

No. 25-1105

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

KRISTEN CROOKSHANKS, as parent and next of friend of a minor on behalf
of C.C.; MINDY SMITH, as parent and next of friend of a minor on behalf of
E.S.; NAACP-COLORADO-MONTANA-WYOMING STATE AREA
CONFERENCES; and THE AUTHORS GUILD,

Plaintiffs-Appellees,

v.

ELIZABETH SCHOOL DISTRICT,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Colorado
Hon. Charlotte N. Sweeney
Case No. 1:24-cv-3512-CNS-STV

**BRIEF OF *AMICI CURIAE* FREEDOM TO READ
FOUNDATION, COLORADO ASSOCIATION OF LIBRARIES, and
AMERICAN ASSOCIATION OF SCHOOL LIBRARIANS
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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Dated: June 20, 2025

DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amici curiae* disclose as follows:

1. Freedom to Read Foundation is a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code that, as a not-for-profit organization, has no parent corporation or stock, and therefore no publicly owned corporation owns ten percent or more of its stock.
2. Colorado Association of Libraries is a not-for-profit organization under Section 501(c)(6) of the Internal Revenue Code that, as a not-for-profit organization, has no parent corporation or stock, and therefore no publicly owned corporation owns ten percent or more of its stock.
3. American Association of School Librarians is a not-for-profit organization and a division of the American Library Association, which is a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code that, as a not-for-profit organization, has no parent corporation or stock, and therefore no publicly owned corporation owns ten percent or more of its stock.

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I. STATEMENT OF INTEREST

The Freedom to Read Foundation (“FTRF”) was established to foster libraries as institutions that fulfill the promise of the First Amendment; support the rights of libraries to include in their collections, and make available, any work they may legally acquire; establish legal precedent for the freedom to read of all citizens; protect the public against efforts to suppress or censor speech; and support the right of libraries to collect, and individuals to access, information that reflects the diverse voices of a community so that every individual can see themselves reflected in the library’s materials and resources.

The Colorado Association of Libraries (“CAL”) was founded in 1893 and represents the Colorado library community to advocate for quality library services, support access to information, and foster the professional development of its members. CAL members are librarians, library employees, institutions, and corporations drawn from public, school, academic, and special libraries; public library trustees; education administrators; library service providers; library vendors; volunteers; and library supporters.

The American Association of School Librarians (“AASL”) is the preeminent national professional association for school librarians. All aspects of the association’s work reflect its core values: learning; innovation; equity; diversity; inclusion; intellectual freedom; and collaboration. AASL is committed to ensuring

that all learners have a school library collection that is physically and intellectually accessible and where access is best met at the time of need.

Amici curiae believe that viewpoint censorship violates the core value of preserving intellectual freedom and thus have a strong interest in the outcome of this case.

Appellant and Appellees consent to the filing of this *amici curiae* brief.

II. STATEMENT OF CONTRIBUTIONS

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, *amici curiae* state that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person (other than the *amici curiae*, their members, or their counsel) contributed money that was intended to fund preparing or submitting this brief.

III. INTRODUCTION

“The school library is a mirror of the human race, a repository of the works of scientists, leaders, and philosophers. It is the locus where the past meets tomorrow, embellished by the present. The school library offers the student a range of knowledge, from the world’s great novels and plays to books on hobbies and how-to-do-it projects.” *Roberts v. Madigan*, 702 F. Supp. 1505, 1512 (D. Colo. 1989).

Defendant-Appellant Elizabeth School District (the “District”) undermined the purpose of the school library, and violated the First Amendment, by removing 19 books from school libraries (the “Removed Books”). The Removed Books include the Pulitzer Prize-winning novel *Beloved* by Toni Morrison, and best-sellers *The Kite Runner* by Khaled Hosseini and *The Hate U Give* by Angie Thomas. See District Br. 5.

The District’s actions are contrary to the history and purpose of libraries; well-established curation standards employed by trained librarians; and the First Amendment. The District argues that its actions were “government speech,” and thus not subject to First Amendment scrutiny. If that argument were accepted, governments could refuse to make books available in libraries based upon the viewpoints therein. Under the District’s view, the First Amendment would allow a Democratic-controlled school board to prohibit school libraries from carrying books by conservative authors, or a Republican-controlled school board to do the same

with liberal authors. That argument is anathema to the First Amendment and the purpose of school libraries. The District Court should be affirmed.

