

Case No. 06-14633

**IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT**

MIAMI-DADE COUNTY SCHOOL BOARD et al.,
Appellants,
vs.

AMERICAN CIVIL LIBERTIES UNION
OF FLORIDA, INC. et al.,
Appellees.

On Appeal from the United States District
Court for the Southern District of Florida
Case No. 06-CV-21577-GOLD

**BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW
AND JUSTICE IN SUPPORT OF APPELLANTS URGING REVERSAL**

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

The American Center for Law and Justice has no parent corporation and issues no stock.

The following is a complete list of all persons and entities known to the American Center for Law and Justice that have an interest in the outcome of this appeal and are not included in the certificate contained in the first brief filed:

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INTEREST OF AMICUS¹

Amicus, the American Center for Law and Justice (ACLJ), is a non-profit, public interest law firm committed to ensuring the ongoing viability of religious and other constitutional freedoms in accordance with principles of justice. Jay Alan Sekulow, ACLJ Chief Counsel, has argued and participated as counsel of record in numerous cases involving constitutional issues before federal and state courts throughout the United States. *See, e.g., Scheidler v. NOW*, 126 S. Ct. 1264 (2006); *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619 (2003); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 117 S. Ct. 855 (1997); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 113 S. Ct. 2141 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S. Ct. 753 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 110 S. Ct. 2356 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 107 S. Ct. 2568 (1987). This case is of particular interest to the ACLJ due to the impact it will likely have upon the ability of local school boards to carry out their day-to-day educational functions as elected representatives of their communities.

¹ All parties have consented to the filing of this brief amicus curiae. No counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE ISSUE

Did the district court err in relying upon Justice Brennan’s plurality opinion in *Board of Education v. Pico*, 457 U.S. 853, 102 S. Ct. 2799 (1982), to hold that the First Amendment gives elementary school students a right to receive information that overrides the authority of public school officials to determine the content of their libraries?

SUMMARY OF THE ARGUMENT

The district court erred in holding that the Miami-Dade County School Board’s decision to replace the “*A Visit To*” book series—including *A Visit To Cuba*—“with a more accurate set of books” is unconstitutional. This case presents this Court with the opportunity to address the appropriate level of deference that should be given to public schools with regard to the operation of their libraries.

First and foremost, the district court failed to give sufficient weight to the well-established principle that public school boards have broad discretion in carrying out their educational functions. The day-to-day operations of our nation’s schools are primarily the responsibility of state and local governments because they are best equipped to prepare students to become informed citizens. While the decisions of public school officials are by no means insulated from judicial review, courts should afford the actions of school officials a strong presumption of constitutionality.

Second, the district court erred in relying upon Justice Brennan’s plurality opinion in *Pico* because it holds no precedential value with regard to First Amendment issues. Justice White concurred in the judgment on the narrowest grounds, basing his concurrence on the summary judgment issue; therefore, under *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993 (1977), his concurrence contains the only binding portion of *Pico*. The district court erred in holding that Justice White’s failure to address the First Amendment issues should be read as a vote in support of the plurality’s rationale. Also, a majority of the Justices in *Pico* actually rejected the argument that the Court’s prior “right to receive information” cases imposed an affirmative obligation upon public schools to provide students with the library books of their choosing.

The district court also failed to address adequately the impact of the Supreme Court’s decision in *United States v. American Library Association*, 539 U.S. 194, 123 S. Ct. 2297 (2003) (“*ALA*”), upon the persuasive weight of the *Pico* plurality opinion. In *ALA*, those challenging the Children’s Internet Protection Act (CIPA) cited *Pico* in arguing that the Act abridged the right to receive information, while supporters of the Act argued that following the rationale of the *Pico* plurality would undermine the ability of public libraries to function. The Court upheld the Act by a 6-3 vote. Notably, the four-Justice plurality opinion did not even mention *Pico*, while Justices Breyer and Souter cited the *Pico* plurality opinion in their

separate opinions. Several scholars have analyzed the *ALA* decision's implicit rejection of the *Pico* plurality's rationale, although no appellate court has directly considered this issue.

Finally, the district court erred in holding that the School Board's decision does not meet the requirements of the *Pico* plurality opinion. The *Pico* plurality was mainly concerned about the suppression of ideas and noted that materials may be removed from public school libraries due to concerns over "educational suitability" or "appropriateness to age and grade level." Justice Blackmun's concurring opinion also acknowledged that schools are free to replace books with ones that are "better written." The School Board's decision here to replace the *A Visit To* series with better, more accurate books was based on its determination that four- to eight-year-old readers would be given the false impression that life in Cuba is just like life in the United States. The Board's concern was the accuracy of facts and the need to prepare students to be well-informed citizens, not the suppression of ideas.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The Decisions that Public School Boards Make as a Part of Their Educational Function Are Entitled to Great Weight.

