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**Banned Books & Banned Identities:
Maintaining Secularism and the Ability to Read in Public Education
for the Well-Being of America's Youth**

Megan M. Tylenda *

Books containing LGBTQ+ themes and characters are being removed from public school libraries at a rapid rate across the United States. While a book challenge has made it to the Supreme Court once before, the resulting singular plurality opinion left courts without a clear test to apply, ultimately leaving students' First Amendment rights in the air. Additionally, the increasingly relaxed view of courts towards religious influence in public schools indicates that if a modern case were to reach the Supreme Court, religious challenges may be accepted, which would leave LGBTQ+ students who seek to see themselves represented in literature without an avenue to do so. In light of this and other legislation harming LGBTQ+ students, in addition to studies indicating mental health concerns for LGBTQ+ youth, the best avenue to resolve this issue is to create a federal regulation separate from the courts. Students having access to literature that represents them or challenges them to learn about people different from themselves is essential to lessening mental challenges and inequalities faced by LGBTQ+ students and, without a standard that includes a formal review process for schools, the risk of detriment to mental health only increases. Others have sought to disregard the current plurality standard of review altogether in favor of a book removal test based on standards outlined in Wisconsin v. Yoder, while some have described that courts are utilizing Hazelwood School District v. Kuhlmeier, but reliance on the courts is difficult to ascertain considering the number of book challenges that go unreported and current religious influence.

This Article suggests that the most efficient way to rectify this issue is for the U.S. Department of Education to implement a funding-based regulation requiring that schools have a process of review, designating who is involved in that process, and requiring schools to provide a report of which books are removed at the end of each school year; if upon review the removals are found to be content- or viewpoint-based, the challenge must be revisited. Even though the Department cannot have direct oversight over school libraries and their book selection, it can establish regulations that make certain federal funding contingent on requisite programs and requirements that the schools can establish themselves. This Article seeks to add to the current debate over book bans and how they should be handled, especially when considering LGBTQ+ students, and provide a legal alternative for a remedy outside of the judicial system.

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INTRODUCTION

“So, Matilda’s strong, young mind continued to grow, nurtured by the voices of all those authors who had sent their books out into the world, like ships onto the sea. These books gave Matilda a hopeful and comforting message; you are not alone.”

--MATILDA, 1996¹

When children read books, they can formulate their own opinions and understandings of the world around them. Children can walk in the shoes of characters that look similar to themselves; but most often, they walk alongside characters startlingly different from them. Most children are not taking part in whaling voyages,² wandering a post-cataclysmic world with one of their parents,³ or inheriting a candy factory after winning a golden ticket.⁴ By working with texts that challenge their everyday views and perspectives, children develop the ability to empathize, understand, and learn from others in a way that likely differs from their lived experiences, especially in seemingly homogenous communities.⁵

The concept of children learning from and about those different from themselves by reading is nothing new. Students have been reading classics as a portion of their education for decades through what scholars and teachers have dubbed “the canon.”⁶ And, as the world changes, so does the literature that is published and added to curriculums⁷ and school libraries. These new books portraying diverse characters and their perspectives are being heavily challenged, especially when they pertain to LGBTQ+ characters and themes.⁸ These direct challenges to literature are a portion of a larger problem facing LGBTQ+ students

¹ MATILDA, at 6:50 (TriStar Pictures 1996).

² See HERMAN MELVILLE, *MOBY-DICK* (Wordsworth Editions Ltd. 1993) (1851).

³ See CORMAC MCCARTHY, *THE ROAD* (Vintage Int’l 2007).

⁴ See ROALD DAHL, *CHARLIE AND THE CHOCOLATE FACTORY* (Puffin Books 2021) (1964).

⁵ See *5 Ways Books Boost Social Skills in Children*, BOOK NOOK ENRICHMENT (June 1, 2022), <https://booknooknyc.com/5-ways-books-boost-social-skills-in-children/>; cf. Cassie Myers, *But My Organization isn’t Diverse! Growing Diversity, Equity and Inclusion in “Homogeneous” Organizations*, LUNARIA, <https://lunariasolutions.com/blog-post/deiinhomogenousteam/> (last visited Nov. 3, 2022) (while this company discusses homogeneity in relation to the workplace, the same characteristics can apply to close-knit towns and remote communities that seem to lack diversity when solely examining visible attributes).

⁶ Andrew Newman, *These High School ‘Classics’ Have Been Taught for Generations – Could They be on Their Way Out?*, (Sept. 16, 2022, 1:17 PM), <https://theconversation.com/these-high-school-classics-have-been-taught-for-generations-could-they-be-on-their-way-out-188197>.

⁷ See *id.* While the inclusion of diverse literature in a school’s curriculum is certainly important, the scope of this Article is limited to books in school libraries.

⁸ See Hannah Natanson & Lori Rozsa, *Students Lose Access to Books Amid ‘State-Sponsored Purging of Ideas’*, WASH. POST (Aug. 17, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/08/17/book-ban-restriction-access-lgbtq/>; see also Madeline Armstrong, *Long Island Districts in the Thick of Book-Banning ‘Crisis’*, LONG ISLAND ADVOC. (Apr. 21, 2022), <https://longislandadvocate.com/long-island-districts-in-the-thick-of-book-banning-crisis/>; Amanda Holpuch, *Texas School District Removes Bible and Anne Frank Adaptation in Back-to-School Sweep*, N.Y. TIMES (Aug. 17, 2022), <https://www.nytimes.com/2022/08/17/us/texas-school-books-removed-bible.html>.

in many states throughout America: a rise in anti-LGBTQ+ legislation directly impacting schools and debate over parental control and religious entwinement in public education. These problems, more broadly, are endangering students who are already more prone to bullying, discrimination, and worsened mental health than their heterosexual or cisgender peers.⁹

This Article argues that the importance of establishing more extensive protections for LGBTQ+ students and, more specifically, for protecting access to literature containing LGBTQ+ themes¹⁰ in school libraries is paramount to children's well-being today. The increase in challenges to this literature, legal challenges for students across the United States, the lack of a clear legal standard, and an increasingly lenient interpretation of the Free Exercise Clause and Establishment Clause of the First Amendment render it necessary for the U.S. Department of Education to take action. The Department of Education may do so by creating a funding-contingent regulation that includes the skeleton of a procedural review process for public schools to independently implement, which would allow children to not only have an education in which they learn stellar math, science, and history but an education in which they also develop compassion for others different from themselves and become the best versions of themselves.

Part I of this Article will discuss the role of literature in education, the history of book challenges, and the current book challenges that are overwhelmingly aimed at LGBTQ+ literature. Part II will describe the current legal standard for addressing such challenges, why it needs clarification, and the fading secularism in public education that may create challenges if the issue returns to the Supreme Court. Part III will explore the importance of establishing protections for books containing LGBTQ+ characters and themes and currently proposed legislation that may aid in finding a solution. Part IV will propose potential remedies to mitigate harm by the U.S. Department of Education that are viewpoint and content-neutral, based on existing case law and respected international covenants.

I. LITERATURE AND ITS HISTORICAL AND CONTEMPORARY CENSORSHIP IN PUBLIC EDUCATION

A. *The Role of Literature in Education*

Some scholars have described the goal of education as “the acquisition of knowledge and understandings that free an individual from prejudice and ignorance, and the development of his character, skills, and abilities through study

⁹ Madeleine Roberts, *New CDC Data Shows LGBTQ Youth are More Likely to be Bullied Than Straight Cisgender Youth*, HUM. RTS. CAMPAIGN (Aug. 26, 2020), <https://www.hrc.org/news/new-cdc-data-shows-lgbtq-youth-are-more-likely-to-be-bullied-than-straight-cisgender-youth> [<https://perma.cc/WE6W-WV98>] (“It’s clear from the national data that many LGBTQ young people continue to suffer higher health and suicide risks than their peers.”).

¹⁰ This Article focuses on the impact of book challenges in relation to LGBTQ+ themes and students, but the rise in book challenges is also impacting other minority groups. See, e.g., Marisa Shearer, *Banning Books or Banning BIPOC?*, 117 NW. UNIV. L. REV. ONLINE 24 (2022).

and experience.”¹¹ When it comes to the specific role of literature in education, Helen Huus writes, “the reader can obtain a first-hand account from writers of all times and from many cultures—persons he never could have met—providing he holds the key to the language in which the work is written.”¹² Of the contributions that literature has made to society that Huus describes, two categories are relevant when considering the role of LGBTQ+ literature and why these books play a crucial part when they remain in school libraries.¹³

The first category, “[l]iterature aids in understanding human nature,” points out that children’s literature, regardless of topic, often teaches themes of kindness, friendship, and consideration of others.¹⁴ Generally, literature allows children (and adults) to learn about others, compare characters’ experiences with their own, and emerge with newfound perspectives, which Huus hopes “will lead pupils to an understanding of ways of life in societies unlike their own.”¹⁵ Huus then emphasizes the importance of real-life problems in literature through the second category: “[l]iterature provides vicarious experiences that aid individuals in growing up.”¹⁶ Notably, a child “may improve his concept of himself as he reads how others have faced and solved similar personal problems.”¹⁷ Huus writes that concepts that have previously been considered taboo, such as death and divorce, are being explored further through children’s literature, which allows children to become more willing to discuss issues they themselves are facing in their own lives.¹⁸ Just as exploring death and divorce in children’s literature can be helpful, it can also benefit children to see themselves and others different from themselves in the context of contemporary LGBTQ+ themes, characters, and challenges.¹⁹

B. Historical Challenges to Literature

The American Library Association’s (“ALA”) Office of Intellectual Freedom has compiled data about challenged and banned books since 1990.²⁰ It is important to consider the difference between the two terms, as a large percentage of books that are removed from school libraries and classrooms eventually return after lengthy review and debate; according to the ALA, most of what receives public attention are challenges, meaning someone, or a group of people, has objected to a

¹¹ Helen Huus, *The Role of Literature in Children’s Education*, 50 EDUC. HORIZONS 139, 139 (1972).

¹² *Id.*

¹³ *See id.* at 139–44.

¹⁴ *See id.* at 142.

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *Id.*

¹⁸ *See id.* at 142–43. Huus, in this 1972 article, refers to the exploration of these taboo topics as a “recent” development in children’s literature. *Id.* at 142.

¹⁹ *See, e.g., infra* Parts I.C, III.B.

