UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

E.K. and S.K., minors, by and through their parent and next friend, LINDSEY KEELEY, *et al.*,	)	
Plaintiffs,	)	Case No. 1:25-cv-637 (PTG/IDD)
v.	)	
DEPARTMENT OF DEFENSE EDUCATION ACTIVITY, *et al.*,	)	
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

ERIK S. SIEBERT
United States Attorney

MEGHAN E. LOFTUS
MATTHEW J. MEZGER
Assistant United States Attorneys
Office of the United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3757/3741
Fax: (703) 299-3983
Email: meghan.loftus@usdoj.gov
matthew.mezger@usdoj.gov

INTRODUCTION

Plaintiffs' Opposition (Dkt. 55) does not save their claims from dismissal. Plaintiffs lack standing in this case as to either of their claims because they have not alleged a particularized injury as to both the changes to the curriculum and the removal of books. Even assuming Plaintiffs had standing, the government speaks both through its public school curriculum and the curation of school libraries. Therefore, even if Plaintiffs could clear the jurisdictional hurdle on their two claims, those claims nevertheless fail to state a claim upon which relief may be granted. Accordingly, the Court should dismiss Plaintiffs' Complaint in its entirety.

ARGUMENT

I. Plaintiffs' Opposition Confirms That They Have Mounted Only A Generalized Grievance Against DoDEA's Recent Actions.

At all times, it is Plaintiffs' burden to establish this Court's jurisdiction, which includes satisfaction of Article III's standing requirements. *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). But Plaintiffs have not met that burden here in connection with their two claims given the lack of a particularized injury resulting from DoDEA's actions in response to the relevant Executive Orders ("EOs") and Directives at issue in the case. Accordingly, the Court has no power to resolve these claims and should dismiss Plaintiffs' claims for lack of subject matter jurisdiction.

A. Plaintiffs Have No Injury in Fact on Their Curriculum Claim Because They Cannot Allege a Violation of an Established Constitutional Right.

As detailed in Defendants' brief, Plaintiffs lack standing to pursue a challenge to the changes to the curriculum because they have not alleged—and cannot allege, based on case law—a particularized injury. *See* Br. (Dkt. 49) at 8-11.

1. There are no allegations in the Complaint that any individual Plaintiff was prohibited from speaking because of the changes to the curriculum. Thus, cases like *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)—

cases in which students were the speakers—are not directly applicable to the Court's analysis here, as the rights of student-as-speakers are not at issue here. *See* Br. at 9-10.

2. That leaves Plaintiffs to attempt to articulate an injury through a novel theory—that students in the five DoDEA schools at issue have a constitutional right to receive information about topics in the EO from DoDEA. But no Supreme Court case or Fourth Circuit case has authorized such a right, and there is no reason for the Court to create one here.

Plaintiffs attempt to avoid the lack of binding precedent on the right to receive information in this Circuit by classifying the issue as a circuit split. This purported distinction is of no moment. Whether classified as a circuit split or otherwise, Plaintiffs concede, as they must, that the key case on which they rely, *Board of Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 870 (1982), did not result in a majority opinion declaring students have a right under the Free Speech Clause to receive information in the classroom. Compl. ¶ 3. *Pico* is therefore not binding authority on this Court for that proposition. *See infra* at 13. Furthermore, the out-of-circuit cases Plaintiffs *do* cite to argue such a right exists—*Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015); *Virgil v. School Board of Columbia County*, 862 F.2d 1517 (11th Cir. 1989); and *Pernell v. Florida Board of Governors of State University System*, 641 F. Supp. 3d 1218 (N.D. Fla. 2022)—also do not bind this Court. Indeed, in the same breath that they urge this Court to follow *Arce* and *Virgil*, Plaintiffs tacitly recognize this principle in their attempt to distinguish *Fleming v. Jefferson County School District, R-1*, 298 F.3d 918 (10th Cir. 2002). *See* Opp. at 6 ("The Government bases its new, more limited, reading of First Amendment protections on *Fleming* . . . , an out-of-circuit case that did not address students' right to receive information at all."). Simply put, neither the Supreme Court nor the Fourth Circuit has recognized the constitutional right that Plaintiffs ask this Court to

create. As such, there is no case that requires this Court to recognize the right as Plaintiffs define it. Nor have Plaintiffs provided any reason for the Court to create such a right here.