Local school boards, as representatives of parents and the general public, enjoy broad discretion in matters relating to education. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72, 108 S. Ct. 562, 570 (1988); *Ambach v.*

Norwick, 441 U.S. 68, 76-78, 99 S. Ct. 1589, 1594-96 (1979); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 507, 89 S. Ct. 733, 737 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 104, 270 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510, 534, 45 S. Ct. 571, 573 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 401-02, 43 S. Ct. 625, 627-28 (1923). In the seminal case of *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S. Ct. 686, 691 (1954), the Court proclaimed that “education is perhaps the most important function of state and local governments.” As the Court later explained in *Epperson*,

[b]y and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Epperson, 393 U.S. at 104, 89 S. Ct. at 270. The Court has repeatedly emphasized that “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.” *Hazelwood School Dist.*, 484 U.S. at 273, 108 S. Ct. at 571 (citations omitted).

School boards are given broad discretion in their day-to-day operations because they play a vital role “in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests.” *Ambach*, 441 U.S. at 76, 99 S. Ct. at 1594. A vital function of the public school system is to “inculcat[e] fundamental values necessary to the maintenance of a democratic

political system” *Id.* at 77, 99 S. Ct. at 1595. “The public educator’s task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so.” *Hazelwood School Dist.*, 484 U.S. at 278, 108 S. Ct. at 574. The structure of the American educational system is based on the belief that state and local school boards are better equipped to make educational decisions than are federal bureaucrats or judges. Supreme Court Justice Jackson once warned his fellow Justices not to allow “zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation.” *McCullum v. Bd. of Educ.*, 333 U.S. 203, 237, 68 S. Ct. 461, 478 (1948) (Jackson, J., concurring).

The district court’s holding, in misplaced reliance upon the plurality opinion in *Pico*, sharply contradicts the Supreme Court’s characterization of the importance of the value-inculcating function of public schools. The district court’s view severely limits the discretionary authority of school boards to make important educational decisions, significantly hindering the preparation of students for participation as citizens. Justice Rehnquist noted in his *Pico* dissent that

[t]he effective acquisition of knowledge depends upon an orderly exposure to relevant information. Nowhere is this more true than in elementary and secondary schools, where, unlike the broad-ranging

inquiry available to university students, the courses taught are those thought most relevant to the young students' individual development.

Pico, 457 U.S. at 914, 102 S. Ct. at 2832 (Rehnquist, J., dissenting).

Here, the Miami-Dade County School Board decided to remove *A Visit To Cuba*, and the rest of the “*A Visit To*” book series, because of “the finding that the book is inaccurate and contains several omissions.” *ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd.*, 439 F. Supp. 2d 1242, 1257 (S.D. Fla. 2006). In the Board’s view, the book portrays life in Cuba inaccurately and downplays the devastating effects that the totalitarian regime there has had upon the Cuban people. School Board member Frank Bolaños summed up the Board’s concerns when he said that the book “does not teach our children the truth about Cuba.” *Id.* at 1259. To address this problem, the Board simply ordered that the books be replaced “with a more accurate set of books that is more representative of actual life in these countries.” *Id.* at 1257. This determination poses no constitutional crisis. Rather, it falls within the category of routine, discretionary decisions made by thousands of school boards across the country on a daily basis.

In sum, the local school board is a microcosm of the democratic process. Parents exercise their constitutional right to “direct the upbringing and education of [their] children” by electing school board members and entrusting them with their children’s education. *See Pierce*, 268 U.S. at 534, 45 S. Ct. at 573. When, as here, a public school board makes a decision that it believes will enhance students’

education, courts should be mindful that “[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.” *Epperson*, 393 U.S. at 104, 89 S. Ct. at 270. In other words, great weight should be assigned to the educational decisions made by the School Board in this case.

II. The District Court Erred in Holding that, Under the Plurality Opinion in *Pico*, There is a Right of Students to Receive Information From Public School Libraries.

The primary reason the district court refused to give appropriate weight to the school board’s judgment was because the court relied heavily upon Justice Brennan’s plurality opinion in *Pico* for its First Amendment analysis. The court erred in relying on that opinion’s view that students have a right to receive information from public schools that supersedes the authority of the school to determine the content of its libraries because the plurality opinion did not state the holding of the Court in *Pico*.

A. Justice White’s Concurring Opinion Provided the Holding in *Pico*, Not Justice Brennan’s Plurality Opinion.

The plurality opinion in *Pico* is not binding as precedent. Only three Justices (including the author) joined the entirety of the plurality opinion; Justice Blackmun joined portions of it and wrote his own concurring opinion. It is well established that “[w]hen 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.’” *Marks*, 430 U.S. at 193, 97 S. Ct. at 993 (citation omitted); see also *Peek-a-Boo Lounge, Inc. v. Manatee County*, 337 F.3d 1251, 1261 n.10 (11th Cir. 2003).

