

4-1-2009

***Pico* Takes A Visit To Cuba: Will Pretext Become Precedent In The Eleventh Circuit?**

Joelle C. Achtman

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Law Commons](#)

Recommended Citation

Joelle C. Achtman, *Pico Takes A Visit To Cuba: Will Pretext Become Precedent In The Eleventh Circuit?*, 63 U. Miami L. Rev. 943 (2009)
Available at: <https://repository.law.miami.edu/umlr/vol63/iss3/11>

This Note is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

***Pico* Takes a Visit to Cuba: Will Pretext Become Precedent in the Eleventh Circuit?†**

JOELLE C. ACHTMAN†

I.	INTRODUCTION	944
II.	THE RISE OF PUBLIC SCHOOL LIBRARY LITIGATION: PRE- <i>PICO</i> BOOK REMOVAL CHALLENGES	947
	A. <i>Background</i>	947
	B. <i>Pre-Pico Removals Based on Obscene and Offensive Content</i>	949
	1. <i>PRESIDENT’S COUNCIL, DISTRICT 25 v. COMMUNITY SCHOOL BOARD NO. 25</i>	950
	2. <i>ZYKAN v. WARSAW COMMUNITY SCHOOL CORPORATION</i>	950
	3. <i>BICKNELL v. VERGENNES UNION HIGH SCHOOL BOARD OF DIRECTORS</i> ..	951
	4. <i>SHECK v. BAILEYVILLE SCHOOL COMMITTEE</i>	952
	C. <i>Pre-Pico Removals Tainted by Pretextual Ulterior Motives</i>	952
	1. <i>MINARCINI v. STRONGSVILLE CITY SCHOOL DISTRICT</i>	953
	2. <i>RIGHT TO READ DEFENSE COMMITTEE OF CHELSEA v. SCHOOL COMMITTEE OF THE CITY OF CHELSEA</i>	953
	3. <i>SALVAIL v. NASHUA BOARD OF EDUCATION</i>	956
III.	THE SUPREME COURT’S REVIEW OF PUBLIC SCHOOL LIBRARY BOOK BANNING: <i>PICO</i> AND ITS PROGENY	958
	A. <i>Factual Background</i>	958
	B. <i>Holding and Opinions</i>	960
	C. <i>Post-Pico Removal Cases</i>	963
	1. <i>CAMPBELL v. ST. TAMMANY PARISH SCHOOL BOARD</i>	963
	2. <i>CASE v. UNIFIED SCHOOL DISTRICT NO. 233</i>	965
	3. <i>COUNTS v. CEDARVILLE SCHOOL DISTRICT</i>	967
IV.	<i>¡VAMOS A CUBA! PICO</i> IN THE ELEVENTH CIRCUIT	968
	A. <i>Factual Background</i>	968
	B. <i>Holding</i>	973
	1. FIRST AMENDMENT ALLEGATIONS AND SCHOOL BOARD RESPONSE	973
	2. EXAMINATION OF PRIOR CASE LAW	974
	3. FACTUAL APPLICATION AND OUTCOME	978
	C. <i>Should Pico Apply?</i>	981
	D. <i>How Should the Eleventh Circuit Rule in Vamos a Cuba?</i>	984

† The purpose of this Note is to analyze and contextualize the 2006 controversial *¡Vamos a Cuba!* book removal case and subsequent litigation in *American Civil Liberties Union of Florida, Inc. v. Miami-Dade School Board*. At the time of its writing, the appealed case was still pending before the Eleventh Circuit. Just prior to the Note going to print, the Eleventh Circuit handed down its decision overturning the District Court’s ruling. Please note that sections I-V are printed as originally written. Section VI was added just prior to publication to address the Eleventh Circuit’s ruling, critique its application of relevant case law, and discuss implications of its decision.

† J.D. Candidate 2010, University of Miami School of Law; B.A. 2007, University of Richmond. I would like to thank my amazing family and friends for their eternal patience, advice, love, and support, especially Carmine and Danny Achtman and Mark Simms. Thanks also to JoNel Newman for early guidance and feedback.

V. CONCLUSION	988
VI. POSTSCRIPT	991

All of us can think of a book . . . that we hope none of our children or any other children have taken off the shelf. But if I have the right to remove that book from the shelf—that work I abhor—then you also have exactly the same right and so does everyone else. And then we have no books left on the shelf for any of us.

—Katherine Paterson, American author of children’s books (1932—)¹

I. INTRODUCTION

Though hardly a new battle,² the tug-of-war between public-school-board decision-making and the First Amendment has received increasing legal attention over the past thirty years, particularly in the context of school board authority and discretion in the selection and removal of books.³ Although courts across the country faced no dearth of controversy pertaining to the appropriate level of control in public-school libraries,⁴ the Supreme Court declined to address the scope of book

1. Goodreads.com, Quotes by Katherine Paterson, http://www.goodreads.com/author/quotes/1949.Katherine_Paterson (last visited May 13, 2009).

2. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that wearing armbands on school premises as a form of expression is constitutionally protected by the First Amendment, and school officials may neither prohibit nor punish such activity absent a demonstration of “substantial disruption of or material interference with school activities.”); *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (finding Arkansas’s anti-evolution statutes contrary to First Amendment freedom of religion protections); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that compulsion of flag salute and pledge by school officials violates First Amendment rights to freedom of speech and religion).

3. See, e.g., *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (plurality opinion) (“[L]ocal school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books”); *Chiras v. Miller*, 432 F.3d 606, 618 (5th Cir. 2005) (holding that because selection of textbooks for public school curriculum is a form of government speech, school board officials are afforded broad discretion in their decisions and the First Amendment creates no right to be asserted by textbook authors); *Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25*, 457 F.2d 289, 294 (2d Cir. 1972) (upholding a school board’s removal of a public school library book on the grounds that authority for the selection of books statutorily lies with the school board and review by the court for such selection or removal is thus inappropriate); *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County Sch. Bd. (Vamos a Cuba)*, 439 F. Supp. 2d 1242, 1288 (S.D. Fla. 2006) (ordering defendant school board to return removed library book series after determining that such removal was likely based on board members’ distaste of the ideas contained in one book belonging to the series); Kelsey Menzel, Comment, Board of Education v. Pico: *School Library Book Removal and the First Amendment*, 14 ST. MARY’S L.J. 1063, 1064 (1983) (“Before the 1960’s, freedom of religion was the only first amendment concern to receive significant judicial consideration within the public school environment.”).

4. See *infra* Part II.

removals by school officials⁵ until the landmark case of *Board of Education, Island Trees Union Free School District, No. 26 v. Pico*.⁶ After identifying public-school libraries as having a “unique role,”⁷ and thus deserving greater First Amendment protection, the Court held that “local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books.”⁸ Though handing down a decision with loaded language and powerful implications, the failure of the Court to establish a majority opinion has left lower courts questioning *Pico*’s precedential value.⁹

While *Pico*’s splintered opinion leaves the door open for trial and appellate courts to essentially model their own interpretations of the constitutional limits on school board authority to remove library books,¹⁰ the plurality’s analysis has so far been upheld and applied in subsequent book-banning cases.¹¹ In 2006, however, the District Court for the Southern District of Florida encountered its own book removal controversy in *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board*¹² (*Vamos a Cuba*). The polemical issue in South Florida began when the daughter of a former Cuban political prisoner brought home *¡Vamos a Cuba!*, a book in an elementary travel series that she had checked out from her public-school library.¹³ Finding the book offensive, her father lodged a formal complaint with the Miami-Dade School Board requesting the book’s permanent removal from the “total school environment” because, “as a former political prisoner from Cuba,” he found its material was “untruthful” and “portray[ed] a life in

5. See, e.g., *Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25*, 409 U.S. 998 (1972) (denying certiorari for appeal concerning school board’s removal of a public school library book).

6. 457 U.S. 853 (1982).

7. *Id.* at 869.

8. *Id.* at 872.

9. See, e.g., *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995) (“Even though the constitutional analysis in the *Pico* plurality opinion does not constitute binding precedent, it may properly serve as guidance”); *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 875 (D. Kan. 1995) (“The plurality decision in *Pico* is not binding precedent.”).

10. See, e.g., *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” (alteration in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))).

11. See *Campbell*, 64 F.3d at 191 (applying *Pico* and remanding for development of factual record to determine whether removal was unconstitutionally motivated); *Case*, 908 F. Supp. at 875 (“[T]he court concludes that it should follow the *Pico* decision in analyzing the Olathe School District’s removal of *Annie on My Mind* from the District’s libraries.”). As previously noted, just prior to publication of this Note, the Eleventh Circuit ruled on the *Vamos a Cuba* case, supposedly applying a *Pico* analysis, but reaching a conclusion contrary to that reached in *Campbell and Case*.

12. 439 F. Supp. 2d 1242 (S.D. Fla. 2006), *vacated*, 557 F.3d 1177 (11th Cir. 2009).

13. *Id.* at 1247.

Cuba that does not exist.”¹⁴ After engaging in behavior deviating from normal school procedure for handling contested library books, the school board disregarded the recommendations of its two designated committees and superintendent, and permanently banned not only that particular book from that particular library, but also banned all books in the series from all of the libraries in the district.¹⁵ Although board members alleged the books were removed based on inaccuracy, the decision smacked of pretextual justification used to cover up the fact that the board disagreed with perceived political implications of the text.¹⁶

Following the growing trend in post-*Pico* litigation, the District Court for the Southern District of Florida applied the *Pico* plurality’s reasoning and ordered the defendant school board to replace the library books it had removed, finding that the motivations compelling such action had failed to pass constitutional muster.¹⁷ The unhappy school board subsequently appealed, and the still-pending case marks the Eleventh Circuit’s first chance to “directly address and apply”¹⁸ *Pico*’s framework. With the highly political and hotly contested¹⁹ *Vamos a Cuba* case sitting on its docket, the Eleventh Circuit finds itself at an important juncture in First Amendment jurisprudence pertaining to school board control in the realm of public-school libraries. The court’s determination in this case will either continue the trend of solidifying *Pico* as precedent, or it will carve out a pretextual loophole for Eleventh Circuit school boards to remove books at will without critical examination of the role of masked motivations.

This Note seeks to review the constitutional background and prior relevant case law that presently shapes the field of First Amendment rights in public-school libraries and argues that (1) *Pico* is the appropriate standard to be applied to the *Vamos a Cuba* case, (2) the District Court for the Southern District of Florida correctly employed the *Pico* analysis and reached the only just conclusion, and (3) the Eleventh Circuit should affirm this conclusion on appeal. Part II of this Note will (1) present the constitutional framework governing children’s rights in public schools and the extent to which those rights may be truncated by school boards, (2) discuss the unique dual role of the public-school

14. *Id.*

15. *Id.* at 1257.

16. *Id.* at 1251–60.

17. *Id.* at 1294.

18. *Id.* at 1270.

19. See, e.g., Rob Jordan, *Commie Book Ban: Vamos a Cuba Has Become an Unlikely Political Lightning Rod*, MIAMI NEW TIMES, Aug. 10, 2006, available at <http://www.miaminewtimes.com/2006-08-10/news/commie-book-ban>; Carol J. Williams, *Schools Told To Reinstate Banned Cuba Book*, L.A. TIMES, July 25, 2006, at A12.

library and how this dual role affects the constitutional treatment and protections of decisions pertaining to rights within the library environment, and (3) culminate with a detailed account of the rise in library book removal litigation prior to the Supreme Court decision in *Pico* and demonstrate the importance of factual background in the outcome of book banning cases. Part III of this Note will canvass the Supreme Court's landmark book removal decision, *Board of Education, Island Trees Union Free School District No. 26 v. Pico* and its progeny. Part IV will discuss the presently pending *Vamos a Cuba* case, beginning with a presentation of the facts and holding and concluding with an analysis answering the questions of whether *Pico* is the appropriate standard to be applied, whether the district court reached the proper conclusion, and how the Eleventh Circuit should rule.

II. THE RISE OF PUBLIC SCHOOL LIBRARY LITIGATION: PRE-*PICO* BOOK REMOVAL CHALLENGES

A. *Background*

The Supreme Court has long recognized public education's central role in society and the "importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests,"²⁰ as well as the duty of such schools to "inculcat[e] fundamental values necessary to the maintenance of a democratic political system."²¹ Thus, the Court has affirmed that "by and large, public education in our Nation is committed to the control of state and local authorities,"²² and that courts will neither question nor interfere with this control, nor resolve any "conflicts which arise in the daily operation of school systems."²³ Notwithstanding this deference, however, the Supreme Court also recognizes that children retain constitutional rights and "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,"²⁴ where students do not "shed their [First Amendment] constitutional rights . . . at the schoolhouse gate."²⁵ School officials are, nevertheless, generally afforded broad discretion over curricular decisions²⁶ and may,

20. *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

21. *Id.* at 77.

22. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *see also* *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils . . .").

23. *Epperson*, 393 U.S. at 104.

24. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

25. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

26. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) ("Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports."); *Chiras v. Miller*,

to an extent, place legitimate limitations on matters that “students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”²⁷ While subject to limitation within the school context, children’s constitutional rights may not be completely eviscerated and decisions “directly and sharply implicat[ing] basic constitutional values”²⁸ will be rendered impermissible. The public-school library, however, creates somewhat of a constitutional conundrum due to the fact that it has historically been considered a separate sphere with respect to the scope of curricular and educational influence.²⁹ Examining the origin of public-school libraries and the struggle to develop a unique identity separate from that of their corresponding schools, Robert J. Peltz quotes guidance given by Melvil Dewey—former state librarian of New York—to the American Library Association and the National Edu-

432 F.3d 606, 618 (5th Cir. 2005) (holding that because selection of textbooks for public school curriculum is a form of government speech, school board officials are afforded broad discretion in their decisions and the First Amendment creates no right to be asserted by textbook authors); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1029, 1031–32 (9th Cir. 1998) (upholding school district’s assignment of and refusal to remove particular books from its curriculum on the grounds that plaintiff’s request “significantly interfere[s] with the District’s discretion to determine the composition of its curriculum,” and rejecting “the notion that putting books on trial in our courts is the proper way to determine the appropriateness of their use in the classroom” because “[s]uch judgments are ordinarily best left to school boards and educational officials charged with educating young people and determining which education materials are appropriate for which students, and under what circumstances.”); *Virgil v. Sch. Bd. of Columbia County*, 862 F.2d 1517, 1525 (11th Cir. 1989) (upholding school board’s decision to remove a portion of a humanities textbook from the curriculum based on vulgarity and sexual explicitness).

27. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). *Hazelwood* concerned the removal of two pages from a high school newspaper prior to its publication. School officials removed the two pages containing articles regarding students’ experiences with pregnancy and parental divorce on the grounds that such content was inappropriate for younger students at the school and violated the privacy of parents mentioned in the divorce article. *Id.* at 262–63. Upon finding that the newspaper was produced by journalism classes as part of the educational curriculum, Justice White fashioned the “imprimatur of the school” test and, upon its application, concluded that the school board had not overstepped its First Amendment boundaries in removing the two articles. *Id.* at 271–76. If the imprimatur of the school can reasonably be perceived, such materials “may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting,” and “[e]ducators are entitled to exercise greater control . . . to assure . . . that the views of the individual speaker are not erroneously attributed to the school.” *Id.* at 271. Under the “imprimatur of the school” test, the exercise of broad discretionary censorship by school boards is consistent with First Amendment protections, so long as the actions taken are “reasonably related to legitimate pedagogical concerns.” *Id.* at 273. For other cases permitting school board censorship based on the “imprimatur” test, see, for example, *Bannon v. School District of Palm Beach County*, 387 F.3d 1208, 1220 (11th Cir. 2004), applying *Hazelwood* and upholding a school district’s compelled removal of religious icons from murals painted for a school beautification project, and *Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1016–17 (9th Cir. 2000), applying *Hazelwood* and upholding a school district’s refusal to allow a teacher to post gay-and-lesbian-awareness-month materials on school bulletin boards.

