April 20, 2022

Via email

Re: North East Independent School District Book Removals

Dear North East ISD Board Members and Superintendent Maika,

As organizations committed to protecting civil liberties and rights, racial justice, LGBTQ+ equality, and education equity, we write to express our deep concern about North East ISD's recent review for removal of books from its library shelves. We urge North East ISD to immediately remedy this violation of the First Amendment, the Texas Constitution, and North East ISD's own policy by immediately reinstating all removed books and returning to long-standing policies and procedures. Further, the District should publicly acknowledge its grave missteps in taking these actions and affirm its commitments to LGBTQ+ and racial inclusivity and to educating its students on the history of racism and racial injustice in the United States. The District must take these urgent steps to protect against the suppression of ideas through book bans.

The attached legal analysis sets out the recent history of concerning actions taken by North East ISD and legal implications of such efforts in detail. To summarize, in December 2021, North East ISD removed 414 books from its shelves, in contravention of district policy. At the time, Superintendent Maika stated that the purpose of the review was to weed out "obscene or vulgar material," but the list of books recommended for removal as a result of the review, and the justifications for those recommendations, cannot be squared with this purported justification. The following is just a subset of topics and books targeted by the district for initial removal in December 2021 for the purpose of irregular review:

- **The United States' history of racism:** the National Book Award-winning *Stamped from the Beginning: The Definitive History of Racist Ideas in America*, by Ibram X. Kendi; *Caste: The Origins of Our Discontents*, by Isabel Wilkerson; *Citizen: An American Lyric*, by Claudia Rankine; and *They Called Themselves the KKK: The Birth of an American Terrorist Group*, by Susan Bartoletti;
- **LGBTQ+ and racial inclusivity:** *In Our Mothers' House*, by Patricia Polacco; *Gender Identity: The Ultimate Teen Guide*, by Cynthia Winfield; *Pride: Celebrating Diversity & Community*, by Robin Stevenson; and the Newbery Medal-winning *New Kid*, by Jerry Craft;
- **Anti-LGBTQ+ discrimination:** *The Year They Burned the Books*, by Nancy Garden; and *V for Vendetta*, by Alan Moore;

- **Reproductive rights:** *The Cider House Rules*, by John Irving; *Roe v. Wade: The Untold Story of the Landmark Supreme Court Decision that Made Abortion Legal*, by Marian Faux; and
- **Sex education:** *Safe Sex 101: An Overview for Teens*, by Margaret O. Hyde

After three months of review, North East ISD announced that it is recommending removal of 110 books, virtually all of which include LGBTQ+ themes, abortion, teen pregnancy, and sex education. Justifications for removals include "superseded by a book with more positive reviews on a similar subject" and "poor professional reviews." In no instance is the justification the district's original stated purpose in conducting the reviews, vulgarity or obscenity. For each book, the district has provided "suggested titles" for replacement—which it calls "updating."

The provided replacements in numerous instances do not include the themes present in the removed books—LGBTQ+ issues, abortion, teen pregnancy, and sex education—at all. Particularly, numerous books recommended for removal robustly cover LGBTQ+ issues or feature LGBTQ+ characters, while their recommended replacements do not. Further, explanations for many recommended removals do not hold up to scrutiny. Thus, in at least some instances, the justifications appear to be pretext for removing books with themes apparently disfavored by the district, such as LGBTQ+ issues.

For instance, the district recommended removal of *The Miseducation of Cameron Post* on the basis that it is "superseded by a book with more positive reviews on a similar subject." This novel centers on a lesbian teenager sent to anti-LGBTQ+ "conversion" camp after her family discovers her romantic relationship with another girl. The four recommended replacements all relate to teenagers in foster care or, in one instance, a teen who is falsely suspected of murdering her parents and who is trying to evade their true killer. Three of the four have lower ratings on major book review websites.

