

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: May 23, 2025]

No. 23-50224

LELIA GREEN LITTLE; JEANNE PURYEAR;
KATHY KENNEDY; REBECCA JONES; RICHARD DAY;
CYNTHIA WARING; DIANE MOSTER,

Plaintiffs-Appellees,

versus

LLANO COUNTY; RON CUNNINGHAM, in his official
capacity as Llano County Judge; JERRY DON MOSS,
in his official capacity as Llano County
Commissioner; PETER JONES, in his official capacity
as Llano County Commissioner; MIKE SANDOVAL, in
his official capacity as Llano County Commissioner;

LINDA RASCHKE, in her official capacity as Llano
County Commissioner; AMBER MILUM, in her official
capacity as Llano County Library System Director,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:22-CV-424

Before ELROD, *Chief Judge*, and JONES, SMITH,
WIENER, STEWART, SOUTHWICK, HAYNES, GRAVES,
HIGGINSON, WILLET, HO, DUNCAN, ENGELHARDT,

OLDHAM, WILSON, DOUGLAS, and RAMIREZ, *Circuit Judges*.*

STUART KYLE DUNCAN, *Circuit Judge*.†

INTRODUCTION

We consider whether someone may challenge a public library’s removal of books as violating the Free Speech Clause.

Patrons of a county library in Texas sued the librarian and other officials, alleging they removed 17 books because of their treatment of racial and sexual themes. The district court ruled that defendants abridged plaintiffs’ “right to receive information” under the Free Speech Clause and ordered the books returned to the shelves. On appeal, a divided panel of our court affirmed in part. We granted en banc rehearing.

We now reverse the preliminary injunction and render judgment dismissing the Free Speech claims. We do so for two separate reasons.

First, plaintiffs cannot invoke a right to receive information to challenge a library’s removal of books. Yes, Supreme Court precedent sometimes protects one’s right to receive someone else’s speech. But plaintiffs would transform that precedent into a brave new right to receive information from the government

* Judge RICHMAN was recused and did not participate in the decision.

† Ten judges join Parts I–III of this opinion and the judgment (Chief Judge ELROD and Judges JONES, SMITH, HAYNES, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON). Seven of those judges join the opinion in full (Judge JONES, SMITH, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM).

in the form of taxpayer-funded library books. The First Amendment acknowledges no such right.

That is a relief, because trying to apply it would be a nightmare. How would judges decide when removing a book is forbidden? No one in this case—not plaintiffs, nor the district court, nor the panel—can agree on a standard. May a library remove a book because it dislikes its ideas? Because it finds the book vulgar? Sexist? Inaccurate? Outdated? Poorly written? Heaven knows. The panel majority itself disagreed over whether *half* of the 17 books could be removed. For their part, plaintiffs took the baffling view that libraries cannot even remove books that espouse racism.

The only sensible course—and, happily, the one supported by reams of precedent—is to hold that the right to receive information does not apply here. A plaintiff may not invoke that right to challenge a library’s decisions about which books to buy, which books to keep, or which books to remove.

True, one of our decisions—*Campbell v. St. Tammany Parish School Board*, 64 F.3d 184 (5th Cir. 1995)—suggested students could challenge the removal of a book from public school libraries. But *Campbell* was based on a mistaken reading of precedent and, since decided, has played no role in similar controversies in our circuit. We therefore overrule *Campbell*.

Second, a library’s collection decisions are government speech and therefore not subject to Free Speech challenge. Many precedents teach that someone engages in expressive activity by curating and presenting a collection of third-party speech. People do this all the time. Think of the editors of a poetry compilation

choosing among poems, or a newspaper choosing which editorials to run, or a television station choosing which programs to air. So do governments. Think of a city museum selecting which paintings or sculptures to feature in an exhibit.

In the same way, a library expresses itself by deciding how to shape its collection. As one court put it: “With respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude.” *People for the Ethical Treatment of Animals v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005) [*PETA*]. What the library is saying is: “We think these books are worth reading.”

On this point, we note an error that bedeviled our sister circuit. See *GLBT Youth in Iowa Schools Task Force v. Reynolds*, 114 F.4th 660, 668 (8th Cir. 2024). Contrary to its view, a library does not speak through the words of the books themselves. “Those who check out a Tolstoy or Dickens novel would not suppose that they will be reading a government message.” *PETA*, 414 F.3d at 28. The library is not babbling incoherently in the voices of Captain Ahab, Hester Prynne, Odysseus, Raskolnikov, and Ignatius J. Reilly. Rather, the library speaks by selecting some books over others and presenting that collection to the public—just as a museum does when it curates a collection of various schools of art. No one thinks the museum is contradicting itself by featuring both Rembrandt and Andy Warhol.

This conclusion gains strength when we consider the history of public libraries. From the moment they emerged in the mid-19th century, public libraries have shaped their collections to present what they held to be worthwhile literature. What is considered worthwhile, of course, evolves over the years. Public

libraries used to exclude most novels, which were thought bad for morals. Today a library would not think of excluding *Fifty Shades of Grey*. But what has not changed is the fact, as true today as it was in 1850, that libraries curate their collections for expressive purposes. Their collection decisions are therefore government speech.

Finally, we note with amusement (and some dismay) the unusually over-caffeinated arguments made in this case. Judging from the rhetoric in the briefs, one would think Llano County had planned to stage a book burning in front of the library. Plaintiffs and *amici* warn of “book bans,” “pyres of burned books,” “totalitarian regimes,” and the “*Index librorum prohibitorum*.” One *amicus* intones: “Where they burn books, they will ultimately burn people.”¹

Take a deep breath, everyone. No one is banning (or burning) books. If a disappointed patron can’t find a book in the library, he can order it online, buy it from a bookstore, or borrow it from a friend. All Llano

¹ See Suppl. Brief of Appellees (referring throughout to the 17 “Banned Books”); Brief for Freedom to Read Found. et al. as Amicus Curiae at 5 (“pyres of burned books kindling the rise of early twentieth-century totalitarian regimes”); Brief for Found. for Individual Rts. and Expression as Amicus Curiae at 9–11 (“The Burning of the Books and the Burying of the Philosophers,” Diocletian’s “public burning of Christian writings,” Pope Paul VI’s “*Index librorum prohibitorum*,” and Heine’s “Where they burn books, they will ultimately burn people”); Brief for Texas Freedom to Read Project as Amicus Curiae at 7 (“Book bans have devastated Texas libraries.”). The dissenting opinion joins in this unfortunate rhetoric. See Dissent at 30 (accusing us of “sanction[ing] government censorship in every section of every public library in our circuit”); *id.* at 37 (suggesting we have “join[ed] the book burners” (citation and internal quotation marks omitted)).

County has done here is what libraries have been doing for two centuries: decide which books they want in their collections. That is what it means to *be* a library—to make judgments about which books are worth reading and which are not, which ideas belong on the shelves and which do not.

If you doubt that, next time you visit the library ask the librarian to direct you to the Holocaust Denial Section.

* * *

We REVERSE the preliminary injunction, RENDER judgment dismissing plaintiffs' Free Speech claims, and REMAND for further proceedings consistent with this opinion.

I. BACKGROUND

A. Facts and Proceedings

Plaintiffs are seven patrons of the Llano County library. Llano County lies about 80 miles northwest of Austin with a population of just over 21,000. Its library system has three branches, located in Llano (the county seat), Kingsland, and Buchanan Dam. The current library director is Amber Milum. *See* TEX. LOC. GOV'T CODE § 323.005(a) ("If a county library is established, the commissioners court shall employ a county librarian."). Among other duties, the librarian "shall determine which books and library equipment will be purchased." *Id.* § 323.005(c). The library is supervised by the county commissioners court and the state librarian. *Id.* § 323.006.

In April 2022, plaintiffs sued Milum, the commissioners court, County Judge Ron Cunningham, and the library board ("defendants") in federal court. They alleged defendants removed certain library

books because of objections to their treatment of sexual or racial themes. Plaintiffs tried to check out the books but were unable to do so. They claimed a violation of their “First Amendment rights to access and receive information and ideas.”²

Following discovery, defendants moved to dismiss based on standing, mootness, and failure to state a claim. Plaintiffs moved for a preliminary injunction based on their First Amendment claims. In October 2022, the district court held a two-day hearing with testimony from seven witnesses.

The testimony focused on 17 books removed from the Llano branch. Seven of them—which the parties call the “Butt and Fart Books”—are a series of children’s books with titles like: *I Broke My Butt!* and *Larry the Farting Leprechaun*. Another book is the well-known children’s story *In the Night Kitchen* by Maurice Sendak, which contains drawings of a naked toddler. Another is a sex-education book for pre-teens, *It’s Perfectly Normal*, which has cartoon depictions of sexual activity. Three are young-adult books touching on sexuality and homosexuality (*Spinning, Shine, Gabi: A Girl in Pieces*). Two portray gender dysphoric children and teenagers (*Being Jazz* and *Freakboy*). Two others discuss the history of racism in the United States (*Caste* and *They Called Themselves the K.K.K.*).³

² Plaintiffs also alleged a Fourteenth Amendment due process claim. That claim is not at issue because the district court did not rely on it to grant a preliminary injunction.

³ The full list of books is: *My Butt Is So Noisy!*; *I Broke My Butt!*; *I Need a New Butt!*, all by Dawn McMillan; *Larry the Farting Leprechaun*; *Gary the Goose and His Gas on the Loose*; *Freddie the Farting Snowman*; *Harvey the Heart Has Too Many Farts*, all by Jane Bexley; *It’s Perfectly Normal: Changing Bodies*,

Defendants generally testified that the books were removed, not because of disagreement with their content, but as a result of a standard “weeding” method known as “Continuous Review, Evaluation, and Weeding” or “CREW.” Under this approach, books are evaluated according to the so-called “MUSTIE” factors: **M**isleading, **U**gly, **S**uperseded, **T**rivial, **I**rrelevant, and **E**lsewhere. So, a book might be removed because it was inaccurate (“misleading”), damaged (“ugly”), outdated (“superseded”), silly (“trivial”), seldom checked out (“irrelevant”), or available at another branch (“elsewhere”).⁴

For their part, plaintiffs portrayed this weeding rationale as pretextual. They claimed Milum actually removed the books under orders from Cunningham and the commissioners court. Cunningham and Moss, plaintiffs asserted, were responding to com-

Growing Up, Sex and Sexual Health by Robie H. Harris and Michael Emberley; *In the Night Kitchen* by Maurice Sendak; *Caste: The Origins of Our Discontents* by Isabel Wilkerson; *They Called Themselves the K.K.K.: The Birth of an American Terrorist Group* by Susan Campbell Bartoletti; *Being Jazz: My Life as a (Transgender) Teen* by Jazz Jennings; *Freakboy* by Kristin Elizabeth Clark; *Shine* by Lauren Myracle; *Gabi, a Girl in Pieces* by Isabel Quintero; *Spinning* by Tillie Walden; and *Under the Moon: a Catwoman Tale* by Lauren Myracle.

⁴ Testimony also addressed the library’s decision to stop offering e-books and audiobooks through the “Overdrive” database. According to the library, Overdrive’s filters could not keep children from viewing books depicting sexual activity. The library removed Overdrive and replaced it with a database called “Bibliotheca.” Some of the 17 removed books may remain accessible through Bibliotheca, although the record does not show which ones. The district court subsequently ruled that plaintiffs’ Overdrive-related claims were moot and dismissed them without prejudice. See *Little v. Llano Cty.*, 1:22-CV-424-RP, 2023 WL 2731089, at *6 (W.D. Tex. Mar. 30, 2023).

plaints from the public—spearheaded by Rochelle Wells, Rhonda Schneider, Gay Baskin, and Bonnie Wallace—about the books at issue. They also emphasized that, after dissolving the existing library board, the commissioners put Wells, Schneider, Baskin, and Wallace on a new board with input into the library’s selections.⁵

B. District Court Decision

1. *Motion to Dismiss*

The district court denied defendants’ motion to dismiss the Free Speech claims. *See Little*, 2023 WL 2731089, at *7–8 (W.D. Tex. Mar. 30, 2023). As a threshold matter, the court ruled that the removal of books implicated plaintiffs’ “First Amendment right to access information.” *Id.* at *7 n.4 (citing *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995)).⁶

⁵ The dissenting opinion claims this background “omits material facts . . . concerning how and why the seventeen books at issue were removed.” Dissent at 2. Not so. The dissent merely contains more details about the public’s complaints and the county officials’ response. But our bottom line and the dissent’s are the same: in response to public complaints about the books, the Llano County Commissioners Court, which oversees the library, ordered the books removed. *See* Dissent at 3 n.5 (recognizing “the Llano County Commissioners Court . . . oversees the Llano County library system”).

⁶ The court also held plaintiffs had standing because they had “attempted and failed to check out the removed books from the library.” *Little*, 2023 WL 2731089, at *5. Additionally, the court ruled that the library’s “in-house checkout system”—one created after litigation began under which the 17 books were removed from the catalog and kept behind the counter—did not moot plaintiffs’ claims. *See id.* at *6.

On the merits, the court held that a library violates the Free Speech Clause when its “substantial motivation” for removing a book “was to deny library users access to ideas with which [the government] disagreed.” *Ibid.* (quoting *Campbell*, 64 F.3d at 190). The court acknowledged that “public libraries should be afforded ‘broad discretion’ in their collection selection process, in which library staff must necessarily consider books’ content.” *Ibid.* (quoting *United States v. Am. Library Ass’n*, 539 U.S. 194, 205 (2003) (plurality) [“ALA”]). But the court believed this discretion “applies only to materials’ selection,” not their removal. *Ibid.*

The court also rejected defendants’ argument that a library’s collection decisions are “government speech to which the First Amendment does not apply.” *Ibid.* The court thought the precedents supporting this argument “mostly involve the initial selection, not removal, of materials.” *Ibid.* See *PETA*, 414 F.3d at 28 (“With respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude.”).

Finally, the court suggested that public libraries are “limited public forums,” and that, as a result, their removal decisions are “subject to First Amendment limitations.” See *Little*, 2023 WL 2731089, at *7 n.4 (citation omitted).

2. Preliminary Injunction

Applying these principles, the court granted a preliminary injunction ordering the library to reshelve the 17 books. At the outset, the court reiterated its view that “the First Amendment ‘protect[s] the [plaintiffs]’ right to receive information,” and that the “key inquiry” concerns library officials’ “substantial

motivation in arriving at the removal decision.” *Id.* at *9 (citations omitted). Based on that framework, the court ruled plaintiffs were likely to show defendants removed the 17 books based on both viewpoint and content discrimination.

As to viewpoint discrimination, the court found defendants removed the books based on complaints that they were “inappropriate,” “pornographic filth,” and “CRT and LGBTQ books.” *Id.* at *9–10. As to content discrimination, the court found the removal was “directly prompted by complaints from patrons and county officials over the contents of these titles.” *Id.* at *11. In either case, the court rejected defendants’ argument that the removals were part of the normal “weeding” process. *Id.* at *10–11. Instead, the court found defendants’ “substantial motivation” for removing the books was “a desire to prevent access to particular views.” *Id.* at *12.

Finding the remaining injunction factors met, the court entered a preliminary injunction requiring defendants to reshelve all 17 books and “update” library catalogs to show the books are “available for checkout.” *Id.* at *14. The court also enjoined defendants “from removing any books from the Llano County Library Service’s catalog for any reason during the pendency of this action.” *Ibid.*

Defendants appealed.

C. Panel Decision

A divided panel of our court affirmed in part. *See Little v. Llano Cty.*, 103 F.4th 1140 (5th Cir. 2024). The majority agreed with the district court that library patrons have the “right to receive information and ideas.” *Id.* at 1147 (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). It also agreed that a library

violates that right if a book's removal was "substantially motivated' by the desire to deny 'access to ideas with which [the library] disagree[s]." *Id.* at 1148–49 (quoting *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982) [*Pico*] (plurality)). But the majority modified the district court's ruling to allow a library to remove books only "based on . . . the accuracy of the[ir] content," *id.* at 1150, or "based on a belief that the books [are] 'pervasively vulgar' or on grounds of 'educational suitability,'" *id.* at 1154 (quoting *Campbell*, 64 F.3d at 188–89). Finally, the majority agreed that a library's collection decisions are not government speech. *Id.* at 1151–52.

Applying that standard, Judge Wiener concluded all 17 books were removed improperly. *Id.* at 1154–55. Partially concurring, Judge Southwick concluded nine books were properly removed based on vulgarity or educational suitability. *Id.* at 1158–59 (Southwick, J., concurring in part). Accordingly, the majority modified the injunction to require reshelving only eight of the 17 books. *Ibid.* Dissenting, Judge Duncan would have reversed the district court altogether, either because a library's curation decisions are government speech or because removing books does not implicate any right to receive information. *Id.* at 1177–86, 1168–69 (Duncan, J., dissenting).

We granted en banc rehearing. *Little v. Llano Cty.*, 106 F.4th 426 (5th Cir. 2024).

II. STANDARD OF REVIEW

To obtain the "extraordinary remedy" of a preliminary injunction, the applicant must show

(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Planned Parenthood of Greater Tex. v. Kauffman, 981 F.3d 347, 353 (5th Cir. 2020) (en banc) (citations omitted).

“We review the district court’s grant of [a] preliminary injunction for abuse of discretion, reviewing underlying factual findings for clear error and legal conclusions de novo.” *United States v. Abbott*, 110 F.4th 700, 708 (5th Cir. 2024) (en banc) (citation omitted); see 28 U.S.C. § 1292(a)(1). “When a district court applies incorrect legal principles, it abuses its discretion.” *Kauffman*, 981 F.3d at 354 (citation omitted).

* * *

Embedded in the district court’s ruling are two distinct legal questions. The first is whether a library’s removing a book implicates a patron’s right to receive information. The second is whether a library’s collection decisions—that is, its choices about which books to put on or remove from the shelves—are government speech. We consider the first question in part III and the second question in part IV.⁷

⁷ The dissenting opinion claims that, by deciding these legal questions, we “rush[]” past the “narrow issue” of whether the preliminary injunction was an abuse of discretion. Dissent at 10. Not so. By definition, a district court abuses its discretion by granting a preliminary injunction based on incorrect legal

III. RIGHT TO RECEIVE INFORMATION

By invoking the right to receive information, may someone challenge a library’s decision to remove books from its shelves? Plaintiffs say “yes,” as did the district court and the panel majority. *See Little*, 103 F.4th at 1147. But if the answer is “no,” as defendants and some *amici* argue, then plaintiffs’ Free Speech claim fails at the outset. We tackle the question as follows.

First (A), we survey the precedents. Second (B), we explain why the right to receive information is not implicated by a library’s removing books (nor by its not acquiring a book in the first place). Finally (C), we consider our decision in *Campbell*, 64 F.3d 184, which applied the right to a school library’s removing books. We overrule *Campbell*.

A. Right-to-receive-information precedents

Plaintiffs’ brief surveys the history of the right to receive information and argues it “extends to public libraries.” Specifically, they contend patrons can invoke the right to challenge a library’s decision to

principles. *See Kauffman*, 981 F.3d at 354. As explained below, the district court did precisely that, which requires reversal. *See, e.g., Atchafalaya Basinkeeper v. U.S. Army Corps of Eng’rs*, 894 F.3d 692, 704 (5th Cir. 2018) (vacating preliminary injunction “because the [district] court misapplied applicable legal principles”). The dissent also claims we fail to “identify[] any legal principle” to support our First Amendment holding. Dissent at 10. That is quite wrong. We identify not one but two such principles: (1) library patrons cannot rely on a “right to receive information” to challenge a library’s collection decisions, and (2) those collection decisions are government speech. We defend those principles at length below. *See infra* Part III at 13–28; Part IV at 28–55.

remove books. We discuss those cases here and, in the next part, explain why plaintiffs' argument fails.

We start with plaintiffs' earliest case, *Martin v. City of Struthers*, 319 U.S. 141 (1943). Jehovah's Witnesses challenged a city's prohibition on door-to-door distribution of "handbills, circulars[,] or other advertisements." *Id.* at 1412–43. *Martin* held the law violated the First Amendment based on a person's "right to distribute literature" and another's "right to receive it." *Id.* at 143 (citation omitted). In other words, the government could not bar someone from receiving someone else's speech.

The cases applying *Martin* follow this pattern. A court could not bar a union organizer from delivering a speech to company employees. *Thomas v. Collins*, 323 U.S. 516, 538 (1945). The government could not burden someone's right to receive political literature through the mail. *Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 306 (1965). A state violated a man's "right to receive information" by prosecuting him for privately possessing obscene material. *Stanley*, 394 U.S. at 564–65. Scholars had the right to "receive [the] information and ideas" of a foreign scholar they invited to the United States. *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972). Sellers had the right to propose transactions, and buyers had the right to receive them. *Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976).⁸

⁸ See also *Murthy v. Missouri*, 603 U.S. 43, 75 (2024) ("While we have recognized a First Amendment right to receive information, we have identified a cognizable injury only where the listener has a concrete, specific connection to the speaker." (citing *Kleindienst*, 408 U.S. at 762) (cleaned up)).

Each of these cases held that the First Amendment limits the government's power to prevent one person from receiving another's speech. The listeners mostly prevailed.⁹ In none of the cases, however, did a plaintiff invoke a right to receive information from the *government*. And none suggested that the First Amendment obligates the government to provide information to anyone.¹⁰ To the contrary, those cases “only recogniz[ed] a negative right against government interference with the exchange of information by private citizens.” Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. LAW & PUB. POL'Y 113, 140 (2008).¹¹

⁹ Not always. In *Kleindienst*, the scholars' rights were trumped by Congress's power to exclude aliens. 408 U.S. at 765–70. And in *Virginia State Pharmacy Board*, the government was given some leeway to regulate commercial speech. 425 U.S. at 770–73.

¹⁰ Nor does *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), which plaintiffs cite. That case rejected a First Amendment challenge to the FCC's “fairness doctrine,” which required radio stations to allow someone to respond if attacked on a broadcast. *See id.* at 374–75. The Court held the agency could attach such a condition when allocating frequencies, referencing “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas.” *Id.* at 390. Nowhere does *Red Lion* suggest this “right” requires the government itself to provide such information.

¹¹ The dissenting opinion briefly notes these Supreme Court precedents without discussing them. *See* Dissent at 11. It offers no rejoinder to our point that none remotely supports someone's right to demand information from the *government*, whether in the form of library books or anything else. Instead, the dissent grounds its entire argument on the Supreme Court's *Pico* case. Dissent at 12–22. But, as we explain below, *Pico* was so fractured that our court has twice held (and today reaffirms) that it lacks any precedential force. And, in any event, a majority of the *Pico*

We turn next to the Supreme Court’s splintered decision in *Pico*, 457 U.S. 853, where students challenged a school board’s removing books from a school library. Plaintiffs repeatedly cite one of the *Pico* opinions, joined by three Justices, which would have found a violation of the right to receive information. *See Pico*, 457 U.S. at 866–67 (op. of Brennan, J., joined by Marshall and Stevens, JJ.). *Pico* does not help plaintiffs, though.

To begin with, our en banc court ruled long ago that *Pico* carries no precedential weight. *See Muir v. Alabama Educ. Television Comm’n*, 688 F.2d 1033, 1045 n.30 (Former 5th Cir. 1982) (en banc) (“[W]e conclude that the Supreme Court [in *Pico*] decided neither the extent nor, indeed, the existence *vel non*, of First Amendment implications in a school book removal case.”).¹² That remains the correct reading of *Pico*. Not only was *Pico* “highly fractured,” *Chiras*, 432 F.3d at 619 n.32, but “[a] majority of the justices did not join any single opinion.” *Muir*, 688 F.2d at 1045 n.30. And the narrowest opinion (Justice White’s) said nothing about the First Amendment. *Ibid.*¹³ So, we reaffirm what we held over forty years ago: “*Pico* is of

Justices rejected applying the right to receive information to a school library’s decision to remove books. *See infra*.

¹² *See also Chiras v. Miller*, 432 F.3d 606, 619 n.32 (5th Cir. 2005) (noting *Muir*’s holding that “*Pico* has no precedential value as to the application of First Amendment principles to the school’s decision to remove the books from the library”).

¹³ *See Pico*, 457 U.S. at 883 (White, J., concurring in the judgment) (voting to affirm only in deference to court of appeals’ fact findings but declining to join Brennan’s “dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library”). *See also Marks v. United States*, 430 U.S. 188, 192–93 (1977).

no precedential value as to the application of the First Amendment to these issues.” *Ibid.*¹⁴

Second, putting aside *Pico*’s non-binding status, a majority of the Justices rejected the idea that someone’s “right to receive information” requires a library to shelve particular books. *See Muir*, 688 F.2d at 1045 n.30 (explaining a “majority” of *Pico*’s Justices agreed “there is no First Amendment obligation upon the State to provide continuing access to particular books”). On this point, Chief Justice Burger’s opinion was especially forceful. “[T]he right to receive information and ideas,” he wrote, “does not carry with it the concomitant right to have those ideas affirmatively provided at a particular place by the government.” *Pico*, 457 U.S. at 888 (citing *Stanley*, 394 U.S. at 564) (Burger, C.J., dissenting). Three Justices (Powell,

¹⁴ The dissenting opinion minimizes that statement as “half-century-old dicta, in a footnote.” Dissent at 15. We disagree. In *Muir*, our en banc court carefully parsed the *Pico* opinions and “conclude[d] that the Supreme Court decided neither the extent nor, indeed, the existence *vel non* . . . of First Amendment implications in a school book removal case.” 688 F.2d at 1045 n.30. Furthermore, applying the *Marks* rule, we identified Justice White’s opinion as the narrowest one and concluded that it “expresses *no opinion* on the First Amendment issues.” *Ibid.* (emphasis added). Two decades later, a panel of our court confirmed that is a correct reading of *Pico*. In *Chiras*, we again concluded that *Pico*’s “highly fractured” opinions “ha[ve] no precedential value” as to the First Amendment, 432 F.3d at 619 n.32 (citing *Muir*, 688 F.2d at 1045 n.30), emphasizing Chief Justice Burger’s point that *Pico* “contained no binding holding,” *ibid.* (citing *Pico*, 457 U.S. at 886 n.2) (Burger, C.J., dissenting). The dissent gives us no reason to reconsider what we have already twice decided about *Pico*’s non-precedential status. Consequently, the dissent’s accusations that we wrongly “revisit,” “modify,” “adjust,” “discard,” and “nulli[f]y” *Pico*, *see* Dissent at 19–21, are misplaced.

Rehnquist, and O'Connor) joined Burger's opinion in full, and a fourth (Blackmun) agreed with this point.¹⁵

Finally, plaintiffs cite two sister circuit cases applying the "right to receive information" in the library context. See *Neinast v. Bd. of Tr. of the Columbus Metro. Libr.*, 346 F.3d 585, 590 (6th Cir. 2003); *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1247–48 (3d Cir. 1992). But those cases addressed whether a library could evict someone from its *premises*, not whether someone could demand the library put certain books on its *shelves*.

Kreimer, for instance, ruled a library could evict a menacing vagrant whose "odor was often so offensive

¹⁵ See *Pico*, 457 U.S. at 878 (Blackmun, J., concurring in part and concurring in the judgment) ("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 895 (Powell, J., dissenting) (agreeing with Burger that a "right to receive ideas" in a school . . . finds no support in the First Amendment precedents of this Court"); *id.* at 904, 910 (Rehnquist, J., dissenting) ("agree[ing] fully" with Burger's opinion and rejecting "the very existence of a right to receive information" in the school setting as "wholly unsupported by our past decisions and inconsistent with the necessarily selective process of elementary and secondary education"); *id.* at 921 (O'Connor, J., dissenting) (joining Burger's dissent).

The dissenting opinion fails to acknowledge that a majority of the *Pico* Justices rejected extending the right to receive information to a school library's collection. Indeed, our court has twice read *Pico* that way. See *Muir*, 688 F.2d at 1045 n.30 (observing the four dissenting *Pico* Justices "agree[d] with Justice Blackmun that there is no First Amendment obligation upon the State to provide continuing access to particular books, *thus making a majority of Members for that view*") (citations omitted) (emphasis added); *Chiras*, 432 F.3d at 619 n.32 (same). We reaffirm that correct reading of *Pico* today.

that it prevented the [l]ibrary patrons from using certain areas of the [l]ibrary.” 958 F.2d at 1247, 1262–68. The right to receive information, the court explained, “includes the right to some level of *access* to a public library.” *Id.* at 1255 (emphasis added). *Neinast* treated the right the same way. *See* 346 F.3d at 591 (quoting *Kreimer*, 958 F.2d at 1255). Neither case suggested patrons can make a library carry the books they want.

B. Plaintiffs cannot invoke a right to receive information to challenge book removals.

We hold that plaintiffs cannot invoke the right to receive information to challenge the library’s removal of the challenged books.

First, plaintiffs would stretch the right far beyond its roots. As discussed, the above cases teach that people have some right to receive information from others without government interference. *See, e.g., Martin*, 319 U.S. at 143 (“[F]reedom [of speech and press] embraces the right to distribute literature and necessarily protects the right to receive it.”) (citing *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)). But plaintiffs want more. They demand to receive information from the government itself.¹⁶

It is one thing to tell the *government* it cannot stop *you* from receiving a book. The First Amendment protects your right to do that. *See, e.g., Lamont*, 381 U.S. at 306 (Postal Service could not regulate receipt of “communist political propaganda”). It is another thing for *you* to tell the *government* which books it

¹⁶ After all, the books they want are owned by the county. *See* TEX. LOC. GOV’T CODE § 323.005 (librarian “shall determine which books . . . will be purchased”).

must keep in the library. The First Amendment does not give you the right to demand that. *See, e.g., Pico*, 457 U.S. at 889 (Burger, C.J., dissenting) (“[T]here is not a hint in the First Amendment, or in any holding of th[e] [Supreme] Court, of a ‘right’ to have the government provide continuing access to certain books.”).

Second, if people can challenge which books libraries remove, they can challenge which books libraries buy. “[A] library just as surely denies a patron’s right to ‘receive information’ by not purchasing a book in the first place as it does by pulling an existing book off the shelves.” *Little*, 103 F.4th at 1171 (Duncan, J., dissenting).¹⁷ For good reason, no one in this litigation has ever defended that position.

Suppose a patron complains that the library does not have a book she wants. The library refuses to buy it, so she sues. Her argument writes itself: “[I]f the First Amendment commands that certain books cannot be *removed*, does it not equally require that the same books be *acquired*?” *Pico*, 457 U.S. at 892 (Burger, C.J., dissenting).¹⁸ She would be right. This means patrons could tell libraries not only which books to keep but also which to purchase. Could they also sue the county to increase its library fund? *See*

¹⁷ *See also Pico*, 457 U.S. at 916 (Rehnquist, J., dissenting) (“The failure of a library to acquire a book denies access to its contents just as effectively as does the removal of the book from the library’s shelf.”).

¹⁸ *See also Pico*, 457 U.S. at 895 (Powell, J., dissenting) (“If a 14-year-old child may challenge a school board’s decision to remove a book from the library, upon what theory is a court to prevent a like challenge to a school board’s decision not to purchase that identical book?”).

TEX. LOC. GOV'T CODE § 323.007 (establishing a “county free library fund”).

In a footnote, plaintiffs try to distinguish book removals from purchases. They say libraries have “a wider variety of legitimate considerations” for not buying books, such as “cost,” and they assert unbought books will “vastly outnumber” removed books. So what? Plaintiffs can just as easily probe a library’s “considerations” for not buying a book as for removing one. Did the library lack funds, or did the librarian dislike the book’s views? That’s what discovery is for. And it is no answer to say that a failure-to-buy case will be harder to prove than a removal case. Maybe, maybe not. The point is that, once courts arm plaintiffs with a right to contest book removals, there is no logical reason why they cannot contest purchases too.¹⁹

Third, how would judges decide whether removing a book is verboten? What standard applies? The district court asked whether the library was “substantially motivated” to “deny library users access to ideas” by engaging in “viewpoint or content discrimination.” *Little*, 2023 WL 2731089, at *7, 9–10. The panel clarified that libraries *could* remove books that are “[in]accura[te],” “pervasively vulgar,” or “educational[ly]

¹⁹ The dissenting opinion assures us that the “right” it would recognize is “not an affirmative right to demand access to particular materials,” nor would it “require Llano County either to buy and shelve” particular books. Dissent at 24. Yet the dissent offers no reason for believing that beyond its own say-so. The dissent merely asserts that removing a book somehow “prescribe[s] . . . orthodoxy,” while not purchasing a book does not. *Id.* at 24–25. But that distinction makes no sense. A library can “prescribe orthodoxy” just as easily by refusing to buy a book as by removing it.

[un]suitabl[e].” *Little*, 103 F.4th at 1150, 1154. On en banc, plaintiffs argued the standard was “no viewpoint discrimination.” Applying such tests²⁰ to library book removals would tie courts in endless knots.

Consider one of the challenged books: *It’s Perfectly Normal*, a book for “age 10 and up” that features cartoons of people having sex and masturbating. See *Little*, 103 F.4th at 1183–84 & n.34 (Duncan, J., dissenting).²¹ If the library removed the book because of the pictures, as plaintiffs claim, did it violate the

²⁰ The dissenting opinion proposes yet another standard. Drawing from Justice White’s *Pico* opinion, it would forbid officials from removing books because they find them “inappropriate, offensive, or otherwise undesirable.” Dissent at 32. We have already explained, however, that White’s opinion endorsed no First Amendment standard. *Ante* at 15–17. But putting that aside, the dissent’s standard contradicts both the now-vacated panel majority and our *Campbell* decision, which the dissent purports to champion. See Dissent at 13–15 (defending *Campbell*). Both the panel majority and *Campbell* allowed removal of books deemed “pervasively vulgar” or “educationally unsuitable.” See *Little*, 103 F.4th at 1154 (quoting *Campbell*, 64 F.3d at 188–89). Indeed, the dissent’s absolutist view even contradicts Justice Brennan’s *Pico* opinion, which also suggested a school library could remove “pervasively vulgar” books. See *Pico*, 457 U.S. at 871 (op. of Brennan, J.).

²¹ See ROBIE H. HARRIS AND MICHAEL EMBERLEY, *IT’S PERFECTLY NORMAL: CHANGING BODIES, GROWING UP, SEX, GENDER, AND SEXUAL HEALTH* (The Family Library 2021). Quoting one witness, the dissenting opinion describes *It’s Perfectly Normal* as “a general health book . . . for ages 10 to 12” that “includes illustrations of adults in adult situations.” Dissent at 3 (cleaned up). But that benign description hardly captures why a parent of a 10-year-old might object to the book. See *Little*, 103 F.4th at 1184 (Duncan, J., dissenting) (showing one of the explicit cartoon depictions of sexual activity in *It’s Perfectly Normal*).

First Amendment? Surely the library wanted to “deny access” to the book’s “ideas.” So, yes. And surely the library “discriminated” against the book’s “content.” So, yes again. But the library also deemed the book “educationally unsuitable” for 10-year-olds. So, no. And it likely found the book “vulgar,” but perhaps not “pervasively.” So, maybe. No surprise, then, that the panel majority split over whether removing *It’s Perfectly Normal* was permitted.²²

Or consider a hypothetical that came up at oral argument. O.A. Rec. at 37:15–37:45. A library discovers on its shelves a racist book by a former Klansman. See, e.g., DAVID DUKE, *JEWISH SUPREMACISM: MY AWAKENING ON THE JEWISH QUESTION* (2003). Can it be removed? If the library deems the book “inaccurate” or “educationally unsuitable,” yes. But if the library dislikes its content or viewpoint, no. The problem is obvious: deeming a book “inaccurate” or “unsuitable” is often *the same thing* as disliking its “content” and “viewpoint.” Judges might as well flip a coin.

It is worth noting plaintiffs’ view on this question. Incredibly, they maintain the First Amendment forbids removing even racist books. They defended that position before the panel: a librarian, they insisted, cannot remove “a book by a former Grand Wizard of

²² Compare *Little*, 103 F.4th at 1154 n.12 (Wiener, J.) (removing *It’s Perfectly Normal* is impermissible because it expresses “a viewpoint sufficient to support an unconstitutional motivation under *Campbell*”), with *id.* at 1158–59 (Southwick, J., concurring) (removing *It’s Perfectly Normal* is “likely permissible” because it was “removed as part of the library’s efforts to respond to objections that certain books promoted grooming and contained sexually explicit material that was not appropriate for children”). The majority also split over removing the “Butt and Fart Books” and *In the Night Kitchen*. *Id.* at 1154 n.12.

the Ku Klux Klan” if she dislikes its view that “black people are an inferior race.” *Little*, 103 F.4th at 1172–73 (Duncan, J., dissenting). At en banc, they doubled down. See O.A. Rec. at 37:34–45 (“My answer is still no, Judge Duncan.”). Astonishing. Who knew that the First Amendment requires libraries to shelve the collected works of the Ku Klux Klan?²³

That is, of course, utter nonsense. “[I]f a library had to keep just any book in circulation—no matter how out-of-date, inaccurate, biased, vulgar, lurid, or silly,” then “[i]t would be a warehouse, not a library.” *Id.* at 1167 (Duncan, J., dissenting). That is confirmed, not only by common sense, but also by the practices of leading library associations.

For example, a Texas weeding manual instructs librarians to weed “books that contain stereotyping . . . or gender and racial biases,” “unbalanced and inflammatory items [about immigration],” and “books that reflect outdated ideas about gender roles.” CREW: A WEEDING MANUAL FOR MODERN LIBRARIES, 33, 65,

²³ The dissenting opinion dismisses such inquiries as mere “rhetorical questions.” Dissent at 15. Not so. Courts sensibly ask whether a proposed rule could lead to absurd consequences. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (rejecting Establishment Clause rule barring religious groups from receiving general public benefits because, otherwise, “a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair”) (citation omitted). Notably, the dissent declines to say whether its own rule would forbid a library’s removing a racist book. But the answer seems clear. If the First Amendment prohibits a public library from removing a book because of its “inappropriate, offensive, or . . . undesirable” content, Dissent at 32, then the library could not constitutionally remove from its shelves even the most noxious racist screed. That is reason enough to reject the dissent’s proposed rule.

73 (Texas State Library & Archives Comm’n 2012). Similarly, the American Library Association (ALA) advises librarians to remove “items reflecting stereotypes or outdated thinking; items that do not reflect diversity or inclusion; [and] items that promote cultural misrepresentation.” REBECCA VNUK, *THE WEEDING HANDBOOK: A SHELF-BY-SHELF GUIDE*, 6 (ALA Editions, 2d ed. 2022). The same handbook proclaims it is “basic collection maintenance” to remove racist books, such as “the Dr. Seuss books that are purposefully no longer published due to their racist content.” *Id.* at 106.²⁴

Whatever else one might think of the advice in these guides, it is unmistakably *viewpoint* discrimination. And, by plaintiffs’ account, all of it violates the First Amendment. That cannot be the law. By definition, libraries must have discretion to keep certain ideas—certain viewpoints—off the shelves. “The First Amendment does not force public libraries to have a Flat Earth Section.” *Little*, 103 F.4th at 1167 (Duncan, J., dissenting).

Finally, by removing a book, the library does not prevent anyone from “receiving” the information in it. The library does not own every copy. You could buy the book online or from a bookstore. You could borrow it from a friend. You could look for it at another library. *See Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting) (“[T]he most obvious reason that petitioners’ removal of the books did not violate respondents’ right to

²⁴ Surprisingly, the ALA joined an *amici* brief that contradicts its own weeding advice. *See* Brief for Amici Curiae Freedom to Read Found. et al., as Amici Curiae at 11–12, 15 (arguing that weeding is based on “viewpoint neutrality,” is “not the targeted removal of disfavored or controversial books,” and “should not be used as a deselection tool for controversial materials”).

receive information is the ready availability of the books elsewhere.”). The only thing disappointed patrons are kept from “receiving” is a book of their choice at taxpayer expense. That is not a right guaranteed by the First Amendment.

C. *Campbell* is overruled.

That brings us to *Campbell*, where we considered a challenge to a school board’s removal of the book *Voodoo & Hoodoo* from school libraries in a Louisiana parish. See 64 F.3d at 185. The book, which “trace[d] the development of African tribal religion,” featured a “how-to” guide to using “spells, tricks, hexes, [and] recipes . . . to bring about particular events.” *Ibid*. Relying on Justice Brennan’s *Pico* opinion, *Campbell* ruled the removal implicated students’ “First Amendment right to receive information.” *Id.* at 188 (citing *Pico*, 457 U.S. at 872 (op. of Brennan, J.)).

Defendants argue *Campbell* was wrongly decided and should be overruled. We agree.