28. *Epperson*, 393 U.S. at 105.

29. See Richard J. Peltz, *Pieces of Pico: Saving Intellectual Freedom in the Public School Library*, 2005 BYU EDUC. & L.J. 103, 108–27 (2005).

cation Association for the proper concept of the public school library in the late nineteenth century, emphasizing that “the school library would remain primarily a library and not . . . be subsumed, and thus subverted”³⁰ by the school’s curriculum and educational duties:

We can not do too much in bringing libraries and schools into the closest harmony and co-operation, but they should be co-workers each keeping its proper field and giving the co-operation and respect due to its associate, and not drifting into the traditional relation of the lion and the lamb that lie down together, with the lamb inside the lion.³¹

Given this “dual identity”³² of curricular–but-non-curricular, confusion over the scope of control hardly surprised courts hearing constitutional claims regarding the exercise of censorship by school officials. Predictably, when confronted with the 1972 to 1982 influx of book removal litigation, trial and appellate courts struggled with the appropriate balance between traditional state authority over public-school decision-making and First Amendment rights in the spherically separate school-library setting. However, while judges across the country seemed to contradict one another each time a new case was adjudicated, their rulings were in fact more closely aligned than they appeared: Removals based on obscene or offensive conduct were generally upheld, while removals with suspicious justifications were generally overturned. More importantly, each decision weighed heavily on the factual background accompanying the constitutional claims, making every holding somewhat unpredictable, as new factual scenarios could easily massage the prior ruling into a new standard unique to the instant case. Given this flexible and fact-dependent nature of the book removal cases and corresponding holdings, the remainder of Part II describes pre-*Pico* removal cases in detail, as such details in this context are what make cases similar or dissimilar, and thus make prior holdings more or less applicable.

B. *Pre-Pico Removals Based on Obscene and Offensive Content*

When presented with factual patterns suggesting removal of materials because of perceived obscene or offensive content, four courts applied a highly deferential analysis of book banning, refusing to intervene in ordinary school matters. Of these four, only one court contravened the school board’s decision, finding that the factual background suggested that the board acted unreasonably.

30. *Id.* at 115.

31. *Id.* (internal quotation marks and citation omitted).

32. *Id.* at 121.

1. *PRESIDENTS COUNCIL, DISTRICT 25 v. COMMUNITY SCHOOL BOARD NO. 25*

The Second Circuit commenced the decade-long wave of library litigation in 1972 when it reviewed *Presidents Council, District 25 v. Community School Board No. 25*.³³ In *Presidents Council*, a group of students and parents, along with others, brought a suit contesting the school board's removal of a particular book from all junior high school libraries in the district because of the graphically detailed "acts of criminal violence, sex, normal and perverse, as well as episodes of drug shooting."³⁴ After the suit was filed, the board held a public meeting and subsequently passed a resolution permitting the book to remain at those libraries that had already acquired it, but making it available only on direct loan to permission-granting parents.³⁵ Litigation continued, however, and the circuit court ruled in favor of school officials, finding that since by statute New York had "determined that the responsibility for the selection of materials in the public school libraries . . . is to be vested in the Community School Board,"³⁶ it was inappropriate for the Court to review "either the wisdom or the efficacy of the[ir] determinations."³⁷ Furthermore, it concluded, the plaintiffs suffered "no impingement upon any basic constitutional value,"³⁸ and "the administration of any library . . . involves a constant process of selection and winnowing."³⁹ Although the Second Circuit's ruling was appealed by the student-plaintiffs, the Supreme Court denied certiorari, declining to address the issues of students' public-school library First Amendment rights.⁴⁰

2. *ZYKAN v. WARSAW COMMUNITY SCHOOL CORPORATION*

In 1980, high school students in the Seventh Circuit brought a First

33. 457 F.2d 289 (2d Cir. 1972).

34. *Id.* at 290-91.

35. *Id.* at 290.

36. *Id.* at 291.

37. *Id.*

38. *Id.*

39. *Id.* at 293.

40. *Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25*, 409 U.S. 998, 998 (1972). Justice Douglas dissented, seemingly perturbed over the extent of school board authority allocated in determining the rights of students. Supporting a grant of certiorari, Douglas argued:

The First Amendment is a preferred right and is of great importance in the schools. . . . What else can the School Board now decide it does not like? How else will its sensibilities be offended? Are we sending children to school to be educated by the norms of the School Board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems? . . . Because the issues raised here are crucial to our national life, I would hear argument in this case.

Id. at 999-1000 (Douglas, J., dissenting).

Amendment suit alleging that the Warsaw School Board's decision to permanently remove a library book "stemmed from their social, political and moral tastes and not from educational criteria."⁴¹ Echoing the Second Circuit's rationale in *Presidents Council*, the Seventh Circuit also found that students lacked a viable constitutional claim in *Zykan v. Warsaw Community School Corporation*.⁴² Carefully denoting that the ruling was "not to say that an administrator may remove a book from the library as part of a purge of all material offensive to a single, exclusive perception of the way of the world,"⁴³ the Seventh Circuit determined that "no such allegations appear[ed] in plaintiffs' pleading."⁴⁴ Although the plaintiffs contended that the board's decision was based on "particular words in the books [that] offended their social, political, and moral tastes,"⁴⁵ the court found that this did not bolster their cause of action because "it is in general permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views."⁴⁶ The court further instructed that "nothing in the Constitution permits the courts to interfere with local educational discretion until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute."⁴⁷

3. *BICKNELL V. VERGENNES UNION HIGH SCHOOL BOARD OF DIRECTORS*

That same year, the Second Circuit again condoned the removal of library materials on the basis of obscene or vulgar content in *Bicknell v. Vergennes Union High School Board of Directors*.⁴⁸ After the school board removed two books on account of the "vulgarity and indecency of language used,"⁴⁹ students brought a First Amendment suit, claiming that their rights had been violated "primarily because the Board's action was motivated solely by the 'personal tastes and values' of the Board members."⁵⁰ Once establishing that there was "no suggestion that the books were complained about or removed because of their ideas, nor that the Board members acted because of political motivation,"⁵¹ the

41. *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980).

42. *Id.* at 1304.

43. *Id.* at 1308.

44. *Id.*

45. *Id.* at 1302.

46. *Id.* at 1305.

47. *Id.* at 1306.

48. 638 F.2d 438, 441 (2d Cir. 1980).

49. *Id.* at 440.

50. *Id.* at 441.

51. *Id.*

court ruled in favor of the defendant school board, asserting that "so long as the materials removed were permissibly considered to be vulgar or indecent, it is not cause for legal complaint that the board members applied their own standards of taste about vulgarity."⁵²

4. *SHECK V. BAILEYVILLE SCHOOL COMMITTEE*

Finally, just months before *Pico* was argued before the Supreme Court, a district court in the First Circuit upheld the general ideology of *Presidents*, *Zykan*, and *Bicknell*. This time, however, a decision was made in favor of the plaintiff students.⁵³ While clearly recognizing that "the state may have a greater responsibility to protect youth from obscenity,"⁵⁴ and that the board's removal of the book "could be viewed as not directly and sharply implicating a basic constitutional right,"⁵⁵ the district court was greatly troubled by the fact that the board had banned the entire book without reading it, particularly when "the social value of its content is roundly praised and stands unchallenged by the state."⁵⁶ After concluding that the book had been banned, not for its obscenity, but rather for "arbitrary official standards of vocabular taste,"⁵⁷ the court instructed that all courts should remain on "first-amendment alert in book-banning cases,"⁵⁸ when the materials in question have been "merely deemed objectionable on vocabular grounds."⁵⁹ Granting the students in *Sheck* a preliminary injunction against the removal of the contested books, the court held that "a less vigilant standard would leave the care of the flock to the fox that is only after their feathers."⁶⁰

C. *Pre-Pico Removals Tainted by Pretextual Ulterior Motives*

Although, as evidenced above, decisions based on legitimate concerns of vulgarity or obscenity invoked substantial deference to school board discretion, courts across the country were less willing to extend this deference to decisions couched in factually suspicious justifications. Hence, courts held that public school boards' prerogative in abrogating children's constitutional rights was not absolute and would not be upheld where facts sufficiently demonstrated that library book removal

52. *Id.*

53. *Sheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679, 693 (D. Me. 1982).

54. *Id.* at 687.

55. *Id.* at 684.

56. *Id.* at 687.

57. *Id.*

58. *Id.* at 688.

59. *Id.* at 687.

60. *Id.* at 688.

decisions were tainted by pretextual ulterior motives of the board members.

1. *MINARCINI V. STRONGSVILLE CITY SCHOOL DISTRICT*

In *Minarcini v. Strongsville City School District*, the Sixth Circuit reviewed a case concerning the decision of a school board to not only remove books from its high-school library, but also prohibit class discussion of the materials and their use for supplemental reading.⁶¹ Ruling in favor of the suit-bringing students, the Sixth Circuit rooted its holding in two major concepts. First, opined the court, when a library is established in a public school, "it is an important privilege created by the state for the benefit of the students in the school."⁶² Having instituted this privilege, the state may not then withdraw the privilege via "succeeding school boards whose members might desire to 'winnow' the library books for the content of which occasioned their displeasure or disapproval."⁶³ Second, the court found that should the board wish to "winnow" library books, its removal will only be sustained if the proffered reasons for its actions are "neutral in First Amendment terms."⁶⁴ Unable to find any First Amendment neutral reasoning for the board's removal decision in this case, the Sixth Circuit determined that the Strongsville "School Board removed the books because it found them objectionable in content and because it felt that it had the power, unfettered by the First Amendment, to censor the school library for subject matter which the Board members found distasteful."⁶⁵ This, the court held, was unconstitutional because by establishing the public-school library in the first place, the school board "created such a privilege for the benefit of its students," and could not "place conditions on the use of the library which were solely related to the social or political tastes of the school board members."⁶⁶

2. *RIGHT TO READ DEFENSE COMMITTEE OF CHELSEA V. SCHOOL COMMITTEE*

While the *Minarcini* court insinuated ulterior motives for the school board's action, a district court in the First Circuit encountered a more factually complex case than had previously been adjudicated.⁶⁷ In *Right to Read Defense Committee of Chelsea v. School Committee*, the parent

61. 541 F.2d 577, 579 (6th Cir. 1976).

62. *Id.* at 581.

63. *Id.*

64. *Id.* at 582.

65. *Id.*

66. *Id.*

67. *Right to Read Def. Comm. of Chelsea v. Sch. Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

of a high-school student called the school board committee chairman complaining of offensive language in an anthology his daughter had checked out from the library.⁶⁸ The chairman, Quigley, assured the parent that the issue would be dealt with and after reading only the specific poem mentioned in the complaint, concluded that the entire anthology should be removed from the high-school library.⁶⁹ Speaking with no one but the complaining parent prior to his determination, Quigley scheduled an emergency committee meeting and penned a newspaper editorial that same night which publicized the instigating event and was circulated the following day.⁷⁰ Quigley did not distribute copies of the book to committee members until they arrived at the meeting and only allowed the three male members to review the copies, as he did not think female members should be exposed to such offensive language and "assumed that at least two of the women . . . would accept his characterization of the poem."⁷¹

At the meeting, Superintendent McGee was asked to compile and present a report to the committee regarding the "filthy" and "vile" text.⁷² McGee agreed, though warned Quigley and the rest of the committee that "it was inappropriate to handle this complaint in an open school meeting, and that Quigley was 'setting in motion a chain of events that might lead to censorship'"⁷³—an opinion Quigley mocked and chastised in another editorial published the following day.⁷⁴ After reading the entire book, McGee imparted his findings at another committee meeting two days later, informing the members that aside from the poem complained of and a single objectionable word in one other work, there was "no obscene terminology" and that, in his opinion, the book was "sound and ha[d] educational value with the exception of the passage objected to and one other word in one other poem."⁷⁵ McGee stated that the book would be temporarily removed to the principal's office, pending a decision as to whether the entire anthology should be banned or whether only the offensive pages would be extracted.⁷⁶ In yet another special meeting following McGee's recommendations, Quigley, along with a couple of other members, determined that, even though they had not read the book, the "low down dirty rotten filth, garbage, fit only for the

68. *Id.* at 706.

69. *Id.*

70. *Id.* at 706-07.

71. *Id.* at 707.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

sewer”⁷⁷ should be permanently banned, despite suggested alternatives—such as requiring parental permission for students under the age of eighteen.⁷⁸ At the same meeting, one committee member suggested that the board look into “setting up a system of reviewing and acting upon complaints from parents or others on any books,”⁷⁹ but this suggestion was defeated and Quigley’s motion to ban the book permanently was passed.⁸⁰ McGee, who had not been present at the meeting, informed the principal shortly thereafter that only the offensive pages were to be removed and the book returned to the library.⁸¹ The principal removed the pages, but contrary to McGee’s instruction, did not return the book to the library.⁸² Six days later, students filed a suit alleging First Amendment violations and requesting injunctive relief.⁸³ After consulting with its attorney, the school board held its last special meeting and adopted a resolution presented and prepared by the attorney indicating that the text was permanently removed from the library on the grounds that:

1) [T]he book dealt with “sex education,” not a school subject; 2) that [it] had a potentially unhealthy and counter-productive effect on some children; and 3) the Committee preferred that even sex education books in the library not contain words and phrases considered “filthy, shocking and obscene by a large section of the community.”⁸⁴

Examining the case, the district court began its reasoning for granting the plaintiffs injunctive relief with the widespread dogma that “local authorities are, and must continue to be, the principal policy makers in the public schools,”⁸⁵ and that “it is the tension between these necessary administrative powers and the First Amendment rights of those within the school system that underlies the conflict in this case.”⁸⁶ The court retraced the holding of *Minarcini* and similarly opined that a school board does not have *carte blanche* to remove books at its will.⁸⁷ After reviewing the record, the court found it to leave “no doubt” that the committee banned the book “because it considered the theme and language . . . to be offensive.”⁸⁸ Citing the Supreme Court’s decision in *Mt.*

77. *Id.* at 708.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 709.

84. *Id.*

85. *Id.* at 710–11.

86. *Id.* at 711.

87. *Id.* at 711, 714.

88. *Id.* at 711.

Healthy City Board of Education v. Doyle,⁸⁹ the judge stipulated that "the reasons underlying the actions of school officials may determine their constitutionality,"⁹⁰ and, in the instant case, it appeared that the reasons underlying the school board's actions were impermissible and the committee's adopted resolution legitimizing its banning of the book was "a self-serving document that rewrote history in an effort to meet the issues of this litigation. In simple terms, it was a pretext."⁹¹ Furthermore, the court asserted, "if this work may be removed by a committee hostile to its language and theme, then the precedent is set for removal of any other work. The prospect of successive school committees 'sanitizing' the school library of views divergent from their own is alarming."⁹² Finding the board's action to have infringed the plaintiffs' First Amendment protected rights, the book ban was enjoined.⁹³

3. SALVAIL V. NASHUA BOARD OF EDUCATION

Shortly after *Right to Read* was decided, a district court in the First Circuit reviewed a book removal case, only this time the cause of action alleged the wrongful removal of a magazine collection and subsequent cancellation of the school library's subscription.⁹⁴ In 1977, the State Department of Education in New Hampshire circulated guidelines to its public schools instructing how to appropriately deal with any challenged library materials.⁹⁵ Although such guidelines were concededly advisory, they were "designed to be applicable to challenges to the material made by the members of any school board," and provided detailed instructions

89. 429 U.S. 274, 283-84 (1977). In *Mt. Healthy*, an untenured teacher brought suit against his former employer alleging that his contract was not renewed because of a telephone call he made to a local radio station regarding a school memorandum. In addressing the teacher's alleged First Amendment infringement, the Court instructed that, despite the fact that "he could have been discharged for no reason whatsoever, and had no constitutional right to a hearing prior to the decision not to rehire him," *id.* at 283, his First Amendment claim was "not defeated by the fact that he did not have tenure," and "he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms," *id.* at 283-84. Reviewing the district and appellate court opinions, the Court found that the teacher had carried his burden in demonstrating that his conduct was both protected under the First Amendment and that it was a "substantial" or "motivating" factor in the Board's decision, but that "the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.* at 287. Determining that it was unable to ascertain what result the lower courts would have reached had they applied this standard, the Court vacated the judgment and remanded the case. *Id.*

90. *Right to Read*, 454 F. Supp. at 712.

