

No. 04-10998

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DANIEL CHIRAS, ET AL.

Plaintiffs-Appellants,

v.

GERALDINE MILLER, ET AL.

Defendants-Appellees.

**Appeal from the United States District Court
for the Northern District of Texas, Dallas Division**

**BRIEF FOR AMERICAN BOOKSELLERS FOUNDATION FOR FREE
EXPRESSION, FREEDOM TO READ FOUNDATION, AND NATIONAL
COALITION AGAINST CENSORSHIP AS AMICI CURIAE FOR PLAINTIFFS-
APPELLANTS IN SUPPORT OF REVERSAL**

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rules 28.2.1 and 29.2 of the Rules of the United States Court of Appeals for the Fifth Circuit, the undersigned counsel of record certifies that amici curiae the American Booksellers Foundation for Free Expression, Freedom to Read Foundation, and National Coalition Against Censorship are not financially interested in the outcome of the

above-captioned litigation.

Respectfully submitted,

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STATEMENT CONCERNING ORAL ARGUMENT

Amici curiae concur with the brief filed by Appellants concerning the matter of oral argument before this Court.

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INTEREST OF THE AMICI

The American Booksellers Foundation for Free Expression

(ABFFE) was organized as a not-for-profit organization by the American Booksellers Association in 1990 to inform and educate booksellers, other members of the book industry, and the public about the danger of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials. ABFFE has over 300 member bookstores, located primarily in the United States.

The Freedom to Read Foundation (FTRF) was established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens.

National Coalition Against Censorship (NCAC) is an alliance of 50 national organizations, including religious, educational, professional, artistic, labor and civil rights groups united by a conviction that freedom of thought, inquiry and expression are indispensable to a healthy democracy. NCAC, founded in 1974, is the largest national organization devoted exclusively to defending the right to free expression and works to

educate its members and the public about the dangers of censorship and how to oppose it. The positions advanced by NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

INTRODUCTION

This case involves serious allegations of partisan censorship of the Texas environmental science curriculum.¹ Amici submit this brief to address the constitutional constraints on viewpoint-based curriculum decisions and the detrimental consequences of the overly deferential approach taken by the District Court.²

The facts alleged, which must be taken as true in evaluating plaintiffs’ Motion to Dismiss, make clear that censorship occurred; the only issue is whether the censorship was permissible in the context of a high-school curriculum decision. The sixth edition of Plaintiff-Appellant Daniel Chiras’s environmental science textbook, Environmental Science: Creating a Sustainable Future, was recommended for use in “regular” and Advanced Placement environmental science courses by the Commissioner of Education after the publisher agreed to make certain factual corrections recommended by a panel of educators at Texas A&M University. Second Amended Complaint (“Compl.”) ¶¶ 16-17. But the Texas State Board of Education (SBOE) ultimately rejected the book after two private organizations – the Texas Public Policy Foundation (TPPF) and Citizens for a Sound Economy

¹ Amici take no position on the truth of the Plaintiffs’ allegations.

² This brief is filed with the consent of all parties.

(CSE) – successfully pressed the SBOE to schedule an additional public hearing on November 8, 2001, just one day prior to the final adoption vote. Id. at ¶ 22. TPPF and CSE allegedly objected to the book on the grounds that, inter alia, it reflected “anti-Christian” and “anti-free enterprise” sentiment; that it blamed “Christianity, democracy and industrialization as causing the so-called environmental ‘crisis’”; and that it contained “shocking” “vitriol against Western civilization and its primary belief systems.” Id. at ¶ 24. These last-minute comments, which Plaintiffs asserted below influenced the SBOE’s final vote, see, e.g., id. at ¶¶ 30, 34, are wholly unrelated to the environmental science curriculum requirements. Id. at ¶ 26.³ In contrast, according to the Complaint, a University of Texas professor of ecology recommended Environmental Science because, of the three books being considered for adoption, it contained “the best and most coherent discussion of the basic ecology of the Earth.” Id. at ¶ 28.