Under the *Marks* doctrine, it is significant that Justice White concurred in *Pico* only because he believed that unresolved issues of fact remained which made summary judgment improper. Under *Marks*, it is clear that his concurring opinion provided the holding for the case. See *Muir v. Alabama Educ. Television Comm’n*, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982) (holding that *Pico* has no precedential value because Justice White concurred on the narrowest grounds). Both the plurality opinion and Justice Blackmun’s concurring opinion considered broad First Amendment issues. Justice White explained, however, that “[t]he unresolved factual issues, as I understand it, is the reason or reasons underlying the school board’s removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance.” *Pico*, 457 U.S. at 883, 102 S. Ct. at 2816 (White, J., concurring).

Expressly distancing himself from the plurality’s discussion of constitutional issues, Justice White stated, “[t]he plurality seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no

necessity for doing so at this point.” *Id.* Justice White added, “[w]e 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 evident here.” *Id.* at 884, 102 S. Ct. at 2817. Therefore, under the *Marks* doctrine, the actual holding of *Pico* was simply that the Court should not decide what constitutional significance, if any, the Board of Education of the Island Trees Union Free School District’s motive for removing library books has without knowing what the Board’s actual motive was. Chief Justice Burger noted in his dissent that, “[f]ortunately, there is no binding holding of the Court on the critical constitutional issue presented.” *Id.* at 886 n.2, 102 S. Ct. at 2817 n.2 (Burger, C.J., dissenting); *see also id.* at 904 n.1, 102 S. Ct. at 2827 n.1 (Rehnquist, J., dissenting).

The district court erred in regarding Justice White’s vote to remand for further factual investigation as agreement with Justice Brennan’s First Amendment analysis. The district court quoted Justice Brennan’s statement in *Pico* that

[t]he evidence plainly does not foreclose the possibility that petitioners’ decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books, or upon a desire on petitioners’ part to impose upon the students of the Island Trees High School and Junior High School a political orthodoxy to which petitioners and their constituents adhered.

ACLU of Fla., 439 F. Supp. 2d at 1267 (citation omitted). The district court then erroneously asserted,

[a] majority of the Court supported this conclusion. . . . Justice White's agreement may be inferred from his concurrence. Justice White's vote to remand for trial *implied that he accepted the viability of the plaintiffs' claim* that the attempted imposition of orthodoxy was a claim upon which relief could be granted.

Id. at 1267 & n.20 (emphasis added). It is clear from Justice White's opinion, however, that he in no way "implied that he accepted the viability of the plaintiffs' claim." In fact, he stated that the Court "should not decide constitutional questions until it is necessary to do so." *See id.*; *Pico*, 457 U.S. at 884, 102 S. Ct. at 2817 (White, J., concurring). By reproving the Court for "[issuing] a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library," Justice White clearly expressed his view that it was too early in the litigation to decide whether the School Board's motivation has any constitutional relevance. The district court's characterization of Justice White's concurring opinion as accepting the viability of the plurality's arguments is an incorrect application of the *Marks* doctrine and is simply untenable.

B. The Pico Plurality's Characterization of a Right of Students to Receive Information From Public School Libraries is Not Supported By the Cases It Relied Upon.

The district court's analysis was based in large part upon the *Pico* plurality's view that students have a First Amendment right to receive information that sharply limits the ability of public schools to regulate the content of their libraries.

A review of the other *Pico* opinions—and the cases relied upon by Justice Brennan—reveals the invalidity of this view.

In *Pico*, a majority of the Justices *expressly rejected* Justice Brennan’s view that the right to receive information includes a right of students essentially to override the decision of a school board that a library book should be removed. Although four Justices joined certain portions of Justice Brennan’s plurality opinion, only three Justices joined Section II-A(1), which set forth an extremely broad view of the right to receive information. *Pico*, 457 U.S. at 863-69, 102 S. Ct. at 2806-09 (Brennan, J., plurality opinion). In arguing for this view, Justice Brennan relied primarily upon the following cases:

- *Martin v. Struthers*, 319 U.S. 141, 63 S. Ct. 862 (1943) (holding that an ordinance prohibiting all door-to-door distribution of literature violated the First Amendment);
- *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943) (holding that the First Amendment prohibits the government from compelling students to express a message that is contrary to their religious beliefs);
- *Lamont v. Postmaster General*, 381 U.S. 301, 85 S. Ct. 1493 (1965) (holding that a statute allowing the federal government to block “communist political propaganda” sent through the mails unless the addressee affirmatively requested to receive such mail violated the addressee’s First Amendment rights);
- *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965) (holding that the freedom of association and the right to marital privacy ensures that the government may not prohibit doctors from giving married couples information about contraceptives);
- *Tinker v. Des Moines School District*, 393 U.S. 503, 89 S. Ct. 733 (1969) (holding that the First Amendment prohibits public school officials from

censoring student speech unless it materially interferes with the operation of the school);

- *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243 (1969) (holding that the First Amendment and the right to privacy bar the government from criminalizing the possession of obscene materials within one's home);
- *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407 (1978) (holding that a statute forbidding banks and for-profit corporations from spending money to influence the vote on referendum proposals dealing with issues that did not materially affect their businesses violated the First Amendment).