IV. ARGUMENT

A. Libraries are crucial to American democracy.

Public libraries predate our country’s establishment, with Benjamin Franklin often credited with founding the first American subscription library in 1731. Jared Gibbs, *“For Tomorrow Will Worry About Itself”: Ivan Illich’s Deschooling Society and the Rediscovery of Hope*, 34 W. NEW ENG. L. REV. 381, 394 (2012). Colonial libraries developed as early as 1770. Richard J. Peltz, *Pieces of Pico: Saving Intellectual Freedom in the Public School Library*, 2005 BYU Educ. & L.J. 103, 112 (2005).

“After the British burned Washington’s congressional library during the War of 1812, Thomas Jefferson sold his personal collection...to start what is now the Library of Congress.” *Fayetteville Pub. Libr. v. Crawford Cnty., Arkansas*, 684 F. Supp. 3d 879, 889 (W.D. Ark. 2023). “He famously said, ‘I have often thought that nothing would do more extensive good at small expense than the establishment of a small circulating library in every county....’” *Id.*

B. School libraries are critical to our democracy.

The emergence of public libraries coincided with the rise of public education and, with it, school libraries. “[P]ublic libraries...were originally conceived as part of the nation’s broader educational movement, and it was their educational function

that provided the principal justification for public support.” [Michael Kevane & William A. Sundstrom, *The Development of Public Libraries in the United States, 1870-1930: A Quantitative Assessment*, INFO. & CULTURE A J. OF HIST. 1, 1 \(2012\).](#)

Melvil Dewey, inventor of the library cataloging system, asserted that:

[a] collection of books in every schoolroom for everyday use is coming to be considered an essential part of a school building’s furniture. These books introduce children to the best literature of the world; they interest them in other phases of any subject they may be studying than those set forth in their text-books.... [T]hey familiarize the children with books and their use; and, in any subject, they permit the beginning of that laboratory method which is now considered so essential in all educational work.

Peltz, *supra*, at 114.

Professional school libraries began to emerge in the 1900s. BLANCHE WOOLLS, *ENCYCLOPEDIA OF LIBRARY AND INFORMATION SCIENCES, SCHOOL LIBRARIES* 4000 (4th ed. 2017). Since the early 1950s, more than 30,000 school libraries have been established. [U.S. DEPARTMENT OF EDUCATION, *AMERICA’S PUBLIC SCHOOL LIBRARIES: 1953-2000* 1 \(2005\).](#)

C. Robust school libraries result in better student outcomes.

School libraries’ positive impact on students is well-documented. “Research studies” show “student success when schools had libraries, librarians, and resources.” WOOLLS, *supra*, at 4004. The quality of, and access to, books at a school library is a powerful predictor of academic achievement. *See, e.g.*, [Keith Curry Lance & Linda Hofschire, *Change in School librarian staffing linked with gains in*](#)

student achievement, 2005 to 2011, LIBRARY RESEARCH SERVICE (2012); Keith Curry Lance & Bill Schwartz, *How Pennsylvania School Libraries Pay Off: Investments in Student Achievement and Academic Standards*, PA SCHOOL LIBRARY PROJECT (2012); Briana Hovendick Francis, et al., *School Librarians Continue to Help Students Achieve Standards: The Third Colorado Study*, LIBRARY RESEARCH SERVICE (2010); Douglas L. Achterman, *Haves, Halves, and Have-Nots: School Libraries and Student Achievement in California*, U. N. Tex. (2008); Keith Curry Lance, et al., *The Impact of School Library Media Centers on Academic Achievement* (1993).

Research consistently confirms that strong library programs increase student achievement. Keith Curry Lance & Debra E. Kachel, *Why School Librarians Matter: What Years of Research Tell Us*, KAPPAN (2018); see also, e.g., Keith Curry Lance, *Proof of the Power: Recent Research on the Impact of School Library Media Programs on the Academic Achievement of U.S. Public School Students*, ERIC CLEARINGHOUSE (2001).

D. Librarians rely upon set standards to curate school libraries.

The American Library Association (“ALA”) is the sole accrediting body for library and information science schools in the United States. *Fayetteville*, 684 F. Supp. 3d at 890. “Professional librarians hold advanced degrees from ALA-

accredited institutions, and...are taught to adhere to the ALA’s Code of Ethics and Library Bill of Rights in their professional lives.” *Id.*

The ALA’s Code of Ethics “guide[s] the work of librarians” with a focus on “the values of intellectual freedom that define the profession of librarianship.” [Code of Ethics, AM. LIBR. ASS’N \(2021\)](#). Contrary to the District’s assertion that “librarians are *supposed* to engage in viewpoint discrimination” (District Br. 32), chief among librarians’ obligations is the duty ***not*** to limit access to information based on viewpoint:

1. We provide the highest level of service to all library users through appropriate and usefully organized resources; equitable service policies; equitable access; and accurate, unbiased, and courteous responses to all requests.
2. We uphold the principles of intellectual freedom ***and resist all efforts to censor library resources.***

6. We do not advance private interests at the expense of library users, colleagues, or our employing institutions.
7. We distinguish between our personal convictions and professional duties ***and do not allow our personal beliefs to interfere*** with...the provision of access to their information resources.