To begin with, *Campbell* drew its holding from one of *Pico*’s “highly fractured” opinions. *Chiras*, 432 F.3d at 619 n.32. But we long ago held, and today reaffirm, that *Pico* lacks precedential value. See *Muir*, 688 F.2d at 1045 n.30 (“We are unable to interpret the Court’s opinion in *Pico* to give us guidance in the application of the First Amendment[.]”). What’s more, only three of the *Pico* Justices thought students could challenge book removals by asserting a right to receive information. See *Pico*, 457 U.S. at 866–67 (op. of Brennan, J., joined by Marshall and Stevens, JJ.). That idea was rejected by a majority of the Justices.²⁵

²⁵ See *id.* at 878 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 888 (Burger, C.J., dissenting); *id.*

They were right to do so. Yes, cases protect your right to receive information from other people, but none gives you the right to demand it from the government. *See supra* III.A. For good reason. People could tell libraries not only which books to keep but also which to buy. Courts would endlessly split hairs over a library’s motives for removing a book. And, most obvious, removing a library book does not deny anyone the chance to read it. The book has not been “banned,” as plaintiffs and their *amici* breathlessly claim.²⁶ People who want the book can buy it or borrow it from somewhere else. *See supra* III.B.

Campbell also made little sense on its own terms. It held a library could *not* remove a book to “deny students access to ideas” but *could* remove it for “pervasive[] vulgar[ity]” or “educational suitability.” 64 F.3d at 188–89 (citation omitted). Try applying that standard to *Voodoo & Hoodoo*.

The book’s “section on voodoo spells,” according to parents, “encouraged harmful, antisocial behavior among young readers.” *Id.* at 186 (cleaned up). That is putting it mildly. One “spell” required “[o]btain[ing] a piece of the intended victim’s hair,” while another advised using “menstrual blood, pubic hair, semen, urine, and excrement.” *Id.* at 185 n.2. What is the difference between wanting to “deny access” to those

at 895 (Powell, J., dissenting); *id.* at 904, 910 (Rehnquist, J., dissenting); *id.* at 921 (O’Connor, J., dissenting); *see also supra* III.A.

²⁶ *See* Suppl. Brief of Appellees (referring throughout to the 17 “Banned Books”); Brief for Assoc. of Am. Publishers, Inc. et al. as Amici Curiae (same); Brief for Found. for Individual Rts. and Expression as Amicus Curiae at 1, 5, 6, 8–11, 15, 17, 33; Brief for Tex. Freedom to Read Project as Amicus Curiae at 4, 8, 16, 21, 28.

ideas and thinking they are “vulgar” or “educationally unsuitable”? None. Yet *Campbell*’s holding was grounded on that faux distinction.²⁷

Plaintiffs counter that *Campbell* is “straightforward” because it only forbids “viewpoint animus.” That is incorrect for at least two reasons.

For starters, *Campbell* is not based on “viewpoint animus,” but on whether a library wants to “deny students access to ideas.” *Id.* at 188–89. There is nothing straightforward about that standard, as this case vividly shows. The panel majority could not agree how *Campbell* applied to over half of the challenged books. *Compare Little*, 103 F.4th at 1154 & n.12 (Wiener, J.), *with id.* at 1158–59 (Southwick, J., concurring). If federal judges cannot tell whether removing a book violates the First Amendment, how are librarians supposed to? Are they “denying access to ideas” or are they removing books that are “vulgar” or “educationally unsuitable”? Should they keep a constitutional lawyer on staff?

But suppose that *Campbell* only forbids “viewpoint animus,” as plaintiffs claim. That works no better. Racism is a viewpoint. So is sexism. So are “quackeries like phrenology, spontaneous generation, tobacco-smoke enemas, Holocaust denial, [and] the theory that the Apollo 11 moon landing was faked.” *Id.* at 1167 (Duncan, J., dissenting).²⁸ If a librarian finds such

²⁷ This lack of internal consistency is further evidence *Campbell* was wrongly decided. After all, “[t]he primary power of any precedent lies in its power to persuade—and poorly reasoned decisions may not provide reliable evidence of the law’s meaning.” *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2280 (2024) (Gorsuch, J., concurring).

²⁸ See, e.g., LYDIA KANG, QUACKERY: A BRIEF HISTORY OF THE WORST WAYS TO CURE EVERYTHING (2017) (discussing 18th-

deck on the shelves, does the First Amendment bar him from removing it? Of course not. *See, e.g.*, Frederick F. Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 106 (1998) (“[One] would hardly disagree . . . with the ability of a librarian to select books accepting that the Holocaust happened to the exclusion of books denying its occurrence.”).

Finally, plaintiffs urge us to keep *Campbell* because “librarians in this Circuit have successfully operated under it for nearly 30 years.” We disagree. Plaintiffs cite nothing showing what role, if any, *Campbell* has played in controversies over library books.²⁹ Our court rarely cites *Campbell* and has never applied it until

century notion that “tobacco-smoke enemas” could revive drowning victims); HENRY HARRIS, THINGS COME TO LIFE: SPONTANEOUS GENERATION REVISITED (2002) (discussing “the theory that inanimate material can, under appropriate conditions, generate life forms by completely natural processes”); Audiey Kao, *Medical Quackery: The Pseudo-Science of Health and Well-Being*, 2 VIRTUAL MENTOR: A.M.A. J. ETHICS 30, 30 (Apr. 2000) (explaining that early-20th-century phrenology practitioners purported to examine a person’s character by “measur[ing] the conformation of the skull” with a “psychograph”); DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (1994) (discussing history of Holocaust denial).

²⁹ Nor does the dissenting opinion, which instead baldly asserts that “the lack of substantial post-*Campbell* litigation suggests, if anything, that *Campbell* provides a workable standard for libraries.” Dissent at 14 n.7. That is pure speculation. To the contrary, the panel majority’s inability to coherently apply *Campbell* in this very case suggests exactly the opposite. *See Little*, 103 F.4th at 176–77 (Duncan, J., dissenting) (“The two judges in the majority cannot agree on how their rules apply to over *half* of the books at issue.”).

the panel in this case.³⁰ So, nothing suggests that overruling *Campbell* would upend library administration in this Circuit.

In any event, the key factor in deciding whether to overrule *Campbell* is whether its “holding was indeed flawed.” *Kauffman*, 981 F.3d at 369. It was. *Campbell* is overruled.

* * *

We hold that plaintiffs cannot challenge the library’s decision to remove the 17 books by invoking a right to receive information. Their Free Speech claims must therefore be dismissed.

IV. GOVERNMENT SPEECH

Defendants, along with 18 *amici* States, separately argue that a public library’s collection decisions are government speech and therefore not constrained by the Free Speech clause. We tackle that question as follows.

³⁰ Indeed, in *Chiras v. Miller*—a case that rejected, among other things, a student’s claim that the state violated his right to receive information by not funding a particular textbook—we addressed the precedential value of *Pico* at length without once citing *Campbell*. See *Chiras*, 432 F.3d at 618–20. Whether we have relied on a decision is, of course, not dispositive of its accuracy but does “point[] to clues” indicating whether the decision was correct. *Loper Bright Enterprises*, 144 S. Ct. at 2280; see also *Knick v. Township of Scott*, 588 U.S. 180, 203 (2019) (listing reliance on the decision as relevant *stare decisis* consideration). While lack of citation is by no means the primary reason we overrule *Campbell*, it speaks to our past and current hesitancy to apply precedent that appears incorrect. See *Loper Bright Enterprises*, 144 S. Ct. at 2271 (“[W]e have avoided deferring under *Chevron* since 2016. . . . [F]or decades, we have often declined to invoke *Chevron* even in those cases where it might appear to be applicable.”).

First (A), we survey the precedents. Second (B), we examine whether a library’s collection creates a public forum for third-party speech, which is often the flip side of the government speech question. Third (C), we examine the factors set out by the recent government speech case, *Shurtleff v. City of Bos.*, 596 U.S. 243, 252 (2022).³¹ Finally (D), we sum up.³²

A. Government speech precedents

The new President gives his inaugural address. (“WE ARE ALL REPUBLICANS, WE ARE ALL

³¹ The dissenting opinion’s entire response to this 25-page analysis consists of one footnote. *See* Dissent at 22 n.14. We respond below to the few points it raises.

³² Plaintiffs (and the dissent) argue this issue was “waived” because defendants did not raise it before the panel. *See* Dissent at 23 n.14. Not so. The issue was raised and ruled on in the district court, ruled on by the panel majority, and thoroughly explored in en banc briefing. So, the issue is before us. *See Lucio v. Lumpkin*, 987 F.3d 451, 478 (5th Cir. 2021) (“The maxim is well established in this circuit that a party who fails to make an argument before *either the district court* or the original panel waives it for purposes of en banc consideration.” (emphasis added) (citation omitted)); *see also Miller v. Texas Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 348–49 (5th Cir. 2005) (en banc) (finding issue forfeited because “TTUHSC failed to raise this argument in its briefs before either the district court or the original panel of this court” and “[n]either did it argue the point in its original en banc brief”). In any event, we have discretion to reach the issue. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (“[W]hat questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals[.]”); *see also Stramaski v. Lawley*, 44 F.4th 318, 326 (5th Cir. 2022) (“[W]e may use our ‘independent power to identify and apply the proper construction of governing law’ to any ‘issue or claim [that] is properly before the court, . . . not limited to the particular legal theories advanced by the parties.’” (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991))).

FEDERALISTS.”). The Army puts up recruiting posters (“I WANT YOU FOR U.S. ARMY.”). The Department of Agriculture sponsors an ad campaign. (“BEEF. IT’S WHAT’S FOR DINNER.”). *See Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 560–62 (2005). The City of Chicago congratulates the victorious Cubs. (“THE CURSE IS OVER!”).

In such cases, it is evident who is speaking: the government. “When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say.” *Shurtleff*, 596 U.S. at 251 (citing *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207–08 (2015)). If the government could not do so, “it is not easy to imagine how government could function.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

People can talk back, of course. They can speak out against (and vote against) policies and officials they disagree with.³³ At the same time, though, “[t]he Free Speech Clause . . . does not regulate government speech.” *Summum*, 555 U.S. at 467 (citations omitted). People can protest what the government says, but they cannot sue to make the government say what they want. “[W]hen the government speaks for itself, the First Amendment does not demand airtime for all views.” *Shurtleff*, 596 U.S. at 247–48.

³³ *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (“[A]dvocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression.” (citation omitted)); *Walker*, 576 U.S. at 207 (recognizing “it is the democratic electoral process that first and foremost provides a check on government speech”).

In some cases, the line between government and private speech “blur[s].” *Id.* at 252; *see also Summum*, 555 U.S. at 470 (noting “situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech”). This is one of them. Most of the books in the Llano County library were written and published by private authors and private firms. They are private speech. Yet the county librarian, along with other county officials, decides which books to buy, buys them with public funds, and manages the library collection. *See* TEX. LOC. GOV’T CODE §§ 323.001, 323.002, 323.005(c), 323.006, 323.007.

That poses the question: when Llano County shapes its library collection, choosing some books but not others, is the county itself speaking or is the county regulating private speech?

To answer, we turn first to the precedents.

1. *Supreme Court cases*

The most instructive cases are those where a speaker presents a curated collection of third-party speech. *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2400 (2024) (“[E]xpressive activity includes presenting a curated compilation of speech originally created by others.”). A newspaper runs certain editorials but not others. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). A cable operator broadcasts some programs but not others. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). A parade organizer lets in certain floats but not others. *Hurley v. Irish–Amer. Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 570 (1995). The editors of a poetry collection select works to “express[] their view about the poets and poems that most deserve the attention

of their anticipated readers.” *Moody*, 144 S. Ct. at 2430 (Alito, J., concurring in the judgment).

In such cases, the Supreme Court has held that the speaker is the one who selects, compiles, and presents. *See, e.g., Hurley*, 515 U.S. at 570 (discussing the “speaker[s]” in those cases who “present[ed] ... an edited compilation of speech generated by other persons” (citations omitted)). The Court recently put the point this way: “Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own.” *Moody*, 144 S. Ct. at 2402; *see also id.* at 2430 (Alito, J., concurring in the judgment) (“[A] compilation may constitute expression on the part of the compiler.”).

Like a private person, a government may express itself by crafting and presenting a collection of third-party speech. *See, e.g., Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998) (“When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.” (citation omitted)). A key precedent illustrating this point is *City of Pleasant Grove v. Summum*, 555 U.S. 460.

In that case, the City created displays in a public park by accepting privately donated monuments, including one of the Ten Commandments. *Id.* at 464–65. A religious organization asked the City to include its own monument. *Id.* at 465. When the City refused, the organization sued, arguing the City violated the Free Speech Clause by engaging in viewpoint discrimination. *Id.* at 466.

The Supreme Court disagreed. The City’s selecting some monuments over others “constitute[s] govern-

ment speech.” *Id.* at 472–74. It did not matter that the monuments were works by private sculptors. *Id.* at 464. The relevant expression was the City’s choosing the ones it wanted. *Id.* at 473 (“The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park[.]”). The City could “express its views,” the Court explained, even “when it receives assistance from private sources for the purpose of delivering a government-controlled message.” *Id.* at 468 (citing *Johanns*, 544 U.S. at 562).³⁴

Summum maps neatly onto our case. Just as the City of Pleasant Grove selected private speech (monuments) and displayed that speech in a park, the Llano County library selects private speech (books) and features them in the library. The relevant expression lies not in the monuments or the books themselves, but in the government’s selecting and presenting the ones it wants. And in both cases the government sends a message. Pleasant Grove said, “These monuments project the image we want.” *See Summum*, 555 U.S. at 473. Llano County says, “These books are worth reading.”

Plaintiffs object that, while a City’s selecting monuments for a park is an expressive act, a library’s selecting books for a library does not convey “any particular message to the public.” We disagree.

Consider one of the precedents cited by *Summum*: the plurality opinion in *ALA*, 539 U.S. 194. *See Summum*, 555 U.S. at 478 (citing *ALA*, 539 U.S. at 205

³⁴ As we discuss below, the Court also held that the City did not create a public forum for private speech. *Id.* at 478–80. *See infra* IV.B.

(plurality)). *ALA* addressed a federal law giving libraries money for internet access, provided they installed filters to block obscene or otherwise illegal material. *ALA*, 539 U.S. at 199 (plurality). In rejecting a Free Speech challenge to the law, the four-Justice plurality³⁵ relied heavily on libraries' broad discretion to shape their collections. *See id.* at 207 (plurality) (describing internet as "a technological extension of the book stack" (citation omitted)).

Again and again, the plurality emphasized the expressive character of a library's collection decisions. A library's "goal" in choosing books is to "provide materials that would be of the greatest direct benefit or interest to the community," to "collect only those materials deemed to have requisite and appropriate quality," and to "identif[y] suitable and worthwhile material." *Id.* at 204, 208 (plurality) (quotation omitted). To drive the point home, the plurality quoted this advice from a library manual: "The librarian's responsibility . . . is to separate out the gold from the garbage[.]" *Id.* at 204 (plurality) (quoting W. KATZ, COLLECTION DEVELOPMENT: THE SELECTION OF MATERIALS FOR LIBRARIES 6 (1980)).

The governments in *ALA* and *Summum* each engaged in the "expressive activity" of selecting and presenting private speech. *Moody*, 144 S. Ct. at 2400. The library "decid[ed] what private speech to make available to the public," *ALA*, 539 U.S. at 204 (plurality) (citation omitted), just as the City "decided to accept . . . donations [of monuments] and to display them in the Park." *Summum*, 555 U.S. at 472. Both

³⁵ *See* 539 U.S. at 198, 214 (plurality); *id.* at 214 (Kennedy, J., concurring in the judgment); *id.* at 215 (Breyer, J., concurring in the judgment).

were “[d]eciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items.” *Moody*, 144 S. Ct. at 2402. And, as discussed below, public libraries have been doing precisely that since they arose in the mid-19th century. *See infra* IV.C.

In sum, Supreme Court precedent teaches that someone may engage in expressive activity by curating and presenting a collection of someone else’s speech. *See Moody*, 144 S. Ct. at 2400, 2402; *id.* at 2430 (Alito, J., concurring in the judgment); *Hurley*, 515 U.S. at 570; *Turner Broad.*, 512 U.S. at 636; *Miami Herald*, 418 U.S. at 258. Governments can speak in this way, no less than private persons. *See Summum*, 555 U.S. at 472–73; *Forbes*, 523 U.S. at 674.

Take any public museum—say, the National Portrait Gallery. The Gallery selects portraits and presents them to the public. Its message is: “These works are worth viewing.”³⁶ A library says the same thing through its collection: “These books are worth read-ing.” The messages in both cases are the government’s.³⁷

³⁶ Indeed, the Gallery’s stated mission is “to tell the story of America” through its selection of portraits. *See About us*, NATIONAL PORTRAIT GALLERY (Dec. 11, 2024), <https://perma.cc/XKD9-ECE4>.

³⁷ What response does the dissenting opinion offer to our discussion of these numerous Supreme Court precedents? None at all. The dissent does not address *Moody*, nor *Miami Herald*, nor *Turner Broadcasting*, nor *Forbes*, nor *Hurley*, nor *Summum*, nor *ALA*. Nor does the dissent discuss (or even cite) any of the circuit precedents we discuss below. Indeed, the only substantive contribution the dissent makes is to misstate our holding. Contrary to the dissent’s view, we do not hold that “the government may ‘speak’ by removing library books for any

2. Circuit cases

Next, we consider circuit cases that, like *Summun*, treat the government’s selective presentation of third-party speech as the government’s own expression. Indeed, one of those, *PETA v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005), states in *dictum* that “[w]ith respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude.”

For instance, in *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314 (1st Cir. 2009), plaintiffs sued a town for refusing to include their hyperlink on the town’s website. Applying *Summun* and *ALA*, the First Circuit rejected the plaintiff’s Free Speech challenge: “[T]he Town engaged in government speech by establishing a town website and then selecting which hyperlinks to place on its website.” *Id.* at 331 (citing *Summun*, 539 U.S. at 472–74). When government “uses its discretion to select between the speech of third parties for presentation” through government channels, “this in itself may constitute an expressive act by the government that is independent of the message of the third-party speech.” *Id.* at 330 (citing *Summun*, 539 U.S. at 470–77).

Similarly, in *Ill. Dunesland Pres. Soc’y v. Ill. Dep’t of Nat. Res.*, 584 F.3d 719, 721 (7th Cir. 2009), plaintiffs sued an agency for refusing to include their

reason.” Dissent at 24. That tendentious formulation appears nowhere in our opinion. Instead, we hold that the county library speaks here by compiling and curating a collection of third party speech, a task that by definition involves selecting some books while excluding others. *See, e.g., PETA*, 414 F.3d at 28 (“With respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude.”).

“scary two-page pamphlet” in park display racks. The pamphlet warned about “asbestos contamination” at park beaches. *Ibid.* Applying *Summum*, the Seventh Circuit rejected plaintiffs’ Free Speech challenge by characterizing the selection of materials as government expression “designed to attract people to the park.” *Id.* at 724–25 (citing *Summum*, 539 U.S. at 467–68). As the court explained:

The [agency’s] choice of materials conveys a message that is contradicted by the plaintiff’s pamphlet. The message of the publications in the display racks is: come to the park and have a great time on the sandy beaches. The message of the plaintiff’s pamphlet is: you think you’re in a nice park but really you’re in Chernobyl[.]

Id. at 725. The court also highlighted the absurdity of a viewpoint neutrality requirement: “Must every public display rack exhibit on demand pamphlets advocating nudism, warning that the world will end in 2012, . . . or proclaiming the unconstitutionality of the income tax, together with pamphlets expressing the opposing view on all these subjects?” *Ibid.* (citation omitted).

Particularly helpful is the D.C. Circuit’s decision in *PETA v. Gittens*, 414 F.3d 23. For its public art program called “Party Animals,” the District of Columbia solicited designs for donkey and elephant sculptures. *Id.* at 25. Designs chosen by the District would be displayed at prominent locales. *Id.* at 26. PETA submitted two elephant designs, “one of a happy circus elephant, the other of a sad, shackled circus elephant with a trainer poking a sharp stick at him.” *Ibid.* After the District “accepted the happy elephant, but rejected the sad one,” PETA sued under the

Free Speech Clause. *Ibid.* The district court granted a preliminary injunction requiring the District to display the sad elephant. *Id.* at 27.³⁸ The D.C. Circuit reversed.

The District’s choice of some designs over others, the court held, was the District’s own speech. *Id.* at 28 (citing *Forbes*, 523 U.S. at 674). The court distinguished the District’s speech from the artists’ speech, using the analogy of public library books: “As to the message any elephant or donkey conveyed, this was no more the government’s speech than are the thoughts contained in the books of a city’s library.” *Ibid.* Nonetheless, government speech was still present:

With respect to the public library, *the government speaks through its selection of which books to put on the shelves and which books to exclude*. In the case before us, the Commission spoke when it determined which elephant and donkey models to include in the exhibition and which not to include.

Ibid (emphasis added).³⁹

Finally, our circuit has also applied the *ALA* plurality in the government speech context. *Chiras v. Miller*

³⁸ This version “depict[ed] a shackled elephant crying” with a “sign tacked to the elephant’s side [that] read: ‘The Circus is coming. See SHACKLES–BULL HOOKS–LONELINESS. All under the ‘Big Top.’” *Id.* at 26.

³⁹ While *PETA* pre-dated *Summum*, its analysis anticipated the Supreme Court’s. *See id.* at 29 (“First Amendment constraints do not apply when the [government] authorities engage in government speech by installing sculptures in the park. If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee.”).

considered a Free Speech challenge to the Texas State Board of Education’s (“SBOE”) decision not to select a textbook for the state curriculum. 432 F.3d 606, 611–15 (5th Cir. 2005). The textbook’s author claimed the SBOE engaged in viewpoint discrimination by rejecting his book. *Id.* at 611. We disagreed. Relying on *ALA* (among other decisions), we held: “[W]hen the SBOE devises the state curriculum for Texas and selects the textbook with which teachers will teach to the students, *it is the state speaking*, and not the textbook author.” *Id.* at 614 (emphasis added); *see ibid.* (discussing *ALA*, 539 U.S. at 205).⁴⁰

In sum, these circuit decisions follow the lessons of *Summum* and other cases about the selection and presentation of third-party speech. By selecting, compiling, and presenting a collection of another person’s speech, the government expresses its own views. It may do so by selecting hyperlinks for a town website, or pamphlets for a park display rack, or statues for a public art display, or textbooks for a state curriculum. It may also do so by selecting books for a library’s collection.

⁴⁰ *Chiras* also relied on two Supreme Court decisions that anticipated *Summum*. The Court’s decision in *Ark. Educ. Television Comm’n v. Forbes*, we noted, recognized that “public broadcasters exercise a wide degree of discretion when making programming decisions.” *Chiras*, 42 F.3d at 613 (citing *Forbes*, 523 U.S. at 673). Similarly, *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), recognized that an “art funding program . . . required the NEA to use content based criteria in making funding decisions.” *Chiras*, 432 F.3d at 614. The *ALA* plurality likewise drew on *Forbes* and *Finley* in recognizing libraries’ discretion to shape their collections. *See ALA*, 539 U.S. at 204–05 (plurality) (discussing *Forbes* and *Finley*).

3. *Some objections*

Most of plaintiffs’ objections to applying the government speech doctrine focus on the *Shurtleff* factors, so we address those below. *See infra* IV.C.1. We address a few broad objections here, however.

First, plaintiffs contend that “censoring public library books is not government speech.” That is wordplay, not argument. Any of the government speech cases just discussed could be tendentiously reframed as the government “censoring” private speech. For instance, someone could have accused the City in *Summum* of “censoring” the monuments it rejected for its display. Or someone could have said the District of Columbia in *PETA* was “censoring” the sad elephant statue it rejected. Courts do not frame the question that way, though. Instead, they ask whether a government’s selective compilation and presentation of third-party speech constitutes government speech. *See Summum*, 555 U.S. at 468; *PETA*, 414 F.3d at 30. Plaintiffs do not confront that question.⁴¹

Second, plaintiffs warn that finding government speech here will dangerously “expand” the doctrine, setting the stage for government to “silence or muffle” protected speech. To support this argument, plaintiffs

⁴¹ Plaintiffs also suppose that the claimed government speech here is merely a library’s “warranting” that books “are of a particular[] quality.” Not so. A library selects books it thinks suitable, buys them with public funds, and presents a curated collection to the public. That is the “expressive activity” at issue, *Moody*, 144 S. Ct. at 2400, not merely the government’s putting its seal of approval on a book.

rely heavily on the Supreme Court’s decision in *Matal v. Tam*, 582 U.S. 218 (2017).⁴² Plaintiffs are mistaken.

In *Matal*, the federal Patent and Trademark Office (“PTO”) refused to place a rock band’s name on the principal register because it found the name (“THE SLANTS”) was “disparaging” under trademark law. *See* 582 U.S. at 227–29. The Supreme Court held this violated the band leader’s Free Speech rights by discriminating based on viewpoint. *See id.* at 243–44, 247.

For several reasons, the Court rejected the PTO’s argument that “the content of a registered mark is government speech.” *See id.* at 236, 234–39. For instance, the PTO registers marks without asking whether the government agrees with a mark’s viewpoint. *Id.* at 235. And how could one put into the government’s mouth the “content” of millions of registered marks, many of which express conflicting views? *Id.* at 236 (“If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently.”). Moreover, “[t]rademarks have not traditionally been used to convey a Government message.” *Id.* at 238. Finally, the PTO does not “approv[e]” a mark by registering it, nor does the public think the government adopts “the contents” of marks. *Id.* at 237, 238.

Matal has no bearing here. To begin with, the claimed government speech is entirely different. Defendants argue that a library speaks by selecting and presenting a collection of books. *See Moody*, 144 S.

⁴² The dissenting opinion also claims our government speech holding “contradicts” *Matal*, *see* Dissent at 23 n.14, but does not explain how.

Ct. at 2400 (“[E]xpressive activity includes presenting a curated compilation of speech originally created by others.”). In *Matal*, by contrast, the PTO argued the government spoke through the actual content of the marks. See *Matal*, 582 U.S. at 236 (rejecting PTO’s “far-fetched” argument that “the content of a registered mark is government speech”). The two cases would be equivalent only if Defendants claimed the library’s speech lay in the words of the books themselves. No one argues that, though. See *PETA*, 414 F.3d at 28 (“Those who check out a Tolstoy or Dickens novel would not suppose that they will be reading a government message.”).

Matal also lacks the expressive elements present here. While a library selects only the books it wants, the PTO does not register only the marks it likes; registering all qualified marks is “mandatory.” *Matal*, 582 U.S. at 235. Similarly, the register is not a curated compilation—rather, it is a listing of millions of marks that “meet[] the Lanham Act’s viewpoint-neutral requirements.” *Ibid.* Nor is the register presented to the public; to the contrary, few people “ha[ve] any idea what federal registration of a trademark means.” *Id.* at 237. And, while trademarks have never been thought to convey government messages, libraries’ collection decisions (as discussed in IV.C, *infra*) have traditionally conveyed the library’s view of worthwhile literature.

Finally, *Matal*’s concerns about expanding government speech are not implicated here. The Court worried that, “[i]f federal registration makes a trademark government speech,” then someone could say the same about copyright. See *id.* at 239 (“[W]ould the registration of the copyright for a book produce a similar transformation?”). This case raises no such

worry. No one supposes that, by choosing books, the library transforms the books themselves into government speech. The library's speech consists only in presenting a curated collection of books to the public. *See Moody*, 144 S. Ct. at 2402 (“expressive activity” consists in “[d]eciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items”).

In sum, recognizing the library's activity as government speech raises no danger of the government's suppressing someone else's speech. The books a library excludes from its shelves do not vanish into thin air. They remain available elsewhere for anyone to read. *See Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting) (“[T]he most obvious reason that petitioners' removal of the books did not violate respondents' right to receive information is the ready availability of the books elsewhere.”).

B. Public forum doctrine

Another way of looking at the government speech issue is to ask whether a library, by selecting books, creates a public forum. In cases where the government displays third-party speech, the government speech and public forum doctrines are often two sides of the same coin. The government argues that it is speaking (and so can say what it wants), while plaintiffs counter that the government has created a public forum (where viewpoint discrimination is forbidden). *See Shurtleff*, 596 U.S. at 252 (asking whether “government–public engagement transmit[s] the government's own message” or whether “it instead create[s] a forum for the expression of private

speakers’ views”).⁴³ The public forum argument has dropped out of this case, but it is still helpful to illustrate the nature of the expression represented by a library’s collection.⁴⁴

Forum analysis assesses when government can regulate private speech on property it owns or controls. *See generally Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 426–27 (5th Cir. 2020) [*FFRF*]. In traditional public fora—sidewalks, streets, and parks—the government has little regulatory leeway: content- or viewpoint-based restrictions are strictly scrutinized. *FFRF*, 955 F.3d at 426 (citing *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 758 (5th Cir. 2010)).⁴⁵ The government has more latitude in “limited” public fora, which are “places that the government has opened for public

⁴³ *See also Summum*, 555 U.S. at 478, 472 (rejecting forum analysis while accepting government speech); *PETA*, 414 F.3d at 28 (same); *Walker*, 576 U.S. at 208–09, 214–15 (accepting government speech while rejecting forum analysis); *cf. id.* at 233–34 (Alito, J., dissenting) (accepting forum analysis while rejecting government speech).

⁴⁴ In granting a preliminary injunction, the district court relied in part on the notion that public libraries are limited public fora. *See Little*, 2023 WL 2731089, at *7 n.4. Plaintiffs defended that view at the panel stage, *see Little*, 103 F.4th at 1174 (Duncan, J., dissenting), but the panel majority did not adopt it. *See id.* at 1149; *see also id.* at 1174 (Duncan, J., dissenting). At en banc, plaintiffs no longer relied on the argument.

⁴⁵ The same standard applies to “designated” public fora, which are “places that the government has designated for the same widespread use as traditional public forums.” *Ibid.* (citation omitted). In either traditional or designated public fora, however, the government may impose reasonable restrictions on the time, place, and manner of private speech. *See, e.g., Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) (citation omitted).

expression of particular kinds or by particular groups.” *Ibid.* (citing *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346 (5th Cir. 2001) (per curiam)). There, restrictions are valid if they are “(1) reasonable in light of the purpose served by the forum and (2) do[] not discriminate against speech on the basis of viewpoint.” *Id.* at 426–27.

To support their forum argument at the panel stage, Plaintiffs pointed to three sister-circuit decisions that deem libraries some kind of public forum. Those cases have no bearing on the question before us, however. They address whether libraries may evict people from their premises—such as sex offenders, shoeless persons, or a vagrant who menaced library staff and whose “odor was often so offensive that it prevented the [l]ibrary patrons from using certain areas of the [l]ibrary.” See *Doe v. City of Albuquerque*, 667 F.3d 1111, 1115 (10th Cir. 2012) (sex offenders); *Neinast v. Bd. of Tr. of the Columbus Metro. Libr.*, 346 F.3d 585, 589 (6th Cir. 2003) (shoeless man); *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1247–48 (3d Cir. 1992) (menacing, odiferous vagrant). Those courts answered that question by treating a library’s premises as a public forum. See, e.g., *Kreimer*, 958 F.2d at 1259 (library at issue “constitutes a limited public forum”).

We need not decide whether this analysis was correct. It is one thing to say that a public library’s *premises* may constitute some kind of public forum. A library might open one of its rooms to poetry readings by the public and thereby create a limited public forum. See, e.g., *id.* at 1259–60 (concluding library was “a limited public forum” because “the government intentionally opened the Library to the public for *expressive activity*”). It is entirely another

thing, though, to extend this concept to a library's *bookshelves*. Plaintiffs' cases lend no support for that. They address only whether a library can evict *people*. See, e.g., *Neinast*, 346 F.3d at 592 (upholding no-shoes policy because it avoided "tort claims brought by library patrons who were injured because they were barefoot"). They say nothing about whether a library can evict *books* from its shelves.

More to the point, it makes no sense to apply forum analysis to a library's collection. Library shelves are not a community bulletin board: they are not "places" set aside "for public expression of particular kinds or by particular groups." *FFRF*, 955 F.3d at 426. If they were, libraries would have to remain "viewpoint neutral" when choosing books. See *Summum*, 555 U.S. at 470 (limited public fora's restrictions must be "viewpoint neutral"). That would be absurd. Libraries choose certain viewpoints (or range of viewpoints) on a given topic. But they may exclude others. A library can have books on Jewish history without including the Nazi perspective. See, e.g., *Schauer* at 106 (explaining a librarian may choose books "accepting that the Holocaust happened to the exclusion of books denying its occurrence"). Forum analysis has no place on a library's bookshelves.

This conclusion is supported by the government speech cases discussed above. See *supra* IV.A.1–2. Start again with *Summum*. In addition to ruling that the City was speaking by choosing monuments, the Court also ruled that the City did not create a public forum. Allowing "a limited number of permanent monuments" was not the same as opening the park for "the delivery of speeches [or] the holding of marches." *Summum*, 555 U.S. at 478. The park obviously had limited space. And it would be absurd to bar the City

from engaging in “viewpoint discrimination” when choosing monuments. “On this view,” the Court noted, the United States could have accepted the Statue of Liberty only by “providing a comparable location” for, say, a “Statue of Autocracy.” *Id.* at 479. “[P]ublic forum principles,” then, were “out of place in the context of th[at] case.” *Id.* at 478 (quoting *ALA*, 539 U.S. at 205 (plurality)).

Or consider the D.C. Circuit’s *PETA* decision. Also citing *ALA*, the court held the District did not create a public forum. *PETA*, 414 F.3d at 29 (quoting *ALA*, 539 U.S. at 204–05 (plurality)). By choosing statues for display, the District was speaking for itself, not regulating private speech. The government “may run museums, libraries, television and radio stations, primary and secondary schools, and universities,” and “[i]n all such activities, the government engages in the type of viewpoint discrimination that would be unconstitutional if it were acting as a regulator of private speech.” *Id.* at 29 (citation omitted).

Finally, consider *ALA* itself. The plurality squarely rejected the notion that a library’s collection is a public forum. “A public library does not acquire Internet terminals in order to create a public forum,” the plurality explained, “any more than it collects books in order to provide a public forum for the authors of books to speak.” *ALA*, 539 U.S. at 206 (plurality). We have followed *ALA* on this point. *See Chiras*, 432 F.3d at 614 (relying on *ALA* for proposition that neither forum analysis nor heightened scrutiny apply to libraries’ collection decisions) (citing *ALA*, 539 U.S. at 205 (plurality)).

In sum, neither law nor logic supports the notion that a public library’s book collection is a public forum. This reinforces the conclusion that a library’s collec-

tion decisions are government speech and not the regulation of private speech.

C. *Shurtleff* factors

In en banc briefing, the parties raised additional arguments about government speech under *Shurtleff v. City of Bos.*, 596 U.S. 243 (2022). In that case, the City of Boston allowed private parties to fly flags of their choosing on the city flagpole. The Supreme Court held the City was not engaging in government speech but instead had created a limited public forum. *Id.* at 248. As a result, the City could not refuse a group’s request to fly a “Christian flag” because that would constitute viewpoint discrimination. *Ibid.*

In deciding the program was not government speech, the Court considered certain kinds of evidence: “[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; [3] and the extent to which the government has actively shaped or controlled the expression.” *Id.* at 252 (brackets added) (citing *Walker*, 576 U.S. at 209–214).

All three factors support the conclusion that a library’s choice of the books on its shelves is government speech. We consider each in turn.⁴⁶

1. *History of the expression*

Public libraries, in the modern sense, arose in the United States in the mid-19th century. *See generally* JESSE H. SHERA, FOUNDATIONS OF THE AMERICAN

⁴⁶ The dissenting opinion’s entire response to this nine-page analysis is to cite a sister-circuit case and peremptorily assert that “none of [the *Shurtleff*] factors supports a conclusion that library book removals constitute government speech.” Dissent at 23 n.14 (citing *Reynolds*, 114 F.4th at 667–68).

PUBLIC LIBRARY (1949); JOECKEL, *THE GOVERNMENT OF THE AMERICAN PUBLIC LIBRARY* (1935). Their earliest precursors were private religious libraries, which consisted mostly of the Bible and theological works.⁴⁷

These were followed by “social libraries,” where private individuals contributed funds to buy books. SHERA at 59. The first was founded by Benjamin Franklin in 1731. *See* MICHAEL H. HARRIS, *HISTORY OF LIBRARIES IN THE WESTERN WORLD*, 184 (1995). Such ventures, hundreds of which were chartered by the colonies, had the purpose of “propagat[ing] ‘virtue, knowledge, and useful learning.’” SHERA at 59–60 (discussing 1747 charter of the Redwood Library Company of Newport).⁴⁸ Their largely theological collections were privately endowed but available to the public. *See id.* at 25, 29, 102–06.

Around the same time there arose “circulating libraries,” which were privately-owned and subscription-based. *See* DAVID KASER, *A BOOK FOR SIXPENCE: THE CIRCULATING LIBRARY IN AMERICA* (1980). In contrast to social libraries, circulating libraries tended to have a larger share of popular novels. *Id.* at 86; SHERA at 222–23.

⁴⁷ *See* SHERA at 20 (discussing founding of religious libraries by Captain Robert Keany in the mid-17th century and Rev. Thomas Bray in the late-17th century).

⁴⁸ *See id.* at 238 (quoting 1771 constitution of the Social Library of Salisbury, Connecticut that library existed for the “promotion of Virtue, Education, and Learning and . . . the discouragement of Vice and Immorality”); *see also* HARRIS at 187 (1995) (“The nation’s social libraries were generally promoted as serious sources of knowledge for those who desired to improve themselves. They did not, at least openly, cater to the public taste for romance and popular fiction, choosing instead to purchase only the best nonfiction and some few classic works of fiction.”).

By the mid-19th century, several municipalities had created “public” libraries, funded and controlled by the government and meant to strengthen the educational mission of social libraries. *See* JOECKEL at 24; *see also id.* at 15 (discussing 1833 “free circulating library” of Petersborough, New Hampshire). Their collections were curated to foster education and virtue. SHERA at 222–25.⁴⁹ Similarly, the first municipal public library recognized by state statute, the 1848 Boston Public Library, was considered by its Board of Trustees to be “the means of completing our system of public education.” JOECKEL at 17; SHERA at 175.

In light of public libraries’ avowed educational mission, content selection was critical. For instance, by 1834, the Petersborough Town Library’s collection consisted overwhelmingly of historical, biographical, and theological works. SHERA at 166. Novels, despite their popularity, occupied a mere 2% of the collection. *Ibid.* This was no accident: many educators, echoing Thomas Jefferson, found novels “poison[ous]” and “trashy.” *Id.* at 222–23; KASER at 88–90.

The same was true of state libraries. New York’s 1835 library law, establishing the first statewide tax-supported library, considered the public library an “educational agency” and charged the state superintendent with creating lists of suitable books. JOECKEL at 9, 12; *see also* SHERA at 183–84 (discussing subsequent creation of statewide library systems in Connecticut, Rhode Island, Michigan, Iowa, Indiana, Ohio, and Wisconsin). Collections weeded books

⁴⁹ *See also id.* at 168 (observing that the Rev. Abiel Abbot, the Petersborough library chairman, viewed the library “as a factor in public education and in the spread of knowledge and virtue among his people”).

promoting “improper” morality, with the result that fiction was mostly excluded. See KASER at 88 (discussing Horace Mann’s views on social ills caused by novels). So, for instance, in 1851 Representative John Wight urged Massachusetts to establish public libraries to “promot[e] virtue, reform . . . vice, increase . . . morality,” and “diminish[] the circulation of low and immoral publications.” SHERA at 239.⁵⁰

The lesson from this historical sketch is obvious: by shaping their collections, public libraries were speaking, loudly and clearly, to their patrons. “These books will educate and edify you. But the books we have kept off the shelves—trashy novels, for instance—aren’t worth your time.” Patrons might have disagreed; maybe they wanted to read *Madame Bovary* (1856) or *The Woman in White* (1859). Be that as it may, the public library’s view on edifying literature was quintessential government speech.

Today, public libraries convey the same message to the reading public. True, the message’s content has changed: what today’s Library Board thinks is worth reading is likely not what the Petersborough Town Council thought in 1833 nor the Massachusetts

⁵⁰ See also HARRIS at 247 (“Public library philosophy up through the 19th century was characterized by a decidedly authoritarian and missionary cast. Justin Winsor, who served as President of the American Library Association for the first ten years of its existence, clearly stated this thrust when he noted that the public library could be wielded as a ‘great engine’ for ‘good or evil’ among the ‘masses of the people.’”); SIDNEY HERBERT DITZION, ARSENALS OF A DEMOCRATIC CULTURE: A SOCIAL HISTORY OF THE AMERICAN PUBLIC LIBRARY MOVEMENT IN NEW ENGLAND AND THE MIDDLE STATES FROM 1850 TO 1900, 87 (1947) (“The public library moreover offered as its primary contribution the shaping of unformed and of ill-formed tastes in things cultural.”).