As Defendants argued in their opposition to Plaintiffs' motion for a preliminary injunction, *Arce* and *Virgil* do not change this interpretation of *Pico* as non-binding, non-precedential authority. *See* Opp. to Prelim. Inj. (Dkt. 29) at 13 (discussing *Arce* and *Virgil*). Indeed, Plaintiffs' citation to the Eleventh Circuit's decision in *Virgil* ignores the Eleventh Circuit's more recent decision in *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board*, 557 F.3d 1177 (11th Cir. 2009), in which the Eleventh Circuit held that "*Pico* is a non-decision as far as precedent is concerned. It establishes no standard." *Id.* at 1200. In that case, the Eleventh Circuit vacated a preliminary injunction enjoining the school board from removing certain books, finding that for the one claim for which the plaintiff did have standing, the school board did not violate the First Amendment. *Id.* at 1230 ("*Even assuming* that the First Amendment applies to school board decisions to remove books from school libraries, the Board's action in removing this book did not violate the First Amendment." (emphasis added)).

Nor does *Pernell* help Plaintiffs' position. In *Pernell*, the district court considered the First Amendment implications of a state law on instruction in the classrooms of the state *university* system. 641 F. Supp. 3d at 1231. In discussing the intersection of First Amendment jurisprudence with the educational setting, *Pernell* noted that different "constitutional rules applicable in higher education do not necessarily apply in primary and secondary schools, where students generally do not choose whether or where they will attend school." *Id.* at 1240. *Pernell*'s own language therefore makes it inapposite to the current case, which is focused on minor children in K-12 schools. *See also Virgil*, 862 F.2d at 1520 ("At the same time, the Supreme Court has held that the rights of students in public schools are not automatically coextensive with the rights of adults"

(citing *Hazelwood*, 484 U.S. at 266)). And even the district court in *Pernell* recognized that the case law supports "the general proposition that the State is, of course, permitted to determine the content of its public school curriculum" and that the state retains the "right to make content-based choices in setting the public school curriculum"—exactly what Defendants argue here. *Id.* at 1241-42.

Similarly flawed is Plaintiffs' interpretation of *Hazelwood* as green-lighting the creation of a student's right to receive information. While the Ninth and Eleventh Circuits may have applied *Hazelwood* in *Arce* and *Virgil* to create, out of whole cloth, a student's right to receive information, that interpretation is found nowhere in *Hazelwood*. As argued in Defendants' brief, *Hazelwood* does not address the student body's right to receive information. Br. at 10-11. Rather, the Supreme Court's analysis was focused on the student journalists who wrote the newspaper articles, *i.e.*, the speakers, not on the student body that was deprived of an opportunity to read those articles, *i.e.*, the listeners. 484 U.S. at 262. That two Courts of Appeals may have taken an overly expansive view of *Hazelwood* does not force this Court to do the same.

Finally, Plaintiffs' standing analysis glosses over the distinction between speakers and listeners that Defendants made in their opening brief. *See* Br. at 8-11. The *Pico* plurality upon which Plaintiffs so heavily rely recognized that the right to receive ideas is reciprocal of the right to speak. *Pico*, 457 U.S. at 867-68. But in emphasizing the role of the students/listeners in this reciprocal rights scheme, Plaintiffs ignore that "all First Amendment rights accorded to students must be construed 'in light of the special characteristics of the school environment.'" *Id.* (quoting *Tinker*, 393 U.S. at 506). As described *infra* at II.A.1., one of the "special characteristics of the school environment" is that the government speaks through curriculum and may therefore choose its own message. Recognizing a right to receive information in the classroom, as Plaintiffs urge

this Court to do, would run afoul of the government speech doctrine, which permits the government to choose its own message in avenues like curriculum. *See* Br. at 11; *see also Pico*, 457 U.S. at 863, 864. Accordingly, because Plaintiffs have not alleged a violation of an established constitutional right that is implicated in DoDEA's curriculum changes, they lack standing on that claim.

B. An Interest in Reading a "Broad Variety of Ideas" Does Not Mean that Plaintiffs Have been Injured by the Book Removals.

Plaintiffs cannot sustain their burden to establish standing in connection with their book removal claim as none of the Plaintiffs have sought to access any of the books the five DoDEA schools withdrew from their bookshelves. Br. at 12-13. Indeed, absent from their Complaint and this record is any allegation or evidence that one of the relevant EOs precluded any one of the Plaintiffs from accessing a book that she or he wanted to read from one of the five DoDEA libraries. Br. at 12-13. They have thus failed to establish a particularized injury resulting from a DoDEA action borne of the EOs at issue in this case.