Id. (emphasis added).

The ALA’s Library Bill of Rights sets forth the “basic policies [that] should guide [library] services.” [Library Bill of Rights, AM. LIBR. ASS’N \(2019\) \(preamble\)](#).

The Library Bill of Rights is unequivocal in its condemnation of censorship and attempts to limit information based on viewpoint:

Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.

Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment.

Id. §§ II, III. “[A]ll people’ and ‘all points of view’ should be included in library materials and information,” with “no limiting qualifiers for viewpoint, origin, or politics.” [*Interpretations of the Library Bill of Rights*, AM. LIBR. ASS’N \(2017\)](#).

These policies apply to school libraries. [*Access to Resources and Services in the School Library: An Interpretation of the Library Bill of Rights*, AM. LIBR. ASS’N \(2014\)](#). The school library “serves as a point of voluntary access to information and ideas and as a learning laboratory for students as they acquire critical thinking and problem-solving skills needed in a pluralistic society.” *Id.* School library curation should be “unfettered by...personal, political, social, or religious views” so that “[s]tudents and educators...have access to resources and services free of constraints resulting from personal, partisan, or doctrinal disapproval.” *Id.*

Amicus curiae AASL follows the National School Library Standards, which emphasize the importance of the school library as an essential part of the learning community, preparing students for college, careers, and life. *See generally* [*AASL Standards Framework for Learners*, AM. ASS’N OF SCH. LIBRARIANS \(2017\)](#). School

librarians are trained to curate collections in an inclusive, not exclusive, process. *See generally* [Diverse Collections: An Interpretation of the Library Bill of Rights, AM. LIBR. ASS'N \(2019\)](#). School librarians do not exclude materials because they are controversial or represent viewpoints with which they disagree, but include books that reflect a diversity of thought. *See id.* School librarians curate the library collection, and also provide resources and learning tools for an entire school.

When trained librarians curate a library collection, they employ techniques including “weeding.” *See* District Br. 26-27. “Weeding” is a procedure performed by librarians to remove and replace books that are damaged or outdated. *See* [Collection Maintenance and Weeding, AM. LIBR. ASS'N \(2018\)](#) (citing the Library Bill of Rights). For example, books that are falling apart, or books about video games from the 1980s that are no longer played, might be removed through weeding. *See id.* Libraries have finite space, and weeding is essential for maintaining library collections as up-to-date, evolving resources. *Id.* Contrary to the District’s description, professional librarians weed books following an established policy that “highlight[s] objective criteria,” considering “materials [] for weeding based on accuracy, currency, and relevancy.” *Id.* For physical books, “[s]pace limitations, edition, format, physical condition, and number of copies are considered.” *Id.*

Trained librarians curate library collections not to promote or restrict particular viewpoints, but to ensure that those collections serve as “a mighty resource

in the free marketplace of ideas.” *Minarcini v. Strongville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976). A librarian engaging in viewpoint discrimination when making curation decisions—whether “weeding” or otherwise—acts contrary to their training; the Library Bill of Rights and Code of Ethics; and the First Amendment.

E. Colorado recognizes the importance of school libraries.

On May 1, 2025, Colorado’s governor signed Senate Bill 25-063 (“SB 25-063”) into law. *See* [SB 25-063](#). The statute provides “that teacher librarians are highly trained and educated and...intentionally and thoughtfully select library resources for their specific public schools to educate and entertain students who attend the school.” *Id.* Further, “[a] range of books and other library resources should be provided for the interest, education, and enlightenment of all students who public school libraries serve” and “[t]he opportunity to be exposed to a wide variety of perspectives and experiences via books and other library resources engenders empathy and understanding.” *Id.*

SB 25-063 requires school libraries to comply with the First Amendment as interpreted in *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982), a case discussed further below. *Id.* SB 25-063 provides other standards regarding the removal of books from school libraries to ensure that students are not deprived of access to a wide array of materials. *See id.*

F. The Removed Books were appropriately selected for school libraries.

By overriding the decisions of librarians and restricting the Removed Books, the District acted contrary to well-established curation principles and the First Amendment. The Removed Books are award-winners, best-sellers, or otherwise have well-recognized literary or educational merit. They are the types of books that a trained librarian would be expected to select for the school library collection.

