Case No. 06-14633

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

vs.

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

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

BRIEF OF AMICI CURIAE AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASSOCIATION OF BOOKSELLERS FOR CHILDREN, FREEDOM TO READ FOUNDATION, REFORMA, PEACEFIRE.ORG, AND THE NATIONAL COALITION AGAINST CENSORSHIP IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici curiae American Booksellers Foundation for Free Expression, Association of Booksellers for Children, Freedom to Read Foundation, Reforma, Peacefire.org, and The National Coalition Against Censorship have no parent corporations and issue no stock.

Theresa Chmara

Counsel for Amici *American Booksellers Foundation for Free Expression, Association of Booksellers for Children, Freedom to Read Foundation, Reforma, Peacefire.org and The National Coalition Against Censorship*

INTERESTS OF *AMICI*[1]

Amici are associations of libraries, bookstores, publishers, authors, artists, and educators devoted to the continued vitality of First Amendment freedoms and the right of citizens to receive information.

Amicus THE AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION ("ABFFE") was organized in 1990 by the American Booksellers Association, the leading association of general interest bookstores in the United States. ABFFE's purpose is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship, and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

Amicus THE ASSOCIATION OF BOOKSELLERS FOR CHILDREN ("ABC") is a national non-profit trade association dedicated to supporting the viability of independent children's bookselling, and the creation of quality children's books. The membership includes booksellers, publisher members,

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[1] *Amici curiae* American Booksellers Foundation for Free Expression, The Association of Booksellers for Children, Freedom to Read Foundation, Reforma, Peacefire.org, and The National Coalition Against Censorship, through undersigned counsel, submit this brief in favor of Appellees. All parties have consented to this filing. No counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than amici curiae, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

authors and illustrators, and other industry professionals. The ABC and its members believe that the free exercise of First Amendment rights is central to its organizational mission, and to the success of the children's book industry as a whole.

Amicus FREEDOM TO READ FOUNDATION ("FTRF") is a nonprofit membership organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen, to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and to set legal precedent for the freedom to read on behalf of all citizens.

Amicus REFORMA - the National Association to Promote Library and Informational Services to Latinos and the Spanish-Speaking was established in 1971 by librarians. Reforma members work in academic, public, and special libraries throughout the United States. Reforma is committed to providing all U.S. Latino and Spanish-Speaking communities with open access to current, accurate, unbiased and relevant information.

Amicus PEACEFIRE.ORG is an organization supporting greater free speech rights and civil rights for people under the age of 18, with a particular focus on free speech rights online.

Amicus THE NATIONAL COALITION AGAINST CENSORSHIP ("NCAC"), founded in 1974, is an alliance of 50 national nonprofit organizations, including religious, educational, professional, artistic, labor, and civil rights groups united in the conviction that freedom of thought, inquiry and expression are indispensable to a healthy democracy. NCAC educates the public and policymakers about threats to free expression and works to create a more hospitable environment for laws, decisions, and policies protective of free speech and democratic values. The positions advocated by the National Coalition Against Censorship in this brief do necessarily reflect the positions of each of its participating organizations.

Amici submit this brief to urge the Court to affirm the decision of the district court that the School Board's decision to remove materials from the school libraries in the Miami-Dade County School District constitutes censorship in violation of the First Amendment of the United States Constitution.

STATEMENT OF THE ISSUES

Whether the Miami-Dade School Board's removal of the entire "A Visit To" book series from all its libraries violates the First Amendment of the United States Constitution.

SUMMARY OF THE ARGUMENT

In this case, the Miami-Dade County School Board voted to remove the book "*A Visit to Cuba*,"[2] and the entire "*A Visit To*" series of which it is a part, from the district's elementary and secondary school libraries. In doing so, the School Board ignored the near-unanimous conclusion reached by two independent bodies, consisting of professional educators, administrators, and community leaders, that *A Visit to Cuba* was educationally significant and developmentally appropriate for the audience of four-to-six year-olds toward which the book is directed. The School Board's stated reason for removing the book -- that it is "inaccurate and contains several omissions" -- belies its real motivations for removal. When voting to remove the book, several board members admitted their removal decision was based on their belief that the books are "offensive" to the Cuban American community because they do not include detailed facts about Cuba's totalitarian dictatorship.