91. *Id.*

92. *Id.* at 714.

93. *Id.* at 715.

94. *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1271 (D.N.H. 1979).

95. *Id.* at 1270.

for the formation of a special review committee and the procedures that the committee should follow in handling a complaint.⁹⁶ Over a period of several months, one Nashua Board of Education member, Mr. Thomaier, who “held strong religious and patriotic views as to the types of reading material that should be available to pupils in a senior high school,”⁹⁷ expressed increasing concern about a particular magazine that was available in the library upon request to high-school students.⁹⁸ At a board meeting in March of 1978, Thomaier presented a formal resolution to remove the magazine, attaching as evidence copies of only a few advertisements from one of the issues.⁹⁹ Several of the other board members suggested that the Department of Education guidelines for procedure be adhered to, but another member supporting Thomaier asserted that they “were not bound by these interim guidelines and that ‘in some cases they should act instantaneously.’”¹⁰⁰ Thomaier’s resolution was passed by a five-to-three vote and instructed the cancellation of the subscription and removal of all issues from the library.¹⁰¹ Plaintiffs subsequently filed suit alleging that the magazine was neither obscene nor patently offensive and that its removal constituted a First Amendment violation.¹⁰² At the onset of litigation, the board reviewed the removed publications and, after meeting again, voted to return two issues of the magazine to the library with the objectionable advertisements excised.¹⁰³ At this same meeting, the board also approved the Department of Education’s guidelines, “which, as worded, were clearly applicable to (any Nashua resident) and would therefore include any member of the Board.”¹⁰⁴

In analyzing the factual record, the district court found that “despite protestations” by the school board, it was “the ‘political content’ of MS magazine . . . that led to its arbitrary displacement,” and “such a basis for removal of the publication is constitutionally impermissible.”¹⁰⁵ The court likened the case to *Right to Read*, indicating that “here, as in *Right to Read* . . . the publication was banned by the Board without reading it, the female Board members were ‘sheltered’ from the alleged improper material,” and “the actions of the Board taken at their meeting . . . wherein all issues of MS were reviewed and two were returned to the

96. *Id.* at 1270–71.

97. *Id.* at 1271.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1272.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1274.

library shelves [were] pretextual and self-serving."¹⁰⁶ Granting the injunctive relief requested by the plaintiffs, the court ruled that the defendant school board "failed to demonstrate a substantial and legitimate government interest sufficient to warrant removal" of the magazine and that the board's action "contravene[d] the plaintiffs' First Amendment rights, and as such it [was] *plainly wrong*."¹⁰⁷

III. THE SUPREME COURT'S REVIEW OF PUBLIC-SCHOOL LIBRARY BOOK BANNING: *PICO* AND ITS PROGENY

Because the Supreme Court has reviewed only one case pertaining to the removal of extracurricular school library books and because the precedential implications of its plurality decision are subject to interpretation, the factual details and rationales supporting its various holdings are of extraordinary importance in its application to the *Vamos a Cuba* case. Likewise, the factual scenarios of the cases following *Pico* are also salient, as the facets of these suits suggest how factually similar litigation should be handled. As such, this part of the Note reviews in detail *Pico* and the relevant cases litigated following its decision.

A. *Factual Background*

In late 1975, members of the Board of Education of the Island Trees Union Free School District No. 26 attended a conference hosted by an organization of politically conservative parents troubled by the educational materials and legislation in the state of New York.¹⁰⁸ At this conference, a list of "objectionable" and "improper" books was distributed and, upon returning to Island Trees, the board members discovered that ten of the listed books were retained in the high school and junior high school libraries.¹⁰⁹ A few months later, the board gave an "unofficial direction" to the superintendent and principals of the junior high and high schools to remove the books from the libraries and deliver them to the offices of the board members so the texts could be read and reviewed.¹¹⁰ The superintendent attempted to remind the board that a policy designed to handle such issues was already in place and that the present decision should be "approached through this established channel But the board disregarded the superintendent's advice."¹¹¹ After the unofficial direction was carried out, the removals became publicized and

106. *Id.* at 1275.

107. *Id.* at 1275-76.

108. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 856 (1982).

109. *Id.* at 856-57.

110. *Id.* at 857.

111. *Id.* at 874-75.

the board justified its actions in a press release, declaring that the removed books were “‘anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy,’ and concluded that ‘[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers.’”¹¹² Shortly thereafter, the board formed a “Book Review Committee” to read the books and make recommendations about whether or not they should be returned to the library based on the books’ “‘educational suitability,’ ‘good taste,’ ‘relevance,’ and ‘appropriateness to age and grade level.’”¹¹³ Although the committee supplied the board with its recommendations, the board “substantially rejected the Committee’s report,” and permanently removed nine of the books from the library and from curricular use, giving “no reasons for rejecting the recommendations of the Committee that it had appointed.”¹¹⁴

In response to the board’s decision, students filed a suit alleging that their First Amendment rights had been violated and that board members had ordered the removal and banned curricular use of the materials “because particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value.”¹¹⁵ The district court granted summary judgment in favor of the school board, finding that it had “acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books . . . were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable”¹¹⁶ for students at the school. The court instructed that although the removal of the texts might “reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement on any first amendment right.”¹¹⁷ The Court of Appeals for the Second Circuit reversed the district court’s decision, finding the case to present more than mere inferences of violative action and, given the “Board’s erratic and free-wheeling behavior,”¹¹⁸ the plaintiff students were “improperly deprived of an opportunity to persuade the finder of fact that the proffered justifications were mere pretext for an intentional violation of plaintiffs’

112. *Id.* at 857 (alterations in original) (quoting *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979), *rev’d*, 638 F.2d 404 (2d Cir. 1980), *aff’d*, 457 U.S. 853).

113. *Id.*

114. *Id.* at 858.

115. *Id.* at 858–59.

116. *Pico*, 474 F. Supp. at 392.

117. *Id.* at 397.

118. *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26*, 638 F.2d 404, 416 (2d Cir. 1980).

rights.”¹¹⁹ The school board appealed and the Supreme Court granted certiorari.¹²⁰

B. *Holding and Opinions*

Writing for the plurality and joined by Justices Marshall and Stevens, Justice Brennan began his opinion by clarifying that the case “does not involve textbooks, or indeed any books that Island Trees students would be required to read On the contrary, the only books at issue in the case are *library* books, books that by their nature are optional rather than required reading.”¹²¹ Brennan further distinguished that no challenge was made to the authority afforded to school boards in library book acquisitions and that this case solely concerned the “*removal* from school libraries of books originally placed there by the school authorities, or without objection by them.”¹²² While fully agreeing that school boards “must be permitted ‘to establish and apply their curriculum in such a way as to transmit community values,’ and that ‘there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political,’”¹²³ the plurality stressed that such prerogative “must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.”¹²⁴ Brennan then laid the foundation for the plurality’s argument by identifying not only the First Amendment’s protection of free speech, but also its “inherent corollary”¹²⁵ of the right to receive information—a right of which students are beneficiaries and “may not be regarded as closed-circuit recipients of only that which the state chooses to communicate.”¹²⁶ Though conceding that both rights must be tapered in accordance with the “special characteristics of the school environment,”¹²⁷ the plurality contended that “the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students”¹²⁸ and, while the board members may have a valid claim “of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values,” their “reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of

119. *Id.* at 418.

120. *Pico*, 457 U.S. at 861.

121. *Id.* at 861–62.

122. *Id.* at 862.

123. *Id.* at 864 (quoting Petitioner’s Brief at 10, *Pico*, 457 U.S. 853 (No. 80-2043)).

124. *Id.*

125. *Id.* at 867.

126. *Id.* at 867–68 (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969)).

127. *Id.* at 868 (quoting *Tinker*, 393 U.S. at 506).

128. *Id.*

the classroom, into the school library and the regime of voluntary inquiry that there holds sway.”¹²⁹ In the special library setting, Brennan opined, the school board still retains “significant discretion,”¹³⁰ and though such discretion “may not be exercised in a narrowly partisan or political manner,”¹³¹ the board may permissibly remove books based on “educational suitability.”¹³² Thus, he determined, the issue of whether or not students’ First Amendment rights had been violated would be contingent upon:

[T]he motivation behind petitioners’ [the Board’s] actions. If petitioners *intended* by their removal decision to deny respondents [the students] access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners’ decisions, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned [by the Court] . . . [W]e hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”¹³³

Analyzing the factual record, the plurality found that although the board’s proffered reasons appeared to be legitimate on their face,¹³⁴ the fact that it neglected to employ “established, regular, and facially unbiased procedures for the review of controversial materials”¹³⁵ and instead, both engaged in “highly irregular and ad hoc” decision-making, rejecting the advice of its newly created committee without explanation, created a genuine issue of material fact as to the motivation behind the removals. As such, the grant of summary judgment to the school board was inappropriate, and the Second Circuit’s decision of reversal and remand was affirmed.¹³⁶

Concurring in part and concurring in the plurality’s judgment, Justice Blackmun wrote his own opinion on the basis that “the principle involved here is both narrower and more basic than the ‘right to receive information’ identified by the plurality,” and that the right in question is not “somehow associated with the peculiar nature of the school

129. *Id.* at 869.

130. *Id.* at 870.

131. *Id.*

132. *Id.* at 871.

133. *Id.* at 871–72 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

134. *Id.* at 873.

135. *Id.* at 874.

136. *Id.* at 875.

library.”¹³⁷ Instead, penned Blackmun, the issue in *Pico* was “how to make the delicate accommodation between the limited constitutional restriction that . . . is imposed by the First Amendment, and the necessarily broad state authority to regulate education.”¹³⁸ Agreeing with the plurality’s decision, Justice Blackman found the “proper balance” to be attained “by holding that school officials may not remove books for the *purpose* of restricting access to political ideas or social perspective discussed in them, when that action is motivated simply by the officials’ disapproval of the ideas involved.”¹³⁹

Justice White also concurred in the plurality’s judgment, but declared any analysis regarding First Amendment issues to be inappropriate, as the Court “should not decide constitutional questions until it is necessary to do so, or at least until there is better reason to address them than are [sic] evident here.”¹⁴⁰ Based on the “unresolved factual issue . . . [of] the reason or reasons underlying the school board’s removal of the books,” Justice White agreed with the appellate decision “on such a fact-bound issue,” and, finding summary judgment improper, concurred with the plurality in affirming the Second Circuit’s ruling.¹⁴¹

Justices Burger, Powell, Rehnquist, and O’Connor filed separate dissenting opinions.¹⁴² Justice Burger was primarily perturbed by the plurality’s employment of the right to receive information, arguing that “no such right . . . has previously been recognized,”¹⁴³ and that “no amount of ‘limiting’ language could rein in the sweeping ‘right’ the plurality would create.”¹⁴⁴ Emphasizing the fact that “local control of education involves democracy in a microcosm”¹⁴⁵ and that the authority of elected school board members does not go unchecked since they can be replaced by community voters, Burger criticized the plurality’s “political” standard by contending that “virtually all educational decisions necessarily involve ‘political’ determinations.”¹⁴⁶

Justice Powell, on the other hand, objected primarily to the abstract nature of the standard set forth by the plurality and the specter of school

137. *Id.* at 878 (Blackmun, J., concurring).

138. *Id.* at 879.

139. *Id.* at 879–80.

140. *Id.* at 884 (White, J., concurring).

141. *Id.* at 883.

142. *Id.* at 885 (Burger, J., dissenting); *id.* at 893 (Powell, J., dissenting); *id.* at 904 (Rehnquist, J., dissenting); *id.* at 921 (O’Connor, J., dissenting). While all four dissenting justices penned separate opinions, Justice Burger’s dissent was joined by Justices Powell, Rehnquist, and O’Connor. *Id.* at 885 (Burger, J., dissenting). Justice Rehnquist’s dissent was joined by Justices Burger and Powell. *Id.* at 904 (Rehnquist, J., dissenting).

143. *Id.* at 887 (Burger, J., dissenting).

144. *Id.* at 892.

145. *Id.* at 891.

146. *Id.* at 890.

board litigation flooding the courts on account of such a “standardless standard that affords no more than subjective guidance to school boards, their counsel, and to courts that now will be required to decide whether a particular decision was made in a ‘narrowly partisan or political manner.’”¹⁴⁷ Justice Rehnquist, echoing the sentiments expressed in the dissents of both Justices Burger and Powell, went further to say that although he could “cheerfully concede” the unconstitutionality of school board discretion exercised in a “narrowly partisan or political manner,” “in *this case*, the facts taken most favorably to the respondents [students] suggest that nothing of this sort happened.”¹⁴⁸ Supplementing Justice Burger’s observation, Justice Rehnquist also chastised Justice Brennan’s approval of book removals based on “educational suitability,” remarking that “such determinations are based as much on the content of the book as determinations that the book espouses pernicious political views.”¹⁴⁹ Finally, Justice O’Connor wrote a separate dissent, advocating that “it is not the function of the courts to make the decisions that have been properly relegated to the elected members of the school boards. It is the school board that must determine educational suitability, and it has done so in this case.”¹⁵⁰

C. *Post-Pico Removal Cases*

In the wake of *Pico*, articles and notes debated the impact and worth of the Supreme Court’s decision,¹⁵¹ but many could agree that the “one clear legacy of *Pico* will be more litigation over school library book removals.”¹⁵² Since *Pico*, three courts have addressed such cases, all utilizing a *Pico*-type analysis in reaching their decisions.

1. *CAMPBELL V. ST. TAMMANY PARISH SCHOOL BOARD*

In 1995, the Fifth Circuit reviewed the removal of a book called *Voodoo & Hoodoo* from all of the school libraries in the St. Tammany Parish.¹⁵³ After a formal complaint regarding the book was filed with the

147. *Id.* at 894–95 (Powell, J., dissenting).

148. *Id.* at 907 (Rehnquist, J., dissenting).

149. *Id.* at 917.

150. *Id.* at 921 (O’Connor, J., dissenting).

151. See generally, Menzel, *supra* note 3 (analyzing the opinions and principle set forth in *Pico*); David Schimmel, *The Limits on School Board Discretion: Board of Education v. Pico*, 6 WEST’S EDUC. L. REP. 285, 286 (1983) (discussing the “panorama of judicial perspectives” in *Pico*); Helen M. Quenemoen, Case Comment, Board of Education v. Pico: *The Supreme Court’s Answer to School Library Censorship*, 44 OHIO ST. L.J. 1103, 1104 (1983) (examining the *Pico* opinions “to determine what precisely was decided.”).

