

No. 25-284

In the Supreme Court of the United States

LEILA GREEN LITTLE, ET AL., PETITIONERS

v.

LLANO COUNTY, ET AL., RESPONDENTS

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The First Amendment’s Speech Clause is implicated only by government acts that “abridge” the freedom of speech. It does not require the government to subsidize or affirmatively assist other people’s efforts to obtain or access books, and it does not empower private citizens to commandeer the resources of government or divert the government’s activities toward their desired ends.

Public libraries continually remove books from their collections to make room for new materials and ensure that their limited shelf space is reserved for materials of requisite quality and relevance to their communities. Libraries are supposed to discriminate based on content and viewpoint when making these curation decisions, as “[t]he librarian’s responsibility . . . is to separate out the gold from the garbage, not to preserve everything.” *United States v. American Library Ass’n Inc.*, 539 U.S. 194, 204 (2003) (plurality op. of Rehnquist, C.J.) (quoting W. Katz, *Collection Development: The Selection of Materials for Libraries* 6 (1980)).

The Fifth Circuit held that a public library does not and cannot “abridge” the freedom of speech by removing books from its collection that it had no constitutional obligation to provide in the first place. The question presented is:

Did the Fifth Circuit correctly hold that the Speech Clause is inapplicable to a public library’s curation decisions, as a library cannot “abridge” anyone’s freedom of speech by offering a limited collection of materials to the public—even when that collection fails to include books that certain library patrons want, and

(i)

even when the library is accused of removing previously included books because of their content or viewpoints?

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BRIEF IN OPPOSITION

The Court will eventually have to resolve whether (and to what extent) the Speech Clause prevents government-owned libraries from removing materials in their collections—especially in light of the confusion and uncertainty produced by the splintered decision in *Board of Education v. Pico*, 457 U.S. 853 (1982). But this is not the case in which to do it.

No federal appellate court (apart from the Fifth Circuit) has ruled on whether the Speech Clause applies to library-book removals since *Pico*. And no other circuit has announced or decided upon a post-*Pico* standard for evaluating Speech Clause challenges to library book-removal decisions. The only other circuits to have even *considered* a constitutional challenge to library-book removals since *Pico* disposed of those appeals without re-

solving whether (or to what extent) the Speech Clause applies to a library’s book-removal decisions. *See ACLU of Florida, Inc. v. Miami-Dade County School Board*, 557 F.3d 1177, 1205–07 (11th Cir. 2009) (assuming for the sake of argument that Justice Brennan’s plurality opinion in *Pico* governs library-book removals while rejecting the plaintiffs’ constitutional claims because they could not even satisfy the standard proposed by Justice Brennan in *Pico*); *GLBT Youth in Iowa Schools Task Force v. Reynolds*, 114 F.4th 660 (8th Cir. 2024) (vacating a preliminary injunction because the district court applied the wrong standard for evaluating facial overbreadth challenges, without ruling on whether or to what extent the Speech Clause limits a public library’s discretion to remove materials from its collection).

More importantly, there are appeals pending in the Eighth, Tenth, and Eleventh Circuits in which the plaintiffs are challenging the constitutionality of library-book removals—and in which the defendants are arguing that the Speech Clause is categorically inapplicable to library book-removal decisions. *See Penguin Random House LLC v. Robbins*, No. 25-1819 (8th Cir.); *Crookshanks v. Elizabeth School District*, No. 25-1105 (10th Cir.); *Parnell v. School Board of Escambia County*, No. 25-13485 (11th Cir.). The appeals in *Penguin Random House* and *Crookshanks* are fully briefed and will be argued soon, and the Eleventh Circuit recently issued a briefing schedule in *Parnell*. The Court should wait and allow these courts to weigh in on whether and how the Speech Clause applies to library-book removals before jumping in to resolve this issue.

OPINIONS BELOW

The opinion of the en banc court of appeals is reported at 138 F.4th 834 and reproduced at Pet. App. 1a–110a. The court of appeals’ panel opinion is reported at 103 F.4th 1140 and reproduced at Pet. App. 111a–199a. The district court’s opinion is unreported and reproduced at Pet. App. 200a–232a.

JURISDICTION

The en banc court of appeals entered its judgment on May 23, 2025. On July 28, 2025, Justice Alito extended the deadline to petition for certiorari to September 22, 2025. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Speech Clause of the First Amendment provides:

Congress shall make no law . . . abridging the
freedom of speech

U.S. Const. amend. I.

The Fourteenth Amendment provides, in relevant part:

No State shall . . . deprive any person of life,
liberty, or property, without due process of law
. . . .

U.S. Const. amend. XIV.

STATEMENT

A public library must continually remove books from its shelves to make room for new arrivals and ensure that its collection remains up-to-date and responsive to the needs of the community. This is standard practice in the library profession, and even small libraries permanently remove thousands of books each year from their shelves and catalogs. From February 1, 2021, to March 18, 2022, the Llano County Library System weeded nearly 8,000 books, which were sold or donated and removed from circulation.¹

Librarians weed materials according to an acronym called “MUSTIE,” which encourages librarians to weed materials that are Misleading, Ugly,² Superseded, Trivial, Irrelevant,³ or available Elsewhere. Pet. App. 8a; *see also* Pet. 4 (acknowledging the propriety of the MUSTIE factors). The MUSTIE factors provide guidelines and not hard-and-fast rules.

The petitioners are patrons of Llano Library who disagree with the library director’s decision to weed 17 of the thousands of books that she weeded in 2021, and they have falsely accused her of weeding those 17 books because she disapproves of their content and viewpoints.

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1. The Llano County Library System comprises three distinct library buildings: Llano Library, Kingsland Library, and Lakeshore Library. The disputed books in this case were weeded from Llano Library.
 2. The “Ugly” factor is used to weed books that are damaged.
 3. A book is “irrelevant” if library patrons are not checking it out enough to warrant continuation in the library’s collection.

