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Book Censorship in Public Schools: Examining Florida HB 1467 (2022)

ABSTRACT. Several pieces of legislation have sprung up in recent years in Florida aiming to restrict public school library books and curricular materials. Notably, this coincides with other state legislative moves to restrict what students read and learn in school with partisan purposes. Library associations have reported that nationally, removed books disproportionately contain LGBTQ and racial minority themes. One law at the heart of these restrictions, Florida HB 1467 (2022), empowers community members to challenge and remove public school books and adds bureaucratic obstacles to the access of previously allowable materials. The vague and broad language of the Florida law leads to erratic application by school districts across the state, resulting in the suppression of protected speech. This article examines a key constitutional tension: Under what circumstances does the students' right to receive information under the First Amendment outweigh school officials' authority, and, by extension, parental authority over local education under the Tenth Amendment? The U.S. Supreme Court in *Board of Education, Island Trees Union Free School District v. Pico* (1982) offers one answer, holding that political orthodoxy is an unacceptable rationale for removal, but pervasive vulgarity and educational unsuitability are acceptable. These three standards are useful, yet entangle in ways *Pico* is not fully suited to address. This article argues HB 1467 (2022) is unconstitutional under the political orthodoxy *Pico* standard, strict scrutiny analysis of content-based regulations, and the vagueness and overbreadth doctrines of the 1st Amendment.

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INTRODUCTION

Book challenges in public schools have arisen at an unprecedented rate in the past few years. PEN America[1] reported 3,362 book removals from public school libraries during the 2022-23 school year, a 33% increase from the previous year.[2] Florida is at the center of this trend, having removed over 1400 books in 2022.[3] Florida HB 1467 was enacted on March 25, 2022, purporting to "improve transparency and accountability relating to the selection and use of instructional materials and library materials in schools."[4] It is the most facially neutral of a 2022 wave of legislation described by the governor as part of his "Year of the Parent" initiative to increase parental rights in education.[5] A single individual raising an objection to a book can initiate a mandatory, lengthy review process, straining the resources of the district[6] and completely removing the book from the school curriculum and/or library's shelves. The implication of the law's stated intent is that existing policies are insufficient at curbing harmful materials to minors.[7] Proponents have not only implied but outright

[1] PEN America is an organization that has promoted freedom of expression in writing and literature since 1922. PEN America, About Us- What Is PEN America (2024), https://pen.org/about-us/.

[2] This was explicitly stated in Key Finding I of the 2022-2023 Banned in the USA report by PEN America, using data from the PEN America Index of School Book Bans. Kasey Meehan, et. al., *Banned in the USA: The Mounting Pressure to Censor*, PEN America, 2023.

[3] *Id*.

[4] *House of Representatives Staff Final Bill Analysis: HB 1467*, Fla. H. R. 1-10, at 8 (2022)

[5] News Release, The Office of Governor Ron DeSantis, *Governor Ron DeSantis Debunks Book Ban Hoax*, Mar. 8, 2023,
https://www.flgov.com/2023/03/08/governor-ron-desantis-debunks-book-ban-hoax/.

[6] According to reporting by Politico, Florida lawmakers themselves admitted this year that several pieces of legislation open up community members' right to challenge books have created administrative inefficiencies from the number of challenges. Andrew Atterbury, *After Notional Backlash, Florida Lawmakers Eye Changes to Book Restrictions*, Politico, Jan. 19, 2024.

[7] "Harmful to minor" criteria is defined in Fla. Stat. § 847.001 (2016) as (a) Predominantly appeals to a prurient, shameful, or morbid interest; (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors. These standards align with similar language of the courts. Fla. Stat. § 847.001 (2016).

accused the current system of instilling "woke indoctrination"[8] to justify the need for the legislation. Of course, there are proper instances where school officials should restrict harmful materials, such as pornography. But this is already barred from educational settings in Florida.[9] Claims of widespread school access to pornographic materials are unsupported by statistics.[10] HB 1467, instead of restricting truly harmful material to children, has added to the nationwide conservative trend of disproportionately restricting books with racial minority and LGBTQ themes. Circulating the idea that the current school system is rife with pornography only builds mistrust in the judgment of public educators and librarians. As of April 2022, PEN America reported that 31% percent of removed books across the country had LGBTQ topics and/or characters, and 41% contained non-white protagonists.[11] LGBTQ students and students of color are receiving a message from the state that their stories do not matter. But it is not only these groups who are harmed by the removal of literature representing them: all students stand to lose from partisan-fueled, government-mandated restrictions on what they are allowed to read in school. Schools are a prime environment for structured public discourse, so this type of censorship harms the development of the budding democratic citizen—one of the key goals of education.

In this article, I focus primarily on the application of HB 1467 to public school and classroom library books. This is a separate issue from the removal of curricular materials, like textbooks, and limits on student journalism. School officials' curation of curricular and journalistic curation are judicially afforded wider discretion than the

[8] The term "woke indoctrination" is in the title of a News Release from Gov. Desantis' office, and "indoctrination" is repeatedly used by Lieutenant Governor Jeanette Nunez when she stated that the signing of the bill was "...meant to promote education, not indoctrination." *Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination*, The Office of Governor Ron DeSantis, April 22, 2022, https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/.

[9] Covering the purchase of instructional materials, Fla. Stat. § 1006.40(c) (2023) (stating that any material purchased for school use must be free of pornography).

[10] Media coverage emphasizes the "pornographic" nature of removed books, but mentioned books are merely *explicit*, taken out of context and unrecognized as "pornographic" by literary experts. I will discuss the difference between sexual explicitness and sexual gratuitousness later, see page 19.

[11] Jonathan Friedman, et.al., Banned in the USA: Rising School Book Bans Threaten Free Expression and Students' First Amendment Rights § (Apr. 2022), https://pen.org/banned-in-the-usa/. PEN America's Banned In the USA report used their index of school book bans from July 1, 2021 to June 30, 2022 to arrive at these numbers. *Id.* at §14 (Methodology).

removal of materials from school libraries.[12] HB 1467 requires school boards to hold public meetings to choose or eliminate books, districts to have procedures allowing for parents to vet classroom instructional materials, media specialists to review every book in the school and classroom libraries, and the state department to publish a list of materials removed for other schools to consider. These appear to be reasonable, but the vagueness of the law has already caused widespread confusion among educators and lawyers parsing out exactly what is allowed.[13] Facially neutral provisions are unconstitutional when their effect is the chilling of First Amendment-protected speech.

I argue HB 1467 (2022) is unconstitutional under the political orthodoxy *Pico* standard, strict scrutiny analysis of content-based regulations, and the vagueness and overbreadth doctrines of the 1st Amendment. While pending litigation on an "applied" basis pushes back on book bans enacted in Escambia County, Florida,[14] it does not challenge the facial legality of HB 1467. Related curriculum restriction legislation like HB 1557, the Parental Rights in Education Act, may be struck down first,[15] but HB 1467 currently remains unchallenged: an administrative legal challenge

[12] In *Hazelwood v. Kuhlmeier* (1988), the U.S. Supreme Court made a ruling regarding a school-sponsored newspaper, declaring that the school's principal did not violate the first amendment rights of students by removing pages from publishing without their knowledge. School library books and school-sponsored newspapers are two separate realms, as one involves the manner of student speech expression and the other the collection and redistribution of pre-existing literature. The *Hazelwood* ruling gave school boards jurisdiction over the manner of student speech. Hazelwood v. Kuhlmeier, 484 U.S. 260, 266 (1988).