Unable to meet that factual burden, despite ample opportunity to do so, Plaintiffs fall back on the generalized assertion that "they place significant importance on having access to a diverse collection of books in their school libraries including books that address race and gender." Opp. at 3 (citing Compl. ¶¶ 70, 76, 77, 79-81). But an "interest" in "access" to idea or to otherwise explore "a broad variety" of ideas does not mean that Plaintiffs want to read about the topics in books DoDEA removed in response to the EOs—*i.e.*, those that concern gender identity or discriminatory equity ideology.[1] Accordingly, the key argument to the standing analysis remains unrebutted:

[1] In this respect, it is inaccurate for Plaintiffs to claim they cannot "see themselves and their stories represented in their schools" or that the EOs require elimination of all references to "race or gender." Opp. at 3, 4. Indeed, considering that one of the relevant EOs promotes the recognition of women as "biologically distinct from men" it is a far cry to suggest the EO eliminates all mention of women. EO 14168 § 3. Similarly, regarding race, the relevant EO only challenges the

Plaintiffs have not put forward any facts to show that the EOs prohibited them from actually accessing these books—let alone that they desired to read books bearing on the subject matters at issue in the EOs. *See also* Br. at 12-13 & n.6.

As analogous case law shows, including a case within this district, these are critical facts that delineate plaintiffs with standing from those who only raised a generalized grievance. *Cousins v. Sch. Bd. of Orange Cnty.*, 687 F. Supp. 3d 1251, 1277 (M.D. Fla. 2023); *PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, 711 F. Supp. 3d 1325, 1329-30 (N.D. Fla. 2024); *Mainstream Loudoun v. Bd. of Trs. of Loudoun Cnty. Libr.*, 2 F. Supp. 2d 783, 792 (E.D. Va. 1998) (Brinkema, J.). Tacitly acknowledging the factual overlap with these cases, Plaintiffs are quick to distinguish *Cousins* on the basis that it concerned the redressability element of standing and therefore does not apply here, where Defendants have argued a lack of injury in fact. Opp. at 4. Regardless of the label Defendants might assign their jurisdictional defect, Plaintiffs must nevertheless bear the burden of establishing jurisdiction. *Miller*, 462 F.3d at 316. Though Plaintiffs also try to distinguish *Cousins* by noting that the complaint largely referenced "only the parents' desire for the access to books," Opp. at 4, they have only established this case's similarity to *Cousins*. Indeed, without any facts showing that the students here have tried to access a removed book—especially when *none* of the Plaintiffs put forward their own declarations to support jurisdiction—it is evident that, like *Cousins*, only Plaintiffs' parents have an interest in retaining books about racial equity and gender identity. *See* 687 F. Supp. 3d at 1277.[2] But this is a case to ostensibly vindicate the

notion that "[m]embers of one race, color, sex, or national origin are morally or inherently superior to members of another race, color, sex, or national origin." EO 14190 § 2(b). Nothing in that EO requires elimination of all mentions of race.

[2] Along that same vein, *Minarcini v. Strongville City School District*, 541 F.2d 577, 583 (6th Cir. 1976), does not aid Plaintiffs' argument. *Minarcini*'s standing analysis was confined to a single sentence and relied on two supreme Court decisions: *Kleindienst v. Mandel*, 408 U.S. 753 (1972) and *Procunier v. Martinez*, 416 U.S. 396 (1974). *Procunier* has since been overruled, *see*

schoolchildren's First Amendment rights, *not* the reading interests of the Plaintiffs' parents. As such, Plaintiffs' interests in the five schools' library collections has no bearing on the First Amendment claim in this case. *See id.* In any event, there is no doubt that this case aligns with *Mainstream Loudoun*—a case that Plaintiffs did not address in their Opposition—where Judge Brinkema dismissed any plaintiff challenging the library's internet policy on Free Speech grounds who did not try to access any webpage the policy blocked. 2 F. Supp. 2d at 792. Just like those dismissed plaintiffs in *Mainstream Loudoun*, none of the Plaintiffs here have tried to check out a book removed due to the EOs. Br. at 12-13 & n.6.

Adopting Plaintiffs' position means that any student who merely learns of a book removal can challenge that removal even if she or he has never set foot in the library, never expressed an interest in reading that book, or otherwise never tried to check out the removed book. That runs counter to key Supreme Court precedent, and Plaintiffs themselves have put forward no limiting principle on what might suffice to establish standing under the rule they espouse here. *FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367, 381 (2024) ("Article III standing screens out plaintiffs who might have only a general legal, moral, ideological or policy objection to a particular government action."); *Griffin v. Dep't of Labor Fed. Credit Union*, 912 F.3d 649, 654-55 (4th Cir. 2019) (stressing that standing requires particularized injury to separate a plaintiff from the general public at large and a use of the sought information). That is why requiring an attempt to access a removed book is key for the standing analysis in these First Amendment claims.

Thornburg v. Abbott, 490 U.S. 401, 413-14 (1989). *Kleindienst* only confirms Defendants' arguments that a plaintiff must try to access the information the government actor blocked, considering the graduate students in that case invited a professor to participate in a panel discussion which did not come into fruition as the professor was not permitted to enter the United States, 408 U.S. at 757.

