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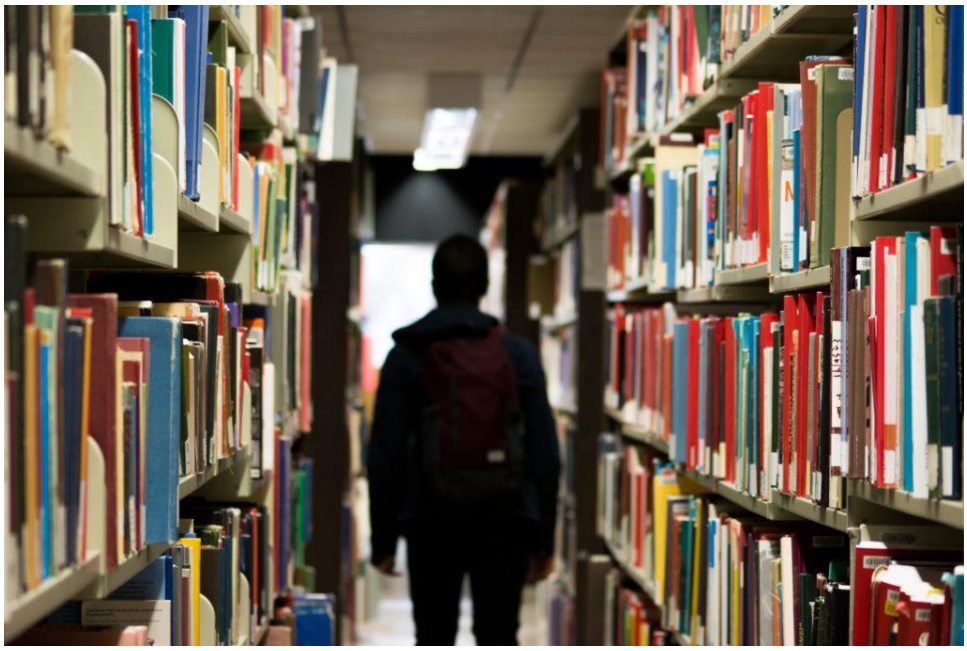

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On October 25th, 2021, Texas State Representative Matt Krause, in his capacity as Chairman of the Committee on General Investigating, circulated a letter addressed to the Texas Education Agency and school-district superintendents.[1] The letter requested that superintendents identify and investigate a list of 800 books possibly held in their districts' libraries that might contain topics ranging from human sexuality to HIV/AIDS to any material that "might make students feel discomfort, guilt, anguish . . . or psychological distress because of their race or sex . . . ."[2]

Representative Krause's action follows a growing wave of complaints directed at libraries from organizations like Moms for Liberty. Moms for Liberty seeks to impose "parental controls" on "potentially harmful books," which include those involving sexual acts, LGBTQ+ identity, and critical race theory.[3] Their lobbying efforts have successfully led to the introduction of bills in state legislatures across the country proposing "book bans" that would restrict schools and libraries from teaching certain books and block student access to certain books in online library databases.[4]

In general, the Supreme Court has looked skeptically on book censorship in the past as a violation of the First Amendment.[5] However, opponents of these publications have found success in targeting "children's literature," primarily driven by the same arguments put forth by Moms of Liberty, that children will be swayed by explicit or "evil" content.[6] Their success is attributable to the school board's granted discretion in determining the "suitability" of books for inclusion in school libraries.[7]

Defendants in book ban suits have relied on this argument at least since 2009. For example, prior to the current wave of legislative "book bans," the Eleventh Circuit considered a First Amendment challenge to a School Board's decision to remove a book from its libraries *ACLU v. Miami Dade*.[8] Relying on a "suitability" test handed down from the Supreme Court in the 1982 decision *Board of Education v. Pico*,[9] the Court sided with the Miami-Dade Board, allowing the book to be removed from libraries because "the Board did not act based on an unconstitutional motive."[10] In that case, the book in question indisputably contained factual inaccuracies, which the court deemed a sufficient motive for the book's unsuitability and ultimate removal from public school libraries.[11]