On April 25, 2022, the petitioners sued Llano County, Amber Milum (the library director), Ron Cunningham (the county judge), every county commissioner, and several volunteer members of the Llano County library advisory board. The complaint alleged that the defendants were violating the plaintiffs’ “First Amendment rights to access and receive information” by weeding the 17 disputed books from Llano Library, and it accused the defendants of engaging in “unconstitutional content-based and viewpoint-based discrimination.”⁴ On May 9, 2022, the petitioners moved for a preliminary injunction that would compel the return of those 17 previously weeded books to the library shelves and catalog.⁵

In response to the petitioners’ lawsuit, the Llano Library accepted a donation of the 17 disputed books and

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4. The complaint also asserted a due-process claim, but the district court did not grant preliminary relief on that claim and it is not an issue on appeal or in the petition for certiorari.
 5. The 17 books that the plaintiffs want returned to the shelves and catalog are: *Freakboy* by Kristin Elizabeth Clark; *Being Jazz: My Life as a (Transgender) Teen* by Jazz Jennings; *Gabi, a Girl in Pieces* by Isabel Quintero; *Under the Moon: A Cat-woman Tale* by Lauren Myracle; *Shine* by Lauren Myracle; *Spinning* by Tillie Walden; *It’s Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health* by Robie Harris; *In the Night Kitchen* by Maurice Sendak; *My Butt is So Noisy!*, *I Broke My Butt!*, and *I Need a New Butt!* (aka the “butt books”), all by Dawn McMillan; *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* (aka the “fart books”), all by Jane Bexley; *They Called Themselves the K.K.K: The Birth of an American Terrorist Group* by Susan Campbell Bartoletti; and *Caste: The Origins of Our Discontent* by Isabel Wilkerson. ROA.1039 (proposed order).

made them available for each of the petitioners to read and check out through the library’s “in-house checkout” system. Pet. App. 154a. These in-house books are not placed on the shelves or in the catalog and do not have bar codes, but are nonetheless made available for library patrons to read and check out. But the plaintiffs refused to accept this arrangement and demanded a preliminary injunction that would return each of the 17 disputed books to the shelves and catalog—even though they could not show “irreparable harm” (or a violation of their First Amendment rights) when the 17 books remained available for each of them to read and check out at Llano Library.

Although the petitioners had alleged a vast conspiracy among the defendants to purge the Llano County Library System of all books containing nudity, LGBTQ content, or critical race theory, their case quickly fell apart when Amber Milum insisted that she alone made the weeding decisions and the remaining defendants denied instructing or pressuring Milum to weed any materials from the library.⁶ Milum also insisted that her deci-

6. ROA.2499 (“I alone made the decisions to weed the 17 disputed books in this case. No other defendant in this case, including Bonnie Wallace, Rochelle Wells, Rhonda Schneider, Jerry Don Moss, or Ron Cunningham, has ever weeded a book from Llano library or directed me to weed or permanently remove a book from the library. Nor has any of these individuals pressured or attempted to pressure me to weed or permanently remove any book from the library system.”); ROA.676 (“I was never instructed or pressured by the County Judge or any of the County Commissioners to weed or otherwise permanently remove any books from the Llano County libraries. I was also never in- (continued...)”)

sions to weed the 17 books had nothing to do with the content or viewpoints expressed in the books.⁷ Ms. Milum did not even read the 17 disputed books before weeding them, and she was not aware of their content or viewpoints.⁸ Ms. Milum weeded the 17 disputed books solely because she concluded, in her professional judgment, that the books satisfied the MUSTIE criteria for weeding, no less than the other 7,767 books that were weeded from the Llano County Library System between February 1, 2021, and March 18, 2022.⁹

structed to remove any books from the libraries by the Llano County Advisory Board.”).

7. ROA.676 (“I did not consider the content of any of the books I weeded when I made the decision to weed them. I also did not consider any of the viewpoints expressed in any of the books I weeded. I weeded the books based on the objective criteria I always use in determining which books to weed.”); ROA.2506-2507 (“I have never in my entire career weeded a book because of its viewpoints, and I have never considered the content of a book when making a weeding decision except to the extent that the MUSTIE factors might require me to consider whether a book should be considered ‘misleading,’ ‘superseded,’ ‘trivial,’ or ‘irrelevant.’”).
8. ROA.3974 (“Q. Have you read any of the books that we’ve been talking about? A. No.”); ROA.2507 (“I did not read any of those books before weeding them, and I am not even aware of the ‘viewpoints’ or ‘positions’ (if any) that might be expressed in any of those books.”).
9. ROA.4174-4187 (Milum explaining her reasons for weeding the disputed books); ROA.672, 675-676 (same); ROA.2500-2501 (Milum explaining her reasons for weeding *Under The Moon*); ROA.2501 (Milum explaining her reasons for weeding the “butt” and “fart” books); ROA.2507 (“I did not consider any of the 17 books that I weeded to be pornographic or in any way inappropriate (continued...)”).

The petitioners tried to salvage their case by relying on two e-mails sent by Judge Cunningham to Ms. Milum. The first of these e-mails, dated November 10, 2021, reads as follows:

Amber,

As we discussed in our meeting in my office at 9:45 AM on November 9, 2021 any and all books that depict any type of sexual activity or questionable nudity are to be pulled immediately.

ROA.349. But Cunningham and Milum both explained that this e-mail merely instructed Milum to *temporarily* pull those books so that Milum could *review* whether they should be weeded or moved from the children's section.¹⁰ It was not an instruction to weed or permanently remove those books.¹¹

priate for a public library. I weeded those books solely based on my application of the CREW/MUSTIE factors.”).

10. ROA.349 (e-mail from Ron Cunningham to Amber Milum of November 10, 2021); ROA.682 (“I did in at least one email to Ms. Milum direct her to ‘pull’ books with ‘sexual activity or questionable nudity,’ it was the shared understanding of both myself and Ms. Milum that ‘pull’ in the context used meant to remove such books from the shelves for review prior to making a decision on whether to re-shelve the books in a different section of the library such as the adult section.”).
11. ROA.682 (Cunningham) (“I have never instructed any library staff, including Ms. Milum, to remove any books from the Llano County library shelves. Nor have I removed any books. It is not within my duties as County Judge to either acquire or remove books from the libraries.”).