Moreover, Plaintiffs flout precedent in suggesting that Defendants' standing argument "create[s] a circular and unreasonable limitation on Plaintiffs' ability to vindicate their First Amendment injury." Opp. at 5. Indeed, the Supreme Court has long concluded that it "is not a reason to find standing" based on the "assumption that if [plaintiffs] have no standing to sue, no one would have standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013) (holding plaintiffs, who had no knowledge of government's surveillance program, lacked standing because, among other reasons, they failed to identify any communication that was subject to surveillance under the challenged program). All Plaintiffs needed to do in the three months between the issuance of the EOs and before filing this lawsuit[3] was attempt to check out any book that DoDEA removed in reaction to the EOs. That is not a significant obstacle for any regular reader of books concerning gender identity or racial equity, as Plaintiffs suggest themselves to be. In fact, the simplicity of establishing standing only underscores that none of the Plaintiffs have a requisite stake in this action. As no Plaintiff has met the requisite showing to establish standing in this case, Plaintiffs' claim in connection with the five schools' book removals must be dismissed for lack of jurisdiction.

II. Plaintiffs Have Failed to State Any Plausible Claim for Relief.

A. The Curriculum Changes at Issue in this Case are Government Speech.

Even assuming Plaintiffs have standing to challenge the curriculum changes here—which they do not—the curriculum developed by DoDEA and modified by DoDEA after the EOs issued is government speech immune from First Amendment scrutiny, or, at the very least,

[3] "Unlike questions of mootness and ripeness, the standing inquiry asks whether a plaintiff held the requisite stake in the out of a case 'at the outset of the litigation.'" *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 187 (4th Cir. 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)).

constitutionally-permissible under the reasonably related to legitimate pedagogical concerns test. *See* Br. at 14-19.

1. The Government Speech Doctrine Precludes Challenge to the Curriculum Changes Here.

Decisions on curriculum fall squarely within the government speech doctrine, and Plaintiffs arguments to the contrary are unpersuasive. *First*, Plaintiffs argue that curriculum does not fall within the government speech doctrine as articulated by the Fourth Circuit in *Planned Parenthood of South Carolina v. Rose*, 361 F.3d 786, 792 (4th Cir. 2004), because "the curricular removals constitute regulatory action aimed at suppressing disfavored viewpoints and harming students' First Amendment right to receive information." Opp. at 12. Plaintiffs have not alleged that any right of a student as a speaker has been curtailed, *see generally* Compl., instead styling the Complaint solely as an injury to a student-plaintiff's right to receive information (rather than a right to speak about certain topics). *See* Br. at 8 n.3; *supra* Section I.A. Plaintiffs cannot now amend their complaint via briefing to allege suppression of student speech. *See Fuller v. Hade*, 2023 WL 2277101, at *6 (E.D. Va. Feb. 28, 2023) (Giles, J.) (citing cases). And, in any event, even if it were procedurally proper to do so, Plaintiffs' vague statement about harm to students, devoid of any factual support, would not pass muster under *Iqbal* and *Twombley*.

Second, Plaintiffs attempt to recharacterize *Shurtleff v. City of Boston*, 596 U.S. 243 (2022) as favorable to their position. This, too, is unpersuasive. As to the first two *Shurtleff* factors,[4] Plaintiffs argue that the public does not perceive school curriculum as the government speaking

[4] To resolve the question presented in that case—whether the City of Boston was speaking through the third-party flags it approved to be flown at City Hall—the Supreme Court held that courts must "conduct a holistic inquiry designed to determine whether," in the particular instance, "the government intends to speak for itself or regulate private expression." 596 U.S. at 252. That inquiry includes factors like (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 message." *Id.* at 259.

because curriculum is established "by local government bodies such as school boards in collaboration with non-governmental education experts, individual teachers, parents, and students." Opp. at 13. This argument ignores the Fourth Circuit's *en banc* decision in *Boring v. Buncombe County Board of Education*, 136 F.3d 364, 368 (4th Cir. 1998), and persuasive out-of-circuit authority that hold that teachers do not have a First Amendment right to choose their own curriculum in contravention of what the local board of education has established. Br. at 15 (citing cases). In fact, it effectively upends the core underpinnings of *Boring* as teachers are the conveyers of the government's speech, which is why they do not have a First Amendment right to challenge a school's curricular choices, as those decisions are reserved to school officials. *Boring*, 136 F.3d at 366; Pls. Reply Prelim. Inj. (Dkt. 36) at 10-11 (admitting that *Boring* holds that it is "school officials who possess decision-making authority over [curricular] content"). However, even taking Plaintiffs' contention as true—that the development of curriculum is influenced by individuals other than the local board of education—that does not change the fact that the Supreme Court "has long recognized that local school boards have broad discretion in the management of school affairs" and has "repeatedly emphasized the comprehensive authority of the States and of school officials to prescribe and control conduct in the schools." *Pico*, 457 U.S. at 863, 864. In other words, while others may influence curriculum development, the Supreme Court has recognized that it is government authorities, typically the local school board, that maintains control over curriculum.