These cases merely state that the government may not typically prevent two private parties from communicating with one another solely because of disagreement with their message, and that the government also cannot force unwilling private parties to espouse a government message. When these cases mention a First Amendment “right to receive information and ideas,” and state that the government may not “contract the spectrum of available knowledge,” they are referring to a right of a *private* speaker to send a message to a *private* recipient free from undue governmental interference. *See Stanley*, 394 U.S. at 564, 89 S. Ct. at 1247-48; *Griswold*, 381 U.S. at 482, 85 S. Ct. at 1680. The cases provide no support for the *Pico* plurality's claim that the First Amendment allows students to dictate the content of public school libraries by simply invoking a “right to receive information and ideas.”

A majority of the Justices in *Pico* rejected Justice Brennan's characterization of a student's right to receive information. While Justice Blackmun joined the other sections of the plurality opinion, he did not join Section II-A(1), and his

concurring opinion stated, “I write separately because I have a somewhat different perspective on the nature of the First Amendment right involved.” *Pico*, 457 U.S. at 876-77, 102 S. Ct. at 2812-13 (Blackmun, J., concurring). Justice Blackmun explained:

In my view . . . the principle involved here is both narrower and more basic than the “right to receive information” identified by the plurality. I do not suggest that the State has any affirmative obligation to provide students with information or ideas, something that may well be associated with a “right to receive.”

Id. at 878, 102 S. Ct. at 2813-14.

Moreover, Chief Justice Burger’s dissenting opinion—which was joined by three other Justices—expressly rejected the notion of a generalized student right to receive information. Chief Justice Burger characterized a key issue in the case as “whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils.” *Id.* at 885, 102 S. Ct. at 2817 (Burger, C.J., dissenting). The Chief Justice commented, “[i]n an attempt to place this case within the protection of the First Amendment, the plurality suggests a new “right” that, when shorn of the plurality’s rhetoric, allows this Court to impose its own views about what books must be made available to students.” *Id.* at 885-86, 102 S. Ct. at 2817. Chief Justice Burger added, “[t]he government does not contract the spectrum of available knowledge by choosing not to retain certain books on the

school library shelf; it simply chooses not to be the conduit for that particular information.” *Id.* at 889, 102 S. Ct. at 2819 (citation omitted).

Additionally, Justice Powell noted in dissent that “[t]he new constitutional right, announced by the plurality . . . finds no support in the First Amendment precedents of this Court.” *Id.* at 895, 102 S. Ct. at 2822 (Powell, J., dissenting).

Moreover, as Justice Rehnquist’s dissenting opinion explained,

[t]he effective acquisition of knowledge depends upon an orderly exposure to relevant information. Nowhere is this more true than in elementary and secondary schools, where, unlike the broad-ranging inquiry available to university students, the courses taught are those thought most relevant to the young students’ individual development.

Id. at 914, 102 S. Ct. at 2832 (Rehnquist, J., dissenting). Justice Rehnquist also noted, “[t]he right described by Justice Brennan has never been recognized in the decisions of this Court and is not supported by their rationale.” *Id.* at 910, 102 S. Ct. at 2830.

C. *The Supreme Court’s Decision in United States v. American Library Association Severely Undermines the Rationale of the Pico Plurality Opinion.*

In the wake of *Pico*, lower federal courts have struggled to deal with the numerous opinions issued by the various Justices in *Pico*. Some cases have found the rationale of the plurality opinion in *Pico* to be instructive. *See, e.g., Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998); *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995); *Kreimer v.*

Bureau of Police for Town of Morriston, 958 F.2d 1242, 1255 (3d Cir. 1992). *But see Chiras v. Miller*, 432 F.3d 606, 619 n.32 (5th Cir. 2005). Some appellate courts, such as this Court, have not yet directly addressed *Pico*'s validity. *See Virgil v. School Bd.*, 862 F.2d 1517, 1523 n.8 (11th Cir. 1989) (distinguishing *Pico* and declining to assess whether it governs library removal cases); *ACLU of Fla., Inc.*, 439 F. Supp. 2d. at 1270 ("The Eleventh Circuit has not yet had the opportunity to directly address and apply *Pico* . . .").