1. The Removed Books have significant merit.

The District directs significant vitriol at *The Bluest Eye* by Nobel Prize-winning author Toni Morrison. See District Br. 7-8, 36-37. Reviewers described the book as having “prose so precise, so faithful to speech and so charged with pain and wonder that the novel becomes poetry,” and as “[a] profoundly successful work of fiction.... Taut and understated, harsh in its detachment, sympathetic in its truth...it is an experience.” See [The Bluest Eye, RANDOM HOUSE PUBLISHING GROUP](#). Parade Magazine listed *The Bluest Eye* as one of the “Best Books of All Time.” See *id.* Jenna Bush Hager, the Today Show co-host and daughter of former President George W. Bush, included the book in her “Read With Jenna” series:

“It was the first book that really opened my eyes to how literature can create understanding and take you into worlds you don’t know”.... “I was totally in awe of Toni Morrison’s ability to make us feel like we were walking in [the protagonist’s] footsteps,” Jenna recalled about the first time she read the novel in her sophomore English class at Austin High School. “I remember marking it up like I had never marked up any books before.”

[Read With Jenna Book Club Picks, TODAY.COM](#).

The Removed Books also include Ellen Hopkins' *Crank*, *Glass*, *Fallout*, *Identical*, *Burned*, and *Smoke*. See District Br. 6. These books are award-winners and several were best-sellers. For example, *Crank* was a #1 New York Times Best Seller that received accolades including the Lincoln Award: Illinois Teen Readers' Choice Master List; Kentucky Bluegrass Award Master List; New York Public Library Best Books for Teens; Pennsylvania School Librarian Association ("PLSA") "Top Ten (Or So)" Young Adult Books; and the Young Adult Library Services Association Teens Top Ten Nominee. See [Crank, SIMON & SCHUSTER](#).

You Should See Me in a Crown by Leah Johnson is another award-winning best-seller. Actor Reese Witherspoon selected it as the "very first Young Adult book pick for Reese's Book Club." [You Should See Me In a Crown, REESE'S BOOK CLUB](#). Time Magazine named it as one of the 100 Best Young Adult Books of all time. See [The 100 Best YA Books of All Time, TIME.COM](#). Publisher's Weekly included the book in its Children's Institute 2020, while Kirkus Reviews listed it as one of the Best Young Adult Romance Books of 2020 and gave it a starred review. See [Children's Institute 2020, PUBLISHERSWEEKLY.COM \(July 3, 2020\)](#); [Best YA Romance of 2020, KIRKUS REVIEWS](#).

It's Your World, If You Don't Like It, Change It by Mikki Halpin is another award winner, included as a New York Public Library Best Book for Teens; as a Westchester's Choice book; and on the PLSA Non-Fiction List. See [It's Your World](#),

[SIMON & SCHUSTER](#). The book is aimed at getting teens active in their community about issues they care about. *See id.*

These are illustrative examples. *Amici* could recite similar facts about the other Removed Books. Each one has significant literary or educational merit.

2. The District violated the First Amendment by ignoring the merit of the Removed Books.

Even if the District could overcome the fact that it engaged in improper viewpoint discrimination, as the evidence demonstrates, the District’s actions violated the First Amendment because the District disregarded the literary and educational value of these books.

“Our founding fathers understood that ‘novel and unconventional ideas might disturb the complacent’; yet in authoring the First Amendment, they sought “to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.” *Fayetteville*, 684 F. Supp. 3d at 891-92 (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)). With respect to schools, “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us.... That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

There “can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any...sect or dogma.” *Epperson v. State of Ark.*, 393 U.S. 97, 106 (1968). “[T]o justify prohibition of a particular expression of opinion, [the State] must...show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). Otherwise, actions like the District’s here could be used to restrict viewpoints from any part of the political, religious, or social spectrum. *See, e.g., Roberts*, 702 F. Supp. at 1512-13 (rejecting attempts to remove the Bible from a school library).

This is true for school libraries: “the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library.” *Pico*, 457 U.S. at 866. “Access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.” *Id.* at 868. “[L]ocal 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.’” *Id.* at 872 (plurality) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)); *see also* SB 25-063 (requiring Colorado school libraries to comply with *Pico*). Because the First

Amendment “does not permit the official suppression of *ideas*,” a majority of the Supreme Court agreed that the removal of books from school library shelves “in a narrowly partisan or political manner” is unconstitutional. *Id.* at 870-71 (plurality); *id.* at 907 (Rehnquist, J., dissenting) (“cheerfully” conceding this point).

