Recent Appellate Decisions on Book Censorship

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Against a surge in book banning in school districts across the country, two recent federal Court of Appeals decisions—from the Fourth and Fifth Circuits—have critically examined the justifications of would-be censors and found them lacking.

In *Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024), the Fourth Circuit affirmed the district court's denial of a preliminary injunction where parents claimed that the Montgomery Board of Education in Maryland had violated their First Amendment Free Exercise and Due Process rights by incorporating certain LGBTQ-inclusive books into the elementary school curriculum and declining to provide parents with notice and an opportunity to opt out of their children's exposure to the books. The books at issue were not intended to be used as part of any kind of explicit instruction about sexual orientation or gender identity. Rather, they were to be used as material for a class read-aloud, an option for literature circles, or paired reading groups.

The Court found that, to succeed on their Free Exercise claim, the parents must demonstrate a "cognizable burden" on their exercise of their religion, which required a showing that the presence of the books and the lack of an opt-out provision "coerces them or their children to *believe* or *act* contrary to their religious views." *Id.* at 208. The record that the parents had presented in support of their application for a preliminary injunction—declarations outlining their religious views and stating that it would violate their religion for their children to be exposed to views or ideas contrary thereto—did not cut it. None of the declarations established that any teacher or school had utilized the LGBTQ-inclusive books, let alone that the challenged books had been used in a way that would coerce a child to change his or her religious beliefs. The Court recognized that "simply hearing about other views" was not equivalent to "direct or indirect pressure to abandon religious beliefs or affirmatively act contrary to those beliefs," *id.* at 210, rejecting the parents' "indoctrination" claim.

In a sharp dissent, Judge Quattlebaum explained that he would have recognized that the board's lack of an opt-out option likely violated the parents' rights because it impermissibly forced them to "choose between obtaining a public benefit"—free public school education for their children—"and exercising their

religious beliefs" that require them to "shield their children from teachings that contradict and undermine their religious views" about "sex, human sexuality, gender and family life." *Id.* at 223.

Left for another day was analysis of the parents' arguments that their due process claim —that the lack of an opt-out provision violated their due process rights to direct their children's education—should be analyzed under a strict scrutiny standard instead of the more common rational basis review due to the so-called "hybrid-rights theory." This controversial theory would require the court to apply heightened scrutiny to a due process claim involving parents' rights related to the education of their children if the claim is coupled with a religious-exercise claim. *Id.* at 217. This theory has had mixed success in the circuits (the Second and Sixth Circuits have rejected it, while the Ninth and Tenth have recognized it), but the Fourth Circuit declined to resolve the open question.

In *Little v. Llano County*, --- F.4th ---- (5th Cir. 2024), library patrons alleged that the Llano County, Texas public library system had violated their First Amendment right to access information and ideas by removing books from the public library based on the books' contents and messages. County officials, in response to citizen complaints, had ordered the library director to remove certain children's books from the shelves because they were not age appropriate. The books ranged in content from the so-called "'butt and farts' books" (*Larry the Farting Leprechaun* and *I Broke My Butt!*), to young adult books touching on themes of homosexuality or gender identity (*Gabi, a Girl in Pieces*), to books about the history of racism (*Caste* and *They Called Themselves the K.K.K.*). The Fifth Circuit affirmed the district court's preliminary injunction requiring the library to return the books to the shelves, finding that County officials had likely violated the First Amendment by removing the books from the library "with the intent to deprive patrons of access to ideas with which they disagree." *Id.* at *11

County Officials claimed that many of these books were removed for "weeding," which is an annual process libraries undertake to remove damaged or outdated books from their collection each year. Llano County claimed that it used a set of objective, neutral criteria to decide which books to weed, including considerations like whether the book was visibly worn out or superseded by a new edition, but also content-based considerations like whether the book was misleading or factually inaccurate, trivial, of no discernable literary or scientific merit, or irrelevant to the needs and interests of the community. Based on the record before it, however, the Court disagreed that the books at issue were removed because of weeding, holding that while content "is necessarily relevant in removal decisions," "a book may not be removed for the sole—or a substantial—reason that the decisionmaker does not wish patrons to be able to access the book's viewpoint or message." *Id.* at *5.

The Court also rejected the argument that the public library's selection of books, and rejection of others, constitutes "government speech" and that its choices are therefore not constrained by the Free Speech Clause. The government speech doctrine recognizes that the government itself, in setting policies or implementing legislative programs, frequently engages in speech and that it would be difficult for the government to function if such activities were subject to standard First Amendment protections. The doctrine thus allows government officials and entities to promote or exclude certain views when "speaking for itself," without regard for the First Amendment rights of their constituents. For example, under the government speech doctrine a town is permitted to deny requests for certain groups to march in its annual town parade and a state is allowed to restrict the content of its license plates. Llano County argued that the curation of certain materials in its public library was government speech, and that, as the dissent explained, it sent a message through its bookshelves that "*this* book is suitable and worthwhile material, while *that* book is not." *Id.* at *32. The majority disagreed, finding that library curation is not government speech because it must take into consideration the public's First Amendment right to receive information.

In a strident dissent, Judge Duncan reasoned that the test the majority set forth was unworkable because there is no way to distinguish whether a book was being "banned" for its content or removed in an exercise of the broad discretion that librarians have to decide a book is not suitable for a particular age group.

The question of whether the government speech doctrine applies to book censorship in public libraries and schools is being litigated across the country. So far, federal courts have not been receptive to the

idea that libraries, including school libraries, are a First Amendment-free zone. *See, e.g.*, *Book People, Inc. v. Wong*, 91 F.4th 318 (5th Cir. 2024) (rejecting argument that requiring vendors to add sexual-content ratings to all library materials was government speech); *GLBT Youth in Iowa Sch. Task Force v. Reynolds*, No. 4:23-CV-00474, 2023 WL 9052113, at *18 (S.D. Iowa Dec. 29, 2023) (rejecting argument that curation of school libraries represent government speech); Order on Motion to Dismiss at 6–7, *PEN American Center, Inc., et al. v. Escambia County School Board*, No. 3:23-cv-10385 (N.D. Fla. Jan. 12, 202) (same).

Efforts to ban books and censor diverse ideas show no sign of diminishing, and arguments in support of these efforts are evolving. Because of the relatively recent vintage of this book-banning surge, many key legal questions remain unresolved. And, as useful as *Mahmoud* and *Llano County* are in helping to clarify some of these open questions, each was decided at the preliminary injunction stage. While each case provides helpful precedent, they are far from over.

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