To the extent that some courts have chosen to follow the *Pico* plurality, they will have to reassess *Pico*'s vitality in light of the Supreme Court's decision in *American Library Association*. The *ALA* case raised the issue of whether minors have a First Amendment right to require public libraries to provide them with specific information. *ALA* dealt with CIPA, a statute which required public libraries receiving certain federal funds to install Internet filtering software that would prevent minors from accessing material harmful to them and block obscenity and child pornography. *ALA*, 539 U.S. at 199, 123 S. Ct. at 2301-02 (Rehnquist, C.J., plurality). The American Library Association and others challenged CIPA's constitutionality, and a three-judge district court held that CIPA was unconstitutional because it required libraries to violate the First Amendment in order to continue receiving federal funds. *Id.* at 202, 123 S. Ct. at 2302-03.

When the case reached the Supreme Court, one of the key issues raised in the briefs was the meaning and application of *Pico* to the case. Those challenging CIPA invoked the *Pico* plurality opinion in support of the argument that CIPA infringed upon the right to receive information. For example, the American Library Association (“ALA”) argued:

This case fundamentally involves the right of library patrons to receive information on the Internet. The First Amendment undoubtedly encompasses not only the right to speak but also the right to receive information. *See, e.g., . . . Board of Educ. v. Pico*, 457 U.S. 853, 867-68 (1982) (plurality opinion) (“The right to receive ideas follows ineluctably from the sender’s First Amendment right to send them.”).

Brief of Appellees American Library Association et al., *United States v. American Library Association*, 539 U.S. 194, 123 S. Ct. 2297 (2003), 2003 U.S. S. Ct. Briefs LEXIS 127, at *19 n.17 (Feb. 10, 2003); *see also id.* at *27, 45 (quoting *Pico*, 457 U.S. at 866, 102 S. Ct. at 2808 (Brennan, J., plurality)). Other CIPA opponents also cited *Pico* in arguing that the statute implicated a right to receive information and ideas and impermissibly contracted the spectrum of available knowledge.²

Those supporting CIPA’s constitutionality noted that the *Pico* plurality opinion is inconsistent with the recognized need for libraries to have broad

² Brief Amici Curiae of Partnership for Progress on the Digital Divide et al. in Support of Appellees, *United States v. American Library Association*, 539 U.S. 194, 123 S. Ct. 2297 (2003), 2003 U.S. S. Ct. Briefs LEXIS 123, at *19 (Feb. 10, 2003); Brief of Appellees Multnomah County Public Library et al., *United States v. American Library Association*, 539 U.S. 194, 123 S. Ct. 2297 (2003), 2003 U.S. S. Ct. Briefs LEXIS 137, at *25 (Feb. 10, 2003).

discretion in regulating content. For instance, one amicus brief submitted by three public libraries stated:

We suggest that a principal reason behind the deeply divided decision of the Court in *Pico* was an awareness by several of the Justices of the consequences of holding that the First Amendment applied to decisions by a library concerning its holdings. . . . Librarians necessarily choose to allocate their limited resources to materials they deem most appropriate for the patrons they serve. The process inherently requires library officials to make choices of what to offer based on the content of those materials.³

Another brief cited the dissenting opinions of Chief Justice Burger and Justice Rehnquist in *Pico* to argue that

[t]he First Amendment protects against the official suppression of ideas, not against the removal (inadvertent or otherwise) of resources from government property. Removing materials from government property is no more an unconstitutional suppression than refusing to acquire the same materials.⁴

In short, the *ALA* case presented the Court with the question of whether the First Amendment creates a right—supported by only three Justices in *Pico*—to

³ Brief Amici Curiae of Three Public Libraries in Support of Appellants, *United States v. American Library Association*, 539 U.S. 194, 123 S. Ct. 2297 (2003), 2002 U.S. S. Ct. Briefs LEXIS 738, at *5 (Jan. 10, 2003).

⁴ Brief Amici Curiae of the American Center for Law and Justice et al. in Support of Appellants, *United States v. American Library Association*, 539 U.S. 194, 123 S. Ct. 2297 (2003), 2003 U.S. S. Ct. Briefs LEXIS 14, at *12 (Jan. 10, 2003) (citation omitted); see also Brief Amici Curiae of Cities, Mayors and County Commissioners in Support of Appellants, *United States v. American Library Association*, 539 U.S. 194, 123 S. Ct. 2297 (2003), 2002 U.S. S. Ct. Briefs LEXIS 741, at *4 (Jan. 10, 2003); Brief Amici Curiae of National School Boards Association et al. in Support of Appellants, *United States v. American Library Association*, 539 U.S. 194, 123 S. Ct. 2297 (2003), 2003 U.S. S. Ct. Briefs LEXIS 15, at *8 (Jan. 10, 2003).

receive information subsidized by public libraries. The Court upheld CIPA's constitutionality by a 6-3 vote, with a four-Justice plurality holding that "public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights" *ALA*, 539 U.S. at 214, 123 S. Ct. at 2309 (Rehnquist, C.J., plurality). The plurality opinion explained that

[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to "encourage a diversity of views from private speakers," but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.