Also illustrative, the district recommended removal of *Best Best Colors / Los Mejores Colores*, a bilingual book for young readers about a multi-racial family with two moms that centers both race and LGBTQ+ themes. Recommended replacements do not include LGBTQ+ themes or characters and are not bilingual. Finally, the district recommended removal of the graphic novel *V for Vendetta* for "lack of reviews." The book is one of the 100 "most inspiring novels" of all time chosen by the BBC. While anti-LGBTQ+ discrimination is a key plotline of *V for Vendetta*, the two recommended replacements—also dystopian graphic novels—lack such a theme.

North East ISD's mass book removals—both in the initial review and in the recommendations for permanent removal—are serious violations of the First Amendment and of North East ISD's own longstanding process for book evaluation. According to the district's own

legal policy, the district "shall not remove materials from a library for the purpose of denying students access to ideas with which the district disagrees." Yet, the district selected books for removal based on a list circulated by a state representative chosen, as that representative has publicly stated, specifically for their "content."[1] The mass removals also provide a roadmap for further removals that violate the First Amendment's clear protections for student access to an array of ideas.

As the Supreme Court stated nearly a century ago, "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[2] Schools, and in particular school libraries, must be a place where students have broad access to a wide variety of ideas—both the popular and unpopular ones of the moment. Simply put, North East ISD cannot remove or ban school library books selected for scrutiny—by North East ISD or by a state legislator—due to their content and the views they express. The First Amendment prevents the district from suppressing the ideas that LGBTQ+ people belong, deserve acceptance and inclusion in American society, and have a wide array of life experiences. It likewise prevents the district from suppressing messages of racial inclusivity and belonging, or accounts of the United States' long history of racial injustice. This is because the comfort of some cannot come at the expense of students' constitutional rights.

North East ISD's initial mass book removal has already harmed students in the district, both by directly suppressing speech and access to ideas and by sending the message to Black, brown, and LGBTQ+ students that North East ISD rejects their history and belonging in the community. The district's recommended permanent book removals send that message loud and clear to LGBTQ+ students in particular. But students perform better, both academically and socially, with access to texts that reflect their identities and experiences in the world.[3] North East ISD is committed to "growing the entire student and foster[ing] critical thinking, problem-solving, creativity, and social development."[4] To live up to that goal and to comply with the First Amendment, the district must take steps to remedy the harms from its actions in removing books.

All books recommended for removal must be placed back on North East ISD shelves as swiftly as possible. If the district seeks to review any books for removal in future, it must follow its written policy for doing so. The district must publicly acknowledge its error in removing the books. It must affirm its commitment to LGBTQ+ and racial inclusivity and teaching the history

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[1] Taylor Goldenstein, *Austin ISD Is First to Defy Texas House Inquiry Into Books About Racism, Sexuality*, Houston Chronicle, Oct. 29, 2021, https://www.houstonchronicle.com/politics/texas/article/Austin-ISD-dismissesTexas-House-inquiry-into-16575282.php.
[2] *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
[3] *See, e.g.*, Rudine Sims Bishop, "Mirrors, Windows, and Sliding Glass Doors," in *Perspectives: Choosing and Using Books for the Classroom*, Vol. 6, No. 3 (summer 1990).
[4] North East ISD, *Leadership Development*, http://choose.neisd.net/leadership-development/.

of racism and racial injustice in the United States. These steps are necessary for North East ISD to comply with the First and Fourteenth Amendments.

Thank you for your attention to this matter. We look forward to your prompt response.