Legislature in 1851. But governments through those who curate collections—still propose which books, in their view, merit the public’s attention. They do so through the unsubtle act of including some books and excluding others.

Just take a look at the 2012 Texas State Library “CREW”⁵¹ guide. *See generally* CREW: A WEEDING MANUAL FOR MODERN LIBRARIES (Texas State Library & Archives Comm’n 2012). This is the official guide to curating collections in Texas libraries. The practice of weeding and the CREW guide are discussed extensively by the plaintiffs and their *amici*.⁵² Surprisingly, though, plaintiffs portray weeding as entirely non-ideological. They claim weeding is based on “neutral criteria” and “more akin to maintenance work than intentional control of the specific content made available to the public.” Appellees’ Supp. Br. at 30–31.⁵³

But the CREW guide shows the opposite is true. Public libraries are told to weed the following:

⁵¹ As previously noted, “CREW” stands for **C**ontinuous **R**evue, **E**valuation, and **W**eeding. The CREW guide is available online at: <https://perma.cc/PH33-HR2R>.

⁵² *See* Appellees’ Supp. Br. at 30–31; Brief for Amici Freedom to Read Found. et al. as Amici Curiae, at 8–9 & n.27.

⁵³ Similarly, *amici* Freedom to Read, the Texas Library Association, and the American Library Association assert that “[w]eeding is not the removal of books that, in the view of government officials, contain ‘inappropriate’ ideas or viewpoints” and is not “a deselection tool for controversial materials.” Brief for Freedom to Read Found. et al. as Amici Curiae at 8–9. These statements are flatly contradicted by the parts of the CREW guide quoted below. They are also contradicted by the ALA’s own weeding guide.

- “[B]iased, racist, or sexist terminology or views.”
- “[S]tereotypical images and views of people with disabilities and the elderly, or gender and racial biases.”
- “[O]utdated philosophies on ethics and moral values.”
- “[B]ooks on marriage, family life, and sexuality . . . [are] usually outdated within five years.”
- “[B]ooks with outdated [political] ideas.”
- “[B]iased or unbalanced and inflammatory items [about immigration].”
- “[O]utdated ideas about gender roles in childrearing.”
- “Art histories . . . [with] cultural, racial, and gender biases.”
- “[Children’s] books that reflect racial and gender bias” or have “erroneous and dangerous information.”

CREW at 19, 33, 63, 64, 65, 73, 76, 77, 81, 82.

Similarly, the American Library Association also advises librarians to remove “items reflecting stereotypes or outdated thinking; items that do not reflect diversity or inclusion; [and] items that promote cultural misrepresentation.” *See* VNUK at 6; *see supra* III.B (discussing ALA weeding handbook). For instance, the handbook’s chapter on “Diversity and Inclusion” warns librarians that “children’s books have overwhelmingly featured white faces” and encourages them to include works that “represent diverse people of different cultures, ethnicities, gender identities, physical abilities, races, religions, and

sexual orientation.” VNUK at 105. More specifically, it advises that it is “basic collection maintenance” to “[r]emov[e] the Dr. Seuss books that are purposefully no longer published due to their racist content.” *Id.* at 106.⁵⁴

This guidance would be right at home in 1850s Massachusetts. *See* SHERA at 239 (recounting Rep. Wight’s 1851 argument that libraries would “diminish[] the circulation of low and immoral publications”). To be sure, today’s librarian may have a different idea of what constitutes a “low and immoral publication.” But the song remains the same: officials, both in 1851 and 2024, are telling the public which books will “promote virtue, reform vice, [and] increase morality.” *Ibid.* (cleaned up). In 1851, that might have been John Marshall’s *The Life of George Washington*. *See id.* at 166. Today, it might be *It’s Perfectly Normal* or *Freakboy*. *See Little*, 103 F.4th at 1162 n.8 (Duncan, J., dissenting). Either way, the public library’s judgment is 100-proof government speech.⁵⁵

⁵⁴ *See Oliver v. Arnold*, 3 F.4th 152, 165 (5th Cir. 2021) (Duncan, J., dissenting) (discussing controversies over certain Dr. Seuss books).

⁵⁵ Plaintiffs’ arguments on *Shurtleff*’s first factor miss the mark. First, they suggest libraries have historically provided “equal opportunity of access to information.” What “equal opportunity” meant, however, was that all *patrons* should have equal access to libraries, not that all *ideas* should be featured on library shelves. *See, e.g.*, ALA LIBRARY BILL OF RIGHTS (“Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves.”). Second, plaintiffs point out that Llano County’s own policy denies “endorsement” of any author’s “viewpoint.” This again mistakes the nature of the library’s expression, which lies not in the words of the books themselves but in the library’s

2. *Public perception*

Shurtleff next “consider[ed] whether the public would tend to view the speech at issue as the government’s.” 596 U.S. at 255. The answer is yes.

The 18 *amici* States get this exactly right: “People know that publicly employed librarians, not patrons, select library materials for a purpose.” Brief for 18 States as Amici Curiae at 9. Indeed, that is a matter of Texas law. *See Little*, 103 F.4th at 1177 (Duncan, J., dissenting) (under Texas law, the public librarian “shall determine which books . . . will be purchased,” subject to “the general supervision of the commissioners court” (quoting TEX. LOC. GOV’T CODE §§ 323.005(c), 323.006)).

Or look at it this way: suppose a patron walks into the Llano County Public Library looking for Stephen King’s *Salem’s Lot*. It’s nowhere to be found. In fact, he’s told that the library stocks none of King’s books because they are morbid trash. Annoyed, the patron wants to lodge a complaint. *Question*: should he address his complaint to (a) the Library Board; (b) other patrons; or (c) Stephen King? *Answer*: (a). Any reasonable library patron would grasp this instantly.

And yet the Eighth Circuit recently reached a different conclusion. In *GLBT Youth in Iowa Schools Task Force v. Reynolds*, the court ruled that the public would *not* “view the placement and removal of books in public school libraries as the government speaking.” 114 F.4th 660, 668 (8th Cir. 2024). The panel’s reasoning? Given the variety of books on the shelves, if

crafting its collection by choosing certain books. *See PETA*, 414 F.3d at 28.

the government were the one speaking, it would be “babbling prodigiously and incoherently.” *Ibid.* (quoting *Matal*, 582 U.S. at 236).⁵⁶ Unfortunately, we must disagree with our colleagues.

To begin with, the Eighth Circuit misunderstood the government “speech” at issue. It is not “the words of the library books themselves.” *Little*, 103 F.4th at 1182 (Duncan, J., dissenting). No one even claims that. As the D.C. Circuit pointed out nearly 20 years ago in *PETA*, “[t]hose who check out a Tolstoy or Dickens novel would not suppose that they will be reading a government message.” *PETA*, 414 F.3d at 28. A library that includes *Mein Kampf* on its shelves is not proclaiming “Heil Hitler!” Rather, “the government speaks through its *selection* of which books to put on the shelves and which books to exclude.” *Ibid.* (emphasis added); see also *Little*, 104 F.4th at 1182 (Duncan, J., dissenting) (noting “the distinction between government and private speech at work here”).

The Eighth Circuit also misapplied *Summum*. As discussed, there the City conveyed its *own* message by displaying the donated monuments it chose. See *supra* III.A. The city’s message was its *selection and display* of the monuments, not the monuments themselves.⁵⁷ That maps precisely onto a library collection: the library conveys its *own* message (which books are worth reading) by collecting third-party speech (books). But the Eighth Circuit’s reasoning makes *Summum*

⁵⁶ We have already explained why *Matal* has no bearing on whether a library’s curation decisions are government speech. See *supra* IV.A.3.

⁵⁷ See 555 U.S. at 476 (“By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct” and “does not necessarily endorse the specific meaning that any particular donor sees in the monument.”).

impossible: the only “speech” the court saw was by the books’ *authors*, not the library’s *choosing* some books over others. By that reasoning, when the City of Pleasant Grove displayed the Ten Commandments, it was speaking as God.

Once the nature of the “speech” is clarified, the answer to *Shurtleff*’s second question is as clear as a summer sky. As the previous section explained, the expressive activity at issue is choosing some books and presenting them as worthwhile literature. It is the public library—the *government*—who conveys that message, nobody else. *See, e.g.*, KATZ at 111 (“Specifically, the head librarian is charged with selection. The librarian is responsible to a board, committee, president, mayor, or principal who must take legal responsibility for problems that arise from selection.”).

3. *Extent of government control*

The answer to *Shurtleff*’s third question—“the extent to which the government has actively shaped or controlled the expression,” 596 U.S. at 252—follows from the first question. As explained, literally from the moment they arose in the mid-19th century, public libraries have been shaping their collections for specific educational, civic, and moral purposes. They still do today. *See supra* IV.C.1; *see also* CREW at 65 (calling for weeding “biased or unbalanced and inflammatory items” relating to “immigration and citizenship”); *id.* at 73 (“Weed books that reflect outdated ideas about gender roles in childrearing.”); *id.* at 82 (“Do not retain [young adult] books that have erroneous and dangerous information[.]”).⁵⁸

⁵⁸ The Eighth Circuit went astray by asking narrowly whether the government had previously “asserted extensive control over

In sum, all three of *Shurtleff*'s questions point to one answer: "a public library's selection of some books, and its rejection of others, constitutes government speech." *Little*, 103 F.4th at 1181–82 (Duncan, J., dissenting).

D. Library collection decisions are government speech.

We hold that a public library's collection decisions are government speech. This follows from (1) precedents teaching that a speaker, including a government speaker, engages in expressive activity by selecting and presenting a curated collection of third-party speech; (2) the conclusion that a library's collection is not a public forum; and (3) application of the *Shurtleff* factors, which show that libraries' collection decisions have traditionally expressed libraries' own views about what constitutes worthwhile literature.

Because defendants' decision to remove the 17 books is government speech, that decision is not subject to challenge under the Free Speech Clause.⁵⁹ Plaintiffs' Free Speech claims must therefore be dismissed.

removing books." *Reynolds*, 114 F.4th at 668. But *Shurtleff* asks more broadly about "the extent to which the government"—*i.e.*, a public library—"has actively shaped or controlled the expression"—*i.e.*, the content of their own collections. *Shurtleff*, 596 U.S. at 252. The answer to that question is quite obviously yes. *See supra* IV.C.1.

⁵⁹ We express no opinion on whether a public library's removal of books can be challenged under other parts of the Constitution. *See, e.g., Summum*, 555 U.S. at 468 (observing there may be other "restraints on government speech," such as the Establishment Clause).

CONCLUSION

We REVERSE the preliminary injunction, RENDER judgment dismissing plaintiffs' Free Speech claims, and REMAND for further proceedings consistent with this opinion.⁶⁰

⁶⁰ Defendants' pending motion to dismiss the appeal as moot with respect to former library advisory board members Bonnie Wallace, Rochelle Wells, Rhonda Schneider, and Gay Baskin is GRANTED. Defendants' pending motion to correct the case caption is DENIED AS UNNECESSARY.

JAMES C. HO, *Circuit Judge*, concurring:

The Constitution protects “the freedom of speech.” U.S. CONST. amend. I. That freedom ensures that citizens are free to speak—not that we may force others to respond. It’s the First Amendment, not FOIA.

So “[t]here is . . . no basis for the claim that the First Amendment compels others—private persons or government—to supply information.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (plurality op. of Burger, C.J.). The Supreme Court “has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.” *Id.* at 9. “The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government.” *Id.* at 16 (Stewart, J., concurring).

Our Founders enacted a charter of negative liberties. “[L]iberty in the eighteenth century was thought of much more in relation to ‘negative liberty’; that is, freedom *from*, not freedom *to*.” John Phillip Reid, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 56 (1988).

I alluded to this dichotomy between negative and positive rights in my dissent in *Villarreal v. City of Laredo*, 94 F.4th 374 (5th Cir. 2024). I noted that, when it comes to the First Amendment rights of citizens to question their government, “[t]he government may not answer . . . but the citizen gets to ask.” *Id.* at 409 (emphasis added).

I recognize (and regret) that the right to ask questions was not vindicated in that case. This is not the place to relitigate that loss.

I only bring up *Villarreal* because I don't get how you can vote for Leila Little, but not Priscilla Villarreal. I don't get how some of the dissenters can indulge Little's insistence that the government provide her with certain sexual and other content—yet voice zero support for Villareal's right to merely ask the government about its operations. I don't see how the person who gets jailed for merely requesting information loses—while the person who demands information wins. That doesn't just get the First Amendment wrong—it gets it entirely backwards. *See generally Gonzalez v. Trevino*, 60 F.4th 906, 911–12 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc).

So I share the majority's "dismay" at the "unusually over-caffeinated arguments" made in this case. *Ante*, at 4. When members of the court disparage our decision today for "join[ing] the book burners," it reminds me of how members of the court disparaged our decision in *Oliver v. Arnold*, 19 F.4th 843 (5th Cir. 2021), for banning homework and classroom assignments in public schools. *See id.* at 848–49 (Ho, J., concurring in the denial of rehearing en banc) (rebutting such arguments). Our decision today doesn't burn books any more than our decision in *Oliver* banned homework.

But it's especially striking to compare the rhetoric today to the votes in *Villarreal*. I heartily agree with the dissent that "[t]he free exchange of ideas lies at the foundation of free government by free men." What I don't get is why that means the government must pay for Little's ideas—while Villarreal must pay for her ideas with jail time. The First Amendment should protect Villarreal's negative rights—not Little's affirmative claims.

I.

The fundamental distinction between negative and positive rights is essential to a proper understanding of the First Amendment.

Consider how the law treats public museums. It's well understood that you have no First Amendment claim just because a public museum won't feature the art or exhibit you wish to view. That's because, as today's en banc majority opinion explains, when a government funds and operates a museum, it necessarily acts as a curator for the public's benefit—and there is no First Amendment claim when the government is curating, not regulating.

So a public museum “may decide to display busts of Union Army generals of the Civil War, or the curator may decide to exhibit only busts of Confederate generals. The First Amendment has nothing to do with such choices.” *PETA v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005). *See also, e.g., Pulphus v. Ayers*, 249 F. Supp. 3d 238, 254 (D.D.C. 2017) (rejecting First Amendment claim by an artist challenging the removal of his painting from a Congressional art competition); *Raven v. Sajet*, 334 F. Supp. 3d 22, 25 (D.D.C. 2018) (rejecting First Amendment claim to require display of a portrait of the then-President-Elect at the National Portrait Gallery).

That should end this case, because I see no principled First Amendment distinction between public museums and public libraries. *See, e.g., PETA*, 414 F.3d at 29 (“[The government] may run museums, libraries, television and radio stations. . . . In all such activities, the government engages in the type of viewpoint discrimination that would be unconstitu-

tional if it were acting as a regulator of private speech.”).

And neither do Plaintiffs. During oral argument, counsel for Plaintiffs was given repeated opportunities to draw a distinction between public museums and public libraries for purposes of First Amendment analysis. They repeatedly declined to do so. *See* Oral Arg. at 43:45–46:43. They didn’t, because they can’t.

II.

The dissent appears to accept that the freedom of speech embodies negative, not positive, rights. The dissent focuses instead on a different distinction. It theorizes that the First Amendment does not require a public library to *buy* certain books—but it does forbid a public library from *removing* them, having already bought them. As the dissent puts it, it’s “not an affirmative right to demand access to particular materials,” but rather “a negative right against government censorship.” *Post*, at _ (Higginson, J., dissenting). So “[t]he First Amendment does not require Llano County either to buy and shelve . . . or to keep [certain books]; but it does prohibit Llano County from removing [them].” *Id.*

But I confess that I have trouble locating in the First Amendment a distinction between refusing to purchase certain books (which the dissent would allow) and removing them (which the dissent would condemn).

Consider how we would treat the proposed distinction in other constitutional contexts. Does the Fourteenth Amendment allow a government agency to refuse to hire people based on their race—just so long as they don’t fire people based on their race? Does the Free Exercise Clause permit a public park to exclude

all Christians from entry—it just can’t kick them out once they’ve been let in? Obviously not. No one would draw those distinctions. And the same logic should apply here. If viewpoint discrimination is forbidden, then viewpoint discrimination is forbidden.

So it’s not surprising that Plaintiffs appear to concede that they would forbid public libraries from refusing to purchase as well as remove certain books. *See Oral Arg.* at 42:55–43:30.

I also wonder about the workability of the proposed distinction. Imagine that someone donates their book collection to a local library upon their death. But it turns out that the collection contains some of the material at issue in this case. So the library declines to accept those particular items. Is that refusing to purchase (and therefore permitted)? Or is that removing (and therefore forbidden)? Suppose the entire book collection has already been boxed up, so the estate administrator tells the librarian to either take the entire collection or refuse it whole. So the librarian can’t accept custody of certain books while declining others—it can only remove those books after accepting them. Does that make a difference? Why should it?

It seems more principled to me to conclude that the First Amendment permits all of this, because like public museums, public libraries have to make decisions about which materials to include in, and exclude from, their collections. I’m sure we could all find ways to quibble with how a particular library or museum curates their collections. But curators are not regulators. And I have difficulty determining which curating decisions are subject to scrutiny, and which are exempt, consistent with the text and original understanding of the First Amendment.

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* * *

Plaintiffs have a First Amendment right to read books. They don't have a First Amendment right to force a public library to provide them. So I agree that we should reverse, and accordingly concur.

STEPHEN A. HIGGINSON, *Circuit Judge*, joined by WIENER, STEWART, SOUTHWICK, GRAVES, DOUGLAS, and RAMIREZ, *Circuit Judges*, dissenting:

The free exchange of ideas “lies at the foundation of free government by free men.” *Schneider v. Town of Irvington*, 308 U.S. 147, 161 (1939). As Thomas Jefferson observed, “wherever the people are well informed they can be trusted with their own government.”¹ Letter from Thomas Jefferson to Richard Price (Jan. 8, 1789), <https://www.loc.gov/exhibits/jefferson/60.html>. Public libraries have long kept the people well informed by giving them access to works expressing a broad range of information and ideas. But this case concerns the politically motivated removal of books from the Llano County public library system by government officials in order to deny public access to disfavored ideas.² In an effort to ratify this official

¹ George Washington made the same point more starkly: “[T]he freedom of Speech may be taken away, and, dumb & silent we may be led, like sheep, to the Slaughter.” George Washington, Address to Officers of the Army (Mar. 15, 1783) (transcript available at <https://founders.archives.gov/documents/Washington/99-01-02-10840>).

² The seventeen books at issue are: *Caste: The Origins of Our Discontents* by Isabel Wilkerson; *They Called Themselves the K.K.K.: The Birth of an American Terrorist Group* by Susan Campbell Bartoletti; *Spinning* by Tillie Walden; *Being Jazz: My Life as a (Transgender) Teen* by Jazz Jennings; *Shine* by Lauren Myracle; *Under the Moon: A Catwoman Tale* by Lauren Myracle; *Gabi, a Girl in Pieces* by Isabel Quintero; *Freakboy* by Kristin Elizabeth Clark; *In the Night Kitchen* by Maurice Sendak; *It’s Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health* by Robie H. Harris and Michael Emberley; *My Butt Is So Noisy!* by Dawn McMillan; *I Broke My Butt!* by Dawn McMillan; *I Need a New Butt!* by Dawn McMillan; *Larry the Farting Leprechaun* by Jane Bexley; *Gary the Goose and His Gas on the Loose* by Jane Bexley; *Freddie the Farting Snowman* by Jane

abridgment of free speech, the majority overturns decades of settled First Amendment law, disparaging its free speech protections as a “nightmare” to apply. *Ante*, at 2. Because the majority forsakes core First Amendment principles and controlling Supreme Court law, I dissent.

I

In recounting the background of this case, the majority opinion omits material facts, particularly those concerning how and why the seventeen books at issue were removed from the Llano County library system. This is significant because the district court found that the removals were likely motivated by political censorship, and we disturb such findings of fact only when the district court has committed clear error. *See ante*, at 12 (citing *United States v. Abbott*, 110 F.4th 700, 708 (5th Cir. 2024) (en banc)).

In the summer of 2021, a group of community members began working to remove specific children’s books that they deemed inappropriate from the Llano County library system, starting with what the parties call the “butt and fart books.”³ Defendant Amber Milum, the Llano County Library System Director, had ordered the books for the library system because she thought they would be appropriate and entertaining for children, based on her training as a librarian, the books’ positive reviews, and the library’s selection

Bexley; and *Harvey the Heart Had Too Many Farts* by Jane Bexley.

³ There are three “butt books” (*My Butt is So Noisy!*, *I Broke My Butt!*, and *I Need a New Butt!*) and four “fart books” (*Larry the Farting Leprechaun*, *Gary the Goose and His Gas on the Loose*, *Freddie the Farting Snowman*, and *Harvey the Heart Had Too Many Farts*).

criteria. Former Defendants⁴ Rochelle Wells and Rhonda Schneider—who were, at the time, private citizens—checked the books out of the libraries continually to keep them off the shelves and inaccessible to other patrons. Wells asked Llano County officials and library staff—including Director Milum and Defendants Ron Cunningham (Llano County Judge) and Jerry Don Moss (Llano County Commissioner)⁵—to remove the books from the library system altogether. In response to these complaints, Judge Cunningham and Commissioner Moss directed Director Milum to remove the “butt and fart” books from the shelves, which she did.

At some point in the fall, Commissioner Moss came into the Llano Library to see Martina Castelan, the

⁴ Plaintiffs sued Rochelle Wells, Rhonda Schneider, Bonnie Wallace, and Gay Baskin in their official capacities as members of the Llano County Library Board. After our en banc court heard oral argument in this appeal, Defendants moved to dismiss as moot the claims against Wells, Schneider, Wallace, and Baskin because their respective terms on the Board had expired, along with those of the Board’s other members, and because Llano County had decided not to appoint or reappoint anyone to the Board during the pendency of this litigation. Plaintiffs opposed the motion, arguing that Defendants cannot moot any of Plaintiffs’ claims through voluntary cessation of these Board positions and highlighting that Llano County may immediately fill the vacant Board positions—including by reappointing the former Board members—once this litigation concludes. Because the majority grants Defendants’ motion, *ante*, at 55 n.60, I refer to Wells, Schneider, Wallace, and Baskin as “former Defendants,” where appropriate.

⁵ Moss is one of the Commissioners of the Llano County Commissioners Court, which oversees the Llano County library system and is led by Judge Cunningham. Director Milum testified that the Judge and the Commissioners of the Commissioners Court are her employers.

head librarian, who had previously served as the children's librarian. Commissioner Moss asked to see the "worst possible book that [Head Librarian Castelan] thought [the library] had on the shelves in the children's section." Although Head Librarian Castelan did not view any of the books in the children's section as inappropriate, she concluded, based on complaints they had received about "grooming" in the "[b]utt books," that Commissioner Moss was looking for similar material. Head Librarian Castelan showed Commissioner Moss the "potty training/puberty, maturity books," including the book *It's Perfectly Normal*, which Castelan described as "a general health book . . . for children 10 to 12" that "explores all versions and all aspects of puberty" and that includes "illustrations of adults in adult situations" in "one section of the book." According to Castelan, Commissioner Moss was "taken aback" by the book and told Castelan that he would not have wanted his children or grandchildren to read it. The book was later removed from the library by Director Milum, who acknowledged that she pulled the book for review based, at least in part, on the public controversy regarding the content of books in the library system.

Around the same time, Matt Krause, a member of the Texas House of Representatives, circulated to "Selected Superintendents" of Texas school districts a sixteen-page list of books allegedly "address[ing] or contain[ing]" topics such as:

human sexuality, sexually transmitted diseases, or human immunodeficiency virus (HIV) or acquired immune deficiency syndrome (AIDS), sexually explicit images, graphic presentations of sexual behavior that is in violation of the law, or . . . material that might make students

feel discomfort, guilt, anguish, or any other form of psychological distress because of their race or sex or convey that a student, by virtue of their race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.

In early November, Wells and others divided up review of the Krause list to “see if we have any [of] those books” in the Llano County public library system.

On November 8, Judge Cunningham directed Director Milum “immediately” to remove “[a]ny books with photos of naked or sexual conduct regardless if they are animated or actual photos . . . until further notice” and to refrain from purchasing any additional books “until [they] ha[d] a plan to move forward.” One of the books that Director Milum pulled was the Caldecott-Medal-winning children’s picture book *In the Night Kitchen*, which was included on the Krause list. Director Milum testified that she pulled *In the Night Kitchen* based on “inappropriate content” because it contained illustrations of a naked child. Director Milum further averred that she decided to remove the book because it was “old and worn” and had not been checked out “very much,” but she also acknowledged that it “had been checked out regularly,” and that there was no record of it being damaged. In contrast, Head Librarian Castelan testified that even if they were to remove *In the Night Kitchen* because it was worn, they “would have replaced it with a newer copy” because it is a “classic.”

On November 10, former Defendant Bonnie Wallace emailed Judge Cunningham, providing him with a list of the books from the Krause list that appeared in the Llano County library system and contending that

“pornographic filth ha[d] been discovered” at all three branches of the Llano County library system. In response, Judge Cunningham again instructed Director Milum that “any and all books that depict any type of sexual activity or questionable nudity [be] pulled immediately,” including “books that are available online,” and he further instructed her to advise him and Commissioner Moss “when this task has been completed.”

The next day, Wells emailed her group (including Commissioner Moss) with “an update on the status of the books in the library”:

Commissioner Moss and Judge Cunningham have instructed Amber [Milum], the head librarian, to remove certain books, both physical books and ebooks (via the LIBBY app). There will also be no new books coming in until this is settled. If you go into the library[,] you will see Amber [Milum] and [Martina Castelan] (Children’s librarian) are currently going through the Children’s section, labeling books, and I am assuming also removing the books Commissioner Moss has told them to remove. Amber was told to get rid of Lawn Boy and Gender Queer (physical and ebook). Commissioner Moss, we are very grateful for your help in this situation and all you have done to begin to remedy it!

She also noted that members of the group would be finishing their review of “that 16-page list [issued by Krause] of CRT and LGBTQ book[s]” and would be “sending a list of the ones that are found to be inappropriate, along with a summary, to Commissioner Moss.”

Director Milum provided library staff with a version of this list that she had edited to add additional information about each book—such as which staff member had acquired the book and how often the book had been checked out—and instructed staff to pull all of the listed books from the shelves. At that time, the review was exclusively limited to Wallace’s list. Among the listed books the librarians pulled for review were *They Called Themselves the K.K.K.: The Birth of an American Terrorist Group*, *Caste: The Origins of Our Discontents*, *Freakboy*, *Shine, Spinning, Being Jazz: My Life as a (Transgender) Teen*, *Gabi, a Girl in Pieces*, and *Under the Moon: A Catwoman Tale*, all of which Director Milum removed within a week of receiving the Wallace list, despite not having read *any* of them herself.

One librarian, Barbara Baker, refused to remove the books from the Kingsland Branch and “told Ms. Milum that removing these books would be censorship” and that Baker “believed that [Milum’s] order to remove books was illegal.” Director Milum later terminated Baker for “insubordination,” “creating a disturbance,” “violation of policies,” and “failure to follow instructions.”

In December 2021, the Commissioners Court voted to close all three Llano County library branches for three days to allow the librarians to “check[their] shelves for ‘inappropriate’ books.”

Director Milum thereafter directed library staff to review all of the material in the children’s section of each branch to identify “inappropriate” material, which she defined as “anything that pertained to nudity and anything [the librarians] deemed inappropriate.” This review resulted in hundreds of books being pulled from the shelves and placed on a cart in Director Milum’s office for review.

In January 2022, the Commissioners Court voted to dissolve the existing Library Advisory Board and to replace it with a new one. The Commissioners voted to appoint numerous book removal advocates to the new Library Advisory Board, including Wells, Schneider, and Wallace. Thereafter, former Defendant Gay Baskin was elected President, Wallace was elected Vice President, and Wells was elected Secretary of the new Board. In an email dated January 19, 2022, Wells emailed Commissioner Moss with minutes from a meeting of the new Board. According to Wells's minutes, Director Milum had attended the meeting as a "non-voting member," but the Board had "asked that she not be present at all meeting[s] and just on an as-needed basis" and had noted that the meeting minutes would be emailed to her afterward. Wells's email to Commissioner Moss also included a section introduced as "stuff not in the meeting notes," in which, among other things, she thanked Commissioner Moss for "making [Milum] remove *It's Perfectly Normal*" and requested that future meetings be closed to all but appointed members of the Board, given that there had been "three or four patrons present and taking notes."

A month later, Director Milum told Baker and other members of the Llano County library staff that, "per Judge Cunningham," they were barred from attending the new Library Advisory Board meetings and specifically were not allowed to use their vacation time to do so.

At a meeting the next day, the Board stopped allowing comments from the public, and shortly thereafter, the Board voted to close its meetings to the public entirely.

Plaintiffs filed suit in April of 2022 and moved for a preliminary injunction the next month.

In October of that year, the district court conducted a two-day evidentiary hearing on Plaintiffs' motion for a preliminary injunction, hearing testimony from Head Librarian Castelan, Director Milum, Judge Cunningham, Commissioner Moss, Wells, Plaintiff Leila Little, and counsel for Defendants.

As discussed above, Director Milum generally acknowledged that the seventeen books at issue in this case were pulled from the shelves based on the community group's and Llano officials' directives to remove what they saw as "inappropriate" material, though she further testified that the ultimate decision to remove the books from the library's collection was based on standard justifications for weeding library books under the CREW (Continuous Review Evaluation and Weeding) and MUSTIE (Misleading, Ugly, Superseded, Trivial, Irrelevant, Easily Available Elsewhere) guidelines.

Conflictingly, Head Librarian Castelan—the only person, other than Director Milum and the head librarians of the other branches, who was allowed to weed materials—testified at length that most of Director Milum's removal decisions violated Llano County weeding guidelines. Specifically, Castelan testified in detail that *I Need a New Butt!*, *I Broke My Butt!*, *My Butt Is So Noisy!*, *It's Perfectly Normal*, *In the Night Kitchen*, *Shine*, *Spinning*, *Caste*, *They Called Themselves the K.K.K.*, *Gabi, a Girl in Pieces*, and *Under the Moon* were all removed in violation of the Llano County weeding policies. She further testified that *Being Jazz* could have been removed appropriately because it had not been checked out since 2017, but that she would not have removed it because the Llano County library system only had one or two books pertaining to the experience of being a transgender

teenager. Castelan testified that weeding *Freakboy* was consistent with the applicable guidelines because it had only been checked out once in 2016 but noted that books are typically weeded during the library's annual weeding in August or for reasons such as accidental damage.

Notably, Defendants declined to cross-examine Castelan.

On this evidentiary record, the district court found that “the evidence shows Defendants targeted and removed books, including well-regarded, prize-winning books, based on complaints that the books were inappropriate.” *Little v. Llano Cnty.*, No. 1:22-CV-424-RP, 2023 WL 2731089, at *9 (W.D. Tex. Mar. 30, 2023), *aff’d as modified*, 103 F.4th 1140 (5th Cir.), *reh’g en banc granted, opinion vacated*, 106 F.4th 426 (5th Cir. 2024). Highlighting critical pieces of evidence regarding the actions of various Defendants including Wells, Wallace, Judge Cunningham, Commissioner Moss, and Director Milum, the district court found that “by responding so quickly and uncritically” to Wallace’s and Wells’s complaints, the government actors “may be seen to have adopted Wallace’s and Wells’s motivations.” *Id.* at *10. The court therefore found “that Plaintiffs have clearly shown that Defendants’ decisions were likely motivated by a desire to limit access to the viewpoints to which Wallace and Wells objected.” *Id.*

The district court acknowledged Defendants’ argument that “any cataloguing and removal that occurred was simply part of the library system’s routine weeding process, for which Milum was ultimately responsible.” *Id.*; *see also id.* at *11. But it held that Plaintiffs had “offered sufficient evidence to suggest this post-hoc justification is pretextual,” *id.*,

and that the evidence—including Director Milum’s own testimony—instead indicated that the books Director Milum had reviewed and removed were books that the community group or her superiors deemed inappropriate, “based on people’s perception of their content or viewpoints.” *Id.* at *10; *see also id.* at *11 (“Whether or not the books in fact qualified for ‘weeding’ under the library’s existing policies, there is no real question that the targeted review was directly prompted by complaints from patrons and county officials over the contents of these titles.” (footnote omitted)).

Applying the Supreme Court’s public school library book removal decision in *Board of Education v. Pico*, 457 U.S. 853 (1982), and our court’s corresponding decision in *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184 (5th Cir. 1995), the district court held “that Plaintiffs made a clear showing that the ‘substantial motivation’ for Defendants[] actions appears to be discrimination, as opposed to mere weeding,” and therefore that Plaintiffs demonstrated a substantial likelihood of success on the merits. *Little*, 2023 WL 2731089, at *12. Further finding that Plaintiffs had met the remaining requirements for a preliminary injunction, the district court granted their motion. *Id.* at *13–14.

II

This case therefore presents a narrow issue: whether the district court, after conducting a two-day evidentiary hearing, abused its discretion by issuing a preliminary injunction on Plaintiffs’ motion. But a majority of our court has rushed to sanctify government removal of public library books by cutting off this case at the preliminary injunction stage, with-

out identifying any legal principle that can support its abridgment of the First Amendment.

A

By virtue of the Fourteenth Amendment, the First Amendment to the Constitution commands that states “shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996). The Supreme Court has long recognized that the “right of freedom of speech . . . has broad scope,” reflecting the Framers’ decision “to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.” *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

As part of this broad free speech guarantee, the First Amendment “necessarily protects the right to receive . . . information and ideas, regardless of their social worth,” which “is fundamental to our free society.” *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (internal citations omitted); *see also Thomas v. Collins*, 323 U.S. 516, 530 (1945) (“It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction”); *id.* at 534 (recognizing workers’ “right fully and freely to discuss and be informed”); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (“The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them.”). The government therefore “may not constitutionally [] abridge[]” “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). The Supreme Court has recognized this right across “a variety of contexts.” *Kleindienst v. Mandel*, 408 U.S.

753, 762–63 (1972); *see also* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (collecting cases). Relatedly, the Court has emphasized that the “very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Id.* at 642.

These twin principles—the right to receive information and the right to be free from officially prescribed orthodoxy—are endorsed across the Supreme Court’s spectrum of opinions in *Pico*. *See, e.g., Pico*, 457 U.S. at 866 (plurality opinion) (“[W]e have recognized that ‘the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.’” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965))); *id.* at 870 (“[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom.” (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))); *id.* at 879 (Blackmun, J., concurring in part and concurring in the judgment) (“[O]ur precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.”); *id.* at 907 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting) (“cheerfully conceded[ing]” that the school board’s discretion in selecting materials for its libraries “may not be exercised in a narrowly partisan or political manner” because “[o]ur

Constitution does not permit the official suppression of *ideas*” (quoting *id.* at 870–71 (plurality opinion))).

Animated by these core principles, the four-Justice plurality⁶ explained:

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

Id. at 871 (plurality opinion) (footnote omitted). Justice Blackmun reiterated this point in his separate concurrence: “[W]e strike a proper balance here by holding that school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials’ disapproval of the ideas involved.” *Id.* at 879–90 (Blackmun, J., concurring in part and concurring in the judgment).

For more than forty years, these First Amendment principles have guided courts around the country, including our own. In *Campbell*, a unanimous panel of our court faithfully and efficiently applied *Pico* to hold that “the key inquiry in a [school library] book removal case is the school officials’ substantial motivation in

⁶ Justice Brennan’s plurality opinion was joined fully by Justices Marshall and Stevens. Justice Blackmun joined all of the plurality opinion except for Part (II)(A)(1).

arriving at the removal decision.” 64 F.3d at 190 (Wiener, J., joined by Wisdom and King, JJ.).

Similarly, the Third Circuit has concluded:

Our review of the Supreme Court’s decisions confirms that the First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the positive right of public access to information and ideas. *Pico* signifies that, consistent with other First Amendment principles, the right to receive information is not unfettered and may give way to significant countervailing interests. At the threshold, however, this right, first recognized in *Martin* and refined in later First Amendment jurisprudence, includes the right to some level of access to a public library, the quintessential locus of the receipt of information.

Kreimer v. Bureau of Police, 958 F.2d 1242, 1255 (3rd Cir. 1992).

Yet now, forty years after *Pico*, and thirty years after *Campbell*, our court nullifies both. The majority insists through repetition, but little analysis, that library patrons cannot possibly enjoy First Amendment protections in the context of book removals because trying to enforce such protection “would be a nightmare.” *Ante*, at 2; *see also, e.g., id.* at 2–3, 20–22, 26. As a matter of common sense, it is simply untrue that the direction provided by the Supreme Court in *Pico*, and applied by our court in *Campbell*, has been unworkable.⁷ *Campbell* itself

⁷ The majority seems to suggest that, because “[o]ur court rarely cites *Campbell* and has never applied it” until the instant

identifies certain helpful facts for distinguishing between constitutional collection management and unconstitutional denial of access to ideas:

[W]e are moved to observe that, in light of the special role of the school library as a place where students may freely and voluntarily explore diverse topics, the School Board's non-curricular decision to remove a book well after it had been placed in the public school libraries evokes the question whether that action might not be an unconstitutional attempt to "strangle the free mind at its source." That possibility is reinforced by the summary judgment evidence indicating that many of the School Board members had not even read the book, or had read less than its entirety, before voting as they did Moreover, we note that the School Board's failure to consider, much less adopt, the recommendation of the two previous committees to restrict the Book's accessibility to eighth-graders with written parental permission but to leave the Book on the library shelf—in apparent disregard of its own outlined procedures—has the appearance of "the antithesis of those procedures that might

case, it must not have provided useful guidance for librarians to avoid controversy over book curation. *Ante*, at 27. However, that conclusion does not follow logically from its premise. On the contrary, the lack of substantial post-*Campbell* litigation suggests, if anything, that *Campbell* provides a workable standard for libraries, and that it has done so for thirty years. It is commendable that *Campbell*'s rule applying *Pico* avoids litigation, rather than engendering it. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

tend to allay suspicions regarding [the School Board's] motivations.”

Campbell, 64 F.3d at 190–91 (footnotes omitted) (first quoting *Barnette*, 319 U.S. at 637; and then quoting *Pico*, 457 U.S. at 875 (plurality opinion)).

The *Pico–Campbell* standard has worked for decades—without prompting significant litigation or accusations of federal court library takeovers—and the majority’s legion of rhetorical questions does not establish otherwise.⁸ Regardless, the mere fact that a question of constitutional law may be difficult, or that First Amendment litigation, like many bodies of law, tasks judges and jurors with discerning purpose or motive, is hardly unexpected or menacing. All legal rules have their nuances when applied to novel factual contexts, but it is our role to resolve those complexities to the best of our abilities. We cannot shirk our responsibility simply because some members of our court hypothesize that First Amendment lines may be difficult to draw.

For decades, the Supreme Court’s judgment in *Pico*—faithfully applied by our court in *Campbell*—has prevented undue federal court intervention in the operation of libraries. Nonetheless, our court today discards the durable *Pico* decision as essentially

⁸ Nor do professions of disbelief. See, e.g., *Little*, 103 F.4th at 1159 (dissent) (“The commission hanging in my office says ‘Judge,’ not ‘Librarian.’ Imagine my surprise, then, to learn that my two esteemed colleagues have appointed themselves co-chairs of every public library board across the Fifth Circuit.”); *id.* at 1160 (“Henceforth, these rules will govern each and every public librarian in this circuit, each and every time she takes a book out of circulation. And who will apply these rules? Federal judges, naturally. You’ve heard of the Soup Nazi? Say hello to the Federal Library Police.” (footnote omitted))

meaningless, relying on a footnote in *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (Former 5th Cir. 1982) (en banc). But this effort to displace Supreme Court law with reference to our court’s half-century-old dicta, in a footnote, in an inapposite case, is itself misplaced. The court’s primary observation in *Muir* was simply that *Pico* addressed a different issue than the one there, a public television station’s decision not to broadcast a previously scheduled program: “*Pico* is a case involving a constitutional attack upon the removal of books from a school library which, as discussed in the text, is quite different from the situation confronting us.” *Id.* at 1045 n.30; *see also id.* (“[W]e conclude that *Pico* is of no precedential value as to the application of the First Amendment to these issues.” (emphasis added)); *id.* (“While the majority of the Court entered judgment in *Pico* resulting in a remand for the development of the record, this was necessarily based upon the status of the record and the issues presented in the case. Here, we are satisfied that the record before us adequately presents the issues.”); *id.* at 1045 (“School libraries are distinguishable from broadcast stations in a number of important ways.”).⁹ The *Muir* decision had nothing

⁹ In obvious contrast, the facts of this case map closely onto the facts before the Supreme Court in *Pico*, though in the more First Amendment-protective *public* library context. In *Pico*, the high school library had removed nine books, including *Slaughterhouse-Five* by Kurt Vonnegut, Jr., *Best Short Stories by Negro Writers*, edited by Langston Hughes, and *Black Boy* by Richard Wright. *Pico*, 457 U.S. at 856 n.3. The school district’s justification for removal was that the books were “anti-American, anti-Christian, anti-Sem[itic], and just plain filthy.” *Id.* at 857; *cf. Little*, 2023 WL 2731089, at *10 (“Wallace and Wells had contacted Defendants Cunningham and Moss with a list of books they considered inappropriate, labeling them ‘pornographic filth’ and ‘CRT and LGBTQ books’ and advocating for their removal

to do with libraries, much less book removals, and it predates our court's straightforward, unanimous application of *Pico* in the library book removal context in *Campbell*.