As to "the extent to which the government has actively shaped or controlled the message," *Shurtleff*, 596 U.S. at 259, "Plaintiffs do not contest that the federal government has a role in shaping DoDEA's curriculum." Opp. at 14. Rather, they argue that since only one factor favored the government in *Shurtleff*, and by their count, only one factor favors the government here, the

same result as in *Shurtleff*—that the speech at issue is not government speech—should be the result here. *Id*. This reduction of *Shurtleff* to a tally of factors for and against vastly oversimplifies that case, especially where the Supreme Court provided no guidance as to how to weigh each factor. And in any event, as detailed in Defendants' brief, Plaintiffs' tallying of the *Shurtleff* factors is incorrect—the application of the *Shurtleff* factors points overwhelmingly to the conclusion that the curriculum is government speech. Br. at 18-19.

Finally, Plaintiffs' attempts to distinguish *Griswold v. Driscoll*, 616 F.3d 53, 59 (1st Cir. 2010) (Souter, J.), and *Chiras v. Miller*, 432 F.3d 606, 614-15 (5th Cir. 2005), similarly fall flat. Plaintiffs argue that those cases are not relevant here because "the challenged government action [in those cases] was declining to affirmatively include certain speech, not removing speech that had already been included." Opp. at 12. This is a distinction without a difference. *See Little v. Llano Cnty.*, 138 F.4th 834, 846-47 (5th Cir. 2025) (en banc). Plaintiffs have cited no case law to support their supposition that when the government speaks, it only has one chance to articulate its position, and cannot change that position once it does so.

In sum, Plaintiffs have failed to distinguish curriculum as falling outside of government speech. Accordingly, their curriculum claim should be dismissed.

2. In the Alternative, the Curriculum Changes at Issue Meet the "Reasonably Related to Legitimate Pedagogical Concerns" Test.

Even assuming that curriculum falls outside of the government speech doctrine, the curriculum changes meet *Hazelwood*'s "reasonably related to legitimate pedagogical concems" test. *See* Br. at 19-21. Though Plaintiffs suggest that Defendants put forward no legitimate pedagogical concern, Opp. at 15, the relevant EOs set forth those interests. *See* Br. at 19-21. These EOs may be considered in deciding this motion without converting it to one for summary judgment, as the EOs have been incorporated by reference in Plaintiffs' Complaint, attached as an

exhibit (Dkt Nos. 1-1, 1-2, 1-3), and cited in the Complaint (Compl. ¶¶ 2, 25-27, 29-30). *See Marynowski v. Brady*, 2024 WL 4138746, at *2 (E.D. Va. Sept. 10, 2024) (Giles, J.). The Court may also take judicial notice of them as public records. *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004). The EOs require DoDEA to teach the biological sex binary and promote inclusivity through individual merit. *See, e.g.*, Executive Order No. 14190, "Ending Racial Indoctrination in K-12 Schooling," 90 Fed. Reg. 8853 (Jan. 29, 2025) (stating that the purpose and policy was, in part, to remove the "echo chamber" in which students are "forced" to accept certain concepts "without question or critical examination"); Executive Order No. 14168, "Defending Women from Gender Ideology Extremism and Restoring Truth to the Federal Government," 90 Fed. Reg. 8615 (Jan. 30, 2025) (stating that the purpose is to return to the "ordinary and longstanding use and understanding of biological and scientific terms").

Nevertheless, Plaintiffs continue to assert that the curriculum changes are not tied to any "legitimate pedagogical interests" under *Hazelwood*. Opp. at 15. *But see Hazelwood*, 484 U.S. at 273 ("Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."). They allege that curriculum changes were rooted in an "'anti-wokeness' agenda," Opp. at 16, a phrase which Plaintiffs do not define in their Opposition or in their Complaint. What is clear from the Complaint, however, is that Plaintiffs do not like the curricular changes. Merely attaching a phrase such an "anti-wokeness" to these changes does not automatically prevent those changes from having a legitimate pedagogical concern (just as much as calling prior versions "woke" does not serve as a constitutional talisman), and thus is simply not enough to push Plaintiffs' claim "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680.

B. Plaintiffs' Book Claim Should be Dismissed for Failure to State a Claim.

Plaintiffs fail to state a claim for relief in Count I, their book claim, for three reasons. As their Opposition confirms, Plaintiffs exceed the bounds of what the Supreme Court has recognized as an individual's right to "receive information"; they have put forward no meaningful opposition to Defendants' argument that library curation is government speech; and they have only advanced everyday political disagreements as the basis for their claims rather than any "narrowly partisan or political" reason.

