal to the District Committee, which also voted to keep the book in the libraries. Amador appealed again to the School Board, which voted to remove the book.[86]

The Board Members made several statements that gave insight to the political context at the time and the penumbra of viewpoints that cast a shadow rife with political ideology over this case. Chairman Augustin Barrera stated that "In this particular case, when I read the book, it doesn't really give an opinion, what it does is it gives a lack of information, and it's in that lack of information that I think we as the Cuban community are offended. . . ."[87] Board member Martin Karp stated, "the author's intent in *Vamos a Cuba* was not to say anything about the politics of the country, and the harsh realities that exist there, but… when you do not say anything or avoid addressing real problems, you say a lot."[88] Board member Robert Ingram suggested that if the Board did not vote to remove the book "they can't walk out of here. If they don't vote for it, they

---

[84] Id.
[85] Id.
[86] Id. at 1186.
[87] Id. at 1185.
[88] Id. at 1186.

can't go home, they might find a bomb under their automobiles..."[89] This is likely a reference to events in Miami two decades before wherein a museum in Miami held an art auction "of art created by artists who had not renounced the Castro regime or continued to live in communist Cuba"[90] and amidst protests and hostility against the museum's "tolerant attitude toward contemporary Cuba,"[91] a bomb exploded under the museum director's car.[92] Ingram stated, "I can't vote my conscience without feeling threatened."[93]

Upon the removal,

> American Civil Liberties Union of Florida, Inc. and the Miami-Dade County Student Government Association filed a complaint, pursuant to 42 U.S.C. § 1983, in the Southern District of Florida against the School Board and the superintendent seeking declaratory and injunctive relief. The ACLU and the student government association alleged that the defendants had violated their members' First Amendment rights to freedom of speech and access to information as well as their Fourteenth Amendment rights to due process. The plaintiffs also requested that the district court enjoin the School Board from enforcing its removal order.[94]

The district court found in favor of the Plaintiffs, finding that "While the debate was couched in terms of 'inaccuracies' contained in the Cuba Books, the real issue was that the Cuba Books were content-neutral and scrupulously apolitical, and did not reflect, as viewed by the majority of the School Board members, the true evil of Castro's government and the oppression of the Cuban people." [95]

On appeal, the Eleventh Circuit applied Pico and determined that the Board's "motive is the ultimate fact upon which the resolution of the constitutional question depends."[96] The Court held that the under Pico, the book removal was not unconstitutional because "The record shows

---

[89] Id.
[90] Id. at 1241.
[91] Id.
[92] Id.
[93] Id. at 1187.
[94] Id. at 1188.
[95] Id. at 1205.
[96] Id. at 1204.

that the Board did not simply dislike the ideas in the Vamos a Cuba book. Instead, everyone, including both sides' experts, agreed that the book contained factual inaccuracies."[97] The Court cites many instance where the book explains that Cubans do things "like you do" and says that these statements are inaccurate because "What *Vamos a Cuba* fails to mention, and takes great pains to cover up with its 'like you do' misrepresentations, is that the people of Cuba live in a state of subjugation to a totalitarian communist regime with all that involves."[98]

Miami-Dade improperly applied Pico because they failed to further their inquiry into "into the Board's decision to ensure that the book's educational suitability was the sole motivating factor…"[99] The dissent writes that the" School Board's claim that *Vamos a Cuba* is grossly inaccurate is simply a pretense for viewpoint suppression, rather than the genuine reason for its removal. The record supports the district court's determination that the book was not removed for a legitimate pedagogical reason."[100]

The majority opinion largely disregarded the content of the Board members' statements and attributed the statements to the "factual inaccuracies" in the books. It ignores the astounding political pressure surrounding the removal of the book and ignored the precedent of Cuban Museum of Arts and Culture, Inc. v. City of Miami, 766 F. Supp. 1121, 1122 (S.D. Fla. 1991), wherein a bomb was placed under the museum director's car.[101]

This case illuminates Pico's main flaw: that it is easy to bury the lede, the true motivation, under "educational suitability." Because Pico provides such little guidance, the lower courts are left to determine what equates to "educational suitability" and what motives are