Id. at 206, 123 S. Ct. at 2305 (citation omitted). Importantly, the plurality opinion declined to rely on, or even mention, *Pico*. Instead, its rationale is squarely at odds with the *Pico* plurality's claim that the First Amendment affords minors a right to require school libraries to retain materials in their collections.

Justice Kennedy's short concurring opinion further belies the notion that content decisions made by public libraries may infringe upon minors' constitutional rights. Justice Kennedy's opinion focused on the degree to which CIPA allowed libraries to grant *adults* access to particular websites upon request, stating, "[i]f, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is

little to this case.” *Id.* at 214, 123 S. Ct. at 2309 (Kennedy, J., concurring). Justice Kennedy explained:

There are, of course, substantial Government interests at stake here. The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of *adult library users* to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face.

Id. at 215, 123 S. Ct. at 2310 (emphasis added). It is clear from this opinion that Justice Kennedy had no quarrel with CIPA’s provisions as applied to *minors*.

On the other hand, Justice Breyer’s concurring opinion and Justice Souter’s dissenting opinion cited *Pico* to support their arguments. Justice Breyer cited *Pico* in arguing that CIPA should be subject to heightened scrutiny because it “directly restricts the public’s receipt of information” at public libraries. *Id.* at 216, 123 S. Ct. at 2310 (Breyer, J., concurring). He voted with the plurality because CIPA withstood this heightened scrutiny. *Id.* at 218-20, 123 S. Ct. at 2311-12. Justice Souter argued that, under the *Pico* plurality opinion, the First Amendment prohibits public libraries from removing materials for certain reasons. *Id.* at 236, 123 S. Ct. at 2321 (Souter, J., dissenting). Justice Souter also relied upon the *Pico* plurality in stating, “[t]he difference between choices to keep out and choices to throw out is . . . enormous” *Id.* at 242, 123 S. Ct. at 2324. He added, “[the *Pico* plurality opinion] recognized the right of students using a school library to object to the

removal of disfavored books from the shelves. By the same token, we should recognize an analogous right on the part of a library's adult Internet users" *Id.* at 242 n.8, 123 S. Ct. at 2325 n.8 (citation omitted).

Post-*ALA* scholarship regarding the case has highlighted the *ALA* decision's profound impact upon *Pico*. For example, one commentator has noted that the right of access to information advocated by the *Pico* plurality "has never been recognized by the Court" and added, "*American Library Ass'n* did not recognize the right to receive that was the foundation of the holding in *Pico*." Patrick M. Garry, *The Flip Side of the First Amendment: A Right to Filter*, 2004 MICH. ST. L. REV. 57, 68-69, 81-82. Another scholar has commented that Chief Justice Rehnquist's vision of the role of the public library as one of selective and orderly presentation of relevant ideas "fell into dissent in *Pico* but commanded a plurality in *American Library Ass'n*." Jim Chen, *Mastering Eliot's Paradox: Fostering Cultural Memory in an Age of Illusion and Allusion*, 89 MINN. L. REV. 1361, 1375 (2005). A third commentator has noted that "[Chief Justice] Burger's analysis [in his *Pico* dissent] was largely embraced by the *American Library Ass'n* plurality." Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, The Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 846 (2006).

Importantly, several commentators have noted that the *ALA* decision was inconsistent with the *Pico* plurality's characterization of the right to receive information.⁵ One scholar seeking to salvage the rationale of *Pico* after the *ALA* decision has urged public school librarians to try to preserve "the remaining pieces of *Pico*" by drawing a distinction between the library's curricular and non-curricular functions. Richard J. Peltz, *Pieces of Pico: Saving Intellectual Freedom in the Public School Library*, 2005 BYU EDUC. & L. J. 103, 107-08. He attempted

⁵ See, e.g., Blitz, *supra*, at 845 ("The [*ALA*] plurality opinion . . . does not even mention the right to receive information and ideas. In this respect, [the *ALA*] plurality overlooked (or simply ignored) the major insight of the [*Pico*] plurality in the only other such case to deal with library collections under the First Amendment"); Michael B. Cassidy, Note, *To Surf and Protect: The Children's Internet Protection Act Polices Material Harmful to Minors and a Whole Lot More*, 11 MICH. TELECOMM. TECH. L. REV. 437, 464-65 (2005) ("The *ALA* Court should have followed the Court's reasoning in *Pico* . . ."); Jamie Kennedy, Comment, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 819-20 (2005) ("A natural case to reference in the Court's *American Library Association* decision would have been *Pico*"); Barbara A. Sanchez, Note, *United States v. American Library Association: The Choice Between Cash and Constitutional Rights*, 38 AKRON L. REV. 463, 483-84, 502 (2005) (arguing that *ALA*'s discussion of the library's mission was inconsistent with that set forth in *Pico*); Darin Siefkes, Note and Comment, *Explaining United States v. American Library Association: Strictly Speaking, a Flawed Decision*, 57 BAYLOR L. REV. 327, 351, 354 (2005) (arguing that the analysis of the *ALA* plurality and Justice Breyer undercuts the analysis employed by the *Pico* plurality); Leah Wardak, Note, *Internet Filters and the First Amendment: Public Libraries After United States v. American Library Association*, 35 LOY. U. CHI. L.J. 657, 722 (2004) ("the [*ALA*] plurality should have analyzed the case according to library removal decisions and applied a strict scrutiny analysis in accordance with *Pico*"). But see Lillian R. Bevier, *United States v. American Library Association: Whither First Amendment Doctrine*, 2003 SUP. CT. REV. 163, 183 (arguing that *Pico* "seem[s] hardly relevant" to the issues raised in *ALA*).