The second e-mail from Cunningham to Milum read as follows:

Amber, I am still receiving calls, letters and emails concerning the Farts and Butts books. I think it is best to remove these books from the shelves *for now*.

ROA.2488 (emphasis added). This, too, is not an instruction to weed the “butt” and “fart” books, but a mere request to *temporarily* remove them from the shelves to determine whether they should be weeded or moved from the children’s section. Cunningham and Milum both testified to this effect.¹²

A. The District Court’s Ruling

On March 30, 2023, the district court granted the plaintiffs’ motion for preliminary injunction and ruled that the Speech Clause prohibits a public library from engaging in “content discrimination” or “viewpoint discrimination” when removing books. Pet. App. 221a (“[T]he First Amendment prohibits the removal of books from libraries based on either viewpoint or content discrimination.”).

The district court also ruled that the plaintiffs were likely to succeed on their claims that the defendants had

12. ROA.2499 (Milum) (“Judge Cunningham recommended only that I *temporarily* remove those books from the shelves.”); ROA.2488 (Cunningham) (“My e-mail to Amber Milum . . . recommended only that Ms. Milum *temporarily* remove those books from the shelves to determine whether they should remain in the children’s section of the library.”).

engaged in both “viewpoint discrimination” and “content discrimination.” Pet. App. 220a–221a. The district court did not identify the “viewpoints” that the defendants had discriminated against, nor did it identify the viewpoints expressed in any of the 17 disputed books. *See id.* at 220a–224a. Instead, the district court ruled that the defendants had likely engaged in “viewpoint discrimination” because “the evidence shows” that they “targeted and removed books . . . based on complaints that the books were inappropriate,”¹³ and they “may be seen to have adopted” the motivations of community members who objected to the 17 books (among many others) and wanted them removed from the library. Pet. App. 222a. The district court also ruled that the defendants had likely engaged in “content discrimination” because the decision to *review* the disputed books (and others) for weeding was prompted by complaints from library patrons who found the books objectionable—even if the ultimate weeding decision was made without regard to content or viewpoint. Pet. App. 225a (“[T]he targeted review was directly prompted by complaints from patrons and county officials over the contents of these titles.”).

B. The Fifth Circuit Panel Opinion

The defendants appealed and on June 6, 2024, a panel of the Fifth Circuit, over dissent, affirmed the preliminary injunction with respect to 8 of the 17 disputed books. Pet. App. 111a–199a.

13. Pet. App. 221a.

None of the three judges could agree on the disposition or rationale. The lead opinion, authored by Judge Wiener, rejected the district court’s claim that the First Amendment bans “content discrimination” in public-library weeding decisions. Pet. App. 123a (“[L]ibraries must consider content to some degree in selecting material.”). Instead, Judge Wiener opined that public librarians violate the First Amendment if they weed a book “with the substantial motivation to prevent access to particular points of view.” *Id.* at 127a. According to Judge Wiener, a “motivation is ‘substantial’ when in its absence ‘the opposite decision would have been reached.’” *Id.* at 135a (citations omitted). Judge Wiener would have held that all 17 books were “likely” weeded in violation of the First Amendment. *See id.* at 130a–136a & n.12.

Judge Southwick concurred in part and concurred in the judgment in part. His partial concurrence described the governing standard somewhat differently from Judge Wiener’s lead opinion, declaring that public librarians violate the First Amendment by weeding books “*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.” Pet. App. 142a (quoting *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184, 188 (5th Cir. 1995) (emphasis added)). In applying this standard, Judge Southwick held that the weeding of the seven “butt and fart books” did not violate the First Amendment because there was no evidence showing that these books express an “idea” or “viewpoint.” Pet. App.

142a–143a (“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.”). Judge Southwick also held that the removal of books containing nudity were constitutionally permissible because those books “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.” *Id.* at 144a. But Judge Southwick agreed with Judge Wiener that the plaintiffs had shown that the remaining eight books were likely weeded in violation of the First Amendment.

Judge Duncan dissented, arguing that a public library’s curating decisions are government speech and that the First Amendment should be inapplicable to a public library’s weeding decisions. Pet. App. 145a–199a.

C. The Fifth Circuit En Banc Opinion

The Fifth Circuit granted rehearing en banc and vacated the preliminary injunction in a 10-7 vote.

The en banc majority held that library-book removals do not implicate the First Amendment right of patrons to access and receive information, as there is no constitutional right to compel government-owned libraries to keep any particular book in their collections. Pet. App. 26a–27a (“[B]y removing a book, the library does not prevent anyone from ‘receiving’ the information in it. . . . 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. . . . The only thing disappointed patrons are kept from ‘receiving’ is a book of their choice at tax-

payer expense. That is not a right guaranteed by the First Amendment.”). The en banc majority overruled *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184 (5th Cir. 1995), which held that the Speech Clause limits a school district’s ability to remove books from its libraries. *See id.* at 27a–31a. A seven-judge plurality went on to opine that a public library’s curation decisions are government speech, but this part of the opinion did not garner a majority of the en banc court. *See id.* at 31a–61a.

REASONS FOR DENYING THE PETITION

The Court should deny certiorari because: (1) There is no circuit split on whether or how the First Amendment applies to library book removals after *Pico*; (2) The Court should allow this issue to percolate in the courts of appeals before granting certiorari, especially when the Eighth, Tenth, and Eleventh Circuits will soon be issuing rulings on the constitutionality of library book removals; and (3) The petitioners’ claim that the ruling below “contravenes” this Court’s First Amendment precedents is false.