1. Plaintiffs' Claim is Not Actionable Because the First Amendment Does Not Prevent a Library From Removing Books from its Shelves.

Binding Supreme Court precedent, *i.e.*, those decisions which have gained a majority, has recognized that the right to receive information under the Free Speech Clause consists *only* of an adult's right not to have the government restrict her or his receipt of another individual's speech. Br. at 22 (collecting cases). This assertion stands unrebutted. There is no Supreme Court or Fourth Circuit binding precedent recognizing the right to receive information in the way Plaintiffs conceive, and Plaintiffs have not shown this Court that there is good reason to undertake the expansion of the law for which they advocate. Br. at 22-25. Though Plaintiffs contend that "SCOTUS and decades of precedent hold that students' First Amendment rights are implicated under these facts," Opp. at 10, that proposition is belied by the fact that the cases Plaintiffs cite—to use their oft-repeated phrase—are either "out-of-circuit" or "nonbinding." Opp. at 11. Indeed, the principal case on which they rely, *Pico*, resulted in a plurality opinion that is not binding under the *Marks* rule. Br. at 23; *see also Marks v. United States*, 430 U.S. 188, 193 (1977) (establishing methodology for determining the Supreme Court's binding holding when no singular opinion garners the majority of votes from the Court). Since *Pico*, every circuit court that has addressed *Pico*'s precedential weight has found that it is nonbinding. *Little*, 138 F.4th at 849; *Griswold*, 616

F.3d at 57; *ACLU of Fla. Inc.*, 557 F.3d at 1200. All told, restricting or removing from circulation a book from a library does not fall within the limited "right to receive information" rubric the Supreme Court has recognized. Br. at 22-25. Plaintiffs' claim should therefore be dismissed.

Separately, through their silence, Plaintiffs have confirmed that their claim does more than challenge the five DoDEA schools' removal of books from their shelves; they are also seeking to preclude what books DoDEA *adds* to its library collections. Br. at 24. Plaintiffs had the opportunity to clarify that their claim does not reach the five DoDEA schools' purchasing decisions for books that have never been placed on a bookshelf, but they did not. This concession (through Plaintiff's silence) only underscores that their claim reaches beyond any First Amendment right-to-receive information claim case law has recognized. Even the *Pico* plurality made clear that "nothing in our decision today affects in any way the direction of a local school board to choose books to *add* to the libraries of their schools." 457 U.S. at 871 (plurality op.). Yet despite this express carveout, Plaintiffs press their claim to challenge the five DoDEA schools' purchasing decisions *and* their removal decisions. Plaintiffs' embrace of such an all-encompassing claim confirms that it is beyond the bounds of any previously recognized First Amendment information claim, and, importantly, the putative authority they cite in support of their claims here. Br. at 24-25; *see also Little*, 138 F.4th at 845. The inclusion of challenging those purchasing decisions only confirms that Plaintiffs are, at best, "disappointed patron[s that] are kept from 'receiving' [a] book of their choice at taxpayer expense," but that right is not "guaranteed by the First Amendment." *Little*, 138 F.4th at 848.

2. Plaintiffs Do Not Meaningfully Oppose Defendants' Argument That the Five DoDEA Schools' Curation of Their Libraries is Government Speech.

The five DoDEA schools' curation of their library collection is an act of government speech, and as such, changes to those collections are immune from scrutiny under the First

Amendment's Free Speech Clause. *See Summum*, 555 U.S. at 467. Indeed, "recognizing that government speech almost always supports a given policy objective and the government is entitled to promote a particular message, the School District can surely take legitimate and appropriate steps to ensure that its messages are neither garbled nor distorted." *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 287 (4th Cir. 2008) (cleaned up) (applying government speech doctrine to school district website).

Through their Opposition's silence, Plaintiffs concede two key facts: (1) that the curation of a library is an expressive act, Br. at 25; and (2) that school library curation is an extension of a school's curricular decisions, Br. at 25-26. These concessions confirm that the government speech at issue in this case is the five DoDEA schools' library collections and *not* the individual books on the schools' bookshelves. *See Summum*, 555 U.S. at 473 (holding that city's selection of monuments for park conveyed message "[t]hese monuments project the image we want"); *Little*, 138 F.4th at 853. The message here is that each DoDEA school's library collection contains age-appropriate material for their readers, furthers their educational mission, and ensures unity with its curricular message regarding certain matters of public concern (*e.g.*, individual merit, biological sex binary, etc.).