The district court correctly concluded that the Miami-Dade County School Board should be enjoined from removing the book *A Visit to Cuba*, and the entire *A Visit To* series of which it is a part, from the district's elementary and secondary school libraries. Under applicable First Amendment principles, the School Board may not remove non-curricular books from school library shelves simply because a

[2] Throughout this brief, references to *A Visit to Cuba* are meant to be inclusive of the Spanish-language counterpart to the book, *Vamos a Cuba*.

majority of the Board disagrees with the political ideas or viewpoints expressed in those books. As the district court found, the School Board's claims of "inaccuracies" in the books were merely a pretext for imposing its own political orthodoxy, which is impermissible under any reading of the applicable precedents.

First, the Supreme Court and circuit courts have recognized that although school boards are accorded discretion in the management of school affairs, that discretion is not unlimited. School boards may not exercise their discretion in a manner that imposes a political orthodoxy on students or suppresses a particular viewpoint. Because school libraries occupy a unique place in the educational system as places for voluntary study, a school board's discretion must be exercised with particular caution in this context.

Second, the district court correctly concluded that the analysis of *Board of Education v. Pico*, 457 U.S. 853 (1982) governs this case concerning the removal of a non-curricular book from the library. Although the *Pico* Court disagreed about the exercise of the school board's discretion in that particular case and remanded the case for further fact-finding, a majority of the Court supported the proposition that a school board's discretion cannot be exercised in a narrowly partisan or political manner. It is difficult to imagine a more blatant exercise of a school board's political motivations than this case. The School Board's statements when voting to ban the book expressly cited the political nature of their objections

to the book at issue, and the context in which the vote took place shows the overtly political climate. Moreover, the Board's deviation from its regular procedures by voting to ban all of the books in the *A Visit To* series from all of the libraries in the district without even having read them is further evidence of its impermissible motives.

Third, the district court was correct in concluding that the books are non-curricular, do not bear the imprimatur of the school, and thus are subject to the test set forth in *Pico*. But even under the more lenient standard set forth in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), whereby a school board may regulate expression related to curricular materials so long as the school board's motivation is related to legitimate pedagogical concerns, there is no constitutional justification for the School Board's actions here. Rather, the School Board engaged in a classic case of viewpoint discrimination, which this Court has held is impermissible under *Hazelwood*.

Fourth, the district court was correct in concluding that the removal of school library books does not constitute permissible "government speech." The School Board simply cannot justify its viewpoint discrimination in this case on the theory that the removal is nothing more than government speech. No court has ever endorsed the view that a library board has unbridled discretion to remove books with which it disagrees on the theory that the censorship of the book will be

viewed as nothing more than the government making a statement about the book. The discretion that library staff exercise in making collection decisions are based on objective criteria designed to provide the greatest access to information for the entire community. Removal decisions such as the one at issue in this case -- which blatantly ignore the recommendations of professional librarians and educators -- are not based on objective criteria but rather on subjective, politically motivated agendas. The district court correctly concluded that the School Board cannot justify its censorship decision on these grounds.

For these reasons, *amici* urge this Court to affirm the decision below.

ARGUMENT

I. THE SCHOOL LIBRARY IS NOT THE PLACE FOR THE IMPOSITION OF POLITICAL ORTHODOXY.

While school boards are accorded some discretion in the management of school affairs, it is well settled that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). As the Supreme Court has explained, "Boards of Education . . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the

free mind at its source and teach youth to discount important principles of government as mere platitudes." *Id.* After all, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal quotations marks omitted; second alteration in original).