To restrict the Removed Books, the District had to demonstrate that, *inter alia*, they lack literary or educational merit. *See, e.g., Miller v. California*, 413 U.S. 15, 22-23 (1973) (“in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression”); *Ginsberg v. New York*, 390 U.S. 629, 632 (1968) (law prohibiting speech “utterly without redeeming social importance for minors” constitutional). Where, as here, “every book identified by Plaintiffs has either received accolades or been on best seller lists,” a school board cannot “establish they are harmful to minors pursuant to the *Miller* test.” *Parents v. Rockford Public School District*, 2023 Mich. Cir. LEXIS 928, at *10-11 (Kent Cty. Cir. Ct. Oct. 25, 2023) (rejecting removal of books, including *The Bluest Eye*, *Crank*, *Looking For Alaska*, and *The Kite Runner*).

Library bookshelves have limited space and cannot include every book published. Certified, trained librarians make decisions about which books should or should not be included based upon the needs of the students and communities they

serve. The District overrode those decisions and removed books without giving any weight to their merit. That conduct violated the First Amendment.

G. The District’s actions were not government speech.

The District attempts to justify its actions by arguing that library curation is “government speech,” and not subject to First Amendment scrutiny, for two reasons: *first*, the District’s selection of items for a school curriculum is government speech, so school library curation must be too; and *second*, selecting what books go on or off library shelves is akin to selecting a public monument or issuing a license plate for a vehicle. *See* District Br. 2-3, 23-32. These arguments ignore the role of school libraries and significant limitations on the government speech doctrine.

“[T]he real question in government-speech cases [is] whether the government is *speaking* instead of regulating private expression.” *Shurtleff v. City of Boston*, 596 U.S. 243, 262 (2022) (Alito, J., concurring). Justice Alito warned that “it can be difficult to tell whether the government is using the doctrine ‘as a subterfuge for favoring certain private speakers over others based on viewpoint’” and cautioned that “the government-speech doctrine becomes ‘susceptible to dangerous misuse.’” *Id.* at 262-63; *see also Matal v. Tam*, 582 U.S. 218, 235 (2017) (“[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints”). The District’s actions were not government speech.

1. School libraries are extracurricular.

The District’s argument (District Br. 2-3), that selecting the school curriculum is government speech, and therefore curating a school library collection is too, fails. “No doubt a State possesses legitimate power to protect children from harm,” but “that does not include a free-floating power to restrict the ideas to which children may be exposed.” *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 794-95 (2011) (Scalia, J.).

Even where the government is acting in connection with the curriculum, its power to restrict viewpoints is limited. “Students have a First Amendment right to receive information and ideas,” and that right “applies in the context of school curriculum design.” *See González v. Douglas*, 269 F. Supp. 3d 948, 972-73 (D. Ariz. 2017). Removal of “materials otherwise available in a local classroom” is unconstitutional unless it is “reasonably related to legitimate pedagogical concerns.” *Id.*; *see also Arce v. Douglas*, 793 F.3d 968, 982-83 (9th Cir. 2015) (“remov[al of] materials otherwise available in a local classroom” is not government speech).

In any event, the District’s power over curriculum is not relevant because school libraries are *extracurricular*. Library books are not required reading, but are available for students to explore with the guidance of trained librarians. *See Pico*, 457 U.S. at 862 (Brennan, J.) (“the only books at issue...are *library* books that by their nature are optional rather than required reading”); *Case v. Unified Sch. Dist.*

No. 233, 908 F. Supp. 864, 875-76 (D. Kan. 1995) (school officials do not have “absolute discretion beyond the compulsory environment of the classroom into the school library,” where “the regime of voluntary inquiry...hold[s] sway”). As another court explained:

The student who discovers the magic of the library is on the way to a life-long experience of self-education and enrichment.... [A] library is a place to ***test or expand upon ideas*** presented to him, ***in or out of the classroom***. The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger in such exposure. The danger is in mind control.

Right to Read Def. Comm. v. Sch. Comm., 454 F. Supp. 703, 715 (D. Mass. 1978) (emphasis added).

Although school librarians support the entire school community and are instrumental beyond the library, school library collections are not part of the curriculum and their curation is not government speech. Selecting books for libraries is a situation where the government “expends funds to encourage a diversity of views from private speakers.” *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 833-34 (1995) (cited in District Br. 25). That conduct is ***not*** government speech. *Id.* at 833-86.