It is correct that Justice White's opinion in *Pico* is the narrowest concurrence, *ante*, at 16, and therefore provides "the holding of the Court." *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).¹⁰ But the majority is wrong to suggest that

and relocation."). Steven Pico and four others, all of whom were then students, challenged the decision, alleging that the books were removed because "passages in the books offended [the Board of Education's] social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value." *Pico*, 457 U.S. at 858–59; *cf. Little*, 2023 WL 2731089, at *7 ("[Plaintiffs] allege that Defendants removed, ordered the removal, or pursued the removal of the books at issue 'because they disagree with their political viewpoints and dislike their subject matter.'").

¹⁰ *Marks* itself was a First Amendment case that required the Court to determine the import of the Court's decision in another First Amendment case, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). *See Marks*, 430 U.S. at 192–94. Like *Pico*, *Memoirs* lacked any single opinion joined by a majority of the Court. *See id.* at 192. *See generally Memoirs*, 383 U.S. 413 (including a three-Justice plurality opinion, a single-Justice concurring opinion, concurrences without opinion in the judgment by two Justices based on their dissents in prior cases, and three single-Justice dissenting opinions). The court of appeals in *Marks* had "apparently concluded from this fact that *Memoirs* never became the law." *Marks*, 430 U.S. at 192. But the Supreme Court rejected this reasoning. Observing that, in *Memoirs*, the three-Justice plurality opinion and the respective positions of the three separately concurring Justices all reached the same result but applied different standards, the Court in *Marks* held that the narrowest opinion (the plurality's) "constituted the holding of the Court and provided the governing standards." *Id.* at 193–94.

Justice White’s opinion “said nothing about the First Amendment.” *See ante*, at 16. On the contrary, Justice White’s opinion confirms the same conclusion about the threshold First Amendment inquiry as the *Pico* plurality, whose judgment Justice White joined: that determining a state’s motivation is necessarily anterior to assessing whether a book removal violates the First Amendment. *Pico*, 457 U.S. at 883 (White, J., concurring in the judgment) (expressing a preference for “findings of fact and conclusions of law . . . made by the District Court” on the “unresolved factual issue” of “the reason or reasons underlying the school board’s removal of the books” prior to conclusively deciding the First Amendment issues).

Unlike the plurality, Justice White chose not to expound on what motivation would withstand First Amendment scrutiny until after the district court had conducted this fact-intensive motivation analysis at trial. But he agreed with the plurality, affirming the Second Circuit, that the motivation inquiry presented an issue of fact that was material to the constitutional analysis, precluding summary judgment. That is the common denominator between the plurality opinion and Justice White’s concurrence and, therefore, it is *Pico*’s binding precedent.¹¹ *See Whole Woman’s Health*

Marks therefore offers us a timely reminder that it is critical to parse competing Supreme Court opinions with great care and that First Amendment cases frequently present complex questions with which courts must grapple without decrying them a “nightmare” to apply. *See ante*, at 2.

¹¹ *Accord Case v. Unified Sch. Dist. No. 233*, 895 F. Supp. 1463, 1468 (D. Kan. 1995) (“Justice White joined in the judgment, but preferred to put off announcing a legal rule until the trial court determined why school officials removed the books. What clearly emerges from the *Pico* decision is that the trial court must determine the motivation of the school officials in removing the

v. Paxton, 10 F.4th 430, 440 (5th Cir. 2021) (“We have clarified that [the *Marks* rule] ‘is only workable where there is some common denominator upon which all of the justices of the majority can agree.’” (quoting *United States v. Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013))), *abrogated on other grounds by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022). Justice White’s opinion reflects the broad consensus that, while some—likely most—motivations for removing library books may be constitutional, some are not. Because the government’s motivation for removing a book is a fact question, Justice White took the judicially restrained approach of remanding for fact-finding prior to resolving the ultimate constitutional analysis. Our court, as an inferior court, is bound by “the result” of a Supreme Court case just as much as “those portions of the opinion” that might be offered in its support. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). The “precise issue[]” of whether we may render a final judgment rather than remanding has accordingly been resolved by the Supreme Court, and we are not at liberty to “com[e] to opposite conclusions.” *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Finally, even if we were to follow the majority’s approach and ignore the substance of Justice White’s concurring opinion (which we plainly should not), a majority of the Supreme Court in *Pico* firmly rejected the abnegation of the First Amendment that our court adopts today. Four concurring Justices made explicit that a library’s “discretion may not be exercised in a narrowly partisan or political manner” because “[o]ur

book. Five of the justices in *Pico* agreed that some motivations would be unconstitutional.”); *Crookshanks ex rel. C.C. v. Elizabeth Sch. Dist.*, No. 1:24-CV-03512-CNS-STV, 2025 WL 863544, at *10 (D. Colo. Mar. 19, 2025) (same).

Constitution does not permit the official suppression of *ideas*.” *Pico*, 457 U.S. at 870–71 (Brennan, J., joined by Marshall, Stevens, and Blackmun, JJ.). Crucially, three dissenting Justices—led by then-Justice Rehnquist, who was joined by Chief Justice Burger and Justice Powell—“cheerfully concede[d]” the same. *Id.* at 907 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting). And, as noted, Justice Blackmun took pains to highlight Justice Rehnquist’s “cheerful[] conce[ssion].” *Id.* at 877–78 (Blackmun, J., concurring in part and concurring in the judgment). Our court today not only reaches a result directly contrary to *Pico*, but also casts aside the reasoning of a supermajority of the Court in the process.

B

It is the Supreme Court’s primary prerogative, not ours, to revisit and modify its prior interpretations and applications of our Constitution. It is our responsibility as an inferior court to study Supreme Court decisions closely and to apply those decisions as faithfully as we can, regardless of whether they are expansive or restrained. That is what our court did in *Campbell*. And the Supreme Court is practiced at treading lightly, especially on constitutional issues, especially where free speech rights are implicated, and especially before exempting government action from First Amendment constraint.

Justice Brandeis explained in his celebrated concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), that “[t]he Court will not ‘anticipate a question of constitutional law in advance of the necessity of deciding it,’ nor ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,’” *id.* at 346–47 (Brandeis, J., concurring) (quoting *Liverpool, N.Y.*

& *P.S.S. Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885)). In the ninety years since, judicial restraint has remained a paramount principle in constitutional adjudication. *See, e.g., Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 71–72 (1961) (Frankfurter, J.) (“No rule of practice of this Court is better settled than ‘never to anticipate a question of constitutional law in advance of the necessity of deciding it.’” (quoting *Liverpool*, 113 U.S. at 39)); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 510 (1975) (Rehnquist, J., dissenting) (quoting *Ashwander*, 297 U.S. at 346–47 (Brandeis, J., concurring)); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (Thomas, J.) (same); *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948) (emphasizing that “it [is] the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings”); *In re Cao*, 619 F.3d 410, 440 (5th Cir. 2010) (en banc) (Jones, J., concurring in part and dissenting in part) (“The majority hardly need reminding of the cardinal principle of constitutional adjudication that a court should address the case presented by the facts before it rather than broad, hypothetical scenarios.” (citing *Ashwander*, 297 U.S. at 346–47 (Brandeis, J., concurring))).

With Justice White’s concurrence, the Supreme Court’s thoughtfully restrained judgment in *Pico* avoids constitutional conjecture, but it is no less binding for that restraint. That the high Court’s careful judgment demanding final fact-finding is neither vast nor renunciatory should not embolden the United States Court of Appeals for the Fifth Circuit to proclaim it a nullity and to sally forth ourselves against the First Amendment.

The authority to adjust *Pico*—whether to extend it further or to change course—lies with the Supreme Court alone. Until that time, the Court’s judgment in *Pico* requires us to permit the district court to adjudicate conclusively whether Defendants’ substantial motivation for removing books from the Llano County public library system was not to “weed” according to routine, non-discriminatory considerations, such as inaccuracy or physical damage,¹² but rather to censor what Defendants deemed “inappropriate” ideas and information. *See Pico*, 457 U.S. at 883–84 (White, J., concurring in the judgment).

In its effort to discard *Pico*, the majority seems to lose sight of the question in front of us: whether the district court abused its discretion by granting Plaintiffs’ motion for a preliminary injunction. Indeed, the majority concedes by silence that the district court did *not* clearly err in finding that Defendants’ removal decisions likely were motivated by discrimination against certain ideas and a desire to limit access to those ideas, not just for themselves, but for all

¹² Rather than address the district court’s thorough fact finding as to Defendants’ motivations and actions in this case, the majority cites various library weeding guides and hypothesizes that their guidance “is unmistakably *viewpoint* discrimination” and, therefore, that it “cannot be the law” that this guidance violates the First Amendment because the “First Amendment does not force public libraries to have a Flat Earth Section.” *Ante*, at 23 (quoting *Little*, 103 F.4th at 1167 (dissent)). This analysis misapprehends the issue by getting the constitutional analysis backward. If preexisting, standardized weeding guidelines were ever used to justify the removal of books based on official disapproval of a particular “idea for partisan or political reasons,” thereby sanctioning “state discrimination *between* ideas,” *Pico*, 457 U.S. at 878–79 (Blackmun, J., concurring in part and concurring in the judgment), it is surely the unconstitutional removal decisions that should be overturned, not the Constitution.

others.¹³ Nonetheless, our court instead announces a new abridgement of the First Amendment, holding that public library patrons may not challenge even politically motivated book removals. Hereafter across Texas, Louisiana, and Mississippi, it simply does not matter legally if public officials, motivated by political hostility, target and remove books they deem inappropriate or offensive, in order to deny the public access to the information and ideas therein. The majority's holding therefore usurps the judicial process at each end, arrogating to our court the district court's authority to adjudicate critical fact questions in the first instance (in contravention of *Pico*), and also arrogating to ourselves the Supreme Court's sole authority to revisit its time-tested First Amendment jurisprudence.

C

Even more fundamentally, our court's holding today is incompatible with the “fixed star [of] our constitutional constellation” that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Barnette*, 319 U.S. at 642; *see also id.* at 638 (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy”); *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1327 (11th Cir. 2017) (en banc) (Pryor, J., concurring) (“The First Amendment is a counter-majoritarian bulwark against tyranny. . . . No person is always in the majority, and our Constitution places

¹³ When testifying at the district court's two-day evidentiary hearing, Director Milum confirmed the important and intuitive point that “no parent has the authority in a library system to control what somebody else's children read.”

out of reach of the tyranny of the majority the protections of the First Amendment.”).

By eliminating the public’s right to challenge government censorship of public library books, our court’s holding becomes a Trojan horse for the government speech doctrine that fails to command a majority in its own name.¹⁴ The majority opinion elucidates no

¹⁴ As counsel for Defendants acknowledged during the en banc oral argument, the majority’s “no right to receive” holding collapses into its “government speech” position, creating a circuit split with the Eighth Circuit. *See* Oral Argument at 13:56–14:01, https://www.ca5.uscourts.gov/OralArgRecordings/23/23-50224_9-24-2024.mp3 (Attorney Jonathan Mitchell: “I think there’s no way to overrule *Campbell* without creating a circuit split with the Eighth Circuit on this [government speech] question.”). And although the primary opinion does not command a majority for converting free speech into government speech, it nonetheless devotes twice as many pages to this project as it does to the majority’s rejection of the well-established First Amendment “right to receive.” Yet no court, anywhere in the country, has ever held that the government’s decision to remove books from a public library constitutes government speech, and in fact this position has been firmly rejected by the Eighth Circuit. *See GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 114 F.4th 660, 667–68 (8th Cir. 2024). It is therefore unsurprising that this position is not openly embraced by a majority of this court; nor is it surprising that Defendants themselves declined to make this argument at the panel stage, thus waiving the issue despite the primary opinion’s assertions to the contrary. *See Lucio v. Lumpkin*, 987 F.3d 451, 478 (5th Cir. 2021) (en banc) (“The maxim is well established in this circuit that a party who fails to make an argument before *either* the district court *or* the original panel waives it for purposes of en banc consideration.” (emphasis added) (quoting *Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 349 (5th Cir. 2005) (en banc))).

This attempted First Amendment collapse—supplanting free speech with government speech—contradicts multiple Supreme Court decisions. *See Matal v. Tam*, 582 U.S. 218, 236–37 (2017); *Shurtleff v. City of Bos.*, 596 U.S. 243, 252, 257–58 (2022). In

functional difference between its holding that the public has no First Amendment right to challenge the government's removal of public library books, no matter the reason, and its ostensible plurality holding that the government may "speak" by removing library

Shurtleff, the Court explained that the government speech inquiry is a "holistic" one, and that relevant factors include: "the history of the expression at issue"; "the public's likely perception as to who (the government or a private person) is speaking"; and "the extent to which the government has actively shaped or controlled the expression." *Id.* at 252. As explained by the Eighth Circuit, none of these factors supports a conclusion that library book removals constitute government speech. *See Reynolds*, 114 F.4th at 667–68. Across multiple "government speech" cases, Justice Alito has emphasized the narrowness of the government speech doctrine and the extreme care with which courts must apply it. *See, e.g., Matal*, 582 U.S. at 235 (emphasizing that the Supreme Court "exercise[s] great caution before extending [its] government-speech precedents" and warning that the government speech doctrine "is susceptible to dangerous misuse"); *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009) (describing as "legitimate" the "concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint"); *Shurtleff*, 596 U.S. at 262 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the judgment) (writing separately to articulate his view of "the real question in government-speech cases: whether the government is *speaking* instead of regulating private expression" (emphasis in original)); *id.* at 263–64 (admonishing that the government speech doctrine may be "used as a cover for censorship," and that "[c]ensorship is not made constitutional by aggressive and direct application"); *id.* at 267 ("[G]overnment speech occurs if—but only if—a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech"); *id.* at 268–69 ("Naked censorship of a speaker based on viewpoint, for example, might well constitute 'expression' in the thin sense that it conveys the government's disapproval of the speaker's message. But plainly that kind of action cannot fall beyond the reach of the First Amendment.").

books for any reason, without First Amendment restraint. Turning freedom of speech into government speech is more than a sleight of hand. It results from the majority ignoring preliminary facts found by a district court and repudiating half-century-old Supreme Court authority.

Having done so, the majority grounds its holding that library patrons “cannot invoke the right to receive information to challenge” book removals as a matter of law on a faulty premise: that the “First Amendment does not give you the right to demand” that the government “keep” particular books in the library. *Ante*, at 18. This construction grossly misapprehends the right identified in *Pico* and *Campbell* and the right asserted by Plaintiffs here. It is not an affirmative right to demand access to particular materials. Rather, consistent with the First Amendment’s text and long-standing Supreme Court doctrine, Plaintiffs assert a negative right against government censorship that is targeted at denying them access to disfavored, even outcast, information and ideas.

The First Amendment does not require Llano County either to buy and shelve *They Called Themselves the K.K.K.*, or to keep *They Called Themselves the K.K.K.* in its collection in perpetuity; but it does prohibit Llano County from removing *They Called Themselves the K.K.K.*, or books with similar ideas and information, because it seeks to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *See Barnette*, 319 U.S. at 642. As Plaintiffs put it, the *Pico–Campbell* standard “regulates the *way* in which books are removed, not which books a library shelves.” It is for this reason that the government’s substantial motivation for *removing*

books is the critical inquiry, as recognized by the high Court in *Pico*.

Because the majority purports to rely heavily on the dissents and Justice Blackmun's concurrence in *Pico* to support its renunciation of First Amendment right-to-receive caselaw, it is valuable to explicate how the majority misreads each of these opinions.

First, Justice Blackman, who concurred in all but one section of the plurality opinion and wrote separately only to explain his "somewhat different perspective on the nature of the First Amendment right involved," *Pico*, 457 U.S. at 876 (Blackmun, J., concurring in part and concurring in the judgment), made clear that he viewed the First Amendment right in terms of the government's obligation to "not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons." *Id.* at 879. He declined to reach the "right to receive" question insofar as it could be taken to imply an "affirmative obligation to provide *students* with information or ideas." *Id.* at 878 (emphasis added). In other words, though he traveled a different analytical road, Justice Blackmun joined the plurality's substantive conclusion that the government "rightly possess[es] significant discretion to determine the content of [its] school libraries. But that discretion may not be exercised in a narrowly partisan or political manner." *Id.* at 870 (Brennan, J., joined by Marshall, Stevens, and Blackmun, JJ.). Justice Blackmun thus agreed with the rest of the plurality—and with Justice White—that the government's motivation for removing books from even a school library was critical to the First Amendment inquiry:

In my view, we strike a proper balance here
by holding that school officials may not

remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved. It does not seem radical to suggest that state action calculated to suppress novel ideas or concepts is fundamentally antithetical to the values of the First Amendment.

Id. at 879–80 (Blackmun, J., concurring in part and concurring in the judgment).

The majority's reliance on the dissents in *Pico* is just as confounding because the dissenting Justices' rejection of the plurality's "right to receive information" focused explicitly on their view that *students* do not enjoy such a right in the *school* context because of schools' inculcative function. *See id.* at 893 (Burger, C.J., dissenting) ("[T]he plurality concludes that the Constitution *requires* school boards to justify to its teenage pupils the decision to remove a particular book from a school library. I categorically reject this notion that the Constitution dictates that judges, rather than parents, teachers, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom."); *id.* (Powell, J., dissenting) ("The plurality opinion today rejects a basic concept of public school education in our country: that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools."); *id.* at 911 (Rehnquist, J., dissenting) ("It is true that the Court has recognized a limited version of th[e] right [of access to information] in other settings But not one of these cases concerned or even purported to discuss elementary or secondary educational institu-

tions.”); *id.* at 914 (“The idea that such students have a right of access, *in the school*, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education.”); *id.* at 921 (O’Connor, J., dissenting) (“If the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it.”); *see also Kreimer*, 958 F.2d at 1254–55 (“The dissenters in *Pico* made no contention that the First Amendment did not encompass the right to receive information and ideas, but merely argued that the students could not freely exercise this right in the public school setting in light of the countervailing duties of the School Board.”).

The dissenting Justices in *Pico* explicitly, repeatedly distinguished *school* libraries from *public* libraries, arguing that it was not impermissibly restrictive to deny *students* the right to receive information in the *school* library context because the books would remain available in *public* libraries. *See id.* at 886 (Burger, C.J., dissenting) (“Here, however, no restraints of any kind are placed on the students. They are free to read the books in question, which are available at public libraries and bookstores; they are free to discuss them in the classroom or elsewhere.”); *id.* at 913 (Rehnquist, J., dissenting) (“Our past decisions are thus unlike this case where the removed books are readily available to students and non-students alike at the corner bookstore or the public library.”); *id.* at 914–15 (“Justice Brennan turns to language [in decisions] about *public* libraries . . . and to language about universities and colleges Unlike university or

public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas.”); *see also id.* at 881 (Blackmun, J., concurring in part and concurring in the judgment) (“[S]urely difficult constitutional problems would arise if a State chose to exclude ‘anti-American’ books from its public libraries—even if those books remained available at local bookstores.”).

Justice Rehnquist’s analysis directly juxtaposed the “role of government as educator . . . with the role of government as sovereign.” *Id.* at 909 (Rehnquist, J., dissenting). “When it acts as an educator, at least at the elementary and secondary school level,” Justice Rehnquist explained, “the government is engaged in inculcating social values and knowledge in relatively impressionable young people.” *Id.* Justice Rehnquist underscored that the government-as-educator role was limited in scope and did *not* extend to the shelves of the public library:

The government as educator does not seek to reach beyond the confines of the school. Indeed, following the removal from the school library of the books at issue in this case, the local public library put all nine books on display for public inspection.

Id. at 915. Justice Blackmun highlighted this point in his concurrence:

[W]hile it is not clear to me from Justice Rehnquist’s discussion whether a State operates its public libraries in its “role as sovereign,” surely difficult constitutional problems would arise if a State chose to exclude “anti-

American” books from its public libraries—even if those books remained available at local bookstores.

Id. at 881 (Blackmun, J., concurring in part and concurring in the judgment).

Here, importantly, the library at issue *is* a public library, not a school library. Yet the majority fails even to acknowledge the distinction which the dissenting Justices in *Pico* took great care to emphasize.¹⁵

¹⁵ Notably, at the panel stage in the instant case, the dissent distinguished between school and public libraries but, misreading *Campbell*, urged the *opposite* conclusion from that reached by the dissenters in *Pico*, namely that students enjoy *more* First Amendment protection in the school library context than the general public enjoys in the public library context:

Campbell addressed the “unique role of the school library.” It therefore had to balance “public school officials[] . . . broad discretion in the management of school affairs” against “students’ First Amendment rights.” . . . *Campbell*’s competing considerations are absent here. A county library does not implicate the “unique” First Amendment concerns at play in a public school. . . . So, there is no basis for transplanting *Campbell* into the realm of public libraries.

Little, 103 F.4th at 1170 (dissent) (citation omitted) (quoting *Campbell*, 64 F.3d at 187–88). But *Campbell* (following *Pico*) highlighted the “unique” nature of the school library to explain how students enjoy greater First Amendment freedoms in the school library than they do *in the classroom*. *Campbell*, 64 F.3d at 188 (quoting *Pico*, 457 U.S. at 869). Neither *Campbell* nor the *Pico* plurality opinion quoted therein suggest that students enjoy more First Amendment protections in school libraries as compared to public libraries. On the contrary, both opinions acknowledge the government’s unique interest in the school context but focus on the difference between a school library, where students may engage in free inquiry “no less than any other public library,” *Pico*, 457 U.S. at 868, and a school

The underlying premise—that a student’s First Amendment interests while at school must be balanced with the school’s critical inculcating function—appears often in the Supreme Court’s First Amendment jurisprudence in the school context, including in every opinion in *Pico*. See, e.g., *Pico*, 457 U.S. at 864 (plurality opinion); *id.* at 876–77 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 883 (White, J., concurring in the judgment); *id.* at 889 (Burger, C.J., dissenting); *id.* at 896 (Powell, J., dissenting); *id.* at 913–14 (Rehnquist, J., dissenting); *id.* at 921 (O’Connor, J., dissenting); see also *Barnette*, 319 U.S. at 637 (describing “Boards of Education” as “hav[ing], of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (“Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.”). In contrast, Defendants point to no case law identifying an inculcative interest with which the First Amendment rights of a public library patron must be reconciled.

As a public library, rather than a school library, the Llano County library system serves patrons of all ages. Today, a majority of our court sanctions government censorship in every section of every public library in our circuit. As counsel for Defendants acknowledged in oral argument, there is nothing to stop government officials from removing from a public library every book referencing women’s suffrage, our country’s civil rights triumphs, the benefits of firearms ownership,

classroom, where they must follow an established curriculum. See *id.* at 869; *Campbell*, 64 F.3d at 188.

the dangers of communism, or, indeed, the protections of the First Amendment.¹⁶

D

The majority—apparently “amuse[d]” by expressions of concern regarding government censorship—disparages such concerns as “overcaffeinated” because, if a library patron cannot find a particular book in their local public library, they can simply buy it. *Ante*, at 4.

This response is both disturbingly flippant and legally unsound.

First, as should be obvious, libraries provide critical access to books and other materials for many Americans who cannot afford to buy every book that draws their interest,¹⁷ and recent history demonstrates that

¹⁶ When asked during the en banc oral argument about his “limiting principle” and specifically whether a public library could, for example, remove all books about hunting because they contain harmful violence, counsel for Defendants replied:

I believe they could under the Speech Clause. I would not support that as a matter of policy, and I would hope there would be political constraints in place that would deter them from doing that sort of a thing.

Oral Argument at 9:48–10:13. This reliance on “political constraints” lays bare the disconnect between our court’s holding today and the counter-majoritarian promise of the First Amendment. *See Barnette*, 319 U.S. at 638 (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . .”).

¹⁷ *See* Sonia Sotomayor, *My Beloved World* 47–48 (2016) (“The Parkchester Library was my haven. . . . My mother had subscribed to *Highlights* for Junior and me, and *Reader’s Digest* for herself, but by now I was reading whole issues of the *Digest* myself, cover to cover. . . . Sometimes when a story caught my imagination, I would search the library for the original book—I understood that these were excerpts or abridgments—but I never had any luck, and that mystified me. Now I realize that a tiny

public libraries easily become the sites of frightful government censorship.¹⁸

More significantly, the flippancy mischaracterizes the text and promise of the First Amendment. The First Amendment question presented by Plaintiffs' allegations—as in both *Pico* and *Campbell*—is *not* whether a library has an affirmative obligation to add a particular book to its collection whenever a patron wants it. Plaintiffs “have not sought to compel [Defendants] to add to the [public] library shelves any books that [patrons] desire to read.” *Pico*, 457 U.S. at 862. That is a red herring dragged throughout the majority opinion.¹⁹

public library in a poor neighborhood would be unlikely to receive new releases.”).

¹⁸ See, e.g., James Conaway, *Judge: The Life and Times of Leander Perez* 112–13 (1973) (District Attorney and former judge Leander Perez “spent the months before the desegregation deadline in Baton Rouge, after ordering the closing to blacks of library services in Plaquemines [Parish] and the removal of all books mentioning the United Nations (supposedly a nest of ‘Zionists’) or published by UNESCO, ‘showing a liberal viewpoint,’ or speaking favorably of the Negro race. ‘Wipe that filth from the shelves,’ he commanded.”).

¹⁹ Regardless, book acquisitions demand different considerations than book removals. As Justice Blackmun remarked in *Pico*:

[T]here is a profound practical and evidentiary distinction between the two actions: “removal, more than failure to acquire, is likely to suggest that an impermissible political motivation may be present. There are many reasons why a book is not acquired, the most obvious being limited resources, but there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity.”

Pico, 457 U.S. at 878 n.1 (Blackmun, J., concurring in part and concurring in the judgment) (quoting *Pico v. Bd. of Educ.*, 638

The relevant question is a more sobering one, implicating the very text of the First Amendment's protection against the abridgment of free speech: whether government officials may restrict—abridge—the spectrum of ideas available to the public by culling books from public library shelves, simply because those officials find the books' ideas inappropriate, offensive, or otherwise undesirable. The answer is: “No.” *See* U.S. Const. amend. I (“[The government] shall make no law . . . abridging the freedom of speech”); *Pico*, 457 U.S. at 877 (Blackmun, J., concurring in part and concurring in the judgment) (concluding that the Court's prior decisions concerning students' First Amendment rights “yield a general principle: the State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficiently compelling reasons”); *Campbell*, 64 F.3d at 188 (incorporating the *Pico* plurality's recognition that “school officials are prohibited from exercising their discretion to 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”

F.2d 404, 436 (2d Cir. 1980) (Newman, J., concurring in the result)). Justice Souter offered similar sentiments in another case: “Quite simply, we can smell a rat . . . when a library removes books from its shelves for reasons having nothing to do with wear and tear, obsolescence, or lack of demand. . . . The difference between choices to keep out and choices to throw out is [] enormous, a perception that underlay the good sense of the plurality's conclusion in [*Pico*].” *United States v. Am. Library Ass'n*, 539 U.S. 194, 241–42 (2003) (Souter, J. dissenting). And the two situations are distinct: book removal necessarily follows book acquisition, such that any book that is removed has passed the library's initial purchase assessment and expenditure.

(cleaned up)). The government may not order books removed from public libraries out of hostility to disfavored ideas and information.

Let me finish with the practical reminder that the Supreme Court’s near-half-century-old *Pico* test, applied by us in *Campbell*, has proven sensible and durable, causing neither confusion nor excessive federal court intrusion. The *Pico* rationale—which applies with even greater force in the public library context—contains ample flexibility for public libraries to continue to make collection management decisions based on any number of preexisting and standardized constitutional considerations, including accuracy, currentness, and physical condition. Public libraries importantly serve patrons of all ages, and they have broad latitude to provide safe spaces for parents to encourage a love of learning in their children, while respecting each parent’s prerogative to guide their own child’s public library reading and, at the same time, without encroaching on every other patron’s First Amendment rights. To repeat what is fundamental, Director Milum confirmed that “no parent has the authority in a library system to control what somebody else’s children read.”

Indeed, public libraries of course are free to organize their books in a manner that ensures patrons are directed to age-appropriate materials. Many, if not all, public libraries already do this by maintaining distinct sections for children and for young adults, while the remainder of the library is geared toward adults. Furthermore, the New Orleans Public Library, for example, provides parents and guardians with additional oversight by allowing them to adjust check-out permissions for their children. *See* La. Rev. Stat. § 25:225 (2023). Parents can and should review what

their children read and make decisions regarding what public library materials are appropriate for their children. But that is each parent's prerogative for their own children. These decisions cannot be dictated by government officials, any more than they can be dictated by other parents, based on their own distaste for ideas they deem "inappropriate." Certainly, government officials cannot constitutionally dictate what ideas are "inappropriate" or "offensive" for *adult* library patrons. Yet this is precisely the government censorship that our court approves today.

* * *

In sum, I would continue to respect the Supreme Court's judgment in *Pico*, as we have for thirty years since *Campbell*, and would hold that the district court here did not clearly err in finding that Defendants' substantial purpose likely was to suppress information and ideas deemed inappropriate or offensive. Thus far, the pre-trial evidence in the record overwhelmingly supports the district court's preliminary conclusion that Director Milum, Judge Cunningham, and Commissioner Moss adopted the motivation of Wallace, Wells, Schneider, and Baskin (who thereafter joined the reconstituted and exclusionary Library Advisory Board), and therefore, that all Defendants were likely motivated by a desire to suppress fellow citizens' access to the ideas contained in the seventeen books at issue.²⁰ Consequently, applying the *Pico*—

²⁰ Supporting evidence, described above, includes: documents demonstrating the close temporal connection between the group's political demands, Judge Cunningham's and Commissioner Moss's active involvement, and Director Milum's ultimate removal of books; testimony from Director Milum that she had not read *any* of the books that she removed directly after receiving Wallace's list; and extensive and untraversed testimony from

Campbell standard, we should neither confirm nor nullify a First Amendment violation, but rather entrust our district judge colleague to resolve facts at trial, informing us all, and especially the citizens and officials of Llano County.

More broadly, the logic of the Supreme Court’s school library decision in *Pico*—that the government may not remove library books with the purpose of denying access to disfavored ideas—applies with even greater force to public libraries, where the government has no inculcating role over its sovereign, the people. The First Amendment, with the high Court as its sentinel,²¹ protects the right of the people to be informed because, as the Framers knew, only an informed and engaged people can sustain self-governance. See Letter from Thomas Jefferson to Richard Price (Jan. 8, 1789), <https://www.loc.gov/exhibits/jefferson/60.html>. Public libraries represent the best of that simple but lofty goal. As spaces “designed for freewheeling inquiry,” *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting), they democratize access to a broad range of often-contradictory ideas and provide fertile ground for our minds to grow.²²

Head Librarian Castelan that Director Milum’s removal of books was not consistent with existing library policies, which “has the appearance of ‘the antithesis of those procedures that might tend to allay suspicions regarding [Defendants’] motivations.’” *Campbell*, 64 F.3d at 190–91 (quoting *Pico*, 457 U.S. at 875).

²¹ See Akhil Reed Amar, *The First Amendment’s Firstness*, 47 U.C. Davis L. Rev. 1015, 1028 (2014) (“Never in history have First Amendment freedoms been protected as vigorously by the Court, and no other set of freedoms today is protected more vigorously.”).

²² See, e.g., Clarence Thomas, *My Grandfather’s Son* 17 (2007) (“I spent countless hours [at the Carnegie Library] immersed in the seafaring adventures of Captain Horatio Hornblower, the

More than anything, public libraries offer every one of us the tools to educate and entertain ourselves, to embrace or reject new ideas, and, above all, to engage and challenge our minds.

As I began this opinion with the words of one President, I will close with the words of another. In 1953, when our country was in the throes of McCarthyism, President Eisenhower addressed Dartmouth College's graduating class:

Look at your country. Here is a country of which we are proud But this country is a long way from perfection—a long way. We have the disgrace of racial discrimination, or we have prejudice against people because of their religion. We have crime on the docks. We have not had the courage to uproot these things, although we know they are wrong. . . .

Don't join the book burners. Don't think you are going to conceal faults by concealing

gridiron exploits of Crazy Legs McBain, and the real-life triumphs of Bob Hayes, the world's fastest man; I also read about the civil-rights movement, of which I still knew next to nothing. I was never prouder than when I got my first library card, though the day when I'd checked out enough books to fill it up came close.”); Sonia Sotomayor, *My Beloved World* 47 (2016) (“My solace and only distraction that summer was reading. I discovered the pleasure of chapter books and devoured a big stack of them. The Parkchester Library was my haven. To thumb through the card catalog was to touch an infinite bounty, more books than I could ever possibly exhaust. My choices were more or less random.”); Ketanji Brown Jackson, *Lovely One* 37–38 (2024) (describing participation in “Library Week performances,” during which her class “act[ed] out passages from books [they] had read together,” as well as performances of *The Wizard of Oz* and *Charlotte's Web*, two books that reportedly have been subject to book removals).

evidence that they ever existed. Don't be afraid to go in your library and read every book, as long as that document does not offend our own ideas of decency. . . .

How will we defeat communism unless we know what it is, and what it teaches, and why does it have such an appeal for men, why are so many people swearing allegiance to it? . . .

[W]e have got to fight it with something better, not try to conceal the thinking of our own people. They are part of America. And even if they think ideas that are contrary to ours, their right to say them, their right to record them, and their right to have them at places where they are accessible to others is unquestioned, or it isn't America.

Dwight D. Eisenhower, Remarks at the Dartmouth College Commencement Exercises (June 14, 1953) (transcript available at <https://www.presidency.ucsb.edu/documents/remarks-the-dartmouth-college-commencement-exercises-hanover-new-hampshire>).

Because I would not have our court "join the book burners,"²³ I dissent.

²³ See Dwight D. Eisenhower, The President's News Conference (June 17, 1953) (transcript available at <https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-488>) ("I am against 'book burning' of course—which is, as you well know, an expression to mean suppression of ideas. I just do not believe in suppressing ideas. I believe in dragging them out in the open and taking a look at them.").

111a

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed June 6, 2024]

No. 23-50224

LEILA GREEN LITTLE; JEANNE PURYEAR;
KATHY KENNEDY; REBECCA JONES; RICHARD DAY;
CYNTHIA WARING; DIANE MOSTER,

Plaintiffs—Appellees,

versus

LLANO COUNTY; RON CUNNINGHAM, *in his official capacity as Llano County Judge*; JERRY DON MOSS, *in his official capacity as Llano County Commissioner*; PETER JONES, *in his official capacity as Llano County Commissioner*; MIKE SANDOVAL, *in his official capacity as Llano County Commissioner*; LINDA RASCHKE, *in her official capacity as Llano County Commissioner*; AMBER MILUM, *in her official capacity as Llano County Library System Director*; BONNIE WALLACE, *in her official capacity as Llano County Library Board Member*; ROCHELLE WELLS, *in her official capacity as Llano County Library Board Member*; RHODA SCHNEIDER, *in her official capacity as Llano County Library Board Member*; GAY BASKIN, *in her official capacity as Llano County Library Board Member*,

Defendants—Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:22-CV-424

Before WIENER, SOUTHWICK, and DUNCAN, *Circuit Judges*.

JACQUES L. WIENER, JR., *Circuit Judge*:

*The dirtiest book in all the world is the expurgated book.*¹

Plaintiffs-Appellees, seven patrons of the Llano County library system (“Plaintiffs”), brought this suit against Defendants-Appellants Llano County, the members of the County’s Commissioners Court, the County’s library system director, and the library board (collectively, “Defendants”). Plaintiffs claim that Defendants violated their First Amendment right to access information and ideas by removing seventeen books based on their contents and messages. The district court granted Plaintiffs’ request for a preliminary injunction, requiring Defendants to return “all print books that were removed because of their viewpoint or content” and enjoining Defendants from “removing any books . . . for any reason during the pendency of this action.” Defendants appeal. For the reasons to follow, we MODIFY the language of the injunction to ensure its proper scope, but otherwise AFFIRM.

I. Facts

Libraries must continuously review their collection to ensure that it is up to date and to make room for

¹ Walt Whitman (1888), *in* HORACE TRAUBEL, WITH WALT WHITMAN IN CAMDEN 124 (1906).

new acquisitions. Like many libraries, the Llano County library system uses the “Continuous Review, Evaluation and Weeding” (“CREW”) process. This is a standardized method of evaluating a library’s collection and removing outdated or duplicated materials (also known as “weeding”), according to objective, neutral criteria. Llano County applies the “MUSTIE” factors in weeding books, as recommended by experts in the field, under which a book is evaluated for whether it is (1) “Misleading and/or factually inaccurate,” (2) “Ugly (worn out beyond mending or rebinding),” (3) “Superseded by a new edition or a better source,” (4) “Trivial (of no discernable literary or scientific merit),” (5) “Irrelevant to the needs and interests of the community,” or (6) “Elsewhere (the material may be easily borrowed from another source).” Weeding decisions are made based on “some combination of these criteria – that is, an item will probably not be discarded based on meeting only one these criteria.”

Llano County’s public library system has three physical branches, respectively located in Llano, Kingsland, and Buchanan Dam. The library also offers access to e-books and audiobooks through a digital service called Bibliotheca. Amber Milum serves as the director of the library system. *See* TEX. LOCAL GOV’T CODE § 323.005(a) (providing for the appointment of a “county librarian”). The library is under the general supervision of the County’s Commissioners Court, which is led by Judge Ron Cunningham. *See id.* § 323.006.

In August 2021, Llano resident Rochelle Wells, together with Eva Carter and Jo Ares, complained to Cunningham about “pornographic and overtly sexual books in the library’s children’s section.” They were

specifically concerned with several books about “butts and farts.” Wells had been checking out those books continuously for months to prevent others from accessing them. As library director, Milum had initially ordered those books because she thought, based on her training, that they were age appropriate. Because of the complaints, Cunningham told Milum to remove the books from the shelves. Commissioner Jerry Don Moss also requested that Milum remove the books, telling her that the next step would be going to court, which would lead to bad publicity, and advising her to “pick her battles.” She followed those instructions and removed the “butt and fart” books from both the library shelves and the catalog.

A few months later, in response to further complaints, Cunningham directed Milum to immediately pull all books from the shelves that “depict any type of sexual activity or questionable nudity.” That direction came via a forwarded email that Cunningham had received from a constituent named Bonnie Wallace. Wallace had sent Cunningham a list of books in the Llano County library system that appeared on Texas Representative Matt Krause’s list of objectionable material, referring to the books as “pornographic filth.” After receiving that list (“the Wallace list”) from Cunningham, Milum pulled the books from the shelves, allegedly to “weed” them based on the traditional MUSTIE factors. Milum testified that she would not have pulled the books had it not been for her receipt of the Wallace list. In fact, she had pulled no other books for review during that time period. By the end of 2021, seventeen books—all on the Wallace List—had been removed from the Llano County library system entirely.

Loosely grouped, those books are:

- Seven “butt and fart” books, with titles like *I Broke My Butt!* and *Larry the Farting Leprechaun*;
- Four young adult books touching on sexuality and homosexuality, such as *Gabi, a Girl in Pieces*;
- *Being Jazz: My Life as a (Transgender) Teen* and *Freakboy*, both centering on gender identity and dysphoria;
- *Caste* and *They Called Themselves the K.K.K.*, two books about the history of racism in the United States;
- Well-known picture book, *In the Night Kitchen* by Maurice Sendak, which contains cartoon drawings of a naked child; and
- *It’s Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health*.

