

No. 09-2002

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

THEODORE GRISWOLD et al.,
Plaintiffs-Appellants

v.

DAVID DRISCOLL,
COMMISSIONER OF EDUCATION, et al.,
Defendants-Appellees

On Appeal from the U.S. District Court
for the District of Massachusetts

BRIEF AMICUS CURIAE OF THE
AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
IN SUPPORT OF THE PLAINTIFFS-APPELLANTS
AND FOR REVERSAL

Sarah R. Wunsch, 1st Cir. # 28628
ACLU of Massachusetts
211 Congress Street, 3rd Floor
Boston, MA 02110
617-482-3170, ext. 323

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the American Civil Liberties Union of Massachusetts (ACLUM) hereby certifies that as a Massachusetts not-for-profit corporation, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Table of Contents

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
INTRODUCTION	2
ARGUMENT	5
I. THE DISTRICT COURT ERRED IN FINDING <i>PICO</i> OF NO PRECEDENTIAL VALUE.	5
II. THE COMPLAINT SUFFICIENTLY ALLEGED THAT THE RESOURCE GUIDE WAS A MODERN REPOSITORY OF MATERIALS MUCH LIKE A SCHOOL LIBRARY	13
CONCLUSION	21
CERTIFICATE OF COMPLIANCE WITH RULE 32(A)	22
CERTIFICATE OF SERVICE	22

Table of Authorities

Cases

<i>Ainsworth v. Stanley</i> , 317 F.3d 1, 4 (1st Cir. 2002)	7
<i>Ashcroft v. Iqbal</i> , __ U.S. __, 129 S.Ct. 1937, 1949 (2009)	14
<i>Asociación de Educación Privada de Puerto Rico v. García-Padilla</i> , 490 F.3d 1, 11 (1st Cir. 2007).....	10
<i>Bd. of Education, Island Trees School District v. Pico</i> 638 F.2d 404 (2nd Cir. 1980).....	passim
<i>Bd. of Regents v. Southworth</i> , 529 U.S. 217, 229 (2000).....	20
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544, 570 (2007)	14
<i>Brown v. Hot, Sexy & Safer Prods., Inc.</i> , 68 F.3d 525 (1st Cir. 1995)	1
<i>Campbell v. St. Tammany Parish School Board</i> , 64 F.3d 184 (5th Cir. 1995)	11, 16
<i>Case v. Unified School District</i> , 895 F. Supp. 1463 (D. Ka. 1995)	11
<i>Chiras v. Miller</i> , 432 F.3d 606 (5th Cir. 2005)	4, 5, 11
<i>Griswold v. Driscoll</i> , 625 F. Supp. 2d 49, 64 (D.Mass. 2009).....	5
<i>Johanns v. Livestock Mktg. Ass’n</i> , 544 U.S. 550 (2005).....	18, 20
<i>Keyishian v. Bd. of Regents</i> , 385 U.S. 589, 603 (1967)	2, 21
<i>King v. Palmer</i> , 950 F.2d 771, 781 (D.C. Cir. 1991)	9
<i>Legal Services Corp. v. Velazquez</i> , 531 U.S. 533, 541-545 (2001)	18
<i>Marks v. United States</i> , 430 U.S. 188, 193 (1977).....	7
<i>Memoirs v. Massachusetts</i> , 383 U.S. 413 (1966).....	7
<i>Page v. Lexington Cty. School Dist.</i> , 531 F.3d 275 (4th Cir. 2008).....	20
<i>Parker v. Hurley</i> , 514 F.3d 87 (1st Cir. 2008)	1
<i>Pico v. Bd. of Educ. Island Trees Sch. Dist.</i> , 638 F.2d 404 (2d Cir. 1980) (Pico I).....	4, 12, 13, 18
<i>Pleasant Grove City v. Summum</i> , __ U.S. __, 129 S.Ct. 1125, 1140 (2009).....	19, 20
<i>Right to Read Defense Committee of Chelsea v. School Committee of Chelsea</i> , 454 F. Supp. 703 (D.Mass. 1978).....	13
<i>Romano v. Harrington</i> , 725 F. Supp. 687, 690 (E.D.N.Y. 1989)	11, 19
<i>Shelton v. Tucker</i> , 364 U.S. 479, 487 (1960)	3
<i>Silano v. Sag Harbor Union Free School District</i> , 42 F.3d 719, 723 (2nd Cir. 1994).....	11, 16
<i>Sutcliffe v. Epping School District</i> , __ F.3d __, 2009 WL 2973115 (1st Cir. 2009).....	19
<i>United States v. Johnson</i> , 467 F.3d 56, 63 (1st Cir. 2006).....	7, 9
<i>Virgil v. School Board of Columbia County</i> , 862 F.2d 1517 (11th Cir. 1989)	15, 16