I. THERE IS NO CIRCUIT SPLIT ON WHETHER OR HOW THE SPEECH CLAUSE LIMITS A PUBLIC LIBRARY’S BOOK-REMOVAL DECISIONS

The petitioners claim the Fifth Circuit’s ruling conflicts with decisions from other circuits,¹⁴ but no circuit (apart from the Fifth) has ruled on whether the Speech

14. Pet. 27–30.

Clause limits a public library’s curation prerogatives after *Pico*. And no other circuit since *Pico* has announced a test for determining when a library’s book-removal decisions will violate the Speech Clause.

1. The petitioners claim that the Eighth and Eleventh Circuits have “recognized that the First Amendment applies when public officials remove books from libraries to suppress access to viewpoints.” Pet. 27 (citing *GLBT Youth in Iowa Schools Task Force v. Reynolds*, 114 F.4th 660 (8th Cir. 2024), and *ACLU of Florida, Inc. v. Miami-Dade County School Board*, 557 F.3d 1177, 1205–07 (11th Cir. 2009)). The petitioners misrepresent the decisions in *GLBT Youth* and *ACLU of Florida*. Neither of those rulings holds that the Speech Clause limits the discretion of public libraries to remove materials from their collections. And neither ruling rejects the holding or rationale of the Fifth Circuit’s en banc majority.

a. *GLBT Youth* involved a constitutional challenge to an Iowa statute that banned sexually explicit materials in public-school libraries. The district court categorically enjoined enforcement of the statute after declaring it overbroad and unconstitutional on its face. *See GLBT Youth in Iowa Schools Task Force v. Reynolds*, 709 F. Supp. 3d 664, 672 (S.D. Iowa 2023), *rev’d and vacated*, 114 F.4th 660 (8th Cir. 2024). The Eighth Circuit vacated this preliminary injunction because the district court

misapplied the overbreadth doctrine,¹⁵ and it remanded without ruling on whether (or to what extent) the Speech Clause restricts the authority of school districts to remove books from their libraries. *See GLBT Youth*, 114 F.4th at 671 (“Because the district court issued a preliminary injunction based on a flawed analysis of [overbreadth] law, we reverse its decision and vacate the preliminary injunction.”). At no point does the opinion in *GLBT Youth* rule or purport to rule on: (1) Whether the Speech Clause limits the discretion of government-owned libraries to curate their collections; or (2) The standard for evaluating First Amendment challenges to library-book removals.

The Eighth Circuit’s opinion *does* reject the idea that a public-school library’s book-removal decisions qualify as government speech. *See GLBT Youth*, 114 F.4th at 667–68. But that does not conflict with the ruling below because: (1) The Fifth Circuit majority declined to rule on the government-speech issue; and (2) The Eighth Circuit did not consider or resolve whether the Speech Clause gives libraries carte blanche to remove materials for reasons apart from the government-speech doctrine, as the Fifth Circuit majority held.

The petitioners would have a circuit split on the government-speech issue *if* the Fifth Circuit majority had adopted the plurality opinion’s analysis, which sought to further insulate book-removal decisions from First

15. *See GLBT Youth*, 114 F.4th at 670 (“The district court did not perform the necessary [overbreadth] inquiry set forth in *NetChoice*.”).

Amendment scrutiny by invoking the government-speech doctrine. Pet. App. 31a–61a. But the en banc majority refused to take that step, even as the plurality went out of its way to disavow the government-speech analysis in *GLBT Youth*. Pet. App. 58a–60a. So there is no conflict between the law of the Fifth Circuit and the law of the Eighth Circuit on government speech—nor is there any conflict between these circuits on the constitutional propriety of library-book removals.

b. The petitioners’ attempt to manufacture a circuit conflict with the Eleventh Circuit is even more off base. The opinion in *ACLU of Florida, Inc. v. Miami-Dade County School Board*, 557 F.3d 1177 (11th Cir. 2009), holds that *Pico* has “no precedential value,”¹⁶ in full accordance the Fifth Circuit’s holding that *Pico* has no binding precedential force. Pet. App. 16a n.11 (“*Pico* was so fractured that . . . it lacks any precedential force.”). And the opinion in *ACLU of Florida* rejects the constitutional challenge to a library-book removal by *assuming* for the sake of argument that Justice Brennan’s *Pico* plurality opinion applied and holding that the plaintiffs could not even satisfy the standard proposed by Justice Brennan. *See ACLU of Florida*, 557 F.3d at 1205 (“[U]nder the *Pico* plurality standard we are *assuming* applies, the Board’s motive is the ultimate fact upon which the resolution of the constitutional question depends.” (emphasis added)); *id.* at 1207 (“Under the *Pico* standard we

16. *ACLU of Florida*, 557 F.3d at 1200 (“*Pico* is of no precedential value as to the application of the First Amendment to these issues.” (citation and internal quotation marks omitted)).

are applying, the Board did not act based on an unconstitutional motive.”). So the petitioners’ claim that the Eleventh Circuit “recognized that the First Amendment applies”¹⁷ to library-book removals is false. Assumptions are not holdings,¹⁸ and the assumptions in *ACLU of Florida* do not resolve or “recognize” that the Speech Clause limits a library’s prerogatives to curate its collection. The Eleventh Circuit and its district courts remain free to follow the Fifth Circuit’s opinion if they are so persuaded—and a district court within the Eleventh Circuit recently did so. *See Parnell v. School Board of Escambia County*, No. 4:23-cv-414-AW-MAF, 2025 WL 2957001, *2 (N.D. Fla. Sept. 30, 2025) (“I conclude, as the en banc Fifth Circuit recently did, that a public library’s removal of books does not implicate the First Amendment right to receive information. *Little v. Llano County*, 138 F.4th 834, 850 (5th Cir.) (en banc), *cert. pending*, No. 25-284 (2025).”).