---

[97] Id. at 1207.
[98] Id. at 1213.
[99] Katherine Fiore, "ACLU v. MIAMI-DADE COUNTY SCHOOL BOARD: READING PICO IMPRECISELY, WRITING UNDUE RESTRICTIONS ON PUBLIC SCHOOL LIBRARY BOOKS, AND ADDING TO THE COLLECTION OF STUDENTS' FIRST AMENDMENT RIGHT VIOLATIONS," 56 Vill. L. Rev. 97, 123 (2011).
[100] Miami-Dade, 557 F.3d at 1234. (dissent)
[101] Id. at 1241 (Wilson, dissenting).

acceptable, which leads to courts giving greater deference to school officials in book removal cases than the plurality in Pico intended. Case, Counts, and Tammany contain blatant statements of motivation, but when cases are not so transparent, like Miami-Dade, Pico falters.

e. C.K.-W v. Wentzville R-IV Sch. Dist.

C.K.-W v. Wentzville R-IV Sch. Dist. comes out of the Missouri Eastern District Court in August of 2022 and opens with the court emphasizing that a book removal is not a book ban, writing, "Plaintiffs' characterization of this case makes it important at the outset for the Court to clarify something: this case does not involve banning books."[102] This is contradictory to PEN America's aforementioned definition of a book ban because Wentzville concerns book removals from public school libraries.[103] One of the district policies (Board Regulation 6310) at issue in Wentzville allowed school librarians to remove materials that are "soiled, damaged, or torn beyond repair…[or] exceed age sensitivity… [or] contain unreliable information."[104] The other district policy (Board Regulation 6241) at issue provided a process for the "impartial and orderly" evaluation of complaints the District received regarding specific materials.[105] The process is the following:

> After a principal receives a complaint, 6241 provides that the book will be "removed from use, pending committee study and final action by the Board of Education, unless the material questioned is a basic text." Doc. [19-5]. Within fifteen days of receiving the complaint, the Superintendent of Schools appoints a nine-person "review committee" that must consist of an administrator of the building involved, three teachers, a member of the Board of Education, and four "lay persons." Id…Within twenty days of the appointment of the review committee, 6241 provides the committee must meet, review the written request for reconsideration, read the questioned materials, evaluate, and prepare a written report of its findings and recommendations to the Superintendent of Schools wherein the committee may recommend the material be retained "without

[102] C.K.-W v. Wentzville R-IV Sch. Dist., No. 4:22-cv-00191-MTS, 2022 U.S. Dist. LEXIS 139554, at *3 (E.D. Mo. Aug. 5, 2022).
[103] Id.
[104] Id. at 4.
[105] Id. at 5.

> restriction," retained "with restriction" or not retained. Id. At the next meeting of the locally elected, publicly accountable Board of Education, the Superintendent will report the committee's recommendation to the Board, which then makes the "final" decision on whether to retain the material. Id. The principal of the school will then "see that the decision of the Board is carried out." Id.[106]

There were eight books at issue in Wentzville, all of which, according to the plaintiff's "feature[d] and present[ed] the perspective of an author or protagonist who is non-white, LGBTQ+, or otherwise identifies as a minority."[107] Of the eight books, six were not available in the Wentzville school libraries at the time of the case, three were removed by librarians after receiving complaints per Board Regulation 6310, four were temporarily removed for committee review per Board Regulation 6241, and of those four, three were still under review, while one survived the 6241 process and was returned to the library.[108]

Much of the controversy in this case is centered around *The Bluest Eye* by Toni Morrison. Following a complaint, the Committee voted to keep it, but the Board ultimately chose to remove it, then rescinded that decision and retained the book in the library.[109] Therefore, no books had been permanently removed by Wentzville. [110]

Plaintiffs alleged that the challenges were the concerted effort of two private groups to remove ideas surrounding race and sexuality from school libraries and that Wentzville removed the books because they disliked the ideas within them.[111] Furthermore, they contended that policies that supported the book removals were unconstitutional because they violated the students' First Amendment rights.[112] Plaintiffs sought to enjoin the "Wentzville R-IV School District, from following its policy that allows parents, guardians, and students to initiate