Constitutional Provisions

First Amendment passim

Statutes

Chapter 276 of the Massachusetts Session Laws of 1998.....14

Other Authorities

Berkolow, *Much Ado About Pluralities: Pride and Precedent amidst the Cacophony of Concurrences, and Re-Percolation after Rapanos*, 15 Va. J. Soc. Pol’y & L. 299, 327-28 (2008).....8, 10

David Abel, *Welcome to the Library; Say Goodbye to the Books*, Boston Globe, September 4, 2009, available at http://www.boston.com/news/local/massachusetts/articles/2009/09/04/a_library_without_the_books/17

Charter of the International Military Tribunal (IMT) 59 Stat. 1544, 82 U.N.T.S. 279.....2

Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S 277 (1948)2

The Massachusetts Guide to Choosing and Using Curricular Materials on Genocide and Human Rights (with certain materials excised) is available on the Internet at <http://www.doe.mass.edu/frameworks/news/1999/hrltr699.html>5

STATEMENT OF INTEREST

The American Civil Liberties Union of Massachusetts (ACLUM) is a nonprofit nonpartisan membership organization dedicated to protecting the rights established in the U.S. and Massachusetts Constitutions. Since its founding, defense of First Amendment rights has been ACLUM's foremost concern, including in the context of public education. ACLUM's affiliate, the New York Civil Liberties Union, litigated *Board of Education, Island Trees School District v. Pico*, 457 U.S. 853 (1982), the meaning of which is at issue in this case.

ACLUM has been involved in numerous cases involving academic freedom, student speech, and censorship of unpopular views. At times, ACLUM has supported school districts that have been sued for exposing students to ideas some parents abhor. *See, e.g., Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995); and *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008). Ironically, ACLUM is listed as a resource in the Guide at the heart of the controversy in this case. App. at A233.

ACLUM is concerned that certain principles enunciated by the lower court on less than a full record will serve to constrict the openness of education necessary to the preservation of freedoms important to our society. Because public schools are assigned the task of teaching students how to

become good citizens, capable of participating in the civic life of a democracy, it is crucial to ACLUM that education officials not simply talk about constitutional rights but demonstrate respect for those rights.

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) (alteration in original; citation omitted).

INTRODUCTION

This is an appeal from the dismissal of a lawsuit challenging the removal of items from a public education collection of resources for teaching about various human rights subjects, including the Armenian genocide. The removal - by state education officials - was allegedly based on political considerations, not professional educational ones.

The slaughter of large numbers of human beings on the basis of their race, religion, ethnicity or national origin constitutes genocide and crimes against humanity.¹ We do not question the importance of study of this sad aspect of human history and cruelty. Yet, our abhorrence of these events and sympathy for those who suffered tremendous losses should not control

¹ Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S 277 (1948); Article 6(c) of the Charter of the International Military Tribunal (IMT) 59 Stat. 1544, 82 U.N.T.S. 279.

the establishment of principles by which the courts decide when removal of materials from what is alleged to be in the nature of a modern version of a public school library violates the First Amendment.²

Because “[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 (1960), it is especially important that this Court be cautious before adopting doctrines that may be used to limit those freedoms.