Sincerely,

American Civil Liberties Union of Texas
American Civil Liberties Union
Big Thought
Children's Defense Fund – Texas
Equality Texas
IDRA (Intercultural Development Research Association)
Texas Civil Rights Project
Texas Freedom Network
Young Leaders, Strong City

Addendum: Legal Analysis

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I. Background: Book Removals in North East ISD

In October 2021, State Representative Matt Krause sent a letter to the Texas Education Agency and selected school district superintendents in Texas, asking for the number of copies districts had of certain books from a list of roughly 850 titles.[5] Analysis of the books on Rep. Krause's list determined that 62% of the books relate to LGBTQ+ issues or mention LGBTQ+ people; 14% relate specifically to transgender issues or mention transgender people; 14% relate to sex education; and 8% relate to race and racism.[6] Rep. Krause has declined to explain how he created the list.[7] In March 2022, shortly after anti-LGBTQ+ comments by the Granbury ISD superintendent came to light, Rep. Krause was the lead signatory on a letter from state legislators commending the superintendent for his "courageous leadership."[8]

In December 2021, North East ISD librarians removed from school library shelves all books in the district appearing on Rep. Krause's list—414 books in all. In a letter to parents and guardians, Superintendent Sean Maika wrote that the district "used that [Rep. Krause's] list as a jumping off point." He attributed the review to "ensuring that the books in our libraries do not contain obscene or vulgar material." Superintendent Maika further stated in the letter, "We believe the vast majority of those books are appropriate." Nevertheless, all 414 books on the list were removed from the shelves for review.[9]

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[5] Letter from Rep. Matt Krause to Texas Education Agency Deputy Commissioner for Student Programs and selected school district superintendents, Oct. 25, 2021, https://static.texastribune.org/media/files/965725d7f01b8a25ca44b6fde2f5519b/krauseletter.pdf?_ga=2.213430097.416218816.1635283558-609342680.1588008770. The list of roughly 850 books attached to Rep. Krause's letter is available at https://static.texastribune.org/media/files/94fee7ff93eff9609f141433e41f8ae1/krausebooklist.pdf?_ga=2.142117751.416218816.1635283558-609342680.1588008770.

[6] Danika Ellis, *All 850 Books Texas Lawmaker Matt Krause Wants to Ban: An Analysis*, Book Riot, Nov. 5, 2021, https://bookriot.com/texas-book-ban-list/.

[7] Brian Lopez, *San Antonio-Area School District Reviews 400 Books Flagged by a Texas Lawmaker's Inquiry*, Texas Tribune, Dec. 6, 2021, https://www.texastribune.org/2021/12/06/north-east-isd-books-review/.

[8] Letter from Rep. Matt Krause, et al., to Granbury ISD Superintendent Jeremy Glenn, Mar. 29, 2022, *available at* https://www.facebook.com/KrauseforTexas/posts/508259647525087.

[9] Letter from North East ISD Superintendent Dr. Sean Maika to North East ISD Parents and Guardians, Dec. 7, 2021, https://www.neisd.net/site/default.aspx?PageType=3&DomainID=170&ModuleInstanceID=104840&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=204011&PageID=24346.

A. The 414 Initially Removed Books

Books that North East ISD publicly removed from district libraries, in contravention of district policy and due to their selection for Representative Krause's content- and viewpoint-based list, include:

- Books that advance racial equity and inclusion and that explore the history of racism in the United States, such as:
    - *Stamped from the Beginning: The Definitive History of Racist Ideas in America*, by Ibram X. Kendi. In 2016, *Stamped from the Beginning* won the National Book Award for Nonfiction.
    - *Caste: The Origins of Our Discontents*, by Isabel Wilkerson
    - *Citizen: An American Lyric*, by Claudia Rankine
    - *They Called Themselves the KKK: The Birth of an American Terrorist Group*, by Susan Bartoletti
    - *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, by Michelle Alexander
    - *#BlackLivesMatter: Protesting Racism*, by Rachel L. Thomas
    - *Class Act*, by Jerry Craft
- Books that advance LGBTQ+ inclusion and that explore anti-LGBTQ+ discrimination, such as:
    - *In Our Mothers' House*, by Patricia Polacco
    - *Best Best Colors*, by Eric Hoffman. This book is bilingual, and it also relates to racial inclusion.
    - *Being Jazz: My Life as a (Transgender) Teen*, by Jazz Jennings
    - *GLBTQ: The Survival Guide for Gay, Lesbian, Bisexual, Transgender, and Questioning Teens*, by Kelly Huegel
    - *The Year They Burned the Books*, by Nancy Garden
    - *V for Vendetta*, by Alan Moore
    - *Homophobia: From Social Stigma to Hate Crimes*, by Bill Palmer
- Books about reproductive rights and other legal rights and principles, such as:
    - *Roe v. Wade: The Untold Story of the Landmark Decision That Made Abortion Legal*, by Marian Faux
    - *The Abortion Debate: Understanding the Issues*, by Johannah Haney
    - *We the Students: Supreme Court Cases For and About Students*, by Jamin B. Raskin
- Books about sex education:
    - *101 Questions About Reproduction: Or How 1+1 = 3 or 4 or More*, by Faith Hickman Briney