152. Quenemoen, *supra* note 151, at 1120.

153. *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 185 (5th Cir. 1995).

principal, a school-level committee was organized to review the issue.¹⁵⁴ The book, which discussed the development and evolution of African tribal religion and included traditional “spells,” was primarily charged with “heighten[ing] children’s infatuation with the supernatural and incit[ing] students to try the explicit ‘spells,’” which the complaining parents believed to be “potentially dangerous.”¹⁵⁵ The committee, finding the book to be “educationally suitable” and providing “supplemental information/explanation to a topic included in the approved 8th grade Social Studies curriculum,”¹⁵⁶ unanimously denied its removal and “recommended retaining *Voodoo & Hoodoo* in the school’s library, albeit on a specially-designated ‘reserve’ shelf available only to eighth-grade students who had obtained written permission from their parents to check out the Book.”¹⁵⁷ Pursuant to school board procedure, the decision was appealed to a parish-wide committee, who affirmed the first committee’s decision of retaining the book subject to limited access, with one person, a board member, dissenting on the grounds that the book “promotes extremely unhealthy practices that are not conducive to sound moral values.”¹⁵⁸ The parent again appealed to the school board who, led by the dissenting member of the appellate committee, voted for permanent removal of the text from all parish school libraries despite the fact that “many of the school board members had not even read the book.”¹⁵⁹ The board neither expressed any “opinion on the merits of the recommendations from the two committees” that had previously reviewed the complaint, nor “did the School Board state the reason for its removal action.”¹⁶⁰

After a review of the Supreme Court’s analysis in *Pico*, the court determined that “even though the constitutional analysis in the *Pico* plurality does not constitute binding precedent, it may properly serve as guidance in determining whether the School Board’s removal decision was based on unconstitutional motives.”¹⁶¹ Finding that “at this stage, we simply do not have a full picture of the reasons why the School Board members . . . voted to remove the Book,” the court deemed summary judgment inappropriate as the suspect nature of the board’s “failure to consider, much less adopt, the recommendation of the two previous committees . . . in apparent disregard of its own outlined proce-

154. *Id.* at 186.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 190.

160. *Id.* at 187.

161. *Id.* at 189.

dures,” created a genuine issue of material fact—that fact being “the true, decisive motivation behind the School Board’s decision.”¹⁶²

2. CASE V. UNIFIED SCHOOL DISTRICT NO. 233

A few months later, in *Case v. Unified School District No. 233*,¹⁶³ a district court in the Tenth Circuit granted injunctive relief to students bringing suit against a school board for the removal of two books with gay or lesbian story lines from the school’s library.¹⁶⁴ The two books, which had been donated by local gay rights organizations, stirred political controversy, prompting the assistant superintendent, Dr. Banikowski, to convene the school librarians for review of the accepted texts.¹⁶⁵ The librarians determined that one, *Annie on My Mind*—of which the library already happened to own several copies—contained literary merit and should be retained, while the other was “shallow and incomplete,” and should be removed.¹⁶⁶ Banikowski informed Superintendent Dr. Wimmer of the outcome and Wimmer relayed the information to two school board members. Although no formal complaints had been received from parents, Wimmer expressed concern about the library’s donation procedures as well as the public unease surrounding the most recent donations and called another meeting with the librarians to “make a ‘final disposition’ of the book donation issue.”¹⁶⁷

Preceding this meeting, Wimmer created a set of “Book Donation Guidelines” without “‘seek[ing] input from anyone in the[ir] preparation of these guidelines,’ and unilaterally decided prior to this meeting that the District would not only refuse the books donated . . . but that existing copies of *Annie on My Mind* would be removed from the District’s libraries.”¹⁶⁸ At the meeting, Wimmer informed the librarians that “the District needed to take action because of community concerns regarding the issue” and that “based upon his experience in working with the Board members, Dr. Wimmer felt that a majority of the Board ‘would favor taking this book off the shelves.’”¹⁶⁹ At no point in the meeting was the literary merit, appropriateness, or educational suitability of the book discussed.¹⁷⁰ All copies of *Annie on My Mind* were subsequently removed.¹⁷¹

162. *Id.* at 190.

163. 908 F. Supp. 864 (D. Kan. 1995).

164. *Id.* at 877.

165. *Id.* at 867.

166. *Id.*

167. *Id.* at 868.

168. *Id.*

169. *Id.*

170. *Id.* at 869.

171. *Id.*

Students troubled by the book's removal voiced their dissatisfaction to the school board at a meeting shortly thereafter.¹⁷² Despite First Amendment warnings by its attorney, the school board, without discussing the literary merit or educational suitability of the text, voted to uphold Wimmer's decision based on its opinion that the book offered a "glorification of the gay lifestyle,"¹⁷³ "seemed to have one goal . . . [t]o say its okay to be gay"¹⁷⁴ when "it is not 'okay' to be gay, [b]ecause engaging in a gay lifestyle can lead to death, destruction, disease, emotional problems,"¹⁷⁵ and that homosexuality "obviously leads to a [sic] onslaught of physical destruction,"¹⁷⁶ "is a mental disorder, immoral, and contrary to the teachings of the Bible and the Christian church,"¹⁷⁷ "is sinful in the eyes of God,"¹⁷⁸ and did not align with "community moral standards" or "traditional family values."¹⁷⁹

As in *Campbell*, the court in *Case* also found that despite the fact that "the plurality decision in *Pico* is not binding precedent . . . the court concludes that it should follow the *Pico* decision in analyzing," the book removal in the instant case.¹⁸⁰ The district court pointed out that in *Campbell*, "the court also noted that the school board's failure to follow its own procedures raised suspicion that the motivation of the school board was unconstitutional,"¹⁸¹ and that *Case* was similarly situated in that the board not only "failed to follow its adopted procedures for the reconsideration of library materials," and "ignored its own guidelines and criteria," but also did not "await[] a formal complaint, nor appoint[] a committee to consider the removal."¹⁸² In light of such behavior, the court concluded that "there is 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,"¹⁸³ and the board's "highly irregular and erratic" actions in blatant "disregard of established policy and procedure" constituted "important evidence of their [the board members'] improper motivation,"¹⁸⁴ warranting the denial of summary judgment in favor of the

172. *Id.*

173. *Id.* at 870.

174. *Id.* (alteration in original).

175. *Id.* at 871.

176. *Id.* at 870 (alteration in original).

177. *Id.*

178. *Id.*

179. *Id.* at 871.

180. *Id.* at 875.

181. *Id.* (citing *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 190-91 (5th Cir. 1995)).

182. *Id.* at 872.

183. *Id.* at 875.

184. *Id.* at 876.

school district and the grant of injunctive relief in favor of the students.¹⁸⁵

3. *COUNTS V. CEDARVILLE SCHOOL DISTRICT*

Most recently, a district court in the Eight Circuit applied *Pico*, not to a book that was removed entirely from the library, but to one that was merely restricted and allowed to be read only by students with parental permission.¹⁸⁶ In *Counts v. Cedarville School District*, a parent and her school-board-member pastor filed a “Reconsideration Request Form,” calling for the removal of a particular book in the *Harry Potter* series from the school’s library.¹⁸⁷ Pursuant to policy and procedure, a library committee was formed and after reviewing the book, unanimously voted to retain it in library circulation without restriction.¹⁸⁸ The school librarian presented the committee’s recommendation to the school board, who subsequently voted three-to-two to restrict access not only to the book in the complaint, but to three other *Harry Potter* series books as well, despite the fact that only one member of the board had read only one of the four restricted books¹⁸⁹ on the basis that “the books might promote disobedience and disrespect for authority, and . . . the books deal with ‘witchcraft’ and the ‘occult.’”¹⁹⁰ Following this vote, the novels were removed from general circulation and available only with signed parental permission.¹⁹¹

The court assessed the proffered justifications set forth by the school board and found the first to be unreasonable based on its speculative nature, particularly in light of the fact that none of the board members promulgating the restriction had read all of the books they claimed “could create anarchy” or “lead kids into juvenile delinquency,”¹⁹² and their fears were based, not on current behavioral problems, but only on what students “might do later.”¹⁹³ The Court rejected the witchcraft argument as well, citing *Pico* and explaining that “regardless of the personal taste with which these individuals regard ‘witchcraft,’ it is not properly within their power and authority as members of the defendant’s school board to prevent the students at Cedarville from reading about it.”¹⁹⁴ Granting summary judgment in favor of the plaintiff student, the

185. *Id.* at 877.

186. *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 998 (W.D. Ark. 2003).

187. *Id.* at 1001.

188. *Id.*

189. *Id.*

190. *Id.* at 1002.

191. *Id.*

192. *Id.* at 1003.

193. *Id.* at 1004.

194. *Id.*

judge held that no genuine issue of material fact existed and “the conclusion is inevitable that defendant removed the books from its library shelves for reasons not authorized by the Constitution.”¹⁹⁵

IV. *¡VAMOS A CUBA! PICO* IN THE ELEVENTH CIRCUIT

A. *Factual Background*

In April of 2006, Mr. Amador, a parent and former political prisoner from Cuba, lodged a formal complaint with the Marjory Stoneman Douglas Elementary School concerning a book his daughter had checked out from the library, titled *¡Vamos a Cuba!*, and requesting its removal from the “total school environment” on the grounds that “as a former political prisoner from Cuba,” he found “the material to be untruthful. It portrays a life in Cuba that does not exist.”¹⁹⁶ The book listed in the complaint was one volume in a larger series of picture books entitled “A Visit To,” which aim to convey basic information about life in other countries to young readers between the ages of four and eight and had been acquired by school libraries in the district beginning in 2001.¹⁹⁷ The school board rule (“the Rule”) pertaining to library materials identified a list of fifteen criteria to be used in evaluating texts, such as “educational significance, appropriateness, and accuracy.”¹⁹⁸ The Rule also delineated specific procedures for handling library book complaints, which begins with an “initial, school level review of the complaint, followed by a district level review, and finally, a review before the School Board itself.”¹⁹⁹

In response to the complaint filed by Mr. Amador, a School Materials Review Committee (“SMRC”) was formed and in a seven to one vote, elected to retain the book in the library.²⁰⁰ At the SMRC’s meeting, all eight members found the book to be “educationally significant and developmentally appropriate,” “seven SMRC members found the book to meet the accuracy criteria,”²⁰¹ and six of the members described the book as “scrupulously apolitical, having no political slant, and no political implications.”²⁰² Before the decision had a chance to be appealed to a district level review, however, a member of the school board, Mr. Bolaños, “proposed that the School Board immediately

195. *Id.* at 1005.

196. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County Sch. Bd. (Vamos a Cuba)*, 439 F. Supp. 2d 1242, 1247 (S.D. Fla. 2006).

197. *Id.* at 1248–49.

198. *Id.*

199. *Id.*

200. *Id.* at 1250–51.

201. *Id.* at 1250.

202. *Id.* (internal quotation marks omitted).

remove ¡*Vamos a Cuba!* from the libraries without waiting for the administrative process concerning removal of the book to run its course.”²⁰³ Adding the item “PROTECTING OUR CHILDREN FROM THE HURTFUL & INSULTING DISTORTIONS OF THE BOOK ‘VAMOS A CUBA’ BY REMOVING THESE BOOKS FROM ALL OF OUR PUBLIC SCHOOL LIBRARIES,”²⁰⁴ to the following board meeting’s agenda, the instigating member presented his argument, detailing certain distortions he found in the text:²⁰⁵

- **Book’s distortion:** “The people of Cuba eat, work and study just like you,” page 5.
Reality: Nothing could be further from the truth. The people of Cuba survive without civil liberties and due process under the law . . . People are told where to work. They lose their job if they do not follow the dictates of the communist party. Children are indoctrinated and forced to chant Castro’s greatness in class.
- **Book’s distortion:** “White rice is the most common food in Cuba. Black beans are eaten. Arroz con Pollo is another favorite dish,” page 12.
Reality: Food is rationed; people stand in line for hours to ask for their measly ration only to be told they ran out. Children stop receiving their milk ration at the age of six.
- **Book’s distortion:** “The major celebration in Cuba is ‘Carnival.’ It is celebrated on July 26,” page 26.
Reality: The annual commemoration of July 26th is the symbolic observation of the rise to power of Castro’s communist, totalitarian regime. It is a day of mourning for most Cubans. Cubans celebrate the 20th of May and the 28th of January, to celebrate their independence from Spain and the birth of Jose Martí . . .
- **Book’s distortion:** “The celebrations in Cuba are a mix of African and Catholic roots,” page 27.
Reality: Historically, Castro’s regime has prohibited or chastised those that engage in religious practices . . . [R]eligious leaders . . . have been imprisoned. A famous cry while facing Castro’s firing squad was “Vivo Cristo el Rey” (long live Christ the King).²⁰⁶

The rest of the Board proceeded to debate these points, making “references to political issues and viewpoints,” and “sharply” criticizing “the book for omitting negative political information about the Castro regime from its contents.”²⁰⁷ The children’s book was likened to “books

203. *Id.* at 1251.

204. *Id.*

205. *Id.* at 1251–52.

206. *Id.*

207. *Id.* at 1252.

about pornography,” “devil worship,” and “Hitler Youth, or Nazism, or the KKK Youth,” and characterized as “especially damaging to the sensibilities of this community.”²⁰⁸ Some members described the suffering they and their families experienced at the hands of Castro.²⁰⁹ Mr. Bolaños urged his position favoring an “immediate ban” on the text because he felt the process dictated by the Rule did not “satisfy the segment of our community that is outraged, that feels discriminated against by this book,”²¹⁰ and it “required someone to complain at each of the more than 30 schools bearing the book”²¹¹ for its full removal to be effected.

Following the discussion, the school board’s attorney warned the members that their actions might implicate constitutional issues and that “there was no provision in the School Board’s rules to allow the Board to ‘act independently and remove a book that it finds objectionable. Rather, it must follow the process that is in that rule in order to achieve that purpose.’”²¹² The Board subsequently voted six-to-three to allow the “administrative process” to run its course.²¹³

Mr. Amador was informed of the SMRC’s decision and elected to appeal to the school district, initiating the formation of a District Materials Review Committee (“DMRC”) for the issue’s reconsideration.²¹⁴ Prior to the DMRC meeting, the superintendent issued a memo offering alternatives to removal of the book, including the addition of other, more accurate materials about Cuba to be read in comparison, a bookplate explaining that some of the information was inaccurate, or the institution of parental consent to check the book out from the library.²¹⁵ At the beginning of the meeting, DMRC members voted on which criteria should guide the inquiry’s focus and elected to evaluate the children’s book on the basis of “educational significance, appropriateness, and accuracy.”²¹⁶ During the meeting, participants debated other points of supposed inaccuracy or misrepresentation, including:

- **In the countryside, houses are simple. They are built with palm trunks. The roofs are made of palm leaves or straw.**

It should have been said that many houses are built that way, but certainly not the majority of those in the countryside. Furthermore, the described houses (bohios) are not built with the trunk

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 1252–53.

215. *Id.* at 1253–54.

216. *Id.* at 1254.

. . . but with . . . the upper part attached to the trunk of the long leaf No straw is used in the roof, only the leafs [sic].

- **All students do some work during the school day. Some work in the garden, the older ones working [sic] factories.**

This is absolutely wrong. From the 6th grade on, students go to the countryside for a period of 45 days to do unpaid agricultural work, fulltime. Nowadays from the senior high level, all must go to the countryside to do unpaid agricultural work, on a permanent basis, alternating half day [sic] in the fields and half in the classroom. Needless to say that learning suffers. In addition to great implications of the forced separation from the families at that age and the undesirable environmental conditions. [sic] High pregnancy rates in adolescence are a bi-product of this system.