---

[106] Id. at 4-5.
[107] Id. at 6.
[108] Id. at 7.
[109] Id. 7.
[110] Id. at 8.
[111] Id.
[112] Id. at 9.

challenges to library materials and require the District to restore access to any books it has removed from school libraries during the most recent school year."[113]

The Wentzville court had serious reservations about utilizing Justice Brennan's plurality opinion in Pico, and explained, "Justice Brennan's plurality opinion in Pico, however, is not binding. Indeed, it is not clear what, if anything, from Pico is binding on the case here."[114] This court emphasized that the Pico Court was unanimous in its decision that districts could remove books because of "vulgarity" and "educational suitability."[115] This is inaccurate because Justice Burger's dissent criticizes the notion of "educational suitability", calling it a "standardless phrase." [116] Furthermore, there were disagreements in Pico as to what was "vulgar" compared to "pervasively vulgar"[117], so, remarkably, there was even less consensus in Pico than the court in Wentzville acknowledged.

The Wentzville court also criticized Pico as outdated, explaining that,

> The plurality in Pico eschewed the idea of schools denying students "access to ideas." Today, though, denying students access to a particular book at a school library does not deny them access to the book or its ideas. The forty years since the Court decided Pico have allowed for easier and greater access to ideas more so than perhaps any other forty-year period since the invention of the printing press.[118]

Basically, while perhaps forty years ago removing a book from the school library would have denied students access to ideas, that is not the case today in a world where information is easily exchanged on the internet.

Ultimately, the Wentzville court held against the plaintiffs because the district could have found the books to be unsuitable or vulgar and "Even if the Court disagreed with the District's

---

[113] Id. at 9.
[114] Id. at 14.
[115] Id. at 19.
[116] Pico, 457 U.S. at 890 (Burger, J., dissenting).
[117] Id.
[118] C.K.-W v. Wentzville R-IV Sch. Dist., No. 4:22-cv-00191-MTS, 2022 U.S. Dist. LEXIS 139554, 29 (E.D. Mo. Aug. 5, 2022).

actions, 'it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards.'"[119]

Wentzville demonstrates the difficulty of applying Pico, showing how a court must parse through Pico to extract the usable parts. It attempts to find some common ground in the opinions but does so by generalizing. Furthermore, Wentzville decries Pico's old age, positing that removal of materials from a school library does not necessarily equate to hindering students' access to ideas in 2023 the way it did in 1982.

II. What Happens Next?

Advocacy groups are searching for the next big case, a case with the potential to make it to the Supreme Court and expand on or replace Pico. For example, The Foundation for Individual Rights and Expression (FIRE) is actively searching for student plaintiffs, with Will Creeley, FIRE's legal director, explaining that "We'd like to update and strengthen Pico by building upon it with new decisions. We are standing ready, willing, and able to bring those cases. We need some brave plaintiffs for it."[120] It is likely that in addition to the usual First Amendment claims, the coming cases will be bolstered on Equal Protection and Title IX grounds, meaning that the book removals amount to some form of discrimination. It is also important to remember, as many of the cases above point out, Pico is merely a plurality and is not binding and may be entirely replaced without too much hardship by a Supreme Court ruling already in existence.

1. Title IX

[119] Id. at 31-32, citing Pico, 457 U.S. at 921 (O'Connor, J., dissenting).
[120] Kara Yorio and Kelley R. Taylor. 2022. "Wanted: Student Plaintiffs." *School Library Journal* 68 (9): 20. https://search.ebscohost.com/login.aspx?direct=true&AuthType=sso&db=lfh&AN=158662005&site=eds-live.

The Biden Administration interprets Title IX' "on the basis of sex" as forbidding discrimination based on sexual orientation and gender identity.[121] This interpretation continues the trend of extending Title IX's protections.[122] Twelve states challenged the Biden Administration's interpretation and in July 2022 the Department of Education was enjoined from implementing the interpretation in those states[123] Texas was not one of those states.