The Complaint starkly portrays how a political and religious agenda promoted by a small but influential constituency overrode sound pedagogically-based concerns and played a decisive role in the selection of a

³ Plaintiffs allege that the president of another publishing company whose textbook was approved by the SBOE after it was revised to correct “problems” identified at the November 8 hearing, described the correction process as a “book-burning” and “100 percent political.” Compl. ¶ 31.

textbook for the state environmental science curriculum. After the final vote, the chair of the SBOE revealed her allegiance to local industry, saying that “we . . . always get a raw deal.” Compl. ¶ 33 (emphasis added).

Another SBOE member expressed satisfaction that textbook publishers are “starting to work with conservative groups and textbook critics,” and that “the pendulum is swinging back to a more traditional, conservative value system in our schools.” Id. at ¶ 34.⁴

The question in this case – in which members of Amicus have a direct and substantial interest – is whether the viewpoint-based discrimination just described violates the First and Fourteenth Amendments to the U.S. Constitution. The District Court held that the alleged bases for the SBOE’s rejection of the Chiras textbook reflected “legitimate pedagogical concerns” and thus were an acceptable form of viewpoint discrimination applicable to government-sponsored speech under the standard established in Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). Chiras v. Miller, No. 3:03-CV-2651-M, 2004 WL 1660388, at *13 (N.D. Tex. July 23, 2004). Assuming, arguendo, that Hazelwood applies in

⁴ Plaintiffs also allege that, just prior to the SBOE’s final vote, Jones & Bartlett editor Dean DeChambeau was asked by the chair of the SBOE whether Chiras “has a definite philosophy toward environmentalism.” Compl. ¶ 30.

a case like this one involving blatant viewpoint discrimination in the textbook selection process (an issue Amici do not here address), Amici believe that the ideological and partisan curriculum engineering that allegedly occurred here cannot be justified as “reasonably related to legitimate pedagogical concerns.”

The Constitution does not permit removal of material from the curriculum because it is believed to be “anti-Christian,” or because its discussion of the causes of global warming is thought to express “anti-free enterprise” ideas contrary to the interests of the oil and gas industry. Those concerns do not represent legitimate pedagogical grounds for textbook selection; they are, rather, an expression of a particular political and ideological perspective. At a minimum, the Complaint sets forth facts sufficient to warrant discovery as to the possibly illegitimate motives behind the rejection of the Chiras textbook.

If courts too readily equate political, social, and religious ideology with the moral and civic values that may permissibly influence public school education, they risk not only perverting the educational process but also abridging the First Amendment rights of students to receive ideas and information. Publishers will be required to revise academically sound textbooks to suit the demands of self-appointed censors or risk losing

millions of dollars in sales. This is not a liberal or a conservative issue; it is a First Amendment issue. Despite the concededly modest role for judicial review of school curriculum decisions, constitutional limits on viewpoint discrimination that deprives students of academically appropriate ideas and information are both well recognized and vitally important to maintaining the integrity and quality of public education and the proper role of government in providing such education. Ideological censorship, unmoored from valid educational concerns, has been condemned repeatedly by the Supreme Court as well as by this Court, and should be again here.

The potential impact of the District Court's ruling, if not reversed, is magnified by the size and importance of the Texas textbook market. As the second largest such market in the country, see Compl. at 3 (Introduction), Texas has the ability not only to shape the content of books that are used throughout the country, but to impact the curriculum decisions of school boards in other states. See id. This ripple effect on the learning experience of students throughout the country renders the conduct challenged here national, not just statewide, in its impact. This reality should inform the extent to which the court defers to the SBOE where, as here, it engages in viewpoint-based elimination of expert-validated reading material from the high school curriculum.

ARGUMENT

I. THE FIRST AMENDMENT LIMITS THE DISCRETION OF SCHOOL BOARDS WITH RESPECT TO CURRICULUM DECISIONS

It is firmly established that school boards enjoy broad discretion to determine curriculum content. In Board of Educ. v. Pico, 457 U.S. 853 (1982), the plurality observed that school boards “must be permitted to establish and apply their curriculum in such a way as to transmit community values” to the students, id. at 864 (internal quotation marks omitted), and in Hazelwood, 484 U.S. at 271, the Court stated that “[e]ducators are entitled to exercise greater control over” school-sponsored activities that “may fairly be characterized as part of the school curriculum.” See also Virgil v. Sch. Bd., 862 F.2d 1517, 1518 (11th Cir. 1989) (upholding removal of textbook containing “vulgarity and sexual explicitness” on basis of board’s legitimate pedagogical concern and authority over curriculum). Courts “do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.” Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (striking down law banning teaching of evolution in public schools and universities).

It is equally well established that the inculcative mission of public schools includes imparting civic and moral values. The Supreme Court has noted the “importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests.” Ambach v. Norwick, 441 U.S. 68, 76-77 (1979). See also Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681-84 (1986) (noting that essence of education is to prepare pupils for citizenship through “inculcation of fundamental values”) (brackets omitted); Pico, 457 U.S. at 864 (endorsing view that “there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political”).

There is no dispute, however, that a school board’s discretion in controlling the curriculum is constrained by First Amendment principles. In Epperson, the Court noted that courts “have not failed to apply the First Amendment’s mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief.” 393 U.S. at 104. Although school boards have “important, delicate, and highly discretionary functions, [there are] none that they may not perform within the limits of the Bill of Rights.” West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (holding that students cannot be

forced to salute flag). See also Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (holding that school cannot infringe on certain fundamental rights even though it has authority over many decisions).⁵

First Amendment principles have particular force in the classroom setting, where freedom of inquiry and diversity of thought, although properly limited by educational objectives, are essential to the process of educating effective citizens and leaders. The Supreme Court has recognized that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,” Shelton v. Tucker, 364 U.S. 479, 487-88 (1960), and that the Nation’s future “depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’” Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (citations omitted). The danger to be avoided is official action that casts “a pall of orthodoxy over the classroom.” Id. Thus, “[f]ree

⁵ See also Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 967 (5th Cir. 1972) (holding that even though courts should not interfere in day-to-day operations of school, school must abide by First Amendment and cannot impose “whatever conditions” it wants); Pratt v. Independent Sch. Dist., 670 F.2d 771, 775 (8th Cir. 1982) (holding that school board has authority to establish curriculum, but First Amendment prohibits removal of films from curriculum based on films’ ideological and religious message).

public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.” Barnette, 319 U.S. at 637. Accordingly, where a school board “begin[s] to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute,” Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1306 (7th Cir. 1980), it runs afoul of the constitutional proscription that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” Barnette, 319 U.S. at 642.

Whether the issue is removal of a book from the school library or its removal from the curriculum, the critical question is whether the school board’s decision “rested either upon disagreement with constitutionally protected ideas contained in the book[], or upon the board’s desire to impose upon the students . . . a religious orthodoxy.” McCarthy v. Fletcher, 254 Cal. Rptr. 714, 718 (Ct. App. 5th Dist. 1989) (citing Pico, 457 U.S. at 875). The constitutional constraint articulated in Pico, which involved removal of books from a school library, arguably applies with even greater force here, where a statewide decision to exclude the Chiras textbook from the environmental science curriculum carries a far greater threat of

imposing an ideological orthodoxy in the classroom as a result of the centrality of textbooks to the curriculum. See Pico, 457 U.S. at 892 (Burger, C.J., dissenting). For this reason, courts have not hesitated to apply Pico in the context of curriculum decisions. See, e.g., McCarthy, 254 Cal. Rptr. at 718; Borger v. Bisciglia, 888 F. Supp. 97, 99 (E.D. Wis. 1995); Krizek v. Board of Educ. 713 F. Supp. 1131, 1139 (N.D. Ill. 1989).

The problem confronted in cases like this one is how, consistent with these principles, to reconcile the “tension between . . . exposing young minds to the clash of ideas in the free marketplace [with] the need to provide our youth with a solid foundation of basic, moral values.” McCarthy, 154 Cal. Rptr. at 719. Pico is instructive in answering this question and in providing an analytical backdrop to the evaluation of the manner in which the District Court applied the Hazelwood test in this case.

The plurality in Pico derived the proscription against the suppression of ideas to enforce ideological orthodoxy in schools from the right of students to receive information and ideas. See 457 U.S. at 866-67 (citing Griswold v. Connecticut, 381 U.S. 479 (1965), and Stanley v. Georgia, 394 U.S. 557 (1969)). Exposure to diverse and even controversial ideas is essential to the educational process because it better prepares students for “active and effective participation in the pluralistic, often

contentious society in which they will soon be adult members.” Pico 457 U.S. at 868.

Justice Blackmun, concurring in Pico, thoughtfully examined the issue of how to reconcile the “inculcative function” of the school with the First Amendment bar on “prescriptions of orthodoxy.” 457 U.S. at 879 (Blackmun, J., concurring in part and concurring in the judgment). As Justice Blackmun explained, there are many legitimate reasons why school officials might choose one book over another, such as relevance to the curriculum, quality of writing, level of difficulty, presence of offensive language, budgetary constraints, or “a host of other politically neutral reasons” that do not implicate the First Amendment. Id. at 880. However, the decisions of school officials must be “politically neutral” and should not be the result of the “purposeful suppression of ideas.” Id. at 881.

Justice Blackmun further noted that while the government has no affirmative obligation to provide information, a school board may not, consistent with the First Amendment, “act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.” Pico, 457 U.S. at 879. A school may educate “‘by persuasion and example’ or by choice of emphasis,” but not by an “intentional attempt to shield students from certain ideas that officials find politically distasteful,”

even if “the community rejects the ideas involved.” Id. at 882 (internal citations omitted) (quoting Barnette, 319 U.S. at 640). In the context of removal of library books presented in Pico, Justice Blackmun opined that books could not be removed “for the purpose of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials’ disapproval of the ideas involved” because “state action calculated to suppress novel ideas or concepts is fundamentally antithetical to the values of the First Amendment.” Id. at 879-80.

Although Justice Blackmun noted the practical difficulty in discerning the foregoing constitutional principles in a school’s curriculum decisions, see Pico, 457 U.S. at 879, that difficulty is not presented by this case in its present posture because the court must take as true the allegations, described above, that detail a decision by the SBOE to “shield students from certain ideas that [it found] politically distasteful.” Id. at 882.

II. THE IDEOLOGICAL CONCERNS ALLEGED IN THIS CASE ARE NOT LEGITIMATE PEDAGOGICAL CONCERNS AND THUS DO NOT COMPORT WITH THE FIRST AMENDMENT

The foregoing First Amendment principles must be brought to bear on this Court's evaluation of the SBOE's conduct as alleged here, even if the Court were to affirm the lower court's holding that Hazelwood does not mandate viewpoint neutrality. Although a school can regulate speech in school-sponsored expressive activities "so long as their actions are reasonably related to legitimate pedagogical concerns," Hazelwood, 484 U.S. at 273, the discretion afforded by that standard does not extend to censorship motivated by partisan or political objectives.

A. Ideological Disagreement Is Not a Legitimate Pedagogical Concern

Hazelwood contains few illustrative examples of "legitimate pedagogical concerns," limiting its discussion to concerns that views not be erroneously attributed to the school; speech that would interfere with students' work or infringe on other students' rights; and material that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." 484 U.S. at 271. But Hazelwood makes clear that the First Amendment is implicated, and the school board's discretion, accordingly, is limited, when a

school board decision has “no valid educational purpose.” Hazelwood, 484 U.S. at 273. As one court sensibly observed, this statement does not mean that “regardless of the religious, political or philosophical reasons why a school board may exclude a book from a curriculum, the board’s exercise of discretion will be upheld so long as the board expresses some educational reason for excluding the book.” McCarthy, 254 Cal. Rptr. at 724. Such an interpretation “would be tantamount to vesting absolute discretion in the board to determine the curriculum.” Id. See also Pratt, 670 F.2d at 776 (stating that school boards have limited discretion over curriculum and “do not have an absolute right to remove materials from the curriculum”).

Courts applying Hazelwood have endorsed vulgarity, sexuality, maturity of audience, and avoiding controversy as legitimate bases for censoring speech in the context of school-sponsored activities. See, e.g., Fleming v. Jefferson County Sch. Dist., 298 F.3d 918, 925-26 (10th Cir. 2002) (concerns over discipline, courtesy, respect for authority, and avoiding controversy); Planned Parenthood v. Clark County School District, 941 F.2d 817, 829 (9th Cir. 1991) (concerns over maturity of audience); Virgil, 862 F.2d at 1523 (concerns about sexuality and vulgarity and maturity of audience). Thus, courts will uphold a decision that is based on “non-ideological reason[s],” such as concerns over “harsh language, violence and

nudity,” so long as it is not alleged that school officials acted pursuant to “political or religious beliefs.” Borger v. Bisciglia, 888 F. Supp. 97, 100 (E.D. Wis. 1995) (upholding school policy that prohibited viewing of R-rated films as part of high school curriculum where policy was based on concerns for violence, nudity, and harsh language in such films).

However, a school board's burden of demonstrating reasonableness “becomes geometrically heavier as its decision begins to focus upon the content of materials that are not obscene, libelous, or inflammatory.” Shanley, 462 F.2d at 971. See also Chiu v. Plano Indep. Sch. Dist., 339 F.3d 273, 281-82 (5th Cir. 2003) (relying on Shanley to hold that school cannot prohibit distribution of material critical of curriculum because material was “not obscene, libelous, or inflammatory”).

Constitutional problems arise once a school board moves beyond such viewpoint-neutral concerns to viewpoint-based objections unmoored to curricular requirements, as is alleged to have occurred here.

Because a school board’s discretion “may not be exercised in a narrowly partisan or political manner,” Pico, 457 U.S. at 870, the alleged basis for the rejection of the Chiras textbook presents First Amendment problems not present in a case where the official action was motivated solely by concern with educational suitability. See Pico, 457 U.S. at 877

(Blackmun, J., concurring in part and concurring in the judgment) (“the imposition of ‘ideological discipline’ [is] not a proper undertaking for school authorities”); McCarthy, 254 Cal. Rptr. at 724 (school board cannot “camouflage” religious, political, philosophical reasons for decision with pretextual educational purpose).

The Pico plurality suggested that a constitutional violation would be established if books were removed from the school library because the school board found them to be “anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.” Pico, 457 U.S. at 857, 875. See also Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 582 (6th Cir. 1976) (relying on Pico for proposition that books cannot be removed from library because of “social or political tastes of school board members” without abridging students’ right to receive information); Pratt, 670 F.2d at 773, 776 (holding that films cannot be removed from curriculum due to disagreement with “films’ religious and ideological content” in an attempt to “prevent the ideas contained in the material from being expressed in the school,” which would result in “propagation of a particular religious or ideological viewpoint”); McCarthy, 254 Cal. Rptr. at 722 (school board cannot remove required reading and other material from the curriculum to “suppress an

ideological or religious viewpoint with which the local authorities disagree”).

Against this backdrop, it is evident that the SBOE’s alleged reasons for rejecting the Chiras textbook do not comport with the First Amendment. Plaintiffs have alleged that the SBOE’s concerns – reflecting the high-pressure tactics of two conservative “public interest” groups – were that the book was “anti-Christian” and “anti-free enterprise.” Compl. ¶ 24. As the District Court (benignly) characterized the allegations, the SBOE: (i) disagreed with Chiras’s conclusion that “the root cause of environmental problems is economic growth”; (ii) believed the oil and gas industry’s position was not adequately presented; and (iii) found that “the textbook did not accurately reflect the traditional, conservative values of most Texans.” Chiras, 2004 WL 1660388, at *12. There is no allegation that the SBOE considered any of the material in the Chiras textbook vulgar, sexually explicit, or inappropriate for high school students. Moreover, the Commissioner of Education already had approved the textbook after the publisher had made requested factual corrections. Compl. ¶ 17. In this context, the alleged grounds for decision undoubtedly raise the specter of imposing a “pall of orthodoxy” in the classroom. See McCarthy, 254 Cal. Rptr. at 722 (“a school board does not have the power to advance or inhibit

particular religious orthodoxy as a ‘community value’ no matter how prevalent or unpopular the orthodox view might be in the community”).

B. Procedural Irregularity Suggests Impermissible Motives for the SBOE’s Decision

The risk of impermissible viewpoint-based censorship is even greater when school boards deviate from prescribed procedures and rely upon the opinions of politically-motivated interest groups which are contrary to those of nonpartisan experts to make curriculum decisions. Educational objectives and constitutional principles are both at risk when school boards base their decisions on the political views of interest groups rather than on the recommendations of experts. See Joan Delfattore, *What Johnny Shouldn’t Read* 148 (1992). When interest groups are allowed to control the content of textbooks, they can “impose their own political and religious beliefs on students.” David M. Bieber, “Textbook Adoption Laws, Precensorship, and the First Amendment: The Case Against Statewide Selection of Classroom Materials,” 17 J. Marshall L. Rev. 167, 183-84 (1984).

Such a scenario figured prominently in Pico, where, as the plurality noted, the record showed that the school board ignored the Superintendent’s advice with respect to the library books in question and

appointed a Book Review Committee, whose advice it later rejected without explanation. Pico, 457 U.S. at 875. A school board’s conduct arouses suspicion when it does not follow “established, regular, and facially unbiased procedures for the review of controversial materials” and “ignore[s] the advice of . . . experts.” Id. at 874 (internal quotation marks and citation omitted). See Pratt, 670 F.2d at 777 (affirming district court’s determination that school board’s decision to remove films was an effort to suppress ideas based in part on committee having consulted experts and having rejected their recommendation that book remain in curriculum). Particularly where such facts exist, it is critical for courts to examine the “true motives of the school board . . . to answer a First Amendment challenge” in order to ensure that the school board is not hiding improper ideological motives. McCarthy, 254 Cal. Rptr. at 724. See also Pratt, 670 F.2d at 778 (stating that board acted improperly in removing films because it acted out of ideological concerns, not concerns over violence).

The SBOE’s decision to reopen the public comment period after it had already held the only scheduled public hearing, Compl. ¶ 19, and after TPPF and CSE lobbied against the book on the grounds that, inter alia, it was “anti-Christian” and “anti-free enterprise,” id. at ¶¶ 22, 24, raises legitimate doubt that its motives were legitimate under Hazelwood.

Furthermore, the SBOE's alleged rejection of recommendations from the Commissioner of Education, *id.* at ¶ 21, and from experts such as Professor Maguire from the University of Texas and the Texas A&M University review panel, *id.* at ¶ 28, and its failure to base its decision on the Texas Essential Knowledge Skills (TEKS) curriculum content requirements, *id.* at ¶ 26, certainly render the SBOE's motives suspect.

III. THE MANIPULATION OF CURRICULUM DECISIONS FOR PARTISAN PURPOSES WILL HARM PUBLIC EDUCATION AND DISTORT TEXTBOOK PUBLISHING

As discussed above, the Constitution does not permit school boards to base their decisions on the desire to espouse a particular ideology through the curriculum. *See Barnette*, 319 U.S. at 637 (stating that the public educational system must be politically neutral). Permitting interest groups, whatever their political, social, or religious persuasion, to unduly influence the selection of curriculum materials will weaken our educational system. The consequences are particularly severe where, as here, the decision occurs at the state level and has ramifications for textbook content and selection in many other states.

The facts alleged here paint a disturbing picture of a curricular decision regarding an important and admittedly controversial subject – environmental science – being influenced by interest-group views that the

textbook in question is “anti-American,” “anti-Christian,” and “anti-free enterprise.” See Compl. ¶¶ 20, 24. These are criteria unrelated to the academic merits of the Chiras textbook, and they raise the specter of scientific truth being sacrificed to belief, to the inevitable detriment of the students.

Those immediately harmed by the SBOE’s decision include Mr. Chiras, the putative student plaintiff class, and Mr. Chiras’s publisher, Jones & Bartlett. But the implications of the judiciary taking a “hands off” approach in circumstances such as those alleged here are far broader. Encouraging the view that partisan ideology properly can be brought to bear on curricular decisions under cover of “community values” without running afoul of the First Amendment will encourage such efforts elsewhere with respect to a variety of subject areas, with a consequent “politicization” of the educational process. A belief that it is acceptable to suppress information in service of a political, social, or religious agenda endangers the integrity of academic inquiry and sends a dangerous message to students and teachers alike.

The ongoing campaign to require the teaching of creationism or “intelligent design” in biology textbooks, see Associated Press, “Environment, biology texts at issue in Texas” (first posted Nov. 10, 2003),

available at www.firstamendmentcenter.org/news.aspx?id=12156 (last visited Nov. 15, 2004); Gary Younge, “Darwinism vs. ‘Intelligent Design,’” salon.com (Nov. 9, 2004), is the most glaring example of (religious) belief clashing with science in the public school curriculum setting. In other countries, the ideological/religious perversion of public school education is carried to a dangerous extreme, as exemplified by the fundamentalist Saudi Arabian textbooks that reportedly teach, among other things, that Christians and Jews are infidels. See “The West, Christians and Jews in Saudi Arabian Textbooks” (Center for Monitoring the Impact of Peace 2002), available at <http://www.edume.org/reports/10/toc.htm> (last visited Nov. 19, 2004).

Nothing quite so pernicious is alleged here, but Amici share a deep concern that the decision below is a step in the wrong direction.

The District Court’s decision is an invitation for interest groups of all stripes to seek to imprint their particular points of view on school curricula, without regard for objective academic criteria or for the central educational importance of exposure to, and discussion of, a diversity of ideas. The First Amendment reflects our national commitment to the principle that truth must arise out of the competition of ideas, not from authoritarian selection by government officials. See Keyishian, 385 U.S. at 603. To allow the subversion of this principle in our public schools in order

to protect local industry or to conform to ideological or religious positions on scientific or other academic issues is to risk graduating students “unequipped to cope with the world as we know it.” American Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001) (Posner, C.J.).

CONCLUSION

For the foregoing reasons, Amici respectfully urge this Court to reverse the Order of the District Court.

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CERTIFICATE OF SERVICE

I, Jonathan Bloom, hereby certify that I caused seven true and exact copies and one PDF version saved on a 3.5 inch diskette of the foregoing Brief of Amici Curiae to be forwarded by U.S. mail, first class, postage pre-paid, to the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit, and two true and exact copies and one PDF version saved on a 3.5 inch diskette of the foregoing Brief of Amici Curiae to be forwarded by U.S. mail, first class, postage pre-paid, to counsel for all parties at their addresses of record as shown below on this 22nd day of November, 2004:

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