[13] Reporting by the Miami Herald gives an account of said confusion. Sommer Brugal, *Email exchanges show attorneys' confusion and frustration over Florida's new education laws*, Miami Herald, Sep. 24, 2023.

[14] Penguin Publishing House, PEN America, several authors of banned books are suing Escambia County School District and the Escambia County School Board under the 1st and 14th amendments, arguing that the district's book restrictions in school *libraries* prescribe an "orthodoxy of opinion." However, it cites the district's overreach of its authority from Florida HB 1557 ("Parental Rights in Education Act"), complementary legislation passed in 2022, which they claim goes beyond the scope of the law due to restricting books in school libraries, not just classrooms as HB 1557 allows. It does not cite HB 1467. Douglas Soule, *Nation's largest publisher files federal suit to block Florida county's book ban*, USA Today, May 17, 2023.

[15] The 11th Circuit, in March 2024, upheld the district's court ruling that struck down HB 7, the Stop W.O.K.E. Act, which prohibits classroom and corporate training making students or employees more culturally competent under content-based restriction standards of the First Amendment. Rebecca Falconer, *Appeals court denounces Florida's "Stop Woke Act" as "1st Amendment Sin"*, Axios, Mar. 5, 2024.

to HB 1467 in its specific application towards the classroom library previously failed.[16] However, mootness is not a concern because (a) HB 1467 is unlikely to be challenged in totality due to its facial neutrality, (b) it is not the only school book restriction legislation in Florida,[17] and (c) other states are pursuing similarly written legislation.[18] It is alarming that other states are following in Florida's footsteps in restricting books, seemingly with the same sentiment in mind.[19] While the issue of constitutional overreach into students' free speech is not confined to HB 1467, this article seeks to perform a case study of this law to illustrate the wide-ranging problems caused by it.

I. SECTION ONE: CONTENT TYPE CLASSIFICATION

A. Overview of Free Speech: Protected and Unprotected Speech

Freedom of speech encompasses a broad domain over verbal, written, and other forms of expression. Although it has no qualifications in its wording, there are many exceptions to this "freedom." In the modern day, free speech issues are complex due to the delicate balancing act of preserving a "marketplace of ideas" while protecting other interests like public order[20] and restricting obscene materials.[21] Most speech is

[16] The Florida Education Association, a teacher's union, filed an administrative legal challenge on March 16, 2023 arguing that librarian training materials went beyond the scope of the law, because it defined libraries to include classroom libraries. This did not challenge HB 1467 in totality, only in application towards classroom library books. The challenge was rejected by the judge. News Service of Florida, *A judge backs Florida in a legal challenge to school book rules,* WUSF NPR, Jul. 7, 2023.

[17] Florida HB 1069 (2023) adds additional bureaucracy in public school book restrictions. It introduces a process for parents to appeal the book challenge decision of a school board, only when an objection is denied, to a special magistrate at the district's cost. This process cannot be used as relief to reinstate removed books. Fla. Stat. § 1006.28 (6) (2023).

[18] Texas HB 900 (2023) goes even farther in requiring vendors to abide by a rating system of "sexually explicit" versus "sexually relevant" and "no rating" to be allowed to sell to school libraries, and librarians to make pretextual evaluations of materials using such guidelines. Tex. Code Ann. § 35.002 (West 2023).

[19] Book ban legislation has seemingly followed the same legislative intent in Texas as in Florida. Jeremy Schwartz, *Book bans in Texas spread as new state law takes effect*, The Texas Tribune, Oct. 11, 2023.

[20] *See Brandenburg v. Ohio* (1969) which stated that speech inciting "imminent lawless action" is not protected. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[21] *Roth v. United States* (1957) laid out this test for obscenity: the challenged topic must "(1) have a dominant theme in the work considered as a whole that appeals to prurient interest, (2) be patently offensive because it goes beyond contemporary community standards, and (3) be utterly without redeeming social value." Roth v. United States, 354 U.S. 476, 477 (1957).

protected under the First Amendment, except the following categories: obscenity,[22] defamation, fraud, incitement, fighting words, true threats[23], speech integral to criminal conduct, and child pornography.[24] Challenged school books under Florida law are justified under both constitutionally unprotected speech types, like obscenity and child pornography and protected speech like sexually explicit material.[25] If an official wants to lawfully remove a book based on content, the speech must be categorically unprotected by the First Amendment or the official must possess a narrowly tailored means towards a compelling government interest in limiting protected speech. The next section elaborates on the appropriate domain of free speech regulation in relation to judicial scrutiny.

B. Content-based Versus Content-neutral Restrictions

Free speech regulations can be classified into content-based versus content-neutral domains. Generally, government restriction of a speaker's message is presumed unconstitutional because it implies censorship based on content—exactly what the First Amendment is intended to protect against. This is why the government, acting as the defendant in these cases, typically argues for a content-neutral classification, allowing it to apply the rational basis test instead of the harsher strict scrutiny. The U.S. Supreme Court, recognizing that content-based prohibitions "have the constant potential to be a repressive force in the lives and thoughts of a free people," held that "the Constitution demands that content-based restrictions on

[22] In *Miller v. California* (1973), obscenity is defined as a depiction of sexual conduct in an offensive, excessively prurient way lacking "serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 15 (1973).

[23] In *Watts v. United States*, the U.S. Supreme Court ruled that the crude language threatening the president, as engaged in by Watts, did not constitute a "true" threat using (1) context, (2) conditionality of the statement, and (3) the reaction of the listeners. It was instead determined to be political hyperbole, or exaggerated political speech which is constitutionally protected. Watts v. United States, 394 U.S. 705, 708 (1969).

[24] Child pornography is distinguished from obscenity as it has underlying criminal conduct. In New York v. Ferber (1982), the court stated prohibition of such defined materials must "be limited to works that visually depict sexual conduct by children below a specified age," and the "category of 'sexual conduct' proscribed must also be suitably limited and described." New York v. Ferber, 458 U.S. 747, 764 (1982).

[25] Reporting on community members reading graphic passages in school board meeting. Nikolas Lanum, *Florida school board forced to remove dozens of books after parents read 'graphic' passages aloud,* Fox News, Aug. 31, 2023.

speech be presumed invalid."[26] Numerous U.S. Supreme Court cases put the burden of proof on the government to justify its content-based restriction.[27] If the plaintiff establishes a content-based restriction, the law typically undergoes the strict scrutiny test[28]—the legal concept of negative presumption that places the burden of proof otherwise on the state in pursuing a "compelling state interest" through "narrowly tailored" means. Once content-based restriction is established, courts proceed with strict scrutiny analysis.

Content neutrality is determined when the regulation can be "justified without reference to the content of the regulated speech."[29] On the other hand, content-based restriction is based on the particular subject matter, i.e. removing novels depicting teenagers grappling with their sexuality from the school library, while content-neutral restriction is usually based on the circumstances of expression, i.e. a teacher restricting a personal book from being read in class while curriculum is being taught. Distinction between content-based and content-neutral regulation is sometimes difficult in practice, because many regulations are facially content-neutral. If school boards must refer to the subject matter of a book to justify its complete removal from the school library, the removal process is precisely content-based and subject to strict scrutiny. The jurisprudence of content-based restriction in schools is outlined below to offer an overview of how courts interpret specific facts of the school setting in light of First Amendment considerations.