²⁰ Off. of Intell. Freedom, *Top 10 Most Challenged Book List*, AM. LIBR. ASS’N, <https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10/archive> (last visited Apr. 24, 2023).

book for any number of reasons.²¹ One example of this is the challenge by parents in Laytonville Unified School District's to *The Lorax* by Dr. Seuss²² for its alleged anti-logging characteristics.²³ There, parents challenged the book after learning that it was required reading for second graders because the message of the book was negative for young children, considering that most families made their incomes from the local timber industry, and the book addresses environmental destruction through cutting down Truffula Trees to make Thneeds.²⁴ However, books more frequently face challenges because "(1) the material was considered to be 'sexually explicit'; (2) the material contained 'offensive language'; [or] (3) the materials w[ere] 'unsuited to any age group.'"²⁵ Historical documentation of censorship has demonstrated that "the oldest and most frequently recurring controls have been those designed to prevent the expression of unorthodox religious or political ideas."²⁶

Some organizations, such as PEN America, broaden the definition of a book ban to include challenges.²⁷ PEN America takes the position that:

A book ban occurs when an objection to the content of a specific book or type of book leads to that volume being withdrawn either fully or partially from availability, or when a blanket prohibition or absolute restriction is placed on a particular title within a school or a district.²⁸

The organization classifies book bans this way in part due to the impact that removing books has on children.²⁹ When books are removed from school libraries, one may think that children can simply anticipate having to find the book elsewhere, but this is not feasible for many children as "[m]any students in the

²¹ *Banned Book FAQ*, AM. LIBR. ASS'N, <https://www.ala.org/advocacy/bbooks/banned-books-qa> (last visited Oct. 3, 2022).

²² *The Lorax* is a children's book that aims to teach children about sustainable environmental practices. See generally DR. SEUSS, *THE LORAX* (1971); Hugh Asher, *Earth Day and the Lorax*, An Darach Forest Therapy (Apr. 22, 2023), <https://silvotherapy.co.uk/articles/earth-day-and-the-lorax>.

²³ See John M. Glionna, *Community at Loggerheads Over a Book by Dr. Suess*, L.A. TIMES (Sept. 18, 1989, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1989-09-18-mn-147-story.html>.

²⁴ See *id.*; see also Peter West, *Time to Ax the 'Lorax'?*, EDUC. WEEK (Oct. 4, 1989), <https://www.edweek.org/education/time-to-ax-the-lorax/1989/10> (the mother who brought the challenge to the school board did so because she and her husband "r[an] a wholesale supply business for the logging industry," and "her son expressed the belief that 'if you cut a tree, you kill an animal.'"); *The Lorax: Guide for Philosophical Discussion*, PRINDLE INST. FOR ETHICS, <https://www.prindleinstitute.org/books/the-lorax/#:~:text=The%20Lorax%20is%20a%20cautionary,destruction%20of%20the%20immediate%20environment> (last visited Mar. 11, 2023).

²⁵ *Banned Book FAQ*, *supra* note 21.

²⁶ ANNE LYON HAIGHT, *BANNED BOOKS 387 B.C. TO 1978 A.D.* 105 (1978) (describing how the Roman Catholic Church kept an index of books that the church prohibited with the intention of regulating the books read by Catholics, and the Republic of Ireland kept a similar registry for moral reasons until 1967); see *infra* Part II.C.

²⁷ See *Book Bans: Frequently Asked Questions*, PEN AM., <https://pen.org/book-bans-frequently-asked-questions/> (last visited Jan. 29, 2023).

²⁸ *Id.*

²⁹ See *id.*

United States attend schools without libraries, or, in districts without ready access to public libraries. Not all parents and families have the time or means to access public libraries, or to purchase books.”³⁰

Even though the American Library Association and PEN America have varying interpretations of what it means for a book to be banned, the message is the same: removing access to books from school libraries places children in a position where they may not have access to the ideas at all.³¹

The modern concept of book censorship emerged in the 1920s and flourished in the 1960s and 1970s—going beyond banning books to burning them—when society “tested the bounds of social permissiveness.”³² The rise spiraled in the 1980s too.³³

Similar to the notion that book banning in the United States is not new, challenges of literature with LGBTQ+ themes and characters³⁴ are also not new. In the 1990s, *Annie on My Mind*³⁵ was challenged on many accounts, some emerging from school libraries, because it “idealize[d] or encourage[d] homosexuality.”³⁶ Ideas that challenged social norms were generally at the forefront of removal requests, even when unrelated to LGBTQ+ topics. For example, government restrictions flourished in Georgia in the 1940s and 1950s when the governor requested that certain books be removed from school libraries and burned for being “unfavorable to the South, the Bible, or the state of Georgia.”³⁷ The restriction on literature in school libraries continues to grow in public schools across the country today.

³⁰ *Id.*

³¹ *See id.*; Off. of Intell. Freedom, *supra* note 20; *Banned Book FAQ*, *supra* note 21.

³² PATRICK M. GARRY, AN AMERICAN PARADOX: CENSORSHIP IN A NATION OF FREE SPEECH 3, 21 (1993).

³³ *See id.* at 3 (describing how “[a] 1988 report by the Office for Intellectual Freedom of the American Library Association stated that challenges to library books and school materials increased by 168 percent in the previous five years. And People for the American Way found that attempts to censor schoolbooks doubled in the Northeast between 1988 and 1989.”).

³⁴ *See* discussion of modern challenges and accompanying notes *infra* Part I.C.

³⁵ *Annie on My Mind* is a story about two girls whose friendship becomes a romantic relationship and how the girls navigate the complexities of their love story. NANCY GARDEN, ANNIE ON MY MIND (1982).

³⁶ DAWN B. SOVA, BANNED BOOKS: LITERATURE SUPPRESSED ON SOCIAL GROUNDS 20–22 (Ken Wachsberger, ed. 1998). The book was initially challenged in an Oregon district in 1988, where it was temporarily removed from shelves but later returned. The book was later challenged throughout the 1990s in districts in California (removed from shelves), Maine (retained after challenge), Michigan (retained after challenge), Texas (retained after challenge), and Kansas (challenged but retained in some districts, while challenged and later burned by others). *Id.* In fact, one book ban in Kansas made it to a U.S. District Court, where the judge “ruled that the school board and superintendent had violated the First Amendment of the United States Constitution by removing the novel from school libraries.” *Id.* at 22.

³⁷ *Id.* at 112 (describing how the governor requested books be burned that were “advocating for interracial cooperation” and noting that this request did not come to fruition).

C. A Rise in Challenges Pertaining to LGBTQ+ Content

The ALA releases a list of the top ten most challenged books every year.³⁸ In 2022, however, the ALA saw such a drastic increase in book challenges that the 2022 list includes thirteen books rather than the usual ten.³⁹ The ALA’s “Top 13 Most Challenged Books of 2022” demonstrates that there has been an increase in the removal of literature pertaining to LGBTQ+ topics.⁴⁰ In 2018, five of the eleven most challenged books faced scrutiny for this reason, and this number rose to eight of the top ten in 2019.⁴¹ Challenges in 2020 were outliers in that the year saw a decrease; only one book in the top ten was challenged for its LGBTQ+ content.⁴² Five out of the top ten most challenged books in 2021 were challenged due to LGBTQ+ content.⁴³ Out of the thirteen most challenged books in 2022, seven were challenged for LGBTQ+ content. *Gender Queer* by Maia Kobabe⁴⁴ was the most challenged book of 2022, taking the top spot for the second year in a row.⁴⁵ All thirteen books in 2022 were “claimed to be sexually explicit.”⁴⁶

In Florida alone, PEN America recorded 565 book bans in the 2021–22 school year; many of these challenges are hidden behind false reasoning, such as referring to some literature as “adult romance” when the books do not contain such content, resulting in removal on false pretenses.⁴⁷ Examining 2022 as a whole, the ALA saw a record-breaking number of challenges, nearly doubling challenges from 2021 and the highest number of challenges since the documentation began over twenty years

³⁸ Off. of Intell. Freedom, *supra* note 20.

³⁹ *Top 13 Most Challenged Books of 2022*, AM. LIBR. ASS’N, <https://www.ala.org/advocacy/sites/ala.org.advocacy/files/content/2022%20censorship%20by%20the%20numbers%20infographic-2page.pdf> (last visited Apr. 24, 2023).

⁴⁰ *See id.*; Whitney Strub, *Book banning has a long and homophobic history*, NJ.COM (Dec. 21, 2021, 4:17 PM), <https://www.nj.com/opinion/2021/12/book-banning-has-a-long-and-homophobic-history-opinion.html>; Matt Lavietes, *Over half of 2022’s most challenged books have LGBTQ+ themes*, NBC NEWS (Apr. 25, 2023, 1:47 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/half-2022s-challenged-books-lgbtq-themes-rcna81324>.

⁴¹ Off. of Intell. Freedom, *supra* note 20.

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Gender Queer: A Memoir* is an autobiography about the author’s journey in identifying their gender and sexuality. MAIA KOBABE, *GENDER QUEER: A MEMOIR* (2019).

⁴⁵ *See Top 13 Most Challenged Books of 2022, supra* note 39; Off. of Intell. Freedom, *supra* note 20. *Gender Queer* received a total of 151 known challenges in 2022, which is significantly more than the second most challenged book, which received 86 challenges. *Top 13 Most Challenged Books of 2022, supra* note 38.

⁴⁶ *Top 13 Most Challenged Books of 2022, supra* note 39; *see supra* text accompanying note 25.

⁴⁷ PEN America (@penamerica), TIKTOK (Mar. 17, 2023), <https://www.tiktok.com/@penamerica/video/7211549941020265771>. Jodi Picoult describes how in Martin County, Florida, twenty of her books were recently removed from school library shelves as part of a larger ban that removed eighty-four book titles. Picoult’s book *Second Glance* was removed as a part of this challenge by one parent, claiming “[t]his book is an Adult romance novel.” Picoult states, “[i]t’s worth noting, I do not write adult romance . . . [w]hat they do have are issues like racism, abortion rights, gun control, gay rights, and other topics that encourage kids to think for themselves.” *Id.*

ago.⁴⁸ In 2022, 1,269 challenges of a total of 2,571 titles occurred, and “[o]f those titles, the vast majority were written by or about members of the LGBTQIA+ community and people of color.”⁴⁹ And of those challenges, forty-one percent targeted school libraries directly.⁵⁰

While at first glance one may believe these challenges are isolated to states that are visibly implementing considerably conservative politics, these challenges are happening at the local level and are widespread across the country.⁵¹ One may not expect, for example, that New York is seeing these challenges, but, when considering school boards and their politics at the local level, there are in fact school districts within New York that are challenging these themes.⁵² In one instance, a school district outside of Rochester was forced to evacuate due to a bomb threat that “referenced an LGBTQ-themed book that some parents and others in the district have recently lobbied to get removed from the high school library.”⁵³ On Long Island, the Connetquot Central School District specifically banned⁵⁴ *Gender Queer: A Memoir* written by Maia Kobabe, and in Yorktown Heights, New York, the Yorktown Central School District ultimately denied a challenge⁵⁵ to *All Boys Aren’t Blue* by George M. Johnson⁵⁶ and *Beyond Magenta: Transgender Teens Speak Out* by Susan Kuklin.⁵⁷ Even though New York is typically perceived as a liberal and

⁴⁸ American Library Association Reports Record Number of Demands to Censor Library Books and Materials in 2022, AM. LIB. ASS’N (March 22, 2023), <https://www.ala.org/news/press-releases/2023/03/record-book-bans-2022> [hereinafter “Record Number of Demands”].

⁴⁹ *Id.*

⁵⁰ See *Top 13 Most Challenged Books of 2022*, *supra* note 39.

⁵¹ See Natanson & Rozsa, *supra* note 8; see also Hannah Natanson, *More Books are Banned than Ever Before, as Congress Takes on the Issue*, WASH. POST (Apr. 7, 2022, 1:13 PM), <https://www.washingtonpost.com/education/2022/04/07/book-bans-congress-student-library/>.

⁵² See Maureen Mullarkey, *Banned Books Week: What Titles Have Been Removed From LI Schools?*, PATCH (Sept. 20, 2022, 5:16 PM), <https://patch.com/new-york/sayville/banned-books-week-what-titles-have-been-removed-li-schools>.

⁵³ Beth Adams & Brian Sharp, *Children Have a Second School Day Disrupted by Anonymous Bomb Threat in HILTON*, (Mar. 24, 2023, 10:22 AM), <https://www.wxnews.org/local-news/2023-03-24/more-bomb-threats-hilton-schools-terrorism>. The threats were not found to be credible, and the school district’s superintendent reiterated the importance of the value of literature such as the challenged book with respect to children learning about themselves in situations where they may have nowhere else to turn to. *Id.*

⁵⁴ *Banned Book FAQ*, *supra* note 21; see Sam Desmond, *Sexually explicit book returned to high school library*, LONG ISLAND ADVOC. (May 19, 2022, 12:00 AM), <https://www.longislandadvance.net/stories/sexually-explicit-book-returned-to-high-school-library,90349>.

⁵⁵ Michael Woyton, *Banned Books Week: What’s Been Removed From Some Hudson Valley Schools*, PATCH (Sept. 20, 2022, 1:36 PM), <https://patch.com/new-york/yorktown-somers/banned-books-week-whats-been-removed-some-hudson-valley-schools>.

⁵⁶ *All Boys Aren’t Blue* explores the author’s experiences growing up as a gay Black man. The book explores themes of family, gender identity, and Black joy, amongst others. See generally GEORGE M. JOHNSON, *ALL BOYS AREN’T BLUE* (2020).

⁵⁷ *Beyond Magenta: Transgender Teens Speak Out* is a compilation of interviews of six transgender teens that dive into their journeys of self-identification, their living situations, and transitions. See generally SUSAN KUKLIN, *BEYOND MAGENTA: TRANSGENDER TEENS SPEAK OUT* (2015).

accepting state on the topic of LGBTQ+ rights and advocacy,⁵⁸ the structure of the education system at the local level reflects local politics,⁵⁹ and much of New York is conservative.⁶⁰ As a result, control at the local level produces inconsistent policies across the state and the country when it comes to content that children are permitted to access. Much of this is heavily influenced by groups such as Moms for Liberty, a group PEN America has identified as having a large influence on book challenges and bans,⁶¹ which has chapters in Suffolk and Nassau counties on Long Island.⁶²

An example of a book challenge that impacts LGBTQ+ students and themes can be seen in a recent lawsuit that emerged in Missouri during early 2022.⁶³ A school district is being challenged by the American Civil Liberties Union of Missouri (ACLU) on behalf of four students on the grounds that their book removal process directly violates students' First Amendment rights.⁶⁴ The school district's policy, at the time of the lawsuit, imposed an automatic removal when books are challenged without first providing notice to students.⁶⁵ The challenged book that sparked this lawsuit is centered around science, technology, engineering, and math and is meant for young children but was challenged by a parent in the school district because the book mentions a character's non-binary identity on three of the book's 307 pages.⁶⁶ At present, the policy allows any person to present a challenge to literature due to viewpoints expressed in the literature.⁶⁷ The ACLU has challenged the policy, arguing that "the way the policy is written, 'a parent, guardian, or student who

⁵⁸ See, e.g., Sammy Gibbons, *New York Introduces Trans Refuge Bill to Protect Children, Families, Doctors*, DEMOCRAT & CHRON. (May 14, 2022, 10:23 AM), <https://www.democratandchronicle.com/story/news/2022/05/13/transgender-lgbtq-rights-bill-would-make-new-york-refuge-state/9745306002/>.

⁵⁹ Kate Lisa, *Legislative priorities take shape to better N.Y. literacy rates*, SPECTRUM NEWS (July 27, 2023, 8:45 PM), <https://spectrumlocalnews.com/nys/central-ny/politics/2023/07/27/legislative-priorities-take-shape-to-better-ny-literacy-rates#:~:text=But%20because%20New%20York%20is,more%20specific%20reading%20instruction%20guidelines>.

⁶⁰ See *New York Election Results*, BLOOMBERG (Dec. 16, 2022, 3:10 PM), <https://www.bloomberg.com/graphics/2022-us-election-results/new-york/>.

⁶¹ Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in School*, PEN AMERICA (Sept. 19, 2022), <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/>.

⁶² *Banned Book FAQ*, *supra* note 21; *Find a Chapter Near You*, MOMS FOR LIBERTY, <https://www.momsforliberty.org/chapters/> (last visited Jan. 29, 2022).

⁶³ See *Around the Nation*, 50 QUINLAN, SCH. L. BULL. NL 4, (2023); Jodi Fortino, *ACLU Sues Independence School District Over Book Removal Policy*, KCUR (Dec. 7, 2022, 5:06 PM), [https://www.kcur.org/education/2022-12-07/aclu-lawsuit-book-ban-missouri-independence-school-board; Amended Class Action Complaint for Prospective Relief, C.K.-W ex rel v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906 \(E.D. Mo. 2022\) \(No. 4:22-cv-191\), https://www.aclu.org/cases/ck-w-v-wentzville-r-iv-school-district-0?document=plaintiffs-amended-class-action-complaint-prospective-relief](https://www.kcur.org/education/2022-12-07/aclu-lawsuit-book-ban-missouri-independence-school-board; Amended Class Action Complaint for Prospective Relief, C.K.-W ex rel v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906 (E.D. Mo. 2022) (No. 4:22-cv-191), https://www.aclu.org/cases/ck-w-v-wentzville-r-iv-school-district-0?document=plaintiffs-amended-class-action-complaint-prospective-relief).

⁶⁴ *Around the Nation*, *supra* note 63.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

objects to a book because it contains a discussion about “sex,” a person’s “sexuality,” or their “race” would trigger that book’s automatic removal from all library shelves pending review and a Board vote.”⁶⁸ Additionally, there is no appeals process if the Board determines a book should remain off shelves, which denies students and others in the community the opportunity to be heard.⁶⁹ Many of the other points made by the ACLU echo notions in this Article that the removal of this literature deprives students of the opportunity to see themselves and other diverse individuals portrayed in books available to them in school.⁷⁰

D. Silent Challenges

One of the obstacles in addressing book challenges and bans in school libraries is that the majority of the challenges are silent, meaning that they are unreported.⁷¹ It is estimated that about eighty-two to ninety-seven percent of book challenges are unreported, and therefore never face community or further legal scrutiny.⁷² This practice of book challenges going unreported remained an issue in 2022, as school districts continued to quietly challenge and sometimes temporarily or permanently remove books from school library shelves.⁷³

Book challenges and removals that are unreported are just as significant as challenges that face community and legal scrutiny, as students from underrepresented backgrounds are still impacted. For some students, the ability to read books about real-life individuals or fictional characters that reflect their identities and/or experiences is potentially one of the only forms of representation they may have, which is important because studies have shown that representation allows students who are prone to feeling a sense of “otherness” to take pride in who they are and accept themselves.⁷⁴ Considering the current statistics on the mental health of LBGTQ+ youth,⁷⁵ it is paramount that these books stay on public library school shelves.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.*; *supra* notes 10–18 and accompanying discussion.

⁷¹ *See* Nick Duffy, *Library Books Are Still Being Censored Over LGBT+ Content on a Horrifying Scale. Oh, and Harry Potter*, PINK NEWS (Sept. 28, 2020), <https://www.thepinknews.com/2020/09/28/banned-books-week-lgbt-american-library-association-tango-makes-three-beyond-magenta/>.

⁷² *See id.*; Off. of Intell. Freedom, *supra* note 20.

⁷³ *See, e.g.*, Armstrong, *supra* note 8 (quoting Nora Pelizzari, the director of communications for the National Coalition Against Censorship: “Books are disappearing very quietly and quickly in a lot of places . . . [a] lot of times censorship succeeds when it happens in silence.”).

⁷⁴ *See, e.g.*, *2022 National Youth Survey on LGBTQ Mental Health*, THE TREVOR PROJECT (2022), <https://www.thetrevorproject.org/survey-2022/#representation> [<https://perma.cc/3Q82-HR3Y>] (LGBTQ youth overwhelmingly felt good about being a part of the LGBTQ community in various instances: 89% when there is LGBTQ representation in movies, 79% when musicians shared they were a part of the LGBTQ community, and 67% when athletes shared they are a part of the LGBTQ community).

⁷⁵ *See* discussion and accompanying notes *infra* Part III.B.

II. A LACK OF CLARITY FOR LEGAL ACTION

A. *The Standard: Board of Education, Island Trees Union Free School District No. 26 v. Pico and the Court's Role in School Libraries*

For book challenges that are not silent, one significant problem in addressing whether a book has been rightfully removed from school library shelves is that the issue has only reached the Supreme Court of the United States in one instance: *Board of Education, Island Trees Union Free School District No. 26 v. Pico* (hereinafter “*Pico*”).⁷⁶ The issue originated following the removal of literature from the District’s high school and junior high school libraries.⁷⁷ Parents of students attended a conference held by a conservative organization which focused on education in New York; there they learned about books they later sought to remove from their school district’s library.⁷⁸ When the parents brought this to the School Board’s attention, the books were promptly removed while Board members reviewed them; parents called the books “anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.”⁷⁹ After an appointed committee reviewed the books based on certain criteria, it suggested that some of the books should be returned to the school libraries, while others remain off shelves, but the Board did not agree with the committee’s findings and drew its own conclusions, removing more than what was recommended, and providing no explanation as to why.⁸⁰

Students filed a complaint on the basis that the actions of the Board violated their First Amendment rights.⁸¹ The district court did not agree with the students, determining that the Board’s actions were not based on religion, but rather on “conservative educational philosophy.”⁸² Due to the established precedent that gives school boards broad discretion in educational policymaking, the court did not wish to intervene and granted the Board’s motion for summary judgment, even though the removal “clearly was content-based.”⁸³ On appeal, the Second Circuit reversed the district court’s judgment, remanding the case to trial.⁸⁴

When this case made it to the Supreme Court on *certiorari*, the Court noted the case’s unique nature compared to previously decided cases about the constitutional limits on State control in the classroom: this case did not relate to

⁷⁶ See 457 U.S. 853 (1982).

⁷⁷ *Id.* at 856–57.

⁷⁸ *Id.*

⁷⁹ *Id.* at 857. Because of this, the Board considered it “[their] duty, [their] moral obligation, to protect the children.” *Id.*

⁸⁰ See *id.* at 857–58.

⁸¹ See *id.* at 858–59.

⁸² *Id.* at 859.

⁸³ *Id.* at 859–60. The district court acknowledged that the Board’s actions could “reflect a misguided educational philosophy” but still did not see a need to intervene. *Id.*

⁸⁴ *Id.* at 860.

textbooks required for curriculum, or required reading in general, for that matter.⁸⁵ The substantive question the Court needed to address was whether the First Amendment placed any limitations on the discretion of the School Board.⁸⁶ The Court utilized decades of precedent in agreeing “that local school boards must be permitted ‘to establish and apply their curriculum in such a way as to transmit community values,’ and that ‘there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.’”⁸⁷ The Court also recalled that school boards must exercise their discretion “in a matter that comports with the transcendent imperatives of the First Amendment.”⁸⁸ The Court also discussed the role of the school library in students’ right to receive information. “The school library is the principal locus of such freedom.”⁸⁹ The Court ultimately affirmed the decision of the Second Circuit and remanded the case to the district court because the motivations of the School Board potentially raised a genuine issue as to whether the procedure the School Board followed in removing books was outside the procedures already put in place and whether the review was conducted without bias.⁹⁰

Part of the problem when considering the lasting effects of *Pico* is that it is a plurality opinion.⁹¹ Another problem is that there have been no other cases on this specific issue to reach the Supreme Court.⁹² As a result, this has left much discretion to lower courts, although most courts do follow *Pico*’s guidance.⁹³ The plurality determined that the removal was problematic as the books were removed “simply because [school officials] dislike[d] the ideas contained in those books and

⁸⁵ See *id.* at 861–62. Compare with *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a state law that forbade the teaching of modern foreign languages in public and private schools) and *Epperson v. Arkansas*, 393 U.S. 97 (1968) (declaring unconstitutional a state law that prohibited the teaching of the Darwinian theory of evolution in any state-supported school).

⁸⁶ See *Pico*, 457 U.S. at 863.

⁸⁷ *Id.* at 863–64 (citing *Meyer*, 262 U.S. at 402; *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Epperson*, 393 U.S. at 104; *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 507 (1969); and *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

⁸⁸ *Pico*, 457 U.S. at 864 (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (public school students are not required to salute the flag during the pledge of allegiance under the First Amendment) and *Tinker*, 393 U.S. 503, 513–14 (holding schools may not abridge students’ rights to freedom of expression of their political views)).

⁸⁹ *Pico*, 457 U.S. at 868–69. The Court included reasoning from a Massachusetts District Court: “a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum . . . The student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom.” *Id.* at 869 (quoting *Right to Read Defense Comm. v. Sch. Comm.*, 454 F. Supp. 703, 715 (Mass. 1978)).

⁹⁰ See *id.* at 875; see also FED. R. CIV. P. 56(c).

⁹¹ See generally *Pico*, 457 U.S.; Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STANFORD L. REV. 795, 798 (2017) (citing *Marks v. United States*, 430 U.S. 188 (1977) describing how the standard for lower courts to interpret plurality opinions, the “narrowest grounds rule”, leaves many lower courts without clear guidance for how use the decisions).

⁹² See, e.g., Ryan L. Schroeder, Note, *How to Ban a Book and Get Away With It: Educational Suitability and School Board Motivations in Public School Library Book Removals*, 107 IOWA L. REV. 363, 365 (2021).

⁹³ See, e.g., *id.*

[sought] their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’”⁹⁴

Subsequent opinions from lower courts have seemingly developed their own tests for whether a book’s removal from a school library is constitutional.⁹⁵ The plurality in *Pico* focused on the School Board’s motivation towards removing the books and determined that personal viewpoints are an impermissible motivation when they are a “substantial factor” in challenging the literature.⁹⁶ Rather, for removal to be justified, the decision would need to be based upon “educational suitability.”⁹⁷ This is helpful to some extent, but the lack of binding precedential value⁹⁸ and lack of clarity has led some courts to utilize *Hazelwood School District v. Kuhlmeier*,⁹⁹ which has “permitted courts to erode the *Pico* standard.”¹⁰⁰ The confusing factor for courts, it seems, is the vague concept of “educational suitability.”¹⁰¹ While courts have articulated that suitability relies on the decision-making process itself—content-based reasoning versus politically-motivated reasoning—these concepts are closely knit, an issue Justice Rehnquist touched upon in his dissent.¹⁰²

The Fifth Circuit provides an example in *Campbell v. St. Tammany*¹⁰³ of “adopting a higher standard of review [than *Pico*] because of the non-curricular nature of book removals.”¹⁰⁴ And the Eleventh Circuit in *ACLU of Florida, Inc. v. Miami-Dade County School Board*¹⁰⁵ determined that if the ideas expressed in the

⁹⁴ *Pico*, 457 U.S. at 872 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

⁹⁵ Schroeder, *supra* note 92, at 365.

⁹⁶ *See Pico*, 457 U.S. at 870, 870–71 (quoting *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

⁹⁷ *See id.* at 871 (quoting Transcript of Oral Argument at 53, *Bd. of Educ., Island Trees Union Free Sch. Dist., No. 26 v. Pico*, 457 U.S. 853 (1982) (No. 80-2043)).

⁹⁸ *See Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’”) (quoting *Gregg v. Georgia*, 148 U.S. 153, 169 n. 15 (1976)).

⁹⁹ 484 U.S. 260, 273 (1988) (holding educators in public schools are able to censor student speech within curricular activities if those methods of censorship are “reasonably related to legitimate pedagogical concerns”).

¹⁰⁰ Schroeder, *supra* note 92, at 375. For example, the Fifth Circuit held in *Campbell v. St. Tammany Parish School Board* that there was insufficient evidence to prove improper motivation in the matter of a book removal and utilized language from *Hazelwood* despite claiming to apply *Pico*. *Id.* at 376. Additionally, and most relevant to this Article, *Case v. United School District No. 233*, a case reviewed by the Kansas District Court, aligned its exploration of ‘educational suitability’ from *Pico* with *Hazelwood*’s “legitimate pedagogical concerns” in a book removal concerning books with LGBTQ+ issues. *Id.*

¹⁰¹ *See id.* at 378; Lindsay M. Saxe, Case Comment, *Politics Versus Precision: Did Miami-Dade School Board Violate the First Amendment When It Voted to Remove ¡Vamos a Cuba! From Its District Libraries?*, 61 FLA. L. REV. 921, 931 (2009).

¹⁰² *See Pico*, 457 U.S. at 917 (Rehnquist, J., dissenting).

¹⁰³ 64 F.3d 184 (1995).

¹⁰⁴ Schroeder, *supra* note 92, at 380.

¹⁰⁵ 557 F.3d 1177 (2009).

book were the sole focus of the removal, that removal was improper.¹⁰⁶ Because of continued variance in interpretation, some scholars argue that reliance on *Pico* should be abandoned altogether, even suggesting that a book-specific test based on *Tinker v. Des Moines*¹⁰⁷ would be more beneficial in deciding these matters as they reach courts.¹⁰⁸ However, recent challenges, particularly in states that are seeing these kinds of suits, demonstrate that judges are still utilizing *Pico* to some extent.¹⁰⁹

B. The Need for Clarification in Light of Other Policies in Education

Sometimes the intent behind book challenges and removals goes beyond local school districts. Over the past two decades, there have been instances of state legislatures that have voted affirmatively for legislation that ultimately results in certain books being banned throughout the entire state's public schools.¹¹⁰ While most states are not currently banning books containing LGBTQ+ topics, when one examines other contemporary acts of state legislation, it may not be incorrect to assume that the literature could be next, or that there are silent challenges already occurring.

In Virginia, for example, new model codes for education proposed by Governor Youngkin would erode policies and protections for transgender students in Virginia public schools that had been established in 2020 by his predecessor, Governor Northam.¹¹¹ The proposed changes would, amongst other things, require school staff only to use the student's name that appears on their official record, unless provided with a note from their parents.¹¹² The proposed bill requires that:

Any person licensed as administrative or instructional personnel by the Board of Education and employed by a local school board who, in the scope of his employment, has reason to believe, as a result of direct communication from a student, . . . that such student is self-identifying as a gender that is different than his biological sex shall, as soon as practicable, contact at least one of such student's parents to ask whether such parent is aware of the student's mental state and

¹⁰⁶ See *id.* at 1202.

¹⁰⁷ 393 U.S. 503 (1969).

¹⁰⁸ See Schroeder, *supra* note 92, at 383–86.

¹⁰⁹ See, e.g., T.K. *ex rel.* C.K.-W. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 915 (E.D. Mo. 2022) (discussing *Pico*'s "mens rea" requirement and making it clear that while school districts are afforded discretion, this cannot be narrowly partisan or political in nature).

¹¹⁰ See NAT'L COUNCIL OF TCHRS. OF ENG., CENSORSHIP NOW: REVISITING *THE STUDENTS' RIGHT TO READ* 1 (2014).

¹¹¹ VA. CODE ANN. § 22.1–23.3 (2020).

¹¹² Mark Spooner, *Youngkin Administration Revamps Model Transgender Policies*, FAIRFAX SCH. MONITOR (Sept. 17, 2022), <https://fairfaxschoolsmonitor.com/youngkin-administration-revamps-model-transgender-policies/>.

whether the parent wishes to obtain or has already obtained counseling for such student.¹¹³

School districts across Virginia have seen challenges of LGBTQ+ themes in literature too.¹¹⁴ While some lawsuits have been dismissed before trial,¹¹⁵ “Virginia has been on the frontlines, with public school curricula and books serving as a major prong for Republican Glenn Youngkin’s successful run for governor.”¹¹⁶

In South Dakota, the governor signed a bill into law that bans transgender girls from competing on and with female sports teams within the state.¹¹⁷ Although other states have proposed similar legislation,¹¹⁸ South Dakota has fully committed to these policies by signing them into law. One school district in the state attempted a form of silent challenge¹¹⁹ when it nearly destroyed thirty-five newly purchased copies of *Fun Home* by Alison Bechdel,¹²⁰ amongst other literature, rather than let them be introduced to classrooms.¹²¹

The Oklahoma Senate introduced a bill that would require students to use multiple occupancy restrooms exclusively aligned with their biological sex, although granting some “reasonable” accommodations.¹²² If enacted, schools would not be

¹¹³ H.B. 2432, 2023 Leg., Reg. Sess. (Va. 2023) (emphasis omitted).

¹¹⁴ Lou Chibbaro, *Loudon County Removes LGBTQ Book from School Libraries*, WASH. BLADE (Jan. 18, 2022), <https://www.washingtonblade.com/2022/01/18/loudoun-county-removes-lgbtq-book-from-school-libraries/>.

¹¹⁵ Hillel Italie, *Judge Tosses Suit that Tried to Deem Books Obscene for Kids*, WTOP (Aug. 30, 2022), <https://wtop.com/virginia/2022/08/va-judge-tosses-suit-that-tried-to-deem-books-obscene-for-kids/>. The suit was dismissed, in part, on jurisdictional grounds, as the case was brought in state court and Virginia Law did not provide the Circuit Court Judge the authority to make a determination as to the materials’ obscenity. *Id.* However, Judge Baskerville, who oversaw the case, did write that deciding for the plaintiff would have created a prior restraint on the material and its distribution. *Id.*

¹¹⁶ *Id.*

¹¹⁷ Jo Yurcaba, *South Dakota Governor Signs 2022’s First Trans Athlete Ban Into Law*, NBC NEWS (Feb. 3, 2022, 6:09 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/south-dakota-governor-signs-2022s-first-trans-athlete-ban-law-rcna14725>; S.B. 46, 97th Leg., 739th Sess. (S.D. 2022). A similar bill has recently advanced to the Committee on Education in the Alaska State Legislature. *See* H.B. 27, 33d Leg., 1st Sess. (Alaska 2023).

¹¹⁸ *See, e.g.*, H.B. A1630, 2023 Leg., 2022 Sess. (N.J. 2023) (the “Fairness in Women’s Sport Act” was referred to Assembly Education Committee in early 2022 and utilizes *United States v. Virginia*, 518 U.S. 515, 533 (1996) to justify utilizing classifications based on sex in sports).

¹¹⁹ *See* discussion *supra* Part I.D.

¹²⁰ *Fun Home: A Family Tragicomic* documents the journey of a girl named Alison who learns to accept herself as a lesbian in college, later processing her closeted father’s life as a gay man after he commits suicide. ALISON BECHDEL, *FUN HOME: A FAMILY TRAGICOMIC* (2007).

¹²¹ *See South Dakota School District Attempts to Destroy 350 Brand New Books Rather Than Let People Read Them*, AUTHOR’S GUILD (May 9, 2022), <https://authorsguild.org/news/statement-on-south-dakota-soft-censorship-attempt/>. This specific story describes literature in relation to classrooms rather than libraries but still shows the magnitude of the issue. *See id.*

¹²² S.B. 26, 59th Leg., 1st Sess. (Okla. 2023). A “reasonable” accommodation, as provided in the proposed Bill, is “access to a single-occupancy restroom or changing room.” *Id.* § 1(c). However, similar “reasonable” accommodations by individual school districts, such as in *Whitaker v. Kenosha Unified School District*, have caused emotional and physical harm to students—restriction of water intake and “stress-related migraines, depression, and anxiety because of the policy’s impact on [the plaintiff’s] transition and what he perceived to be an impossible choice between living as a boy or using the restroom. He even began to

able to create policies to the contrary, and any school not in compliance would face a five percent reduction in state funding the following year.¹²³ This means schools could potentially face weighing the needs of some students against a portion of the school district's funding.¹²⁴ The bill, as proposed, does not mention religion as a reason or inspiration, but the Governor of Alabama, who signed a similar bill into law, justified the action with religious beliefs.¹²⁵ Not only does the proposed Oklahoma bill directly target transgender and nonbinary students, but another proposed bill from early 2022 directly targets books in the state's public schools and school libraries.¹²⁶ Even without enacted legislation permitting banned books, Oklahoma ranked fifth in the number of books it banned in 2021 out of all fifty states, enacting forty-three bans across just three school districts.¹²⁷

This is not to say that all states are introducing harmful legislation that would negatively affect LGBTQ+ students. States such as California have, conversely, introduced and passed legislation that expressly protects them.¹²⁸ The California Education Code now “prohibits discrimination, harassment, intimidation, and bullying based on the actual or perceived characteristics . . . [of] gender, gender identity, gender expression, . . . [and] sexual orientation.”¹²⁹ Additionally, California requires that all activities that are typically segregated by sex, such as sports, be available to students in a manner consistent with their gender identity.¹³⁰ It is incredibly important to celebrate these victories for LGBTQ+ students, but it is essential to consider that students often do not get to choose the state in which they

contemplate suicide.” *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1041 (7th Cir. 2017).

¹²³ Okla. S.B. 26, § 1(E)(2)–(F).

¹²⁴ *See id.*

¹²⁵ *See id.*; Caleb Turrentine, *Gov. Ivey Signs Bills Banning Medication to Transgender Youth and Transgender Bathroom Bill*, ABC 33/40 NEWS (Apr. 8, 2022), <https://abc3340.com/news/local/gov-ivey-signs-bill-banning-medication-for-transgender-youth-and-transgender-bathroom-bil-alabama-governor-kay-ivey-legislative-session-state-house-dont-say-gay-bill-trans-lgbtq-rights-parents-doctors-medical-care-gender> (quoting Governor Ivey, “I believe very strongly that if the Good Lord made you a boy, you are a boy, and if he made you a girl, you are a girl. We should especially protect our children from these radical, life-altering drugs and surgeries when they are at such a vulnerable stage in life. Instead, let us all focus on helping them to properly develop into the adults God intended them to be”).

¹²⁶ *See* Okla. S.B. 26; S.B. 1142, 58th Leg., 2d Sess. (Okla. 2022) (the Education Committee passed a version of the proposed bill that states: “No public school district, public charter school, or public school library shall maintain in its inventory or promote books that make as their primary subject the study of sex, sexual preferences, sexual activity, sexual perversion, sex-based classifications, sexual identity, or gender identity or books that are of a sexual nature that a reasonable parent or legal guardian would want to know of or approve of prior to their child being exposed to it”).

¹²⁷ Addy Bink, *Oklahoma Ranks #5 in Most Banned Books in Previous Year*, NEXSTAR (Sept. 20, 2022, 1:37 PM), <https://www.fourstateshomepage.com/news/northeast-oklahoma/hundreds-of-books-have-been-banned-this-year-which-titles-and-states-are-most-impacted/>.

¹²⁸ *See* CAL. EDUC. CODE § 234.1 (2020); CAL. EDUC. CODE § 221.5 (2015). Illinois has inscribed statutory measures against bullying. *See* 105 ILL. COMP. STAT. 5/27–23.7 (2022). New Jersey has enacted measures that target bullying and harassment concerning gender identity and expression. *See* N.J. STAT. ANN. § 18A:37–14 (West 2010).

¹²⁹ CAL. EDUC. CODE § 234.1 (2020).

¹³⁰ *See* CAL. EDUC. CODE § 221.5 (2015).

reside—even if their parents/guardians are supportive in an unsupportive location, the family may not be able to move—and are therefore unable to choose which public school they attend.¹³¹ A student’s ability to equally participate in activities or have a safe harbor from harassment should be a federal matter¹³² to ensure that *all* of America’s youth have the same comfort and opportunities when attending their educational institutions.

C. *The Fading Nature of a Secular Public Education and its Judicial Implications*

Given the nature of general challenges facing LGBTQ+ students and the challenges directly facing representative literature, one may point toward the plurality opinion in *Pico* and its stance that books should not be removed based on their ideas if those ideas are challenged on the basis of religious ideals and other “matters of opinion.”¹³³ Similarly, the Eleventh Circuit deems a removal improper when the sole focus of discontent with the literature is its ideas.¹³⁴ This interpretation presents an optimistic outlook for literature challenged based on religion in public schools only to some extent. Just as book challenges are on the rise across the country, so is a more lenient judicial understanding of the Free Exercise and Establishment Clauses of the First Amendment,¹³⁵ potentially endangering these secular interpretations of how a book challenge should be addressed.

For example, the Kansas District Court in the Tenth Circuit ruled in favor of religious liberties when up against school policies intended to provide students with privacy in *Richard v. USD 475 Geary County*.¹³⁶ The plaintiff, a teacher, argued that her withholding of any information, such as preferred names and pronouns, from parents when communicating with them under the school district’s Communication with Parents Policy violated her religious beliefs due to how her

¹³¹ Cf. Ann Owens, *Income Segregation between School Districts and Inequality in Students’ Achievement*, 91 SOCIO. OF EDUC. 1, 2–3 (2018) (income segregation between schools and school districts, which has risen by 15% since 1990, has a significant impact on the ability of children to achieve academically); Judy Molland, *Educational Success Is Largely Determined By Where You Live*, MOMSRISING TOGETHER: CHILDHOOD & EARLY EDUC. (June 22, 2022), <https://www.momsrising.org/blog/educational-success-is-largely-determined-by-where-you-live> (discussing that the children who live in wealthy school districts typically have a higher rate of educational successes and opportunities).

¹³² See discussion *infra* Part III.A.

¹³³ See Bd. of Educ., *Island Trees Free Union Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

¹³⁴ See generally *ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177 (2009).

¹³⁵ See generally *Richard v. USD 475 Geary Cnty.*, 2022 U.S. Dist. LEXIS 83742 (D. Kan. 2022) (holding in favor of a teacher’s religious beliefs rather than upholding a school policy); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (holding that the football coach’s prayers after games were permissible as private speech, that the school district burdened the coach’s rights under the Free Exercise Clause, and that this prayer did not constitute coercion of the players); *Carson ex rel. O. C. v. Makin*, 142 S. Ct. 1987 (2022) (holding that Maine’s voucher program which was conditioned on providing a “nonsectarian” education violated the Free Exercise Clause).

¹³⁶ 2022 U.S. Dist. LEXIS 83742 (D. Kan. 2022).

religion views dishonesty.¹³⁷ While the various policies enacted by the district at issue gave great leeway to those with adverse religious views, the court granted a preliminary injunction in halting the district's Communication with Parents Policy based on the plaintiff's free exercise rights under the First Amendment.¹³⁸ The court reasoned that the plaintiff "would face the Hobbesian choice of complying with the district's policy and violating her religious beliefs, or abiding by her religious beliefs and facing discipline."¹³⁹

Additionally, the Supreme Court determined that when a football coach at a public school was asked not to pray after games by the district, the district burdened his Free Exercise rights in *Kennedy v. Bremerton School District*.¹⁴⁰ The court differentiated this decision from precedent by establishing that unlike other determinations involving prayers at public school football games, the students who joined in the coach's post-game prayers, in this case, were not coerced in any way and the prayers were not "broadcast or recited to a captive audience."¹⁴¹ However, the dissent identifies numerous points that the majority seemingly overlooked, such as the inherent and unique coercion that students face and the coach's history of inviting others to join in his prayers, ultimately stating that "[t]his decision does a disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state."¹⁴²

These decisions render it difficult to believe that if a book challenge based on religion were to reach the Supreme Court today it would be struck down. While it should certainly be considered that all families should be able to have access to public education, for families that have deep religious viewpoints that they feel conflict with certain ideas in public schools, such as those contained in challenged books, one should also consider the growing school choice movement that may allow children to attend religious institutions for free in many states.¹⁴³ While many supporters of the separation of church and state are frustrated with the Supreme Court's ruling in *Carson ex rel C. O. v. Makin*, which held that states with voucher

¹³⁷ *See id.* at *1–6.

¹³⁸ *See id.* at *9–10.

¹³⁹ *Id.* at *13. Further, the court found the argument that the district's option of never referring to students by the name or pronoun inadequate when held against the plaintiff's religiously held belief toward concealment, as the plaintiff also believes "parents have a fundamental right to control the upbringing of their children," and the plaintiff could still accidentally make a remark and face discipline. *See id.* at *4, *13–14.

¹⁴⁰ 142 S. Ct. at 2433.

¹⁴¹ Compare *Kennedy*, 142 S. Ct. at 2431–32 (finding no requirement to participate), with *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 294, 311–12 (2000) (finding that a publicly broadcast prayer prior to football games violated the Establishment Clause where attendance was required for at least some portion of the student body, such as cheerleaders).

¹⁴² *Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting).

¹⁴³ *See, e.g., Nirvi Shah, US School Voucher Programs Have Caught On – But are they Funneling Public Dollars in Private Schools?*, THE GUARDIAN (Sept. 7, 2022, 5:00 AM), <https://www.theguardian.com/education/2022/sep/07/us-school-vouchers-covid-private-schools-parents-new-hampshire>.

programs must be willing to extend voucher programs to religious schools,¹⁴⁴ one frustrated with religious challenges in public schools could theoretically also support the ability of those with sincerely held religious beliefs be able to attend a school that upholds their values, rather than potentially imposing those religious views on a supposedly secular institution amongst children who may not share those same beliefs.

III. CONSIDERATIONS FOR EFFICIENTLY AND QUICKLY CODIFYING MORE EXTENSIVE PROTECTIONS FOR LGBTQ+ STUDENTS AND LITERATURE

A. A Current Lack of Federal Protections for Students

Legal standards concerning books remain unclear, but there is hope for other relevant legal protections for LGBTQ+ students that would impact their ability to thrive at school. This being said, the proposed legislation that aims to create a safer school environment and curb discrimination remains stalled.¹⁴⁵ For example, the Safe Schools Improvement Act was proposed in early July of 2021 but has not proceeded through the House in over a year, having been referred to the House Committee on Education and Labor.¹⁴⁶ The Safe Schools Improvement Act would require all fifty states “to direct their local educational agencies (LEAs) to establish policies that prevent and prohibit bullying and harassment of elementary and secondary school students. In particular, these policies must prohibit bullying and harassment based on race, color, national origin, sex, sexual orientation, gender identity, disability, or religion.”¹⁴⁷ Additionally, LEAs would be required to advise all individuals within their schools of prohibited conduct on an annual basis, provide an avenue for parents and students to submit grievances, and provide public information on how frequently prohibited conduct occurred within individual schools and districts.¹⁴⁸ This, alongside the Equality Act, could provide greater protection for LGBTQ+ students.

The Equality Act has witnessed more movement through the legislative process than the Safe Schools Improvement Act, having been introduced in the

¹⁴⁴ Carson *ex rel.* O. C. v. Makin, 142 S. Ct. 1987 (2022). As an aside, the dissents in this opinion are painstakingly clear about the increasingly lenient application of the Establishment Clause and Free Exercise Clause in recent years, with Justice Sotomayor writing “[w]hat a difference five years makes. In 2017, I feared that the Court was ‘lead[ing] us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.’ . . . Today, the Court leads us to a place where separation of church and state becomes a constitutional violation.” *Id.* at 2014 (2022) (Sotomayor, J., dissenting). Even more relevant, here, is the dissents’ recollection that as the Supreme “Court has long recognized, the Establishment clause requires that public education be secular and neutral as to religion.” *Id.* If the majority is already eroding this standard of separation in this fashion, it is likely that books opposed on religious grounds stand little chance.

¹⁴⁵ See Safe Schools Improvement Act, H.R. 4332, 117th Cong. (2021); Equality Act, H.R. 5, 117th Cong. (2021).

¹⁴⁶ Safe Schools Improvement Act, H.R. 4332, 117th Cong. (2021).

¹⁴⁷ *Id.*

¹⁴⁸ See *id.*

House of Representatives and passed a week later in February 2021.¹⁴⁹ However, it has not seen any movement in the Senate since mid-March of 2021.¹⁵⁰ The Equality Act would provide an explicit prohibition towards “discrimination based on sex, sexual orientation, and gender identity in areas including . . . education.”¹⁵¹ If this bill were to become law, an individual would be guaranteed access to a shared facility, such as a locker room or restroom, that aligns with their gender identity, and the Department of Justice would be able to intervene in federal courts where there are equal protection actions concerning sexual orientation or gender identity.¹⁵² This would aid students facing issues with a lack of access to gender-affirming spaces tremendously, as numerous students have encountered what may feel like lengthy litigation proceedings on this account alone.¹⁵³

B. Why LGBTQ+ Students and Their Books Need Further Protection

The importance of expanding federal protections for LGBTQ+ students and books that represent them in the wake of harmful legislation comes in part because LGBTQ+ youth face a disproportionate rate of victimization, suicide ideation/attempts, and more mental health challenges than their heterosexual and cisgender peers.¹⁵⁴ This is critical, as bullying dramatically affects a child’s ability to participate in their education actively and meaningfully:

[t]he National Institute of Child Health reports that . . . [m]ore than two-thirds of students report general bullying as an ongoing problem in their school, about 1 in 10 students drops out or changes schools because of repeated bullying, and more than 1 in 10 report school absences because of fear of bullying.¹⁵⁵

These rates of bullying increase when applied to students who self-identify as part of the LGBTQ+ community.¹⁵⁶

From September to December of 2021, The Trevor Project¹⁵⁷ conducted a national survey to measure the mental health trends of LGBTQ+ youth and

¹⁴⁹ See Equality Act, H.R. 5, 117th Cong. (2021).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See, e.g., *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. Ct. App. 2020) (time elapsed from filing of complaint to remand on appeal was over a year).

¹⁵⁴ See Joseph P. Robinson & Dorothy L. Espelage, *Inequities in Educational and Psychological Outcomes Between LGBTQ and Straight Students in Middle and High School*, 40 *EDUC. RESEARCHER* 315, 320–24 (2011).

¹⁵⁵ See SUSAN M. SHAW & JANET LEE, *GENDERED VOICES FEMINIST VISIONS*, 535, (Oxford Univ. Press 7th ed.2020).

¹⁵⁶ See Robinson & Espelage, *supra* note 154, at 320–21.

¹⁵⁷ The Trevor Project is an organization that hosts a crisis line for LGBTQ+ youth, engages in advocacy and research, and works with public education institutions to help individuals and educators understand the needs of LGBTQ+ youth. *Explore Trevor*, TREVOR PROJECT, <https://www.thetrevorproject.org/explore/> (last

successfully collected the experiences of 34,000 individuals aged thirteen to twenty-four.¹⁵⁸ The survey results indicate that LGBTQ+ youth face high levels of physical harm and/or threats.¹⁵⁹ For LGBTQ+ youth who attempted suicide in the year leading up to the survey, the rates were more than double for youth who received or experienced physical threats and/or harm than those youth who did not have those experiences.¹⁶⁰ Additionally, during the height of the COVID-19 Pandemic, the Pew Research Center found that LGB students faced more than double the number of mental health stressors than their heterosexual classmates, which courts are noticing.¹⁶¹

These concerns were part of the focus of hearings before the Subcommittee on Civil Rights and Civil Liberties of the Committee on Oversight and Reform during the 117th Congress.¹⁶² In the second portion of this session, a high school teacher from Kentucky testified that he had received many text messages from suicidal students who identified as LGBTQ+ saying their goodbyes, and that “[f]orty-five percent of LGBTQ youth seriously considered suicide this year. We chip away at their dignity and spaces to exist. The systems meant to protect them will not even acknowledge them.”¹⁶³ A parent from Florida also testified, discussing how the new legislation in Florida may create a rise in the bullying of her non-binary child and a loss of support staff at her child’s public school.¹⁶⁴

visited Jan. 17, 2023). Through its public education initiatives, the Trevor Project has provided various trainings to educators, created over 20,000 safe spaces for LGBTQ+ youth across the United States, and is the first organization of this nature in the nation to form an official partnership with the New York Department of Education. *Public Education*, TREVOR PROJECT, <https://www.thetrevorproject.org/public-education/> (last visited Jan. 17, 2023).

¹⁵⁸ *2022 National Youth Survey on LGBTQ Mental Health*, *supra* note 74, at 3.

¹⁵⁹ *Id.* at 15 (stating that “36% of LGBTQ youth reported that they have been physically threatened or harmed due to either their sexual orientation or gender identity.” This number drops to 31% when only considering sexual orientation but jumps to 37% when concerning transgender and nonbinary youth being harmed due to gender identity alone).

¹⁶⁰ *See id.* at 16 (29% of LGBTQ youth who attempted suicide in the year leading up to the survey experienced physical threats/harm, compared to 10% who did not).

¹⁶¹ Katherine Schaeffer, *In CDC Survey, 37% of U.S. High School Students Report Regular Mental Health Struggles During COVID-19*, PEW RSCH. CTR. (Apr. 25, 2022), <https://www.pewresearch.org/fact-tank/2022/04/25/in-cdc-survey-37-of-u-s-high-school-students-report-regular-mental-health-struggles-during-covid-19/> (reporting that 76% of LGB students felt sad/hopeless for at least one consecutive two-week period as compared to 37% of heterosexual students reporting this same feeling); *see also* Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 594 (4th Cir. 2020) (“[Transgender individuals] are up to three times more likely to report or be diagnosed with a mental health disorder as the general population”).

¹⁶² *See generally* *Free Speech Under Attack: Book Bans and Academic Censorship: Hearing Before the Subcomm. on Civil Rights and Civil Liberties of the Comm. on Oversight and Reform*, 117th Cong. (2022); *Free Speech Under Attack (Part II): Curriculum Sabotage and Classroom Censorship: Hearing Before the Subcomm. on Civil Rights and Civil Liberties of the Comm. on Oversight and Reform*, 117th Cong. (2022).

¹⁶³ *Free Speech Under Attack (Part II)*, *supra* note 162, at 18–19.

¹⁶⁴ *See id.* at 23 (referencing the most recent Trevor Project survey which stated that 1 in 5 transgender or non-binary students have attempted suicide last year and demonstrating concern that the recent Florida legislation might create a rise in bullying of her non-binary child and that it may also mean a loss of supportive staff at school); *2022 National Youth Survey on LGBTQ Mental Health*, *supra* note 74.

When schools and legislation are supportive of their LGBTQ+ students, they can provide a support system that students' homes sometimes do not.¹⁶⁵ When students felt that their school was affirming and supportive, they reported lower rates of attempted suicide.¹⁶⁶ This is an important consideration, as “[f]ewer than 1 in 3 transgender and nonbinary youth found their home to be gender-affirming.”¹⁶⁷ While general education is the purpose of public schools, one should find it equally important that a child is getting the support they need to be happy and comfortable. Without these things, students may not be focusing on their studies or reaching their full academic potential.¹⁶⁸

Some could argue that losing access to books is not truly an issue because courts continue to uphold other protections for students such as upholding a public school district's policy that enables transgender students to use school facilities that align with their gender identities under the Equal Protection Clause and Title IX.¹⁶⁹ This is particularly relevant because, in celebration of fifty years since its enactment, the U.S. Department of Education released proposed changes to Title IX and opened a forum for public comment in June 2022.¹⁷⁰ The U.S. Department of Education cited the Supreme Court's 2020 ruling in *Bostock v. Clayton County* as a metric in the creation of these changes; discrimination based on sexual orientation and gender inherently discriminates against an individual based on sex.¹⁷¹ In sum, the proposed changes would further allow students who identify as part of the LGBTQ+ community to be themselves and provide refuge from retribution in the event they bring grievances under Title IX.¹⁷²

¹⁶⁵ See 2022 National Youth Survey on LGBTQ Mental Health, *supra* note 74, at 20. When asked whether home or school was an LGBTQ-affirming space, 37% identified home as LGBTQ-affirming, while 55% identified school as such. Similarly, 32% of transgender and non-binary youth identified home as gender-affirming, which is less than the 51% who identified school as a gender-affirming space. *Id.*

¹⁶⁶ See *id.* at 4, 21.

¹⁶⁷ *Id.* at 4.

¹⁶⁸ Cf. F. Wagner, RG Wagner, U. Kolanisi, L.P. Mukuapane, M. Masango, & F.X. Gomez-Olive, *The Relationship Between Depression Symptoms and Academic Performance Among First-Year Undergraduate Students at a South African University: A Cross-Sectional Study*, 22 BMC PUB. HEALTH 2067 (2022) (discussing how depression and other mental illnesses negatively impact students' ability to learn in higher education).

¹⁶⁹ See generally *Parents for Priv. v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (holding that the Fourteenth Amendment does not provide students in public high schools with privacy rights that would allow them to refuse to share school facilities such as restrooms with transgender students, and there were alternatives within the school district's policy for those unwilling to share these spaces); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018) (holding that the school district's policy which allowed transgender students to use facilities consistent with their gender identities did not violate the Title IX rights of cisgender students as the policy did not discriminate based on sex and was applied to all students equally).

¹⁷⁰ *The U.S. Department of Education Released Proposed Changes to Title IX Regulations, Invites Public Comment*, U.S. DEP'T OF EDUC. (June 23, 2022), <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment> (hereinafter "*Proposed Changes to Title IX Regulation*").

¹⁷¹ See *id.*; see also, 140 S. Ct. 1731 (2020).

¹⁷² See *Proposed Changes to Title IX Regulations*, *supra* note 170.

While this seems like progress, as we have seen from the examples of legislation in Virginia, South Dakota, and Oklahoma, this is not as straightforward as those celebrating these proposed regulations might envision because there seems to be a growing barrier for federally binding action.¹⁷³ In Ohio, for example, the State Board of Education has proposed that it will not follow those newly proposed Title IX regulations if they are adopted, and a federal judge has temporarily blocked the Department of Education's guidance to explicitly protect transgender students via a preliminary injunction in twenty states.¹⁷⁴ This makes the protection of literature critically important.

IV. POTENTIAL SOLUTIONS & MITIGATING HARM

As discussed in Part II, the lack of a clear legal standard and an increasingly relaxed Supreme Court concerning religion in public education may spell disappointment for anyone who hopes a case concerning book challenges will reach the Court soon.¹⁷⁵ This leaves the solution in the hands of the legislature and federal agencies such as the U.S. Department of Education. Although these options have their drawbacks, they may have a higher chance of being successful in the current judicial climate. This Part will seek to address a potential solution to ensure that LGBTQ+ students have access to literature that represents them in public school libraries by first describing the drawbacks, then considering international covenants, and lastly, proposing a path forward.

A. *The Lack of Power of the Federal Government in Public Education*

Historically the federal government has had a limited role in the nation's public education. Even states hold somewhat of a limited role, as education is mostly led by local districts.¹⁷⁶ The Elementary and Secondary Education Act of

¹⁷³ See *supra* notes 110–27 and accompanying text.

¹⁷⁴ See David Rees & Kevin Freeman, *Top Ohio School Board Considers Resolution Blocking LGBTQ+ Protections*, FOX 8 NEWS (Sept. 20, 2022, 10:25 PM), <https://fox8.com/news/top-ohio-school-board-considers-resolution-blocking-lgbtq-protections/>; *Tennessee v. Dep't of Educ.*, No. 3:21-cv-308, 2022 U.S. DIST. LEXIS 125684, at *1 (E.D. Tenn. 2022); see also Bianca Quilantan, *Federal Judge Blocks Education Department's Title IX Guidance That Protects Transgender Students*, POLITICO (July 16, 2022, 12:28 PM), <https://www.politico.com/news/2022/07/16/education-departments-title-ix-guidance-transgender-students-00046209>.

¹⁷⁵ See *Free Speech Under Attack (Part II)*, *supra* note 162. Those heavily invested in whether this issue will soon reach the Supreme Court again are currently keeping their eyes on a recent lawsuit jointly filed by PEN America, multiple authors, and Penguin Random House LLC in response to book bans imposed throughout a Florida School District, who, along with the School Board, has not followed its existing review process and disproportionately targeted books about or written by LGBTQ+ individuals. See generally Compl., *PEN America v. Escambia Cty. Sch. Dist.*, (2023) (No. 3:23-cv-10385).

¹⁷⁶ See 20 U.S.C. § 3403(a) (The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States.); see also Brandon Pelsue, *When it Comes to Education, the Federal Government is in Charge of . . . Um, What?*,

1965¹⁷⁷ transformed this to some extent, by “offer[ing] states funding for education programs on a conditional basis.”¹⁷⁸ In 1979, President Carter helped establish the U.S. Department of Education which, moving forward, coordinated the growing amount of federal law applicable to education.¹⁷⁹ When the No Child Left Behind (NCLB) Act¹⁸⁰ was enacted in the early 2000s, federal oversight of education peaked, with one Secretary of Education attempting to utilize it to further federalize education via waiver after the NCLB expired in 2007.¹⁸¹ Certain aspects of the NCLB were kept when the Elementary and Secondary Education Act was reauthorized in 2015 as the Every Student Succeeds Act,¹⁸² and the federal government’s involvement in public education was at a high.¹⁸³ However, since the Trump Administration, the federal government’s involvement in education has decreased, with some in Congress moving to abolish the U.S. Department of Education as a whole.¹⁸⁴ This is not the first time that the Department has faced such scrutiny; after Andrew Johnson created a Department of Education in 1867, it was demoted to the Office of Education in 1968 “due to the concern that the Department would exercise too much control over local schools.”¹⁸⁵ This makes taking any federal action difficult, but it still seems to be the most promising step.

B. International Perspectives for Potential Remedies

One avenue to explore when considering the implementation of protections for and needs of students is international covenants containing aspects of education that the United States has agreed to follow.¹⁸⁶ One example is the United

HARVARD ED. MAG. <https://www.gse.harvard.edu/news/ed/17/08/when-it-comes-education-federal-government-charge-um-what> (last visited Mar. 14, 2023).

¹⁷⁷ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (prior to 2015 reauthorization).

¹⁷⁸ Pelsue, *supra* note 176.

¹⁷⁹ *See id.*; *see also An Overview of the U.S. Department of Education*, U.S. DEP’T OF EDUC. (Sept. 2010), <https://www2.ed.gov/about/overview/focus/what.html>.

¹⁸⁰ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

¹⁸¹ *See Pelsue, supra* note 176; *see also* Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. 607, 611 (2015).

¹⁸² Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

¹⁸³ *See Pelsue, supra* note 176.

¹⁸⁴ *See id.*; Thomas Massie (@RepThomasMassie), TWITTER (Feb. 14, 2023, 7:54 AM), <https://twitter.com/RepThomasMassie/status/1625478675142508549> (the tweet reads: “I have introduced a bill to terminate the Department of Education. There is no Constitutional authority for this federal bureaucracy to exist.” The congressman attached a photo of his proposed bill, H.R. 899—To terminate the Department of Education); H.R. 899, 118th Cong. (1st Sess. 2023) (the proposed bill is one sentence: “To terminate the Department of Education”). For what it is worth, Congressman Massie also introduced an identical bill a year prior, and it did not make it past being referred to the House Committee on Education and Labor. H.R. 899, 117th Cong. (1st Sess. 2022).

¹⁸⁵ *An Overview of the U.S. Department of Education, supra* note 179.

¹⁸⁶ *See What is the Universal Declaration of Human Rights?*, AUSTRALIAN HUM. RTS. COMM’N, <https://humanrights.gov.au/our-work/what-universal-declaration-human->

adhere to the tolerance and understanding of those traits.¹⁹³ This is initially confusing, and, while frustrating to those looking for an international avenue to promote understanding within the infrastructure of U.S. public education, it is necessary to understand that the UDHR does not only apply to secular states.¹⁹⁴

Some scholars have proposed introducing an international legal framework that would address the right to read, as one does not currently exist.¹⁹⁵ There is no human rights treaty or any form of documentation that addresses an individual's "right to read," although existing frameworks and rights may be applied to this right, such as the right to information and freedom of expression.¹⁹⁶ A right that one might perceive as useful here would be the right to culture, however, in examining the issue of literature containing LGBTQ+ themes, one must also acknowledge that the right to culture does not directly protect the rights of those individuals.¹⁹⁷ While the international framework does not exist, that does not mean that the federal government should not consider this in addressing a rise in book challenges.

C. Potential Paths Forward to Maintain Access to Literature

The best path forward to resolving any uncertainty caused by the unclear judicial standards and protecting children's access to representative literature in public education is through the Department of Education.

While the inherent design of the U.S. Department of Education does not permit federal participation in education to supplant that of state and local control, especially when it comes to the selection of materials that may be available in school libraries, the Department has found a way to increasingly play a role in public schools throughout the United States—funding.¹⁹⁸ The Department has influenced education through conditional federal funding through successful regulations such as The Family and Educational Rights and Privacy Act of 1974¹⁹⁹

¹⁹³ See *Universal Declaration of Human Rights*, *supra* note 187; Sharon Yecies, *Sexual Orientation, Discrimination, and the Universal Declaration of Human Rights*, 11 CHI. J. INT'L L. 789, 803 (2011).

¹⁹⁴ See Yecies, *supra* note 193, at 803–05.

¹⁹⁵ See generally McKenna Deutsch, Note, *Burned, Banned, and Censored: The Need for an International Framework that Addresses the Right to Read*, 39 WIS. INT'L L. J. 329 (2022) (Deutsch argues that the United Nations should declare the right to read a fundamental right because existing treaties and the work of non-governmental actors do not sufficiently address and protect this right).

¹⁹⁶ See *id.* at 342–43; Lea Shaver, *The Right to Read*, 54 COLUM. J. TRANSNAT'L L. 1, 5 (2015); see also Maeve McDonagh, *The Right to Information in International Human Rights Law*, 13 HUM. RTS. L. REV. 25, 26 (2013).

¹⁹⁷ See Deutsch, *supra* note 195, at 349; see also David Langlet, *Unfolding from Nonexistence: The Dynamic but Contested Evolution of LGBT-Human Rights*, 55 SCANDINAVIAN STUD. L. 339, 344 (2010).

¹⁹⁸ 1 EDUCATION LAW § 3.1(3) (2022).

¹⁹⁹ See generally Family Educational and Privacy Rights Act, 20 U.S.C. § 1232g (2013).

and the Individuals with Disabilities Education Act.²⁰⁰ Additionally, reports demonstrate that state laws are contributing to the increase in book bans, meaning that a federal avenue is necessary.²⁰¹ In all likelihood, then, the best and most feasible solution for addressing the rise in book removals across the United States would be for the Department of Education to implement review procedures and safeguards that correspond with public school funding.

In light of this, the Department of Education should establish a regulation that either provides additional funding to the nation's public schools or makes the receipt of some federal funding conditional on implementing a new procedural review process for library books. Federal education code states:

No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.²⁰²

However, a new regulation by the Department need not “exercise any direction, supervision, or control . . . over the selection or content of library resources.”²⁰³ By reinforcing principles readily upheld by the courts and explicitly written in the Constitution, the Department does not have to take control, it only needs to ensure state and local education agencies adhere to a skeleton of a procedure.

Without overstepping established boundaries, the Department of Education could create a regulation that expands upon and formalizes *Pico*. This could be a part, or an addition to, President Biden's Education Department coordinator, a new position the President intends to tackle the banned book epidemic in schools.²⁰⁴ As mentioned in Part II.A, one of the largest roadblocks courts have faced in

²⁰⁰ See 1 EDUCATION LAW § 3.1(3) (2022) (discussing how these regulations have successfully implemented new standards or services for students by making additional funding conditional on implementing these regulations or by making continued funding contingent on their implementation); see generally Individuals with Disabilities Education Act, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended in scattered sections of 20 U.S.C.).

²⁰¹ See Eesha Pendharkar, *State Laws Are Behind Many Book Bans, Even Indirectly, Report Finds*, EDUC. WEEK (May 19, 2023), <https://www.edweek.org/teaching-learning/state-laws-are-behind-many-book-bans-even-indirectly-report-finds/2023/05>. The report, compiled by PEN America, “found that 31 percent of book bans in the last six months of 2022 were connected to legislation passed in three states: Florida, Utah, and Missouri.” *Id.*

²⁰² 20 U.S.C. § 3403(b).

²⁰³ *Id.*

²⁰⁴ Bo Erickson, *Biden Administration to Appoint Anti-book Ban Coordinator as Part of New LGBTQ Protections*, CBS NEWS (June 8, 2023), <https://www.cbsnews.com/news/biden-anti-book-ban-coordinator-new-lgbtq-protections/>.

considering the removal of books is the lack of clarity of “educational suitability.”²⁰⁵ The Department should build upon this by utilizing guidelines such as Scholastic’s Age Groups, as Scholastic is well known for its school book fairs and is America’s largest publisher for children’s books.²⁰⁶ Scholastic’s Age Groups are four categories based on what is developmentally appropriate and an appropriate reading level for children.²⁰⁷ This regulation should also require that districts either adopt the American Library Association’s Library Bill of Rights²⁰⁸ or create a district-specific policy that is similar in nature.²⁰⁹ The UDHR can be utilized here, too, as a portion of the requirement can be derived from Article 26, specifically the notion that “[e]ducation shall be directed to the full development of the human personality.”²¹⁰

After establishing firmer guidelines, not absolutes, about what is suitable, the Department can keep with the well-established role of parental choice in education²¹¹ by creating a uniform way that parents can request books be reviewed, and strongly encouraging that school districts require that parents affirm that they

²⁰⁵ See *Free Speech Under Attack (Part II)*, *supra* note 162, Part A and accompanying notes; Bd. of Educ., Island Trees Union Free Sch. Dist., No. 26 v. Pico, 457 U.S. 853, 871 (1982) (quoting Transcript of Oral Argument at 53, Bd. of Educ., Island Trees Union Free Sch. Dist., No. 26 v. Pico, 457 U.S. 853 (1982) (No. 80-2043)).

²⁰⁶ *About Our Age Groups*, SCHOLASTIC (Feb. 6, 2013), <https://www.scholastic.com/parents/family-life/parent-child/about-our-age-groups.html>; *Why Scholastic Book Fairs?*, SCHOLASTIC <https://bookfairs.scholastic.com/content/fairs/why-scholastic.html> (last visited Mar. 17, 2023).

²⁰⁷ See *id.*

²⁰⁸ Pertinent to the banning of LGBTQ+ themes and books is the first tenet: “Materials should not be excluded because of the origin, background, or views of those contributing to their creation.” See American Library Association, *Library Bill of Rights*, AM. LIBR. ASS’N., <https://www.ala.org/advocacy/intfreedom/librarybill>, (last updated Jan. 29, 2019). While this is terrific news, as discussed throughout this Article, children most likely cannot dictate in which state their family resides, and some families do not have the resources or abilities to move to states enacting similar legislation.

²⁰⁹ At the time this Article was written, two states had proposed state regulations similar in nature in that public school libraries must adopt the Library Bill of Rights or see a loss of funding: Illinois and New Jersey. See Shia Kapos, *Illinois Set to Become First State to End Book Bans*, POLITICO (May 3, 2023, 4:12 PM), <https://www.politico.com/news/2023/05/03/illinois-to-become-first-state-to-prohibit-book-bans-00095151>; Gary Price, *New Jersey: Libraries and Schools Would be Prohibited From Banning Books or Lose State Funding Under Legislation Introduced Today*, LIBR. J. (May 22, 2023), <https://www.infodocket.com/2023/05/22/new-jersey-libraries-and-schools-in-new-jersey-would-be-prohibited-from-banning-books-or-lose-state-funding-under-legislation-introduced-today/>. Illinois officially became the first state to ban book bans in June 2023 when Governor J.B. Pritzker signed the bill into law. Orlando Mayorquin, *To Fight Book Bans, Illinois Passes a Ban on Book Bans*, N.Y. TIMES (June 13, 2023), <https://www.nytimes.com/2023/06/13/us/illinois-book-bans-schools-public-libraries.html#:~:text=A%20Ban%20on%20Book%20Bans%3A%20Illinois%20will%20prohibit%20book%20bans,the%20first%20of%20its%20kind>. The bill directly states: “It is further declared to be the policy of the State to encourage and protect the freedom of libraries and library systems to acquire materials without external limitation and to be protected against attempts to ban, remove, or otherwise restrict access to books or materials.” H.B. 2789, 103d Gen. Assemb. (Ill. 2023).

²¹⁰ See *Universal Declaration of Human Rights*, *supra* note 187, at Article 26 ¶ 2.

²¹¹ See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (establishing parents have a right to direct the education of their children).

are challenging only books that they have read before submitting a challenge.²¹² Additionally, the Department should also recommend that the procedures limit the number of books that may be challenged by one parent at a time; the more books that are challenged at a time, the less time can be dedicated to seriously considering the qualities and merits of a book. This is a necessary recommendation considering the ALA Office of Intellectual Freedom's statistics that indicate that of the challenged books in 2022, "90% were part of attempts to censor multiple titles. Of the books challenged, 40% were in cases involving 100 or more books."²¹³ As Jodi Picoult states in a TikTok concerning the removal of her literature from Florida schools, "[t]here is absolutely nothing wrong with a parent deciding a certain book is not right for [their] child. There is a colossal problem with a parent deciding that therefore, no child should be allowed to read that book."²¹⁴

The next portion of the regulation should establish that school boards create a review panel, which should, at a minimum, contain the school district's librarians, the superintendent, and several parents and teachers, the number of which could be dependent on the size of the district. While this panel reviews challenges, the regulation should require that challenged books remain on select library shelves so that parents unopposed to the book can grant permission to their children to read them until they are either returned to general shelves or officially removed by the panel. This panel should be encouraged by the regulation to have an appeal process.

The last aspect, and arguably most important, is that the school districts should be required to file a report consisting of the number of titles removed, if any, the titles, and general reasoning for their removal at the conclusion of each school year. This does not permit the Department any control over the school libraries themselves and ensures that students are afforded a more thorough review of the literature. Moreover, this also allows the Department to ensure that school districts are not burdening their students' First Amendment rights, as the Court in *Pico* emphasized that this is an important factor.²¹⁵ If, for example, the Department discovered that a district repeatedly violated students' First Amendment rights and removed books on behalf of a motive other than educational suitability (i.e., religious values or politics),²¹⁶ the regulation could permit a loss of federal funding if the book is not discussed again by the panel.

²¹² This recommendation would be in school districts' best interest because when parents are able to challenge books without reading them, they can overwhelmingly challenge an abundance of literature at one time, often resulting in "chaos as principals do not have the time to do their job and read all that material." PEN America (@penamerica), *supra* note 47.

²¹³ Record Number of Demands, *supra* note 48.

²¹⁴ PEN America (@penamerica), *supra* note 47.

²¹⁵ *See supra* note 88 and accompanying text; Bd. of Educ., Island Trees Free Union Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982).

²¹⁶ This is an important consideration because the influx of challenges in 2022 displayed clear motives. The director of the ALA Office of Intellectual Freedom "said in an interview [on March 23, 2023] ' . . . We're seeing a campaign by politically partisan groups to remove vast swaths of books that don't meet their agenda, whether that's a political or religious or moral agenda.'" Alexandra Alter & Elizabeth A. Harris, *Attempts to Ban Books Doubles in 2022*, N.Y. TIMES (March 23, 2023), <https://www.nytimes.com/2023/03/23/books/book-ban-2022.html>.

This regulation is neutral in that it allows students from various walks of life more of an opportunity for representative literature to remain on school library shelves. It does not take away the important role that communities have developed in their school districts. Rather, it ensures that these two interests are balanced and can be checked if needed.

CONCLUSION

The path forward seems daunting in the absence of a clear legal test for book challenges in public school libraries and in light of the growing religious movement in the public sphere. While courts should work to establish a more uniform test to address challenged literature, the current judicial climate does not indicate that this would be the best route forward, especially considering the concurrent rise in other anti-LGBTQ+ legislation affecting school children. Given the data that demonstrates the saddening state of mental health for LGBTQ+ youth, it could be detrimental to wait for another book challenge to reach the Supreme Court, where it is likely a religious challenge might be deemed acceptable.

Even with a historically limited role in the nation's education, the federal government may be able to protect students' well-being and maintain a secular public education by taking cues from international treaties, signed by the United States, and by amending proposed legislation or establishing a viewpoint and content-neutral federal review procedure for challenged literature. The Department of Education has a large impact on how children can participate and learn through their education, and it is time they use their impact to protect a secular education and a child's ability to read books that are representative of them and those they may interact with throughout their lives.