2. The D.C. Circuit has opined that a public library’s curation decisions are government speech immune from Speech Clause challenge. *See People for the Ethical Treatment of Animals v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005) (“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.”). The

17. Pet. 27

18. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (“[A]ssumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions.”).

petitioners try to fob off this discussion as “dicta,”¹⁹ but it does not matter whether this constitutes holding or

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19. Pet. 29. The petitioners are wrong to call *PETA*’s discussion of library-curation decisions “dicta.” The opinion in *PETA* rejected an animal-rights organization’s demands to include a sculpture of a suffering circus elephant in a government-sponsored art exhibit. *PETA* held that the art exhibit constituted government speech and analogized the government’s selection of artistic submissions to a public library’s curation activities, which it also characterized as government speech:

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. It is of no moment that the library owns the books, just as the District of Columbia owned the donkeys and elephants. Those who check out a Tolstoy or Dickens novel would not suppose that they will be reading a government message. But in the case of a public library, as in the case of the Party Animals exhibit, there is still 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. 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. In using its ‘editorial discretion in the selection and presentation of’ the elephants and donkeys, the Commission thus ‘engage[d] in speech activity’; ‘compilation of the speech of third parties’ is a communicative act.

PETA, 414 F.3d at 28 (citation omitted). The opinion in *PETA* announced a rule of law that was broader than necessary to resolve the particular facts before it, but that does not convert the judicially announced rule into “dicta.” See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) (“[T]he principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law” (citation and internal quotation marks omitted)); Pierre (continued...)

dicta because it fails to present a conflict with the Fifth Circuit’s decision in either event. Even if one believes that *PETA*’s decision to characterize library-curation decisions as government speech qualifies as a holding, and even if one believes that *PETA*’s government-speech holding conflicts with the Eighth Circuit’s contrary conclusion on the government-speech issue in *GLBT Youth*, that would not justify granting certiorari in *this* case because the Fifth Circuit majority declined to rule on the government-speech argument and rested its holding entirely on other grounds.

3. The petitioners claim that the Fifth Circuit’s decision conflicts with rulings from the Second and Sixth Circuits that predate *Pico*. Pet. 27 (citing *Bicknell v. Vergennes Union High School Board of Directors*, 638 F.2d 438, 441 (2d Cir. 1980), and *Minarcini v. Strongsville City School District*, 541 F.2d 577, 582 (6th Cir. 1976)).

Bicknell rejected a First Amendment challenge to a school board’s decision to remove library books, and held that the Speech Clause allows libraries to remove materials “so long as the materials removed are permissibly considered to be vulgar or indecent.” *Bicknell*, 638 F.2d at 441. *Minarcini* acknowledged that the government has no constitutional obligation to provide libraries yet analyzed the prerogative to remove library books under

N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1256 (2006) (“A dictum is an assertion in a court’s opinion of a proposition of law which does not explain why the court’s judgment goes in favor of the winner.”).

the unconstitutional-conditions doctrine²⁰ and concluded that library-book removals violated “the First Amendment right to know.” *Minarcini*, 541 F.2d at 584.

Each of these decisions predates the Fifth Circuit’s ruling by more than 40 years, and they were decided in a doctrinal landscape that bears no resemblance to the First Amendment case law of today. Neither of those courts had the opportunity to consider the competing opinions in *Pico*, nor did they have the benefit of the crucial precedents from this Court that uphold the government’s prerogative to selectively subsidize speech. *See, e.g., Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983) (“[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right”); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as

20. *See Minarcini*, 541 F.2d at 582 (“Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville High School or to choose any particular books. Once having created such a privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the social or political tastes of school board members. The Supreme Court long ago said: “It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege.” (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)).

Communism and Fascism.”); *Ysursa v. Pocatello Educational Ass’n*, 555 U.S. 353, 355 (2009) (“The First Amendment prohibits government from ‘abridging the freedom of speech’; it does not confer an affirmative right to use government . . . mechanisms for the purpose of obtaining funds for expression.”); *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (“It is the very business of government to favor and disfavor points of view” (citation and internal quotation marks omitted)). So while it is correct for the petitioners to observe that *Bicknell* and *Minarcini* reject the notion that the Speech Clause gives government-owned libraries unfettered discretion to remove books, it is akin to asserting a “circuit conflict” between a recently decided Establishment Clause case and a case from the 1970s that was decided against the background of a different jurisprudence prevailing at that time. The Court should wait for a circuit to consider and reject the Fifth Circuit’s approach with the benefit of this Court’s recent First Amendment case law. That will provide a clash among courts that are fully informed of the latest developments in First Amendment doctrine, and that vigorously dispute how this Court’s current cases apply to the issue of library-book removals.

It is also far from clear that the Second and Sixth Circuits would continue following *Bicknell* and *Minarcini* given this Court’s intervening decision in *Pico*. See *Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC v. U.S. Immigration and Naturalization Service*, 336 F.3d 200, 210 (2d Cir. 2003) (panel opinions need not be followed if “an intervening Su-

preme Court decision that casts doubt on our controlling precedent”); *The Northeast Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 720 (6th Cir. 2016) (similar). The position taken in *Bicknell* would prohibit library-book removals whenever they present a *risk* of suppressing ideas, which goes beyond what even Justice Brennan proposed in his *Pico* plurality opinion. Compare *Bicknell*, 638 F.2d at 441 (recognizing “a First Amendment right of members of a school community to be free of the inhibiting effects upon free expression that result when the circumstances surrounding the removal of books create a risk of suppressing ideas.”), with *Pico*, 457 U.S. at 870 (plurality opinion of Brennan, J.) (“Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner.”). And *Minarcini* goes even further, indicating that library-books removals are categorically forbidden unless the expunged book was damaged or obsolete, or was removed because of limited shelf space.²¹

Justice Brennan’s plurality opinion in *Pico* does not bind the federal courts of appeals, but it represents the most far-reaching understanding of the constitutional restrictions of library-book removals ever taken by a Supreme Court justice, and stands as the outermost limit of what any member of this Court in *Pico* was willing to

21. See *Minarcini*, 541 F.2d at 581 (“Of course, a copy of a book may wear out. Some books may become obsolete. Shelf space alone may at some point require some selection of books to be retained and books to be disposed of. No such rationale is involved in this case, however.”).

endorse. So *Pico*, at the very least, indicates that the Speech Clause restrictions on library-book removals extend no further than what Justice Brennan’s plurality opinion proposed, and that calls into question whether opinions such as *Bicknell* and *Minarcini* continue to bind three-judge panels and district courts in the Second and Sixth Circuits.