- **In a Cuban valley, there are big colored paintings, on the rocks and caves. These were painted by Cuba's inhabitants about a thousand years ago.**

This is probably the worst factual error in the book. This paint was made in the 1960's . . . the writer introduces this gross misinformation that really has no excuse. This huge painting called Mural de la Prehistoria is located in the Valle de Viñales in Pinar del Rio province.²¹⁷

One participant in the meeting even argued that the “titles of the Cuba Books are ‘misrepresentations’ because they mistakenly imply that one can visit Cuba freely.”²¹⁸ After considering all of the information, however, the DMRC, at its second meeting, “eventually determined that the Cuba Books met the School Board Rule, . . . were supplemental and not mandatory, and . . . were valuable to an individual course of study.”²¹⁹ The group then looked to appropriateness and accuracy, but considered these factors “in light of the criteria of scope, special features, translation integrity, and aesthetic quality,”²²⁰ and as far as “missing facts,” assessed “whether those facts were meant to be included in a book for young children.”²²¹ At the culmination of the review, the DMRC elected to keep the books in the library without restriction by a vote of fifteen-to-one.²²² The superintendent subsequently affirmed this recommendation and informed Mr. Amador of his decision. Mr. Amador then appealed to the school board.²²³

Just prior to the school board's review of the decisions of the

217. *Id.* at 1255.

218. *Id.* at 1254.

219. *Id.*

220. *Id.* at 1255.

221. *Id.* at 1255–56.

222. *Id.* at 1256.

223. *Id.*

SMRC and DMRC, its attorney issued another memorandum warning of potential liability and constitutional claims that might consequently arise from any deviating action taken by the board in this matter.²²⁴ The attorney specifically noted that reviews by the DMRC could not apply to books district wide and that “although the Rule does not prohibit the Board from making a decision affecting the District as a whole, such District-wide impact would be more susceptible to legal challenge.”²²⁵ The attorney further cautioned that “[i]t is in our opinion that deviation from the DMRC’s decision, especially in light of the extensive analysis and deliberations . . . would most likely subject a decision by the board to a legal challenge.”²²⁶

Notwithstanding these admonitions, however, the board issued a final order removing not only all copies of *¡Vamos a Cuba!* from all of the school libraries in the district, but also removing all of the other books in the series from all of the other libraries as well,²²⁷ despite the fact that none of the other books had been reviewed for accuracy nor subjected to the appropriate removal procedures.²²⁸ The decision began with a resolution submitted by Bolaños titled “TEACHING OUR CHILDREN THE TRUTH ABOUT CUBA BY REMOVING THE BOOK ‘VAMOS A CUBA’ FROM ALL OF OUR PUBLIC SCHOOL LIBRARIES & REPLACING THEM WITH HISTORICALLY ACCURATE AND EDUCATIONALLY RELEVANT BOOKS” and stating that the book “should not remain in the hands and minds of innocent five to nine year old children.”²²⁹ Reviewing Bolaños’s proposition and reaching their final conclusion, Board members appeared to decide the issue based on their personal feelings. The chairman of the board commented that it was “in the lack of information that I think we as the Cuban community are offended.”²³⁰ Another member identified her “commitment to stand with the Cuban American community” and stated that “she must support removal of the Book because she would not be doing [her] job as a board member if [she] were to reach any [other] conclusion.”²³¹ Most notably, one board member favoring retention of the book commented on the “excellent process” mandated by the school board Rule and chastised her fellow board members:

We are rejecting the professional recommendation of our staff based

224. *Id.*

225. *Id.*

226. *Id.* at 1257.

227. *Id.*

228. *Id.* at 1286.

229. *Id.* at 1257.

230. *Id.* at 1258.

231. *Id.* at 1259.

on political imperatives that have been pressed upon members of this board, which I completely understand, and with which I sympathize, but one of the things we did when we took an oath of office today is to uphold the Constitution of the United States as it has been set down and interpreted by the United States Supreme Court.²³²

Finally, another member expressed concern that the group was being pressured by politics into voting for removal and that “he could not vote his [sic] the way his conscience directed ‘without feeling threatened.’”²³³

B. Holding

1. FIRST AMENDMENT ALLEGATIONS AND SCHOOL BOARD RESPONSE

Upon execution of the board’s final order of removal, the parent of another child attending the Marjory Stoneman Douglas Elementary School, along with the American Civil Liberties Union of Florida, brought suit against the school board, alleging that its removal of the books violated the First Amendment because the “[o]rder [was] not content and viewpoint neutral,”²³⁴ and the “decision was motivated by School Board and community disapproval of the content in the books.”²³⁵ Justifying its actions, the school Board proffered four arguments contesting the validity of the plaintiffs’ First Amendment claims:²³⁶ (1) *Pico*’s seven-opinioned plurality decision has no meaningful precedential value and thus should not be applied;²³⁷ (2) under the standard set forth in the subsequently decided case of *Hazelwood v. Kuhlmeier*,²³⁸ the board’s removal would be justified “if the school library selection process were regarded as ‘school-sponsored speech’ because the replacement of such inaccurate books is ‘reasonably related to a legitimate pedagogical concern;’”²³⁹ (3) under *Hazelwood* and Eleventh Circuit precedent in *Virgil v. School Board of Columbia County, Florida*²⁴⁰ and *Bannon v. School District of Palm Beach County*,²⁴¹ both

232. *Id.*

233. *Id.* at 1260.

234. First Amended Complaint for Declaratory and Injunctive Relief at 38, *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County Sch. Bd.*, 439 F. Supp. 2d 1242 (S.D. Fla. 2006) (No. 06-21577).

235. *Id.* at 36.

236. Defendants’ Initial Memorandum of Law in Opposition to Motion for Preliminary Injunction at 1–2, *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County Sch. Bd.*, 439 F. Supp. 2d 1242 (S.D. Fla. 2006) (No. 06-21577).

237. *Id.* at 1.

238. 484 U.S. 260 (1988).

239. Defendants’ Initial Memorandum of Law in Opposition to Motion for Preliminary Injunction, *supra* note 236, at 2.

240. 862 F.2d 1517 (11th Cir. 1989).

241. 387 F.3d 1208 (11th Cir. 2004).

the selection and removal of public-school library books is a "curricular function in a nonpublic forum that constitutes 'government speech,'" and thus does not implicate the First Amendment rights of the plaintiffs;²⁴² and (4) even if *Pico*'s standard were applied, the board's actions are consistent with the "educational suitability" exception distinguished by Justice Brennan due to the fact that the books were removed "because they are rife with material omissions of basic facts, and are so misleading as to present a false view of the countries as a matter of fact."²⁴³

2. EXAMINATION OF PRIOR CASE LAW

Before directly addressing the arguments before the court, District Judge Gold articulated a summary of the First Amendment constitutional issues implicated in the present matter and opened his opinion in *Vamos a Cuba* by reiterating the point that the instant case concerned "library books, books that are by their nature optional rather than required reading."²⁴⁴ After likening the inquiry to that of *Pico*, the judge pointed out that the case was unique because, instead of dealing with the usual high-school books objectionable on grounds of "vulgar language and inappropriate sexual references," the library books being banned here "are written in a simple manner for young elementary school children and provide superficial introductions about how people live their lives in foreign countries."²⁴⁵ In lieu of the typically objectionable features of books in prior challenges, "the heart of the argument" for the removal of *Vamos a Cuba* is that it "omit[s] the harsh truth about totalitarian life in Communist Cuba."²⁴⁶

Turning to the claims before the court, Judge Gold laid the foundation for his analysis by first highlighting the long-standing Supreme Court case law pertaining to school board authority in the realm of both library and scholastic affairs, paying special attention to the traditional balancing act employed by courts between the broad discretion afforded to schools boards in the management of public education and the fact that such discretion "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."²⁴⁷ Recognizing that students' rights may be limited, but not completely annihilated, in a curricular context, Judge Gold returned his focus to the case at hand and

242. Defendants' Initial Memorandum of Law in Opposition to Motion for Preliminary Injunction, *supra* note 236, at 3.

243. *Id.* at 1.

244. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County Sch. Bd. (Vamos a Cuba)*, 439 F. Supp. 2d 1242, 1265 (S.D. Fla. 2006).

245. *Id.*

246. *Id.* at 1265-66.

247. *Id.* at 1266. For a summary of such case law, see *supra* Part II.A.

the “‘unique role of the school library’ as a place where students [can] engage in voluntary inquiry” emphasized in *Pico*.²⁴⁸ After recounting the facts, holding, and various opinions in *Pico*,²⁴⁹ Judge Gold elected to hold off on addressing the school board’s first argument and instead turned to the claim that *Hazelwood v. Kuhlmeier*²⁵⁰ condoned the board’s action.

A school-related case reviewed by the Court six years after *Pico*, *Hazelwood* concerned the removal of two pages of articles regarding students’ experiences with pregnancy and parental divorce from a school newspaper destined for publication on the grounds that the material was inappropriate for younger students and violated the privacy of certain parents.²⁵¹ Upon finding that the newspaper was produced as part of the educational curriculum of the school’s journalism class, the Court fashioned an “imprimatur of the school”²⁵² standard and determined that materials that “students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. . . . may be fairly characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting,” and “educators are entitled to exercise greater control . . . to assure . . . that the views of the individual speaker are not attributed to the school,”²⁵³ so long as the actions taken are “reasonably related to legitimate pedagogical concerns.”²⁵⁴ As such, the Court found the school board in *Hazelwood* to have acted within the boundaries of its authority in censoring the two articles.²⁵⁵

Interestingly, *Hazelwood*’s majority opinion in no way referred or cited to *Pico*—an observation with which the school board buttressed its argument. Though acknowledging this point, Judge Gold deemed this omission to be “presumably . . . because the issues involved were totally different in the sense that *Hazelwood* was a ‘student speech’ case, while *Pico* dealt with removal of books from a school library.”²⁵⁶ Judge Gold stipulated that while it *might* be possible under a “more lenient *Hazelwood* test,” for school boards to exercise their discretion over library materials without violating the First Amendment as long as that discretion was “reasonably related to pedagogical concerns,” case law in the

248. *Id.* at 1268 (quoting Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 868–69 (1982)). For a summary of *Pico*, see *supra* Parts III.A–B.

249. *Vamos a Cuba*, 439 F. Supp. 2d at 1267–71.

250. 484 U.S. 260 (1988).

251. *Id.* at 262–63.

252. *Id.* at 271–76.

253. *Id.* at 271.

254. *Id.* at 273.

255. *Id.* at 276. See also *supra* note 27.

256. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County Sch. Bd. (Vamos a Cuba)*, 439 F. Supp. 2d 1242, 1272 (S.D. Fla. 2006).

Eleventh Circuit exhibits that “the *Hazelwood* test has *not* been so expanded where non-curricular books are at issue and where, even under the *Hazelwood* standard, the school officials’ actions were motivated by a disagreement with the views expressed in the books as compared to pedagogical concerns relating to vulgarity and sexuality.”²⁵⁷ Gold then supported this contention, dispelling arguments (2) and (3) with the review of three Eleventh Circuit cases.

The opinion first addressed *Virgil v. School Board of Columbia County, Florida*,²⁵⁸ a case upholding a school board’s removal of a previously approved textbook on the grounds that the removal was based on the board’s legitimate pedagogical concerns reasonably related to the text’s vulgarity and sexual explicitness.²⁵⁹ In evaluating the board’s action, the court found two issues especially pertinent to its application of the *Hazelwood* standard. First, both parties had stipulated to the motivation behind the removal—the vulgar and sexually explicit contents of the work—and no allegations of ulterior motives or pretext were presented before the court.²⁶⁰ Therefore, the only issue to be decided by the court regarding the board’s motivation was whether it was reasonably related to the removal of the text.²⁶¹ Second, the questionable materials in the case had “not been banned from the school,” were “available in the school library,” and no teacher or student had been “prohibited from assigning or reading these works or discussing the themes contained therein in class or on school property.”²⁶² In reaching its conclusion, the Eleventh Circuit was careful to point out that in this case, the removed materials “obviously carry the imprimatur of the school”²⁶³ and specifically emphasized that “we decide today *only* that the Board’s removal of these works from the *curriculum* did not violate the Constitution.”²⁶⁴ The court also clarified that “we need not in this case address the validity of school action to remove a book from a separate outside reading list. . . . [I]t might be easier to make such separate, outside readings subject to parental approval, or otherwise limit the imprimatur of school approval.”²⁶⁵ The court even referred to *Pico* briefly in a footnote, but primarily to indicate that it was inapplicable to *Virgil* because (1) the materials were not library books; (2) determination of a potentially unconstitutional motive was not at issue; and (3) the Eleventh Cir-

257. *Id.* (emphasis added).

258. 862 F.2d. 1517 (11th Cir. 1989).

259. *Id.* at 1525.

260. *Id.* at 1522–23, 1522–23 nn.6–7.

261. *Id.* at 1523.

262. *Id.* at 1525.

263. *Id.* at 1522.

264. *Id.* at 1525 (emphasis added).

265. *Id.* at 1522 n.5.

cuit at such time would not make any “suggestion as to the appropriate standard to be applied in a case where one party had demonstrated that removal stemmed from opposition to the ideas contained in the disputed materials.”²⁶⁶

The next Eleventh Circuit case addressed in the *Vamos a Cuba* opinion, *Searcey v. Harris*, dealt with a school board’s prohibition of a particular organization from participating in a public-high-school “career day.”²⁶⁷ The organization, Atlanta Peace Association, argued that it was wrongfully barred from participating because the school board disagreed with its military views and such view-point discrimination violated the First Amendment.²⁶⁸ Although the board attempted to argue that “*Hazelwood* does not prohibit school officials from engaging in viewpoint discrimination,” the Eleventh Circuit disagreed, contending that “*Hazelwood* involved a content based distinction,” regarding sexually explicit material and that “there was no indication that the principal was motivated by a disagreement with the views expressed in the articles.”²⁶⁹ Finding that the school board in *Searcey* had discriminated against the organization based on its viewpoint, the court clarified the Eleventh Circuit’s stance on *Hazelwood*, directing that “although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on *viewpoint*.”²⁷⁰

Finally, Judge Gold addressed the case brought forth by the defendant school board, *Bannon v. School District of Palm Beach County*, in which the Eleventh Circuit upheld a school board’s action compelling a student to remove religious icons she had painted on a public-school mural created as part of a beautification project.²⁷¹ In *Bannon*, the court found the murals to bear the imprimatur of the school and applied *Hazelwood*, finding that the student’s drawings were “school-sponsored expression in a nonpublic forum subject to restriction . . . because they occurred in the context of a curricular activity,” and therefore, “censorship . . . was a reasonable *content-based* restriction that was rationally related to the legitimate pedagogical concern of avoiding the religious controversy and debate generated” by the artwork.²⁷²

266. *Id.* at 1523 n.8.

267. *Searcey v. Harris*, 888 F.2d 1314, 1316 (11th Cir. 1989).

268. *Id.* at 1315.

269. *Id.* at 1324–25.

270. *Id.* at 1325 (second emphasis added).

271. *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1217 (11th Cir. 2004).

272. *Id.* (emphasis added).

