



March 23, 2023

BY EMAIL AND MAIL TO:

Re: Harmful Effects of Removing Public School Library Books

Dear Superintendent and Members of the Board:

We write to express our alarm regarding recent efforts to ban books in Mississippi public schools. Several school districts in our state have recently removed highly acclaimed books—including literature written by lauded Mississippi authors—from school library collections. We applaud the schools, libraries, and communities that have resisted these demands and preserved our national tradition of libraries as places for young people to learn, imagine, grow, and explore diverse storytelling. We urge you to affirm your commitment to public education, the First Amendment, and the welfare of all students in your community by resisting these harmful and misguided efforts. If books have been banned in your district, we also implore you to restore students' access to all materials in your library collection as soon as possible. Additionally, Mississippi school districts should verify that existing library book selection and reconsideration policies are in line with federal law and constitutional principles.¹

Background

In the fall of 2019, Mississippi had the highest growth of all states on the National Assessment for Education Progress.² These gains were particularly strong in reading. Although our students made great gains in literacy, their access to stimulating and challenging resources is simultaneously being threatened.

School-based book bans are part of a dangerous nationwide trend where school boards or administrators succumb to pressure from parents and politicized advocacy groups to deny students access to vital literature and information about LGBTQ+ people,³ human sexuality, racial discrimination, marginalized identities, and other topics that students have the right to learn about.⁴ Restricting students' access to books limits their

¹ Schools should establish and adhere to uniform and transparent procedures to evaluate calls to remove books. Such procedures generally include establishment of a review committee to carefully evaluate the materials at issue, receive input from stakeholders, and make written findings. *See, e.g., Selection & Reconsideration Policy Toolkit for Public, School, & Academic Libraries*, AM. LIBR. ASS'N (Dec. 25, 2017), <https://www.ala.org/tools/challengesupport/selectionpolicytoolkit/formalreconsideration>.

² Kayleigh Skinner, *Results are in: Mississippi students No. 1 in the country for reading gains*, MISS. TODAY (Oct. 30, 2019), <https://mississippitoday.org/2019/10/30/results-are-in-mississippi-students-no-1-in-the-country-for-reading-gains/>.

³ LGBTQ+ is an acronym standing for lesbian, gay, bisexual, transgender, and queer, plus all other queer and gender diverse identities that are not specifically covered by the other five initials.

⁴ Jonathan Friedman, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sep. 19, 2022), <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/>.

opportunity not only to learn about themselves but also people who are different from them. As a result, students are hindered from becoming active and informed citizens in their communities—a fundamental principle of public education.

Legal Concerns

Library book removals are contrary to an appropriate educational mission and raise serious legal issues of discrimination in education, including violating the right to receive information protected by constitutional and statutory free speech guarantees.

I. Access to School Library Books is a Protected Right Under the First Amendment

First Amendment free speech rights include the right to receive information, and for students in school libraries to access information and ideas free from viewpoint-based censorship. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (plurality). In *Pico*, the U.S. Supreme Court examined a challenge to a school’s removal of books by Kurt Vonnegut and Langston Hughes on grounds that the books were considered by some to be “anti-American” and “just plain filthy.” *Id.* at 853. The Court emphasized the importance of a student’s ability to access information, finding that “the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students.” *Id.* at 868.

Notably, the fact that a book discusses sexuality or sexual conduct, or uses profanity, does not make it “obscene” or “pervasively vulgar” nor otherwise justify its removal for that reason alone.⁵ In 1978, a Massachusetts federal district court enjoined on free speech grounds the removal of a book’s poem about sexual harassment with profane language, finding that it was not obscene and “no substantial government interest was served by cutting off students’ access” to the book. *Right To Read Def. Comm. of Chelsea v. Sch. Comm. of City of Chelsea*, 454 F. Supp. 703, 713 (D. Mass. 1978).