4. The petitioners try to concoct a circuit split by touting cases from other circuits that have nothing to do with library-book removals. Pet. 29–30 (citing *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992); *Neinast v. Board of Trustees of Columbus Metropolitan Library*, 346 F.3d 585, 591 (6th Cir. 2003); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1119 (10th Cir. 2012)). *Kreimer* rejected a facial constitutional challenge to rules that prohibited library patrons from loitering, staring at or stalking others in the library, or entering the library with offensive body odors. See *Kreimer*, 958 F.2d at 1248. *Neinast* rejected a First Amendment claim brought by a library patron who was evicted for refusing to wear shoes. See *Neinast*, 346 F.3d at 588. And *Doe* held that a city law banning registered sex offenders from entering library buildings violated the Speech Clause—but it reached this conclusion only because the city had refused to introduce any evidence showing how its ban was “narrowly tailored to serve a significant governmental interest.” *Doe*, 667 F.3d at 1122.

None of these cases say anything about a library’s authority to remove books from its shelves, and none of them purport to limit a library’s book-removal prerogatives in any way. The petitioners, however, claim that the

Fifth Circuit’s ruling “conflicts” with these cases because each of these cases acknowledges that denying entrance to a library building burdens a library patron’s First Amendment “right to receive information,” which may or may not be overcome by the state’s countervailing interests in protecting other library patrons from menacing or unhygienic behaviors. *Kreimer*, 958 F.2d at 1251 (“[A] right to receive information founded under the First Amendment is implicated in this case.”); *Neinast*, 346 F.3d at 591 (“This right to receive information ‘includes the right to some level of access to a public library, the quintessential locus of the receipt of information.’” (quoting *Kreimer*, 958 F.2d at 1255)); *Doe*, 667 F.3d at 1119 (“[C]ourts have specifically recognized the right to receive information in the context of restrictions involving public libraries.”).

But recognizing a constitutional right to enter a library building is a far cry from holding that the First Amendment empowers library patrons to demand that libraries include their preferred books within their collections and place those books within the library’s limited shelf space. The petitioners confidently assert that the Third, Sixth, and Tenth Circuits “would have decided this case differently” based on their precedents in *Kreimer*, *Neinast*, and *Doe*. Pet. 30. But those courts might have chosen to distinguish the issue of library eviction from library book-removal, as the Fifth Circuit

did,²² and the petitioners have no way of knowing how those courts would rule until they are presented with an actual case challenging the constitutionality of a library’s book-removal decisions. Petitioners do not establish circuit splits through imaginative reconstruction.

5. The petitioners note that federal district courts have interpreted the Speech Clause to limit a library’s book-removal prerogatives. Pet. 27–28 n.2 (citing authorities). But opinions of federal district courts have no precedential value and need not be followed by anyone—including the federal district court that issued the ruling. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” (citation and internal quotation marks omitted)). And of the nine district-court rulings cited by the petitioners, six are from courts in the Fifth, Eighth, Tenth, and Eleventh Circuit—so those opinions have been or will soon be superseded by the decision below or by the soon-to-be-decided appeals in *Penguin Random House*, *Crookshanks*, and *Parnell*. *See* p. 2, *supra*; pp. 26–30, *infra*. The remaining three district-court opinions predate *Pico*. None of these district-court rulings create a split of authority worthy of this Court’s attention. *See* Sup. Ct. R. 10(a)–(c) (listing the splits in authority that counsel in favor of certiorari, with no mention of conflicts

22. Pet. App. 19a. (“[T]hose cases addressed whether a library could evict someone from its *premises*, not whether someone could demand the library put certain books on its *shelves*.”).

between or among the federal district courts, or between a federal court of appeals and one or more federal district courts).

II. THE COURT SHOULD AWAIT THE RESOLUTION OF THE PENDING APPEALS IN PENGUIN RANDOM HOUSE, CROOKSHANKS, AND PARNELL

As of now, the Fifth Circuit is the only federal appellate court to have ruled on *Pico*'s application to library-book removals. But three more circuits will soon have their say. See *Penguin Random House LLC v. Robbins*, No. 25-1819 (8th Cir.); *Crookshanks v. Elizabeth School District*, No. 25-1105 (10th Cir.); *Parnell v. School Board of Escambia County*, No. 25-13485 (11th Cir.). The Court should wait for these circuits to rule on the constitutionality of library-book removals and grant certiorari if a circuit split emerges from these soon-to-be-issued rulings.

The appeal in *Penguin Random House* is a sequel to *GLBT Youth in Iowa Schools Task Force v. Reynolds*, 114 F.4th 660 (8th Cir. 2024), which vacated a preliminary injunction that had blocked the enforcement an Iowa statute banning sexually explicit materials in public-school libraries. The panel in *GLBT Youth* held that the district court had misapplied the overbreadth doctrine and remanded for an overbreadth analysis consistent with *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). See *GLBT Youth*, 114 F.4th at 670. On remand, the district court once again declared the Iowa statute facially unconstitutional on overbreadth grounds and re-issued the preliminary injunction that prevented any enforcement

of the statute. *See Penguin Random House LLC v. Robbins*, 774 F. Supp. 3d 1001 (S.D. Iowa 2025). The state has appealed and is asking the Eighth Circuit to hold the Speech Clause inapplicable to library book removals, as the Fifth Circuit did. The appeal is fully briefed and will soon be calendared for argument.

