

## **BANS AND BIAS: THE FIRST AMENDMENT AND LGBTQ+ BOOKS**

By: Alexi Terris, Staff Editor, Vol. 31<sup>1</sup>

In recent years, public school libraries throughout the country have become targets of organized and unprecedented efforts to remove books with LGBTQ+ themes.<sup>2</sup> Conservative parents, school administration, political groups, and state officials label the books as obscene, pornographic, or overly sexual.<sup>3</sup> While some challengers take a targeted approach by objecting to specific books, such as *Gender Queer* by Maia Kobabe,<sup>4</sup> an alarming trend has emerged: pushing for the blanket removal of any books containing LGBTQ+ content.<sup>5</sup> The censorship trend over the past three years has led PEN America to document instances of book bans.<sup>6</sup> For example, the 2022-2023 school year report revealed that, among 2,532 book bans affecting 5,049 schools nationwide, 41% of the targeted books included LGBTQ+ characters or themes.<sup>7</sup> In comparison, the 2023-2024 school year reached new heights, seeing 10,046 instances of book bans, and 39%

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<sup>2</sup> See Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES, (June 22, 2023), <https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html> (“It’s a pretty startling phenomenon here in the United States to see . . . efforts to press criminal charges against school librarians.”) (internal quotation marks omitted); Jonathan Friedman & Nadine F. Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AMERICA, (Sept. 19, 2022), <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools> (“[T]he efforts to target books containing LGBTQ+ characters or themes are frequently drawing on long-standing, denigrating stereotypes that suggest LGBTQ+ content is inherently sexual or pornographic.”).

<sup>3</sup> Neal Broverman, “*Filth*,” “*Obscene*”: *GOP Attacks Books About LGBTQ+ Kids, Racism*, THE ADVOCATE, (Feb. 1, 2022), <https://www.advocate.com/exclusives/2022/2/01/filth-obscene-gop-attacks-books-about-lgbtq-kids-racism>.

<sup>4</sup> See Maia Kobabe, *Schools are banning my book. But queer kids need queer stories*, THE WASHINGTON POST, (Oct. 29, 2021), <https://www.washingtonpost.com/opinions/2021/10/29/schools-are-banning-my-book-queer-kids-need-queer-stories/> (Kobabe explains, “Queer youth are often forced to look outside their own homes, and outside the education system, to find information on who they are. Removing or restricting queer books in libraries and schools is like cutting a lifeline for queer youth, who might not yet even know what terms to ask Google to find out more about their own identities, bodies and health.”).

<sup>5</sup> Andrew Perry, *Pico, Lgbtq+ Book Bans, and the Battle for Students' First Amendment Rights*, 32 TUL. J.L. & SEXUALITY 197, 198 (2023).

<sup>6</sup> Kasey Meehan et al., *Banned in the USA: Beyond the Shelves*, PEN AMERICA, (Nov. 1, 2024), <https://pen.org/report/beyond-the-shelves/#heading-0>.

<sup>7</sup> Friedman & Johnson, *supra* note 2.

of the 4,000 titles pulled from shelves included LGBTQ+ content.<sup>8</sup> This article examines how the landmark case *Island Trees Union Free Sch. Dist. No. 26 v. Pico*<sup>9</sup> influences the recent surge in school library book bans and the concerning implications of labeling LGBTQ+ themed books as obscene to circumvent the First Amendment.<sup>10</sup>

The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”<sup>11</sup> The Freedom of Speech and Freedom of the Press clauses work together to provide individuals with a constitutional right against government censorship of information and suppression of ideas.<sup>12</sup> While school officials have broad discretion to make content-based decisions for their libraries,<sup>13</sup> the First Amendment limits that discretion to ensure it is not exercised narrowly in favor of certain partisan or political viewpoints.<sup>14</sup> The district court examines the motive behind a school board’s actions to determine whether the book removal violated students’ First Amendment rights since schools cannot remove books purely because the school does not like the content of the book’s message.<sup>15</sup> Therefore, a school board exceeds the scope of its discretion when its primary reason for a book’s removal was an attempt to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”<sup>16</sup>

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<sup>8</sup> Meehan, *supra* note 6.