- *Dating, Relationships, and Sexuality: What Teens Should Know*, by Wendy Hart Beckman

B. The 110 Books Recommended for Permanent Removal

In March, after the books had been off the shelves for more than three months, North East ISD announced that it was recommending permanent removal of 110 of them. The district has provided a list of "suggested titles" for replacement of each book whose removal it recommends.[10] **While Superintendent Maika originally stated that the purpose of the review was to remove "obscene or vulgar material" from the library, none of the titles are being removed for such reasons.** Instead, the district's justifications for removal include "superseded by newer edition or more recently published book on the same subject"; "superseded by a book with more positive reviews on a similar subject"; "poor professional reviews"; "outdated content"; and "lack of reviews."[11] On closer inspection, even these new explanations for many removals do not hold up to scrutiny. Moreover, in some cases, the explanations are used to recommend removal of books with themes that predominate Rep. Krause's list, such as LGBTQ+ issues and abortion, and recommend replacement with books that do not share those themes. While Superintendent Maika has stated that recommended replacements are "on the very same topics,"[12] that is not in fact the case.

For example, North East ISD recommended removal of *The Miseducation of Cameron Post* because it is purportedly "superseded by a book with more positive reviews on a similar subject." *The Miseducation of Cameron Post* is about a gay teenager in Montana who is sent to conversion camp after her family discovers her romantic relationship with her best friend. None of the four books that North East ISD recommends for replacement relate to discriminatory anti-LGBTQ+ conversion therapy or otherwise center LGBTQ+ themes. *Just Lucky* is the story of a child sent to foster care after her grandmother's dementia causes a fire. *The Girl in the Headlines* is about an eighteen-year-old suspected in her parents' murder while fleeing the true killer. *Watch Over Me* is about a young adult who has aged out of foster care and accepts a teaching job on an isolated, haunted farm. It has some LGBTQ+ representation,[13] but LGBTQ+ issues, including anti-LGBTQ+ discrimination, are not themes of the book. *What I Carry* is also about a teenager on the brink of aging out of foster care.

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[10] North East ISD, *Suggested Title Replacements for Book Reviews*, https://www.neisd.net/Page/34489.
[11] North East ISD, *Recommendations for Book Reviews*, https://www.neisd.net/Page/34461.
[12] North East ISD Regular Board Meeting, Mar. 14, 2022, https://www.youtube.com/watch?v=mAV2wZsKOsQ&list=PLG14EAEfK50o8GcOGM5oC1GbaLxvm2I59&index=3&ab_channel=NorthEastISD (statement by Superintendent Maika at ~ 22:45).
[13] The protagonist evinces attraction to both men and women, although it is not a central theme of the book. A character uses "they/them pronouns," and another character mentions that he has two moms.