to explain the *ALA* plurality's refusal to apply (or even mention) *Pico* by arguing, "*ALA* may be regarded as a decision about Internet, or book, selection, and *Pico* as a decision about book removal." *Id.* at 147. *Pico* supporters must admit, however, that "[t]he language of the Rehnquist plurality opinion certainly smacks of the Rehnquist dissent in *Pico*," and that *ALA* "left *Pico* on uncertain terms" and "dealt a serious blow" to its characterization of the public library. *Id.* at 147, 156.

Despite *ALA*'s clear impact upon the viability of the *Pico* plurality opinion, the district court in this case merely referred to it once in a footnote:

United States v. Am. Library Ass'n, 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) addressed claims that the Children's Internet Protection Act . . . violated the First Amendment. The Court found that public library staffs enjoy broad discretion in making "collection" decisions. Again, this case does not involve a "collection" decision. It involves a "removal" decision under a different set of School Board rules.

ACLU of Fla., Inc., 439 F. Supp. 2d at 1280 n.33. The district court failed to consider how the *ALA* case affected the rationale of *Pico*, especially the *ALA* plurality's characterization of the discretion afforded to public libraries. This case presents this Court with the opportunity to be the first appellate court to directly consider *ALA*'s impact upon the *Pico* plurality opinion.⁶

⁶ Besides the District Court's opinion in this case, only two published opinions have cited both *ALA* and *Pico*, but neither opinion considered *ALA*'s impact upon *Pico*. See *Chiras*, 432 F.3d at 606; *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 292-93, 299-301 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *rev'd sub nom.*, 126 S. Ct. 327 (2005).

III. Even Under the Plurality Opinion in *Pico*, The School Board’s Decision to Replace the “*A Visit To*” Book Series With a More Accurate Set of Books Was Consistent With the First Amendment.

To the extent that the *Pico* plurality opinion retains any persuasive weight after the *ALA* case, the Miami-Dade County School Board’s decision to replace the “*A Visit To*” book series due to its inaccuracies is fully consistent with the analysis proposed by the *Pico* plurality:

[W]hether [school officials’] removal of books from their school libraries denied [students] their First Amendment rights depends upon the motivation behind [the school officials’] actions. If [they] intended by their removal decision to deny [students] access to ideas with which [they] disagreed, and if this intent was the decisive factor in [their] decision, then [they] have exercised their discretion in violation of the Constitution.

Pico, 457 U.S. at 871, 102 S. Ct. at 2810 (Brennan, J., plurality). Justice Brennan identified the central holding of his opinion as follows:

[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, 102 S. Ct. at 2810 (quoting *Barnette*, 319 U.S. at 642, 63 S. Ct. at 1187).

The plurality explained that school board discretion to remove library books “may not be exercised in a narrowly partisan or political manner,” such as by removing all books authored by members of a particular race or political party. *Id.* at 870-71, 102 S. Ct. at 2810. In other words, the *Pico* plurality was primarily concerned “with the suppression of ideas.” *Id.* at 871, 102 S. Ct. at 2810.

The plurality opinion identified several legitimate reasons for removing books from public school libraries. Removal would be appropriate if the books were “pervasively vulgar,” or if “the removal decision was based solely upon the ‘educational suitability’ of the books in question.” *Id.* Book removal “criteria that appear on their face to be permissible [include] the books’ ‘educational suitability,’ ‘good taste,’ ‘relevance,’ and ‘appropriateness to age and grade level.’” *Id.* at 873, 102 S. Ct. at 2811.

Moreover, Justice Blackmun’s concurring opinion set forth additional permissible bases for a school’s book removal decision:

School officials must be able to choose one book over another, without outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present.

....

[E]ven absent space or financial limitations, First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language, or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are “manifestly inimical to the public welfare.” And, of course, school officials may choose one book over another because they believe that one subject is more important, or is more deserving of emphasis.

Id. at 880, 102 S. Ct. at 2815 (Blackmun, J., concurring) (citations omitted).