II. A School Board’s Authority to Restrict Library Books is Limited by the First Amendment

Following *Pico*, courts within the Fifth Circuit and throughout the country have reaffirmed the principle that, “[i]n light of the special role of the school library as a place where students may freely and voluntarily explore diverse topics, [a] School Board’s non-curricular decision to remove a book well after it had been placed in the public school libraries evokes the question whether that action might not be an unconstitutional attempt to ‘strangle the free mind at its source.’” *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 190 (5th Cir. 1995) (quoting *West Va. State Bd. of Educ. v. Barnette*, 319

⁵ The U.S. Supreme Court has held that materials are not “obscene” so as to fall outside constitutional protection except where the works “taken as a whole, appeal to the prurient interest in sex [and] portray sexual conduct in a patently offensive way, and [] taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

U.S. 624, 637 (1943)). A school board must meet a high burden to justify book restrictions, for a school board “cannot limit access to library materials solely on the basis of the content of those materials, unless the [government] can demonstrate that the restriction is necessary to achieve a compelling government interest and there are no less restrictive alternatives for achieving that interest.” *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000). “Local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books. . .” *Id.*

Parental concern is often raised in book content regulation, including locations throughout Mississippi. In *Pico*, the U.S. Supreme Court directly addressed this issue. There, school board members removed books from the library shelves after obtaining a list of “objectionable” books from a “politically conservative organization of parents.” *Pico*, 457 U.S. at 857. Although the school board was able to cherry-pick excerpts from many of the disfavored books containing vulgar or sexually explicit language, the Court held that the board violated the First Amendment insofar as they “intended by their removal decision to deny [students] access to ideas with which [the board members] disagreed.” *Id.* at 871. The objections of parents regarding library books and materials do not create a compelling government interest. *See Sund* at 551; *See also Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008) (“Public schools are not obliged to shield individual students from ideas which parents may find religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them. . .”); *See also Keefe v. Geanakos*, 418 F.2d 359, 361–62 (1st Cir. 1969) (“With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education.”).⁶

III. “Restricted Access” Categories for Disfavored Books are Unconstitutional

The U.S. Supreme Court has established the narrow exceptions that allow a school to restrict a student’s First Amendment rights. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 50, 509 (1969) (holding that unless a behavior or activity “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained”). Absent a demonstration of solid facts that a book will cause harm to students or the educational environment, not mere speculation or distaste, a school board must remove restrictions and return books to the shelves. *See Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 1000 (W.D. Ark. 2003). The court in *Counts* struck down several restrictions on books because the school board did not meet this high bar. *Id.* at 1003-04.

The U.S. Supreme Court has found that restricting a student’s access to ideas within library books without a compelling governmental interest no matter how minor the restriction may seem, is unconstitutional. Thus, in addition to prohibiting the complete removal of library books for political or viewpoint-based reasons, the First Amendment

⁶ Parents who do not want their children to have access to certain materials can instruct their children not to access them or may, in appropriate circumstances, direct school librarians not to allow their children to check them out. However, these parents have no right to censored library resources for all other students.

also prohibits viewpoint-based restrictions on *access*, such as placing disfavored books in a separate section of the library or requiring parental permission to check out the books. *Sund*, 121 F. Supp. 2d at 549-50 (quoting *Turner Broadcasting, Inc. v. FCC*, 512 U.S. 622, 641 (1994)) (“Even where a regulation does not silence speech altogether, the Supreme Court has given ‘the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.’”); *see also Counts*, 295 F. Supp. 2d at 1002 (explaining that “the stigmatizing effect of having to have parental permission to check out a book constitutes a restriction on access” based on viewpoint). Additionally, challenged books should not be removed until the review process is complete according to the American Library Association.

IV. Discrimination Based on Race, Gender Identity, and Sexual Orientation

Removing books that reflect the experiences of members of LGBTQ+ communities and communities of color is inconsistent with federal legal protections, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, which prohibit discrimination in schools on the basis of race, national origin, or sex, including sexual orientation and gender identity. Book removals and restrictions may constitute unlawful discrimination.⁷