The school library is a place particularly well-suited for the discovery of truth out of a multitude of tongues. As a plurality of the Court noted in *Pico*, the school library is "especially appropriate for the recognition of the First Amendment rights of students." 457 U.S. at 868. The plurality explained, "[a] school library, no less than any other public library, is 'a place dedicated to quiet, to knowledge, and to beauty.'" *Id.* (quoting *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (opinion of Fortas, J.)). It is also a place where "'[s]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.'" *Id.* (quoting *Keyishian*, 385 U.S. at 603); *see Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (noting that the school library is a "mighty resource in the free marketplace of ideas"). Accordingly, the First Amendment rights of students are "directly and sharply implicated by the removal of books from the shelves of a school library." 457 U.S. at 866.

As the Sixth Circuit has noted, the school library "is an important privilege created by the state for the benefit of the students in the school." *Minarcini*, 541 F.2d at 581. "That privilege is not subject to being withdrawn by succeeding school boards whose members might desire to 'winnow' the library for books the content of which occasioned their displeasure or disapproval." *Id.* The Court further observed that "[o]f 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." *Id.* But there, as here, "[n]o such rationale is involved in this case." *Id.* Rather, the rationale for removing the books in this case was the School Board members' feelings that they were offensive to some members of the Cuban-American community. As discussed below, such a rationale for book removal is impermissible.

II. THE DISTRICT COURT PROPERLY APPLIED THE *PICO* STANDARD TO THIS CASE.

In *Board of Education v. Pico*, 457 U.S. 853 (1982), the Court considered the precise question presented here -- the limits on a School Board's discretion to remove books from a public school library. The Court was fractured over the precise application of the legal test and other legal issues. The Court was not fractured, however, over whether the First Amendment imposes some limits on the exercise of a School Board's discretion when removing books from the library. Eight of the nine Justices agreed that a School Board cannot remove books from a

library simply because it disagrees with the message of the books. In this case, the district court's opinion rested squarely on its factual finding that the School Board removed the books from the school district libraries because they found the content disagreed with their own political viewpoint. The district court's conclusions thus are unassailable and fully comport with the *Pico* test.

A. A Majority Of The *Pico* Court Held That There Are Limits To The School Board's Exercise Of Discretion To Remove Library Books.

The district court stated that in its view, the "Eleventh Circuit would conclude that the removal of books from school libraries implicates the First Amendment where the books have become controversial simply because the majority of School Board members disagreed with their content, or point-of-view," or "because those members desired to impose upon their students a political orthodoxy to which they and their constituents adhered." *American Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 439 F. Supp. 2d 1242, 1272 (S.D. Fla. 2006) [hereinafter "*ACLU*"]. This reasoning was entirely justified, as it relied upon a proposition in *Pico* that received the support of a majority of the Justices.

A majority of the *Pico* court supported the proposition that a School Board may not act with the motive to impose a political orthodoxy. The plurality opinion, joined by four Justices, held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained

in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Pico*, 457 U.S. at 872 (quoting *Barnette*, 319 U.S. at 642). Justice White, whose opinion is controlling under *Marks v. United States*, 430 U.S. 188 (1977), concurred in the judgment for the purpose of remanding the case for further fact finding on the "reason or reasons underlying the school board's removal of the books." *Pico*, 457 U.S. at 883 (White, J., concurring in the judgment). Had Justice White rejected the plurality's conclusion that there were limits on the exercise of the School Board's discretion, there would have been no need to remand the case precisely for a determination as to the motivation of the Board in removing the material from the library. As the district court concluded, "Justice White's vote to remand for trial implied that he accepted the viability of the plaintiffs' claim that the attempted imposition of orthodoxy was a claim upon which relief could be granted." *ACLU*, 439 F. Supp. 2d at 1267 n.20; *see also Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995) (noting that Justice White's concurrence "does not reject the plurality's assessment of the constitutional limitations on school officials' discretion to remove books from a school library" and therefore using that part of the *Pico* plurality opinion as guidance).