3. FACTUAL APPLICATION AND OUTCOME

Given the unique nature of library books and their distinction from curricular materials in both Supreme Court and Eleventh Circuit case law, Judge Gold determined that “the mere purchase of a few books which essentially remained on the library shelves over a period of several years can hardly be characterized as ‘curricular’ or be argued to reasonably bear the imprimatur of the school,” and concluded that the “book removal did not in fact occur in the context of a curricular activity.”²⁷³ Furthermore, based on the evidence, it appeared to the court that unlike *Bannon*, the Miami-Dade School Board was “concerned with viewpoint, not content, that related to life in foreign countries,” and “accordingly, even under the more lenient *Hazelwood* standard, the School Board’s action would be in violation of *Searcey* and *Bannon*.”²⁷⁴ Finding *Virgil* and *Searcey* to be supportive of a *Pico* application and finding *Bannon* to be “not on point” and “totally unrelated to the facts and issues in this case,”²⁷⁵ Judge Gold contended that “the case law is not unclear in the Eleventh Circuit and the School Board is less than candid with this Court in suggesting otherwise.”²⁷⁶ Therefore, “in the absence of a binding Eleventh Circuit opinion,”²⁷⁷ the court rejected the school board’s first argument and elected to follow in the footsteps of the Fifth Circuit in *Campbell*²⁷⁸ and the Tenth Circuit District Court in *Case*,²⁷⁹ adjudicating *Vamos a Cuba* according to a *Pico* analysis.²⁸⁰ Recalling that under *Pico*, a school board may not remove non-curricular library books simply because the board “dislikes the ideas or the point-of-view contained in the books and seeks by their removal to prescribe what shall be orthodox in politics, nationalism, or other materials,”²⁸¹ Judge Gold narrowed the focus of inquiry to the board’s final argument: Did the Miami-Dade School Board make its removal decision based on “inaccuracies” or based on unconstitutional motives? And, if such impermissible motives were at play, were they the decisive factor in the board’s action? Answering both inquiries in the affirmative, the judge determined that the school board members “intended by their removal of the books to deny schoolchildren access to ideas or points-

273. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County Sch. Bd. (Vamos a Cuba)*, 439 F. Supp. 2d 1242, 1278 (S.D. Fla. 2006).

274. *Id.* at 1279.

275. *Id.* at 1277.

276. *Id.* at 1281.

277. *Id.*

278. *See supra* Part III.C.1.

279. *See supra* Part III.C.2.

280. *Vamos a Cuba*, 439 F. Supp. 2d at 1281.

281. *Id.* at 1283.

of-view with which the school officials disagreed, and that this intent was the decisive factor in their removal decision,” and thus the board “abused its discretion in a manner that violated the transcendent imperatives of the First Amendment.”²⁸²

Though board members insisted they had been concerned with and motivated by the book’s factual inaccuracies and omissions throughout the entire process, the court identified these goals as “*post hoc* rationalizations,” that do “nothing to counterbalance the overwhelming evidence, for preliminary injunction purposes, of view-point discrimination whether under the *Pico* or *Searcey/Bannon* tests.”²⁸³ Supporting this evidentiary conclusion, Judge Gold highlighted the school board’s violation of its own procedures and blatant disregard of the recommendations of both committees pursuant to those procedures.²⁸⁴ The school board again attempted to employ the inaccuracy argument to justify its radical departure from the decisions of the SMRC and DMRC, but the court discerned these arguments “now relied upon” to be “merely a pretext to provide constitutional cover for the impermissible actions taken.”²⁸⁵ Given the board’s rapid intervention following the SMRC’s decision, it appeared that “Mr. Bolaños’ immediate desire was to circumvent the appeals process under the Board’s own rules by immediately removing *Vamos a Cuba* not only from the school library . . . but in all such libraries throughout the district.”²⁸⁶ Although heeding the warnings of its attorney to allow the book to continue through the appellate process, the board ignored the foreshadowing advice of its counsel to affirm the prior “thorough and extensive” reviews of the committees, lest the board open itself to constitutional liability.²⁸⁷ Instead, in the hearing “replete with examples of political decision-making based upon the politics of opposition to the Castro regime in Cuba,”²⁸⁸ the board recklessly dispelled the SMRC and DMRC’s determinations of educational suitability. Moreover, the fact that

[T]he School Board’s ultimate action was not to remove *one* book from *one* library where *one* parent raised an issue, but to remove *all* the Cuba Books from *all* the libraries and, of significant importance, to remove the remaining nineteen books in the Series when . . . none of these other books were subjected to the School Board’s own review processes or were ever previously questioned on appeal, or

282. *Id.*

283. *Id.* at 1282.

284. *Id.* at 1285.

285. *Id.* at 1282.

286. *Id.* at 1286.

287. *Id.*

288. *Id.* at 1285.

were ever read by most of the School Board members prior to that vote²⁸⁹

only further fueled the plaintiffs' looming allegations of pretext.

Judge Gold also investigated issues of educational suitability, finding credible the testimony of the plaintiffs' experts who postulated that "the objections to the Cuba Books appear to be based on adults attempting to import an adult value system into a children's book," and that "too much information of the kind at issue is cognitively more damaging to young children than too little."²⁹⁰ Professionals continued to testify that "young children, the target audience of these books, would simply be unable to grasp the level of political thought implicit"²⁹¹ in the board's debate and that this type of information in "a simple travel book for first and second graders"²⁹² would make the "books inappropriate for young children,"²⁹³ particularly where the goal is "simply to show a young child that other people in other cultures also eat, work and go to school like they do," and not "to discuss complex issues of government with respect to any of the countries."²⁹⁴ Balancing the board's accuracy arguments and the information presented by the plaintiffs' professionals, Judge Gold posited the question:

[S]hould School Board members who happen to emigrate from any of these [other] countries to the United States be permitted to ban books in the Series because of their individual political orthodoxy and point-of-view of what is "true" for a child's life in one or more of those countries? The obvious answer is "no."²⁹⁵

Judge Gold deemed the "degree of accuracy" invoked by the board to "sweep too broadly,"²⁹⁶ to legitimize book-banning of the sort presented in this case. After assessing all of the facts, the judge concluded that the board's rationalizations of "perceived inaccuracies"²⁹⁷ were simply "a guise and pretext"²⁹⁸ and as such, its motivation behind the removal decision was unconstitutional. Were courts to allow "boards to engage in *post hoc* rationalization for book-banning" without consequence, cautioned Judge Gold, they would be both condoning and permitting public-school officials "to mask impermissibly motivated

289. *Id.* (emphasis added).

290. *Id.* at 1287.

291. *Id.* at 1288.

292. *Id.* at 1286.

293. *Id.* at 1288.

294. *Id.*

295. *Id.* at 1283.

296. *Id.* at 1284.

297. *Id.*

298. *Id.* at 1283.

behavior by plausible but disingenuous justifications.”²⁹⁹ Finally, in finding the ACLU’s evidence more convincing—at the very least for preliminary injunction purposes—and ruling for the plaintiffs, Judge Gold addressed the fact that the board’s removal of the books had been supported by a large portion of the community and explained that the court’s decision, though perhaps unpopular, was the only decision viable under the First Amendment demands of the Constitution:

Nothing written here is intended to cast doubt upon the heartfelt point-of-view expressed by Mr. Bolaños and his supporters. Tragically, that point-of-view is based on real life experiences that members of the Cuban Community and their families have painfully endured in Cuba But many have come to this nation, and continue to do so today, for the opportunity to live in freedom under the protection of our Constitution and the Bill of Rights. The quintessential right of freedom of speech may not be sacrificed on the altar of beliefs In this nation, we do not prohibit the expression of an idea simply because some in the community find it offensive or disagreeable.³⁰⁰

C. *Should Pico Apply?*

Because the decision in *Pico* was penned by a plurality and not by a majority of the Court, and because there is no Eleventh Circuit precedent applying the plurality’s rationale, the first question concerning the *Vamos a Cuba* case is whether or not *Pico* is the appropriate and applicable standard. Although *Pico* was the first, and presently the only, book removal challenge to be heard by the Supreme Court,³⁰¹ the exact nature and weight of its holding is somewhat nebulous,³⁰² as “it is not an opinion of the Supreme Court as an institution, and the Court itself is not obligated to follow such an opinion.”³⁰³ However, some scholars, such as David Schimmel, have opined that “until the Court specifically modifies the plurality opinion, it should certainly have more weight than dicta and will probably be highly influential, if not binding, on lower courts.”³⁰⁴ Helen M. Quenemoen echoes this approach, promulgating the stance that “since in a plurality decision a majority of the Justices have agreed on a result that binds the parties, sometimes that result can have precedential effect on future cases with similar facts. In such cases

299. *Id.* at 1282.

300. *Id.* at 1284.

301. *See, e.g.,* Menzel, *supra* note 3, at 1081.

302. *See, e.g., supra* notes 9–10.

303. Schimmel, *supra* note 151, at 297.

304. *Id.*

it is the result, not the rationale, that is authoritative."³⁰⁵

The Supreme Court has held that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds.'"³⁰⁶ In *Pico*, the narrowest concurring opinion was that of Justice White, who, if nothing else, directly indicated that motivations behind the removal of library books by local school boards may implicate the First Amendment rights of students and may constitute an impermissible infringement upon those rights.³⁰⁷ Reading the plurality opinion along with both concurrences, it appears that a majority of the Court agreed both that "it is possible for a plaintiff to show a constitutional violation when a school board removes books from a school library," and that the school board's "discretion is subject to court review if it appears that the motivation for the removals might have been unconstitutional."³⁰⁸ As such, *Pico* "should be considered to have settled [these two issues], with the appropriate stare decisis effect," and any subsequent removal cases "will have to be individually litigated once plaintiffs can establish that the motivation may not have been constitutionally acceptable."³⁰⁹

Considering the aforementioned approaches to determining plurality precedent, it appears that *Pico* is the correct standard for the issues in *Vamos a Cuba*. As Quenemoen predicted, cases bearing similar factual patterns to *Pico* have been properly subjected to a *Pico* analysis, and *Vamos a Cuba* should be no different. Additionally, *Pico* has not only been applied by lower courts in factually uncanny cases, such as *Campbell*³¹⁰ and *Case*,³¹¹ but was even applied to board action simply *restricting* access to a book by requiring parental permission in *Counts*.³¹² Although the *Counts* court may have extended the *Pico* doctrine further than its colleagues might, the fact that post-*Pico* courts have consistently applied the unconstitutional motivation analysis in situations where

305. Quenemoen, *supra* note 151, at 1114.

306. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

307. *See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 883-84 (1982) (White, J., concurring); *supra* text accompanying note 141; *see also* Quenemoen, *supra* note 151, at 1115 ("That Justice White agreed with the others in the majority that a library book removal can so abridge students' first amendment rights that it warrants court intervention can be inferred from his failure to join in the dissent's position that defendants' motion for summary judgment should have been granted.").

308. Quenemoen, *supra* note 151, at 1115.

309. *Id.*

310. *See supra* Part III.C.1.

311. *See supra* Part III.C.2.

312. *See supra* Part III.C.3.

proffered reasons for board action regarding library books appear pretextual remains the same.

While the Eleventh Circuit lacks case law specifically endorsing *Pico* as precedent, it also lacks case law declining its adoption in the appropriate circumstances. Although the Court in *Virgil* rejected the plaintiffs' prayer for application of *Pico*, it did so on account of the fact that it was not the appropriate situation for the standard, as the books were indisputably curricular and no allegations as to improper motive had been made. Furthermore, the books were being removed only from the scholastic curriculum and were still made available in the library for both reading and discussion purposes. Despite making "no suggestion as to the appropriate standard to be applied in a case where one party has demonstrated that removal stemmed from opposition to the ideas contained in the disputed materials,"³¹³ the court did not repudiate *Pico*'s potential applicability and promoting any other opinion on this matter would have been irrelevant to the case at hand and merely advisory. Furthermore, the Eleventh Circuit alluded to its propensity under the *Hazelwood* standard to limit a board's authority concerning supplemental curricular materials, suggesting that "it might be easier to make such separate, outside readings subject to parental approval, or otherwise limit the imprimatur of school approval."³¹⁴ If the Eleventh Circuit would be willing to narrow the acceptable boundaries of school action exercised in reasonable relation to pedagogical concerns in the realm of supplemental *curricular* materials, it is highly likely, given case law such as *Virgil*, that this narrowing would be extended further in the realm of non-curricular materials such as library books. Similarly, the court declined to employ an unconstitutional motivation standard in *Bannon*, as the situation was factually inapposite to the circumstances warranting a *Pico* analysis. Not only did the murals clearly bear the imprimatur of the school and thus command greater board discretion, but the case concerned student free speech and expression rights, not books. As such, invocation of the *Pico* standard in that case would have been irrelevant and misguided. Finally, though also factually disparate, the Eleventh Circuit's rationale in the *Searcey* decision suggests it would support the application of *Pico*'s plurality to *Vamos a Cuba*. If, as the court ruled, *Hazelwood* does not offer "any justification for allowing educators to discriminate based on viewpoint,"³¹⁵ and a school board may not deny organizations access to its school's Career Day—a forum conceivably bearing the imprimatur of the school—because it disagrees

313. *Virgil v. Sch. Bd. of Columbia County, Fla.*, 862 F.2d 1517, 1523 n.8 (11th Cir. 1989).

314. *Id.* at 1522 n.5.

315. *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989).

with their political stance, it is highly likely that the Eleventh Circuit would find removal of books based on political viewpoint discrimination equally unconstitutional, and thus, support a motivational analysis standard akin to *Pico* in such pertinent situations.

D. *How Should the Eleventh Circuit Rule in Vamos A Cuba?*

In applying the *Pico* standard to the *Vamos a Cuba* case, the Eleventh Circuit should affirm the findings of District Judge Gold and hold the Miami-Dade County School Board's removal of the "A Visit To" series books from all of the district libraries unconstitutional based on its politically motivated abuse of discretionary power. While Judge Gold thoroughly and adequately supported his ruling on valid facts necessarily leading to his conclusion, a couple of other points further bolster his position. First, some argue that "any school board departure from established book removal procedures . . . evidences an impermissible removal, particularly when those procedures provide for non-board input"³¹⁶ to safeguard against unilateral board decision-making. It appears that courts nationwide agree with this proposition, as evidenced by the near unanimous findings of pretext in cases where school boards have departed from procedure—both pre-³¹⁷ and post-*Pico*.³¹⁸ In the instant case, the Miami-Dade School Board not only violated procedure pertaining to the review of *¡Vamos a Cuba!* by intervening prior to the DMRC's assessment and subsequently enforcing its pre-decided conclusion after allowing the book to go through what is adequately described as a puppet show of an appellate process, but also violated procedure regarding the banning of the remaining books in the series with no process whatsoever. As ACLU cooperating attorney JoNel Newman accurately remarked, the board members' decision to "defy U.S. law prohibiting censorship and ignore the recommendation of their own Superintendent and two committees is a slap in the face to our tradition of free speech and the School Board's own standards of Due Process," for "the purpose of having a procedure to evaluate a book and provide recommendations is pointless when the School Board chooses to ignore the advice of educators and librarians."³¹⁹ Given the fact that, as the court in *Case* noted, "there is no basis in the record to believe that these Board members meant by 'educational suitability' anything other than

316. Richard Ricci, *Public School Library Book Removals: Community Values v. First Amendment Freedoms*, 57 NOTRE DAME LAW R. 166, 188 (1981).

317. *See supra* Part II.C.

318. *See supra* Part III.C.

319. Press Release, American Civil Liberties Union of Fla., ACLU Files Lawsuit Against the Miami-Dade County School Board over Book Censorship (June 21, 2006), available at http://www.aclufl.org/news_events/?action=viewRelease&emailAlertID=1949.

their own disagreement with the ideas expressed in the book,³²⁰ an Eleventh Circuit finding of the Miami-Dade School Board's inaccuracy justifications as anything but politically motivated pretext would be an equal slap in the face to First Amendment jurisprudence.