Recently, the Department of Education Office of Civil Rights opened an investigation into a Texas School District because of allegations that it removed books featuring LGBTQ+ students from the school libraries.[124] The initial complaint was filed by the American Civil Liberty Union of Texas against Granbury Independent School District alleging "that Granbury school officials directed the removal of all LGBTQ books from school libraries…"[125] They cited comments that the superintendent, Jeremy Glenn, made in a closed but recorded meeting with librarians where he reportedly told them to remove the books.[126] Glenn is reported as saying "I acknowledge that there are men that think they're women and there are women that think they're men…I don't have any issues with what people want to believe, but there's no place for it in our libraries" and clarifying the books he wanted removed by saying, "It's the transgender, LGBTQ and the sex — sexuality — in books…"[127]

---

[121] Hannah Natanson, "Are Book Bans Discrimination? Biden Administration to Test New Legal Theory.," The Washington Post (WP Company, January 17, 2023), https://www.washingtonpost.com/education/2023/01/13/granbury-book-ban-biden-civil-rights-investigation-title-ix/.
[122] Kelley R Taylor, "Are Book Bans a Civil Rights Violation? A Federal Investigation into a Texas District Will Decide," School Library Journal, January 28, 2023, https://www.slj.com/story/Are-Book-Bans-a-civil-Rights-Violation-A-Federal-Investigation-into-a-Texas-District-Will-Decide.
[123] Id.
[124] Id.
[125] Id.
[126] Id.
[127] Mike Hixenbaugh, "A Texas Superintendent Ordered Librarians to Remove LGBTQ-Themed Books. Now the Federal Government Is Investigating.," The Texas Tribune (The Texas Tribune, December 20, 2022), https://www.texastribune.org/2022/12/20/granbury-books-investigation-civil-rights/.

While the Granbury incident has not reached the courts, it is laying the foundation for challenging book removals under Title IX discrimination. The use of Title IX in the book banning forum is new and lacks precedent. It is highly dependent on the use of the Biden Administration's interpretation of "on the basis of sex." Acceptance or denial of that interpretation is what makes or breaks this argument when the removal concerns sexual orientation and gender identity.

Furthermore, the events in Granbury are unusual because there is a recording of the superintendent articulating his reasoning for removal and blatant disregard of procedure. While the Title IX argument is nuanced and interesting, it might not have to be touched. If Granbury ISD was to go to court, it could likely be decided by Pico alone, much like Case, were a district court to give Pico any credence.

2. Equal Protection

Book removals may follow established procedures and appear nondiscriminatory on their face, however removals "may still improperly target books on the basis of content pertaining to race, gender, or sexual orientation, invoking concerns of equal protection in education."[128]

Invisible in the background of Wentzville was the American Civil Liberties Union of Missouri, which argued that "School boards cannot ban books because the books and their characters illustrate viewpoints different of those of the school board; especially when they target books presenting the viewpoints of racial and sexual minorities, as they have done in Wentzville."[129] This is similar to the language from Tinker cited in Pico—"the school board must "be able to show that its action was caused by something more than a mere desire to avoid the

[128] Jonathan Friedman, "Banned in the USA: The Growing Movement to Censor Books in Schools", PEN America, September 19, 2022, https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/.
[129] Id.

discomfort and unpleasantness that always accompany an unpopular viewpoint."[130] The difference is that the ACLU is emphasizing that the book removals targeted the "viewpoints of racial and sexual minorities" to advance their Equal Protection argument. The ACLU argued that the removals did not follow set procedures and that books were "removed on an arbitrary basis and not in a viewpoint neutral manner."[131]

This argument harkens back to Village of Arlington Heights v. Metro. Hous. Dev. Corp., which held that racially disproportionate impact alone was not enough to show an Equal Protection violation, and that proof of racially discriminatory intent or purpose was required to show such a violation.[132] While impact may provide a court with an "important starting point", courts must also look to the historical background of the decision, the sequence of events leading up to the decision or action, departures from the normal procedural and substantive sequences in connection with the decision or action, and the legislative or administrative history of the decision or action.[133]