In January 2022, the existing library board was dissolved and a new board was created. Cunningham appointed Wells and Wallace to the new board. The new board implemented several policy changes, including prohibiting Milum from attending their meetings and requiring her to seek approval before purchasing any new books.

Defendants’ attorney donated copies of the seventeen books back to the library after the inception of this litigation. However, today the books are not on shelves nor in the catalog system. Instead, if a patron wishes to access them, he or she must approach the desk and ask the librarian for them. Their existence has not been advertised in any way: Without reading the briefs in this lawsuit, there is no way to know

that the books are available. Defendants characterize this as an “in-house checkout system,” which has been traditionally used to let people read reference books inside the library. However, unlike the seventeen at issue here, those books are available in the catalog.

II. Procedural History

Plaintiffs, seven patrons of the library, brought this suit, alleging that Defendants removed the seventeen books because they disagreed with the books’ content, in violation of the First Amendment.² Plaintiffs sought a preliminary injunction requiring, among other things, that Defendants replace the seventeen books. In response, Defendants moved to dismiss Plaintiffs’ suit under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). After a two-day evidentiary hearing, the district court largely denied Defendants’ motion to dismiss and granted Plaintiffs’ motion for a preliminary injunction.

The district court first held that Plaintiffs had standing to bring the case, including assertion of a constitutional injury in the form of an inability to check out the contested books. The court rejected Defendants’ argument that Plaintiffs’ claims were mooted because they could access the books through Bibliotheca or the in-house checkout system.³ The

² Plaintiffs also brought a due process claim under the Fourteenth Amendment. However, that claim is not at issue in this appeal because the district court did not rely on it in granting the preliminary injunction.

³ Initially, Plaintiffs also brought a claim relating to OverDrive, the online book database that the library had used prior to Bibliotheca. The district court granted Defendants’ motion to dismiss Plaintiffs’ “OverDrive-related claims” because

district court next held that Plaintiffs' complaint adequately pleaded a First Amendment claim upon which relief could be granted, noting that while public libraries have "broad discretion" to curate the content of their collections, this discretion is not absolute. See *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 204 (2003) (plurality opinion) (hereinafter "*ALA*"). The court therefore adopted a standard from our 1995 decision *Campbell v. St. Tammany Parish School Board*, in which we held that libraries may not "remove books from school library shelves 'simply because they dislike the ideas contained in those books.'" 64 F.3d 184, 188 (5th Cir. 1995) (quoting *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (plurality opinion)). "The key inquiry in a book removal case," we wrote in *Campbell*, is whether the government's "substantial motivation" was to deny library users access to "objectionable ideas." *Id.* at 187, 190. The district court held that Plaintiffs had adequately pled that "Defendants' conduct was substantially motivated by a desire to remove books promoting ideas with which [they] disagreed."

The trial court then considered Plaintiffs' application for a preliminary injunction. It held that Plaintiffs were likely to succeed on the merits of their claim, addressing both viewpoint and content discrimination. As to viewpoint discrimination, applying the standard from *Campbell*, the court found that Defendants' "likely motivat[ion]" in removing the books was "a desire to limit access to the viewpoints" with which they disagreed. It saw Defendants' claim that the removals were part of the library's routine

they were mooted by the County's new contract with Bibliotheca.

weeding process as a post hoc and pretextual rationalization. The court also determined that Plaintiffs were likely to succeed on the merits of their First Amendment claim through a content discrimination analysis, as the removal decisions would not survive strict scrutiny.

Finding the remaining preliminary injunction factors to be satisfied, the district court ordered Defendants to “(1) return all print books that were removed because of their viewpoint or content,” including the seventeen books at issue; (2) “update all Llano County Library Service’s catalogs to reflect that these books are available for checkout”; and (3) refrain from “removing any books from the Llano County Library Service’s catalog for any reason during the pendency of this action.”

Defendants timely appealed the district court’s injunction. They also moved to expedite the appeal and for an injunction pending appeal. A motions panel of our court agreed to expedite and carried the motion for an injunction with the case. When this panel was assigned the case, we granted an administrative stay of the district court proceedings pending our decision.

III. Standard of Review

“We review a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law *de novo*.” *Rest. Law Ctr. v. U.S. Dep’t of Lab.*, 66 F.4th 593, 597 (5th Cir. 2023) (citation omitted). A factual finding is not clearly erroneous if it is “plausible in light of the record viewed in its entirety . . . even though we may have weighed the evidence differently.” *Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107, 1116 (5th Cir. 2021) (citation omitted). To obtain the “extraordinary

remedy” of a preliminary injunction, the movant must show “(1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) the injunction will not disserve the public interest.” *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 219 (5th Cir. 2010).

IV. Analysis

The crux of this appeal concerns the appropriate balance between a library’s necessary discretion in making collection decisions and the rights of its patrons to access information and ideas. Although this is undoubtedly a hot-button issue at present, we answered the question in 1995 in *Campbell*, a directly applicable decision that circumscribes the boundaries of our analysis today. The district court, applying the correct standard, did not abuse its discretion in granting Plaintiffs’ request for a preliminary injunction. We explain why below.

A. The First Amendment Limits Public Libraries’ Discretion to Shape Their Collections

We first outline the relevant cases to trace the contours of the First Amendment as it applies to libraries and book removal. While the First Amendment may most famously shield freedom of speech, it also protects “the right to receive information and ideas.” *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). This right is a “necessary predicate to the recipient’s meaningful exercise” of other rights protected by the

First Amendment. *Pico*, 457 U.S. at 867 (plurality opinion).⁴

In *Pico*, the Supreme Court considered whether school officials acted in violation of the First Amendment when they removed what critics called “just plain filthy” books from public school library shelves. *Id.* at 857 (plurality opinion). A plurality of the Court observed that, because students do not “shed their constitutional rights . . . at the schoolhouse gate,” school officials must discharge their discretionary functions “within the limits and constraints of the First Amendment.” *Id.* at 865 (plurality opinion) (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969)). The Court held that while school boards have discretion to “determine the content of their school libraries,” such discretion “may not be exercised in a narrowly partisan or political manner.” *Id.* at 870 (plurality opinion). School officials “may not remove books from school library shelves simply because they dislike the ideas contained in those

⁴ The dissent asserts that *Stanley*’s “right to receive information and ideas” is only relevant in a private context. It is true that the only quasi-binding precedent to apply this right to public libraries is one of *Pico*’s several opinions. Note, however, that this court has applied *Stanley*’s rule in the context of prison libraries, see *Mann v. Smith*, 796 F.2d 79, 83 n.3 (5th Cir. 1986), and other circuits have applied it to public libraries, see *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992). And regardless, the Supreme Court has applied *Stanley* in various other non-private contexts, rendering the dissent’s concern about extending its holding inapt. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (attending criminal trials); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (receiving advertisements with prescription drug prices); *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (hearing a lecturer speak).

books.” *Id.* at 872 (plurality opinion). If they do so with the intent to deny “access to ideas with which [they] disagree[], and if this intent [is] the decisive factor in [their] decision, then [they] have exercised their discretion in violation of the Constitution.”⁵ *Id.* at 871 (plurality opinion).⁶

We had an opportunity to apply this Supreme Court guidance in *Campbell*. There, school officials had removed the book *Voodoo & Hoodoo* from the school library after parents complained that the book was dangerous. 64 F.3d at 186–87. We affirmed the principle that the “key inquiry in a book removal case” is the remover’s “substantial motivation in arriving at the removal decision.” *Id.* at 190. The record, however, was not sufficiently developed at the summary judgment stage to determine whether “the single decisive motivation” behind the removal decision was to “deny students access to ideas with which the school officials disagreed.” *Id.* at 188, 191. Thus, while the circumstances surrounding the removal of *Voodoo & Hoodoo* could not “help but raise

⁵ A “decisive factor” is a “‘substantial factor’ in the absence of which the opposite decision would have been reached.” *Pico*, 457 U.S. at 871 n.22 (plurality opinion).

⁶ Although *Pico* was a highly fractured opinion, the Supreme Court has clarified that “all members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar.” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986). We have said that while “the constitutional analysis in the *Pico* plurality opinion does not constitute binding precedent, it may properly serve as guidance in determining whether the . . . removal decision was based on constitutional motives.” *Campbell*, 64 F.3d 189. Our opinion in *Muir v. Alabama Educational Television Commission* does not compel an alternative result. *See id.* (citing *Muir*, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982) (en banc)).

questions regarding the constitutional validity of [the] decision,” we remanded the case to the district court for further factual consideration. *Id.* at 191.

Also relevant to our analysis today is the Supreme Court’s 2003 *American Library Association* decision. That case addressed a federal law granting public libraries money for internet access, provided that they install computer filters to block material harmful to children. 539 U.S. at 201. A plurality of the Court rejected a facial First Amendment challenge to the law. *See id.* at 198–99 (plurality opinion). The yet again sharply divided Court (with a four-judge plurality, two concurrences, and three dissents) did so for different reasons. Justice Rehnquist, writing for the plurality, emphasized public libraries’ “broad discretion” in shaping their collections, writing that it is the librarian’s responsibility to “separate out the gold from the garbage.” *Id.* at 204 (plurality opinion) (quoting W. KATZ, COLLECTION DEVELOPMENT: THE SELECTION OF MATERIALS FOR LIBRARIES 6 (1980)). Justice Kennedy focused not on libraries’ discretion but instead on the fact that a librarian could quickly unblock material upon request, rendering any burden on patrons insignificant. *Id.* at 214–15 (Kennedy, J., concurring). Finally, Justice Breyer’s concurrence was concerned with “fit”: the relative burden that the law placed on library patrons versus the government’s legitimate interests in protecting young library patrons from inappropriate material. *Id.* at 220 (Breyer, J., concurring). There were very few “common denominators” between these three opinions which would “provide a controlling rule that establishes or overrules precedent.” *See Whole Woman’s Health v. Paxton*, 972 F.3d 649, 652 (5th Cir. 2020) (internal quotation marks and citation omitted). To the extent that one

exists, we see it as an agreement that libraries must consider content to some degree in selecting material. But we still hesitate to ascribe *ALA* with significant precedential power, such that it could have modified the clear rule that we announced in *Campbell*.

From these three cases, we glean the following rules. Librarians may consider books' contents in making curation decisions. *Id.* at 205 (plurality opinion). Their discretion, however, must be balanced against patrons' First Amendment rights. *Pico*, 457 U.S. at 865 (plurality opinion). One of these rights is "the right to receive information and ideas." *Stanley*, 394 U.S. at 564. This right is violated when an official who removes a book is "substantially motivated" by the desire to deny "access to ideas with which [they] disagree[]." *Pico*, 457 U.S. at 871 (plurality opinion); *see also Campbell*, 64 F.3d at 191. To be sure, content is necessarily relevant in removal decisions. *ALA*, 539 U.S. at 205 (plurality opinion). But a book may not be removed for the sole—or a substantial—reason that the decisionmaker does not wish patrons to be able to access the book's viewpoint or message. *Campbell*, 64 F.3d at 191. Thus, a librarian who removes the 7th Edition of a Merriam-Webster dictionary in favor of the 8th Edition does not act unconstitutionally simply because he or she considers the books' content and prefers the new edition. They may remove the 7th Edition with the intent to eliminate superfluous editions to make room for new volumes, or merely because the content is superseded by the 8th Edition. Similarly, a book by a former Grand Wizard of the K.K.K., which hasn't been checked out in years and is discovered by a librarian during routine weeding, could be removed based on lack of interest and poor circulation history.

We agree with Defendants that public forum principles are “out of place in the context of this case.” *ALA*, 539 U.S. at 205 (plurality opinion). In *ALA*, the plurality explained in dicta that forum analysis is inapplicable because “[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.” *Id.* at 206 (plurality opinion). But that is not what Plaintiffs argue here. They are not authors who seek to have their books included in the library’s collection, but instead are patrons who seek to exercise their right to receive information.⁷ This distinction is relevant to the applicability of forum principles. In *Chiras v. Miller*, a textbook author and a student brought suit against a state board of education that decided to select certain textbooks over others. 432 F.3d 606, 607 (5th Cir. 2005). A panel of our court relied on *ALA* and found that forum analysis did not apply. *Id.* at 615. We did so on consideration of whether there was a “forum to which Chiras [the textbook author] might assert a right of access under the First Amendment.” *Id.* at 618. But, we wrote, “[t]he conclusion that no forum exists in this case does not necessarily preclude . . . Appellant Rodriguez’s asserted right as a student to receive the information in Chiras’ textbook from the school.” *Id.*

The dissent—like Defendants—attempts to distinguish *Pico* and *Campbell* from *ALA* and the case at

⁷ This also distinguishes many of the cases cited by the dissent. See, e.g., *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 465 (2009) (plaintiff was organization seeking to create and donate monument to public park); *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 26 (D.C. Cir. 2005) (same).

hand. Each of the reasons for doing so is without merit; all four cases are harmonizable. First, our colleague believes that *Campbell*'s focus on the "unique role of the school library" circumscribes its applicability. *See Campbell*, 64 F.3d at 188 (quoting *Pico*, 457 U.S. at 869 (plurality opinion)). It is beyond dispute that there are unique considerations involved in balancing the discretion necessary for collection curation against students' First Amendment rights. *See Pico*, 457 U.S. at 879 (Blackmun, J., concurring). But if the principles enshrined in *Pico* and *Campbell* apply in the education context, in which particular free speech principles are restricted because of school officials' need to control the curriculum and school environment, then they apply with even greater force outside of the education context, where no such limitations exist. *See Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 3d 530, 548 (N.D. Tex. 2000). In emphasizing that students do not "shed their constitutional rights . . . at the schoolhouse gate," the Court in *Pico* necessarily acknowledged that rights outside the school context are even more robust. *See Pico*, 457 U.S. at 865 (plurality opinion) (quoting *Tinker*, 393 U.S. at 506). The Court in *Pico* also expressly emphasized that its holding is limited to "library books, books that by their nature are optional rather than required reading," as opposed to curricular materials. *Id.* at 862 (plurality opinion). This rendered the unique constitutional concerns of the classroom immaterial to the case. *See id.* ("Our adjudication of the present case thus does not intrude into the classroom.")⁸ As we noted in *Campbell*, "the

⁸ We discussed this distinction in *Chiras v. Miller*, in which we declined to apply *Pico* to a situation involving the selection of a textbook for use in the classroom, as *Pico* concerned "the

high degree of deference accorded to educators' decisions regarding curricular matters diminishes when the challenged decision involves a noncurricular matter." 64 F.3d at 188. Our colleague's worry about "transplanting *Campbell* into the realm of public libraries" is therefore misplaced, as we are already bound by its reasoning in and out of the school context.

The dissent next insists that *ALA* prevents us from applying *Campbell*, as *Campbell*'s "substantial motivation" test is incompatible with *ALA*'s recognition of public libraries' "broad discretion" in collection curation. First, as we noted above, the badly fractured nature of *ALA*'s plurality opinion circumscribes its precedential effect. We are skeptical that five Justices would have agreed with the "broad discretion" language of the plurality. Further, "broad discretion" is not the same as "unlimited discretion." The Supreme Court recognized in *Pico* that officials do not have "absolute discretion to remove books from their school libraries." 457 U.S. at 869 (plurality opinion). The hypothetical posed by the dissent is inapt: If a librarian exercises his or her discretion in removing a book promoting Holocaust denial, as allegedly allowed by *ALA*, it does not necessarily follow that "the book is being removed because the library dislikes the ideas in it," as forbidden by *Campbell*. Instead, the librarian might be removing the book based on other constitutional considerations, such as the accuracy of the content. Although a public library *does* have discretion to consider books' content in shaping its collection, when such discretion is exercised via unconstitutional motivations—

removal of an *optional* book from the school library." 432 F.3d at 619 (emphasis added).

i.e., a desire to “prescribe what shall be orthodox,”—the protections of the First Amendment necessarily come into play. *Pico*, 457 U.S. at 872 (plurality opinion) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). The dissent’s second justification for rejecting *Campbell*, then, is also unpersuasive.

Finally, the dissent contends that, even if *Campbell* were to apply in the public library context, the district court’s application of the case does not comport with its holding. Our colleague sees the district court’s use of strict scrutiny for content-related decisions as being in conflict with *Campbell*’s suggestion that removing “pervasively vulgar” or “educational[ly] [un]suitable” books would not be unconstitutional. *See Campbell*, 64 F.3d at 188–89 (quoting *Pico*, 457 U.S. at 871 (plurality opinion)). The district court’s opinion is somewhat imprecise on the difference between viewpoint and content discrimination and the role that *Campbell*’s substantial-motivation test plays in each analysis. But *Campbell*’s rule holds true regardless: if the remover’s motivation is to deny access to ideas with which he or she disagrees, the remover violates the Constitution. *Id.* at 188. Even if this decision were subject to only the lowest level of scrutiny, the government has no legitimate interests furthered by removal. We therefore hold that if a government decisionmaker removes a book with the substantial motivation to prevent access to particular points of view, he or she violates the First Amendment, and no further analysis is required.

Before the district court, Defendants also asserted that their actions in selecting books for library shelves constituted government speech, to which the Free

Speech Clause does not apply. The district court disagreed, explaining that it was bound by *Campbell*'s application of the First Amendment to library collection decisions.⁹ Defendants have not pressed this theory on appeal, although our dissenting colleague remains convinced.¹⁰

While “[t]he Free Speech Clause . . . does not regulate government speech,” collection decisions are

⁹ The district court also distinguished between cases cited by Defendants about the initial selection of materials versus those regarding book removal, holding that only the latter were relevant to the case at hand. We decline to expressly address the relevance of this distinction because *Campbell*'s clear application renders it unnecessary for the scope of our review today. We note that it is entirely possible that a book with a strong viewpoint, initially protected on selection, might later be constitutionally removed if, *inter alia*, it becomes damaged or is not checked out.

¹⁰ Plaintiffs contend that Defendants have waived their government-speech argument by not raising it in their opening brief to this court. Generally, “a party waives any argument that it fails to brief on appeal.” *United States v. Whitfield*, 590 F.3d 325, 346 (5th Cir. 2009). But this rule is not absolute; whether waiver applies “depends on the nature of the issue.” *Stramaski v. Lawley*, 44 F.4th 318, 326 (5th Cir. 2022). Our dissenting colleague sees the question of government speech as inextricably bound up in the issue of how the First Amendment applies to a library’s collection decisions, such that we cannot address one without the other. *See id.* (considering “the unasked question of whether the doctrine even applies”). Although we are not so confident in the inevitability of the government speech theory, we consider the question because of its import. *See id.* at 326 (explaining that the issues which we may consider are “not limited to the particular legal theories advanced by the parties”); *see also Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (“[W]hat questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals.”).

not such speech. See *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). Nowhere in *Campbell*, which is binding on us, did we suggest that a public official’s decision to remove a book from a school library was government speech. See 64 F.3d at 190. The choice to do so is subject to the First Amendment’s limitations. See *id.* at 188. The cases cited by our dissenting colleague, like *Forbes* and *Finley*, stand for the proposition that the government requires extensive discretion in “deciding what private speech to make available to the public.” *ALA*, 539 U.S. at 204 (plurality opinion) (citing *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 672–73 (1998) and *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 585 (1998)). We agree. But, again, this discretion is not so unfettered as to put these government actions entirely outside the ambit of the First Amendment. See *Pico*, 457 U.S. at 869 (plurality opinion) (rejecting absolute discretion). In each of these cases, the Court upheld the government’s right to consider the content of private speech in deciding what to make available to the public. See, e.g., *Finley*, 524 U.S. at 585 (allowing the NEA to consider a “wide variety” of funding criteria, including “the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work’s contemporary relevance, its educational value . . .”). As discussed above, we agree that library personnel must necessarily consider content in curating a collection. However, the Court has nowhere held that the government may make these decisions based solely on the intent to deprive the public of access to ideas with which it disagrees. That would violate the First Amendment and entirely shield all collection decis-

ions from challenge. *See Pico*, 457 U.S. at 871 (plurality opinion); *Campbell*, 64 F.3d at 190.¹¹

B. Defendants Likely Violated Plaintiffs' First Amendment Rights

Having laid out the foregoing principles, we conclude that resolution of this appeal requires a relatively straightforward application of *Campbell*, in which we considered direct testimony as well as circumstantial evidence in evaluating the defendants' substantial motivation. *See Campbell*, 64 F.3d at 190 *see also Pico*, 457 U.S. at 874 (plurality opinion). The seventeen books at issue here were removed after constituents complained that they were "pornog-

¹¹ The dissent cites numerous cases involving the selection of public monuments. The case at hand, however, is distinguishable based on the differences between a monument in a public park and a book on a public library shelf. In *Pleasant Grove City, Utah v. Summum*, for example, the Supreme Court held that a "City's decision to accept certain privately donated monuments . . . is best viewed as a form of government speech . . . [and as such] is not subject to the Free Speech Clause." 555 U.S. at 481. The Court considered the plaintiff's "legitimate concern" that the government-speech doctrine could be used as "a subterfuge for favoring certain private speakers over others based on viewpoint." *Id.* at 473. It held that there was nothing deceptive about the selection of monuments, however, because by placing a monument in a park the government "dramatically" endorses the monument's message, signaling that "the City intends the monument to speak on its own behalf." *Id.* The same cannot be said about library collection decisions, however, which are too numerous to keep track of and often occur behind closed doors. The Court was also persuaded that the government "made no effort to abridge the traditional free speech rights—the right to speak, distribute leaflets, etc.—that may be exercised . . . in [the park]." *Id.* at 474. Plaintiffs have no such recourse in the library, which is not a traditional public forum as is a park. *See Estiverne v. La. State Bar Ass'n*, 863 F.2d 371, 376 (1989).

raphic filth” inappropriate for children. Specifically, Wallace and the other objectors were concerned about young readers accessing critical race theory, facts about sexuality, stories about gender dysphoria, and images that purportedly promote “grooming” behavior. Each of the books Milum removed were on the Wallace list. The removed books were not slated for review before the complaints were lodged, and no other books were weeded during that period. Moreover, Wallace and Wells were elevated to the newly reconstituted library board after their involvement in the complaints. “[T]he circumstances surrounding the . . . [removal] cannot help but raise questions regarding the constitutional validity of [the] decision.” *Campbell*, 64 F.3d at *see also Pico*, 457 U.S. at 875 (plurality opinion) (noting that the procedures used to remove the book seemed like “the antithesis of those procedures that might tend to allay suspicions regarding the [government’s] motivation”). The district court, which had the opportunity to observe Milum’s live testimony, found her explanations for her alleged reasons for removing the books to be contradictory and unconvincing. *See United States v. Gibbs*, 421 F.3d 352, 357 (5th Cir. 2005) (citation omitted) (“One of the most important principles in our judicial system is the deference given to the finder of fact who hears the live testimony of witnesses because of his opportunity to judge the credibility of those witnesses.”). Each of these facts support the district court’s reasonable conclusion that the books were removed because of the Defendants’ complaints, and that Defendants’ substantial motivation was to deny access to particular ideas. *See Pico*, 457 U.S. at 871 (plurality opinion).

The district court found that “[t]here is no real question that [Milum’s] targeted review was directly

prompted by complaints from patrons and county officials over the content of these titles.” We agree with Defendants that the real issue here is not Milum’s choice to review the books on the Wallace List, but instead is her decision to permanently remove the seventeen books. The evidence, however, demonstrates that the complaints did not merely cause Milum to pull the books for review; they were likely also the motivating factor in her decision to remove the seventeen books from the shelves permanently. Although Moss and Cunningham testified that they did not expressly direct Milum to permanently remove the books, it was not clear error for the district court to understand their communications as instructions to do just that. *See Anderson v. City of Bessamer City*, 470 U.S. 564, 574 (1985) (“Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”). The contemporaneous communications instructed that the books should be “pulled immediately,” not specifying whether they should be pulled for review or forever. Further, the supervisory role of the Commissioners and the language used, such as “Please advise Commissioner Moss and I when this task has been completed,” underscores the fact that Milum removed the books because she was told to do so. She did not even read the books before removing them. Although it is Milum’s motivation that matters, we agree with the district court that she likely “adopted” the motivations of the other Defendants.

Defendants aver that the books were removed through the library’s routine weeding process and its application of the MUSTIE factors. A review of the evidence reveals that the district court did not clearly err in finding this reasoning to be unpersuasive.

First, one of the main rationales behind the CREW process is to ensure that there is space for new books on the shelves. But the Llano County library suspended all new purchases in October of 2021, rendering this concern irrelevant. Second, Milum's alleged application of the MUSTIE factors was contradictory and inconsistent. For example, Milum testified that *Freakboy* was weeded because it was "irrelevant," given that it had not been checked out in five years, and "elsewhere" because it was available on interlibrary loan. But Milum herself testified that a book should not be weeded for "irrelevance" simply because it had not been checked out in a while. She also testified that a book is available "elsewhere" when it is "*easily* borrowed from another source," rather than simply available anywhere, yet she did not look to see where *Freakboy* was located. Further, Milum's reasoning for weeding *Freakboy* applies to hundreds of other books in the Llano County system, but those books remain on the shelves. As another example, Milum stated that *In the Night Kitchen* was removed because it was "ugly," as the library's copy had been damaged. However, the physical evidence at trial showed otherwise.

When these explanations are stripped away, it becomes clear that Milum likely weeded these books because she was told to by those who disagreed with their message. That is not a valid reason to remove a book under the MUSTIE criteria. It was not clear error for the district court to conclude that Defendants' alternative explanations for removal were pretextual.

We note that the removal of at least some of these books could be upheld if the right justifications had been found by the district court. As we recognized in

Campbell, “an unconstitutional motivation would not be demonstrated if the . . . officials removed the books from the . . . libraries based on a belief that the books were ‘pervasively vulgar’ or on grounds of ‘educational suitability.’” *Campbell*, 64 F.3d at 188–89 (quoting *Pico*, 457 U.S. at 871 (plurality opinion)). But that is not what seems to have happened here. For example, Milum testified that she initially ordered the “butt and fart” books because she thought based on her training that they were age appropriate, and her “opinion about the appropriateness of these books as the head librarian never changed.”¹² Our holding in this case is controlled by the district court’s supportable fact-finding that Defendants’ removal decisions were likely motivated by a desire to limit access to ideas with which they disagreed.

The fact that Milum did not weed every book on the Wallace list does not negate the likelihood that Defendants’ substantial motivation in removing the seventeen books was a desire to limit public access to the books’ viewpoints. Nor is that finding undermined by Milum’s decision to weed *Being Jazz* from

¹² While the “butt and fart” books may not on their face have a clear “idea” or “viewpoint,” the record reveals that they were removed because Defendants did not want readers to have access to books with pictures of naked bodies. Defendants believe that these books promote “grooming” by depicting children displaying their naked bodies to “various individuals, some of whom are adults.” I see access to these images—and what Defendants say that they allegedly promote—as a viewpoint sufficient to support an unconstitutional motivation under *Campbell*. Both of my colleagues disagree, however, so our holding does not require the return of those books. Nor does it require the return of *In the Night Kitchen* or *It’s Perfectly Normal*, for the same reasons.

the Llano branch while refusing to do so at the Kingsland branch where the book had been checked out more recently. A motivation is “substantial” when in its absence “the opposite decision would have been reached.” *Pico*, 457 U.S. at 871 n.22 (plurality opinion). That Milum decided to weed only those books on the Wallace list that allegedly met a MUSTIE criteria does not necessarily mean that she would not have weeded the books without an unconstitutional motivation. It is possible that “something other than Bonnie Wallace’s objections was behind Milum’s decision to weed those books,” and that her substantial motivation in removal was still unconstitutional.

We reversed the district court in *Campbell* because there was not sufficient evidence in the summary judgment record to support a finding “as a matter of law” that the book in question was removed “substantially based on an unconstitutional motivation.” 64 F.3d at 190. There are two important differences between the procedural posture of that case and this one. First, we have here the benefit of a multi-day adversarial hearing, in which the district court had the opportunity to observe witnesses under cross-examination. *See Campbell*, 64 F.3d at 190 (“[P]ermitting cross-examination probing [the removers’] justifications for removing the Book[] will enable the finder of fact to determine . . . the true, decisive motivation.”); 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 2949 (3d ed. 2023) (“When the outcome of a Rule 65(a) application depends on resolving a factual conflict by assessing the credibility of opposing witnesses, it seems desirable to require that the determination be made on the basis of their demeanor during direct and cross-examination, rather than on the respective

plausibility of their affidavits.”). Second, we are not deciding as a matter of law that Defendants’ substantial motivation was unconstitutional, as is true on summary judgment review. Instead, we are merely holding that Plaintiffs have a substantial likelihood of ultimately succeeding on the merits. Those merits are still to be litigated in the trial court. *See All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 242 (5th Cir. 2023), *cert. granted*, 144 S.Ct. 537 (Dec. 13, 2023) (“[W]e note that ‘substantial’ does not mean ‘certain.’”); *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) (“A plaintiff is not required to prove its entitlement to summary judgment in order to establish a substantial likelihood of success on the merits for preliminary injunction purposes.” (internal quotation marks and citation omitted)).

C. Plaintiffs Met Their Burden in Showing Other Preliminary Injunction Factors

In addition to the likelihood of success on the merits of Plaintiffs’ First Amendment claim, Defendants contend that the trial court erred in holding that the remaining factors required for a preliminary injunction were met. The parties talk past each other in arguing over the relevance of these issues within the context of standing. But these questions arise not in the district court’s denial of Defendants’ motion to dismiss—which Defendants do not appeal—but instead in the court’s issuance of the preliminary injunction. As noted above, to obtain a preliminary injunction, Plaintiffs must show that (1) they are likely to succeed on the merits, (2) they will likely suffer irreparable harm in the absence of relief, (3) the balance of the equities tip in their favor, and

(4) an injunction is in the public interest. *La Union Del Pueblo Entero*, 608 F.3d at 219.

Defendants insist that Plaintiffs are unable to meet the irreparable-harm prong required for preliminary injunctive relief because they are still able to read and checkout the seventeen contested books through the library’s “in-house checkout system.” Defendants claim that Plaintiffs have not shown “*any* harm (let alone an ‘irreparable’ harm) that they will suffer from obtaining the disputed books through the library’s in-house checkout system” as opposed to using the usual process. The district court held that this difference did indeed create an irreparable harm. When we review that determination for clear error, we conclude that the district court did not so err. *See Taylor-Travis*, 984 F.3d at 1116. We agree with Defendants that the injuries to other library patrons, who may not know about the availability of the contested books, is irrelevant for this analysis. *See Jones v. District of Columbia*, 177 F. Supp. 3d 542, 546 n.3 (D.D.C. 2016) (“[T]he irreparable harm prong of the injunctive relief calculus only concerns harm suffered by the party or parties seeking injunctive relief.”). But Plaintiffs have shown that they themselves will be injured by being unable to anonymously peruse the books in the library without asking a librarian for access. This burden on accessing their right to receive information is a valid First Amendment injury. *See Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 754 (1996);¹³ *see also Lamont v.*

¹³ Defendants attempt to distinguish this case on the basis that, unlike cable programming, libraries “have limited shelf space and *must* relegate some materials to alternative sources such as . . . an in-house checkout system.” This is a red herring that harkens back to Defendants’ argument about the role of content in collection decisions. It is true that libraries must

Postmaster Gen. of U.S., 381 U.S. 301, 307 (1965) (holding that the government acted unconstitutionally when it imposed an “affirmative obligation” on plaintiffs to request access to communist literature, which would have a “deterrent effect”). And a “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). We cannot say that the district court clearly erred in concluding that Plaintiffs will be irreparably harmed in the absence of an injunction.

Neither did the district court err in evaluating the balance of the equities or the public interest. First, Defendants assert that the balance of the equities tips in their favor, since complying with the injunction will impose a large burden on them, and Plaintiffs have not suffered a constitutional injury. We have held otherwise. Second, as the district court pointed out, “injunctions protecting First Amendment freedoms are always in the public interest.” *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 539 (5th Cir. 2013) (citation omitted). The district court did not abuse its discretion in concluding that the remaining factors for a preliminary injunction were met.

D. The Preliminary Injunction is Overbroad

Finally, Defendants contend that the preliminary injunction ordered by the district court is overbroad.

make decisions based on space constraints, but it is their motivation in making those choices that matters for the First Amendment. It is unconstitutional for the government to choose certain books for an in-house checkout system above others, simply because they wish to prevent the public from accessing ideas with which they disagree.

Plaintiffs requested an injunction requiring Defendants to return the seventeen contested books to the catalog and the shelves. Their proposed order required the return of “the following print books that were removed or concealed from the Llano County Libraries in 2021 or 2022 because of their viewpoint or content,” and then listed the seventeen books. In contrast, the injunction issued by the district court ordered the return of “all print books that were removed because of their viewpoint or content, *including* the following print books,” then listed the seventeen books by name. Defendants complain that Plaintiffs failed to show that they are injured by the removal of any library materials other than the seventeen complained-of books. We agree. Because an injunction may go no further than what is necessary “to ensure Plaintiffs’ relief,” the injunction issued by the district court is overbroad to the extent that it requires the return of any books beyond the seventeen discussed herein. *See Missouri v. Biden*, 83 F.4th 350, 395 (5th Cir. 2023).

The district court’s order further enjoins Defendants from “removing *any* books from the Llano County Library Service’s catalog for *any* reason during the pendency of this action.” That language also goes too far. “[I]t is axiomatic that an injunction is overbroad if it enjoins a defendant from engaging in legal conduct.” *Id.* There are still entirely valid and constitutional reasons to remove books from the library’s shelves, such as when a patron severely damages a book. The injunction, then, is not narrowly tailored to remedy the injury of which Plaintiffs complain. *See OCA-Greater Hous. v. Texas*, 867 F.3d 604, 616 (5th Cir. 2017) (citation omitted). We will therefore modify the district court’s order to reflect the limited scope of the relief.

V. Conclusion

The dissent accuses us of becoming the “Library Police,” citing a story by author Stephen King. But King, a well-known free speech activist, would surely be horrified to see how his words are being twisted in service of censorship. Per King: “As a nation, we’ve been through too many fights to preserve our rights of free thought to let them go just because some prude with a highlighter doesn’t approve of them.”¹⁴ Defendants and their highlighters are the true library police.

Government actors may not remove books from a public library with the intent to deprive patrons of access to ideas with which they disagree. Because that is apparently what occurred in Llano County, Plaintiffs have demonstrated a likelihood of success on the merits of their First Amendment claim, as well as the remaining factors required for preliminary injunctive relief. The district court’s order is AFFIRMED, except that we MODIFY the district court’s injunction to state:

IT IS ORDERED THAT:

1. Within twenty-four hours of the issuance of the mandate, Defendants shall return the following books to the publicly visible and accessible shelves of the Llano County Libraries:
 - a. *Caste: The Origins of Our Discontent* by Isabel Wilkerson;

¹⁴ Stephen King, *The Book-Banners: Adventure in Censorship is Stranger Than Fiction*, THE BANGOR DAILY NEWS (Mar. 20, 1992), <https://stephenking.com/works/essay/book-banners-adventure-in-censorship-isstranger-than-fiction.html>.

- b. *Called Themselves the K.K.K: The Birth of an American Terrorist Group* by Susan Campbell Bartoletti;
 - c. *Spinning* by Tillie Walden;
 - d. *Being Jazz: My Life as a (Transgender) Teen* by Jazz Jennings;
 - e. *Shine* by Lauren Myracle;
 - f. *Under the Moon: A Catwoman Tale* by Lauren Myracle;
 - g. *Gabi, a Girl in Pieces* by Isabel Quintero; and
 - h. *Freakboy* by Kristin Elizabeth Clark.
2. Immediately after returning the books to the Libraries as ordered in 1. above, Defendants shall update all Llano County Library Service's catalogs to reflect that those books are available for checkout.
 3. Defendants are hereby enjoined from removing any books from the Llano County Library Service's publicly visible and accessible shelves and/or searchable catalog without first providing Plaintiffs with documentation of (a) the individual who decided to remove or conceal the books, and (b) the reason or reasons for that removal or concealment.

Lastly, Defendants' motions to stay the district-court proceedings pending appeal and to stay the preliminary injunction pending appeal are DENIED AS MOOT.

LESLIE H. SOUTHWICK, *Circuit Judge*, concurring in part and concurring in the judgment in part:

This court has declared that officials 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.” *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 188 (5th Cir. 1995) (quotation marks and citations omitted). While that case was in the context of a school library, the First Amendment standard it announced applies outside of schools as well. Judge Wiener’s thorough and nuanced opinion accurately captures the state of current law when it identifies the standard from *Campbell* as the one to apply here. I concur in that opinion’s explication of the law. I part company on some of the law’s application.

I find that some of the removals here satisfy the *Campbell* standard. The district court found that all removals were unconstitutional, stating: “Plaintiffs have clearly shown that Defendants’ decisions were likely motivated by a desire to limit access to the viewpoints to which Wallace and Wells objected.” I disagree, first, because not all of the books express an “idea” or “viewpoint” in the sense required by the caselaw. I am referring to the items we have needed to label for clarity as the “butt and fart books.” Viewpoints and ideas are few in number in a book titled “Gary the Goose and His Gas on the Loose”—only juvenile, flatulent humor. Perhaps a librarian selected the book believing the juvenile content would encourage juveniles to read. Even if that is so, I do not find those books were removed on the basis of a dislike for the ideas within them when it has not

been shown the books contain any *ideas* with which to disagree.

Second, at this stage of the case, I find the motivations behind some of the removals here are likely defensible and cannot satisfy the standard for a preliminary injunction. The district court concluded that those responsible for removing the books had effectively adopted the motivations of those objecting to the books, *i.e.*, “by responding so quickly and uncritically, Milum and the Commissioners may be seen to have adopted Wallace’s and Wells’s motivations.” Wallace and Wells objected to the butt and fart books on the basis that they (1) promoted “grooming” of minors¹ and (2) were sexually explicit. These objections do not convert the resulting removals into viewpoint-based decisions. No controlling law prevents a librarian from exercising what might be called traditional discretion to remove certain types of *content*. *Campbell* itself acknowledged the Supreme Court’s guidance that school librarians may permissibly remove books on the belief that the books were “pervasively vulgar” or were not educationally suitable. *Campbell*, 64 F.3d at 188–89 (quoting and citing *Board. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870–72 (1982) (plurality opinion)).

Whatever the outer bounds of this traditional discretion might be, I would have no difficulty in allow-

¹ To “groom” in the sense used here, according to the Merriam-Webster Dictionary, is “to build a trusting relationship with (a minor) in order to sexually exploit them especially for nonconsensual sexual activity.” *Merriam-Webster Dictionary Online*, <https://www.merriamwebster.com/dictionary/groom#:~:text=%3A%20to%20clean%20and%20maintain%20the,to%20make%20neat%20or%20attractive> (last accessed May 30, 2024).

ing the removal of a book from the children's section on the basis that it encourages children to engage in sexual activity with adults or includes sexually explicit content. At this stage of the case, I find ordering the return of such books to be error.

For similar reasons, the removals of *In the Night Kitchen* by Maurice Sendak and *It's Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health* by Robie Harris are also likely permissible. While these books may express ideas, they were removed as part of the library's efforts to respond to objections that certain books promoted grooming and contained sexually explicit material that was not appropriate for children. Whether these two books or the butt and fart books actually promoted grooming or contained sexually explicit material is irrelevant. This court's governing law focuses on the subjective motivation of the remover, *see Campbell*, 64 F.3d at 191, and the district court reasonably concluded that the removers here had adopted the motivations of the objectors.

I conclude that the plaintiffs have not met their burden to show a likelihood of success on the merits of their constitutional challenges to the removal of the butt and fart books,² *In the Night Kitchen*, and *It's Perfectly Normal*. The plaintiffs are, therefore, not entitled to a preliminary injunction requiring the return of those books to the Llano County Libraries.

² *My Butt is So Noisy!*, *I Broke My Butt!*, and *I Need a New Butt!* by Dawn McMillan, and *Larry the Farting Leprechaun*, *Gary the Goose and His Gas on the Loose*, *Freddie the Farting Snowman*, and *Harvey the Heart Has Too Many Farts* by Jane Bexley.

STUART KYLE DUNCAN, *Circuit Judge*, dissenting:

The commission hanging in my office says “Judge,” not “Librarian.” Imagine my surprise, then, to learn that my two esteemed colleagues have appointed themselves co-chairs of every public library board across the Fifth Circuit. In that new role, they have issued “rules” for when librarians can remove books from the shelves and when they cannot. While I do not doubt my colleagues’ good intentions, these “rules” are a disaster. They lack any basis in law or common sense. And applying them will be a nightmare.