The complaint in this case alleged that materials reflecting the views of some Turkish organizations and scholars to whom these organizations directed Department of Education specialists were removed from a collection of resources compiled by the Massachusetts Department of Education based on political protests, not educational criteria. Second Am. Compl. ¶ 27; App. A31. The plaintiffs charged that the removal was like the

² Indeed, it is useful to consider other examples that may be affected by the principles developed in this case:

- A school librarian creates a list of references on sex education that includes books or Internet sites by Planned Parenthood but then is pressured to remove them based on political protests, not professional judgment;
- A government repository of materials on the topic of climate change includes resources about the role of human beings in causing global warming. Political protest, not scientific objection, causes that material to be removed.

removal of a book from a school library (§ 24; App. A29), thus making relevant the U.S. Supreme Court decision in *Bd. of Education, Island Trees School District v. Pico*, which has long been the touchstone in dealing with that issue and which recognized possible First Amendment claims if school boards removed books from libraries for political reasons, not valid educational reasons. *Bd. of Educ. Island Trees Sch. Dist. v. Pico*, 457 U.S. 853 (1982) (hereafter “*Pico*”), affirming *Pico v. Bd. of Educ. Island Trees Sch. Dist.*, 638 F.2d 404 (2d Cir. 1980) (*Pico I*). A majority of the justices in *Pico* also acknowledged that in the area of curriculum, schools had much greater power, although not entirely unlimited, to make choices about what shall be taught without violation of the Constitution.

If the collection of resources at issue here were obviously a school library or obviously the choice of curriculum materials, this case would be much easier in light of *Pico*. But in dismissing the complaint, prior to discovery, the district court relied in large part on the Fifth Circuit ruling in *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005), which concerned the Texas Board of Education’s rejection of a textbook for use in classrooms, not the question of removal of a book from a library. According to the district court here, the *Chiras* court “correctly stated that ‘*Pico* has no precedential value as to the application of First Amendment principles [even] to [a] school’s

decision to remove [] books from the library.” *Griswold v. Driscoll*, 625 F. Supp. 2d 49, 64 (D.Mass. 2009) (alteration in original, citations omitted).

The ACLU of Massachusetts, as amicus curiae, respectfully suggests that this statement concerning the meaning and value of *Pico* was incorrect in *Chiras*, should not have been adopted by the court below, was unnecessary in both cases, and should not be adopted by this Court.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING *PICO* OF NO PRECEDENTIAL VALUE

The district court here rejected the plaintiffs’ contention that the removal of so-called “contra-genocide” websites from the resource guide³ was analogous to the removal of books from school libraries as in *Pico*. *Id.* at 65. Upon a proper record, it might be correct for a court to rule that the Guide in its entirety constituted curriculum and was not analogous to a school library where issues as to motive in the removal of books are key to

³ The current version of The Massachusetts Guide to Choosing and Using Curricular Materials on Genocide and Human Rights (with certain materials excised) is available on the Internet at <http://www.doe.mass.edu/frameworks/news/1999/hrltr699.html> See Second Amended Complaint ¶ 34; App. at A35. The use of the word “curricular” in the title does not answer the question of whether the resource is in fact curricular or more in the nature of a repository of resources which, much like a library, is useful for curriculum purposes, but certainly does not define what shall be taught in class. See *infra* at Point II.

consideration of First Amendment restrictions on such decisions. However, on a motion to dismiss, that record was lacking and there was no need or basis to call into question the importance of *Pico*'s holding in regard to removal of books from a public school library.

Five justices on the U.S. Supreme Court ruled in *Pico* that summary judgment had improperly been granted in favor of the school district in that case which challenged the removal of nine books from a public school library. Five justices, a majority, believed that a trial was needed to resolve factual disputes focused on the motives of the school board in ordering the removal of the books from the library.