In addition to this majority, fully eight of the nine Justices signed on to the proposition that while School Boards "possess significant discretion to determine

the content of their school libraries," that discretion "may not be exercised in a narrowly partisan or political manner." *Pico*, 457 U.S. at 870 (opinion of Brennan, Marshall, Stevens, and Blackmun, J.J.); *see id.* at 907 (Rehnquist, J., joined by Chief Justice Burger and Powell, J., dissenting) ("cheerfully conced[ing]" this proposition); *Pico,* 457 U.S. at 883 (White, J., concurring) (remanding for fact-finding as to School Board's motives for removal of book). Although the dissenters rejected the plurality's conclusion that there was reason to believe the School Board's discretion had been exercised in such a manner in that case, they did not reject the plurality's conclusion that the School Board's discretion is limited. *See id.* at 907 (Rehnquist, J., dissenting) ("In *this case* the facts . . . suggest that nothing of this sort happened.") (emphasis in original).

Given the near-unanimous support of the *Pico* Court for the proposition that the discretion of the School Board may not be exercised in a narrowly partisan or political manner, the district court was entirely justified in its conclusion that the Eleventh Circuit would be guided by *Pico* "if it is clearly demonstrated that the majority of the School Board's opposition to the content of ideas expressed in the banned books was the 'decisive factor' underlying the decision to remove." *ACLU*, 439 F. Supp. 2d at 1272.

B. The Facts Clearly Demonstrate That Imposing A Political Orthodoxy Was The Decisive Factor In The School Board's Decision.

It is difficult to imagine a clearer example of a School Board acting in a "narrowly partisan or political manner" to impose its own orthodoxy than this. *A Visit to Cuba* is a politically neutral text written for children between the ages of four and six. Critical reviews of the books describe them as a "good beginning reader choice for school and public libraries," *Criticas* (July 1, 2004), which "offer superficial introductions to geography, people, customs, language, and daily life," *Horn Book* (Fall 2001), and in which "[i]nformation is offered in simple statements without commentary," *Publishers Weekly* (March 11, 2001). *See ACLU*, 439 F. Supp. 2d at 1249 n.8 (quoting five uniformly positive reviews of the series by journals covering children's literature). Nevertheless, the school board voted to remove the book, and the entire series of which it is a part, from the district because the books did not communicate certain information about the political situation in Cuba.

The school board's formal review process began only after a parent complained that "[a]s a former political prisoner from Cuba" he found the material in *A Visit to Cuba* to be "untruthful" because it "portray[ed] a life in Cuba that does not exist." *ACLU*, 439 F. Supp. 2d at 1247 (internal quotations marks omitted). At each step of the review process, the review boards applied the

mandated objective review criteria and found the material appropriate for the school library. At each step of the review process, the appointed boards voted to retain the material in the school library.

The book was first reviewed by an eight-member School Materials Review Committee (SMRC) that included professional educators, administrators, and community leaders, and that examined the book according to fifteen criteria set forth in the school board's regulations.[3] The SMRC also considered reviews of the books from publications covering children's literature. The SMRC unanimously concluded that the book was educationally significant and developmentally appropriate, and voted 7-1 to retain the book on the shelves. *See ACLU*, 439 F. Supp. 2d at 1250. In so doing, several members of the committee wrote comments on their ballots describing the book as "apolitical" or having "[n]o political slant" or "without direct political implications." *See id.* at 1250 n.9 (internal quotations omitted).

The book was then reviewed by a sixteen-member District Materials Review Committee (DMRC), again consisting of professional educators, administrators, and community leaders. This committee again used the fifteen criteria prescribed by the regulations, and voted to focus particularly on the three criteria of

[3] These criteria included educational significance, appropriateness, accuracy, literary merit, scope, authority, special features, translation integrity, arrangement, treatment, technical quality, aesthetic quality, potential demand, and durability. Miami-Dade Cty. Sch. Bd. R. 6Gx13-6A-1.26.