Look no further than today’s decision. The two judges in the majority, while agreeing on the rules, cannot agree on how they apply to over *half* of the 17 books *in this case*. So, according to JUDGE WIENER, a library cannot remove *It’s Perfectly Normal*, a sex-education book for 10-year-olds that has cartoons of people having sex and masturbating. Op. 27. But according to JUDGE SOUTHWICK, removing that book is “likely permissible,” at least “[a]t this stage of the case,” because it contains “sexually explicit material that [i]s not appropriate for children.” Op. 2, 3 (Southwick, J., concurring in part and concurring in the judgment in part). Evidently, both judges would not allow a librarian to remove racist books—unless they have a “poor circulation history.” Op. at 12. They differ, however, on how the rules apply to a series of children’s books about flatulence. *Compare* Op. 21 n.11 *with* Op. 1, 3 (Southwick, J., concurring in part and concurring in the judgment in part). And so we have a genuine first in the Federal Reporter: federal judges debating whether the First Amendment lets a library remove a book called (I kid you not) *Larry the Farting Leprechaun*.

This journey into jurisprudential inanity should never have been launched. There is a simple answer to the question posed by this case: A public library's choice of some books for its collection, and its rejection of others, is government speech. I dissent.

What follows is what our opinion should have said.

INTRODUCTION

Suppose you are a public librarian. One day, you receive complaints about two books. The first is *It's Perfectly Normal*, a sex-education book for ages 10 and up. A mother argues that the book, which has explicit cartoons¹ of sexual activity, is inappropriate for children and should be removed. The second is *Little Black Sambo*, an old children's book. A mother argues that the book, whose cover features a racist caricature,² is inappropriate for children and should be removed. The librarian sees some sense in both complaints. But does the Constitution let her pull either book off the shelves?

The district court in this case said no. Agreeing with Plaintiffs, the court ruled that the Free Speech Clause bars a public library from removing any book based on disagreement with its contents. So, the court ordered the Llano County library to reshelve 17 books, including *It's Perfectly Normal*. County officials had removed those books, Plaintiffs alleged, after patrons complained about their treatment of sexual and racial themes. The officials now appeal, arguing the injunction was based on a mistaken view of how the Free Speech Clause constrains a library's collection decisions.

The majority now affirms the district court's Free Speech ruling. Op. 2. In doing so, the majority invents "rules" to discern when the Free Speech Clause bars libraries from removing books. *Id.* at 11. Here they are:

¹ Scroll to page 43, *infra*, to see some of them.

² Scroll to page 24, *infra*, to see it.

1. Libraries “may consider books’ contents in making curation decisions.” *Ibid.* (citing *United States v. Am. Libr. Ass’n, Inc.*, 539 U.S. 194, 204 (2003) [*ALA*] (plurality)).
2. But patrons have the “right to receive information and ideas.” *Ibid.* (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).
3. A library violates that right if its decision to remove a book is “‘substantially motivated’ by the desire to deny ‘access to ideas with which [the library] disagree[s].’” *Id.* at 11–12 (quoting *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982) [*Pico*] (plurality)).
4. But a library can remove books “based on . . . the accuracy of the[ir] content,” *id.* at 15, or “based on a belief that the books [are] ‘pervasively vulgar’ or on grounds of ‘educational suitability,’” *id.* at 21 (quoting *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 188–89 (5th Cir. 1995)).

Henceforth, these rules will govern each and every public librarian in this circuit, each and every time she takes a book out of circulation.³ And who will apply these rules? Federal judges, naturally. You’ve heard of the Soup Nazi? Say hello to the Federal Library Police.

³ The majority “decline[s]” to say whether the rules *also* govern a librarian’s “initial selection” of books, *id.* at 16 n.8. We will presumably find that out in litigation coming soon to a federal court near you—over whether a library “unconstitutionally” chose not to acquire explicit sex-education books for 10-year-olds.

As I explain below, the majority's rules lack any grounding in the First Amendment or common sense. The underlying "right" the rules supposedly protect comes from a 50-year-old case recognizing the freedom to peruse obscene materials—not in a public library, but "in the privacy of a person's *own home*." *Id.* at 11 (quoting *Stanley*, 394 U.S. at 564) (emphasis added). The rules themselves are facially absurd: by the majority's own admission, a librarian can remove *The Autobiography of David Duke* only if it has a "poor circulation history." *Id.* at 12. Moreover, the rules will be a nightmare to apply. In this very case, the two judges in the majority cannot even agree on how they apply to crude children's books like *I Broke My Butt! Compare id.* at 21 n.11, *with* Op. 1, 3 n.2 (Southwick, J., concurring in part and concurring in the judgment in part). So, we can look forward to years of litigation testing whether a librarian's "substantial motivation" for removing *Gary the Goose and His Gas on the Loose* was her "desire to deny access to certain ideas" (unconstitutional) or rather the belief that the book was "vulgar" or "educationally unsuitable" (constitutional).⁴

What a train wreck. It has never been the law that the Free Speech Clause bars a public library from selecting or removing books based on content or viewpoint. To the contrary, "[a] library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material." *ALA*, 539 U.S. at 208 (plurality). Plainly, that involves choosing some

⁴ On a more serious note, the majority judges also split over "sexually explicit" children's books and books that may "promote[] grooming" of minors. See Op. 2–3 (Southwick, J., concurring in part and concurring in the judgment in part).

books, and rejecting others, because of what they say or how they say it. If a library could not do that, it would be a warehouse, not a library.

Imagine if a library had to feature books of *all* viewpoints. Alongside history books, it would have to shelve conspiracy theories. *See, e.g.*, RANDY WALSH, *THE APOLLO MOON MISSIONS: HIDING A HOAX IN PLAIN SIGHT* (2018). Alongside medical books, it would have to shelve quackeries. *See, e.g.*, L. RON HUBBARD, *DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH* (2007). Alongside books on Jewish history, it would have to shelve books denying the Holocaust. *See, e.g.*, ROBERT FAURISSON, *THE DIARY OF ANNE FRANK—A FORGERY?* (1985). How preposterous.⁵ A public librarian can, without transgressing the Free Speech Clause, reject such books—precisely because she rejects their viewpoint. Just so, if a librarian finds such books on the shelves, she can remove them. *See ALA*, 539 U.S. at 204 (“The librarian’s responsibility . . . is to separate out the gold from the garbage.”) (plurality) (quoting W. KATZ, *COLLECTION DEVELOPMENT: THE SELECTION OF MATERIALS FOR LIBRARIES* 6 (1980)).

There is a simple answer to the question posed by this case: A public library’s choice of some books for its collection, and its rejection of others, is government speech. “With respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude.” *People for the Ethical Treatment of Animals*

⁵ The majority’s response to the Holocaust-denial hypo is equally preposterous. A librarian can’t remove the book because she “dislikes the ideas in it” but can remove the book if she questions the “accuracy” of Holocaust-denial. Op. 14–15. What’s the difference? *See infra* note 17 (discussing this further).

v. Gittens, 414 F.3d 23, 28 (D.C. Cir. 2005) [*PETA*]. This conclusion is supported by a long line of Supreme Court precedent, as well as authority from our sister circuits.⁶ It means the Free Speech Clause does not constrain a public library’s collection decisions. The Clause provides no coherent standard against which to judge a library’s inescapably expressive decision about which books it deems “suitable and worthwhile” and which it does not. *ALA*, 539 U.S. at 208 (plurality).

In other words, the Constitution does not deputize federal judges as the Library Police.

I. BACKGROUND

A. *Facts and Proceedings*

Plaintiffs are seven patrons of the Llano County public library. Llano County lies about 80 miles northwest of Austin and has a population of just over 21,000. The county’s public library system has three branches, located in Llano (the county seat), Kingsland, and Buchanan Dam. Amber Milum serves as the library system director. *See* TEX. LOCAL GOV’T CODE § 323.005(a) (providing for appointment of a “county librarian”). The library is under the general supervision of the county commissioners court and County Judge Ron Cunningham. *See id.* § 323.006 (providing “[t]he county library is under the general

⁶ *See infra* Part III(B)(1)–(2) (discussing *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *ALA*, 539 U.S. 194; *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Sutcliffe v. Epping School District*, 584 F.3d 314 (1st Cir. 2009); *Ill. Dunesland Pres. Soc’y v. Ill. Dep’t of Nat. Res.*, 584 F.3d 719 (7th Cir. 2009); *PETA*, 414 F.3d 23).

supervision of the commissioners court” and “also under the supervision of the state librarian”).

In April 2022, Plaintiffs sued Cunningham, Milum, the commissioners court, and the library board (collectively, “Defendants”) in federal district court. They claimed Defendants violated their “First Amendment right to access and receive ideas by restricting access to certain books based on their messages and content.” According to Plaintiffs, the books were targeted because Defendants objected to their treatment of sexual or racial themes. Plaintiffs argued this constituted “viewpoint discrimination” in violation of the First Amendment’s Free Speech Clause.⁷ Following discovery, Defendants moved to dismiss based on standing, mootness and failure to state a claim. Plaintiffs moved for a preliminary injunction based on their First Amendment claims. In October 2022, the district court held a two-day hearing with testimony from seven witnesses.

The testimony focused on 17 books removed from the Llano branch. Seven of them—which the parties call the “Butt and Fart Books”—are a series of children’s books with titles like: *I Broke My Butt!* and *Freddie the Farting Snowman*. Another book is the well-known children’s story *In the Night Kitchen* by Maurice Sendak, which contains drawings of a naked toddler. Another is a sex-education book for pre-teens, *It’s Perfectly Normal*, which has cartoon depictions of explicit sexual activity. Three are young-adult books touching on sexuality and homosexuality (*Spinning*, *Shine*, *Gabi: A Girl in Pieces*).

⁷ Plaintiffs also alleged a Fourteenth Amendment due process claim. That claim is not at issue because the district court did not rely on it to grant a preliminary injunction.

Two portray gender dysphoric children and teenagers (*Being Jazz* and *Freakboy*). Two others discuss the history of racism in the United States (*Caste* and *They Called Themselves the K.K.K.*).⁸

Defendants generally testified that the books at issue were removed, not because of disagreement with their content, but as a result of a standard “weeding” method known as “Continuous Review, Evaluation, and Weeding” or “CREW.” Under this approach, books are weeded according to the so-called “MUSTIE” factors: **M**isleading, **U**gly, **S**uperseded, **T**rivial, **I**rrelevant, and **E**lsewhere. So, a book might be weeded because it was inaccurate (“misleading”), damaged (“ugly”), outdated (“superseded”), silly (“trivial”), seldom checked out (“irrelevant”), or available at another branch (“elsewhere”).

For their part, Plaintiffs portrayed this weeding rationale as pretextual. According to Plaintiffs, Milum actually removed the books under orders from Cunningham and the commissioners court (in particular, Commissioner Jerry Don Moss). Plaintiffs

⁸ The full list of books is: *My Butt is So Noisy!; I Broke my Butt!; I Need a New Butt!*, all by Dawn McMillan; *Larry the Farting Leprechaun*; *Gary the Goose and His Gas on the Loose*; *Freddie the Farting Snowman*; *Harvey the Heart Has Too Many Farts*, all by Jane Bexley; *It's Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health* by Robie H. Harris and Michael Emberley; *In the Night Kitchen* by Maurice Sendak; *Caste: The Origins of Our Discontents* by Isabel Wilkerson; *They Called Themselves the K.K.K.: The Birth of an American Terrorist Group* by Susan Campbell Bartoletti; *Being Jazz: My Life as a (Transgender) Teen* by Jazz Jennings; *Freakboy* by Kristin Elizabeth Clark; *Shine* by Lauren Myracle; *Gabi, a Girl in Pieces* by Isabel Quintero; *Spinning* by Tillie Walden; and *Under the Moon: a Catwoman Tale* by Lauren Myracle.

argued Cunningham and Moss were responding to complaints from the public—spearheaded by Rochelle Wells and Bonnie Wallace—about some books’ treatment of sex and race. They also emphasized that, after dissolving the existing library board, the commissioners put Wells and Wallace on a new advisory board with input into the library’s selections.

Testimony also addressed the library’s decision to stop providing access to e-books and audiobooks through the “Overdrive” online database. Witnesses testified this was done because Overdrive’s filters were unable to keep children from accessing books containing graphic depictions of sexual activity. The library removed Overdrive and replaced it with a database called “Bibliotheca.” Some of the 17 removed books remain accessible through Bibliotheca, although the record does not make clear which ones.

Finally, witnesses described an “in-house checkout system” at the Llano branch which contained physical copies of the 17 removed books. Although patrons could check out the books through this system, the books were kept behind the counter and not listed in the catalog. The books had been donated to the library by an anonymous donor who turned out to be one of Defendants’ lawyers.

B. District Court Decision

1. Motion to Dismiss

The district court granted Defendants’ motion to dismiss in part and denied it in part. *See generally Little v. Llano County*, 1:22-CV-424-RP, 2023 WL 2731089 (W.D. Tex. Mar. 30, 2023). First, the court found that Plaintiffs had standing because they wanted to check out the 17 books but could not. Next,

the court found that creation of the in-house checkout system after the litigation began did not moot Plaintiffs' claims. The court did find, however, that Plaintiffs' claims related to Overdrive were moot because it had been replaced with Bibliotheca, a "comparable online service." The court therefore dismissed claims related to Overdrive without prejudice.

The court then turned to Plaintiffs' Free Speech claims with respect to the 17 books. It acknowledged that, in the 2003 *American Library Association* decision, a plurality of the Supreme Court recognized public libraries' "broad discretion" over the content of their collections. *See ALA*, 539 U.S. at 205 (plurality). But the district court believed that this discretion "applies only to materials' selection," not to their removal.

As to removals, the district court adopted a standard from our 1995 decision in *Campbell v. St. Tammany Parish School Board*. That case held that the First Amendment bars school officials from "removing books from school library shelves 'simply because they dislike the ideas contained in those books.'" *Campbell*, 64 F.3d at 188 (quoting *Pico*, 457 U.S. at 872 (plurality)). The district court also suggested that public libraries are "limited public forums" for First Amendment purposes. For that proposition, the court relied on a federal district court's 2000 decision in *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000).

Accordingly, the court denied Defendants' motion to dismiss. The court ruled Plaintiffs stated a valid First Amendment claim by pleading that "Defendants' conduct was substantially motivated by a desire to remove books promoting ideas with which [they]

disagreed.” The court also rejected Defendants’ argument that the removal decisions were “government speech to which the First Amendment does not apply.” The court believed that any precedents supporting this proposition, including *ALA*, “mostly involve the initial selection, not removal, of books.” *See, e.g., PETA*, 414 F.3d at 28 (“With respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude.”).

Finally, the court rejected Defendants’ argument that First Amendment cases concerning school libraries, like *Campbell*, do not apply to disputes over the books available in public libraries. To the contrary, the court reasoned that the First Amendment right “to access to information” applied in *Campbell* should have “even greater force when applied to public libraries,” since public libraries are “designed for freewheeling inquiry.”

2. Preliminary Injunction

The court then turned to Plaintiffs’ motion for a preliminary injunction. The court’s analysis started with this overarching Free Speech principle, carried over from its motion to dismiss ruling: “Although libraries are afforded great discretion for their selection and acquisition decisions, the First Amendment prohibits the removal of books from libraries based on either viewpoint or content discrimination.” The court found Plaintiffs were substantially likely to succeed in showing that Defendants engaged in both viewpoint and content discrimination by removing the 17 books at issue.

As to viewpoint discrimination, the court found Defendants removed books “based on complaints that

the books were inappropriate.” For example, Defendants removed the Butt and Fart Books based on complaints about those books’ “appropriateness.” Other books were removed after Wallace and Wells emailed Cunningham and Moss lists of books generally identified as “pornographic filth” and “CRT and LGBTQ books.”

The court rejected Defendants’ argument that the removals were “simply part of the library system’s routine weeding process.” To the contrary, the court found Plaintiffs “clearly show[ed] that Defendants’ decisions were likely motivated by a desire to limit access to the viewpoints to which Wallace and Wells objected.”

The court also found Plaintiffs were likely to succeed on their claim that Defendants removed books based on “content-based restrictions.” “Content-based restrictions on speech,” the court stated, “are presumptively unconstitutional and subject to strict scrutiny.” *See Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

The court ruled that Plaintiffs clearly met that standard. It found “sufficient evidence to suggest” that Defendants’ weeding explanation was “pretextual.” “Whether or not the books in fact qualified for ‘weeding’ under the library’s existing policies,” the court stated, “there is no real question that the targeted review was directly prompted by complaints from patrons and county officials over the contents of these titles.” Finally, the court found the book removals were unlikely to survive strict scrutiny—*i.e.*, they were “not narrowly tailored to serve a compelling state interest.”

Finding the remaining factors met, the court entered a preliminary injunction: (1) requiring Defendants to “return all print books that were removed because of their viewpoint or content,” including the 17 books discussed above; (2) requiring Defendants to “update” all library catalogs “to reflect that these books are available for checkout”; and (3) enjoining Defendants from “removing” any books from the catalogs “for any reason during the pendency of this action.”

Defendants timely appealed. They also moved to expedite the appeal and for an injunction pending appeal. A motions panel of our court granted the motion to expedite.⁹ Nearly a year later, the panel majority now affirms the district court’s First Amendment ruling, while narrowing the preliminary injunction to requiring the return of 8 of the 17 removed books and updating library catalogs accordingly. Op. 26–27. The majority does not order all of the books returned because the two judges in the majority do not agree how the Free Speech standard they adopt applies to the Butt and Fart Books and to two books with certain sexual content. *Compare id.* at 21 n.11 with Op. 1–3 (Southwick, J., concurring in part and concurring in the judgment in part).

II. STANDARD OF REVIEW

“We review a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law *de novo*.” *Rest. Law Ctr. v. U.S. Dep’t of Labor*, 66 F.4th 593, 597 (5th Cir. 2023)

⁹ The motions panel carried the injunction motion with the appeal. When this panel was assigned to the case, it granted an administrative stay of the district court proceedings pending its decision.

(citation omitted). “When a district court applies incorrect legal principles, it abuses its discretion.” *Planned Parenthood of Greater Tex. v. Kauffman*, 981 F.3d 347, 354 (5th Cir. 2020) (en banc) (citation omitted).

To obtain the “extraordinary remedy” of a preliminary injunction, the movant must show he is likely to prevail on the merits and also “demonstrate a substantial threat of irreparable injury if the injunction is not granted; the threatened injury outweighs any harm that will result to the nonmovant if the injunction is granted; and the injunction will not disserve the public interest.” *Atchafalaya Basin-keeper v. U.S. Army Corps of Eng’rs*, 894 F.3d 692, 696 (5th Cir. 2018) (citation omitted).

III. DISCUSSION

Defendants marshal a phalanx of arguments for vacating the preliminary injunction. Only one need be addressed. The district court held that the Free Speech Clause¹⁰ bans a public library from considering the content or viewpoint of books when deciding whether to remove them. I agree with Defendants that this was legal error.

Below, I first (A) explain how the district court erred and how the panel majority deepens that error, and then (B) set out how the Free Speech Clause applies to a public library’s choice of the materials in its collection.¹¹

¹⁰ “Congress shall make no law . . . abridging the freedom of speech[.]” U.S. CONST. amend. I.

¹¹ So, there is no need to address Defendants’ other arguments, which are: (1) Plaintiffs’ First Amendment right “to access and receive information” has not been violated because they can check out the 17 books through the in-house system;

A. Public Libraries Have Broad Discretion to Shape Their Collections.

The district court began on the right foot by citing the Supreme Court’s *ALA* decision.

ALA addressed a federal law giving public libraries money for internet access, provided they installed filters to block material harmful to children. The Court—in a four-justice plurality with two concurrences—rejected a facial First Amendment challenge to the law. *See* 539 U.S. at 198–99, 214 (plurality); *id.* at 215 (Kennedy, J., concurring in the judgment); *id.* at 216 (Breyer, J., concurring in the judgment).¹² *ALA* is pertinent because it drew on libraries’ discretion to shape their collections, defined to include not only the internet but also books and other materials. *See, e.g., id.* at 207 (plurality) (describing internet as “a technological extension of the book stack”) (citation omitted); *id.* at 217 (Breyer, J., concurring) (explaining “a library’s ‘collection’” is “broadly defined to include all the information the library makes available”).

(2) for the same reason, Plaintiffs do not show irreparable harm; (3) even assuming the district court did not err on the First Amendment standard, it clearly erred in ruling Milum engaged in viewpoint or content discrimination; (4) the preliminary injunction is overbroad (although the majority finds it is, which is correct as far as it goes); (5) the balance of equities and public interest do not clearly favor preliminary injunctive relief.

¹² While not rejecting the plurality’s analysis of the facial challenge, Justice Kennedy wrote separately that he would consider an as-applied challenge if an adult patron showed he was blocked from viewing “constitutionally protected Internet material.” *Id.* at 215 (Kennedy, J., concurring in the judgment). Justice Breyer also concurred, but unlike the plurality he would have applied heightened scrutiny. *See id.* at 216 (Breyer, J., concurring in the judgment).

The key rationale lies in the plurality's statement, quoted by the district court, that public libraries have "broad discretion" over which materials they make available to the public. "Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them." *ALA*, 539 U.S. at 205 (plurality). The district court could have quoted many other passages saying the same thing.¹³ The point is captured most vividly by this advice from a library manual, which the plurality quoted approvingly: "The librarian's responsibility . . . is to separate out the gold from the garbage." *Id.* at 204 (plurality) (quoting KATZ, *supra*, at 6).

ALA makes one thing clear: the Free Speech Clause allows public libraries to shape their collections based on the content and viewpoint of books. Indeed, the notion that the Clause *forbids* this is preposterous. How else are libraries supposed to choose the books on their shelves if not by "discriminating" according to content and viewpoint? "[S]eparat[ing] out the gold from the garbage" means—by definition—rejecting some books and preferring others because of *what* they say and *how*

¹³ See, e.g., 539 U.S. at 204 (plurality) ("To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons."); *ibid.* (explaining a library's "goal has never been to provide 'universal coverage,'" but rather "to provide materials 'that would be of the greatest direct benefit or interest to the community'") (citation omitted); *ibid.* (observing "libraries collect only those materials deemed to have 'requisite and appropriate quality'"); *id.* at 208 ("A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material[.]"); *id.* at 217 (Breyer, J., concurring in the judgment) (referring to "the discretion necessary to create, maintain, or select a library's 'collection'").

they say it. *Ibid.* This is common sense, and *ALA* plainly supports it.

Imagine if a library had to keep just any book in circulation—no matter how out-of-date, inaccurate, biased, vulgar, lurid, or silly. It would be a warehouse, not a library. By definition, libraries curate what they offer. A library’s “goal has never been to provide universal coverage,” but rather to “collect only those materials deemed to have requisite and appropriate quality.” *Id.* at 204 (plurality) (cleaned up).¹⁴ Selecting materials for their “requisite and appropriate quality” means choosing some content and viewpoints while rejecting others. No one thinks the Constitution requires public libraries to shelve books promoting quackeries like phrenology, spontaneous generation, tobacco-smoke enemas, Holocaust denial, or the theory that the Apollo 11 moon landing was faked.¹⁵ See Frederick A. Schauer, *Principles*,

¹⁴ See also *id.* at 217 (Breyer, J., concurring in the judgment) (rejecting strict scrutiny because it “would unreasonably interfere with the discretion necessary to create, maintain, or select a library’s ‘collection’”).

¹⁵ See, e.g., LYDIA KANG, *QUACKERY: A BRIEF HISTORY OF THE WORST WAYS TO CURE EVERYTHING* (2017) (discussing 18th-century notion that “tobacco-smoke enemas” could revive drowning victims); HENRY HARRIS, *THINGS COME TO LIFE: SPONTANEOUS GENERATION REVISITED* (2002) (discussing “the theory that inanimate material can, under appropriate conditions, generate life forms by completely natural processes”); Audiey Kao, *Medical Quackery: The Pseudo-Science of Health and Well-Being*, 2 VIRTUAL MENTOR: A.M.A. J. ETHICS 30, 30 (Apr. 2000) (explaining that early-20th-century phrenology practitioners purported to examine a person’s character by “measur[ing] the conformation of the skull” with a “psycho-graph”); DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1994) (discussing history of Holocaust denial).

Institutions, and the First Amendment, 112 HARV. L. REV. 84, 106 (1998) (“SCHAUER”) (few people would “disagree . . . with the ability of a librarian to select books accepting that the Holocaust happened to the exclusion of books denying its occurrence”). The First Amendment does not force public libraries to have a Flat Earth Section.

How, then, did the district court—and now the majority—reach the mind-boggling conclusion that the Free Speech Clause *bars* libraries from removing books based on content or viewpoint? By making a series of legal errors. First, the district court and the majority invented a right to “receive information and ideas” in a public library. Op. 11. But that supposed right comes from a case recognizing the right to possess obscene materials *in one’s private home*. Second, the district court and the majority each drew on our court’s *Campbell* decision to constrain a library’s discretion. But *Campbell* applies in the unique realm of *school* libraries and extending it to public libraries runs headlong into the Supreme Court’s subsequent *ALA* decision. Furthermore, the district court relied on *Campbell* to make a nonsensical distinction (which the majority does not accept) between a library’s *acquiring* and *removing* books. Third, the district court wrongly applied forum analysis to a library’s bookshelves—an analysis which, again, the majority apparently disavows. Finally, the majority aggravates the district court’s errors by inventing “rules” for librarians that are self-contradictory and will prove impossible to apply.

1. *The Stanley v. Georgia right to privately possess obscenity does not extend to a public library.*

The majority stumbles out of the gate by grounding its holding on the supposed right of library patrons “to receive information and ideas.” Op. 9, 11. The majority excavates this right from *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Op. 9. But even a casual perusal of *Stanley* shows why that decision does not translate to a public library.

Stanley recognized a person’s right to view obscene books and films at home. As the Supreme Court put it: the petitioner was “asserting the right . . . to satisfy his intellectual and emotional needs in the privacy of his own home.” *Stanley*, 394 U.S. at 565. This is the context of the Court’s recognizing a “right to receive information and ideas.” *Id.* at 564; *see also ibid.* (observing the case involved “a prosecution for mere possession of printed or filmed matter *in the privacy of a person’s own home*”) (emphasis added); *ibid.* (noting the petitioner’s “right to be free . . . from unwanted governmental intrusions into one’s *privacy*”) (emphasis added).

It is too obvious for words why *Stanley*’s right to privately peruse obscenity at home cannot extend to a public library. But I will say it anyway. The home is *private* while the public library is *public*. Mr. Stanley won the right to watch legally obscene films at his house (presumably with the shades drawn). *See id.* at 563 (recognizing Stanley’s right to privately view materials whose distribution could be banned under *Roth v. United States*, 354 U.S. 476 (1957)); *see also Miller v. California*, 413 U.S. 15 (1973). He did not win the right to watch dirty movies in a reading room at the local county library. *Cf. United States v.*

Marchant, 803 F.2d 174, 178 (5th Cir. 1986) (noting that “the attempt to extend *Stanley* ‘overlooks the explicitly narrow and precisely delineated *privacy* right on which *Stanley* rests”) (quoting *United States v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 127 (1973)).

No precedent has ever extended *Stanley* to a public library. The closest anyone has come is Justice Brennan’s separate opinion in *Pico*. See *Pico*, 457 U.S. at 867 (op. of Brennan, J., joined by Marshall and Stevens, JJ.). That opinion, which only two other Justices joined, would have extended the *Stanley* right to a school library. *Id.* at 856–57 (op. of Brennan, J.). But at least *five* other Justices rejected the idea. See *id.* at 883 (White, J., concurring in the judgment); *id.* at 885 (Burger, C.J., joined by Powell, Rehnquist, and O’Connor, JJ., dissenting). And our *Campbell* decision—discussed in detail below—identified Justice White’s *Pico* concurrence as the narrowest ground for the judgment. See *Campbell*, 64 F.3d at 189 (stating that “Justice White’s concurrence in *Pico* represents the narrowest grounds for the result in that case”). Justice White’s concurrence *rejected* Justice Brennan’s “dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library.” *Pico*, 457 U.S. at 883 (White, J., concurring in the judgment). So, our own precedent belies the notion that *Stanley* applies to a school library.

Finally, consider the absurdity of extending *Stanley*’s “right to receive information” to a public library. It suggests that a public library has a constitutional obligation to make sure patrons “receive” certain materials. Cf. *id.* at 888 (Burger, C.J., dissenting) (explaining *Stanley*’s “right to receive information

and ideas' . . . does not carry with it the concomitant right to have those ideas affirmatively provided at a particular place by the government"). It also suggests that a public library must not only avoid removing certain books but must acquire those books as well. *See id.* at 916 (Rehnquist, J., dissenting) (explaining the "distinction between acquisition and removal makes little sense" because "[t]he failure of a library to acquire a book denies access to its contents just as effectively as does the removal of the book from the library's shelf"). None of that makes any sense.

The majority's Free Speech misadventure should have stopped in its tracks here. *Stanley's* right to peruse obscenity in private has no application to someone's desire to read books, obscene or not, in a public library.

2. Just as when they acquire books, public libraries can remove books based on content or viewpoint.

The district court and the majority, in different ways, both mistakenly drew on our *Campbell* decision. The district court found in *Campbell* a constitutional distinction between a library's *acquiring* and *removing* books that collapses under the slightest scrutiny. For its part, the majority tries to "harmonize" *Campbell* with *ALA* by using *Campbell* to artificially constrict public libraries' discretion to shape book collections. Op. 13. But the cases are discordant. *Campbell* addresses the unique school library context and extending it to public libraries flies in the face of *ALA* and common sense.

Contrary to the district court's reasoning, the Free Speech Clause does not apply differently to a library's decision to acquire books as opposed to its decision to

remove them. That bizarre dichotomy finds no support in *ALA*, again the most on-point decision. The opinions in that case discuss libraries' discretion in "decid[ing] what material to provide to their patrons," in "selecting . . . material," in "making collection decisions," and in "creat[ing], maintain[ing], or select[ing]" its materials. *See ALA*, 539 U.S. at 204, 205 (plurality op.); *id.* at 217 (Breyer, J., concurring in the judgment). None suggests that a library's discretion, at its apex when acquiring a book, somehow vanishes if a library retires the book because it is now inaccurate or biased or no longer of interest. That is good news, because the distinction between acquiring and removing books makes no sense.

To support the supposed distinction between acquisition and removal, the district court believed it was bound by our 1995 decision in *Campbell*. As noted, *Campbell* held that the First Amendment bars officials from "remov[ing] books from school library shelves simply because they dislike the ideas contained in these books." 64 F.3d at 188 (cleaned up) (citation omitted). The court found a fact dispute over why officials removed a book called *Voodoo & Hoodoo* from St. Tammany Parish school libraries and remanded for further inquiry. *Id.* at 190. Even assuming *Campbell* contains some distinction between acquiring and removing books, *Campbell* does not apply here for at least three reasons.

First, *Campbell* addressed the "unique role of the school library." *Id.* at 188 (quoting *Pico*, 457 U.S. at 868–69 (plurality)). It therefore had to balance "public school officials[]" . . . broad discretion in the management of school affairs" against "students' First Amendment rights." *Id.* at 187–88. Those

“competing considerations,” *Campbell* stressed, lay “at the core of this First Amendment book removal case.” *Id.* at 188; *see also id.* at 190 (noting “the special role of the school library as a place where students may freely and voluntarily explore diverse topics”).

Campbell’s competing considerations are absent here. A county library does not implicate the “unique” First Amendment concerns at play in a public school. *Id.* at 188; *see also ibid.* (observing a school library is “the principal locus” of students’ “free[dom] to inquire, to study[,] and to evaluate”) (quoting *Pico*, 457 U.S. at 868–69 (plurality)). While no doubt important to the local community, a county library is—to state the obvious not part of a public school. *Cf. Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (discussing students’ First Amendment rights “in light of the special characteristics of the school environment”). So, there is no basis for transplanting *Campbell* into the realm of public libraries.¹⁶

Second, even if one were inclined to extend *Campbell* to public libraries, *ALA* would stand in the way. *Campbell* prohibits removing a school library book if the “decisive factor” is “dislike [of] the ideas contained in th[e] book[.]” 64 F.3d at 188 (quoting *Pico*,

¹⁶ The majority responds by saying that *Campbell* applies both “in and out of the school context.” Op. 14. Not so. *Campbell* positively marinates in the school context. *See, e.g., Campbell*, 64 F.3d at 188 (“School officials’ legitimate exercise of control over pedagogical matters must be balanced, however, with the recognition that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”) (quoting *Tinker*, 393 U.S. at 506). To say that *Campbell* applies “out of the school context” is to rewrite the decision.

457 U.S. at 870–72). By contrast, *ALA* recognizes public libraries’ “broad discretion to decide what material to provide to their patrons.” *ALA*, 539 U.S. at 204 (plurality); *see also id.* at 217 (Breyer, J., concurring in the judgment) (discussing “the discretion necessary to create, maintain, or select a library’s ‘collection’”).

The two standards are incompatible. Suppose a public library discovers it offers a book promoting Holocaust denial and decides to remove it. *ALA* allows that. *See ALA*, 539 U.S. at 208 (plurality) (“A library’s need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material[.]”). Yet, there is no escaping that the book is being removed because the library “dislike[s] the ideas” in it. *Campbell*, 64 F.3d at 188.¹⁷ So, *Campbell* would likely forbid what *ALA* allows. We cannot extend *Campbell* in such a way that it conflicts with an on-point Supreme Court decision, especially one issued long after *Campbell*.¹⁸

¹⁷ The majority’s response to this point is baffling. It claims a librarian does “not necessarily” remove the Holocaust-denial book because she “dislikes the ideas in it,” but perhaps because she objects to “the accuracy of the content.” Op. 14–15. What in heaven’s name is the difference? And does the majority not see that just about *every* disagreement over a book’s “ideas” can be re-imagined as a disagreement about a book’s “accuracy”? And even if there is some metaphysical distinction between the two concepts, the majority is sentencing the judiciary to an eternity of hair-splitting litigation over whether a librarian’s motives for removing a book are about “ideas” or “accuracy.”

¹⁸ This also answers the majority’s view that First Amendment rights “outside the school are even more robust.” Op. 13. *ALA* teaches that the opposite is true: because public libraries do not have to contend with the sometimes competing speech

Third, even assuming *Campbell* applies to a public library, it would still conflict with the district court's First Amendment rationale. The district court applied strict scrutiny to a public library's removing a book based on *any* consideration of content. But *Campbell* itself would allow a school library to remove books "based on a belief that the books were 'pervasively vulgar' or on grounds of 'educational suitability.'" *Campbell*, 64 F.3d at 189 (quoting *Pico*, 457 U.S. at 870–72). In other words, because of objectionable *content* or *viewpoint*. So, even if *Campbell* applied here (which it could not under *ALA*), it would impose a First Amendment standard different from the district court's. That is yet another reason not to apply *Campbell* to a public library.¹⁹

interests of students and administrators, they have "broad discretion" to curate their collections. In any event, as discussed, the majority's whole conception of library patrons' "rights" in this context is mistaken, based on an illogical extension of *Stanley*. See *supra* Part III(A)(1).

¹⁹ The majority concedes the district court's opinion was "somewhat imprecise" on this point, Op. 15, yet waves away any problem by stating: "But *Campbell*'s rule holds true regardless: if the remover's motivation is to deny access to ideas with which he or she disagrees, the remover violates the Constitution." *Ibid*. Six pages later, though, the majority reintroduces the same problem by conceding a librarian *can* remove books that are "pervasively vulgar" or "educationally unsuitable." *Id.* at 21. The majority has thus simultaneously missed my point and proved it: there is no discernible difference between (1) removing a book because of disagreement with its "ideas," and (2) removing a book because it is "vulgar" or "educationally unsuitable." Maybe there is a world where a librarian can, at the same time, agree with a book's ideas and yet believe the book is so crass or stupid that it should be pulled off the shelves. It is not our world, though.

Instead of addressing whether *Campbell* supports a constitutional distinction between acquiring and removing books, the majority hides in the tall weeds. In a footnote, it “decline[s] to expressly address” this question because *Campbell* only involved removal. Op. 16 n.8. Come on. If one’s right to “receive information” is violated by a library’s removing a book, then the obvious question is whether that right is also violated by a library’s not acquiring the book in the first place. I suspect the reason the majority ducks this question is that answering it would nuke its position. Does anyone think patrons have a First Amendment right to make libraries *purchase* their preferred books? Of course not. But a library just as surely denies a patron’s right to “receive information” by not purchasing a book in the first place as it does by pulling an existing book off the shelves.

The majority does embrace *Campbell*, however, for the proposition that public librarians’ discretion must be limited when they remove books. See Op. 11, 18. The majority is mistaken here, too. Perhaps *Campbell* gives some support to curtailing *school* librarians’ discretion over book removals, given the sometimes competing interests of school officials and students. See *Campbell*, 64 F.3d at 188 (I express no opinion on whether *Campbell* was correctly decided). But that idea falls flat when applied to public librarians, who must have the freedom to remove books for various reasons inescapably related to the books’ content and viewpoint.

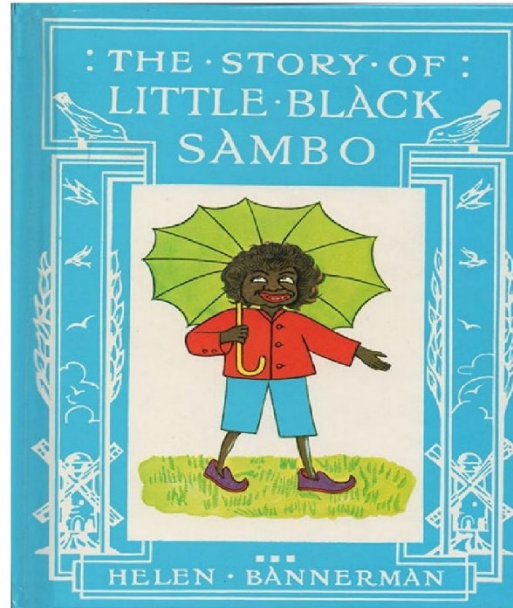
Times change and library collections change along with them. Here is one mundane example. Not long ago, astronomy books taught that Pluto was a full-fledged planet. In 2006, Pluto was demoted to a “dwarf.” See INT’L ASTRONOMICAL UNION, RESOLUTION

B6, XXVI GENERAL ASSEMBLY (2006) (“Pluto is a ‘dwarf planet’ . . . and is recognized as the prototype of a new category of Trans-Neptunian Objects.”). If a public library replaces books listing Pluto as the outermost planet with newer books listing Neptune, does it commit “content or viewpoint discrimination”? Yes, it does. Otherwise, it would commit library malpractice.

Two more examples. Suppose a public librarian discovers on the shelves the 1943 book *Sex Today in Wedded Life*, which offers this advice to married women:

Don’t bother your husband with petty troubles and complaints when he comes home from work. Be a good listener. Let him tell you his troubles; yours will seem trivial in comparison. Remember your most important job is to build up and maintain his ego (which gets bruised plenty in business).
Morale is a woman’s business.

EDWARD PODOLSKY, *SEX TODAY IN WEDDED LIFE* (1943). Today, some may find this viewpoint outdated. Or suppose a librarian discovers an old children’s book displaying racist stereotypes—one infamous example is *Little Black Sambo* (1899):



Today, a librarian would surely prefer a book depicting race in a better light. According to Plaintiffs, though, the First Amendment forbids the librarian from removing either book based on disagreement with their “viewpoint” on sex or race. That cannot be the law (but it is now, thanks to the majority).

You may be thinking: surely Plaintiffs would not push this idea *that* far! You would be wrong. At oral argument, Plaintiffs made their position crystal clear. See O.A. Rec. at 24:00–27:20. Counsel was asked this hypothetical:

Q: Let’s say a new librarian comes in and discovers on the shelves a book by a former Grand Wizard of the Ku Klux Klan. The book explains why black people are an inferior race. So she removes it from the shelves. Is that viewpoint

discrimination? And if so is that unconstitutional?

A: In your hypothetical, Judge Duncan, *why* did she remove it from the shelves?

Q: Because she found that idea offensive. That black people are inferior.

A: If that was her substantial or . . . decisive motivation, then yes, your honor.

Q: Really? *Really?*

O.A. Rec. 24:36–25:11. This position is absurd. Yet, incredibly, the majority *agrees* with it. We are told that a librarian can only remove “a book by a former Grand Wizard of the K.K.K. . . . *based on lack of interest and poor circulation history.*” Op. 12 (emphasis added). So, if a library’s patrons are keenly interested in the “viewpoint and message” of, say, *The Autobiography of David Duke*—and so they check the book out regularly—then a library cannot constitutionally remove it. Astounding.