In this case, the School Board’s decision to replace *A Visit to Cuba* and the other books in the series with more accurate books was clearly motivated by a desire to ensure that young, impressionable students are not given incomplete or

erroneous information. The Board's actions were guided by its stated criteria for evaluating library materials, which "include educational significance, appropriateness (to age, maturity, interest and learning levels), and accuracy." *ACLU of Fla., Inc.*, 439 F. Supp. 2d at 1248. For example, *A Visit to Cuba* tells its four- to eight-year-old readers that "[t]he people of Cuba eat, work and study like you." *Id.* at 1248, 1251. As School Board member Bolaños explained, however,

[n]othing could be further from the truth. The people of Cuba survive without civil liberties and due process under the law and receive 10 to 20 year prison sentences for simply writing a document or voicing an opinion contrary to the party line. 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.

Id. at 1251. There are numerous other inaccurate statements of this nature throughout the book. *See, e.g., id.* at 1255. The School Board's decision falls within the "educational suitability" and "appropriateness to age and grade level" concerns identified as legitimate by the *Pico* plurality. *See Pico*, 457 U.S. at 873, 102 S. Ct. at 2811 (Brennan, J., plurality).

The inaccuracies and oversimplifications found in *A Visit to Cuba* provided the School Board with a sufficient basis for concluding that four- to eight-year-olds may be led to erroneously believe that life in Cuba is no different than life in the United States. A recent report on Cuban human rights abuses issued by the United States Department of State explains,

[Cuban] law prohibits forced and compulsory labor by children Nonetheless, the government required children to work in various situations.

Students at rural and boarding schools were expected to participate in several hours of manual labor per day. Secondary school students were expected to devote up to 15 days of their summer vacation completing a variety of tasks ranging from farm labor to urban cleanup projects and were paid a small wage for this labor. Students in post-secondary institutions . . . were expected to devote 30 to 45 days per year to primarily agricultural work. Refusal to do agricultural work could result in expulsion from school.

U.S. Dept. of State, *Cuba: Country Reports on Human Rights Practices – 2005* (Mar. 8, 2006), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2005/61723.htm> (last visited Oct. 13, 2006). It is beyond dispute that life for Cuban children is nothing like life for their American counterparts. *See, e.g.*, U.S. Dept. of State, *Trafficking in Persons Report*, at 100 (June 2006), *available at* <http://www.state.gov/documents/organization/66086.pdf> (last visited Oct. 13, 2006) (classifying Cuba as “a source country for women and children trafficked for the purposes of sexual exploitation and forced child labor”).

Although “[e]ducational suitability . . . is a standardless phrase,” it must at the very least include the minimal requirement that information presented as fact is actually true. *See id.* at 890, 102 S. Ct. at 2820 (Burger, C.J., dissenting). Since “public schools are vitally important ‘in the preparation of individuals for participation as citizens,’” it is critical that students receive accurate information about the issues, public figures, and foreign nations that help shape American

domestic and foreign policy. *See id.* at 864, 102 S. Ct. at 2806 (Brennan, J., plurality) (quoting *Ambach*, 441 U.S. at 76-77, 99 S. Ct. at 1594). A school’s duty to ensure that its library materials are accurate and well-researched is *heightened*—not lessened—when a book’s subject matter touches upon issues of public concern and debate. Schools can only prepare students “for participation as citizens” by ensuring that they are not misinformed about the world they live in. *See id.* In sum, this case simply involves the correction of factual inaccuracies, not “the suppression of ideas.” *See id.* at 871-72, 102 S. Ct. at 2810.

The School Board’s decision to replace the “*A Visit To*” book series with better, more accurate books is supported by ample evidence. For example, one School Materials Review Committee member commented that the “author could have better written and researched the topic,” while another added that the “[a]uthor could have better researched her topic.” *ACLU of Fla., Inc.*, 439 F. Supp. 2d at 1250 n.9. One review of the Spanish language version of the book series considered by the Committee noted that “[t]he texts are repetitive and somewhat dry,” while another called the books’ discussions of the countries “superficial.” *Id.* at 1249 n.8. Although many people involved in the review process did not recommend that *A Visit to Cuba* be replaced, this fact in no way hinders the School Board’s ability “to choose one book over another . . . when the first book is deemed . . . *better written*” *See Pico*, 457 U.S. at 880, 102 S. Ct. at 2815

(Blackmun, J., concurring) (emphasis added). A school board does not “cast a pall of orthodoxy over the classroom” by improving the quality of the educational materials available to its students. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 603, 87 S. Ct. 675, 683 (1967).

CONCLUSION

For the foregoing reasons, amicus respectfully requests this Court to reverse the district court’s decision.

Submitted October ____, 2006.

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Fed. R. App. P. 32(a) because the brief contains 6,961 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman, 14-point font.

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I hereby certify that true and correct copies of the foregoing were served upon the following by first-class mail, postage prepaid, by being deposited in the U.S. Mail on this ____ day of October, 2006.

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