Closer examination reveals how North East ISD's justification for removing *The Miseducation of Cameron Post* and replacing it breaks down. While the recommended replacement books may include the "similar subject," broadly speaking, of familial difficulties, they clearly do not speak to LGBTQ+ discrimination and LGBTQ+ teens' experiences as *The Miseducation of Cameron Post* does. Moreover, *The Miseducation of Cameron Post* has a rating of 4.06 stars out of 5 on the popular books website Goodreads and 4.6 stars out of 5 on Amazon, higher on both websites than two of the three proposed replacements and equal on Amazon to the other. Contrary to North East ISD's justification for removal, the other books do not have "more positive reviews."[14]

North East ISD also recommended removal of *Best Best Colors / Los Mejores Colores*, a bilingual book in which a child with two mothers, one of whom is Black and one of whom is white, learns that he does not have to choose one favorite color. In the book, his mothers help him make a rainbow flag for a pride parade. Removal was recommended due to "lack of reviews." Its recommended replacements are *All Because You Matter* and *Northbound: A Train Ride Out of Segregation*. While both of these books may be meaningful *additions* to North East ISD libraries, neither is a one-for-one replacement for *Best Best Colors / Los Mejores Colores*. Neither of the proposed replacement books are bilingual. And neither include LGBTQ+ characters or themes, or multiracial families—both of which are central to *Best Best Colors / Los Mejores Colores*.

Additionally, the district recommended Alan Moore's *V for Vendetta* for removal due to "lack of reviews." The book is one of the 100 "most inspiring novels" of all time chosen by the BBC—one of ten selected under "Politics, Power & Protest," alongside Alice Walker's *The Color Purple*, Harper Lee's *To Kill a Mockingbird*, and Aldous Huxley's *Brave New World*.[15] The district recommended replacing *V for Vendetta* with *Odessa* or *George Orwell's 1984 Graphic Novel*. Anti-LGBTQ+ discrimination is a key plotline of *V for Vendetta*: Evey, the protagonist arrested by a dystopian regime, finds a letter in her cell written by a former prisoner executed for being a lesbian. The letter gives Evey the strength to resist collaboration with the government. By contrast, there is no comparable plot arc regarding LGBTQ+ discrimination in either of the graphic novels recommended to replace *V for Vendetta*. *1984* centers on a heterosexual relationship and does not include LGBTQ+ themes. *Odessa* is about an eighteen-year-old's quest with her younger siblings to find out what happened to their missing mother following a natural disaster in the United States. It includes LGBTQ+ representation, but not as the fuel for rebellion central to *V for Vendetta*.

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[14] *Just Lucky* rates 3.81 stars on Goodreads and 4 stars on Amazon; The Girl Watch Over Me, 3.88 and 4.5 respectively; and What I Carry, 4.26 and 4.6.

[15] BBC Arts, *Discover 100 Amazing Novels With Brand New BBC Sounds Podcast*, Feb. 7, 2022, https://www.bbc.co.uk/programmes/articles/494P41NCbVYHlY319VwGbxp/discover-100-amazing-novels-with-brand-new-bbc-sounds-podcast; BBC News, *100 "Most Inspiring" Novels Revealed by BBC Arts*, Nov. 5, 2019, https://www.bbc.com/news/entertainment-arts-50302788.

In several additional instances, books with themes that appear repeatedly on Rep. Krause's list—such as LGBTQ+ issues and characters, abortion, and teen pregnancy—have at least one recommended replacement that either lack those themes altogether or are a stark shift from the original. Examples include, but are not limited to:

- *Image and Identity: Becoming The Person You Are*: This book includes a wide range of topics related to identity, including culture and ethnicity, gender, and sexual orientation. North East ISD's recommended replacement, *More Than a Body: Your Body is an Instrument, Not an Ornament*, is about body positivity.
- *Putting Makeup on the Fat Boy*: This book won two prestigious LGBTQ+ awards, the Stonewall Book Award for Children's and Young Adult Literature and the Lambda Literary Award for Children's and Young Adult Literature. This is a realistic novel about a gay male teenager who wants to become a make-up artist. North East ISD recommends removal because it is "superseded by a book with more positive reviews on a similar subject."[16] One of the recommended replacements, *The First 7*, is a sci-fi novel about a post-apocalyptic planet, in which the protagonist is a lesbian—but LGBTQ+ themes are not the primary focus of the book. The other, *Tigers Not Daughters*, is a magical realist novel about Latina sisters living in San Antonio.
- Numerous further examples, including: *Alan Cole Is Not a Coward*; *Archenemy*; *Beyond Dreams: True-to-Life Stories from Hamilton High*; *Chainbreaker*; *Death Wind*; *Masked*; *My Invented Life*; *The Edge of the Water*; *The Five Stages of Andrew Brawley*; *Dating, Relationships, and Sexuality: What Teens Should Know*; and *101 Questions About Reproduction: Or How 1 + 1 = 3 or 4 or More*
- One of the books repeatedly recommended to replace sex education books is a book on social anxiety, *Find Your Fierce: How to Put Your Social Anxiety in Its Place*.

Further, in two instances, the original books in North East ISD libraries were not written from a religious perspective, while the recommended replacements are written from an explicitly Christian perspective:

- *101 Questions About Sex and Sexuality: With Answers for the Curious, Cautious, and Confused*: The recommended replacement, *25 Questions You're Afraid to Ask About Love, Sex, and Intimacy*, is from an explicitly Christian perspective. It includes, "God purposefully created us as sexual beings and intentionally designed our sexuality to be a powerful force. . . . Many women feel like sexuality has hijacked their happiness, and it certainly seems to be a barrier to honoring God. We desperately need God's perspective on sexuality. Fortunately, the Bible has a lot to say on the topic."[17] The original book, *101 Questions*, is not written from a religious perspective.

[16] North East ISD, *Recommendations for Book Reviews*, https://www.neisd.net/Page/34461.
[17] Juli Slattery, *25 Questions You're Afraid to Ask About Love, Sex, and Intimacy* 14 (2021).

- *Bioethics: Who Lives, Who Dies, and Who Decides?*: This book includes discussion of abortion. One of North East ISD's recommended replacements does not cover abortion. The other recommended replacement is from an explicitly Christian perspective, unlike the original book. For example, one passage states, "Because we are sinners whom God has in Jesus acted to reconcile, our life is disordered in countless ways, not least in our search for mastery and self-sufficiency."[18]

While the original list of removed books included many books related to the history of racism in the United States and racial inclusivity, virtually none of those recommended for permanent removal do. Instead, the removed books are overwhelmingly about LGBTQ+ themes and characters, abortion, teenage pregnancy, and sex education. If the neutral criteria articulated for removal had in fact been neutrally applied, it is unlikely that there would be such a disparity between the contents of the books originally removed and the contents of the books recommended for permanent removal. The existence of this disparity suggests that removal recommendations were based on the ideas expressed in the books, not the stated neutral criteria.

Finally, North East ISD's highly irregular review process in deciding to remove these books was contrary to district policy. North East ISD policy provides for "rel[iance] on District professional staff to select and acquire instructional resources."[19] Once such materials are acquired, the district provides that "a parent of a District student, *any employee*, or any District resident may formally challenge an instructional resource . . . on the basis of appropriateness."[20] Such a challenge triggers a process of informal and formal reconsideration, specified in detail in the policy—for example, the principal of the school where the instructional resource is located appoints a reconsideration committee.[21] Superintendent Maika claimed in March that "this administration did not challenge these books" and characterized the review process as "not a challenge."[22] But, again, Superintendent Maika described the review in December 2021, when books were pulled off the shelves, as "about ensuring that the books in our libraries do not contain obscene or vulgar material"—in other words, a content-based review of materials already selected by professional librarians.[23] As Superintendent Maika stated in December, that was the reason for removing the 400+ books from the shelves.[24] The method that district policy provides

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[18] Gilbert Meliander, *Bioethics and the Character of Human Life: Essays and Reflections* 36 (2020).