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[26] Stated in the majority opinion by Justice Kennedy. Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 657 (2004).

[27] *United States v. Playboy Entertainment Group, Inc*. (2000) (citing *Greater New Orleans Broadcasting Assn., Inc. v. United States* (1999)). "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. E.g., Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U. S. 173, 183." U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 804 (2000).

[28] Strict Scrutiny: Legal Information Institute, https://www.law.cornell.edu/wex/strict_scrutiny (last visited May 23, 2024).

[29] Plaintiffs CCNV were denied a permit to demonstrate in Lafayette Park and the National Mall, because the demonstration entailed camping in symbolic tents to call attention to homelessness, which violated the National Park Service's regulation of "camping" (sleeping) only in designated campgrounds. CCNV alleged a First Amendment violation. The U.S. Supreme Court ruled in favor of the National Park Service, stating it was a valid regulation of speech based on the time, location, or manner of expression without regard for message, and narrowly tailored to the substantial government interest of maintaining the pristine condition of the Capital. Community for Creative Non-Violence, at 293 (emphasis added); Heffron, at 648 (quoting Virginia Pharmacy Bd., at [*792] 771); *see* Boos v. Barry, 485 U.S. 312, 320-321 (1988) (Plurality Opinion).

II. SECTION TWO: CASE LAW OF CONTENT-BASED RESTRICTIONS IN PUBLIC SCHOOLS

A. Suppression of School Curriculum Cases: Lower Courts Clash on Applicable Standards for Removal

Objections to and subsequent removals of curriculum content are fairly common. In *Cary v. Board of Education* (1979), the 10th Circuit Court of Appeals left room for school boards to make curricular content restrictions based on political decisions informed by the board members' personal views. High school elective language arts teachers filed a suit when the school board banned ten of 1,285 books from their book list to use in class. The board had previously established a book selection committee of administrators, teachers, students, and parents, which had only rejected one of the 1,285 books in its majority committee report and nine in its minority report. Giving no explanation, the board disregarded the committee findings, which included rationales for removals, and barred six titles not mentioned in committee reports from district use. Under state law, the board had ultimate responsibility to determine the means of teaching, and under a collective bargaining agreement, the teachers had to comply or face termination. The 10th Circuit did not require the school board to disclose its reasoning and found the exclusions were not "a systematic effort to exclude any particular type of thinking or book"[30] because the teachers were not banned from mentioning the books in class or recommending them. Thus, the court appeared to apply a heavy standard for bringing a curricular ban up to a First Amendment violation: because a certain ideology was not *categorically prohibited* in other forms of expression—verbally—the board's override of the teachers' chosen curricular materials was constitutional.

The "systematic effort" framework continued in *Zykan v Warsaw Community School Corp.* (1980),[31] where students alleged First Amendment and Fourteenth Amendment violations from the combination of the following factors: removals of books in English courses and the school library, removals of certain English course offerings, and terminations of certain English teachers. The students did not sufficiently prove that the school board abused their discretion to warrant judicial intervention. In order to make a successful case, the 7th Circuit Court of Appeals stated that the plaintiffs needed to abide by the standards later echoed in *Pico*:

[30] Cary v. Bd. of Educ. of the Adams-Arapahoe Sch. Dist., 427 F. Supp. 945 (10th Cir. 1977).
[31] Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1301 (7th Cir. 1980).

> Noticeably absent from the amended complaint is any hint that the decisions of these administrators flow from some rigid and uniform view of the sort the Constitution makes unacceptable as a basis for educational decision-making or from some systematic effort to exclude a particular type of thought, or even from some identifiable ideological preference. Plaintiffs have also not alleged that the Board's decisions have deprived them of all contact with the material in question by, for example, forbidding students to have or to read the materials or making them wholly unavailable to them from other sources.[32]

Zykan posited that future cases of content-based restriction in school curricula would need to rise to the standard of proving that (1) a certain type of thought was systematically excluded, (2) a nameable thought or ideology was being espoused or prohibited by the school board, or (3) categorical exclusion of the material had occurred. Furthermore, the *Zykan* court placed two limits on secondary school academic freedom. Firstly, the students' right and necessity to academic freedom are limited by their intellectual development, which the court argues is underdeveloped and in need of "direction and guidance from those better equipped by experience and reflection to make critical educational choices."[33] Secondly, intellectual development is only one role of secondary education; schools are also responsible for nurturing social, political and moral values to integrate students into the community. This underlines the tension of content-based restriction cases in schools—whether the interest in intellectual development outweighs the interest in students' social, political, and moral development. These interests can and should be weighed in tandem, but book removals are often contended on the basis that its contents are lacking in the latter. Since competing educational interests based on academic level are so nuanced, book removal policies must be constructed to account for this.

Later appellate court rulings conflicted with the *Zykan* standards. In *Pratt v. Independent School District* (1982), parents of high school students objected to the use of short films adapting "The Lottery," a short story about a prosperous community with a twist that the residents randomly select one person to be stoned every year to maintain good omens. Teachers argued this was used to critically discuss blind adherence to tradition, yet public outrage ensued on the basis of violence and negative

[32] *Zykan*, 631 F.2d 1300 at 1306.
[33] *Id,* at 1304.

impact on students' religious values. A book challenge committee convened with both teacher and public input, concluding that the films should not be shown at the junior high level but remain at the high school level, with an opt-out form to be sent home before viewing. This committee recommendation was appealed to the school board, who decided that the films would be eliminated from the district curriculum entirely. The district's junior and senior high school students filed suit, and the 8th Circuit Court of Appeals affirmed the district court's ruling that a school board's removal of the films from the high school curriculum violated the students' First Amendment rights. The parents pushing for removal relied heavily "on their ideological and religious beliefs," and the school board removed the films without other reasons.[34] Only when the district court requested a reason for removal did the school board provide a rationale of exaggerated violence. This was found to be unconvincing as it was made after the fact and in reference to the single violent scene from the source material. The school board argument that "The Lottery" in short story form was still available was similarly unsatisfactory: "Restraint on protected speech generally cannot be justified by the fact that there may be other times, places, or circumstances for such expression."[35] In contrast to the 7th Circuit in *Zykan*, the 8th Circuit in *Pratt* rejected the notion that even if a removed library book is allowed elsewhere in the school, school officials cannot justify their removal decision based on this limited availability. Content-based restrictions on protected speech are still subject to strict scrutiny. The 8th Circuit concluded that the school district failed to rise to the burden of proof necessary to establish a substantial governmental interest for its content restriction. While the Tenth Amendment power of local authorities to determine the most suitable curriculum for students using a reflection of local community views was duly acknowledged, the students' right to receive information and be exposed to controversial ideas took priority in *Pratt*.

The circuit clashes in deciding the constitutionally allowable standards for content-based curriculum restriction signify the judicial challenges of weighing free speech against educational curation. This difficulty can be partly attributed to tilting consideration towards educational curation when the context is the mandatory school curriculum as opposed to the school library. The library differs in being a space of voluntary inquiry and development of individual curiosity, albeit still curated by educational authorities. Next, we answer: how do the courts view book restrictions in school libraries as similar to or different from curriculum?

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[34] Pratt v. Ind. Sch. Dist. No. 831, Forest Lake, 670 F.2d 771, 778 (8th Cir. 1982).
[35] *Id,* at 779.

B. Removal of School Library Book Cases

Courts have indeed distinguished school libraries from classroom curriculum in book removal cases. Before *Pico*, one case involved the preliminary removal of an anthology written by 8-18 year olds from a high school library following an insistent review committee member's concerns of one obscene poem.[36] The superintendent found educational value in other aspects of the book which connected to school curriculum offerings, but affirmed the objectionable poem "City." In its rounds of hearings, the committee rejected one member's proposal to limit the circulation of the book in the school library to students under 18 and voted to remove the entire anthology without reading it. In the suit, the defendants referenced an appellate case[37] affirming a school board's authority to select books to defend its absolute right in removal. The District Court of Massachusetts rightly pointed out here that the implications of an absolute right to removal in the school library are not the same as selection, and there was expert-testified value in other sections of the anthology, enjoining the ban. It upheld standards that a challenged book must be obsolete, improperly selected, obscene, or that the library faced financial or physical limitation in order to justify its removal.[38] This case affirmed the importance of full context and narrow tailoring to ensure alignment with free speech, crucial in the library's marketplace of ideas.

Another district court ruling, *Salvail v. Nashua Board of Education* (1979, DC NH) followed similarly. It recognized that school libraries and the books contained in them are not a required service of a board of education, but once created, cannot be restricted solely on the social or political tastes of board members.[39] It also rejected offensiveness as a rationale for removal, noting that what is offensive to some may be of interest as scholarly research of social phenomena to others. *Salvail*'s standard for what schools would be allowed to justify removal was "'educational' considerations, obsolescence, or architectural necessity."[40] From these two cases, *Pico* retained the obscenity standard and acknowledgement of the extreme implications of

[36] The district court found the poem to be truly offensive to some and uncertain in scholarly value, yet valuable in portraying a thought-provoking, sensitive theme for older students. It rejected classification of the poem as legally obscene. Right to Read Defensive Committee v. School Committee of Chelsea, 454 F. Supp. 703 (D. Mass. 1978).

[37] Presidents Council v. Comm. Sch. Bd. No. 25, 457 F.2d 289, 293 (2d Cir. 1972).

[38] *Id,* at 293.

[39] Salvail v. Nashua Board of Education, 469 F. Supp. 1269, 1272 (D.N.H. 1979).

[40] *Id,* at 1274.

removal—possible government censorship of certain viewpoints—as opposed to mere materials *selection*—government curation of appropriate materials for intellectual development. From there, *Pico* ruled narrowly in the school library domain regarding *removals* only. This was intentional as to not insert judicial influence into dictating selection standards, but rather protecting against breaches of intellectual liberty.

C. *The Preeminent Case: Board of Education, Island Trees Union Free School District v. Pico (1982)*

Pico is the preeminent case for instances of book removals in school libraries because it is the first and only time the U.S. Supreme Court addressed this specific First Amendment issue. Junior high and high school students brought suit when several board members of their school district bypassed recommendations from the board-appointed Book Review Committee and removed nine books from schools without reason. The *Pico* Court ruled in a plurality that the school board's removal of school library books that they later claimed were "'anti-American, anti-Christian, anti-Semitic, and just plain filthy'"[41] was unconstitutional, because they cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[42] This presented a solution to the lower court-splitting of allowable removal standards. *Pico* affirmed the right to receive information, floated in its predecessor cases and a primary concern of this article, as a natural corollary to the right to express speech under the First Amendment.[43] In schools, this means the students' right to receive information from materials in the library is indeed protected under free speech.

However, *Pico* set a weak precedent on barring "narrowly partisan" and individually opinionated reasons for removing books in schools by introducing loopholes.[44] Respondents in *Pico* accepted that if a school board made its book removal

[41] *Board of Education v. Pico ex rel.*, 457 U.S. 853, 102 S. Ct. 2799 , 857 (1982).

[42] This affirmed the holding in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

[43] For more on the right of receiving information, see also *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243 (1969); *Lamont v. Postmaster General of United States*, 229 F. Supp. 913 (S.D.N.Y. 1964)

[44] *See* paragraph 49 of *Pico* holding: It states that motivation behind book removals matter, with 2 examples of a Democratic school board removing books in favor of Republicans and an all-white school board removing all books authored by Black people or advocating for racial equality to be violations of the First Amendment rights of students in accessing those books. But large faults are evident here—(a) the reality of book removals is much more subtle than the examples provided and (b) findings of pervasive vulgarity and educational unsuitability appear to be suitable for justifying removals even upon findings of political motivations. *Pico*, 457 U.S. at 871.

decision "because those books were pervasively vulgar" or "solely upon the 'educational suitability,'" then the district would not be suppressing ideas and therefore not be in violation of the First Amendment. In other words, if a school district can prove its intent for removal was based on pervasive vulgarity or educational unsuitability, it stands on solid constitutional ground. Educational suitability is "a standardless phrase" as expressed by Chief Justice Burger in his dissent,[45] where he predicts that nearly all decision-makers of the removed books will cite educational unsuitability and be able to make an interpretation of the book's content at odds with the age and emotional maturity of the audience. This mirrors what is often done in a book challenge. Books can also be pervasively vulgar in language, but educationally suitable in theme, which is a nuance that *Pico* does not address. Which standard prevails then? These loopholes, plus the plurality decision, makes *Pico* authoritatively weak.[46] Since 1982, over a dozen similar cases have been ruled as distinguished, or too factually different from the issues raised in *Pico* for the lower court to decline to use the *Pico* precedent. This raises questions over how the court should address new book removal legislation such as Florida HB 1467, if removals can pass the pervasive vulgarity standard but are unjustified by educational suitability standards. How then does the prohibition of political and individual orthodoxy in a removal decision intertwine with the pervasive vulgarity and educational suitability loopholes? Additional doctrinal analysis provides answers to these shortcomings of *Pico*.

III. SECTION THREE: SECONDARY SOURCE LITERATURE REVIEW: THEORETICAL AND DOCTRINAL APPROACHES

Legal scholars point to the right to receive information as established in *Pico* as a principle supporting the social democratic analysis of the First Amendment. It is important to distinguish the *right to receive* from the similar *right to access*. The doctrinal right to access indeed exists, but is limited to areas where government proceedings "where there is a history of public access and where public access logically improves the functioning of the government process at issue" where the government is

[45] Justice Burger actually argues that the Supreme Court should not weigh in on this matter as a "super censor" of local school boards and leave it to be decentralized to local officials, contrary to what I believe. But he correctly notes that what constitutes "educational suitability" and "political factors" are ill-defined in the plurality. *Board of Education v. Pico ex rel.*, 457 U.S. 853, 102 S. Ct. 2799 , 885 (1982) (Burger, J., dissenting).

[46] Three justices joined the plurality opinion, two concurred, and four dissented. *Id*, at 853.

the speaker.[47] The range of views expressed in school library books do not indicate government's endorsement of those views, as the traditional purpose of a library is to provide the public free access to a host of views, some controversial. Nor is a school library improved by public access. Therefore, the focal point of this article is the right to receive, which instead pertains to what content the government is permitted to block from listeners when the government is not speaking, i.e. in a school library setting. This corollary right is supported by Justice Brennan's earlier *Lamont v. Postmaster General* (1965) concurrence. He writes the intent of the Bill of Rights is not to be read so narrowly as to only guarantee its specific language, but also additional rights needed to make those guarantees meaningful:

> It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful... I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.[48]

The court reaffirmed the right to receive in *Pico*, arguing that students must be exposed to diverse viewpoints because they must be prepared for "active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[49] This wording hints at a more expansive right to receive information free from orthodoxy in all aspects of public school, although the holding was only applied to school libraries. Justice Blackmun in his *Pico* concurrence, cited similar cases using social democratic reasoning[50] to argue that school libraries were too narrow of an

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[47] Francesca Procaccini, Symposium Articles: (E)Racing Speech in School, 58 Harv. C.R.-C.L. L. Rev. 457, (Summer, 2023), available at https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:69DG-7971-JD86-N007-00000-00&context=1516831.

[48] *Lamont*, 381 U.S. 301 at 381.

[49] *Pico*, 457 U.S. 853 at 868.

[50] *See* Ambach v. Norwick, 441 U.S. 68, 77 (1979); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

application.[51] The importance of establishing democratic principles should not be undermined in classrooms while supported in libraries. Hence, there is theoretical and doctrinal legitimacy for the freedom to receive information without partisanship to be applied widely in the school setting, including the classroom.

A range of other First Amendment doctrinal approaches are used to analyze content-based restrictions in schools. Legal scholars have examined political orthodoxy in legislation restricting the teaching of Critical Race Theory (CRT), a legal framework positing that racism is embedded in American institutions, transcending individual prejudice and affecting the very foundations of the legal system.[52] The original meaning of CRT, as coined in the context of legal doctrine, has been distorted into an all-encompassing term for cultural grievances.[53] Educators struggle to interpret the vaguely-written legislation restricting CRT and sometimes opt to avoid teaching certain topics in fear of legal consequences and community backlash of such a politically charged topic.[54] Book-banning legislation is similar in these regards. Ryan Rosenkrantz of the University of Memphis Law Review applies the vagueness, overbreadth, and chilling effect doctrines to anti-CRT legislation.[55] The court has not clearly defined how much overbreadth is needed for judicial intervention, but has ruled that multiple instances of the rule applying towards constitutionally protected speech.

Sean Maloney of DePaul Law Review finds *Pico* to be an insufficient precedent protecting book banning in public schools. His proposed solution takes a modern approach, referencing social media content moderation cases. He draws a comparison between school libraries serving as an intermediary for providing curated content, including internet services, to students who choose to use the library with social media platforms who do the same. He then proposes this model:

> (1) extending the First Amendment's protection of editorial judgments to cover a public school library's curation and filtering judgments (2)

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[51] *Island Trees Sch. Dist. v. Pico*, 457 U.S. 853, 879-882 (1982) (Blackmun, J., concurring).

[52] Crenshaw gives essential background to critical race theory in her work. *See* Critical Race Theory: The Key Writings that Formed the Movement (Kimberle Crenshaw, et. al. eds., 1995).

[53] This is according to the NAACP's account of Critical Race Theory as published by their Legal Defense Fund. What Is Critical Race Theory?, NAACP Legal Defense Fund, https://www.naacpldf.org/critical-race-theory-faq/.

[54] Reporting by Axios covers how this is affecting teachers. *See* Russel Contreras and Sommer Brugal, *Educators wrestle with new limits on teaching Black history*, Axios, Feb. 1, 2024.

[55] Ryan Rosenkrantz, *Note: From "Race to the Top"* to No Race at All: A First Amendment Challenge to Anti-Critical Race Theory Bills*, 53 U. Mem. L. Rev. 439, (2022)

> treating public school libraries as private actors that engage in First-Amendment protected activity through their curation and filtering of books and (3) applying First Amendment scrutiny to any new law concerning school board book bans.[56]

Maloney acknowledges this is an imperfect model for a new book banning framework, but one that preserves *Pico's* intent of giving school boards some role in curating their library contents while removing the "educational unsuitability" and "vulgarity" guidelines that pressure, persuade, or legitimize school boards' decisions to ban books. Another scholar argues for the judicial abandonment of *Pico* tests altogether with an express rejection of the curricular-based *Hazelwood v. Kuhlmeier* holding being applied to book removal cases.[57] Ryan Schroeder of Iowa Law Review suggests school boards should be required to prove the removed material will "materially and substantially disrupt the work and discipline of the school" as a principle taken from *Tinker v. Des Moines* or that it is for practical reasons such as shelf space limitations, physical damage, or obsolescence.

Other scholars point to appellate court rulings that further undermine *Pico* and offer solutions. Shane Morris of Drexel Law Review highlights the Eleventh Circuit's ruling in *ACLU v. Miami-Dade* (2009), where they decided that a school board's ban of a series of books due to factual inaccuracies about Cuba was permissible under the 1st Amendment.[58] The court determined the removal standard was motivated by "educational suitability," not "political orthodoxy," which is allowable under *Pico*. Morris argues the court should use the substantial truth doctrine, typically used in libel cases, as a standard school boards would use to justify their removal of a book based on factual inaccuracies. Katherine Fiore of Villanova Law Review criticizes the Eleventh Circuit's decision as incorrect due to its sole focus on the "educational suitability" standard, ignoring a full judicial analysis on other factors that influenced the school

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[56] *Notes & Comments: Political Advocacy Groups: The Puppet Masters Behind Public School Boards' Banning of Books,* 73 DePaul L. Rev. 129, (Fall, 2023), *available at* https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:69XX-RDS1-JD86-N468-00000-00&context=1516831.

[57] 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.R. 363, 387 (2021) (discussing the proper grounds upon which to remove a challenged book).

[58] Shane Morris, *The First Amendment in School Libraries: Using Substantial Truth to Protect a Substantial Right*, 13 Drexel Law Review, 787, 790 (2021) (discussing the removal standard for book bans).

board's decision.[59] She generally argues for courts interpreting *Pico* to prohibit book removal decisions if plaintiffs demonstrate there were improper factors, which means courts must defer to improper removal factors if educational suitability was not the sole reason. Deference to improper factors over the defendant's argument of educational unsuitability in its removal decision requires heavy emphasis on the validity of fact-findings. Morris on the other hand advocates for a strengthening of *Pico*'s standard by also applying the substantial truth doctrine in content-based restriction cases.

Borrowing from the literature's creative use of doctrines, I take a multi-faceted approach in analyzing the unconstitutionality of HB 1467 using the vagueness and overbreadth doctrines. I apply strict scrutiny to content-based restrictions as is typically done in First Amendment jurisprudence. Finally, I tie in standards of the *Pico* holding, particularly on educational suitability, vulgarity, and political orthodoxy. The current limitation I note is the possibility for *Pico* to aid in both sides of book removals due to unresolved intersections of the aforementioned standards, which compels the Court to clarify.

IV. SECTION FOUR: APPLICATION TO HB 1467

A. Strict Scrutiny of Content-Based Restrictions

By including a public review process with passage recitations of challenged books in addition to mandating every book in a public school to be reviewed by a media specialist, HB 1467 inherently relies on the book's content to determine whether it should be removed. This constitutes a content-based regulation, which undergoes strict scrutiny—does the law have a "compelling government interest" with "narrowly tailored" means to achieve that purpose? The challenge of determining "compelling government interest," as legal scholars have noted, is that the Supreme Court avoids offering general guidelines over what separates "compelling" from "important" under intermediate scrutiny and "legitimate" under the rational basis

[59] Katherine Fiore, *Note: ACLU v. Miami-Dade County School Board: Reading Pico Imprecisely, Writing Undue Restrictions on Public School Library Books, and Adding to the Collection of Students' First Amendment Right Violations,* 56 Vill. L. Rev. 97, (2011), *available at* https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:53P7-C3D0-00CT-V0KF-00000-00&context=1516831.

test.[60] Of course, the government, through the local school board, has some interest in regulation of public school library books to facilitate proper intellectual and social development of budding citizens. Government also has an interest in consulting parents in the education of their children. But this interest cannot be extended so broadly as to include the interest of *parents'* and *other community members'* regulation of books in the school domain. Government's overarching, essential role in educational curation under the Tenth Amendment is distinct from its duty to include parental input. For example, a parent may very well object to their minor child having access to a school book depicting same-sex romance on religious grounds. This parent has several options for recourse: requesting the librarian or teacher to send an opt-out form notifying them of such content being presented to their child, pulling their child out of public school to be homeschooled or educated in a private institution more suitable for their beliefs, and of course, privately speaking with their child on the subject. But this single parent's objection does not include them in the government's interest in regulating public school books.

The court could *assume* compelling government interest to avoid answering what is "compelling." In that scenario, HB 1467 must then be narrowly tailored to achieve its purpose of regulating what reading materials students are provided with in school. For this to be met, the government must explore less restrictive means of accomplishing their purpose. Under HB 1467, community members have input over the materials selection process in schools via the power to *remove* what is deemed to be unsuitable. Community members are empowered to raise challenges and participate in a mandated public review process for every challenged book, resulting in categorical removals from a school's curriculum for instruction or from a school library where students voluntarily choose materials to consume. This is an especially harsh impact on the domain of the school library—one parent's successful challenge of a book, perhaps because it does not suit their political or social tastes, but has valid literary merit based on its status quo inclusion in a school library, results in the complete removal of such material for all students to enjoy freely in the entire school. There are alternative means that should be explored, such as implementing permission slips for concerned parents who want to regulate what their children read in the school library. Some districts

[60] Robert T. Miller, *What Is a Compelling Governmental Interest?*, 21, Journal of Markets & Morality 71, 73-74 (2018) (discussing defining a compelling governmental interest). The author cites *Burwell v. Hobby Lobby* (2014) as an example of where SCOTUS avoids deciding if a particular governmental interest is compelling by *assuming* compelling interest and then determining the government's means are not narrowly tailored to fail the strict scrutiny test.

already have these measures in place, yet go above and beyond in restricting the books for all children in the district in complete disregard for nuance.[61] The 'explicitness' of challenged materials often boils down to necessary descriptions of sexual topics, such as discovering sexuality as a young adult or uncomfortable depictions of sexual assault in literature themed around the prevalence of gendered violence, especially in minority communities. Challenged books of this nature are widely considered of literary merit, having won prestigious literary awards and circulated to students because of its educational value,[62] something brushed over in the removal decisions. Government should not be applying such sweeping restrictions, in violation of the narrowly tailored criteria of strict scrutiny, to remedy these perceived issues.

B. Vagueness and Overbreadth Doctrines with Pico *Standards*

In addition to strict scrutiny of content-based regulations, HB 1467's unconstitutionality can be analyzed through two related First Amendment doctrines: vagueness and overbreadth. The vagueness doctrine examines whether a law has precise enough standards for the courts and enforcement agencies to enforce it and for subject parties to understand how to comply.[63] If "the threat of sanctions may deter ... almost as potently as the actual application of sanctions,"[64] then a law is unconstitutionally vague. HB 1467 violates this because its ill-defined, unacceptable learning materials confuse teachers and librarians about what is allowed. To avoid being subject to a third-degree felony, some teachers and librarians err on the 'safe' side of preliminary restrictions, removing their classroom library books until a licensed media specialist

[61] Escambia County already has an "opt out" form for parents to fill if they don't want their children to read a certain book. Yet, it is one of the leading counties in Florida in book objections and removals. *See* Reshma Kirpalani and Hannah Natanson, *The lives upended by Florida's school book wars*, Wash. Post, Dec. 21, 2023.

[62] In the 2022-23 school year, these books were removed from several Florida school districts: Pulitzer Prize winner *Beloved* by Toni Morrison, PEN/Hemingway Award winner *Homegoing* by Yaa Gyasi, Nebula Award winner *Flowers for Algernon* by Daniel Keyes, and numerous acclaimed young adult novels that won American Library Association's Best Fiction for Young Adults, such as *Looking for Alaska* by John Green and *The Absolutely True Diary of a Part-Time Indian* by Sherman Alexie. See Florida Department of Education, 2022-2023 School District Reporting Pursuant to Section 1006.28(2), Florida Statutes, https://www.fldoe.org/core/fileparse.php/5574/urlt/2223ObjectionList.pdf.

[63] *See* U.S. Const. Amend. 5, § 8.

[64] *NAACP v. Button*, 371 U.S. 415, 433 (1963).

reviews it.[65] Others only apply the review process to new selections. In the 2022-23 school year, schools in only 21 of Florida's 67 counties removed books, with the highest concentration in Clay County.[66] The restriction of protected speech in some regions while leaving others unscathed reflects the patchwork implementation of the poorly defined statute.

The Florida Department of Education released a "Library Media and Instructional Materials Training" manual in an attempt to guide school librarians on the law's implementation. It writes that instructional materials cannot "contain any matter *reflecting unfairly* [emphasis added] upon persons because of their race, color, creed, national origin, ancestry, gender, religion, disability, socioeconomic status, or occupation."[67] The phrase "reflecting unfairly" is vague, subjective, and alarming to civic-minded Americans as it essentially reads that any history that reflects poorly on white America cannot be taught. Teachers and librarians familiar with the governor's strongly publicized stance on American historical education understand this to be a nationalist teaching of civics. Does the teaching of the Civil War's basis in the slavery debate "reflect unfairly" upon those with Confederate ancestors? Does that then exclude the mention of slavery as a main cause of the war? This has the potential of systematically excluding non-white historical perspectives that are by nature, an unsavory reflection of some white historical actors. Teaching only the pretty parts of history is incomplete, inaccurate, and a disservice to the children who will grow up in a society that necessitates an understanding of the nation's history to carry on democratically. A color-blind, exclusionary teaching philosophy is not compelling for developing students' social, political, and moral character, which is the government

[65] Under HB 1467, "Each book made available to students through a school district library media center or included in a recommended or assigned school or grade-level reading list must be selected by a school district employee who holds a valid educational media specialist certificate, regardless of whether the book is purchased, donated, or otherwise made available to students." One teacher reports she cannot teach any book outside the district curriculum without express permission. In Escambia County, some students returned to a school library with bookshelves covered in black paper, unable to check out any existing books until the media specialist, as defined in Florida Statutes Section 1012.01(2)(c), could review their collection. Some schools interpreted HB 1467 to extend to classroom libraries, leading to teachers restricting access to classroom libraries pending media specialist review. *See* Reshma Kirpalani and Hannah Natanson, *The lives upended by Florida's school book wars*, Wash. Post, Dec. 21, 2023.

[66] *See* Reporting by NBC Miami. Gabi Rodriguez, Roughly 300 books were removed from school libraries in Florida last year. Here's the full list, NBC Miami, Sep. 17, 2023.

[67] Florida Department of Education, Library Media and Instructional Materials Training, https://www.fldoe.org/core/fileparse.php/20562/urlt/8-6.pdf (last visited Mar. 23, 2024).

interest purportedly at stake. The underlying political intent to re-write history in such a partisan way,[68] additionally runs afoul of the political orthodoxy test in *Pico*.

Overbreadth analysis is often used in tandem with vagueness, as it looks at whether the regulation reaches beyond its constitutional allowance of suppressing unprotected speech into protected speech. In free speech, the overbreadth doctrine permits facial invalidation of a law when it "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'"[69] The Supreme Court in *Virginia v. Hicks* (2003) affirmed the finding in *Broadrick v. Oklahoma* (1973): if a substantial amount of protected free speech is chilled, the court must stop all enforcement of the law "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." That is, the law is facially unconstitutional unless partial invalidation can adequately narrow the scope back into restriction of only unprotected speech. Overbreadth "presupposes that there is *some* legitimate sweep," or in other words, some government purpose.[70] If no such purpose is found, the overbreadth doctrine does not apply—the challenge does not need to go further. But assuming that the regulation of books and curricular materials passes, the overbreadth doctrine offers an additional angle to explain HB 1467's unconstitutionality.

The result of HB 1467's mandate of book removal hearings being public in tandem with other "Year of the Parent" legislation empowering parents to raise challenges has resulted in numerous instances[71] of removed books that should be constitutionally protected. These include *Red, White, and Royal Blue* by Casey McQuiston, a young adult novel about a fictional First Son of the United States falling in love with a British prince, *The Handmaid's Tale* by Margaret Atwood, a precautionary novel about a totalitarian world where women are forced into sexual servitude, *The Bluest Eye* by Toni Morrison, a grueling coming-of-age novel of a black

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[68] *See* article by the New York Times reporting on alleged political intent. Sarah Mervosh, *Florida's New Black History Standards Have Drawn Backlash. Who Wrote Them?*, N.Y. Times, Jul. 28, 2023.

[69] Virginia v. Hicks, 539 U.S. 113, 118–19 (2003) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

[70] *See Pernell v. Florida Board of Governors*, No. 1-139 (N.D. Fla. Nov. 17, 2022) (order granting preliminary injunction).

[71] Referring to the full list of objections and removals of books from 2022-2023 in Florida. Florida Department of Education, 2022-2023 School District Reporting Pursuant to Section 1006.28(2), Florida Statutes, https://www.fldoe.org/core/fileparse.php/5574/urlt/2223ObjectionList.pdf (last visited Mar. 23. 2024).

girl who suffers childhood sexual abuse, struggling to find beauty in herself, and even a children's book, *And Tango Makes Three* by Justin Richardson, which portrays two male penguins from the Central Park Zoo raising a family. Besides inserting public comment into the review process and, consequently, unnecessary public pressure, the HB 1467 mandate that a licensed media specialist must first review all books present in a school has resulted in a substantial amount of protected speech being suppressed.[72] This level of decentralization is an overreach of the Tenth Amendment's education localization.

HB 1467's training guidelines acknowledge there is no statutory definition of pornography but outline its prohibition with the Merriam-Webster definition: "the depiction of erotic behavior (as in pictures or writing) intended to cause sexual excitement."[73] Proponents of HB 1467 and similar legislation believe teachers and librarians curate sexually exciting materials for school-aged children to access. They point to books for a young adult audience, such as coming-of-age novels, which often include depictions of sexual acts and discuss sex as a natural part of growing up. Their primary purpose is educational: to encourage self-discovery, not to be sexually exciting in the way television, pornography, and other sexually explicit content visual media are. In academic research examining the potential negative effects of sexually explicit material (SEM) exposure on adolescents, researchers operationalize SEM as internet pornography.[74] Books containing some sexual content are not systematically studied for their effect on adolescents, because it is precisely understood that it exists in a separate realm from pornography—literature.

Sexual explicitness is not necessarily gratuitous. This is something acknowledged in the training materials, as it includes the caveat that sexually explicit material must additionally be "harmful to minors" to constitute a violation. But at the same time, the considerations section for what is "suited to student needs and

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[72] A substitute teacher recounts the difficult task of the 52 media specialists in his district reviewing 1.6 million titles, which left bookshelves empty for weeks. Dorey Scheimer, et. al., *First person: The book bans leaving Florida school bookshelves empty.* WBUR, Mar. 3, 2023.

[73] The state's Library Media and Instructional Materials Training stipulates that library materials and reading lists must be free of such defined "pornography." Florida Department of Education, Library Media and Instructional Materials Training, https://www.fldoe.org/core/fileparse.php/20562/urlt/8-6.pdf.

[74] A review of longitudinal studies on SEM's effect on adolescents: Goran Koletić, *Longitudinal associations between the use of sexually explicit material and adolescents' attitudes and behaviors: A narrative review of studies*, 57, Journal of Adolescence, 119-133 (2017) (discussing SEM's effect on adolescents).

appropriate for age and grade level" states to "err on the side of caution" in making these choices.[75] This leaves librarians, teachers, and school boards to restrict allowable speech out of an abundance of caution to avoid retribution from Republican Party-aligned groups like Moms for Liberty.[76] Moms for Liberty originated in Florida, reading out-of-context passages in school board meetings to push for book removals, but has increased its national presence with conspiratorial statements like calling teachers "groomers" and has since been classified as an extremist organization by the Southern Poverty Law Center.[77] Public educators, after years of being trusted to exercise their professional discretion in curating materials for their students, are now suffocated by HB 1467 training materials' vague language over what is allowable and the ire of conservative groups. The infiltration of partisanship into typically apolitical book review processes also violates *Pico*'s prohibition of political orthodoxy, showing several avenues of unconstitutionality.

C. Anticipated Counterarguments

Proponents of HB 1467 may argue that book removal legislation is not a specific political maneuver riding off culture war rhetoric but a rightful way to combat "pornographic and inappropriate materials that have been snuck into our classrooms and libraries to sexualize our students."[78] I argue instead that this legislation is based solely on moral posturing and fear-mongering—children simply are not being exposed to pornographic materials in school. Child pornography is categorically unprotected under the First Amendment. Pornography in schools is prohibited under Florida statute, and it is a false equivalence to put sexually explicit educational and literary material in the same category as internet pornography. There also already exists extensive protections and processes to ensure parental input when it is sensible to do

[75]Koletić, *supra* note 74, at 11.

[76] Governor DeSantis appointed the Moms of Liberty co-founder to the Florida Commission on Ethics. *See* AP News, *Florida Gov. Ron DeSantis appoints Moms for Liberty co-founder to state Commission on Ethics*, AP News, Sep. 6, 2023. At the 2023 Moms for Liberty conference, Republican presidential candidates made appearances to court favor: Ali Swenson and Jill Colvin, *Trump and DeSantis court Moms for Liberty in a sign of the group's rising influence over the GOP*, AP News, Jun. 29, 2023.

[77] Southern Poverty Law Center, a civil rights group founded to litigate segregation cases in the Deep South, in their assessment of Moms of Liberty as an extremist group: The Southern Poverty Law Center, Moms for Liberty, SPLC, https://www.splcenter.org/fighting-hate/extremist-files/group/moms-liberty

[78] This comes from Ron DeSantis' webpage. Governor Ron DeSantis Debunks Book Ban Hoax, The Office of Governor Ron DeSantis, Mar. 8, 2023, https://www.flgov.com/2023/03/08/governor-ron-desantis-debunks-book-ban-hoax/.

so, such as the use of permission slips for sex education in middle school.[79] In press releases and journalistic support for HB 1467, no statistics are cited to show a trend of current wrongdoing, merely asserting that woke indoctrination and sexualization of children in schools is pervasive. HB 1467 empowers conservative interest groups[80] to raise objections in public review hearings with talking points astray from established conventions of educational and literary merit. It permits an extreme few[81] community members to overwhelm school board meetings, typically uneventful proceedings, and create vitriolic environments threatening the normal function of school boards.[82] The applicability of *Pico*'s political orthodoxy standard could not be clearer when a statute's legislative intent and effect, even if neutrally worded, is laced with a partisan agenda.

To legally justify this, I anticipate that the state would rely on the "educational suitability" and "vulgarity" standards of *Pico* to prove that the state does have a compelling government interest in protecting students from developmentally inappropriate content. Essentially, the state would argue that the removed books are justified because they are overly sexual and inappropriate for students of a certain age range to read, therefore warranting the appropriate means of state intervention, complete removal from public school libraries or classroom libraries.

But as mentioned earlier, vulgarity can clash with educational suitability because vulgar material *can* be educationally suitable. For example, *The Bluest Eye* by Toni Morrison is one of the most frequently challenged books nationwide,[83] and has been removed in several Florida school districts. It does contain sexually explicit

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[79] Fla. Stat. § 1002.20(3)(d). See Florida 1002.20 generally for individual parental input in their children's education.

[80] USA Today reported on one example of this, specifically the group Moms for Liberty. Will Carless, et. al., *What's behind the national surge in book bans? A low-tech website tied to Moms for Liberty,* USA Today, Oct. 5, 2023.

[81] Of 1,000+ national school book challenges reviewed by the *Post*, 60% of filings originated from only 6% of challengers—11 people. Hannah Natanson, *The Post reviewed 1,000 school book challenges. Here's what we found.,* Wash. Post, Dec. 23, 2023.

[82] AP News report on how school board meetings run afoul regarding the teaching of racial topics and school mask mandates, with largely volunteer school board members resigning over the political vitriol directed at them. Carolyn Thompson, *Hostile school board meetings have members calling it quits*, AP News, Aug. 29, 2021. *See also* Reporting by PBS Newshour discusses an instance of activity by right-wing group Moms for Liberty. Ali Swenson, *Far-right group Moms for Liberty poised to clash with teachers unions over school board races nationwide*, PBS Newshour, Jul. 2, 2023.

[83] As reported by Marshall University in their list of books banned elsewhere in the United States. Ron Titus, *Banned Books 2023*, Marshall University, Aug. 22, 2023, https://www.marshall.edu/library/bannedbooks/the-bluest-eye/.

material—it depicts the sexual assault of a young girl at the hands of her stepfather. At face value, this sounds inappropriate, and it *is* for lower grade levels, which is why this is only taught in upper classes in high school. However, the state confuses the *depiction* of sexual explicitness as implicit *endorsement* of those acts. The Bluest Eye is frequently taught in AP English courses for its educational value. It is well recognized for its literary merit by the literary world—Morrison is a recipient of the Nobel Prize in Literature. The discomfort brought by reading this novel is precisely one of the aspects it seeks to show— that the intersection of harsh gender and race oppression in the 20th-century Deep South is an uncomfortable reality.

Younger readers do not happen upon this book, with library sectioning and teacher/librarian recommendations in place. Young readers will go to the appropriate book section for their reading level. If they wander astray, they are redirected by librarians. In classroom libraries, teachers give recommendation lists based on reading levels and only stock the range of material appropriate for their students. It is a flagrant violation of Pico's educationally suitability standard, should that be the primary controlling test, to categorically remove books such as *The Bluest Eye*. Out-of-context passages of a book and considerations of individual taste should not be the basis of removal, as is being done in public removal meetings. Considering the book as a whole with consultation of well-established conventions of educational/literary merit should be the prioritized reasoning—the educational suitability standard in *Pico*. The case of vulgarity intersecting with educationally suitable books highlights how *Pico* could potentially be applied on both sides. Hence, the pervasive vulgarity aspect of *Pico* is a significant loophole in free speech protection.

D. The Current Legal Landscape and a Path Forward

The Elementary School Rule and Training Rule, which serve as administrative guidelines for HB 1467, are already being challenged in court, but the lawsuit does not seek to invalidate the statute.[84] However, merely revising the administrative guidelines is an insufficient remedy for the infringement of students' free speech. Letting the statute stand invites the proliferation of similar legislation, which is exactly what has occurred. The District Court of Northern Florida, in an ongoing suit challenging the HB 1467-adjacent HB 1557, the Parental Rights in Education Act (2022) in Escambia

[84] Florida Education Association release on administrative challenges of Florida HB1467 guidelines: Teachers, Librarians, Parents Challenge Censorship Agenda (Mar. 17, 2023), https://feaweb.org/release/teachers-librarians-parents-challenge-censorship-agenda/

County, Florida, recently found ideological intent in book removals to be a plausible violation of the First Amendment and rejected a motion to dismiss by the state.[85] The judge noted that the applicable legal standard for adjudicating First Amendment violations in school libraries is "not entirely clear" but noted the common standards of appropriate removal reasons in these cases to be "legitimate pedagogical concerns including things like pornographic or sexual content, vulgar or offensive language, gross factual inaccuracies, and educational unsuitability for certain grade levels."[86] These standards are partly from *Pico* but also partly from later lower court cases like *ACLU v. Miami-Dade* (2009). As content-based restrictions in schools continue to be litigated in an atmosphere of unclear standards, it is apparent that one of these cases must advance to the highest court to revisit *Pico*.

CONCLUSION

HB 1467 is merely one piece of facially neutral legislation that impedes students' constitutionally protected free speech rights: the right to receive information. Using the *Pico* standards, strict scrutiny of content-based restrictions, and the vagueness and overbreadth doctrines to analyze, HB 1467 is unconstitutional. The law doesn't exist in a vacuum—the implication of letting related, more brazenly restrictive legislation stand even if HB 1467 is struck down eventually is equally flawed. The common theme of these waves of legislation is placing undue restrictions on what students can learn and read in schools through bureaucratic inefficiency. It prescribes a wave of paternalistic, partisan-fueled standards limiting LGBTQ and racial minority stories in particular. This endangers education's purpose of preparing burgeoning students to participate in a democratic marketplace of ideas if what students can access is already suppressed in a preparatory environment—school. Additional partisan-fueled legislation empowering parents to bring moral panic to schools has no necessity based on existing state and federal statutes. It only creates mistrust in public educators, exhausts district resources to comply with review processes, and, most significantly, chills students' right to receive constitutionally protected speech.

Pico, the controlling case, does not offer answers for when pervasively vulgar materials are the same as educationally suitable ones. This is the core unresolved question, giving book challengers a demonstrable constitutional loophole for removal

[85] *See* PEN America v. Escambia County School Board, Order on Motion to Dismiss (Doc. 25, filed Jan. 12, 2024).
[86] *Id.* at 7.

decisions. HB 1467 decentralizes the power of deciding allowable school books so much that arbitrary community members with political aims can suppress the protected speech of entire schools and entire districts. Stronger judicial protection must be enacted to stop this from continuing. The Supreme Court clearly must revisit this difficult constitutional question, protecting students' First Amendment rights in the school and classroom library domains.