Hazelwood Sch. Dist. v. Kuhlmeier (District Br. 2) is inapposite because it involved articles in a school-created and school-sponsored newspaper integrated into “the educational curriculum” at the school, controlled by the school’s journalism teacher. 484 U.S. 260, 268 (1988). Here, the books on school library shelves were

not printed or edited by the government. *Hazelwood* has no application to libraries. *See id.*; *see also Chiras v. Miller*, 432 F.3d 606, 615-16 (5th Cir. 2005) (cited in District Br. 44) (case involving the selection of textbooks for use *in the classroom*); *cf. Arce*, 793 F.3d at 982 (*Chiras* does not apply to “a *student’s* First Amendment rights”).¹

The District’s actions were a forbidden attempt to exercise a “free-floating power to restrict the ideas to which children may be exposed.” *Brown*, 564 U.S. at 794-95. Those actions were not government speech.

2. The government does not speak through the contents of library shelves.

The District’s attempt to equate certified, trained librarians’ decisions about library curation to other forms of government speech fails. *See* District Br. 23-32. The Supreme Court articulated three factors to determine whether an action is government speech: “[1] the history of the expression at issue; [2] the public’s likely perception as to who (the government or a private person) is speaking; and [3] the extent to which the government has actively shaped or controlled the expression.”

¹ *Hazelwood* would not help the District if it applied; it requires that the government’s actions be “reasonably related to legitimate pedagogical concerns.” 484 U.S. at 273. The evidence showed that the District restricted the Removed Books because of disagreement with the viewpoints therein, and it ignored the merit of the books. *See* pgs. 12-17, *supra*.

Shurtleff, 596 U.S. at 244. The District does not address these factors, which compel the conclusion that its actions are not government speech.

In *Matal*, the Supreme Court held that the government’s registration of trademarks is not government speech. 582 U.S. at 235-39. The Court reasoned that “[t]he Federal Government does not dream up these marks, and it does not edit marks submitted for registration.” *Id.* at 235. If the marks were government speech, then the government “is babbling prodigiously and incoherently” and “saying many unseemly things.” *Id.* at 236. The Court held that “[t]rademarks have not traditionally been used to convey a Government message...[a]nd there is no evidence that the public associates the contents of trademarks with the Federal Government.” *Id.* at 238; *see also, e.g., Shurtleff*, 596 U.S. at 254-56 (city did not control messages on flags on government property and public would not believe city endorsed those messages).

The District did not “dream up” or “edit” the books in the school library. *See Matal*, 582 U.S. at 235. If putting books on a shelf is government speech, then the government “is babbling prodigiously and incoherently” and “saying many unseemly things.” *See id.* The Elizabeth High School Library is not sending

students any cognizable message by, *e.g.*, including on its shelves both *Mein Kampf* and books celebrating Jewish faith.²

The government has not traditionally conveyed messages to the public through library shelves. *See id.* at 238. Rather, as set forth above at pgs. 5-11, *supra*, the District's actions are antithetical to school libraries' history and mission. Nor would the public reasonably perceive that the government speaks by placing particular books on library shelves. No one thinks that Angie Thomas and Khaled Hosseini are conveying government messages, or that the government has endorsed every word of their works.

The District argues that the government is not speaking through books, but through placing certain books, but not others, on the shelves. *See* District Br. 27-32. Unlike a private actor who curates newspaper articles, television programs, or social media posts expressing certain viewpoints or content, however, one of a library's

² *See* [Mein Kampf](https://elizabethsd.follettdestiny.com/cataloging/servlet/presenttitledetailform.do?siteTypeID=-2&siteID=&includeLibrary=true&includeMedia=false&mediaSiteID=&bibID=15226&walkerID=1750368436123), Elizabeth High School Library Catalog, <https://elizabethsd.follettdestiny.com/cataloging/servlet/presenttitledetailform.do?siteTypeID=-2&siteID=&includeLibrary=true&includeMedia=false&mediaSiteID=&bibID=15226&walkerID=1750368436123>; *The Everything Judaism Book*, Elizabeth High School Library Catalog, <https://elizabethsd.follettdestiny.com/cataloging/servlet/presenttitledetailform.do?siteTypeID=-2&siteID=&includeLibrary=true&includeMedia=false&mediaSiteID=&bibID=10029&walkerID=1745629558675>.

major objectives is to make available a wide array of books, regardless of viewpoint. *See* pgs. 5-11, *supra*.

Again, no coherent, discernible “message” is conveyed to someone who sees both *Mein Kampf* and books about Jewish faith on the shelves. It is hard to imagine, as the District appears to argue (*see* District Br. 29), that the government is trying to convey that *Mein Kampf* is an “appropriate” book all students should read. Curating a library is not “government speech.”