[19] North East ISD, EF (Local) Instructional Resources) at 1 (June 9, 2017), https://pol.tasb.org/Policy/Download/179?filename=EF(LOCAL).pdf.

[20] *Id.* (emphasis added) at 2.

[21] *Id.* at 2-4.

[22] North East ISD, Regular Board Meeting, Mar. 14, 2022, https://www.youtube.com/watch?v=mAV2wZsKOsQ&list=PLG14EAEfK50o8GcOGM5oC1GbaLxvm2I59&index =3&ab_channel=NorthEastISD (statement by Superintendent Maika at ~ 22:00).

[23] Letter from North East ISD Superintendent Dr. Sean Maika to North East ISD Parents and Guardians, Dec. 7, 2021.

[24] *Id.*

for such review, including review triggered by district employees, is a book challenge.[25] Thus, contrary to Superintendent Maika's assertions, the district did not follow policy.

II. North East ISD's Book Removals Violate the First Amendment

More than 40 years ago, the Supreme Court held that "local school boards may not remove books from their school library shelves simply because they dislike the ideas contained in those books." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (plurality). North East ISD recognizes that this Supreme Court case controls the district's actions in decisions regarding the removal of library materials. The district's own legal policy explains, citing *Pico*: "Students' First Amendment rights are implicated by the removal of books from the shelves of a school library. A district shall not remove materials from a library for the purpose of denying students access to ideas with which the district disagrees."[26] Yet North East ISD initially denied students access to more than 400 books from a list selected specifically for their ideas, for months, in an irregular process. It has now recommended removal of 110 books as the result of that irregular process. This is a plain violation of the First Amendment of the U.S. Constitution and its state corollary, Article I, Section 8 of the Texas Constitution, as well as North East ISD policy.

A. North East ISD's Book Removals Are Inconsistent with the Supreme Court's Decision in *Pico*

As the Supreme Court explained in *Pico*, school districts may not "seek by [books'] removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." 457 U.S. at 872. Importantly, school districts cannot exercise discretion over library contents "in a narrowly partisan or political manner." *Id.* at 870. For example, "if an all-white school board, motivated by racial animus, decided to remove all books authored by [Black authors] or advocating racial equality and integration," doing so would plainly violate the First Amendment. *Id.* at 871.

In *Pico*, taking into account such evidence, the Supreme Court reversed a decision that had ended the case in favor of the district. *Id.* at 875. The Court explained, "The evidence plainly does not foreclose the possibility that petitioners' decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books, or upon a desire . . . to impose upon the students . . . a political orthodoxy to which [the school board] and their constituents adhered." *Id.* Although the school board in *Pico* was able to cherry-pick excerpts from many of the disfavored books containing vulgar or sexually explicit language, the Supreme

[25] North East ISD, EF (Local) Instructional Resources) at 2-4.
[26] North East ISD EF (Legal) Policy, Instructional Resources at 1 (Nov. 15, 2019), https://pol.tasb.org/Policy/Download/179?filename=EF(LEGAL).pdf.

Court held that the school board nevertheless violated the First Amendment if they "intended by their removal decision to deny [students] access to ideas with which [the board members] disagreed, and if this intent was the decisive factor in [the school board's] decision." *Id.* at 871. The Supreme Court also emphasized that the school board failed to use "established, regular, and facially unbiased procedures" for reviewing the book, noting that evidence that the book "removal procedures were highly irregular and ad hoc" could undercut the district's claims of viewpoint neutrality. *Id.* at 874.