educational significance, appropriateness, and accuracy. *See id.* at 1254. The DMRC considered four possible alternatives: (1) keeping the book in the library; (2) leaving the book in the library but allowing the students to use alternate materials; (3) limiting the use of the book; or (4) removing the book from the total school environment. *See id.* at 1256. During the committee's public meeting considering these alternatives, members of the public often whispered the word "communist" whenever DMRC members spoke favorably about the book. *See id.* at 1255. Nonetheless, the DMRC voted 15-1 to keep the book in the library with no restrictions. *See id.* at 1256. The Superintendent then upheld this recommendation. *See id.*

But the Miami-Dade County School Board blatantly ignored the findings of the two independent bodies, and the Superintendent and instead found the book to be "inaccurate" and to "contain[] several omissions." *See id.* at 1257. The Board does not appear to have used any evaluative criteria in making that decision, which its own counsel warned would expose the Board to liability. *See id.* Rather, the Board focused on the fact that the book's portrayal of life in Cuba was offensive to some members of the Cuban-American community. *See, e.g., id.* at 1258 (quoting comments of Board chairman that the cover of the book showing Cuban children in uniform was "offensive to us as a community"); *id.* at 1259 (quoting Board member describing her vote as a "commitment to stand with the Cuban American

community, [of] which I am a very proud member"); *id.* at 1258 (quoting another Board member describing the book as "offensive, inaccurate, full of omissions"). This led one Board member to comment: "We are rejecting the professional recommendation of our staff based on political imperatives that have been pressed upon members of this board, which I completely understand, and with which I sympathize, but one of the things we did when we took an oath of office today is to uphold the Constitution of The United States as it has been set down and interpreted by the United States Supreme Court." *Id.* at 1259. The Board voted 6-3 to remove the book, and the entire series of which it is a part, from all of the district's libraries.

In finding the book "inaccurate," the Board focused primarily on what the book did not say, rather than what it did say. For example, the book was "inaccurate" because it did not provide four-to-six year-old students with information such as the fact that "[t]he people of Cuba survive without civil liberties and due process under the law and receive 10 to 20 year prison sentences for simply writing a document or voicing an opinion contrary to the party line," *id.* at 1251, or the fact that "[e]ducation is permeated by political control and indoctrination, as well as by discrimination, but with great privilege for children of the elite," *id.* at 1255, or the fact that "[h]igh pregnancy rates in adolescence are a bi-product" of adolescents being sent to the countryside to do unpaid agricultural

work, *id.* Clearly such facts would be inappropriate in a book for four-to-six year olds. Indeed, as appellee's expert noted below, the "alleged omissions are appropriate omissions given the age level and purpose for which the book is intended." *Id.* at 1288 n.42.

No one questions that the six School Board members who voted to remove the books acted from sincere and deeply felt personal conviction that any book about Cuba must portray the full extent of the harsh realities of the political situation in that country. But this deeply felt personal conviction does not render politically-neutral picture books for four-to-six year-old beginning readers "inaccurate." Nor does it permit the Board members to censor books that do not espouse and promote those personal and political beliefs. A key criterion of the Board's rules is "appropriateness," to ensure that the books are "geared to the age, maturity, interest, and learning levels of students for whom it is intended." Miami-Dade Cty. Sch. Bd. R. 6Gx13-6A-1.26. It is difficult to see how the facts about teen pregnancy, loss of due process, imprisonment, and indoctrination that the School Board felt should be included in the book would be appropriate for four-to-six year olds. Another key criterion is "accuracy," which explicitly cites "objectivity" as a component of accuracy. *Id.* Here, the School Board's primary reason for removing the books appears to have been that they were *too* objective.

Should this Court endorse the School Board's interpretation of "inaccuracy," it will be opening the door to a whole host of challenges. For example, a picture book describing how Christopher Columbus discovered America, such as *Columbus Day: Let's Meet Christopher Columbus*, by Barbara deRubertis would be "inaccurate" without a detailed description of Columbus's treatment of Native Americans after arriving in America. *President George Washington*, a picture book by David Adler, would be "inaccurate" unless it included the fact that Washington was a slave-owner, as were many of the other Founding Fathers. Perhaps even a reference book for children about cars and trucks would be "inaccurate" without a discussion of how their emissions contribute to global warming. It simply cannot be true that age-appropriate, politically-neutral texts are rendered "inaccurate" by their omission of information that would promote or express a particular political viewpoint. The School Board members did not remove the books because they were inaccurate; they removed the books because they did not convey the message they believed should be conveyed about Cuba.

It is abundantly clear from the record that the motivation of those School Board members who voted to ban *A Visit to Cuba* was not to remove "inaccurate" books from the library shelves, but to remove books that did not conform to the political and nationalist orthodoxy they believe in and embrace. As the district court noted, "[i]ndicia may be found both in the content of the debate and the

means of its presentation." 439 F. Supp. 2d at 1285. The six members of the School Board who voted to remove the books did so with explicit references tying their votes to solidarity with their Cuban-American constituents, many of whom appeared at the public meetings to express their feelings about the books. And they did so by ignoring the recommendations of twenty-five professionals who evaluated the book according to established criteria and found them to be developmentally appropriate, educationally suitable, and accurate. This is a textbook example of a local School Board "remov[ing] 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.'" *Pico*, 457 U.S. at 872 (plurality opinion (quoting *Barnette*, 319 U.S. at 642)). Here, as in *Minarcini*, a school board may not "place conditions on the use of the library which [a]re related solely to the social or political tastes of school board members." 541 F.2d at 582.

C. The School Board's Failure To Follow Its Own Procedures Is Further Evidence Of Its Impermissible Motives.

Although the Board members' impermissible motives in removing *A Visit to Cuba* from the shelves of Marjory Stoneman Douglas Elementary School are already abundantly clear from the record, further evidence that the Board's claims of "inaccuracy" were simply a pretext can be garnered from looking at the procedures the Board followed. The Board violated its own procedures, which are

designed specifically to protect against the arbitrary removal of material from schools, by voting to remove the entire *A Visit To* series of which the book is a part from all libraries in the district.

At the request of the parent, committee members reviewed only single book and reviewed it only for the purposes of removing it from the shelves of the library at Marjory Stoneman Douglas Elementary School. Nonetheless, the Board voted to remove the entire *A Visit To* series from the entire district, apparently without having reviewed any of the other books in the series. The Board did so despite the express warning from its counsel that "[t]here is no provision in the [School Board's] Rule for a district-wide removal of a school library book stemming from a DMRC review" and that a decision to remove the book district-wide would be "more susceptible to legal challenge because the Rule apparently contemplates independent school-by-school decisions regarding books." *See also ACLU*, 439 F. Supp. 2d at 1256.

The Miami-Dade School Board's failure to follow its own procedures reinforces the district court's finding and "suspicion that the motivation of the school board was unconstitutional." *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 875 (D. Kan. 1995) (citing *Barnette*, 319 U.S. at 637). The School Board removed twenty-two titles from every library in the district without submitting the books to any review procedure whatsoever. The Board's utter

disregard for its own procedures "has the appearance of 'the antithesis of those procedures that might tend to allay suspicions regarding [the School Board's] motivation.'" *Campbell*, 64 F.3d at 190-91 (quoting *Pico*, 457 U.S. at 875). And, as in *Campbell*, the evidence here indicating that school board members had not even read the twenty-two books before voting reinforces the conclusion that the removal action is "an unconstitutional attempt to 'strangle the free mind at its source.'" *Id.* at 190 (quoting *Barnette*, 319 U.S. at 637). The School Board's failure to follow its own procedures constitutes evidence of the Board's impermissible motives in banning the book.

III. THE BANNED BOOKS ARE NOT PART OF THE CURRICULUM, BUT EVEN IF THEY WERE, THE SCHOOL BOARD ENGAGED IN IMPERMISSIBLE VIEWPOINT DISCRIMINATION BY REMOVING THEM FROM THE LIBRARY.

The Eleventh Circuit has stated that in order to be considered a curricular activity, an activity must be both "supervised by faculty members" and "designed to impart particular knowledge or skills to student participants and audiences." *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1214 (11th Cir. 2004) (quotation marks omitted). Moreover, the activity must "bear[] the imprimatur of the school." *Id.* at 1215.

There is no evidence in the record that the book *A Visit to Cuba*, nor any book in the *A Visit To* series, was ever assigned to any student for use in a regular scheduled course of study under the supervision of any faculty member. Nor is

there evidence that the books were purchased or used as textbooks or were assigned by any classroom teacher to any student as either required or optional reading. There is no evidence that any student was required to check out *A Visit to Cuba* in conjunction with any classroom or school project. While the books may help to impart reading skills to students who check them out of the library, there is no evidence that they are a part of any course of study "designed" to do so. Therefore, it cannot be said that the books were part of any "curriculum" bearing the imprimatur of the School District. Indeed, during the debate preceding the vote to remove the material, the School Board's own counsel advised the Board that the book in question was not "instructional material." *ACLU*, 439 F. Supp. 2d at 1278. And the School Board's own rules distinguish Library Media Center materials from Instructional Materials. *See id.* at 1278 n.29. Simply because the books remained on the library shelves over a period of years does not transform them into part of the school "curriculum" or imbue them with the imprimatur of the school. The books should therefore be considered non-curricular for purposes of the First Amendment analysis. However, even if this Court determines that the books are part of the curriculum, the School Board's removal of them based upon their political viewpoint is impermissible.

A. Because the Books Are Not Part of the Curriculum, the *Hazelwood* Test Does Not Apply In This Situation.

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court held that educators may exercise control over student expression in a curricular program if the restrictions are "reasonably related to legitimate pedagogical concerns." *Id.* at 273. The discretion of school authorities is considerably more limited, however, when it extends "beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway." *Pico*, 457 U.S. at 869 (plurality opinion). A school board's decision to remove a book not included in the curriculum "must withstand greater scrutiny within the context of the First Amendment than would a decision involving a curricular matter." *Campbell*, 64 F.3d at 189; *Romano v. Harrington*, 725 F. Supp. 687, 690 (E.D.N.Y. 1989) ("pedagogic concerns allow educators to exercise more control over the content of students' required reading lists than over their voluntary, extra-curricular selections, even though the voluntary and required selections may exist side by side on the school library's shelf"). As the district court correctly concluded, Eleventh Circuit precedent holds that the removal of a book from a school library is a non-curricular decision subject to the exacting test of *Pico*, rather than the more lenient test of *Hazelwood*.

In *Virgil v. School Board of Columbia County,* 862 F.2d 1517, 1520 (11th Cir. 1989), the Eleventh Circuit upheld application of *Hazelwood*'s "legitimate pedagogical concerns" test to the school board's decision to discontinue use of a textbook from an elective high school class because optional reading material contained in the text was sexual and vulgar. In addressing this issue, the Court relied on two points. First, the book in the *Virgil* case was a part of the curriculum, a textbook used in a regularly scheduled course of study in the school. *See id.* at 1522. And the Court recognized that, "[i]n matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity." *Id.* at 1520 (citing *Hazelwood*, 484 U.S. at 268-70). Second, the stipulated reason for removal was "related to the vulgarity and sexual explicitness of the material," *id.* at 1523 n.7, which was necessarily related to legitimate pedagogical concerns.

The *Virgil* Court explicitly distinguished *Pico* on these two grounds. As to the first, it noted that "*Pico* involved a school library, and the plurality took special note of the 'unique role of the school library' as a repository for '*voluntary inquiry.*'" *Id.* at 1523 n.8 (emphasis added). And as to the second reason, the Court stated that "[b]y virtue of the parties' stipulated reasons for the Board action in this case, the motive at issue in *Pico* is absent here." *Id.* The Court went on to note that it made "no suggestion as to the appropriate standard to be applied in a

case where one party has demonstrated that removal stemmed from opposition to the ideas contained in the disputed materials." *Id.* Thus, the Court recognized that the analysis of *Hazelwood* does not control in a case such as this where the banned book is non-curricular and the motive for its removal is the School Board's opposition to the ideas contained in the book.

B. Even If The *Hazelwood* Standard Applies, The Board's Actions Are Still Unconstitutional Viewpoint Discrimination And Cannot Be Permitted Under A "Government Speech" Theory.

The debate about whether or not *A Visit to Cuba* is part of the school curriculum is largely academic, however, because even if the *Hazelwood* test applies, the Board's motivation in removing the books was not related to legitimate pedagogical concerns and constitutes impermissible viewpoint-based discrimination.

In *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), this Court explicitly rejected the school board's argument that *Hazelwood* does not prohibit school officials from engaging in viewpoint-based discrimination. In discussing *Hazelwood*, the Eleventh Circuit took note of the Supreme Court's holding that educators may exercise control over student expression in a curricular program if the restrictions are "reasonably related to legitimate pedagogical concerns." *Id.* at 1319. The Court went on to state, however, that "[a]lthough *Hazelwood* provides reasons for allowing a school official to discriminate based on content, we do not

believe it offers any justification for allowing educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis. Without more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral." *Id.* at 1325 (internal citations omitted).

As detailed above, the School Board here was concerned with the viewpoint of *A Visit to Cuba*, not its content. The Board expressed its desire for books that would explain life in Cuba, but wanted only those books that would do so from the viewpoint of a Cuban exile. As the plaintiffs' expert opined below: "To present Cuba as a normal place is unacceptable to exiles because it negates the very reason for their exile and struggle. . . . The adamant rejection of normalcy accounts for the strong desire to remove from the library shelves a book that treats Cuba as the same as any other country." *ACLU*, 439 F. Supp. 2d at 1284 n.37 (internal quotation marks omitted; ellipsis in original). Accordingly, even under the more lenient *Hazelwood* standard, the School Board's actions cannot stand because they constitute impermissible viewpoint discrimination.

Nor can the School Board justify its censorship decisions on the basis that the removal constitutes "government speech." The School Board's reliance on *United States v. American Library Ass'n*, 539 U.S. 194 (2003) for the proposition that removal of books from the library on the basis of viewpoint is permissible

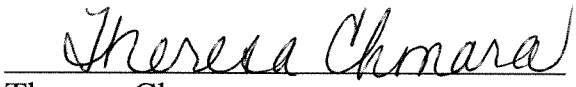
government speech is utterly misplaced. In the ALA case, the Supreme Court held only that a federal statute was not facially unconstitutional when it required library recipients of federal funding to insure that Internet terminals used filtering that would prevent access to visual images that constituted obscenity, child pornography or material harmful to minors.

Neither the ALA case nor any other case stands for the proposition that a school board may impose its own subjective, political viewpoint on library book removal decisions. If such viewpoint based "government speech" was permissible, it would destroy the very essence of the First Amendment. Governments would be permitted to remove any and all books from libraries simply because they disagreed with their political message. This would permit precisely the situation that the Justices in *Pico* -- including the Justices dissenting -- rejected, whereby a "Democratic school board, motivated by party affiliation, [could] order[] the removal of all books written by or in favor of Republicans." *Pico*, 457 U.S. at 870-71. As the Court concluded, "few would doubt that the order violated the constitutional rights of the students denied access to those books." *Id.* at 871. The School Board's decision simply cannot be justified under a "government speech" theory.

CONCLUSION

The School Board members objected to *A Visit to Cuba* because it did not provide enough information for four-to-six year olds regarding the nature of life in a totalitarian state. But the actions of the School Board in this case threaten to create the very same situation: "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511. For the foregoing reasons, *amici* respectfully urge this Court to affirm the decision below.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Fed. R. App. P. 32(a) because the brief contains 6515 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and the brief has been prepared in a proportionally spaced font using Microsoft Office Word in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were served upon the following by first-class mail, postage prepaid, by being deposited in the U.S. mail on this 21st day of November, 2006.

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