In sum, a public library’s “broad discretion” to shape its collection applies equally to removing books as to acquiring them. *ALA*, 539 U.S. at 205 (plurality). And barring public librarians from considering a book’s viewpoint as a reason for putting it on the shelves, or for taking it off the shelves, is nonsensical. The district court erred in concluding otherwise and the majority reinforces that error today.

3. Forum analysis does not apply to a public library’s book collection.

The district court also supported its decision by characterizing a library as a “limited public forum” in which viewpoint-based restrictions are verboten. On appeal, Plaintiffs defend the preliminary injunction

on this basis, arguing that forum analysis applies to a library’s book collection. The majority appears to disavow this rationale, *see* Op. 12, but because the district court and the Plaintiffs rely on it, I will explain why it is mistaken.

Forum analysis is used to assess when government can regulate private speech on property it owns or controls. *See generally Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 426–27 (5th Cir. 2020) [*FFRF*]. In traditional public fora—sidewalks, streets, and parks—the government has little leeway to regulate speech: content- or viewpoint-based restrictions are strictly scrutinized. *FFRF*, 955 F.3d at 426 (citing *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 758 (5th Cir. 2010)).²⁰ The government has more latitude in “limited” public fora, which are “places that the government has opened for public expression of particular kinds or by particular groups.” *Ibid.* (citing *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346 (5th Cir. 2001) (per curiam)). There, restrictions are valid if they are “(1) reasonable in light of the purpose served by the forum and (2) do[] not discriminate against speech on the basis of viewpoint.” *Id.* at 426–27; *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (government “may create a forum that is limited to use by certain

²⁰ The same standard applies to “designated” public fora, which are “places that the government has designated for the same widespread use as traditional public forums.” *Ibid.* (citation omitted). In either traditional or designated public fora, however, the government may impose reasonable restrictions on the time, place, and manner of private speech. *See, e.g., Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) (citation omitted).

groups or dedicated solely to the discussion of certain subjects,” where it “may impose restrictions on speech that are reasonable and viewpoint neutral”) (citation omitted).

To support their argument, Plaintiffs point to three sister-circuit decisions that deem public libraries some kind of public forum. Those cases have no bearing on the question before us, however. They address whether public libraries may evict certain people from their premises—such as sex offenders, shoeless persons, or a vagrant who menaced library staff and whose “odor was so offensive that it prevented the [l]ibrary patrons from using certain areas of the [l]ibrary.” *See Doe v. City of Albuquerque*, 667 F.3d 1111, 1115 (10th Cir. 2012) (sex offenders); *Neinast v. Bd. of Tr. of the Columbus Metro. Libr.*, 346 F.3d 585, 589 (6th Cir. 2003) (shoeless man); *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1247-48 (3rd Cir. 1992) (menacing, odiferous vagrant). Those courts answered that question by treating a library’s premises as a First Amendment forum. *See, e.g., Kreimer*, 958 F.3d at 1261 (concluding public library at issue “constitutes a limited public forum”).

We need not decide whether this analysis by our sister circuits was correct. It is one thing to say that a public library’s *premises* may constitute a public forum of some sort. For instance, a library might open one of its rooms to poetry readings by the public and thereby create a limited public forum. *See, e.g., id.* at 1259–60 (concluding public library at issue “constitutes a limited public forum” because “the government intentionally opened the Library to the public for *expressive activity*”). But it is entirely another thing to extend this concept, as Plaintiffs would,

to a library's *bookshelves*. Plaintiffs' cases do not support doing that. They address only whether a library can evict certain patrons. *See, e.g., Neinast*, 346 F.3d at 592 (upholding no-shoes policy because it avoided "tort claims brought by library patrons who were injured because they were barefoot"). They say nothing about whether a library can exclude certain books from its shelves.

More to the point, it makes no sense to apply forum analysis to a library's book collection. Library shelves are not a community bulletin board: they are not "places" set aside "for public expression of particular kinds or by particular groups." *FFRF*, 955 F.3d at 426. If they were, libraries would have to remain "viewpoint neutral" in choosing books. *See Summum*, 555 U.S. at 470 (limited public fora's restrictions must be "viewpoint neutral"). That would be ridiculous. Libraries choose certain viewpoints (or range of viewpoints) on a given topic. But they may exclude others. A library can have books on Jewish history without including the Neo-Nazi take. *See, e.g., Schauer, supra*, at 106 (explaining a librarian may choose books "accepting that the Holocaust happened to the exclusion of books denying its occurrence"). Forum analysis has no place on a library's bookshelves.

If there were any doubt, *ALA* would dispel it. The plurality rejected the notion that a library's book collection is a public forum. "A public library does not acquire Internet terminals in order to create a public forum," the plurality explained, "any more than it collects books in order to provide a public forum for the authors of books to speak." *ALA*, 539 U.S. at 206 (plurality). We have followed *ALA* on this point. *See Chiras v. Miller*, 432 F.3d 606, 614 (5th Cir. 2005)

(relying on *ALA* for proposition that neither forum analysis nor heightened scrutiny apply to libraries' collection decisions) (citing *ALA*, 539 U.S. at 205 (plurality)). A library places books on its shelves for an obvious purpose—"to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." *ALA*, 539 U.S. at 206 (plurality). That core function is at war with any notion that the library's book collection constitutes a public forum.

I said earlier that the majority "appears" to agree with these points. *See* Op. 12 ("We agree with Defendants that public forum principles are 'out of place in the context of this case.'") (citation omitted). I am not 100% sure, though. According to the majority, the notion that a library's shelves are a public forum "is not what Plaintiffs argue here." *Ibid.* Wrong. On page 42 of their brief, Plaintiffs argue (incorrectly) that "courts have almost uniformly held that public libraries are limited public fora to which heightened scrutiny applies, as the District Court found." Red Br. at 42. The majority gets around this by recasting Plaintiffs' argument: they are not "authors" who want their books on library shelves, "but instead are patrons who seek to exercise their right to receive information." Op. 12. So, we arrive again at the supposed right to receive information at a public library. *See supra* Part III(A)(1). Take away that made-up right, and all the plaintiffs have is their library-shelves-are-a-public-forum argument. It is wrong, whether the majority wants to admit it or not.

In sum, First Amendment forum analysis does not apply to a public library's book collection. The district court erred by concluding otherwise.

4. *The majority's "rules" are a jurisprudential disaster.*

Finally, the majority is not content just to adopt the district court's rule that libraries cannot consider content or viewpoint when removing books. While wrong, that rule is at least straightforward. The majority has chosen to complexify the matter by inventing its own "rules." Here they are again:

1. Libraries "may consider books' contents in making curation decisions." Op. 11 (citing *ALA*, 539 U.S. at 204 (plurality)).
2. But patrons have the "right to receive information and ideas." *Ibid.* (quoting *Stanley*, 394 U.S. at 564).
3. A library violates that right if its decision to remove a book is "substantially motivated' by the desire to deny 'access to ideas with which [the library] disagree[s]." *Id.* at 11–12 (quoting *Pico*, 457 U.S. at 871 (plurality)).
4. But a library can remove books "based on . . . the accuracy of the[ir] content," *id.* at 15, or "based on a belief that the books [are] 'pervasively vulgar' or on grounds of 'educational suitability,'" *id.* at 21 (quoting *Campbell*, 64 F.3d at 188–89).

These rules are ill-conceived, self-contradictory, and impossible to apply.

First, like Frankenstein's Monster, the rules are stitched together from bits and parts of four cases—*ALA*, *Stanley*, *Pico*, and *Campbell*. As I've already explained, though, only one of those cases—*ALA*—is actually relevant because it alone addresses the

subject at hand: a public library's discretion to shape its collection. *See supra* Part III. The other cases are inapposite. *Stanley* is about private viewing of obscenity, and *Pico / Campbell* are about school libraries (and both pre-date *ALA*).²¹ The bottom line, though, is that the majority's rules are the majority's creation. No binding precedent, either of the Supreme Court or our court, required their adoption.

Second, the rules contradict themselves. Suppose a librarian removes Henry Miller's 1934 book, *Tropic of Cancer*, based on complaints that the book is "debased and morally bankrupt" and uses "vivid, lurid, [and] salacious language." *See Besig v. United States*, 208 F.2d 142, 145 (9th Cir. 1953) (affirming finding that *Tropic of Cancer* was obscene). The book was a font of controversy in the 1950's and 60's because of its explicit treatment of sexual themes. *Time* referred to it as one of those books "sewer-written by dirty-fingered authors for dirty-minded readers." *Life* took a different view, predicting the book "will be defended by critics as an explosive corrosive Whitmanesque masterpiece (which it is) and attacked as an unbridled obscenity (which it is)." Then-Massachusetts Attorney General, Edward J. McCormack, Jr., was less nuanced: he found the book

²¹ *Pico* bears mention only because *Campbell* discussed it. *See Campbell*, 64 F.3d at 188–89. But *Campbell* itself noted that nothing in *Pico* is "binding precedent" with respect to the First Amendment. *Ibid.* As *Campbell* stated, the "narrowest" and hence controlling opinion in *Pico* is Justice White's concurrence—a concurrence that disavowed the First Amendment discussion in Justice Brennan's separate opinion. *See supra* Part III(A)(2).

“repulsive,” “an affront to human decency,” and “brazenly animalistic.”²²

So, to return to our librarian: does removing *Tropic of Cancer* violate the First Amendment? Let’s apply the majority’s rules:

Question: Was the librarian’s “substantial motive” in removing *Tropic of Cancer* her disagreement with the book’s ideas?

Answer: Yes, so removing it violates the First Amendment.

Question: Did the librarian remove *Tropic of Cancer* because she found it “pervasively vulgar”?

Answer: Yes, so removing it does not violate the First Amendment.

Raise your hand if you see the problem.

Or consider a more modern example. In 2018, the American Library Association stripped Laura Ingalls Wilder’s name from its Lifetime Achievement Award because, according to some, her *Little House* books “reflect dated cultural attitudes toward Indigenous people and people of color.”²³ Suppose, in response to the ALA’s action, a Travis County librarian removes the *Little House* books. The librarian is sued. Let’s apply the majority’s rules. Was the librarian’s “sub-

²² See Barney Rosset, *Profiles in Censorship: Henry Miller and the Tropic of Cancer*, in ROSSET: MY LIFE IN PUBLISHING AND HOW I FOUGHT CENSORSHIP (2017).

²³ See AMERICAN LIBRARY ASS’N PRESS RELEASE, *ALA, ALSC respond to Wilder Medal name change* (June 25, 2018), <https://www.ala.org/news/pressreleases/2018/06/ala-alsc-respond-wilder-medal-name-change>.

stantial motivation” for removing the books to deny access to Wilder’s supposedly dated ideas? Or was her motive that the books were educationally unsuitable? The answer is “yes” and “yes,” which of course is no answer at all.

Finally, the rules cannot be applied coherently. Look no further than this case. The two judges in the majority cannot agree on how their rules apply to over *half* of the books at issue. JUDGE WIENER is confident all 17 books must be restored to the shelves because the evidence shows the “substantial” motive for removing them was to “deny access” to disfavored ideas. *See* Op. 18–23; *see also id.* at 18 (claiming this is a “relatively straightforward application” of the rules). JUDGE SOUTHWICK is less sure. He believes the rules allow the Butt and Fart Books to be removed because he doubts they “contain any *ideas* with which to disagree.” Op. 1 (Southwick, J., concurring in part and concurring in the judgment in part). Alternatively, he believes those books may be removed because a librarian might consider them “pervasively vulgar” or “not educationally suitable.” *Id.* at 2 (citation omitted). He also allows that a book may be removed on the ground that “it encourages children to engage in sexual activity with adults or includes sexually explicit content”—a rationale that, “[a]t this stage of the case,” may include *In the Night Kitchen* (because it contains drawings of a naked toddler) and *It’s Perfectly Normal* (because of the sexually explicit cartoons you can examine on page 43). *Ibid.*

So, by my count, that means the two judges in the majority—while ostensibly agreeing on the “rules”—disagree on whether those “rules” permit removal of nine of the 17 books at issue. To paraphrase Cormac McCarthy, “If the rules you followed led you to this,

of what use were the rules?” Cormac McCarthy, *NO COUNTRY FOR OLD MEN* (2005).

Do I have to answer?

* * *

Because the district court applied an incorrect legal standard, it abused its discretion in entering a preliminary injunction. *See Kauffman*, 981 F.3d at 354 (citation omitted). The court should have vacated the injunction and remanded for further proceedings.

B. The Free Speech Clause Does Not Constrain Public Libraries’ Collection Decisions.

Because the case will continue on remand, the court should answer to the legal question posed here—namely, how the Free Speech Clause applies to a public library’s choice of the books and other materials in its collection.²⁴ The short answer is that those choices are government speech to which the Free Speech Clause does not apply. Below, I explain why that is the case, while responding to the majority’s criticisms.

1. Supreme Court precedents: Forbes, Finley, ALA, and Summum

The library at issue is a public entity supervised by a local government body. *See* TEX. LOCAL GOV’T CODE §§ 323.001(a) (providing for “a free county library”

²⁴ *See, e.g., Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (en banc) (reversing and remanding for district court to consider racial discrimination claim “in light of the guidance we have provided in this opinion”); *Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 482 (5th Cir. 2001) (in addition to reversing class certification, addressing legal issue on which district court erred “to guide the district court on remand”).

created either by “the commissioners court” or “a majority of the voters”); 323.006 (“The county library is under the general supervision of the commissioners court.”). It is supported by county funds. *Id.* § 323.002. It is administered by the county librarian “subject to the general rules adopted by the commissioners court.” *Id.* § 323.005(c). Among other duties, the librarian “shall determine which books and library equipment will be purchased.” *Ibid.*

How, if at all, does the Free Speech Clause constrain this library’s discretion to shape its collection, whether through acquiring new books or removing books on the shelves? As discussed, Plaintiffs defend the position (adopted by the district court and largely affirmed by the majority) that a library’s viewpoint- or content-based removal of books is unconstitutional. They also argue that, as a limited public forum, a library’s removal of a book triggers heightened scrutiny. I have already explained why these arguments fail. For their part, Defendants argue that libraries’ “weeding decisions” need only have a rational basis. As I explain below, both sides are incorrect about the Free Speech standard applicable here.

To answer this question, *ALA* is again a good starting place. The plurality characterized a public library’s choice of books as “the government . . . deciding what private speech to make available to the public.” 539 U.S. at 204 (plurality). To flesh out that idea, the plurality drew on two areas where the government makes similar decisions regarding private speech: a public television station’s “editorial judgments” over what private speech to air (*see Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998)), and a federal agency’s decision to fund certain artistic works (*see Nat’l Endowment for the*

Arts v. Finley, 524 U.S. 569 (1998)). In the plurality's view, these precedents charted the boundaries of a public library's discretion: "The principles underlying *Forbes* and *Finley* . . . apply to a public library's exercise of judgment in selecting the material it provides to its patrons." *ALA*, 539 U.S. at 205 (plurality).²⁵

Those cases afforded the government wide discretion over its presentation of private speech. For instance, *Forbes* recognized that public broadcasters "are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming." 523 U.S. at 673. That discretion generally excludes "claims of viewpoint discrimination" because "a broadcaster by its nature will facilitate the expression of some viewpoints instead of others." *Id.* at 673–74. Moreover, allowing judges to superintend such decisions "would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion." *Id.* at 674; *see also ALA*, 539 U.S. at 204 (plurality).²⁶

²⁵ In Defendants' view, *ALA* teaches that "rational-basis review applies to a public library's weeding decisions." I disagree. The statement Defendants quote for this point ("[G]enerally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational [basis] review.") was itself merely quoting the district court decision in that case. *See ALA*, 539 U.S. at 202 (plurality) (quoting 201 F. Supp. 2d 401, 462 (E.D. Pa. 2002)). The *ALA* plurality, however, did not adopt that standard for testing a library's collection decisions.

²⁶ *Forbes* recognized a "narrow exception" to this general principle—namely, where a public broadcaster creates a "non-public forum" by hosting a candidate debate. *See id.* at 675 (explaining that "candidate debates present the narrow exception to the

Finley is also deferential to government discretion. As the *ALA* plurality explained, *Finley* “upheld an art funding program that required the National Endowment for the Arts (NEA) to use content-based criteria in making funding decisions.” *ALA*, 539 U.S. at 205 (plurality) (citing *Finley*, 524 U.S. 569). The criteria included “consideration [of] general standards of decency and respect for the diverse beliefs and values of the American public.” *Finley*, 524 U.S. at 576 (quoting 20 U.S.C. § 954(d)(1)). The Free Speech Clause did not constrain the NEA’s grant-making discretion, *Finley* reasoned, because judgments based on subjective considerations—including “esthetics” and “artistic worth”²⁷—were “a consequence of the nature of arts funding.” *Id.* at 585, 586; *see also ALA*, 539 U.S. at 205 (plurality). In that realm, “absolute neutrality is simply inconceivable.” *ALA*, 539 U.S. at 205 (quoting *Finley*, 524 U.S. at 585); *see also Chiras*, 432 F.3d at 613–14 (taking a similar view of *Forbes*, *Finley*, and *ALA* in the context of a state board of education’s discretion over curricula and textbooks).

rule” that forum analysis does not apply to public broadcasting). That narrow exception has no application here, however. As discussed, this case does not involve a public library’s decision to open its premises to private speech, much less to candidate debate.

²⁷ As *Finley* explained, the NEA program incorporated a “wide variety” of funding criteria, including: “the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work’s contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form.” *Finley*, 524 U.S. at 585.

Six years after *ALA*, the Supreme Court refined these principles in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). *Summum* rejected a Free Speech challenge to a city's accepting a privately-donated Ten Commandments monument for a public park. *Id.* at 464–65. Citing the *ALA* plurality, the Court held forum analysis did not apply: the city had not opened its property to private speakers but had only allowed installation of “a limited number of permanent monuments.” *Id.* at 478 (citing *ALA*, 539 U.S. at 205 (plurality)). Accordingly, the city did not have to “maintain viewpoint neutrality” in choosing monuments. *Id.* at 479.

Moreover, *Summum* held the city's decision to select some monuments but reject others “constitute[s] government speech.” *Id.* at 472. It did not matter that most of the monuments were privately donated. *Id.* at 464. The relevant expression was the city's decision, guided by its own criteria, to allow only certain monuments on public property. *Id.* at 465. The city could “express its views,” the Court explained, even “when it receives assistance from private sources for the purpose of delivering a government-controlled message.” *Id.* at 468 (citation omitted). This was an example of a government “speak[ing] for itself.” *Id.* at 467 (citation omitted). Indeed, the Court cited a concurring opinion in *Finley* for the proposition that “[i]t is the very business of government to favor and disfavor points of view.” *Id.* at 468. (quoting *Finley*, 524 U.S. at 598 (Scalia, J., concurring in judgment)).

In sum, *Summum* held that the Free Speech Clause did not constrain the city's choice of monuments in a public park. “The Free Speech Clause restricts government regulation of private speech; it does not

regulate government speech.” *Id.* at 467 (citing, *inter alia*, *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 533 (2005)). But, the Court added, “[t]his does not mean that there are no restraints on government speech.” *Id.* at 468. The Court noted the Establishment Clause as one potential check, along with “law, regulation, or practice.” *Ibid.* More fundamentally, the government expression was “ultimately ‘accountable to the electorate and the political process.’” *Ibid.* (quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)). “If the citizenry objects, newly elected officials later could espouse some different or contrary position.” *Id.* at 468–69 (citation omitted).

2. *Sister-Circuit precedents: Sutcliffe, Illinois Dunesland, and PETA.*

Rounding out this discussion, I note sister-circuit cases that treat the government’s presentation of third-party speech as the government’s own expression. For instance, in *Sutcliffe v. Epping School District*, 584 F.3d 314 (1st Cir. 2009), a non-profit group sued a town for refusing to include the group’s hyperlink on the town’s website. Applying *Summum*, *Finley*, *Forbes*, and *ALA*, the First Circuit rejected the plaintiff’s Free Speech challenge: “[T]he Town engaged in government speech by establishing a town website and then selecting which hyperlinks to place on its website.” *Id.* at 331 (citing *Summum*, 129 S. Ct. at 1134; *ALA*, 539 U.S. at 204–05 (plurality); *Finley*, 524 U.S. at 585–86; *Forbes*, 523 U.S. at 674). Specifically, the court read *Summum* to teach that when government “uses its discretion to select between the speech of third parties for presentation” through government channels, “this in itself may constitute an expressive act by the government that

is independent of the message of the third-party speech.” *Id.* at 330 (citing *Summum*, 129 S. Ct. at 1133–36).²⁸

Similarly, in *Illinois Dunesland Preservation Society v. Illinois Department of Natural Resources*, 584 F.3d 719, 721 (7th Cir. 2009), a nonprofit group sued a state agency for refusing to include the group’s “scary two-page pamphlet” in state park display racks. The pamphlet warned about “asbestos contamination while at the beaches of Illinois Beach State Park.” *Ibid.* Applying *Summum*, the Seventh Circuit rejected plaintiffs’ Free Speech challenge by characterizing the agency’s selection of materials in display racks as government expression “designed to attract people to the park.” *Id.* at 724–25 (citing *Summum*, 129 S. Ct. at 1131). As the court explained:

The [agency’s] choice of materials conveys a message that is contradicted by the plaintiff’s pamphlet. The message of the publications in the display racks is: come to the park and have a great time on the sandy beaches. The message of the plaintiff’s pamphlet is: you think you’re in a nice park but really you’re in Chernobyl[.]

Id. at 725. The court also pointed out the absurdity of imposing viewpoint neutrality here: “Must every public display rack exhibit on demand pamphlets

²⁸ Like *Summum*, the court acknowledged that “there may be limits to the government speech doctrine,” such as “vot[ing] [officials] out of office, or limit[ing] the conduct of those officials by law, regulation, or practice.” *Id.* at 331 & n.9 (citations and internal quotation marks omitted). The court added that “[t]he Establishment Clause is another restraint on government speech, and the Equal Protection Clause may be as well.” *Ibid.* (citation omitted).

advocating nudism, warning that the world will end in 2012, . . . or proclaiming the unconstitutionality of the income tax, together with pamphlets expressing the opposing view on all these subjects?” *Ibid.*

The final instructive case is *PETA v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005). As part of a public art program called “Party Animals,” the District of Columbia solicited designs for “sculptures of 100 donkeys and 100 elephants.” *Id.* at 25. Winners chosen by the District²⁹ would have their designs displayed at prominent locales. *Id.* at 26. PETA submitted various elephant designs, including “one of a happy circus elephant, the other of a sad, shackled circus elephant with a trainer poking a sharp stick at him.” *Id.* at 26. After the District “accepted the happy elephant, but rejected the sad one,” PETA sued under the Free Speech Clause. *Ibid.* The district court granted a preliminary injunction requiring the District to display one of PETA’s sad elephants. *Id.* at 27.³⁰ The D.C. Circuit reversed.

The court first concluded that the District itself was speaking by choosing some designs over others. *Id.* at 28 (citing *Forbes*, 523 U.S. at 674). The court carefully distinguished the District’s speech from the artists’ speech, using the analogy of public library books: “As to the message any elephant or donkey conveyed, this was no more the government’s speech

²⁹ The District’s criteria sought “artwork that is dynamic and invites discovery,” “original and creative,” “durable,” and “safe.” *Id.* at 25–26. Not allowed, however, were “direct advertising,” “social disrespect,” “slogans,” or “inappropriate images.” *Ibid.*

³⁰ This version “depict[ed] a shackled elephant crying” with a “sign tacked to the elephant’s side [that] read: ‘The Circus is coming. See SHACKLES–BULL HOOKS–LONELINESS. All under the ‘Big Top.’” *Id.* at 26.

than are the thoughts contained in the books of a city's library." *Ibid.* Nonetheless, government speech was still present:

With respect to the public library, *the government speaks through its selection of which books to put on the shelves and which books to exclude*. In the case before us, the Commission spoke when it determined which elephant and donkey models to include in the exhibition and which not to include.

Ibid (emphasis added).³¹

Next, the court held that "public forum principles 'are out of place in the context of this case.'" *Ibid.* (quoting *ALA*, 539 U.S. at 205 (plurality)). By choosing some designs and rejecting others, the District was not regulating private speech but was speaking for itself. The government, the court explained, "may run museums, libraries, television and radio stations, primary and secondary schools, and universities," and "[i]n all such activities, the government engages in the type of viewpoint discrimination that would be unconstitutional if it were acting as a regulator of private speech." *Id.* at 29 (citing *Schafer*, *supra*, at 104–05). Relying on *Forbes*, *Finley*, and *ALA*, the court underscored the government's wide discretion in such endeavors: "As a television broadcaster, the government must 'ex-

³¹ While *PETA* pre-dated *Summum*, the D.C. Circuit's analysis anticipated the Supreme Court's. *See id.* at 29 (explaining that "First Amendment constraints do not apply when [government] authorities engage in government speech by installing sculptures in the park. If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee").

ercise journalistic discretion’; as an arts patron, the government must ‘make esthetic judgments’; and as a librarian, the government must ‘have broad discretion to decide what material to provide to [its] patrons.’” *Ibid.* (cleaned up) (quoting *Forbes*, 523 U.S. at 674; *Finley*, 524 U.S. at 586; *ALA*, 539 U.S. at 204 (plurality)). Accordingly, the Free Speech Clause did not restrict the District’s “decisions about PETA’s elephants” because the Clause “does not apply to the government as communicator.” *Id.* at 30–31.

3. *A public library’s collection decisions are government speech.*

These precedents point to one conclusion: a public library’s selection of some books, and its rejection of others, constitutes government speech. Those choices are therefore not constrained by the Free Speech Clause. *See, e.g., Summum*, 555 U.S. at 467 (“The Free Speech Clause . . . does not regulate government speech.”) (citation omitted).

I emphasize, as have other courts, the distinction between government and private speech at work here. *See, e.g., Summum*, 555 U.S. at 470–72; *PETA*, 414 F.3d at 28. The government expression in this case is not found in the words of the library books themselves. Of course not. “Those who check out a Tolstoy or Dickens novel would not suppose that they will be reading a government message.” *PETA*, 414 F.3d at 28. Rather, the government speaks by choosing certain books over others for the library’s collection. That selectivity is why we have libraries in the first place. “[T]heir goal has never been to provide universal coverage,” but instead “to collect only those materials deemed to have requisite and appropriate quality.” *ALA*, 539 U.S. at 204 (plurality) (citation and internal quotation marks omitted). And the

message sent by the library's choice is plain: *this* book is "suitable and worthwhile material," while *that* book is not. *Id.* at 208 (plurality). That message is the library's and is not subject to judicial scrutiny under the Free Speech Clause.³²

Plaintiffs' rejoinder is that affording public libraries broad discretion over their collections will lead to something they call "book banning."³³ The theme is

³² The majority's response to this entire line of argument is anemic. First, the majority says *Campbell* never "suggest[ed]" the officials' decision to remove *Voodoo & Hoodoo* was government speech. Op. 16. Likely that's because no one raised the point. In any event, *Campbell* didn't decide the issue and so it is open in this circuit (or at least it was). The majority's next response is entirely circular. It claims that government discretion in "deciding what private speech to make available to the public," while "extensive," is nonetheless subject to First Amendment constraints. *Id.* at 17. What might those constraints be? You guessed it: the government can't "inten[d] to deprive the public of access to ideas with which it disagrees." *Ibid.* In other words, government discretion is limited by the "right" the majority invented for this case. Finally, the majority tries to distinguish *Summum* based on the notion that, unlike the government's selection of public monuments, a library's collection decisions are "numerous" and "often occur behind closed doors." Op. 17–18 n.10. Those are distinctions without a difference. To the contrary, *Summum* is directly on point: just as the government expressed itself there by selecting some monuments over others, so library officials express themselves here by selecting some books over others. See *PETA*, 414 F.3d at 28 (explaining "[w]ith respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude").

³³ Plaintiffs also claim Defendants have "waived" the argument that the library's collection decision is government speech by not arguing the point here. I disagree and so does the majority. See Op. 16 n.9. Whether the Free Speech Clause constrains a library's collection decisions is plainly before us; whether those decisions constitute government expression is

woven throughout Plaintiffs’ brief, which ritually dubs the 17 books at issue the “Banned Books.” *See* Red Br. at 4, 13, 15, 17, 18, 20, 24, 28, 29, 31, 34, 42, 47, 49, 55, 56, 57. The brief’s opening sentence asks: “Can government officials freely purge public libraries of any books containing ideas those officials want to prevent library patrons from accessing?” *Id.* at 1. It warns elsewhere that, without strict judicial oversight, “government officials could remove books for any reason no matter how partisan” and “the robust marketplace of ideas embodied in public libraries would disappear.” *Id.* at 18. This is hyperbole, not argument.

First, Plaintiffs ignore public libraries’ wide latitude to choose the books on their shelves. Our own precedent, quoting *ALA*, recognizes that “public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.” *Chiras*, 432 F.3d at 614 (quoting *ALA*, 539 U.S. at 205 (plurality)). Plaintiffs nonetheless insist that courts have the power to oversee those

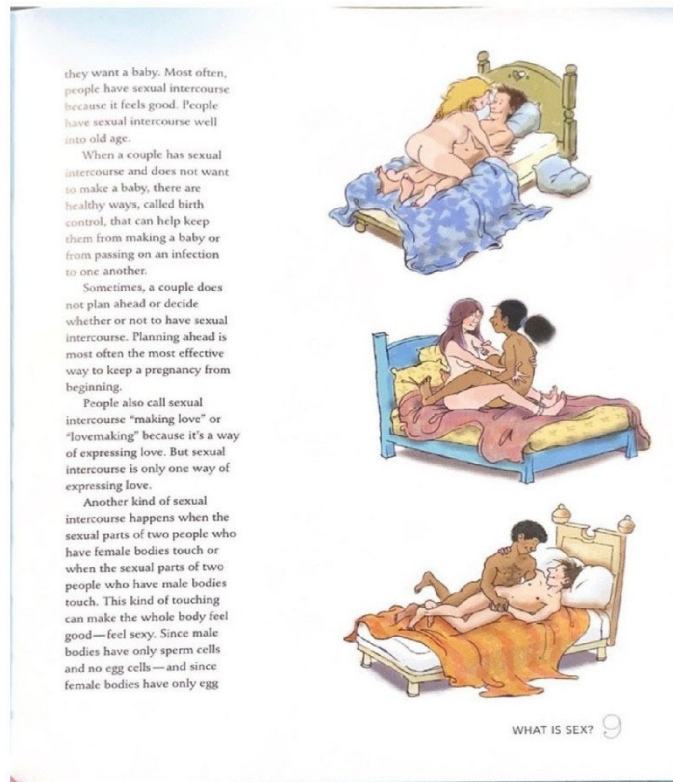
bound up with that question, regardless of how the parties phrase the issue. *See, e.g., Stramaski v. Lawley*, 44 F.4th 318, 326 (5th Cir. 2022) (“[W]e may use our ‘independent power to identify and apply the proper construction of governing law’ to any ‘issue or claim [that] is properly before the court, . . . not limited to the particular legal theories advanced by the parties.’”) (quoting *Kamen v. Kemper Fin. Servs. Inc.*, 500 U.S. 90, 99 (1991)). Regardless, the court could (and should) exercise its discretion to address government speech, even if it were somehow waived. *See Singleton v. Wulff*, 428 U.S. 106, 121 (“[W]hat questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals[.]”). Our court could not properly address how the Free Speech Clause applies to the library’s decision without addressing the intertwined issue of whether that decision was government speech.

decisions in order to prevent “book banning.” This raises an obvious question: what is the difference between a library’s “banning” a book (something Plaintiffs claim is prohibited by the Free Speech Clause) and a library’s discretionary decision not to include the book in its collection? Plaintiffs do not say.

To make this pivotal question more concrete, consider one of the supposedly “banned” books at issue: *It’s Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health*, by Robie H. Harris and Michael Emberley. Plaintiffs’ brief describes *It’s Perfectly Normal* as “an illustrated children’s³⁴ health book that helps readers understand puberty and discusses ways to stay safe online.” Red Br. at 7. Yet the book has stirred controversy³⁵ and evidence suggests it was removed from the library because of its sexually explicit cartoons. *Ibid.* Here are some that have drawn the most attention:

³⁴ The book’s cover states: “FOR AGE 10 AND UP.”

³⁵ See, e.g., Aymann Ismail, *Closed Book*, SLATE.COM (Sept. 11, 2023) (discussing controversy surrounding *It’s Perfectly Normal*), available at <https://slate.com/humaninterest/2023/09/banned-books-list-its-perfectly-normal-facebook.html>.



It's Perfectly Normal, at 9.

So, back to our question: did the library “ban” *It's Perfectly Normal*, as Plaintiffs contend? Or did the library instead exercise its “broad discretion” to decide the book was not “suitable and worthwhile” for 10- year-olds? *ALA*, 539 U.S. at 205, 208 (plurality). Again, Plaintiffs offer no way of distinguishing one from the other. This suggests their cryptic warning about “book banning” is nothing more than a rearguard attack on public libraries’ discretion over their collections. *See, e.g., id.* at 208 (plurality) (“A library’s need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material[.]”).

Second, even *assuming* courts can police libraries' collection decisions, what standard would they apply? The only one proposed by Plaintiffs (and the district court) is to forbid "content or viewpoint discrimination." As shown, that is a non-starter. It would leave a librarian powerless to remove from the shelves all manner of bigoted screeds. It would perversely require librarians to "balance" legitimate scientific volumes with reams of quackery. It would literally bar a library from stopping a subscription to *Penthouse* magazine. *Cf. id.* at 208 (plurality) ("Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion."). In short, it is a standard in open war with the very concept of a library, whose mission is to assess materials *precisely* in terms of content and viewpoint and thereby "separate out the gold from the garbage." *Id.* at 204 (plurality) (quoting KATZ, *supra*, at 6).³⁶

Defendants' counterproposal is that a library's collection decisions must be "rational." That is more modest than Plaintiffs' proposal, but no more helpful. After all, what constitutes an "irrational" collection decision? Featuring the romantic works of E.L. James? Classifying *The DaVinci Code* as "Literature"? The mind reels at judges concocting "standards" for adjudicating such insoluble subjectivities. It would be no different than judges opining on whether the NEA should fund the latest "re-imagining" of *Hamlet*.³⁷ Or whether a public television station should

³⁶ I have already explained why the majority's "rules" will prove impossible to apply coherently, *supra* Part III(A)(4), and need not repeat that here.

³⁷ See, e.g., ALAMO DRAFTHOUSE CINEMA, *You've Never Experienced the Bard Like This Before!* (Oct. 12, 2012)

air old episodes of *The Joy of Painting* instead of the new season of *Call The Midwife*. Those are matters of esthetic, social, and moral judgment and no judge-made test can possibly say whether their resolution in any given case was “rational.” *Cf. Forbes*, 523 U.S. at 674 (“Were the judiciary to require, and so to define and approve, pre-established criteria for access [to public broadcasting], it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion.”). The same goes for a public library’s decision about which books to feature and which books to exclude.

Third, bear in mind the limits of my view. I say only that the *Free Speech* Clause does not constrain a public library’s collection decisions. That says nothing about other parts of the Constitution. *Cf. Summum*, 555 U.S. at 468–49 (suggesting other possible “restraints on government speech” besides Free Speech). I would hold only that that the Free Speech Clause provides no standard against which to judge a public library’s inescapably expressive decision about which books it deems “suitable and worthwhile” and which it does not. *ALA*, 539 U.S. at 208 (plurality).

Nor should we forget the most effective constraint on public officials’ speech: the good sense of the citizens who elected them. “[The Llano County commissioners court] is ultimately ‘accountable to the electorate and the political process for its [choice of library books].’” *Summum*, 555 U.S. at 468 (quoting *Southworth*, 529 U.S. at 235) (brackets added).

(discussing Rudolf Volz’s *Hamlet In Rock*, in which “Hamlet is a whiny goth, Queen Gertrude wears a bright red penis-shaped crown, and the gravedigger is an incomprehensible three-eared space rabbit”), available at <https://drafhhouse.com/news/youve-never-experienced-the-bard-like-this-before>.

Energized voters can bend public officials to their will, as this case amply shows. Plaintiffs' lamentations to the contrary, that does not amount to "book banning." It means that a local government heeded its citizens. True, the upshot is that Llano County's books may differ from the books in Travis or Harris County. But variety is a feature of our system, not a bug. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory[,] and try novel social and economic experiments without risk to the rest of the country.").

IV. CONCLUSION

Stephen King saw this coming. One of his scary stories once warned: "AVOID THE LIBRARY POLICE!"³⁸ Now, thanks to the majority, we are all the Library Police.

I dissent.

³⁸ Stephen King, *The Library Policeman*, in *FOUR AFTER MIDNIGHT* (1990).

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1:22-CV-424-RP

LEILA GREEN LITTLE, et al.,
Plaintiffs,

v.

LLANO COUNTY, et al.,
Defendants.

ORDER

Before the Court are Defendants Llano County, et al.'s ("Defendants") Motion to Dismiss, (Dkt. 42), and Plaintiffs Leila Green Little, et al.'s ("Plaintiffs") Motion for a Preliminary Injunction, (Dkt. 22). Having considered the parties' briefs, the record, and the relevant law, the Court finds that the motion to dismiss, (Dkt. 42), should be partially granted, and the motion for preliminary injunction, (Dkt. 22), should be partially granted. The Court will dismiss only the claims relating to the cancellation of the OverDrive online book database. The Court will also (1) order Defendants to return all the books at issue to the Library System, (2) update the Library System's searchable catalog to reflect that these books are available for checkout, and (3) enjoin Defendants from removing any more books for the pendency of this action. The Court will deny all other relief requested.

I. BACKGROUND

Plaintiffs are patrons of the Llano County Library System who are suing members of the Llano County Commissioners Court (“Commissioners”), members of the Llano County Library Board (“board members”) and Llano County Library System Director Amber Milum for violations of their constitutional rights. Plaintiffs contend that Defendants are infringing their First Amendment right to access and receive ideas by restricting access to certain books based on their messages and content. (Compl., Dkt. 1, at 27–29). They further allege that, because the removal and restrictions happened without prior notice and without any opportunity for appeal, Defendants also violated their Fourteenth Amendment right to due process. (*Id.* at 29–30). Plaintiffs request an injunction that would, among other things, require Defendants to (1) return the books at issue to the catalog and to their original location in the physical shelves, and (2) reinstate access to Overdrive, the Library’s former system for e-book access. (Mot. Prelim. Inj., Dkt. 22, at 2–3).

The Llano County Library System is comprised of three physical libraries: the Llano Library Main Branch, the Kingsland Library Branch, and the Lakeshore Library Branch. Until December 13, 2021, the Library also offered access to OverDrive, a digital e-book catalog that gave library patrons access to a curated collection of thousands of e-books and audiobooks. (Email, Dkt. 22-10, at 79). Today, after a period of unavailability, the Library offers access to e-books and audiobooks through a different service, Bibliotheca.

The Llano County Library System has used the “Continuous Review, Evaluation and Weeding”

(“CREW”) method to keep its collection up to date and make space for new acquisitions. (Hr’g Tr. Vol. 1 at 13:19-20, 18:12-15). The “CREW” method is an established weeding guide used by modern libraries. (See Milum Decl., Dkt. No. 49-1, at 2–2). To identify appropriate candidates for weeding, the CREW method suggests using the following factors, known collectively by the acronym “MUSTIE”: Misleading; Ugly; Superseded; Trivial; Irrelevant; and Elsewhere. (*Id.*). The Library calls this process “weeding.” (Hr’g Tr. Vol. 2 at 71:20-25).

In early July 2021, prior to their appointment to the New Library Board, Defendants Rochelle Wells, Rhonda Schneider, Gay Baskin, and Bonnie Wallace were part of a community group pushing for the removal of children’s books that they deemed “inappropriate.” (Call Log, Dkt. 59-1, at 72; Complaint Logs, Dkt. 59-1, at 77–89). For example, these Defendants objected to two series of children’s picture books, the “Butt and Fart Books,” which depict bodily functions in a humorous manner in cartoon format, because they believed these books were obscene and promoted “grooming” behavior. (*E.g.*, Complaint Logs, Dkt. 59-1, at 79). Defendant Milum, the library system’s director, shared the complaints with the Commissioners Court.¹ Although several commissioners and librarians stated that they saw no problem with the books, Defendants Moss and Cunningham contacted Milum to instruct her to remove the books from the shelves. (*Compare* Log, Dkt. 59-1, at 94 (describing commissioners saying they did not see a problem with the books) *and* Email, Dkt. 59-1, at 91 (same);

¹ The Commissioners Court is the municipal entity that controls the Llano County Library System. The Commissioners Court is led by Llano County Judge Ron Cunningham.

with Cunningham Email, Dkt. 59-1, at 74–75 (instructing Milum to remove the books from the shelves); Mt’g Logs, Dkt. 59-1, at 76, 92 (noting the complaints and stating that Moss told Milum to “pick [her] battles.”)).