It is possible for a court to apply the Arlington factors to book removal cases. For example, applying Arlington to the events in Case v. Unified Sch. Dist. No. 233, there was departure from the normal thirteen-step procedure when the superintendent removed the books despite the librarians' recommendations and prior to the school board's convening over the issue.[134] There were also statements from the board which implied they removed the book solely because of the

---

[130] Pico, 457 U.S. at 880; citing Tinker v. Des Moines School Dist., 393 U.S., at 509.
[131] Kelley R Taylor, "Are Book Bans a Civil Rights Violation? A Federal Investigation into a Texas District Will Decide," School Library Journal, January 28, 2023, https://www.slj.com/story/Are-Book-Bans-a-civil-Rights-Violation-A-Federal-Investigation-into-a-Texas-District-Will-Decide.
[132] Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).
[133] Id. at 267-268.
[134] Case, 895 F. Supp at 1466.

protagonist's sexuality.[135] As for impact, the books removed were those donated which contained gay and lesbian storylines.

3. Replacing Pico

Perhaps, if a case about book removal claws its way to the Supreme Court again, the Court will abandon Pico in favor of something more objective.[136] They may return to Tinker and only approve book removal when "it is necessary to avoid material and substantial interference with schoolwork or discipline."[137] The Plurality in Pico used Tinker to support their explanation of the First Amendment rights retained by students in school, emphasizing that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."' [138] Adopting Tinker would likely narrow boards' discretion to remove books, but this could be mitigated by implementing a more selective process for the books placed in the library.[139]

Alternatively, the Court may look to Hazelwood Sch. Dist. v. Kuhlmeier. Hazelwood is a Supreme Court case involving a school paper produced by the Journalism II class at Hazelwood East High.[140] The process of review for the paper was that the upon completion the journalism teacher would submit the proofs of the paper to the principal, the May 13th Issue is the one at issue here. On May 10, 1983, the teacher submitted the proofs to the principal and the principal did not approve two articles containing student interviews, one involving teen pregnancy and the other about the effect of divorce on the students, but fearing there was not enough time to fix them, he removed them entirely from the paper. The Court held that, "educators do not offend

---

[135] Case, 908 F. Supp. At 870.
[136] Ryan L. Schroeder, How to Ban a Book and Get Away With It: Educational Suitability and School Board Motivations in Public School Library Book Removals, 107 Iowa L. Rev. 363, 387(2021).
[137] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).
[138] Pico, 457 U.S. at 865; citing Tinker v. Des Moines School Dist., 393 U.S., at 506.
[139] Ryan L. Schroeder, How to Ban a Book and Get Away With It: Educational Suitability and School Board Motivations in Public School Library Book Removals, 107 Iowa L. Rev. 363, 389 (2021).
[140] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).

the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[141] The Court afforded a wide degree of deference to the school officials and found that the article removals were permissible because the principal's actions were not unreasonable in the face of the privacy concerns surrounding the articles and that the principal could have reasonably found the articles to be unsuitable for students.[142] They viewed the newspaper as curricular, explaining that "These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences," [143] therefore the school officials could exercise greater control over it and could limit student expression that they believe may "substantially interfere with the work of the school or impinge upon the rights of other students." [144]

Hazelwood reared its head briefly in Miami-Dade and Wentzville. In Miami-Dade, the school district urged the court to consider their case under Hazelwood, claiming that, "books in the district's libraries, should be considered as part of the curriculum for elementary school students, and when viewed in that light its removal was a curricular decision entitled to deference under the Hazelwood decision."[145] However, the Eleventh Circuit declined to apply Hazelwood to book removal or resolve this issue at all, finding that under Pico, which evidently affords less deference to the decisions of school officials than Hazelwood, the book removal was, arguably, motivated by factual inaccuracy rather than mere dislike of the ideas espoused by the book.[146] To

[141] Id. at 273.
[142] Id. at 276.
[143] Id. at 268.
[144] Id. at 266.
[145] Miami-Dade County Sch. Bd., 557 F.3d at 1200.
[146] Id. at 1207.

be succinct, because the book removal passed the muster under the stricter, less deferential standard of Pico, the court did not have to look to Hazelwood.