3. The District relies upon inapposite cases.

Rather than address the Supreme Court’s framework, the District relies upon inapposite cases, particularly *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). *See* District Br. 17, 27-29. There, the Court held that private social media platforms’ aggregation of third-party social media posts based upon particular viewpoints or content constitutes protected “expression” under the First Amendment. 603 U.S. at 728. The case did not address “government speech” or libraries. *See id.* It said nothing about whether library curation is “government speech.”

The District also relies (District Br. 26, 28, 39-40, 43-44) upon plurality and concurring opinions in *U.S. v. Am. Library Ass’n*, 539 U.S. 194 (2003) (“*ALA*”). The District’s argument is ironic because it elsewhere urges the Court to ignore a different plurality opinion, *Pico*. *See* District Br. 20. In any event, *ALA* is inapposite.

The plurality in *ALA* never held that the government speaks through library shelves. *See ALA*, 539 U.S. at 206. The case involved filters on Internet-enabled computers in libraries meant to block three categories of unprotected speech: “‘visual depictions’ that constitute ‘obscenity’ or ‘child pornography,’ and [to] protect[] against access by minors to ‘visual depictions’ that are ‘harmful to minors.’” *See, e.g., id.* at 201, 208-09. *ALA* says nothing about whether library curation constitutes “government speech.” Here, the District removed books with educational and literary merit because of disagreement with their viewpoints.

The District’s argument is the sort of “dangerous misuse” of the “government speech” doctrine about which Justice Alito warned. The Court should reject it.

4. The most persuasive authorities hold that library curation is not government speech.

Courts frequently hold that library curation is not government speech. In *GLBT Youth in Iowa Schools Task Force v. Reynolds*, the Eighth Circuit held that the government-speech doctrine does not extend to “the placement and removal of books in public school libraries.” 114 F.4th 660, 667 (8th Cir. 2024). Unlike public monuments, curating a library collection does not have “the effect of conveying a government message.” *Id.* at 668. If placing a variety of books on the shelves “constitutes government speech, the State ‘is babbling prodigiously and incoherently.’” *Id.* (quoting *Matal*, 582 U.S. at 236).

The District criticizes *GLBT* (see District Br. 30) for addressing government speech when analyzing whether the plaintiffs had standing, but does not explain why that context makes any difference. The District also argues (*id.* 30-32) that *GLBT* inappropriately relied upon *Matal*, but, as set forth above, *Matal* is directly on point.

GLBT is consistent with other decisions. See *Penguin Random House LLC v. Gibson*, 2025 U.S. Dist. LEXIS 57961, at *20-24 (M.D. Fl. Feb. 28, 2025) (“the Court cannot find that the selection or removal of books in a public school library is government speech”); *PEN Am. Ctr., Inc. v. Escambia Cty. Sch. Bd.*, 711 F. Supp. 3d 1325, 1331 (N.D. Fl. 2024) (“The Court is not persuaded that decisions regarding the content of school libraries is ‘government speech’ that is not subject to any constitutional constraints”); *Fayetteville*, 684 F. Supp. 3d at 909 (discussing lack of “legal precedent to suggest that the state may censor non-obscene materials in a public library because such censorship is a form of government speech”). This Court should follow those holdings.³

³ A minority of the *en banc* Fifth Circuit reached a different conclusion. *Little v. Llano County*, 2025 U.S. App. LEXIS 13121 (5th Cir. May 23, 2025). That minority opinion is not binding anywhere, including the Fifth Circuit. The minority opinion was also *dicta* because the majority dismissed plaintiffs’ claims on other grounds. See *id.* at *31. In any event, the *Llano* minority’s analysis was flawed for the same reasons as the District’s argument.

H. The purported availability of the Removed Books from other sources or through extra effort does not prevent a constitutional violation.

The District Court properly rejected the District’s argument that students can obtain the Removed Books by purchasing them or, for certain (but not all) students, asking the school librarian for them. *See* District Br. 35, 38-42. The District’s argument is contrary to the First Amendment right to receive information.

The “right to receive information and ideas” is protected by the Constitution because it is an “inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.” *Pico*, 457 U.S. at 867. As James Madison explained, “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.” [James Madison, Letter from James Madison to W.T. Barry, LIBRARY OF CONGRESS \(Aug. 4, 1822\)](#). The Supreme Court has recognized this right for decades (*see* Pl. Br. 49), recently reaffirming that “[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak *and listen*....” *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (emphasis added). Accordingly, where “the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.” *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975).