North East ISD's book removals directly contravene the settled principles of *Pico*. North East ISD removed more than 400 books initially. The district selected these books for initial removal because they are all the books in the district's possession that appear on a state legislator's content-based list. Virtually all of the district's final recommendations for removal are books that feature LGBTQ+ issues or characters, abortion, teen pregnancy, or sex education. The district's recommended replacements often do not contain those themes; the district's justifications often do not hold up to scrutiny; and those justifications are not the justifications that triggered the initial review. In particular, books with LGBTQ+ issues or characters are an extremely large proportion of those recommended for final removal, and in many instances at least one recommended replacement does not contain those themes. And the review was not consistent with district policy.

It is plain that North East ISD's initial book removals and recommendations for permanent removal are for the purpose of removing books that advocate for LGBTQ+ equality and inclusion and that provide information on abortion, teen pregnancy, or sex education. But *Pico* and North East ISD's own policy are clear: North East ISD cannot remove books from its libraries due to their content.

B. North East ISD's Book Removals Are Inconsistent with Post-*Pico* Cases, Including Cases on Censorship of LGBTQ+ Books

Following *Pico*, courts within the Fifth Circuit and throughout the country have reaffirmed these principles. As the Fifth Circuit has explained, "In light of the special role of the school library as a place where students may freely and voluntarily explore diverse topics, [a] School Board's non-curricular decision to remove a book well after it had been placed in the public school libraries evokes the question whether that action might not be an unconstitutional attempt to 'strangle the free mind at its source.'" *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 190 (5th Cir. 1995) (quoting *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

Both in the Fifth Circuit and throughout the country, courts have affirmed that the First Amendment's prohibition on viewpoint-based censorship of library books includes a prohibition

on viewpoint-based censorship of books because they express support for lesbian, gay, bisexual, and transgender people. *E.g.*, *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 875 (D. Kan. 1995) (holding that the removal from school libraries of a book depicting romance between two women violated the First Amendment); *Parents, Fams., & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 897 (W.D. Mo. 2012) (holding that censorship of LGBT-supportive websites in a school library violated the First Amendment). For example, more than two decades ago, the Northern District of Texas held that the removal of two children's picture books about LGBTQ+ inclusion from the children's section of the Wichita Falls Public Library, and the enactment of a city resolution on book removal procedures to facilitate the books' removal, were "impermissible content-based and viewpoint-based discrimination" in violation of the First Amendment. *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000). This logic applies with equal force today, including to North East ISD's removal of books furthering LGBTQ+ and racial inclusion.

The ACLU has previously successfully sued to restore books to school libraries, including one found on the initial list of removed books, *In Our Mothers' House*. The book is a children's picture book about three adopted children and their two mothers. In that instance, a school district had removed it for "advocacy of homosexuality." In response to the lawsuit, the school district ultimately agreed to restore the book to the shelves and allow it to be checked out on the same terms as any other children's book, and to pay $15,000 in attorneys' fees.[27]

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When the school "board has used its official power to perform an act clearly indicating that the ideas contained in the [books] are unacceptable and should not be discussed or considered," that "message is not lost on students and teachers, and its chilling effect is obvious." *Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771, 779 (8th Cir. 1982). North East ISD has done just that—indicated that the ideas in removed books are unacceptable. North East ISD's book removals are a plain violation of the First Amendment, and of the Texas Constitution and district policy.

We urge that North East ISD remedy this violation of the First Amendment, the Texas Constitution, and North East ISD's own policy as swiftly as possible by returning all of the books to library shelves. Any challenges should proceed in accordance with district policy. Further, the district should publicly commit to LGBTQ+ and racial inclusivity and ensuring students have access to the United States' history of racism and racial injustice in North East ISD libraries. The district should apologize for the removal of books inconsistent with the First

[27] *See* Joshua Block, *School Promises In Settlement To Stop Removing Library Books For 'Advocacy of Homosexuality,'* Jan. 31, 2013, https://www.aclu.org/blog/free-speech/school-promises-settlement-stop-removing-library-books-advocacy-homosexuality.

Amendment and with district policy. Both the initial removals and the recommendations for permanent removal have created a chilling effect on students and teachers that must be remedied.