Second, the large Cuban contingency in South Florida and strong anti-Castro sentiment are no secret,³²¹ and *Vamos a Cuba* is not the first time these political sentiments and community pressures have had a run-in with government officials' proper protection of First Amendment constitutional rights.³²² In *The Cuban Museum of Arts and Culture, Inc. v. The City of Miami*, a Cuban museum in Miami held a fundraising art auction that included a number of pieces created by "artists who had not renounced the Castro regime or . . . who had continued to live in a communist Cuba."³²³ Public outrage ensued at the toleration and alleged "communist sympathies" exhibited by retention of these works in the fundraiser; notwithstanding such opposition and community disapproval, however, the auction proceeded "amidst hostilities and threats," which included the purchasing of a controversial painting at the auction that was subsequently burned in the streets outside the Museum in the middle of a small crowd chanting its protests against the Cuba-friendly artists included in the auction.³²⁴ Sadly, the hostilities did not end after the auction: At least one exhibition had to be postponed; a bomb was detonated underneath the automobile of an attorney serving as a director and vice president of the Museum; and directors and members of the Museum's executive committees were pressured to resign and those who remained "endured McCarthy-like allegations of communist inclinations and sympathies."³²⁵ After weeks of social unrest, the "divisiveness that the controversial exhibition and auction created within the local community was thus squarely thrust before the Miami City Commission," who was eventually asked to "consider the management of the Museum and find a way to oust the Museum's administration."³²⁶ Quickly jumping to

320. *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 875 (D. Kan. 1995).

321. *See e.g.*, Jay Weaver, *Spy Case Nears Crucial Point*, MIAMI HERALD, Feb. 13, 2006, at 1B (describing arguments that accused Cuban spies did not receive a fair trial because "the community was saturated with anti-Castro sentiment."); *see generally* Jordan, *supra* note 19 (describing the Miami Cuban community's response to the *Vamos a Cuba* controversy).

322. *See, e.g.*, *Cuban Museum of Arts and Culture, Inc. v. City of Miami*, 766 F. Supp. 1121 (S.D. Fla. 1991) (enjoining the City of Miami from evicting the Cuban Museum from its premises based on a finding that eviction and refusal to renew the Museum's lease were motivated by community disapproval of a display of works by Cuban artists who had either not renounced Castro, or were still living in a communist Cuba, and that such motivation based on the constitutional exercise of the Museum's First Amendment rights was impermissible).

323. *Id.* at 1122.

324. *Id.*

325. *Id.* at 1122-23.

326. *Id.* at 1123.

the task, the Miami City Commission began investigating any and all alleged violations of the Museum's lease agreement—most of which were frivolous and unsubstantiated—and conducted three audits that were “unprecedented in their scope and proximity to one another.”³²⁷ Transcripts from commission meetings indicated that “Commissioners were irritated and frustrated with the problem of how to get rid of the Cuban Museum and the underlying controversy,” and finding no other remedy but to simply let the lease expire, the Commission passed a motion “resolving not to renew the lease agreement with the *present administration* of the Cuban Museum.”³²⁸ The Museum brought suit and the City Commission commenced eviction proceedings.³²⁹

The District Court for the Southern District of Florida gauged the focus of inquiry on whether the “City of Miami denied the Cuban Museum continued possession of the building now housing the Museum on the basis of the plaintiffs’ exercise of their First Amendment rights,” in exhibiting the works of politically controversial artists at the auction.³³⁰ The court answered this in the affirmative, finding that “the controversy and public reaction to the exhibition and auction of controversial works has pervaded the events that led to the filing of this case,” and that although the City Commission of Miami “may well have tried to rid the City of the Cuban Museum’s present administration by pursuing what would otherwise be valid landlord-tenant concerns, the City nonetheless appears to have fallen victim to the local community’s intolerance for those who chose to provide a forum for controversial artists.” Upon determining that the conduct of the commission and its proffered justifications for the denial of the Museum’s lease renewal “were either minor concerns or a pretextual basis upon which to remove the Cuban Museum and its present directors,”³³¹ the court enjoined the Museum’s eviction and denial of lease renewal.³³²

As in *Cuban Museum of Arts and Culture*, the political circumstances surrounding *Vamos a Cuba* suggest government officials in Miami have once again “fallen victim”:³³³ Though the highly political comments highlighted by Judge Gold from the board’s meeting minutes hardly need reinforcement, newspaper commentary on the political landscape surrounding the case further buttresses the district court’s finding

327. *Id.*

328. *Id.* at 1124.

329. *Id.*

330. *Id.* at 1125.

331. *Id.* at 1127.

332. *Id.* at 1131.

333. *Id.* at 1126.

of the “inaccuracy” explanations as pretextual.³³⁴ In researching the case, one journalist, Rob Jordan, found that the lawsuit ignited a social cause and “as with Elián González, whose image quickly became an icon for many in the long-suffering exile community six years ago, *Vamos a Cuba* morphed overnight from a glorified picture book into a charged talisman, a symbol of *el exilio*’s frustrated victimhood.”³³⁵ The overnight cause célèbre was described as “frightening” by high school student, Ron Bilbao—president of South Miami Senior High School’s student government association.³³⁶ Bilbao was asked to be a student participant on one of the district’s book review committees for the *¡Vamos a Cuba!* controversy and upon his arrival at the meeting, surprisingly found himself swarmed by the media.³³⁷ Bilbao divulged details of the meeting to Jordan, indicating that “if you said something that was for keeping the book, they’d whisper ‘Communist’ in the background. . . . Everybody was on edge.”³³⁸

Jordan also documented sources alleging that board members’ decisions were motivated not only by their heritage, but also by their desire for re-election. One person expressed the view that board member Bolaños “continued the fight not only on a personal agenda, but also to gain votes for his upcoming election.”³³⁹ Another community member commented that the “book-banning issues had been a ‘gift’ to his candidate,” as “campaign contributions to Bolaños skyrocketed in the weeks after he took his stance.”³⁴⁰ A Nicaraguan-born board member, Ana Rivas-Logan, reported being “targeted” by a local radio station popular with Cuban exiles after she voted for the book’s continuance through the book review process. Paraphrasing advice broadcasted to listeners, Rivas-Logan, whose family fled from Cuba prior to her birth, heard one commentator remark, “Let’s not forget, when it comes to election time, that Mrs. Rivas-Logan is Nicaraguan.”³⁴¹ Interestingly enough, when it came time for the final board meeting, Rivas-Logan identified herself as also coming from “an oppressed regime,” and stated that “from the very first day that [she] reviewed the book [she] found the book extremely offensive, inaccurate, full of omissions,” and concluded that the “entire Series should be replaced with a new and updated series.”³⁴²

334. See, e.g., Jordan, *supra* note 19.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County Sch. Bd. (Vamos a Cuba)*, 439 F. Supp. 2d 1242, 1258 (S.D. Fla. 2006).

While common knowledge and local media coverage do not and should not control legal determinations, such evidence may be relevant in assessing the reasonableness and viability of a court's adjudged motives behind allegedly political actions. In this particular case, such local coverage and information certainly lends credence to Judge Gold's assessment of the evidence and reinforces that the correct outcome was reached after a proper *Pico* analysis.

V. CONCLUSION

When Mr. Amador's nine-year old daughter checked out *Vamos a Cuba!* from her elementary-school library,³⁴³ she probably never imagined her selection would set off constitutional fireworks and initiate a landmark case in the Eleventh Circuit. *Vamos a Cuba* is momentous not only because it is the Court's first factually appropriate case for a *Pico* analysis, but also because the details of the lawsuit and the arguments proffered by the Miami-Dade School Board directly test the boundaries of what Justice Brennan characterized as "perfectly permissible" book-bannings based on "educational suitability."³⁴⁴

In his dissent in *Pico*, Justice Rehnquist chastised Brennan for this view, declaring that "such determinations are based as much on the content of the book as determinations that the book espouses pernicious political views."³⁴⁵ Rehnquist's skeptical approach to Brennan's idealistically neutral "educational suitability" determination is right on the mark, and aptly acknowledges that "public schooling persists as such a hotbed for controversy because of the deeply held and often conflicting interests and demands of parents, students, and the states and local communities who run public schools."³⁴⁶ As courts consistently proclaim, "the importance of public schools in the preparation of individuals for participation as citizens and in the preservation of the values on which our society rests has long been recognized,"³⁴⁷ and as "democratic theorists have long recognized, preparing children for democratic citizenship is an important and demanding responsibility."³⁴⁸ Such responsibility unquestionably lies and should lie in the hands of state and local authori-

343. Jordan, *supra* note 19.

344. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982).

345. *Id.* at 917 (Rehnquist, J., dissenting).

346. Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1339 (2007).

347. *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

348. Eichner, *supra* note 346, at 1340.

ties³⁴⁹ who retain “important, delicate, and highly discretionary functions”³⁵⁰ in the execution of their civic duty. However, “free public education, if faithful to the idea of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party or faction,”³⁵¹ and the fact that servants of the state are in charge of organizing such education “is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strange the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”³⁵² Maxine Eichner elaborates on this notion by pointing out that “to add to the complexity of the issue, however, the United States is not merely a democracy, it is a *liberal* democracy, whose commitment to majoritarian rule is tempered by the understanding that some personal rights and liberties should not be subject to the majority’s preferences.”³⁵³ Ron Bilbao’s feedback regarding his book reviewing experience perfectly exemplifies Eichner’s explanation of “liberal democracy.” Discussing his reaction to encounters with members of the majority seeking to ban *¡Vamos a Cuba!*, the high school student reasoned, “I sympathize with them [the Cuban community], I really do, but at the end of the day, we’re talking about a book for elementary school children You don’t just ban a book because it’s painful to you.”³⁵⁴

In reviewing the Miami-Dade School Board’s appeal, the Eleventh Circuit will be faced with deciding whether the eradication of *¡Vamos a Cuba!* and its counterparts from the entire district was a constitutional act legitimately based on pedagogical concerns of accuracy, or whether such proffered explanations were simply pretextual afterthoughts concocted by the board to justify its impermissible actions. As Judge Gold proclaimed, “to ban books because of perceived inaccuracies sweeps too broadly,”³⁵⁵ particularly when such “inaccuracies” are omissions excluded for the very purpose the board boasts its concern: educational suitability for young children. Judge Gold continued to argue that “too many works of literature could be removed from school libraries based on the degree of accuracy according to School Board members,”³⁵⁶ and he is right: were a banning on *¡Vamos a Cuba!* permitted by the court

349. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities.”).

350. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

351. *Id.*

352. *Id.*

353. Eichner, *supra* note 346, at 1341.

354. Jordan, *supra* note 19, at 4.

355. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County Sch. Bd. (Vamos a Cuba)*, 439 F. Supp. 2d. 1242, 1284 (S.D. Fla. 2006).

356. *Id.*

based on the board's rationale, children's rudimentary books describing, for example, Chinese and Israeli cultures could also be banned for failing to inform young students of the grisly details pertaining to the "One-Child" female infanticide epidemic³⁵⁷ or the rampant suicide bomb detonations.³⁵⁸ Just as testifying professionals deemed the dreadful details of Castro's regime to be not only unsuitable, but "cognitively more damaging" to young children, such details regarding political policy issues in other countries would be equally unsuitable for children's books whose purpose is simply to give young students a snapshot of other cultures. Journalist Michael Putney made a similar observation prior to the dispute's litigation.³⁵⁹ Although recognizing *¡Vamos a Cuba!*'s bemoaned omissions as "all indisputably true," he questioned:

[I]s a simple travel book for first and second graders the proper place to discuss [them]? Does *A Visit to Argentina* contain a page on the "disappeared"? Does the book on Haiti include the Ton Ton Macoutes and the brutality of the Duvaliers? . . . Does *A Visit to Germany* include a section on the Holocaust? Does *A Visit to Venezuela* discuss how Hugo Chavez has hijacked democracy? The answer, evidently, is No. Of course, if parents want to discuss any of these things with their kids, they're perfectly free to do so.³⁶⁰

Closing his opinion, Judge Gold warned that "our schools must embody intellectual openness, lest they teach youth to discount important principles of our government,"³⁶¹ and place "at risk the very rights which make this nation great."³⁶² To hold otherwise would only confirm the apprehensive worry expressed by one participant in the removal debates who professed, "I fear we may become that which we constantly protest against."³⁶³ The Eleventh Circuit's critical determination in this appeal of uncharted territory will certainly address such fears, as its pivotal holding will indicate whether the true intentions of the *Pico* plurality will become precedent within the Eleventh Circuit, or whether Rehnquist's dissenting criticism will be realized and *Pico* will merely be

357. See, e.g., Eric Baculinao, *China Grapples with Legacy of its 'Missing Girls,'* NBC NEWS, Sept. 14, 2004, <http://www.msnbc.msn.com/id/5953508> (last visited Dec. 23, 2008).

358. See, e.g., Ellen Knickmeyer, *Suicide Bombing Kills Woman in Israel,* WASH. POST, Feb. 5, 2008, at A16.

359. Michael Putney, *Let's Close the Book on Attempts To Censor,* MIAMI HERALD, Apr. 19, 2006, at A25.

360. *Id.*

361. *Vamos a Cuba*, 439 F. Supp. 2d at 1288.

362. *Id.* at 1284.

363. *Id.* at 1284. Interestingly (and ironically) enough, Cuban state librarians felt those fears had already been realized and criticized the Miami-Dade School Board for its banning of *Vamos a Cuba*, comparing the Board to "Nazis who censored Alice in Wonderland." Francis Robles, *Libraries in Cuba Protest Book Ban,* MIAMI HERALD, Jul. 8, 2006, at 1B.

transformed into vehicle for pretext in Eleventh Circuit school board decision-making.

VI. POSTSCRIPT

Just prior to this Note going to print, the Eleventh Circuit Court of Appeals, after over one year and a half of deliberation, handed down its decision in the *Vamos a Cuba* case.³⁶⁴ In an evidentiarily shocking, yet somewhat anticipated,³⁶⁵ opinion authored by Circuit Judge Carnes, the Eleventh Circuit reversed Judge Gold's decision based upon a finding that "the Board did not simply dislike the ideas in the *Vamos a Cuba* book," and "did not act based on an unconstitutional motive."³⁶⁶ Carnes was not shy about showcasing his skepticism regarding *Pico*'s applicability, remarking that "with five different opinions, and no part of any of them gathering five votes from among the nine justices—only one of whom is still on the Court—*Pico* is a non-decision so far as precedent is concerned. It establishes no standard."³⁶⁷ Indicating, however, that the Court here had no desire to resolve "the question of what standard applies to school library book removal decisions,"³⁶⁸ the Eleventh Circuit placed caveats aside and elected to apply *Pico* in its review of the district court's ruling, reasoning that, even assuming the plaintiffs were entitled to the standard "of their dreams,"³⁶⁹ they would "still lose if the School Board removed *Vamos a Cuba* not for those prohibited reasons, but instead, as the Board insists, for legitimate pedagogical reasons such as concerns about the accuracy of the book."³⁷⁰ Thus, the dispositive issue governing the appeal directly mirrored the central inquiry addressed by the district court: Were the books really removed because of their inaccuracy, or were the removal reasons proffered by the school

364. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County Sch. Bd. (Vamos a Cuba)*, 557 F.3d 1177 (11th Cir. 2009).

365. The Eleventh Circuit Court of Appeals has been recognized as reputedly conservative in its adjudication of civil rights issues. *See, e.g.*, Owen Moritz, *Atlanta Appeals Court Hard To Gauge*, DAILY NEWS, Nov. 16, 2000, at 32 (The Eleventh Circuit Court of Appeals "tended toward conservative rulings in a number of cases during the mid-'90s involving school prayer, First Amendment and sexual harassment."); *see also* Posting of David Oscar Markus to Southern District of Florida Blog, http://www.sdfra.blogspot.com/2006_09_01_archive.html (Sept. 13, 2006, 11:59 EST) ("Lawyers who practice in the 11th Circuit like to compare Judge Ed Carnes to Justice Scalia."); Posting of Julie Kay to Southern District of Florida Blog, http://sdfra.blogspot.com/2009_02_01_archive.html (Feb. 6, 2009, 12:21 EST) (In reference to the Eleventh Circuit's *Vamos a Cuba* ruling, questioning "Are you surprised by the 11th Circuit's ruling authored by Judge Ed Carnes?").