This right applies to minors in schools. *See, e.g., Fayetteville*, 684 F. Supp. 3d at 909-10 (“When it comes to children, it is well established that ‘minors are entitled to a significant measure of First Amendment protection’ and the government may restrict these rights ‘only in relatively narrow and well-defined circumstances’”); *see also Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 187 (2021) (“Minors are entitled to a significant measure of First Amendment protection” (internal quotation and brackets omitted)); *Tinker*, 393 U.S. at 506 (minors do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

The District’s creation of a “hidden library,” by which certain students—but not all students—can request the Removed Books if they know to ask for them, does not render its conduct constitutional. *See* District Br. 38-42. The fact that students “cannot simply go in the library, take the books off the shelf and thumb through them...without going through” extra hurdles “is a restriction on [their] access” and an “impermissible infringement[] of First Amendment rights.” *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 1002 (W.D. Ark. 2003).⁴

⁴ The Fifth Circuit reached a different result. *Llano*, 2025 U.S. App. LEXIS 13121, at *20-31. Its decision seems to have been driven largely by fear that a contrary holding would permit plaintiffs to sue libraries for refusing to purchase certain books. *See id.* That fear is misplaced. No one asserts that an individual can force a library to buy a particular book. The point is that curation decisions are subject to the First Amendment and, as such, the government’s conduct must be viewpoint-neutral, and its content-based restrictions are subject to strict scrutiny. *See, e.g.,*

Library professionals have long denounced charades that limit patrons’ access to materials and amount to “censorship, albeit [in] a subtle form.” *ALA*, 539 U.S. at 239 (Souter, J., dissenting) (citation omitted); *see also* [Restricted Access to Library Materials, AMERICAN LIBRARY ASSOCIATION \(2014\)](#) (“Physical restrictions...may generate psychological, service, or language skills barriers to access”). The District’s banning the Removed Books is nothing like protecting rare or fragile books “stored in a rare-book room.” District Br. 39. And interlibrary loans—which are used to *facilitate access* to books between libraries, regardless of viewpoint—are the opposite of the District’s attempt to make the Removed Books *inaccessible, on the basis of disagreement with a viewpoint*. *See id.*⁵

The District is wrong to argue (District Br. 32-35) that because it had no obligation to open libraries, its conduct is constitutional. Once a library is opened, patrons have rights that the government cannot take away without complying with the Constitution. *See, e.g., Perry Educ. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 46 (1983) (“Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum”); *Rosenberger*, 515 U.S. at 829 (“Once it has opened a limited forum...the State must [not]...discriminate against speech on the

Rosenberger, 515 U.S. at 829 (content-based restrictions are “presumed unconstitutional”).

⁵ *See* [Interlibrary Loans, AM. LIBR. ASS’N.](#)

basis of its viewpoint”). School libraries are at least non-public forums in which speech restrictions must be viewpoint-neutral. *See Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) (“[c]ontrol over access to a nonpublic forum” is constitutional “so long as the distinctions drawn...are viewpoint neutral”).⁶

The District also ignores the fact that not every child can visit public libraries or purchase books. “[G]etting to the public library may be difficult for children and for those who live in homes without Internet access, the school library may be their only access to the digital world.” WOOLLS, *supra*, at 4004. “Because many families cannot afford to purchase children’s books, it becomes all the more important to make community resources...easily and readily available within disadvantaged communities.” Tamara G. Halle, et al., *Family Influences on School Achievement in Low-Income, African American Children*, J. OF EDUC. PSYCH. 89, 527-37 (1997).

School libraries and librarians are a critical resource for children. For many students, the school library is their primary or only means of accessing books. The fact that the Removed Books *might* be available elsewhere is not a substitute for students’ access to books in a school library.

⁶ School libraries should be considered “designated” or “limited” public forums that the government has designated for school community access to a broad range of information outside the curriculum. *See, e.g., Perry*, 460 U.S. at 45-46 (where government “has opened” forum “for use by the public...content-based prohibition[s] must be narrowly drawn to effectuate a compelling state interest”).

V. CONCLUSION

It is no mere rhetorical flourish to say that school libraries are citadels of American democracy. The District's actions undermined those citadels, in violation of the First Amendment. The District Court should be affirmed.

Respectfully submitted,

**FREEDOM TO READ FOUNDATION,
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LIBRARIES, AND AMERICAN
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Dated: June 20, 2025

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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REQUIREMENTS AND VIRUS-FREE CERTIFICATION**

1. This brief complies with the type-volume limitation of FED. R. APP. P. 29(a)(5) and FED. R. APP. P. 32(a)(7) because the brief contains 6,444 words (according to the word-processing software, Microsoft Word, which was used to prepare the brief), excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface; footnotes appear in 14-point Times New Roman typeface.

/s/ Owen R. Wolfe

Owen R. Wolfe

Dated: June 20, 2025

CERTIFICATE OF SERVICE

I certify that on June 20, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Owen R. Wolfe

Owen R. Wolfe