The plaintiffs in *Crookshanks* are suing the Elizabeth School District over its decision to remove 19 titles from its libraries. *See Crookshanks v. Elizabeth School District*, 775 F. Supp. 3d 1160 (D. Colo. 2025). The district court granted a preliminary injunction and ordered the disputed books returned to the library shelves. *See id.* at 1189–90. The district court acknowledged that Justice Brennan’s plurality opinion in *Pico* is “not binding,” yet declared that it “remains a useful starting point” in the First Amendment analysis. *Id.* at 1177, 1179. The district court also held that public-school libraries are (at the very least) a “nonpublic forum,” and that any exclusion of materials from a school library must therefore be viewpoint neutral. *See id.* at 1185. The school district has appealed and is asking the Tenth Circuit to hold that the Speech Clause is categorically inapplicable to library book removals. The appeal is fully briefed and will be argued in January 2026.

Parnell involves a lawsuit brought against the Escambia County School Board after it removed a children’s book called *And Tango Makes Three* from its libraries. The district court entered judgment for the city after endorsing and following the Fifth Circuit’s decision below. *See Parnell v. School Board of Escambia County*, No. 4:23-cv-414-AW-MAF, 2025 WL 2957001, *2 (N.D.

Fla. Sept. 30, 2025) (“I conclude, as the *en banc* Fifth Circuit recently did, that a public library’s removal of books does not implicate the First Amendment right to receive information.” (citing *Little v. Llano County*, 138 F.4th 834, 850 (5th Cir. 2025)). The plaintiffs appealed on October 3, 2025, and their opening brief is due on December 17, 2025.

The Court should wait until it has the benefit of the rulings and opinions in *Penguin Random House*, *Crookshanks*, and *Parnell* before taking up the constitutionality of library book removals. The Fifth Circuit’s decision will be front and center in each of these pending appeals, where the arguments in the Fifth Circuit majority and plurality opinions will be vetted and scrutinized by counsel and each of the three-judge panels. A well-reasoned opinion from a federal court of appeals, or a vigorous dissent from an outvoted panel member, can only help this Court’s eventual consideration of the constitutional issue.

The petitioners think that the decision below is so obviously wrong that the Court should grant certiorari now without awaiting further percolation. Pet. 13–27. But this Court exhibits more epistemic humility when deciding whether to grant certiorari. The Supreme Court is tasked with resolving the most difficult and challenging legal questions of our day, and the likelihood of error decreases significantly when the Court waits until it has the benefit of multiple competing perspectives before tackling an issue. Counsel should exhibit a similar modesty as officers of the Court when deciding whether to recommend certiorari. The petitioners’ Supreme Court counsel are exceptionally talented and highly regarded

attorneys, but even they should recognize that the lawyers and judges involved in the *Penguin Random House*, *Crookshanks*, and *Parnell* appeals may think of arguments or nuances that lawyers for both sides in this case have overlooked. No attorney (and no judge) is infallible, especially when arguing or deciding an issue of First Amendment law that has so divided this Court that it was unable to produce a majority opinion in each of its previous two cases concerning access to library materials. *See Pico*, 457 U.S. 853; *United States v. American Library Ass’n Inc.*, 539 U.S. 194 (2003).

Finally, there is no downside to denying certiorari and waiting for the appeals to conclude in *Penguin Random House*, *Crookshanks*, and *Parnell*. Llano Library has made each of the 17 disputed books available for the petitioners to read and check out through its in-house library system, and the petitioners will enjoy access to those library books no matter how this Court disposes of their certiorari petition. *See* pp. 5–6, *supra*. In addition, libraries within the Fifth Circuit are unlikely to begin purging controversial books from their collections even with the benefit of the decision below, as the possibility that this Court may someday repudiate the Fifth Circuit’s view looms large and no library or municipality wants to be hit with a lawsuit if a future decision of this Court sees matters differently. The petitioners have not identified any library in Texas, Louisiana, or Mississippi that has engaged in inappropriate or questionable book removals since the Fifth Circuit’s ruling. And they do not claim that any library has removed books that it might have kept had the Fifth Circuit not declared the Speech

Clause inapplicable to library-curation decisions. Nor have the petitioners cited any pending or future lawsuit over library-book removals in the Fifth Circuit that is being thwarted by the decision below. The petitioners complain that “attempts” to restrict library books have peaked in recent years,²³ but they present no data on how many of these “attempts” have succeeded, and the petitioners have no basis for assuming that any of the actual book removals violated their interpretation of the First Amendment. Pet. 31 (acknowledging that courts should “afford libraries significant deference” over their book-removal decisions absent a showing of “viewpoint discrimination”). Nor do the petitioners present any reason to believe that leaving the Fifth Circuit’s ruling in place for another year or two will cause any library patron (including the petitioners) to lose access to desired library materials.

The Court should allow this issue to further percolate before granting certiorari—and it should (at the very least) await the rulings and opinions in *Penguin Random House*, *Crookshanks*, and *Parnell*.

III. THE PETITIONERS FALSELY CLAIM THAT THE FIFTH CIRCUIT’S RULING “CONTRAVENES” THIS COURT’S FIRST AMENDMENT PRECEDENTS

The petitioners spend most of their brief railing about how wrong they think the Fifth Circuit’s decision

23. Pet. 32 (“[A]ttempts to restrict library books have reached record levels in recent years. In 2023, 1,247 such *attempts* were reported to the ALA—an all-time high since the ALA began documenting library censorship in 1990.” (emphasis added)).

is. Pet. 13–27. And their lead argument for certiorari is that the decision below “contravenes” this Court’s First Amendment precedents²⁴—although they do not claim that the Fifth Circuit’s ruling warrants summary reversal, which is the appropriate remedy when a court of appeals decision actually contradicts a decision of this Court. Instead, the petitioners claim that the precedents of this Court establish a categorical ban on “viewpoint discrimination” whenever the government subsidizes speech or promotes the speech of others. Pet. 14. The Court has never endorsed this idea in any of its Speech Clause decisions.