By August 5, 2021, Milum informed Cunningham she would be deleting both sets of books from the catalog system. (Cunningham Email, Dkt. 59-1, at 74–75; *see also* List of Removed Books, Dkt. 22-10, at 60–61). In the following months, other books, such as *In the Night Kitchen* by Maurice Sendak and *It’s Perfectly Normal*, by Robbie H. Harris, were removed because of similar complaints: that they encouraged “child grooming” and depicted cartoon nudity. (List of removed books, Dkt. 22-10, at 62–63). There was no recourse for Plaintiffs, or anyone else, to appeal these removals to the library system.

In Fall 2021, Wallace, Schneider, and Wells, as part of their community group, contacted Cunningham to complain about certain books that were in the children’s sections or otherwise highly visible, labeling them “pornographic filth.” (Wallace Email, Dkt. 22-10, at 68–69). On November 10, 2021, Wallace provided Cunningham with lists, including a list of “dozens” that could be found in the library. (*Id.*; *see also* Wallace List, Dkt. 22-10 at 75). The books labeled “pornographic” included books promoting acceptance of LGBTQ views. (*See, e.g.*, Wallace List, Dkt. 22-10²). Other books in Wallace’s list of porno-

² For example, Wallace’s list included the following titles: (1) *All out: the no-longer-secret stories of queer teens throughout the ages* by Saundra Mitchell; (2) *Beyond Magenta: transgender teen speaks out*, by Susan Kuklin; and (3) *Some assembly required: the not-so-secret life of a transgender teen*, by Arin Andrews, among others.

graphic books about “critical race theory” and related racial themes. (*Id.*³). In other communications, Defendants refer to them as “CRT and LGBTQ” books. (Wells Emails, Dkt. 20-10, at 71–72 (discussing book removals and planning a list of “CRT and LGBTQ book[s]”). In the email, Wallace advocated for the books to be relocated to the adult section because “[i]t is the only way that [she] could think of to prohibit future censorship of books [she does] agree with.” (Wallace Emails, Dkt. 22-10, at 68).

That same day, Cunningham and Moss ordered Milum, “[a]s action items to be done immediately,” to pull books that contained “sexual activity or questionable nudity” from the shelves and from OverDrive, which at the time was the Library’s online e-book database. (Cunningham Emails, Dkt. 22-10, at 67; 106). Milum informed Moss and Cunningham she would pull the books, as well as books found in Wallace’s lists. (*Id.*, Hr’g Tr. Vol 1, at 104:6–104:9).

Milum then ordered the librarians to pull books from an edited version of Wallace’s list from the shelves. (Baker Decl., Dkt. 22-1, at 2). On November 12, 2021, Defendants removed several books on the Bonnie Wallace Spreadsheet from the Llano Library Branch shelves, including, for example, *Caste: The Origins of Our Discontents*, *They Called Themselves the K.K.K.: The Birth of an American Terrorist Group*, *Being Jazz: My Life as a (Transgender) Teen*, and *Spinning*. (List of removed books, Dkt. 22-10, at 60–65). In early December, the Commissioners and Milum also discussed options to implement filters or

³ For example, Wallace’s list included the following titles: (1) *Caste, the origins of our discontents*, by Isabel Wilkerson; (2) *How to be an antiracist*, by Ibram X. Kendi, and (3) *Separate is never equal* by Duncan Tonatiuh, among others.

other restrictions for books in Wallace’s list that were available through OverDrive. (OverDrive Emails, Dkt. 22-10, at 8–10). Although Plaintiffs do not identify which e-book titles were at issue in their complaint, Defendants were concerned that at least two of the books in Wallace’s list, *Lawn Bow* by Jonathan Evison and *Gender Queer* by Maia Kobabe, were accessible to library patrons through OverDrive. (Wells Emails, Dkt. 22-9, at 5).

On December 13, 2021, the Commissioners Court voted to approve three days of library closures, from December 20, 2021 to December 23, 2021 to review the library catalog. (Macdougall Emails, Dkt. 20-10, at 79–80). These tasks included “labeling books and checking [the] shelves for “inappropriate” books.” (*Id.*, at 79–80; Hr’g Tr. Vol 1, at 151:1–152:13). The Commissioners Court did not define “appropriateness,” but Milum declared that during these days, the staff mainly pulled books that the other Defendants had identified as inappropriate. (Hr’g Tr. Vol. 1, at 83:5–84:7).

On December 13, 2021, the Commissioners Court also voted to suspend all access to OverDrive. (Email, Dkt. 22-10, at 79). After the start of this litigation, the Commissioners Court voted to enter into a contract with Bibliotheca, another e-book database system. On May 9, 2022, the County began to provide access to Bibliotheca. (Milum Decl., Dkt. 49-1). Bibliotheca provides access to some, but not all, of the books at issue. (*Id.* at 6–7).

On December 13, 2021, the Commissioners Court also voted to dissolve the existing library board and to create a new one, named the “Library Advisory Board.” Wallace, Wells, Schneider, and other Llano County residents who advocated for book removals

were appointed to the new board. This new Board then instituted a policy that all new books must be presented to and approved by the board before purchasing them. (Hr’g Tr. Vol. 1, at 51:5–20; 107:4–21; 111:3–20). The Commissioners Court stopped all new book purchases in November 2021, and no new acquisitions have been approved since this litigation began. (Cunningham Emails, Dkt. 22-10, at 106; Hr’g Tr. Vol. 1, at 50:21–51:8). On or around January 19, 2022, the Board asked Librarian Milum “that she not be present at all meeting [sic] and just on an as-needed basis.” (Mt’g Minutes, Dkt. 22-10, at 52–53). In February 2022, Defendants banned staff librarians from attending New Library Board Meetings. (Librarians’ Emails, Dkt. 22-1, at 6 (“Staff members are not to attend Advisory Board Meetings. You may not use your vacation time to attend.”)). A month later, the meetings were closed to the public. (News Article, Dkt. 22-10, at 130–132; Mt’g Minutes, Dkt. 22-10, at 52–53 (discussing the possibility of closing meetings to the public)).

Plaintiffs filed their complaint on April 25, 2022, (Dkt. 1), and filed their motion for preliminary injunction on May 9, 2022, (Dkt. 22). Defendants filed a motion to dismiss on June 8, 2022. (Dkt. 42). After the parties submitted their respective briefing, the Court held a hearing on the preliminary injunction on October 28 and October 31, 2023. (Order, Dkt. 69; Minute Entries, Dkts. 79, 80). The parties then submitted post-hearing briefing on the preliminary injunction. (Pls.’ Post-Hearing Memorandum in Support, Dkt. 91; Defs.’ Corrected Resp., Dkt. 101; Pls.’ Reply, Dkt. 98; Defs.’ Surreply, Dkt. 117).

II. LEGAL STANDARD

A. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert lack of subject-matter jurisdiction as a defense to suit. Fed. R. Civ. P. 12(b)(1). Federal district courts are courts of limited jurisdiction and may only exercise such jurisdiction as is expressly conferred by the Constitution and federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court properly dismisses a case for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). “The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction.” *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960 (2002). “Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist.” *Id.* In ruling on a Rule 12(b)(1) motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court’s resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

B. Rule 12(b)(6)

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In deciding a 12(b)(6) motion, a “court accepts ‘all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.’” *In re Katrina Canal Breaches Litig.*, 495 F.3d 191,

205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). “To survive a Rule 12(b)(6) motion to dismiss, a complaint ‘does not need detailed factual allegations,’ but must provide the [plaintiffs] grounds for entitlement to relief—including factual allegations that when assumed to be true ‘raise a right to relief above the speculative level.’” *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

A claim has facial plausibility “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). “[A] motion to dismiss under 12(b)(6) ‘is viewed with disfavor and is rarely granted.’” *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (quoting *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)).

C. Rule 65 Standard

A preliminary injunction is an extraordinary remedy, and the decision to grant such relief is to be treated as the exception rather than the rule. *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The party seeking injunctive relief carries the burden of persuasion on all four requirements. *PCI Transp. Inc. v. W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005).

III. DISCUSSION

Plaintiffs seek an injunction ordering the return of the books at issue and other removed books to the library catalog and to their original location, to restore access to OverDrive, and to prevent further book removals. Defendants have filed a motion to dismiss, asserting that Plaintiffs lack standing for most of their claims, that Plaintiffs’ claims regarding access to the OverDrive database are moot, and that, to the extent that Plaintiffs have standing for their claims, Plaintiffs have failed to state either a First Amendment or a Due Process claim. The Court will first address Defendants’ motion to dismiss before turning to Plaintiffs’ motion for preliminary injunction.

A. Defendants’ Motion to Dismiss

Defendants’ motion to dismiss proceeds in two parts. First, Defendants argue that Plaintiffs have not alleged “concrete plans” to access the books at issue, and therefore they have not alleged a cogn-

izable injury. (Mot. Diss., Dkt. 42, at 3–5). Defendants further contend that Plaintiffs’ claims regarding the OverDrive online system are moot because the library has closed that forum, and that in any case, Plaintiffs claims are also moot because Plaintiffs can access the books through the library’s new online database or by requesting them through the “in-house” checkout system. (Reply, Dkt. 54, at 8–9). Second, Defendants argue that Plaintiffs fail to state a claim for relief because the library engaged in government speech, and because there is no liberty interest implicated in book removal. (Mot. Diss., Dkt. 42, at 8–10).

The Court will first address whether Plaintiffs have standing to bring a claim against Defendants before turning to the sufficiency of their allegations for Rule 12(b)(6) purposes. The Court finds that Plaintiffs are suffering a continuing injury, and that most of their claims are not moot. However, the Court also finds that Plaintiffs’ OverDrive related claims are moot because Defendant has replaced OverDrive with Bibliotheca, a comparable online database of books. With respect to the remaining claims, the Court finds that Plaintiffs have properly alleged First Amendment and Due Process violations. As to the First Amendment claims, the Court finds Plaintiffs have sufficiently alleged that Defendants’ actions do not constitute government speech and that Defendants unlawfully removed books based on their viewpoint. As to the Due Process claims, the Court identifies a liberty interest in access to information protected by the Due Process Clause of the Fourteenth Amendment.

1. Standing

To have Article III standing, a plaintiff must “(1) have suffered an injury in fact, (2) that is fairly traceable to the challenged action of the defendant, and (3) that will likely be redressed by a favorable decision.” *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020) (citing *Lujan v. Def’s. of Wildlife*, 504 U.S. 555, 560–61 (1992), *as revised* (Oct. 30, 2020)). “Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects.” *Lujan*, 504 U.S. at 564. “[S]ome day’s intentions—without any description of concrete plans or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury.” *Id.* However, an injury that “has already happened and is ongoing . . . fulfills the constitutional standing requirement” because it is not conjectural. *Inst. for Creation Rsch. Graduate Sch. v. Texas Higher Educ. Coordinating Bd.*, No. 1:09-cv-00382-SS, 2009 WL 10699959, at *2 (W.D. Tex. July 31, 2009) (holding that a municipal education board’s denial of a license to grant degrees was an ongoing injury that fulfills constitutional standing requirements).

Plaintiffs have alleged sufficient facts to show they are suffering an actual, ongoing injury. Plaintiffs alleged that they are library users and members, that they wish to check out the removed library books, and that they have attempted and failed to check out the removed books from the library. (Compl, Dkt. 1, at 27). The removal of books initiated Plaintiffs’ injuries, but the infringement on their right to access information is a “continuing, present adverse effect[]” that qualifies as an injury for Article III purposes.

Lujan, 504 U.S. at 564; cf. *Sund v. City of Wichita Falls*, 12 F. Supp. 2d, 530, 553–54 (N.D. Tex. 2000) (finding irreparable injury where implementation of the city’s resolution would have resulted in books promoting acceptance of LGBTQ families being “segregated” from the children’s section to the adult section). In light of this ongoing effect, requiring Plaintiffs to engage in futile attempts to check out books that are unavailable or to attend the library board meetings that have been closed and stalled for months would be pointless. Accordingly, the Court finds that Plaintiffs have sufficiently pled an actual, ongoing injury for the purposes of standing.

2. Mootness

a. OverDrive-Related Claims

Defendants make two arguments regarding mootness. First, Defendants contend that Plaintiffs’ OverDrive-related claims are moot because the contract cancellation amounts to a closing of the public forum. (Mot. Diss., Dkt. 42, at 5–7; Reply, Dkt. 54, at 8–9). Second, Defendants argue that there is no ongoing injury because Plaintiffs may access the books through Llano County Library System’s new online book database, Bibliotheca, or through the library’s “in-house checkout” system. (Reply, Dkt. 54, at 8–9; Milum’s Supp. Decl., Dkt. 53, at 1–2). Defendants claim their actions were genuine and not litigation posturing. (Mot. Diss., Dkt. 42).

Courts are skeptical of defendant induced mootness because of the risk of posturing—attempting to escape litigation while intending to engage in the same conduct once the case is dismissed. *Yarls v. Bunton*, 905 F.3d 905, 910 (5th Cir. 2018). In general, defendants cannot “evade sanction by predictable

protestations of repentance and reform after a lawsuit is filed.” *Ctr. For Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 425 (5th Cir. 2013) (citation omitted). But the Fifth Circuit has cautioned that skepticism is lessened for voluntary governmental cessation because “[g]overnment officials ‘in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties.’” *Id.* at 910–11. “Without evidence of the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing.” (*Id.* at 910).

As Defendants note, on May 9, 2022, the County began to provide access to Bibliotheca, a different online book database. (Reply, Dkt. 54, at 8). In their post-hearing briefing, Plaintiffs state that Bibliotheca provides access to some, but not all, of the books at issue. (See Pls.’ Post-Hr’g Br., Dkt. 91, at 18 (citing Milum Decl., Dkt. 49-1, at 6–7)). However, Plaintiffs’ complaint does not specify which books Defendants objected to. Without allegations regarding specific books, and given that some of the books at issue are available through Bibliotheca, the Court cannot find, based on the pleadings, that Bibliotheca does not sufficiently replace OverDrive database. Plaintiffs’ injury appears to be the violation of their right to access information through the online book database OverDrive. However, the evidence shows that the County replaced OverDrive with a comparable online service. In light of Plaintiffs’ current pleadings, the County’s new contract with Bibliotheca thus moots the OverDrive-related claims. Accordingly, the Court will dismiss Plaintiffs’ OverDrive-related claims without prejudice.

b. Physical Books

However, the Court does not conclude that Plaintiffs' claims are moot as to the physical books. The physical books at issue in this case, although "available" for checkout are hidden from view and absent from the catalog. Their existence is not discernible to the public, nor is their availability. An injury exists because the library's "in-house checkout system" still places "a significant burden on Library Patrons' ability to gain access to those books." *Sund*, 12 F. Supp. 2d at 534.

Furthermore, Defendants' creation of an "in-house checkout system" comprises precisely the type of posturing the voluntary cessation exception is meant to prevent. Defendant Milum received the books in July, three months into this litigation and shortly after the parties had filed responses to their motions to dismiss and for preliminary injunction, respectively. (Milum Supp. Decl., Dkt. 53, at 1). But the books were not donated by a neutral benefactor with the intent of making them available to library patrons. Defendants' Counsel, Jonathan Mitchell, provided these books ostensibly anonymously. Upon questioning, Counsel repeatedly to avoid the disclosure of his donation by asserting attorney-client privilege. The Court concluded, however, that his actions, clearly designed his clients' litigation position, were not so privileged.

Furthermore, even if Counsel Mitchell's actions were not calculated to promote his clients' litigation position, the Library's protocols making access to the books virtually impossible do not deserve the type of solicitude the Fifth Circuit has instructed. Making books "available" in a back room, only upon specific request by a patron who has no way of knowing that

the books even exist, is hardly a “formally announced change[] to official governmental policy” deserving less scrutiny. *Bunton*, 905 F.3d at 910.

The Court thus finds that the rest of Plaintiffs claims are not moot. Accordingly, the Court will dismiss Plaintiffs’ OverDrive-related claims without prejudice but allow the remaining claims to proceed.

3. First Amendment Claim

Next, Defendants argue that Plaintiffs have not stated a First Amendment claim upon which relief can be granted. Defendants contend that First Amendment protections do not apply to the public library’s content and collection decisions, because libraries are afforded broad discretion over these decisions. (Mot. Diss., Dkt. 42, at 9).⁴

The Supreme Court has recognized that public libraries should be afforded “broad discretion” in

⁴ Defendants also argue that Plaintiffs have not alleged that the library is a public forum, and that any First Amendment claim should fall based on that fact alone. (Reply, Dkt. 54, at 8–9). This argument is unavailing. The Fifth Circuit has recognized that there is a First Amendment right to access information, and that First Amendment protections apply to the removal of materials in public libraries. *See, e.g., Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995)). As the following paragraphs make clear, courts have almost uniformly held that public libraries are subject to First Amendment limitations, even as limited public forums. *See, e.g., Sund v. City of Wichita Falls*, 12 F. Supp. 2d, 530, 534 (N.D. Tex. 2000) (“The Wichita Falls Public Library, like all other public libraries, is a limited public forum for purposes of First Amendment analysis.”). *American Library*, which Defendants cite for the contrary proposition, simply states that “*Internet access* in public libraries is neither a ‘traditional’ nor a ‘designated’ public forum.” *See U.S. v. Am. Library Assn., Inc.*, 539 U.S. 194, 205 (date) (emphasis added).

their collection selection process, in which library staff must necessarily consider books' content. See *U.S. v. Am. Library Assn., Inc.*, 539 U.S. 194, 205 (2003) (plurality). But this discretion is not absolute, and it applies only to materials' selection. In fact, the Fifth Circuit, adopting the Supreme Court's plurality in *Pico*, has recognized a "First Amendment right to receive information" which prevents libraries from "remov[ing] books from school library shelves 'simply because they dislike the ideas contained in these books.'" *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995) (quoting *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (plurality)).

"The key inquiry in a book removal case" is whether the government's "substantial motivation" was to deny library users access to ideas with which [the government] disagreed." *Id.* at 190. Here, Plaintiffs have sufficiently pled that Defendants' conduct was substantially motivated by a desire to remove books promoting ideas with which disagreed. They plainly allege that Defendants removed, ordered the removal, or pursued the removal of the books at issue "because they disagree with their political viewpoints and dislike their subject matter." (Compl., Dkt. 1, at 3, 7–9).

Defendants do not argue otherwise. Instead, they contend that Plaintiffs have not stated a claim because the removal decisions were "government speech to which the First Amendment does not apply." (Mot. Diss., Dkt. 42, at 8–9). But as Plaintiffs' note, the cases Defendants cite mostly involve the initial selection, not removal, of materials. See, e.g., *Am. Library*, 539 U.S. at 205 ("The principles underlying [the precedent] also apply to a public library's exercise of

judgment in selecting the material it provides to its patrons.”); *PETA v. Gittens*, 414 F.3d 23, at 28 (analogizing the discretion afforded to library’s book collection decisions to the commission’s art selection decisions). As the Fifth Circuit held in *Campbell*, removal decisions are subject to the First Amendment and are evaluated based on whether the governments’ “substantial motivation in arriving at the removal decision” was discriminatory. *Campbell*, 64 F.3d at 190. Here, Plaintiff has clearly pled that Defendants had this motivation.

Defendants contend that *Campbell* and *Pico* do not apply to this context because those cases dealt with book removals from public school libraries, which may be subject to unique constitutional rules. (Reply, Dkt. 54, at 8). At the same time, Defendants urge us to follow *Chiras*, even though *Chiras* also involves book selection at a public school library. (*Id.* at 10 (citing *Chiras v. Miller*, 432 F.3d 606, 614 (5th Cir. 2005)). In any case, the Court agrees that the precedent indicates public school libraries are a unique environment for constitutional analysis. *See Pico*, 457 U.S. at 868 (plurality) (“First Amendment rights accorded to students must be construed ‘in light of the special characteristics of the school environment’” (citation omitted)). *Campbell*, *Pico*, and *Chiras* suggest that school officials’ discretion is particularly broad for book selection in public school libraries because of schools’ unique inculcative function. *See also Sund*, 121 F. Supp. 2d at 548. However, the right to access to information first identified in *Pico* and subsequently adopted by the Fifth Circuit in *Campbell* has “even greater force when applied to public libraries,” since public libraries are “designed for freewheeling inquiry,” and the type of discretion

afforded to school boards is not implicated. *Id.* (omitting citations).

Defendants, like other government officials implicated in maintaining libraries, have broad discretion to select and acquire books for the library's collection. But the Fifth Circuit recognizes a First Amendment right to access to information in libraries, a right that applies to book removal decisions. Plaintiffs have clearly stated a claim that falls squarely within this right: that Defendants removed the books at issue to prevent access to viewpoints and content to which they objected.

4. Due Process Claim

Finally, Defendants argue that Plaintiffs have not alleged a due process claim because Plaintiffs do not have a protected property or liberty interest involved in library books. Defendants point to a single Second Circuit case, *Bicknell v. Vergennes Union High School*, 638 F.2d 438, 442 (2d Cir 1980). In *Bicknell*, plaintiffs challenged a school board's decision to remove two books based on their content. *Id.* at 440–41. The Second Circuit found that, even assuming that there was a deprivation of rights at play, such a deprivation did not entitle plaintiffs “to a hearing before that removal takes place.” *Id.* at 442. According to the court, the rights involved were not particularized nor personal enough to require a hearing. *Id.*

But many courts have held that access to public library books is a protected liberty interest created by the First Amendment. *See Doyle v. Clark Cnty. Pub. Libr.*, No. 3:07-cv-00003-TMR-MRM, 2007 WL 2407051, at *5 (S.D. Ohio Aug. 20, 2007); *see also Miller v. Nw. Region Libr. Bd.*, 348 F. Supp. 2d 563,

570 (M.D. N.C. 2004) (denying defendants’ motion to dismiss plaintiff’s Fourteenth Amendment due process claim, holding that access to public library computers was a protected liberty interest); *Hunt v. Hillsborough County*, No. 8:07-cv-01168-JSM-TBM, 2008 WL 4371343, at *3 (M.D. Fla. 2008) (“Plaintiff had a fundamental right to access the Law Library and receive the information provided therein.”); *Dolan v. Tavares*, No. 1:10-cv-10249-NMG, 2011 WL 10676937, at *13 (D. Mass. May 16, 2011) (“[P]laintiff has a liberty interest in being able to access the law library”); cf. *Neinast v. Bd. of Trs. of Columbus Metro. Libr.*, 346 F.3d 585, 592 (6th Cir. 2003) (referring to the First Amendment right to receive information in public library books as a “fundamental right”); *Armstrong v. Dist. of Columbia Pub. Libr.*, 154 F. Supp. 2d 67, 82 (D.D.C. 2001) (recognizing that “access to a public library [] is at the core of our First Amendment values”). And even if this Court were to follow the Second Circuit’s rationale, *Bicknell* only states that the right involved could not sustain a hearing requirement. *Bicknell*, 638 F.2d at 442. The court’s analysis does not foreclose the possibility that Plaintiffs could be entitled to some form of post-removal appellate or review process.

The Court follows our many sister courts in holding that there is a protected liberty interest in access to information in a public library. Accordingly, the Court finds that Plaintiff has sufficiently stated a due process claim.

B. Plaintiffs’ Motion for Preliminary Injunction

Having addressed Defendants’ motion to dismiss, the Court will now evaluate whether Plaintiffs are entitled to a preliminary injunction. Plaintiffs seek an injunction ordering Defendants to: (1) return the

physical books at issue to their original locations and (2) update the Library Service's catalog to reflect that the books have been returned and are available for checkout, and enjoining Defendants from: (1) removing any books from the Llano County's physical shelves during the pendency of the action, and (2) closing future Library Board meetings to members of the public. (Proposed Ord., Dkt. 22-12). Plaintiffs originally requested a preliminary injunction regarding access to OverDrive, but the Court will not address this relief because it has dismissed those claims. Furthermore, Plaintiffs request relief related to their Due Process claim but do not actually present any arguments on the issue. Accordingly, the Court will deny the motion as to their request for access to the library board meetings.

For the rest of the preliminary injunction, Plaintiffs must show (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir. 2012). Plaintiffs have carried their burden on each of these elements.

1. Likelihood of Success on the Merits

a. Viewpoint Discrimination

As the Court stated earlier, the First Amendment "protect[s] the right to receive information." *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000) (citing *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997)). In a book removal case, "the key inquiry . . . is the school

officials' substantial motivation in arriving at the removal decision." *Campbell*, 64 F.3d at 190.

Plaintiffs have made a clear showing that they are likely to succeed on their viewpoint discrimination claim. Although libraries are afforded great discretion for their selection and acquisition decisions, the First Amendment prohibits the removal of books from libraries based on either viewpoint or content discrimination. *See Pico*, 457 U.S. at 871. "Official censorship based on a state actor's subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination." *Robinson v. Hunt County*, 921 F.3d 440, 447 (5th Cir. 2019) (citing *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017)). In a book removal case, plaintiffs must show that an intent to deny library users access to viewpoints with which they disagreed was a "substantial factor" in making the removal decision. *Id.* at 188 n.21 (citing *Pico*, 457 U.S. at 872); *id.* at 190.

Here, the evidence shows Defendants targeted and removed books, including well-regarded, prize-winning books, based on complaints that the books were inappropriate. For example, between early and mid-July 2021, Wells and other citizens contacted Milum to complain about the appropriateness of the "Butt and Fart Books." (Call Log, Dkt. 59-1, at 72; Complaint Logs, Dkt. 59-1, at 77-89). By August 5, 2021, Commissioners Cunningham and Moss had contacted Milum to recommend removing them from the shelves. Milum then deleted these books from the catalog system. (Cunningham Email, Dkt. 59-1, at 74-75; Mt'g Logs, Dkt. 59-1, at 76, 92).

Similarly, between October 28, 2021, and December 22, 2021, a span of two months, Wallace and Wells had contacted Defendants Cunningham and

Moss with a list of books they considered inappropriate, labeling them “pornographic filth” and “CRT and LGBTQ books” and advocating for their removal and relocation. (Wallace Emails, Dkt. 22-10, at 67–69; Wells Emails, Dkt. 22-10, at 71–72; Hr’g Tr. Vol 1, at 89:23–90:4; 97:2–100:2). Cunningham and Moss then instructed Milum, the library director, to pull out these books. (Wallace Emails, Dkt. 22-10, at 67; Wells Emails, Dkt. 22-10, at 71–72). Milum, in turn, removed some of the books and soon thereafter the library was closed for three days at the direction of the Commissioners Court, for the purpose of “checking [the] shelves for ‘inappropriate’ books.” (MacDougall Emails, Dkt. 22-10, at 79–80; Hr’g Tr. Vol 1, at 151:1–152:13).

Admittedly, Wallace, Wells, and other complainants were members of the public, not library board members, at the time. (Hr’g Tr. Vol. 2, at 25:2–25:13). Furthermore, at least one Defendant admitted in his testimony that he did not have personal knowledge of the content of the books at issue. (Hr’g Tr. Vol. 1, at 170:23–172:1; 174:21–175:7). But by responding so quickly and uncritically, Milum and the Commissioners may be seen to have adopted Wallace’s and Wells’s motivations. The Court finds that Plaintiffs have clearly shown that Defendants’ decisions were likely motivated by a desire to limit access to the viewpoints to which Wallace and Wells objected.

Defendants aver that any cataloguing and removal that occurred was simply part of the library system’s routine weeding process, for which Milum was ultimately responsible. (Hr’g Tr. Vol. 1, at 82:8–82:16). Yet Milum testified that the books that she pulled were books that Wallace, Wells, or the Commissioners identified as “inappropriate.” (Hr’g Tr. Vol. 1, at

83:5–84:7). The Commissioners, her superiors and final policymakers with power over the library system,⁵ instructed her to review the books—and even to remove some of them—based on people’s perception of their content or viewpoints. (Hr’g Tr. Vol. 1 at 68:15-18). The short amount of time between the complaints, commissioners’ actions, and Millum’s removal strongly suggests that the actions were in response to each other. . Plaintiffs have made a clear showing about what Defendants’ substantial motivations may have been and how these may have led to the book removals.

Finally, Defendants argue, as they did in their motion to dismiss, that even if their actions amount to viewpoint discrimination, the library’s weeding decisions are only subject to rational-basis review. Not so. The Fifth Circuit’s precedent recognizing a right to access to information is not “nonsense.” (Post-Hr’g Corr. Resp., Dkt. 100, at 25); *see also Campbell*, 64 F.3d at 189–90 (finding that the “decision to remove [books] must withstand greater scrutiny within the context of the First Amendment than would a decision involving a curricular matter.”). Defendants’ attempts to convince the Court otherwise simply confirm what the Court already addressed in Defendants’ motion to dismiss: that “cont-

⁵ Tex. Const. art. 5, § 18(b) (“[T]he County Commissioners Court . . . shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State[.]”); Tex. Loc. Gov’t Code. § 323.006 (“The county library is under the general supervision of the commissioners court.”); *see also Doe AW v. Burleson Cnty.*, No. 1:20-CV-00126-SH, 2022 WL 875912, at *4 (W.D. Tex. Mar. 24, 2022) (holding county commissioners court has final policymaking authority over all areas entrusted to them by the state constitution and statutes).

ent discrimination is permissible and inevitable in library-book selection.” (Post-Hr’g Corr. Resp., Dkt. 100, at 25). It does not follow from this proposition that such discrimination is equally permissible in removal decisions. To hold otherwise would be to entirely disregard *Campbell*.

b. Content Discrimination

Even if Plaintiffs had not shown a likelihood of success on their viewpoint discrimination claim, the Court finds that Plaintiffs clearly met their burden to show that these are content-based restrictions that are unlikely to pass constitutional muster. Content-based restrictions on speech are presumptively unconstitutional and subject to strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000). A restriction is content-based if it “applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed*, 576 U.S. at 163. But, as discussed above, multiple Defendants acknowledged during the hearing that each of the books in question were slated for review (and ultimately removal) precisely because certain patrons and county officials complained that their contents were objectionable.⁶

Although Defendants now argue that each of these books were subject to routine “weeding” from the library’s catalogue based on content-neutral factors, Plaintiffs have offered sufficient evidence to suggest

⁶ Hr’g Tr. Vol. 1 at 127:24-128:5; *see also* Ex. 52 at 1-2; Ex. 2A; Ex. 2; Hr’g Tr. Vol. 1 at 66:9-14 (Butt and Fart books); Hr’g Tr. Vol. 1 at 70:13-18, 71:9-15; Ex. 19 (*In the Night Kitchen*, and *It’s Perfectly Normal*); Hr’g Tr. Vol. 1 at 82:3-10, 82:24-83:3, 84:12-21, 94:23-25 (LGBTQ and CRT books).

this post-hoc justification is pretextual. Whether or not the books in fact qualified for “weeding” under the library’s existing policies,⁷ there is no real question that the targeted review was directly prompted by complaints from patrons and county officials over the contents of these titles. Defendants’ contemporaneous communications, as well as testimony at the hearing, amply show this. For example, Ms. Wells testified at the hearing that “if there was any book that [in her opinion] was harmful to minors that was in the library, I would speak with the director, [Milum] to have it removed.” (Hr’g Tr. Vol. 1 at 205:9-14). In turn, Milum acknowledged that “the reason that [the books] were selected to be weeded and reviewed to be weeded, as opposed to other books, w[as] because Ms. Wallace had them on her list” of objectionable books. (*Id.* at 82:24-83:3). And, notably, there is no evidence that any of the books were slated to be reviewed for weeding prior to the receipt of these complaints; to the contrary, many other books eligible for weeding based on the same factors appear to have remained on the shelves for many years.⁸

⁷ The record contains competing testimony on this point. Milum stated in her declarations and testimony that she weeded the 17 disputed books because she believed that each of them met the library’s criteria for weeding under the CREW and MUSTIE factors. *See* Milum Decl., Dkt. No. 49-1, at ¶¶ 8, 12–16; Hr’g Tr. Vol. 2 95:16–106:20. In contrast, Tina Castelan stated that Milum’s decisions to weed some of disputed books violated the library’s weeding policies. *See id.* at 6–9; Hr’g Tr. Vol. 1 at 33:15–45:18. It appears to be undisputed that, given its subjective nature, reasonable minds may disagree over how to apply the CREW and MUSTIE criteria. *Id.* at 127:6-8.

⁸ *Compare* Ex. 52 *with* Ex. 79A; *see also, e.g.*, Hr’g Tr. Vol. 2 at 127:21-25, 136:4-7.

Defendants' insist that "[t]he notion that librarians cannot engage in 'content discrimination' when weeding books is absurd" because "[w]eeding inherently involves content discrimination." This is unavailing. In the context of weeding, the test the Fifth Circuit stated in *Campbell* provides flexibility for the type of content considerations Defendants warn about. In a book removal case, "the key inquiry . . . is the [library] officials' substantial motivation in arriving at the removal decision." *Campbell*, 64 F.3d at 190. Although some of the MUSTIE criteria consider content, overall, the library weeding process appears to be directed towards managing the size and quality of the library collection. That is, the Llano County Library System has discretion to weed books, using professional criteria, when its "substantial motivation" is to curate the collection and allow space for new volumes. As long as its motivation remains as such, the library system may cull and curate its collection as needed.

Conversely, when the governments' "substantial motivation" appears to be a desire to prevent access to particular views, like in this case, Defendants' actions deserve greater First Amendment scrutiny. The Court finds that Plaintiffs made a clear showing that the "substantial motivation" for Defendants actions appears to be discrimination, as opposed to mere weeding.

Under the strict scrutiny analysis, the Defendants bear the burden of proving that the removals are narrowly tailored to serve a compelling interest. *Reed*, 135 S. Ct. at 2226; *Turner Broad. Sys.*, 512 U.S. at 664–65. Applying this standard, the Court finds it substantially likely that the removals do not further any substantial governmental interest—

much less any compelling one. Indeed, the Defendants' briefing doesn't argue that their actions can survive heightened scrutiny, nor have they set forth any governmental interests that are served by the removals. On this record, the Court will not endeavor to guess what interests Defendants may eventually proffer. As content-based restrictions on Plaintiffs' right to receive information, Plaintiffs have clearly shown the removals are likely to be constitutionally infirm because they are not narrowly tailored to serve a compelling state interest.

2. Irreparable Harm

The "loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury." *Texans for Free Enter v. Texas Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013). "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Opulent Life Church*, 697 F.3d at 295. Because Plaintiffs have clearly shown Defendants actions likely violate their First Amendment right to access to information, they have clearly shown they are suffering irreparable harm.

Attempting to deny this harm, Defendants contend that Plaintiffs can access every one of the books through either the InterLibrary Loan system, Bibliotheca, or the library system's in-house checkout system. None of these options mitigate the constitutional harm Plaintiffs are suffering. First, the InterLibrary Loan system is not a replacement for access to books within the Llano County Library System. Patrons must pay for postage and wait for weeks for books to arrive. (Milum Decl., Dkt. No. 49-1, at 10; Hr'g Tr. Vol. 2 at 124:24-125:1). Furthermore, to allow the InterLibrary loan system to stand

in for purported “access” to the books would absolve any government official from liability for unconstitutional book removals, no matter how egregiously unconstitutional their intent, as long as the official could find, *ex post facto*, a library or network from which it could secure a loan.

Likewise, access through Bibliotheca is not a replacement for access to the physical books at issue. E-books and physical books are tangibly different. Using Bibliotheca requires access to a compatible device, and most of the books are not available through Bibliotheca at all. (Milum Decl., Dkt. 49-1, at 6–7; Hr’g Tr. Vol. 2 at 47:2-4). Furthermore, as early as March 2022, Defendants were trying to remove books they had already purchased through Bibliotheca, due to concerns about their appropriateness. (Wallace Depo., Dkt. 59-1, at 114:4-10, 126:12-15; Bibliotheca Emails, Dkt. 59-1, at 104–107). Even if the Court were to find that access to these e-books is equivalent to access to the physical books, there is sufficient evidence to raise concerns that the books would not remain in place without an injunction.

The Court’s reservations about Defendants’ in-house checkout system are even greater. As noted above, the books that are supposedly “available” for checkout are absent from the library’s catalog. They are, to the extent they exist, not accessible from the library shelves. A patron must, notwithstanding the fact that the books’ existence is not reflected in the library catalog, know that the books can be requested. They must then make a special request for the book to be retrieved from behind the counter. This is, of course, an obvious and intentional effort by Defendants to make it difficult if not impossible to access the materials Plaintiffs seek. This ongoing

infringement warrants an interim remedy precisely because the harm is ongoing and irreparable.

3. Balance of Equities and Public Interest

As to the last two factors, Defendants once again insist that the balance of equities and public interest cannot support an injunction because Plaintiffs have not, will not, and could not have suffered constitutional harm. This Court found otherwise. “[I]njunctions protecting First Amendment freedoms are always in the public interest.” *Texans for Free Enter.*, 732 F.3d at 539 (quoting *Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)). As Plaintiffs request an injunction protecting their First Amendment Freedoms, and there is no evidence that the equities tilt in Defendants favor, the Court finds Plaintiffs have clearly shown these factors are in their favor.

4. Remedy

Although Plaintiffs have demonstrated they are entitled to a preliminary injunction, their evidence cannot sustain some of the remedies they seek. The evidence demonstrates that, without an injunction, Defendants will continue to make access to the subject books difficult or impossible. Defendants must therefore be prevented from removing the books, and the books at issue be made available for checkout through the Library System’s catalogs. (Proposed Ord., Dkt. 22-12⁹).

⁹ Librarian Milum testified at the hearing that the Library System does not plan to weed or add any books to the Library for the pendency of this litigation; therefore, an injunction preventing book removals is unlikely to be burdensome. (Hr’g Tr. Vol. 1, at 130:5–15).

However, Plaintiffs focused on book removals, not on relocations. Therefore, the Court cannot find that they are entitled to their request to return the physical books to their original locations. The Court will not invade the prerogative of the Library with regard to proper placement of books or restrictions on access.

Although Plaintiffs originally requested a preliminary injunction regarding access to OverDrive, the Court will not grant the relief because it has dismissed those claims. Finally, Plaintiffs requested relief related to their Due Process claim but did not actually present any arguments or evidence on the issue. Accordingly, the Court will deny the motion as to their request for access to the library board meetings.

IV. CONCLUSION

For the reasons given above, **IT IS ORDERED** that Defendants' motion to dismiss, (Dkt. 42), is **GRANTED. IN PART** and **DENIED IN PART**. Plaintiffs' OverDrive related claims are dismissed **WITHOUT PREJUDICE**. Defendants' motion is denied as to all other claims.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Preliminary Injunction, (Dkt. 22), is **PARTIALLY GRANTED. IT IS ORDERED THAT:**

1. Within twenty-four hours of the issuance of this Order, Defendants shall return all print books that were removed because of their viewpoint or content, including the following print books, to the Llano County Libraries:

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- a. *Caste: The Origins of Our Discontent* by Isabel Wilkerson;
 - b. *Called Themselves the K.K.K: The Birth of an American Terrorist Group* by Susan Campbell Bartoletti;
 - c. *Spinning* by Tillie Walden;
 - d. *In the Night Kitchen* by Maurice Sendak;
 - e. *It's Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health* by Robie Harris;
 - f. *My Butt is So Noisy!, I Broke My Butt!, and I Need a New Butt!* by Dawn McMillan;
 - g. *Larry the Farting Leprechaun, Gary the Goose and His Gas on the Loose, Freddie the Farting Snowman, and Harvey the Heart Has Too Many Farts* by Jane Bexley;
 - h. *Being Jazz: My Life as a (Transgender) Teen* by Jazz Jennings;
 - i. *Shine* by Lauren Myracle;
 - j. *Under the Moon: A Catwoman Tale* by Lauren Myracle;
 - k. *Gabi, a Girl in Pieces* by Isabel Quintero; and
 - l. *Freakboy* by Kristin Elizabeth Clark.
2. Immediately after returning the books to the Libraries as ordered in (1) above, Defendants shall update all Llano County Library Service's catalogs to reflect that these books are available for checkout.

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3. Defendants are hereby enjoined from removing any books from the Llano County Library Service's catalog for any reason during the pendency of this action.

SIGNED on March 30, 2023.

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE