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Politics versus Precision: Did the Miami-Dade School Board Violate the First Amendment When it Voted to Remove ¡Vamos a Cuba! from its District Libraries?

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POLITICS VERSUS PRECISION: DID THE MIAMI-DADE SCHOOL BOARD VIOLATE THE FIRST AMENDMENT WHEN IT VOTED TO REMOVE *¡VAMOS A CUBA!* FROM ITS DISTRICT LIBRARIES?

ACLU v. Miami-Dade County School Board, 557 F.3d 1177 (11th Cir. 2009)

Lindsay M. Saxe[*]

Juan Amador, a self-described political prisoner from Cuba, was outraged when he read the inaccurate portrayal of life in Cuba contained in *¡Vamos a Cuba!*,[1] a book in his daughter's elementary school library.[2] Amador promptly requested that the school remove the book from its library because the book was untruthful and "'portray[ed] a life in Cuba that does not exist.'"[3] At the end of a lengthy, four-tiered administrative review process, the Miami-Dade County School Board (School Board) voted to remove the book from all school district libraries.[4]

In response, another parent and two organizations, the American Civil Liberties Union (ACLU) and the student government association, sued the School Board in federal district court, alleging that its actions

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1. ALTA SCHREIER, ¡VAMOS A CUBA! (2000); *¡Vamos a Cuba!* is the Spanish language version of "A Visit to Cuba," the book that spawned the litigation. *Id.* Before the respondent's removal order, there were forty-nine copies spread amongst the district's thirty-three elementary and middle schools. *Id.* at 1183. Consistent with the present court's opinion, this Comment will adopt the Spanish-language title, *¡Vamos a Cuba!*, as a means of identifying all forty-nine copies of the book. *Id.*

2. ACLU v. Miami-Dade County Sch. Bd., 557 F.3d 1177, 1182 (11th Cir. 2009) (*Miami-Dade County Sch. Bd. II*).

3. *Id.* (quoting ACLU v. Miami-Dade County Sch. Bd., 439 F. Supp. 2d 1242, 1247 (S.D. Fla. 2006) (*Miami-Dade County Sch. Bd. I*)).

4. *Id.* After reading the book, Amador initiated the school district's four-tiered administrative process, which reviews citizen requests for the removal of books from the district's libraries. *Id.* at 1183–84. This process begins with an initial complaint to a school's principal, who does not have authority to remove the book, but may explain why the book is in the library's collection. *Id.* at 1184. If unsatisfied with the explanation, the citizen may file a formal request for removal, which is heard by the School Materials Review Committee, an ad hoc group of professional educators, administrators, parents, teachers, students, and library specialists. *Id.* The School Materials Review Committee's recommendation regarding the book's removal can be appealed to the superintendent, who can either issue a decision based on the committee's recommendation or submit the appeal to the District Material Review Committee, a similar ad hoc group of educational professionals and interested individuals. *Id.* Once the District Committee makes a recommendation to the superintendent, the superintendent makes a decision. *Id.* As a final administrative measure, the superintendent's decision may be appealed to the school board, which issues the final ruling on behalf of the school system. *Id.*

violated the First Amendment and the Due Process Clause.[5] The district court denied the Board's motion to dismiss the complaint,[6] issued a preliminary injunction enjoining the School Board from enforcing its removal order, and ordered that any books already removed be returned to the district's libraries.[7] On review, the Eleventh Circuit vacated the preliminary injunction, remanded the case, and HELD that even if the First Amendment applied to book removal decisions, the Board's actions did not violate it.[8]

Neither teachers nor students forsake their constitutional rights to free speech or expression at the schoolhouse gate.[9] The Supreme Court has repeatedly affirmed the importance of First Amendment protections in the school context while also recognizing the authority of school officials to control student conduct.[10] Because school libraries play an integral part in facilitating classroom discussion, federal courts generally view the removal of books by school boards for censorship purposes as imposing a serious burden on freedom of discussion, implicating First Amendment protections.[11] Therefore, while courts often grant school boards significant discretion in determining the contents of school libraries, a school board's motivation for removing a

5. *Id.* at 1183.

6. *Id.* at 1189. The defendants sought dismissal on the basis that the ACLU did not have organizational standing to bring the suit through its member Mark Balzli, whose son attended a school within the school district, because any First Amendment right to the school's library books belonged to the student and not the parent, and Balzli's son was not a member of the ACLU. *Id.*

7. *Id.* at 1190.

8. *Id.* at 1230.

9. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). *Tinker*, the seminal case balancing a student's right to free speech and a school's right to control classroom conduct, involved a passive student protest of the Vietnam War. *Id.* at 504. When the respondent found out that students planned to wear black armbands to school as a symbol of their objection to the war, they adopted a policy that any student wearing an armband would be asked to remove it and threatened with suspension. *Id.* Ultimately, the Court held that the respondent could not prohibit this form of student expression because it neither interfered with school activities nor caused any disruption that might have justified the respondent's actions. *Id.* at 505, 513–14. "[T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* at 505–06. *See also* RONNA GREFF SCHNEIDER, *Freedom of Expression Issues and Public Education*, *in* 1 EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION, § 2:3 (2004 & Supp. 2007); Erwin Chemerinsky, *How Will* Morse v. Frederick *Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 19–20 (2008) (noting that in subsequent cases, the Supreme Court has not followed the holding in *Tinker* that student speech can only be punished if it is actually disruptive of school activities).

10. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); SCHNEIDER, *supra* note 9, § 2:3.

11. 16B EUGENE MCQUILLIN, *Public Education: School Boards and School Districts*, *in* THE LAW OF MUNICIPAL CORPORATIONS XX, § 46.09.05 (3d ed. West 2008).

book is subject to scrutiny in cases challenging book removal decisions.[12]

In this area of the law, the primary guide for federal courts is the Supreme Court's decision in *Board of Education v. Pico*.[13] In *Pico*, the petitioner school board gave an unofficial directive that certain books be removed from library shelves and delivered to it for review.[14] The school board later issued a press release justifying its actions, characterizing the books as "'anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy,'" and announcing that it had a duty, a "'moral obligation,'" to protect children from the danger presented by the books.[15] After reviewing a claim challenging the school board's actions under the First Amendment, a plurality of the Supreme Court affirmed the Second Circuit's decision to remand the case for trial.[16]

Because of the fractured nature of the Court's decision, however, the case did not establish a binding First Amendment standard for book removal cases.[17] Justice Brennan, writing the lead opinion, found that the First Amendment prohibited school boards from removing 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.'"[18] A school board could constitutionally remove a book, however, if the book lacked "educational suitability."[19] Only two justices, Justice Marshall and Justice Stevens, joined Justice Brennan's opinion in full.[20] In a concurring opinion, Justice Blackmun agreed with Justice Brennan's First Amendment standard, but also formulated his own standard.[21] In addition, according to Justice Blackmun, a school board could constitutionally remove a book if it contained offensive language, if it was not appropriate for its intended age group, or if the ideas it

12. *Id.*

13. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

14. *Id.* at 857.

15. *Id.*

16. *Id.* at 860, 875.

17. *See infra* note 21 and accompanying text (discussing Justice Blackmun's First Amendment standard in contrast to Justice Brennan's standard).

18. *Pico*, 457 U.S. at 872 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)). There were four dissenters—Chief Justice Burger, Justices Powell, Rehnquist, and O'Connor—who argued that the First Amendment did not limit a school board's power to remove books. *Id.* at 885 (Burger, J., dissenting); *id.* at 893 (Powell, J., dissenting); *id.* at 921 (O'Connor, J., dissenting).

19. *Id.* at 871 (plurality opinion).

20. *Id.* at 855.

21. *Id.* at 879–80 (Blackmun, J., concurring in part and concurring in the judgment). Justice Blackmun found that "school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved." *Id.*

advanced were "'manifestly inimical to the public welfare.'"[22] Justice White did not express an opinion on the First Amendment question, but voted with the plurality for purely procedural reasons.[23]

Ultimately, only four Justices in *Pico* found that the First Amendment applied to book removal cases. Four other Justices dissented, finding that the First Amendment did not apply at all.[24] The final Justice expressed no opinion on the constitutional issue.[25] In effect, then, there was no majority decision on whether the First Amendment applies to book removal decisions.[26] Therefore, federal courts interpret *Pico* as a non-precedent, despite the plurality's articulation of a constitutional standard, because the Court failed to establish a clear and binding First Amendment standard in book removal cases.[27]

To complicate matters, the Court never decided another book removal case. In *Hazelwood School District v. Kuhlmeier*,[28] the Court addressed the applicability of First Amendment protections to a school-sponsored student newspaper, which was described as a part of the school curriculum.[29] It is unclear, however, whether book removal decisions are an aspect of school curriculum and therefore subject to the *Hazelwood* standard.[30]

In *Hazelwood*, the school principal ordered that two pages of the student newspaper, which contained stories about pregnant students and the impact of divorce on students, be withheld from publication.[31] In

22. *Id.* at 880 (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925)).

23. *Id*. at 883–84 (White, J., concurring in the judgment) (arguing that the Court should not decide constitutional questions unless it is necessary to do so).

24. *See supra* notes 18–21 and accompanying text.

25. *See supra* note 23 and accompanying text.

26. *See supra* notes 18–24 and accompanying text. Four Justices found the petitioner's conduct unconstitutional, four found it constitutional, and one expressed no opinion on the matter. *See supra* notes 18–24 and accompanying text.

27. *See* Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1045 n.30 (Former 5th Cir. 1982); Case v. Unified Sch. Dist. No. 233, 895 F. Supp. 1463, 1468–69 (D. Kan. 1995). *See generally* Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980) (explaining that because plurality opinions do not contain a single line of reasoning that garnered the support of a majority of the Court, they provide spotty guidance and present problems of interpretation and application for lower courts).

28. 484 U.S. 260 (1988).

29. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

30. *Miami-Dade County Sch. Bd. II*, 557 F.3d 1177, 1201–02 (11th Cir. 2009).

31. *Hazelwood*, 484 U.S. at 263–64. The principal was concerned that even though the names of the pregnant girls had been removed, they would still be identifiable from the text of the article, and that the discussion of birth control and sexual activity would be inappropriate for some of the school's younger students. *Id.* at 263. Moreover, the principal thought that the parents of the girl who was discussed in the article on divorce ought to have been given a chance to respond to the girl's comments. *Id.* Because he felt that the necessary changes could not be made before the date on which the paper was scheduled to go to press, he told the paper's faculty director to remove the offending pages or risk not having the paper printed at all. *Id.* at

response to the student author's claim that preventing publication of the articles violated the respondent's First Amendment rights, the Court allowed the school to censor the newspaper in order to "'disassociate itself' from speech that would 'substantially interfere with [its] work or impinge upon the rights of other students.'"[32] The Court distinguished *Hazelwood* from its student speech precedents by reasoning that suppression of a student's personal expression on school premises differed from control over school-sponsored activities that "members of the public might reasonably perceive to bear the imprimatur of the school."[33] Accordingly, the Court held that the school had greater authority to control speech in this case because the student newspaper could fairly be characterized as part of the school curriculum.[34] Thus, school administrators would not violate the First Amendment as "long as their actions were reasonably related to legitimate pedagogical concerns."[35]

In the present case, the School Board ordered the removal of *A Visit to Cuba* or *¡Vamos a Cuba!* from its libraries.[36] *¡Vamos a Cuba!* is part of a series developed for children ages five to seven years old to provide basic information about the lives of children in other countries.[37] Reversing the findings of two ad hoc committees of professional educators as well as the superintendent, the School Board voted six to three to remove the book.[38] In response, the district court ordered the School Board put *¡Vamos a Cuba!* back on library shelves.[39] The Eleventh Circuit reversed, but in doing so, did not decide whether the *Hazelwood* or *Pico* standard applied to the respondent's actions, or to book removal cases in general.[40] Rather, the court reasoned that even if

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264–65.

32. *Id.* (quoting Bethel Sch. Dist., No. 403 v. Fraser, 478 U.S. 675, 685 (1986) and Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

33. *Id.*

34. *Id.* The Court gave some examples of activities constituting part of school curriculum, which it said did not have to occur in a traditional classroom setting, including school-sponsored publications, theatrical productions, and other expressive activities that could reasonably be attributed to the school. *Id.* It added that the activities could be so characterized if "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* (footnote omitted).

35. *Id.* at 273.

36. *Miami-Dade County Sch. Bd. II*, 557 F.3d 1177, 1182 (11th Cir. 2009). *See supra* note 1.

37. *See* Heinemann Library, A Visit To, http://www.heinemannlibrary.com/products/series.asp?id=1432912828 (last visited June 27, 2009) (indicating that the publisher intends the series to be used for children ages five to seven as a guide to help them understand what it is like to live, go to school, and participate in traditional ceremonies in other countries).

38. *Miami-Dade County Sch. Bd. II*, 557 F.3d at 1188.

39. *Id.* at 1190.

40. *Id.* at 1202 (finding that the question of what standard applies to school library book removal is unresolved).

the most exacting standard announced by the *Pico* plurality applied,[41] petitioners would lose if the respondent could show that it removed *¡Vamos a Cuba!* not because it disagreed with the ideas in the book, but because it had legitimate pedagogical concerns about the book's accuracy.[42] Given the court's assumption that *Pico*'s First Amendment standard applied, the court determined de novo the constitutional facts of the case—the respondent's motive in removing the book.[43]

After reviewing the record, the court concluded that the School Board did not violate the *Pico* standard because the School Board's motive for removing *¡Vamos a Cuba!* stemmed from factual inaccuracies in the book.[44] Based on its review of the book, the court went on to make its own findings that *¡Vamos a Cuba!* indisputably contained gross inaccuracies.[45] Specifically, the majority found most troubling the book's pattern of comparing life in Cuba to that in the United States with the generalized statement that people live, work, and play "like you do[.]"[46] According to the court, this blanket statement

41. *Id.*; *see also supra* note 18 (discussing judicial opinions in *Pico*).

42. *Miami-Dade County Sch. Bd. II*, 557 F.3d at 1202. The court reasoned that a school board's demand for factual accuracy was not unconstitutional viewpoint discrimination. *Id.* at 1222.

43. *Id.* at 1206–07. When a preliminary injunction is granted by a district court, it is subject to a mixed standard of review. *See* SEC v. Unique Fin. Concepts, Inc., 196 F.3d 1195, 1198 (11th Cir. 1999). The reviewing court will assess the decision to grant the preliminary injunction under an "abuse of discretion" standard, while questions of law supporting the injunction are reviewed de novo. *Id.* Findings of fact are reviewed for clear error. *Id.* In *Miami-Dade County Sch. Bd. II*, given the majority's assumption regarding the constitutional standard that applied, it had to determine the "why" facts, or the school board's motive, de novo because it was the core constitutional fact underlying the district court's decision. *Miami-Dade County Sch. Bd. II*, 557 F.3d 1177, 1206–07 (11th Cir. 2009). The dissenting opinion agreed that the court should have reviewed respondent's motive de novo, but added that the majority should have shown higher deference to the district court's other findings of fact. *Id.* at 1232 (Wilson, J., dissenting). Thus, the dissent argued that the majority included many other fact findings that required greater deference in the court's review. *Id.*

44. *Id.* at 1207 (majority opinion). The court explained that there were nine members of the school board, six of whom voted to remove *¡Vamos a Cuba!*. *Id.* at 1209. Five of the six board members who voted for removal said that their vote was motivated by the factual inaccuracies in the book. *Id.*

45. *Id.* at 1211. The court classified these as inaccuracies based on affirmative misstatements and inaccuracies by omission. *Id.* For example, the third sentence in *¡Vamos a Cuba!* says that people eat, work, and go to school like children in the United States. *Id.* at 1212 (citing Transcript of Record at 28). The court found that in Cuba, food is rationed by the government and has been for a number of years, there is little private work and it is a crime to engage in private practice of a profession, and children are required to engage in unpaid agricultural work or be expelled from school. *Id.* (citation omitted).

46. *Id.* at 1212–14, 1224 (quoting Transcript of Record at 19:216). The district court found that the "like you do" statements in *¡Vamos a Cuba!* were apolitical and content-neutral. *Id.* at 1224 (citing *Miami-Dade County Sch. Bd. I*, 439 F. Supp. 2d 1242, 1283 (S.D. Fla. 2006)). Disagreeing, the majority in *Miami-Dade County Sch. Bd. II* found that regardless of

covered up the fact that people in Cuba live under a totalitarian, communist regime with a poor human rights record, are subject to severe restrictions on individual liberties, and face a booming child sex trade.[47] In a book about Cuba, the statement "like you do" could not be described as any more apolitical or content-neutral than the same statement in a book about the Third Reich, North Korea, or the antebellum South.[48]

The court also took issue with the district court's use of the term "book banning."[49] Historically, the practice of book banning has been based on a government's political or moral objections to the book's contents.[50] Thus contemporary use of the term has a politically charged, pejorative connotation.[51] Here, the court classified the use of the term as "overwrought rhetoric" and reasoned that it did not apply in book removal decisions because such decisions do not prevent anyone from owning, possessing, or reading the book.[52] It simply prevented students from accessing the book at a school library.[53]

In addition, the Eleventh Circuit disagreed with the district court's finding that correcting the factual errors in *¡Vamos a Cuba!* would

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politics, the "like you do" statement was inaccurate. *Id.* The district court also found that a large number of the inaccuracies were inconsequential and that most of the omissions were proper in light of the age level and purpose of the book. *Id.* at 1232 ((Wilson, J., dissenting) (citing *Miami-Dade County Sch. Bd. I*, 439 F. Supp. 2d at 1288 n.42)).

47. *Id.* at 1213–14 (majority opinion); *see also* CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/cu.html (last visited June 27, 2009) (noting under "transnational issues" that "Cuba is principally a source country for women and children trafficked within the country for the purpose of commercial sexual exploitation and possibly for forced labor; the country is a destination for sex tourism, including child sex tourism").

48. *Miami-Dade County Sch. Bd. II*, 557 F.3d at 1224.

49. *Id.* at 1217–18. The district court found that by "totally banning the Cuba books and the rest of the Series, the School Board is in fact prohibiting even the voluntary consideration of the themes contained in the books by students at their leisure." *Miami-Dade County Sch. Bd. I*, 439 F. Supp. 2d at 1279.

50. *Miami-Dade County Sch. Bd. II*, 557 F.3d at 1217–18.

51. *See* Mark Sableman, *Artistic Expression Today: Can Artists Use the Language of Our Culture?*, 52 ST. LOUIS U. L.J. 187, 191 (2007) ("Book bannings are generally classified today like the witch hunts of the past."); *see also* Kathleen McGrory & Jay Weaver, *Court: Miami Schools Can Yank Book on Cuba*, MIAMI HERALD, Feb. 6, 2009 ("[T]he three-judge panel's opinion—not unlike the School Board's initial vote—was so fraught with political rhetoric such as 'book banning' that further appeals seem inevitable.").

52. *See Miami-Dade County Sch. Bd. II*, 557 F.3d at 1218. *But see id.* at 1230 (Wilson, J., dissenting); Claire Mullally, firstamendmentcenter.org: Libraries & First Amendment Speech, Banned Books, http://www.firstamendmentcenter.org/speech/libraries/topic.aspx?topic=banned_books (last visited on June 27, 2009) (describing the historical practice of book banning and applying the term to the modern practice of removing books from school and public libraries).

53. *See Miami-Dade County Sch. Bd. II*, 557 F.3d at 1218 (majority opinion).

result in a book educationally unsuitable for young children.[54] The majority gave two primary reasons for its disagreement. First, as a practical matter, simple removal of the phrase "like you do" could not possibly result in a book unsuitable for young children.[55] Second, the educational suitability of a book was a policy matter better left to local government and was not within the purview of the district court.[56]

At the outset, it is somewhat difficult to reconcile the court's call for judicial restraint with the analysis it must undertake to determine whether a school board's motive was permissible under the *Pico* standard.[57] If the educational suitability of a book is the proffered reason for the book's removal, then a federal court must necessarily engage in some review of the book's educational suitability.[58] Moreover, given the court's reasoning that *¡Vamos a Cuba!* is inaccurate throughout because it omits key facts,[59] it seems unlikely a simple removal of the "like you do" statement would result in an accurate portrayal of life in Cuba.

By reviewing the district court's findings of fact apart from the respondent's motive in removing *¡Vamos a Cuba!*, the court also appeared to overstep its own authority.[60] When a court reviews an order for a preliminary injunction, ordinary, non-constitutional facts are subject to a more deferential, clearly erroneous standard of review.[61] In contrast, constitutional facts are subject to de novo review.[62] Under the majority's First Amendment analysis, the only fact subject to de novo review was the district court's finding regarding the respondent's

54. *Id.* at 1225.

55. *Id.*

56. *Id.* The majority added that "[f]ederal courts should not arrogate to themselves power over educational suitability questions." *Id.*

57. *See supra* note 21 and accompanying text. Writing for the plurality, Justice Brennan found that the First Amendment prohibited school boards from removing 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.'" *Id.*

58. *Miami-Dade County Sch. Bd. II*, 557 F.3d at 1244 (Wilson, J., dissenting).

59. *See supra* note 45 and accompanying text.

60. *Miami-Dade County Sch. Bd. II*, 557 F.3d at 1232 (Wilson, J., dissenting).

61. *Id.*; *see also supra* note 43 and accompanying text; 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE: RULES 64 to 65.1, § 2962 (2d ed. 1995) ("The trial court has considerable discretion in determining whether the situation requires the issuance of either a temporary or a permanent injunction and the fact that the appellate court reaches a contrary conclusion does not warrant a reversal. The scope of review is limited to determining whether the lower court violated some principle of equity or abused its discretion under Rule 65. Furthermore, the district court's findings of fact, which are prepared under Rule 52(a) when it either grants or refuses injunctive relief, will not be set aside unless they are clearly erroneous.") (footnotes omitted).

62. *See supra* note 43 (discussing opposing views on whether the court could determine "why" facts).

motive.[63] Despite this, the majority engaged in a de novo review of facts beyond the constitutional fact.[64] With the exception of the respondent's motive, the trial judge was arguably in a better position to make factual determinations.[65] Thus, the majority's extensive fact-finding leaves it open to the criticism that it treated the case as a decision on the merits and not an appeal from a preliminary injunction.[66]

On the other hand, in the context of this case, many of the facts found by the majority on de novo review could be viewed as integral parts of the analysis in determining whether the respondent's motive violated the First Amendment.[67] The judgments regarding school boards' motives, especially under *Pico*, encompass a wide array of facts including the school boards' conduct and particular characteristics of books removed.

Another difficulty presented by this case is the notion that without a clearly applicable constitutional standard, a reviewing court can analyze the sufficiency of the evidence for a preliminary injunction in school board book removal cases.[68] In order for a plaintiff to successfully obtain a preliminary injunction, she must show a substantial likelihood of success on the merits.[69] The plaintiff does not have to show that she is certain to win.[70] In the present case, the majority and dissent employed different standards, and predictably, disagreed as to whether there was a sufficient likelihood of success under the chosen standard.[71] While the majority found that the petitioners did not make a sufficient showing under the most favorable First Amendment standard from *Pico*,[72] the dissent found that the petitioners made a sufficient showing under the more school board-deferential standard from *Hazelwood*.[73] Furthermore, while this painstaking analysis was undertaken on the basis that the First Amendment applies in such situations, it is not entirely clear, given the outcome of *Pico*, that it does.[74]

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63. *Miami-Dade County Sch. Bd. II*, 577 F.3d at 1232; *id.* at 1232 (Wilson, J., dissenting); *see also supra* note 43 and accompanying text.

64. *Miami-Dade County Sch. Bd. II*, 557 F.3d at 1232 (Wilson, J., dissenting).

65. *Id.* (noting that the district court was well within its discretion to determine what was the more persuasive and credible evidence).

66. *Id.*; *see also* WRIGHT ET AL., *supra* note 61 (discussing discretion in issuance of injunctions).

67. *Miami-Dade County Sch. Bd. II*, 557 F.3d at 1222.

68. Given the four dissenters in *Pico*, there is also some doubt as to whether the First Amendment even applies in school board book removal cases. *See supra* note 18.

69. *Miami-Dade County Sch. Bd. II*, 557 F.3d at 1232, 1233 n.2 (Wilson, J., dissenting); *see also* WRIGHT ET AL., *supra* note 61, § 2948.3 ("All courts agree that plaintiff must present a prima facie case but need not show that he is certain to win.") (footnote omitted).

70. WRIGHT ET AL., *supra* note 61, § 2948.3.

71. *Compare Miami-Dade County Sch. Bd. II*, 557 F.3d at 1202 (majority opinion), *with id.* at 1234 (Wilson, J., dissenting).

72. *Id.* at 1202 (majority opinion).

73. *Id.* at 1234 (Wilson, J., dissenting).

74. *See supra* note 68.

This divergence of opinion demonstrates the difficulty of making the "substantial likelihood" determination in the absence of an explicit First Amendment standard. Without an established standard, it is difficult for courts to review preliminary injunction orders, and for plaintiffs to predict the likelihood of winning a motion for a preliminary injunction. Moreover, until the United States Supreme Court definitively resolves the issue, school boards lack clear notice of what book removal practices, if any,[75] violate the First Amendment.

Compounding the dearth of guidance from the Supreme Court on the applicable First Amendment standard are the Eleventh Circuit panel's completely contradictory findings regarding whether the respondent was politically motivated when it removed *¡Vamos a Cuba!*[76] Even though the district court found overwhelming evidence that the respondent's removal of the book was primarily politically motivated,[77] the majority reversed because the factual inaccuracies in *¡Vamos a Cuba!* constituted a legitimate reason for the book's removal.[78] On its face, this finding seemed to discount several of the main facts that led to the litigation. First, the original objection to the book was based on the viewpoint of a former Cuban political prisoner and exile.[79] Second, two committees of professional educators, parents, and others recommended retaining the book.[80] Finally, most of the respondent's members did not read the other books in the "A Visit to" series before they voted to remove all of them from the school district's libraries.[81]

On the other hand, the initial objections to the book, as well as those of the respondent and the majority in this case, are based on true accounts of life under the totalitarian regime in Cuba.[82] Given these realities were omitted from the book *¡Vamos a Cuba!* is not factually accurate. Still unclear is whether the inclusion of all relevant facts in a book intended to provide the most basic information to young children is a tenable standard for judging books or for determining when a

75. *See supra* note 18.

76. *See Miami-Dade County Sch. Bd. II*, 557 F.3d at 1236–37 (Wilson, J., dissenting).

77. *Id.* (reading the district court's order as concluding that the respondent was using the stated reasons for removing the book as a pretext for political views that opposed the Castro regime).

78. *Id.* at 1236.

79. *Id.* at 1238 (quoting the district court's reasoning that the truth or merit of Juan Amador's objections was not at issue, and noting that the actual issue was "the state's imposition of what shall be the orthodox view of Cuba").

80. *Id.* at 1243.

81. *Id.* at 1243–44 (reasoning that the members' failure to read the other removed books suggests that the board's majority may have had impermissible motives for removing them).

82. *See supra* notes 46–47.

school district can constitutionally remove such books from its libraries.[83]

The lack of clarity about the applicable First Amendment standard in school board book removal cases, as well as the importance of speech protections in the school context,[84] demonstrates that the United States Supreme Court should revisit *Pico* and provide federal courts with greater guidance in this area. By failing to clarify *Pico*, the Supreme Court has fomented confusion and opened the door to circuit-specific standards, created on shaky and politically charged rationales.

83. *See Miami-Dade County Sch. Bd. II*, 557 F.3d at 1248 (Wilson, J., dissenting).

84. *See supra* note 9 and accompanying text.