This Court has recognized that viewpoint discrimination is not only permissible but inevitable when the government funds or facilitates speech. *See Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.”); *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (“‘It is the very business of government to favor and disfavor points of view.’” (quoting *National Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment))). It is also untenable to claim that the government is categorically forbidden to discriminate on the basis of viewpoint when spending taxpayer funds or allocating government-owned resources. Government-

24. Pet. 13–19.

funding decisions are always made under scarcity constraints, which means that the government will *have* to choose some viewpoints over others when deciding the speech that it will subsidize or the amount of government assistance that particular viewpoints will receive.

The petitioners point to a few decisions of this Court that disapproved viewpoint discrimination in the context of government funding, but those decisions were careful to cabin their holdings to particular circumstances present in those cases. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), nixed the University of Virginia’s refusal to fund religious student publications, but only because the university’s Student Activities Fund qualified as a “limited public forum” that triggered the constitutional prohibition on viewpoint discrimination. *Id.* at 829–30; *see also National Endowment for Arts v. Finley*, 524 U.S. 569, 586 (1998) (distinguishing and limiting *Rosenberger*’s holding on this ground); *id.* at 598–99 (Scalia, J., concurring in the judgment) (same). *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), also stops short of imposing a categorical ban on viewpoint discrimination whenever the government subsidizes or propagates another person’s speech—a holding that would have compelled the Court to overrule *Rust*. Instead, *Velazquez* preserves the holding of *Rust*, yet pronounced the funding restriction on Legal Services Corporation attorneys unconstitutional because it “distorts the legal system by altering the traditional role of the attorneys.” *Id.* at 544. Finally, the trademark-

registration cases that the petitioners cite²⁵ involved viewpoint discrimination that restricted a person’s ability to register a trademark; they did not involve expenditures of government funds or the use of government-owned resources to propagate another’s person’s message. There is no categorical prohibition on viewpoint discrimination whenever the government subsidizes or facilitates private speech, and no decision of this Court has ever made such a claim.

The petitioners also argue that the Fifth Circuit’s decision “contravenes” *Pico*. Pet. 16–17. But *Pico* failed to produce a majority opinion, so the lower courts are obligated to follow only the opinion of the justice who “con-
 curred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977). In *Pico*, the controlling opinion under *Marks* belongs to Justice White, who concurred in the judgment and refused to join any portion of Justice Brennan’s plurality opinion. See *Pico*, 457 U.S. at 883–84 (White, J., concurring in the judgment); *Muir v. Alabama Educational Television Comm’n*, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982) (“[T]he opinion of Justice White [is] the narrowest grounds for the judgment [in *Pico*]”). Yet Justice White’s opinion refused to weigh in on whether the First Amendment restricts a library’s ability to remove materials from its collection:

25. Pet. 15 (citing *Matal v. Tam*, 582 U.S. 218 (2017); *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019)).

The District Court found that the books were removed from the school library because the school board believed them “to be, in essence, vulgar.” 474 F. Supp. 387 (E.D.N.Y. 1979). Both Court of Appeals judges in the majority concluded, however, that there was a material issue of fact that precluded summary judgment sought by petitioners. The unresolved factual issue, as I understand it, is the reason or reasons underlying the school board’s removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. Presumably this will result in a trial and the making of a full record and findings on the critical issues.

The plurality seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no necessity for doing so at this point. . . . [I]f there is an appeal, if there is dissatisfaction with the subsequent Court of Appeals’ judgment, and if certiorari is sought and granted, there will be time enough to address the First Amendment issues that may then be presented. . . .

We should not decide constitutional questions until it is necessary to do so, or at least until there is better reason to address them than are

evident here. I therefore concur in the judgment of affirmance.

Pico, 457 U.S. at 883–84 (White, J., concurring in the judgment). This is the controlling opinion in *Pico*, and it remains agnostic on whether the First Amendment imposes *any* constraints on book-removal decisions made by public-school libraries. It merely concurs in a judgment that affirms a federal court of appeals’ decision vacating a ruling that granted summary judgment for the school district and remanding the case for trial. *See id.* at 856–61 (plurality op. of Brennan, J.) (describing the lower-court proceedings).

The petitioners claim that Justice White’s vote to remand the case for factfinding indicates that Justice White must have believed that the Speech Clause imposes *some* constraints on a public school’s ability to remove books from its libraries. Pet. 16. That is untrue. Justice White voted to remand the case so that the Supreme Court could determine whether it would be even be necessary to weigh in on the First Amendment questions; he did not purport to resolve any of those First Amendment issues in his concurrence.

The petitioners also insinuate that three of the *Pico* dissenters “cheerfully conceded” that the Speech Clause imposes at least some limitation on a library’s authority to remove books. Pet. 17 (quoting *Pico*, 457 U.S. at 907 (Rehnquist, J., dissenting)). They did nothing of the sort. All four *Pico* dissenters joined Chief Justice Burger’s dissent, which emphatically rejects *any* Speech Clause limits on a library’s book-removal prerogatives. *See id.* at 889 (Burger, C.J., dissenting) (“[T]here is not a

hint in the First Amendment, or in any holding of this Court, of a ‘right’ to have the government provide continuing access to certain books.”). Then-Justice Rehnquist’s dissent assumed for the sake of argument that *some* constitutional provision (not necessarily the Speech Clause) would limit library-removals in the extreme hypotheticals described in Justice Brennan’s plurality opinion, but he made clear that the Court *should not rule* on those hypotheticals until they were actually presented. *See id.* at 908 (Rehnquist, J., dissenting) (“I would save for another day—feeling quite confident that that day will not arrive—the extreme examples posed in Justice Brennan’s opinion.”). The dissenters did not join or approve any portion of Justice Brennan’s plurality opinion, and they did not endorse any First Amendment constraints on a public library’s curation prerogatives. And even if they had, it is still Justice White’s concurrence that has controlling effect under *Marks*, as none of these dissenters concurred in the Court’s judgment.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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October 24, 2025