<sup>9</sup> 457 U.S. 853 (1982).

<sup>10</sup> *See id.* at 866 (“[W]e think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library.”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (explaining the Court has historically focused “not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.”); Harris & Alter, *supra* note 2 (“The governor of South Carolina asked the state’s superintendent of education and its law enforcement division to investigate the presence of ‘obscene and pornographic’ materials in its public schools, offering ‘Gender Queer’ as an example.”).

<sup>11</sup> U.S. CONST. amend. I.

<sup>12</sup> *Pico*, 457 U.S. at 867.

<sup>13</sup> *See, e.g., id.* at 864; *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

<sup>14</sup> *Pico*, 457 U.S. at 864.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 864-65 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

In 1975, members from the Board of Education of a local New York school district attended a conference hosted by an organization of politically conservative parents concerned about the State’s education legislation.<sup>17</sup> The Board obtained a list of books at the conference deemed “objectionable” and inappropriate reading material for students.<sup>18</sup> A year later, the District’s superintendent met with the high school and junior high school principals after the Board learned that nine books from the list were available in the high school library<sup>19</sup> and one book in the junior high school library.<sup>20</sup> During the meeting, the Board gave an “unofficial” order to remove the ten books from the libraries and give them to its members to read.<sup>21</sup> After the Board’s directive became publicized, it issued a press release justifying its decision by calling the books “anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy” and asserting a duty to “protect the children in our schools from this moral danger.”<sup>22</sup>

Shortly after the Board ordered the nine books’ removal from the District’s libraries and curriculum, a group of students filed a lawsuit against the Board, alleging it decided to remove the books because certain passages “offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value.”<sup>23</sup> The district court granted summary judgment in favor of the Board, rejecting the argument that the Board’s actions infringed on the students’ First Amendment rights while emphasizing the historical precedent of granting

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<sup>17</sup> *Pico*, 457 U.S. at 856.

<sup>18</sup> *Id.*

<sup>19</sup> *Pico v. Island Trees Union Free Sch. Dist.*, 474 F. Supp. 387, 389 n.2 (E.D.N.Y. 1979) (the nine books included: (1) *Slaughterhouse Five* by Kurt Vonnegut, Jr., (2) *The Naked Ape* by Desmond Morris, (3) *Down These Mean Streets* by Piri Thomas, (4) *Best Short Stories by Negro Writers* edited by Langston Hughes, (5) *Go Ask Alice* by Anonymous, (6) *Laughing Boy* by Oliver LaFarge, (7) *Black Boy* by Richard Wright, (8) *A Hero Aint Nothing But A Sandwich* by Alice Childress, and (9) *Soul On Ice* by Eldridge Cleaver).

<sup>20</sup> *Pico*, 457 U.S. at 857.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (quoting *Pico*, 474 F. Supp. at 390).

<sup>23</sup> *Pico*, 457 U.S. at 858–59.

schools broad discretion in making content-based decisions to execute its educational policy.<sup>24</sup> After a three-judge panel wrote separate opinions reversing and remanding the case, the Supreme Court granted certiorari to determine whether the Board's actions were intended to suppress ideas or justified by the intent to remove books considered vulgar or sexually explicit.<sup>25</sup>

The Court disagreed with the district court, finding that removing books from school library shelves directly implicates students' First Amendment rights.<sup>26</sup> For example, Justice Brennan viewed school libraries as spaces where students can access various ideas and freely choose the topics they want to explore, learn, or question.<sup>27</sup> While the plurality reaffirmed that school boards retain vast power to make content-based decisions, it explicitly stated that discretion is not absolute.<sup>28</sup> The First Amendment prohibits schools from exercising their power to enforce educational policies in a manner that endorses particular partisan or political viewpoints.<sup>29</sup>

The Court distinguished permissible and impermissible reasons for banning books.<sup>30</sup> On the one hand, the Court deemed the Board's actions constitutional if the driving force behind the book removal concerned valid educational reasons.<sup>31</sup> On the other hand, the Court considered the Board's actions impermissible if a general opposition to the ideas expressed in the books motivated the removal.<sup>32</sup> In that case, the Board's desire to silence beliefs conflicting with its own would

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<sup>24</sup> *Pico*, 457 U.S. at 859–60.

<sup>25</sup> *Id.* at 860–61.

<sup>26</sup> *Id.* at 866.

<sup>27</sup> *Id.* at 868. *See also* Right to Read Def. Comm. v. School Comm., 454 F.Supp. 703, 715 (Mass. 1978) (“a student can . . . explore the unknown, discover areas of interest and thought not covered by the prescribed curriculum . . . .Th[e] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom.”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.”).

<sup>28</sup> *Pico*, 457 U.S. at 860–61. *See* *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979) (recognizing the significant role public schools play in “inculcating fundamental values necessary to the maintenance of a democratic political system” by preparing students to participate as citizens).

<sup>29</sup> *Pico*, 457 U.S. at 854.

<sup>30</sup> *Id.* at 871.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

violate students' First Amendment rights.<sup>33</sup> Ultimately, the Court found a genuine dispute of material fact regarding the Board's motive for removing the books.<sup>34</sup>

As the landmark Supreme Court case on removing books from school libraries, the plurality decision in *Pico* lacks its precedential value because it failed to define a clear standard for future cases.<sup>35</sup> Consequently, state legislators and school boards exploit this authoritative gap to claim books with LGBTQ+ themes are "obscene," and thus, removing them from school libraries does not infringe on students' First Amendment rights.<sup>36</sup> Accordingly, reading *Pico* today reflects the need for a stronger legal framework to resolve the lingering issues impacting the nationwide rise of book bans in recent years.<sup>37</sup>

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<sup>33</sup> *Pico*, 457 U.S. at 871.

<sup>34</sup> *Id.* at 875.

<sup>35</sup> Nathalie Conklin, *From the Library of Alexandria to the Local School Board: The Modern American Perpetuation of the Legacy of Banned Books*, 48 THURGOOD MARSHALL L. REV. 51, 76, 85 (2023).

<sup>36</sup> See Friedman & Johnson, *supra* note 2. "The legal test for obscenity requires a holistic evaluation of the material, setting a bar that is highly unlikely to be met by materials selected for inclusion in a school library." *Id.* "[T]he term 'obscenity' is being stretched in unrecognizable ways because the concept itself is widely accepted as grounds for limiting access to content." *Id.* See also Harris & Alter, *supra* note 2 ("In Oklahoma, a bill was introduced in the State Senate that would prohibit public school libraries from keeping books on hand that focus on sexual activity, sexual identity or gender identity.").

<sup>37</sup> See Porter Anderson, *Battling Literary Censorship: New Court Actions*, PUBLISHING PERSPECTIVES, (June 2, 2023), <https://publishingperspectives.com/2023/06/censorship-new-court-action-in-the-united-states>. "The argument that certain books need to be removed from schools to 'protect children' is now being used to limit access for adults, as well, which infringes on everyone's rights. Efforts to remove these books not only diminish the richness of our cultural tapestry but also send a message that the experiences of LGBTQ+ and other marginalized communities are unworthy of representation." *Id.* (internal quotation marks omitted). See also Harris & Alter, *supra* note 2 ("By attacking these books, by attacking the authors, by attacking the subject matter, what they are doing is removing the possibility for conversation . . . [they] are laying the groundwork for increasing bullying, disrespect, violence and attacks.") (internal quotation marks omitted).