366. *Vamos a Cuba*, 557 F.3d at 1207.

367. *Id.* at 1200.

368. *Id.* at 1202.

369. *Id.*

370. *Id.*

board merely pretextual after-the-fact justifications for eradicating material deemed offensive and distasteful by a segment of the community?

Hinging the ruling on his findings of “various degrees of serious distortions,”³⁷¹ and the “need for accuracy in factual information” to be “especially true and of utmost importance for five to seven year-olds,”³⁷² Judge Carnes determined that “it simply is not true, as *Vamos a Cuba* asserts, that the lives of children in Cuba are like those of children in this country,”³⁷³ and as such, the “Board’s motive was what it stated—that the book was ordered removed from school libraries because it is full of factual errors.”³⁷⁴ The court further supported its opinion by emphasizing (1) the “consistency throughout the process of the inaccuracy complaints and . . . of the explanations of the Board members who voted to remove the book;”³⁷⁵ (2) the fact that the “Board’s formal order stated *Vamos a Cuba* was being removed because the Board had found that ‘the book is inaccurate and contains several omissions;’”³⁷⁶ and (3) that “five of the six [Board] members voting to remove it explained that they were doing so because of inaccuracies.”³⁷⁷ As to the protestation over the educational suitability of the omitted material for children, the Eleventh Circuit, referring to watered-down statements of hardship in other books in the series, contended that “if it is developmentally appropriate to tell children in this country about some of the hardships that children face in India and in Cambodia, it is no less developmentally appropriate to mention some of those that chil-

371. *Id.* at 1209. One of the “serious” distortions cited by Carnes includes:

[T]he book states that: “[m]any kinds of fruits grow in Cuba,” and that “[b]ananas, pineapples, orange, and mangoes are favorites.” While these fruits are indeed grown in Cuban and may be favorites, the implication that Cubans get to enjoy them is misleading. The population generally does not have free access to them because most of the fruit that is produced is exported, and the fruit that is not shipped out of the country is rationed by the government. The evidence in the record indicates that malnutrition is not uncommon among the children of Cuba. They do not eat like the children of this country do.

Id. at 1212 (second and third alterations in original) (internal citations omitted). Another inaccuracy by omission consisted of:

According to page 22 of *Vamos a Cuba*, “Cuban children go to school between the ages of five and fourteen.” That is not completely true. The record in this case establishes that some children go to school beyond the age of fourteen, but only if the student does not have “a ‘political stain,’” the absence of which “is crucial to have access to the university level, since ‘the universities are for the revolutionaries.’”

Id. at 1213 (internal citations omitted).

372. *Id.* at 1215.

373. *Id.* at 1214.

374. *Id.* at 1211.

375. *Id.*

376. *Id.*

377. *Id.* at 1209.

dren face in Cuba.”³⁷⁸ Finally, chastising Judge Gold’s ruling, Circuit Court Judge Carnes asserted that “the district court’s reasoning is flawed. It never comes to grips with the substance of the School Board’s position, which is that representations made in *Vamos a Cuba* falsely portray a life in Cuba that does not exist and that in reality life under the Castro regime is bad—really bad.”³⁷⁹

While evidence may sometimes be like beauty—both in the eye of the beholder—Circuit Judge Wilson accurately points out in his dissent that “here, the majority ignores certain evidence in order to reach its decision. Instead of considering all the evidence in the record, as the district court did, the majority ignores various statements made by School Board members which suggest and sometimes even admit impermissible motives in the removal decision.”³⁸⁰ Moreover, because the district court was not faced with a “trial on the merits but . . . instead a preliminary injunction hearing, the credible and persuasive evidence was sufficient for the district court to have found a substantial likelihood of success on the merits.”³⁸¹ Admitting that the book did contain some inaccuracies, Judge Wilson discerned that “many of the inaccuracies complained of are inconsequential, which casts doubt on whether those proffered motivations for the book’s removal are worthy of credence.”³⁸² Given expert testimony indicating that when it comes to potentially inappropriate information, “it is better to err on the side of caution in a young children’s book,”³⁸³ and the fact that “without some common ground it is difficult for a child to learn about what would

378. *Id.* at 1227. The passages to which the court refers are the following: (1) “The book *A Visit to Cambodia* tells its audience: ‘Not all young people can go to school. There has been war in Cambodia for more than 20 years. Many schools have been destroyed.’” *Id.* at 1217; (2) “*A Visit to India* informs children: ‘Many children are too poor to go to school. Their families need them to stay at home. The children help farm or they beg in the streets.’” *Id.*

379. *Id.* at 1221.

380. *Id.* at 1233 (Wilson, J., dissenting).

381. *Id.*

382. *Id.* at 1248. Judge Wilson proceeds to detail one such example of this:

For example, one of the “inaccuracies” is that the book explained that Cuban music is played with maracas made of pumpkins. Dr. Clark [defendants’ expert] objected: “To say that maracas are made of pumpkins shows the utter ignorance of the writer on this matter. The maracas are made from the *guiro* fruit, dried and properly processed.” Yet, according to the Dictionary of the Royal Spanish Academy, the *guiro* fruit in fact *is* a pumpkin. It is a type of gourd, which are in the same family as pumpkins. While it may have been more precise for the book to say that maracas are made from a *guiro* fruit or a gourd, it borders on frivolity to argue about whether a maraca is made from a pumpkin. Moreover, it is evident that explaining that a maraca is made from a *guiro* fruit will mean far less to an American four-year-old than explaining that it is made from a pumpkin, with which Halloween has rendered the four-year-old familiar.

Id. (Wilson, J., dissenting) (internal footnote and citations omitted).

383. *Id.* at 1246.

otherwise seem to foreign,”³⁸⁴ Wilson reasoned that “such generalizations do not render a book inaccurate so much as they simplistically illustrate Cuba’s culture.”³⁸⁵ He also addressed the arguments made regarding the Cambodia and India books, and asserted that “negative information *is* in fact included in *Vamos a Cuba*”:³⁸⁶ For example, “the pictures depict Cuba as a poor country, with children missing articles of clothing (on page 10 a young boy is shirtless and on page 19 a boy is shirtless and shoeless), people engaged in manual labor, children also engaged in such labor, and outdated housing and cars.”³⁸⁷ After review of the evidence and the district court’s opinion, Wilson opined that there were “numerous statements that demonstrate that other motivations were at work,”³⁸⁸ and concluded that “the greater weight of the record evidence supports the district court’s finding that the School Board acted in a narrowly partisan, political manner in furtherance of ideological viewpoints, in a way that the First Amendment forbids, when it voted to remove *Vamos a Cuba* from its library shelves.”³⁸⁹

Aside from the shortcomings identified by Wilson, the majority’s opinion fails to engage in critical thought and examination of the circumstances surrounding the case in other ways. For instance, Judge Carnes boasts of the board’s “consistency”³⁹⁰ in its focus on accuracy throughout the entire process; however, it appears the only consistent focus on the Miami-Dade School Board’s agenda was eradicating *¡Vamos a Cuba!*, not only from the Marjory Stoneman Douglas Elementary School, but from every elementary school in the entire district, at all costs and without regard to procedure, ethical discretion, or the Constitution. This is most prominently evidenced by the school board’s hijacking of the review process after the SMRC voted seven-to-one to retain the book³⁹¹—an event conveniently overlooked in Judge Carnes’s opinion. Also overlooked is the fact that in this unwarranted intervention, the board members exhibited very personal and political feelings toward the book and demanded its immediate removal, in knowing violation of appropriate procedure, from the entire district.³⁹² The board backed down, allowing fair procedure to run its course, *only* after its attorney

384. *Id.* at 1249.

385. *Id.*

386. *Id.* at 1247 (emphasis added).

387. *Id.*

388. *Id.* at 1237.

389. *Id.*

390. *Id.* at 1211 (majority opinion).

391. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Sch. Bd. (Vamos a Cuba)*, 439 F. Supp. 2d 1242, 1251–52 (S.D. Fla. 2006). *See also supra* Part IV.A.

392. *Vamos a Cuba*, 439 F. Supp. 2d at 1251–52.

strongly warned that such action would inevitably impel a lawsuit.³⁹³

The Eleventh Circuit then promulgates as convincing evidence the declaration in the school board's final order that the books were removed for inaccuracies and omissions.³⁹⁴ Not only is this proclamation unconvincing in light of the board members' intensely personal and political comments made during the decision,³⁹⁵ but it is also dubious in consideration of the fact that the issuance of the order was practically coached by the board's attorney to avoid potential lawsuits.³⁹⁶ Forecasting another board hiccup subjecting itself to liability, the school's counsel issued another warning memorandum just prior to the board's final review, advising that:

The Board should be careful to state its legitimate, constitutionally-sound reasons for its decisions and the reasons for deviation from the . . . recommendations The Board's decision should be memorialized in a formal order The order should contain the Board's findings and conclusions showing the rationale for the Board's decision [I]t is our opinion that deviation from the DMRC's decision, especially in light of the extensive analysis and deliberation . . . would most likely subject such a decision by the Board to a legal challenge [I]t is exceedingly important that the Board identify with specificity the legal grounds for any Board decisions, particularly one that deviates from the DMRC's recommendations. Moreover, it is our opinion that even a well reasoned decision by the Board that deviates . . . will expose the Board to liability.³⁹⁷

Given such explicit directions, it is difficult to see how the board could issue a final order stating anything other than its best possible shot at insulating itself from legal action.

Judge Carnes also notes that "five of the six [board] members voting to remove it [the book] explained that they were doing so because of inaccuracies."³⁹⁸ Again the opinion-delivering judge—aside from ignoring the overwhelming amount of non-accuracy related comments—fails to contextualize this with crucial evidence: While six of the board members may have (for argument's sake) legitimately believed the books were inaccurate and such defaults rendered them unsuitable for the public-school library, *twenty-six*³⁹⁹ other committee members (including the superintendent and dissenting board members) found, after extensive research and debate, that the books met educational criteria, were "valu-

393. *Id.* at 1252.

394. *Vamos a Cuba*, 557 F.3d at 1211.

395. *Vamos a Cuba*, 439 F. Supp. 2d at 1258–60.

396. *Id.* at 1256–57.

397. *Id.*

398. *Vamos a Cuba*, 557 F.3d at 1209.

399. *Vamos a Cuba*, 439 F. Supp. 2d at 1251, 1256, 1258.

able to an individual course of study,"⁴⁰⁰ and should be retained in the school district's libraries with *no* restrictions.⁴⁰¹ Judge Carnes, therefore, is correct in observing that the reasoning given by these six members suggests they remained true to one intent throughout the process; that intent, however, was to radically thwart the school's system of fair procedure and unilaterally expunge the district of a children's simple picture book based on personal opinions and political viewpoint. Such an agenda—convincing cover story or not—is forbidden by the First Amendment.

Finally, the Eleventh Circuit alleges that the district court, in its ruling, "never comes to grips with the substance of the School Board's position . . . that in reality life under the Castro regime is bad—really bad."⁴⁰² Although Judge Wilson makes a salient counterargument, averring that "recognizing that life in Cuba is oppressive does not justify constitutionally impermissible viewpoint discrimination,"⁴⁰³ the ironic reality is that the Eleventh Circuit, itself, failed to come to grips with substantial points of the plaintiffs' position. Debatable inaccuracies admitted, the court seems to forget that the case concerns *library* books, books that by their very nature are inherently voluntary, and courts across the country and in the Eleventh Circuit have recognized them to be distinguishably so.⁴⁰⁴ While of course accuracy may be one of many concerns in the selection and retention of library books, the small, and in some examples, validated, omissions lamented by the board in *Vamos a Cuba!* "fall[] outside the scope of a superficial geography book."⁴⁰⁵ As Miami journalist Michael Putney points out:

Vamos a Cuba, like all the other books in the series, is simply meant to give small children a sense of what it's like to be a child in another country. One page in *Vamos a Cuba* shows a shirtless and shoeless little boy leading a team of oxen to a farm field. Should the text say it's a state-owned collective? I don't think so, although a knowledgeable parent could tell his child that. Assuming a 6-year-old would care.⁴⁰⁶

400. *Id.* at 1254.

401. *Id.* at 1256.

402. *Vamos a Cuba*, 557 F.3d at 1221.

403. *Id.* at 1237 (Wilson, J., dissenting).

404. *See, e.g.*, Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 861–62 (1982) ("[A]s this case is presented to us, it does not involve textbooks, or indeed any books that Island Trees students would be required to read. . . . [T]he only books at issue in this case are *library* books, books that by their nature are optional rather than required reading."); *see also* Virgil v. Sch. Bd. of Columbia County, Fla., 862 F.2d 1517, 1523 n.8 (11th Cir. 1989) (declining to apply *Pico* because the books at issue were not books of voluntary inquiry in the library and because the parties stipulated no impermissible motive to be at issue).

405. *Vamos a Cuba*, 557 F.3d at 1247 (Wilson, J., dissenting).

406. Putney, *supra* note 359.

The book's purpose is to provide "a simple glimpse into Cuba which will form the basis of a future, deeper understanding about the country," and, as Judge Wilson directs, "the answer to books that do not provide all the information a reader wants is to find another book."⁴⁰⁷ Furthermore, should parents *not* want their children to be exposed to such a minimalist representation of Cuban culture, the answer is also simple: "Don't like the book? Don't check it out. That's a choice unavailable to people in Cuba."⁴⁰⁸

Most importantly, the Eleventh Circuit's ruling fails to come to terms with the dangerously imprudent precedent it sets by reversing the lower court's decision. The court's holding invites not only a tidal wave of frivolous book challenges and litigation based on its narrow interpretation of the degree of "accuracy" required to pass muster in public elementary school libraries,⁴⁰⁹ but also tells school board officials that they may recklessly rob students of their constitutional rights, for any reason—personal, political, or otherwise—so long as they advance a quasi-legitimate *post hoc* excuse when confronted about their impermissible actions. The intimation of such unbridled discretion by the Eleventh Circuit Court of Appeals perilously perverts the spirit of *Pico*'s First Amendment protections and converts courts across Alabama, Florida, and Georgia into venues for pretextual puppet shows.

In response to the Eleventh Circuit's constitutionally repugnant reversal, Howard Simon, Executive Director of the ACLU of Florida, stated, "[C]learly this cannot be allowed to stand. We must take further action."⁴¹⁰ What action exactly, the ACLU has not yet said, but Simon assured that the organization "will move forward to protect free speech in America's public schools through one of the multiple legal options that are available,"⁴¹¹ and that no matter how much the school board and Eleventh Circuit judges "try to evade the facts and bend the law into a pretzel, censorship is censorship is censorship."⁴¹² Will *Vamos a Cuba* visit the Supreme Court? Will the Justices agree? Stay tuned.

407. *Vamos a Cuba*, 557 F.3d at 1248 (Wilson, J., dissenting).

408. Putney, *supra* note 359.

409. *See, e.g., Vamos a Cuba*, 557 F.3d at 1249 (Wilson, J., dissenting) ("For example, a reference book for children about cars and trucks would be 'inaccurate' without information about how their emissions contribute to global warming.").

410. Kathleen McGregory & Jay Weaver, *Yanking Book on Cuba Ruled Legal by Court*, MIAMI HERALD, Feb. 6, 2009, at 1A.

411. Press Release, American Civil Liberties Union of Fla., 11th Circuit Decision Flies in the Face of First Amendment (Feb. 5, 2009), available at http://www.aclufl.org/news_events/index.cfm?action=viewRelease&emailAlertID=3697.

412. McGregory & Weaver, *supra* note 410.