A. Discrimination Based on Race

The Jim Crow South was a “particular hotbed for book censorship”⁸ when book banning marginalized underrepresented and disempowered voices in Mississippi. *Mississippi: Conflict and Change* won the Lillian Smith Book Award for Best Southern Nonfiction in 1975 but was rejected for use in Mississippi's public schools by the Mississippi Textbook Purchasing Board on the grounds that it was “too racially oriented.” *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1148 (N.D. Miss. 1980). When Loewen challenged the Board's decision, the U.S. District Court for the Northern District of Mississippi ruled that the authors were denied their right to free speech and press, and the rejection of the textbook was for “a racially discriminatory purpose” and with “discriminatory intent.” *Id.* at 1154. The American Library Association considers *Loewen* a historic First Amendment case and one of the foundations of the “right to read freely.”⁹

With the recent change of the Mississippi flag, our state has made strides to distance itself from the pain of the Jim Crow South. The removal of books documenting the experiences of people of color exacerbates the unacceptable situation in which students of color are disproportionately subjected to ostracism and bullying, and it

⁷ Pursuant to 42 U.S.C. § 2000d-1, the United States Department of Education is empowered to enact binding regulations implementing the requirements of Title VI of the Civil Rights Act of 1964.

⁸ Erin Blakemore, *The history of book bans—and their changing targets—in the U.S.*, NAT'L GEOGRAPHIC (Sep. 6, 2022), <https://www.nationalgeographic.com/culture/article/history-of-book-bans-in-the-united-states>.

⁹ Robert D. McFadden, *James W. Loewen, Who Challenged How History Is Taught, Dies at 79*, N.Y. TIMES (Aug. 20, 2021) <https://www.nytimes.com/2021/08/20/books/james-w-loewen-dead.html>.

deprives them of the right to an equal educational experience. Removing books that reflect students' experiences not only removes a support system, but also sends the message to students of color that they and their community are not accepted by their teachers and peers.

B. Discrimination Based on Gender Identity and Sexual Orientation

In addition, we are increasingly troubled by the dangerous anti-LGBTQ+ rhetoric in much of the recent book censorship in Mississippi. The GLSEN 2021 National School Climate Survey found that in Mississippi secondary schools only 25% of LGBTQ+ students had access to inclusive library resources, and only 6% were taught positive representations of LGBTQ+ people, history, or events (“inclusive curriculum”).¹⁰ Nationally, LGBTQ+ students are far more likely than their non-LGBTQ+ peers to be bullied and harassed at school, alienated from their families and communities, and suffer from depression and suicidal ideation.¹¹ Access to LGBTQ+ representation or information in literature can be a refuge for these youth, even lifesaving. As such, they rely on public school systems to afford them access to these materials.

Courts have affirmed that the First Amendment's prohibition on viewpoint-based censorship of library materials includes censorship of books because they express support for LGBTQ+ people. *See, e.g., Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 875 (D. Kan. 1995) (holding that the removal of a book from school libraries depicting romance between two women violated the First Amendment); *see also Parents, Fams., & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 897 (W.D. Mo. 2012) (holding that censorship of LGBT-supportive websites in a school library violated the First Amendment); *Sund*, 121 F. Supp. 2d 530, 548) (the removal of two children's picture books about LGBTQ+ inclusion from the children's section of the public library and the enactment of a city resolution on book removal procedures were “impermissible content-based and viewpoint-based discrimination” in violation of the First Amendment).

V. Diversity in Education as a Bedrock of Democracy

Notwithstanding efforts to characterize objections to certain books as “age appropriateness” or protection from “obscenity” or “vulgarity,” the current calls to remove books that center the experiences of LGBTQ+ individuals and individuals of color run parallel to a nationwide political effort to censor inclusive representations from the marketplace of ideas. Such political and partisan intrusions into the school system run afoul of our Constitution. *See Pico*, 457 U.S. at 870-71 (discretion to control content of school libraries “may not be exercised in a narrowly partisan or political manner” or “to deny [students] access to ideas with which [some] disagree[]”); *see also id.* at 907

¹⁰ *School Climate for LGBTQ+ Students in Mississippi*, GLSEN (2021), https://maps.glsen.org/wp-content/uploads/2023/02/GLSEN_2021_NSCS_State_Snapshots_MS.pdf.

¹¹ *LGBTQI+ Youth*, STOPBULLYING.GOV (Sept. 10, 2021), <https://www.stopbullying.gov/bullying/lgbtq>.