Plaintiffs' lone attempt to oppose Defendants' government speech position by citing *GLBT Youth in Iowa Schools Task Force v. Reynolds*, 114 F.4th 660 (8th Cir. 2024), falls flat. Opp. at 11-12. True enough, *Reynolds* did not hold that the curation of school libraries was government speech, *id.* at 667-68, but that conclusion misunderstood the nature of the government's speech in library curation and embraced a theory that is not present in this case. When *Reynolds* concluded that the government would be "babbling prodigiously and incoherently" through the books it selected, it did so on the understanding that the government's speech was each individual book

itself. *See id*. But that is not what Defendants have advanced as the government speech in this case. *See also* Br. at 25-27. Indeed, Defendants have asserted that the government speech is the expressive act of curating a library collection and presenting the totality of that collection to its patrons, not the individual books themselves. *See Summum*, 555 U.S. at 473; *PETA, Inc. v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005) ("Those who check out a Tolstoy or Dickens novel would not suppose they will be reading a government message."). Accordingly, *Reynolds*' reasoning in inapt for this case. *See also Little*, 138 F.4th at 864-65 & n.58.

In the end, it was and has always been within DoDEA's discretion to determine whether it would build libraries for its schools and if they did so, what the contents of those libraries would be given the authority and monetary appropriations Congress bestowed to the Department of Defense. Br. at 16-17, 27. As case law shows in analogous contexts, this enables the government to make the necessary choices for its collection to deliver its intended message and carry out Congressional directives. *See Summum*, 555 U.S. at 473 (monuments for public park); *PETA*, 414 F.3d at 27-28 (selection of exhibits for museum display); *Ill. Dunesland Pres. Soc'y v. Ill Dep't of Nat. Res.*, 584 F.3d 719, 721-22, 725 (7th Cir. 2009) (brochures on tourism display rack).[5] Thus, Plaintiffs' claim for relief in Count I of the Complaint must be dismissed as it challenges

[5] As these authorities illustrate, Plaintiffs' concerns that ruling in Defendants' favor would lead to "unlimited government censorship" are misplaced. *See Little*, 138 F.4th at 856. For example, in holding that Pleasant Grove City engaged in government speech when it selected the monuments for the park, the Supreme Court then authorized the city to "censor" any monuments that it would not select for its park. *Summum*, 555 U.S. at 468. The same is true when the D.C. Circuit authorized the museum to "censor" any proposed exhibits that it believed did not further its message. *PETA*, 414 F.3d at 28. Plaintiffs' argument might have some force *if* they could show that any of the five DoDEA schools prohibited students from discussing or otherwise bringing into the schools any books pertaining to the subject matter in the EOs. But Plaintiffs cannot make that showing here, and they have not pled any allegations to this effect. *See C.K.-W. by & through T.K. v. Wentzville R-IV Sch. Dist.*, 619 F. Supp. 3d 906, 919 (E.D. Mo. 2022) ("The removal of the books at issue from the District's schools does not stop any student from reading or discussing the book, which surely would raise a more serious issue.").

government speech that is immune from liability under the First Amendment's Free Speech Clause.

3. In the Alternative, Plaintiffs Have Not Shown that the Five DoDEA Schools' Book Removals Were Motivated by Unconstitutional Rationales.

Assuming this Court concludes that the *Pico* plurality is binding and rejects the above arguments, Plaintiffs nevertheless failed to plausibly allege that Defendants' determinative factor for the five schools' book removals was a "narrowly partisan or political" reason. As their Opposition confirms, Plaintiffs have only shown, at best, that the five DoDEA schools removed books because a change in administration had differing views than they do of what is suitable for schoolchildren. That is not the type of "narrowly partisan or political" motivation that *Pico* found constitutionally problematic and is instead a reflection of the ordinary democratic process. Accordingly, Count I of Plaintiffs' Complaint should be dismissed.

Both parties agree that, under *Pico*'s plurality decision, the First Amendment's Free Speech Clause is violated when the determinative factor for the book's removal was done in a "narrowly partisan or political manner." *Pico*, 457 U.S. at 870; Br. at 28; Opp. at 7. For good reason. It makes sense that the First Amendment applies only to book removals that were made for "narrowly partisan or political" reasons because *Pico* made plain that it is *constitutional* for schools to remove a book based on its "educational suitability." 457 U.S. at 871. Thus, to weed out First Amendment claims that challenge a constitutional action from those that challenge an unconstitutional action, a plaintiff must necessarily plead facts to establish the plausibility that it was an unconstitutional motivation that caused the book's removal. *See id.* Otherwise, a host of constitutional decisionmaking concerning library curation would become actionable in the federal court system. *See Tinker*, 393 U.S. at 507 (observing that "public education in our Nation is committed to the control of state and local authorities" and as such, the federal courts should not "intervene in the

resolution of conflicts which arise in the daily operation of school systems"). Accordingly, Plaintiffs' efforts to maintain that they pled a plausible claim by presenting a case of "textbook viewpoint discrimination," Opp. at 8, are misplaced—*any* educational suitability determination is, by definition, an act of viewpoint discrimination. *See, e.g.*, *Little*, 138 F.4th at 847 (concluding that "deeming a book 'inaccurate' or 'unsuitable' is often *the same thing* as disliking its 'content' and 'viewpoint'").

In a similar vein, Plaintiffs cannot create a plausible claim based on their subjective view that government actors are being motivated by "disfavored ideas." Opp. at 7, 9. Disfavoring an idea in the *educational* context is equivalent to finding a particular viewpoint or message unacceptable for schoolchildren. By that logic, as *Little* illustrates, it would be impossible for a school library to remove a book authored by a member of the Ku Klux Klan based on the widely accepted rationale that books perpetuating the utterly loathsome notion that an individual's race determines her or his moral worth should not appear on a library's bookshelf. *See* 138 F.4th at 847. Accordingly, try as they might, Plaintiffs cannot waive away *Pico*'s limiting principle that only books removals made because of "narrowly partisan or political" reasons as a "factual dispute that should be subject to discovery." Opp. at 8. That is a fundamental pleading element for any First Amendment book removal claim. Indeed, it is a particularly salient pleading element given that education is a key issue in the political arena, and a school's curricular decision—inclusive of the books it selects for its library shelves—is a byproduct of the political process. *See Hazelwood*, 484 U.S. at 273 ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."). That Plaintiffs only try to downplay the importance of this aspect of *Pico*—that only "narrowly partisan or political" decisions are actionable—only underscores that these key facts are missing from their Complaint.

All told, Plaintiffs' Complaint lacks sufficient factual allegations to plead that narrowly partisan or political motivations were the determinative factor for the five DoDEA schools' decision to remove books from their shelves and initiate further book reviews. As there are no allegations suggesting that Defendants have otherwise prohibited students from bringing books on discriminatory racial equity or gender identity from home or from talking about these subjects, it is implausible that Defendants were motivated by an unconstitutional purpose designed to impose some type of "religious or scientific orthodoxy or a desire to eliminate a particular kind of inquiry generally." *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980).

Though Plaintiffs are quick to suggest that they have alleged that no "legitimate interest exists for the book removals," Opp. at 9, they overlook that they incorporated the EOs as part of their pleadings and the Court may take judicial notice of these publicly available sources. *See supra* at 11-12. As such, Defendants have put forward a legitimate interest for the educational changes the relevant EOs implemented, *supra* at Section II.A.2, and the EOs—regardless of Plaintiffs' disagreements with the concepts espoused in the same—show that these educational changes are far from being narrowly partisan or political. Indeed, there is nothing inherently partisan, let alone narrowly partisan, in ensuring that all school materials focus on an individual's merit rather than an individual's classifications or otherwise ensure that all individuals are treated equally. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 231 (2023) ("In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race."). Similarly, there is nothing narrowly partisan or political about teaching the biological sex binary to the exclusion of teaching that gender is based on one's subjective understanding—especially when the Supreme Court has just observed that it is a matter of great public debate. *See United States v. Skrmetti*, 145 S. Ct. 1816, 1837 (2025). A contrary

conclusion means, as suggested before, that *Pico*'s "narrowly partisan or political" rubric "would be drained of any meaning whatsoever given the breadth of issues that have entered, or will enter, the modern public discourse." Br. at 30; *see also supra* at 17-18. Or, of course, that the government must espouse only Plaintiffs' subjective viewpoints as a part of its pedagogical interests.

In sum, without sufficient allegations to establish the plausibility that narrowly partisan or political motivations were the determining factor for the five schools' book removals and subsequent reviews, the claim must be dismissed. Without those key factual allegations, Plaintiffs only advance a challenge to the results of the electoral process, which can only be remedied by another electoral process. This Court should therefore dismiss Plaintiffs' claim for relief in Count I.

CONCLUSION

For the foregoing reasons and those in Defendants' Opening Brief, Defendants respectfully request that the Court grant their motion to dismiss and dismiss Plaintiffs' Complaint in its entirety.

Dated: July 22, 2025

Respectfully submitted,

ERIK S. SIEBERT
UNITED STATES ATTORNEY

By: /s/

MEGHAN E. LOFTUS
MATTHEW J. MEZGER
Assistant United States Attorneys
Office of the United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3757/3741
Fax: (703) 299-3983
Email: meghan.loftus@usdoj.gov
matthew.mezger@usdoj.gov

Counsel for Defendants