Miami-Dade considered a book on the Cuban experience which most considered factually inaccurate and thus inappropriate for placement in public school libraries. However, recent decisions to ban books in the past few years, however, have focused more on the nature of their content than the factual nature of the content itself. At least one court has considered this particular type of book ban before. A Federal District Court in Missouri applied similar reasoning as the *Miami-Dade* court and similarly sided with the school board's decision to remove eight books from access in public school libraries.[12] As pointed out by the plaintiffs, the books at issue all feature non-white, LGBTQ+, or minority protagonists.[13] However, the defendants argued they featured content inappropriate for children. The court agreed, dismissing the case and holding the plaintiffs lacked a fair chance of winning, even under the suitability test's most favorable framework.[14]

These and other cases have shown that the courts have been hesitant to deny superintendents and public school districts the power to remove or ban books from their libraries, granting them vast discretion to decide the suitability of books for children.

Case law has demonstrated that motivation for banning books does place a limit on a public school entity's discretion to remove books from student access.[15] As the divided majority in *Pico* stated, "[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated . . . constitutional rights . . . . The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks [sic] or advocating racial equality and integration."[16]

Book ban opponents see this argument as an avenue for potential success in the courts.[17] However, proponents such as Representative Krause[18] have employed rhetoric that might render this entire analysis irrelevant.[19] First Amendment protections, proponents argue, do not extend to content such as critical race theory or depictions of LGBTQ+ relationships because such content in nature is an "obscenity," incitement of violence, and defamatory.[20] If believed, courts will not reach the *Pico* suitability analysis because it is well within a school board's discretion to remove these books from their libraries.

In this way, the survival of a book ban depends greatly on the proclivities of the particular judge hearing the challenge and whether the obscenity argument convinces them. Given that most of the current book bans target books on race and sexuality,

diversifying the judiciary seems to be the most likely long-term pathway for protecting the right to read in schools under the First Amendment[21] unless the law adapts to allow for a less discretionary doctrine concerning book bans in schools.[22]

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1. Letter from Matt Krause, Chairman of Texas House Committee on General Investigating, to Lily Laux, Deputy Commissioner School Programs of Texas Education Agency (Oct. 25, 2021).
2. Id.
3. Erika Hayasaki, How Book Bans Turned a Texas Town Upside Down, N.Y. Times Magazine, Sept. 8, 2022, at 36.
4. Hannah Natanson, The Next Book Ban: States Aim to Limit Titles Students Can Search For, Wash. Post (May 10, 2022), https://www.washingtonpost.com/education/2022/05/10/school-library-database-book-ban/ [https://perma.cc/ZE9N-RSTS].
5. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (holding that a state's legislatively created agency to investigate and effectuate extralegal sanctions to censor books in the marketplace impermissibly acted to suppress rather than to advise).
6. Susan L. Webb, Book Banning, First Amend. Encyc. (2009), https://www.mtsu.edu/first-amendment/article/986/book-banning [https://perma.cc/25ZS-N865].
7. Bd. of Educ. v. Pico, 457 U.S. 853, 870-71 (1982).
8. ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd., 557 F.3d 1177 (11th Cir. 2009).
9. See Pico, 457 U.S. 853 (1982).
10. Miami-Dade, 557 F.3d 1177, 1207 (2009).
11. Id. at 1211.
12. See C.K.-W v. Wentzville R-IV Sch. Dist., No. 4:22-cv-00191-MTS, 2022 U.S. Dist. LEXIS 139554 (D. Mo. 2022).
13. Id. at 6.
14. Id. at 18.
15. Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982).
16. Id. at 870-71.
17. See Webb, supra note 6.
18. See Krause, supra note 1.
19. Marisa Shearer, Banning Books or Banning BIPOC?, 117 Nw. U. L. Rev. 24, 36 (2022).
20. Id.
21. See id.
22. See Shane Morris, The First Amendment in School Libraries: Using Substantial Truth to Protect a Substantial Right, 13 Drexel L. Rev. 787 (2021) (arguing that courts should beef up the Pico standard by incorporating the substantial truth doctrine, a doctrine borrowed from defamation law).