(Rehnquist, J. dissenting) (restrictions motivated by “partisan or political” interests, as well as those based on “racial animus,” are unconstitutional).

In debating whether to allow students to check out a book deemed controversial from the school library, it is easy to forget the overarching function of our schools: training students to think for themselves. The U.S. Supreme Court highlighted the important role of public schools in our nation by stating “America’s public schools are the nurseries of democracy.” *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 U.S. 2038, 2040 (2021); *see also, e.g., Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). A school library is a place where “students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.” *Id.* at 853. It is a place where a student may “test or expand upon ideas presented to [them], in or out of the classroom.” *Pico*, 457 U.S. at 869 (quoting *Right To Read*, 454 F. Supp. at 715. Students in a diverse society will thrive only if a diverse array of literature and information are available to them.

By contrast, when school officials attempt to create a “sanitized” learning space by eliminating controversial texts from school libraries, they undermine this critical function of public education. The danger is not in the exposure to “a broad sweep of ideas and philosophies,” but instead “[t]he danger is in mind control.” *Right To Read*, 454 F. Supp. at 715. When books can be removed for all students based on individual parents’ complaints about the author’s message or point of view, it paves the way for an unending series of attempts by one group or another to rid a school of material based on what a vocal minority finds objectionable. Book removals strike at the very heart of the purpose of a public education in our pluralistic society.

Other Concerns

Beyond the legal concerns raised above, there are secondary concerns brought about by public dustups about the appropriateness of reading material in schools. School administrators discouraging student engagement with material they find divisive inhibits the free learning environment schools strive to create. When a superintendent uses their “official power to perform an act clearly indicating that the ideas contained in the [books] are unacceptable and should not be discussed or considered,” that “message is not lost on students and teachers, and its chilling effect is obvious.” *Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn.*, 670 F.2d 771, 779 (8th Cir. 1982).

Unfortunately, debates about books and their subject matter may also add to incidents of bullying of children who are, or whose families are, members of the communities discussed in the banned books. This is particularly the case when opponents describe the books’ content as obscene, pornographic, disgusting, divisive, or otherwise unacceptable. While respecting the right of opponents to speak and be heard, schools must take steps to affirm and protect the equality of the experiences of their students and

to fulfill their legal duties to ensure a safe, supportive, and equitable educational experience.¹²

Resolution

The ACLU has previously sued and won to restore books to school libraries, including for “advocacy of homosexuality.” *A.W. and C.W. v. Davis Sch. Dist.*, 1:12-cv-00242-EJF (D. Utah Jan 31, 2013). Here, the school district ultimately agreed to restore the book to the shelves, remove its restricted access category, and pay \$15,000 in attorneys’ fees.¹³ Alternatively, the ACLU has submitted complaints to the U.S. Department of Education’s Office for Civil Rights, leading to federal investigations.¹⁴

Ultimately, we are asking Mississippi superintendents and school boards to reject censorship in support of the rights and interests of students and our democracy. We urge you to resist any attempts to remove books from your school libraries and, where applicable, restore students’ access to all censored materials as soon as possible. Mississippi school districts should also inquire whether existing library book selection and reconsideration policies violate federal or constitutional law.

We know your district is aware of its obligation to ensure a nondiscriminatory and safe environment for students. We welcome the opportunity to discuss this matter.

Sincerely,



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¹² The Mississippi Code §37-11-67 prohibits bullying or harassing behavior in public schools. *See* MISS. CODE ANN. § 37-11-67 (West).

¹³ *See Universal Settlement and Release of All Claims Against Davis School District and its Agents and Employees*, ACLU (Jan 31, 2013), https://www.aclu.org/wp-content/uploads/legal-documents/aw_v_davis_school_district_settlement_agreement.pdf.

¹⁴ *See Mike Hixenbaugh, A Texas superintendent ordered librarians to remove LGBTQ-themed books. Now the federal government is investigating.*, THE TEX. TRIBUNE (Dec. 20, 2022, 10:00 AM), <https://www.texastribune.org/2022/12/20/granbury-books-investigation-civil-rights/>.