In Wentzville, the court only cited Hazelwood to stress the historical tradition of giving deference to the decisions of school officials and explaining that education falls under the purview of the "parents, teachers, and state and local school officials, and not of federal judges."[147] While not blatantly stating adherence to Hazelwood, the court did stray from Pico and towards a Hazelwood-like view when they held that "Even if the Court disagreed with the District's actions, 'it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards.'"[148]

The main problem in applying Hazelwood to book removal cases is that it is unresolved whether public school libraries are considered curricular, if they are, then perhaps the school library can be analogous to a school paper. If they are not, then Pico is probably the correct starting point for book removal because, weak as it is, it is perfectly on point. However, even if the Hazelwood "reasonably related to legitimate pedagogical concerns" standard is applied, this does not mean that school officials can "engage in viewpoint discrimination."[149] This means that courts would still have to look to possible motivations behind the book removals, which ties back to Pico's reliance on motivation.

Conclusion

Ray Bradbury once wrote in *Fahrenheit 451*, "If you don't want a man unhappy politically, don't give him two sides to a question to worry him; give him one. Better yet, give him none." This was, obviously, not supposed to be an instruction. School libraries are meant to

[147] Hazelwood, 484 U.S. at 273.
[148] C.K.-W v. Wentzville R-IV Sch. Dist., No. 4:22-cv-00191-MTS, 2022 U.S. Dist. LEXIS 139554, at 31-32, citing Pico, 457 U.S. at 921 (O'Connor, J., dissenting)
[149] Miami-Dade County Sch. Bd., 557 F.3d at 1234 (Wilson, dissenting).

function as the "principal locus" of students' freedom "to inquire, to study and to evaluate, to gain new maturity and understanding."[150]

The increasing book challenges, bans, and removals are a threat to that freedom and the only judicial guidance we have from the Supreme Court is toothless and easy to manipulate, with "educational suitability" becoming a catchall and a way to hide true motivations behind book bans. That is not to say that Pico never had any successes, but those successes only came when the motivation was obvious, like in Case, Counts, and Tammany. If the events in Granbury were to amount to a case, it is likely that a court would find the motivations behind the book removals impermissible because like Chloe Kempf, an ACLU attorney, said "the superintendent kind of said the quiet part out loud."[151]

However, Miami-Dade showed how malleable Pico is because despite the statements of board members demonstrating political viewpoints and the context of the case, the Eleventh Circuit ultimately gave deference to the Board and allowed them to use "factual inaccuracies" as a basis of "educational suitability" regarding a twenty-six line children's book. Wentzville demonstrates how easily the limitations Pico attempted to place on the deference granted to school officials in book removal cases can be shaken off.

Pico is in desperate need of expounding and may find a happy union with Title IX or Equal Protection when book removals target members of a protected class. However, all of that is highly speculative as there is no case remotely close to the Supreme Court and the Biden Administration's interpretation of Title IX is up in the air. Moreover, it is difficult to show discriminatory intent unless someone is declaring discriminatory intent. There is the possibility

---

[150] Pico, 457 U.S. at 868.
[151] Mike Hixenbaugh, "A Texas Superintendent Ordered Librarians to Remove LGBTQ-Themed Books. Now the Federal Government Is Investigating.," The Texas Tribune (The Texas Tribune, December 20, 2022), https://www.texastribune.org/2022/12/20/granbury-books-investigation-civil-rights/.

of getting rid of Pico and replacing it with old reliable, Tinker, and limiting school officials' power of removal in favor of increasing their power of selection.[152] There is also the possibility that courts may look to Hazelwood to take up the mantle in matters regarding book removal.

The future of Pico is as vague as Pico itself, however, the past few years have seen an uptick in book challenges and removals in public schools, making it necessary for judicial clarity. With this increase, hopefully, a case will work its way up to the Supreme Court and the Court will decide a workable precedent, either expounding on Pico, or leaving it behind.

[152] Ryan L. Schroeder, How to Ban a Book and Get Away With It: Educational Suitability and School Board Motivations in Public School Library Book Removals, 107 Iowa L. Rev. 363, 389 (2021).