It is of course true that no one opinion garnered a majority of the votes of the justices in *Pico*. There were seven separate opinions altogether. The plurality opinion, authored by Justice Brennan, was joined by Justices Marshall and Stevens. The plurality held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" 457 U.S. at 872. Justice Blackmun joined most of the plurality opinion, including the "holding that school officials may not remove books for the *purpose* of restricting access to the political ideas or social

perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved." *Id.* at 879-80 (Blackmun, J., concurring in part).

Justice White wrote separately, concurring in the judgment, thereby implicitly expressing the view that some reasons for a school board's removal of library materials would violate the First Amendment. "[T]here was a material issue of fact that precluded summary judgment sought by petitioners. The unresolved factual issue ... is the reason or reasons underlying the school board's removal of the books." 457 U.S. at 883.

Marks v. United States, 430 U.S. 188, 193 (1977), requires that "[w]hen 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.'"⁴ *See also Ainsworth v. Stanley*, 317 F.3d 1, 4 (1st Cir. 2002) (quoting *Marks*, 430 U.S. at 193); *United States v. Johnson*, 467 F.3d 56, 63 (1st Cir. 2006) (discussing different ways of determining "narrowest grounds").

⁴ In *Marks*, the Supreme Court rejected the Sixth Circuit's ruling below that an earlier decision, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), "never became the law" because the standard announced in the plurality opinion had the support of only three justices. 430 U.S. at 192.

In *Pico*, a majority of the Supreme Court, including Justice White in his narrow concurrence, expressed the view that summary judgment is precluded when there are issues about the motive of school boards that may have removed school library materials for political reasons.⁵ If Justice White believed that a school board enjoys an unquestionable right to remove books from a library because of disagreement with their viewpoint, there would have been no reason to remand the *Pico* case for a trial to determine “the reason or reasons underlying the school board’s removal of the books.” 457 U.S. at 883. (White, J., concurring) At a minimum, there was an “implicit consensus” among a majority of the justices in *Pico* that improper motive was relevant to claims of violation of the First Amendment from removing books from a public school library, and that it was improper of the district court to have granted summary judgment for the school board. See Berkolow, *Much Ado About Pluralities: Pride and Precedent amidst the*

⁵ Indeed, Justice Rehnquist in a dissent joined by Chief Justice Burger and Justice Powell, noted that he could “cheerfully concede” Justice Brennan’s conclusion that “Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner.” 457 U.S. at 907 (Rehnquist, J. dissenting). Justice Brennan’s examples of what the Constitution would prohibit, which the dissenters agreed with, included: if a Democratic dominated school board ordered the removal of all books favoring Republicans or if an all-white school board motivated by racial animus, “decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*.” *Id.*

Cacophony of Concurrences, and Re-Percolation after Rapanos, 15 Va. J. Soc. Pol’y & L. 299, 327-28 (2008) (“implicit agreement or logical connection between the reasonings” contained in the concurring opinions can provide the “narrowest ground”; where applicable, the Marks rule “supports the rule of law and provides clarity, predictability and guidance for lower courts.” *Id.* at 332).

In *U.S. v. Johnson*, this Court suggested one “sensible approach” to determine the narrowest grounds is to look for the opinion “most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases, in contrast to an opinion that takes a more absolutist position or suggests more general rules.” 467 F.3d at 63 (citation omitted). In *Pico*, Justice White agreed that summary judgment was wrongly granted for the school board on the question of removing books from a public school library and that further fact-finding was appropriate to determine if the motivations of that committee raised First Amendment concerns. His position “represent[s] a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.” *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

In his concurrence, Justice White implicitly acknowledged that, depending on the facts, removal of book from a public school library may violate the Constitution. That holding remains good precedent, should be respected by this Court, and is surely applicable here where the plaintiffs were prevented from engaging in discovery and there was no fact-finding as would take place on a motion for summary judgment or at trial. In *Pico*, even the much fuller record available on a motion for summary judgment was not sufficient; Justice White and the four other justices agreed that a trial was necessary.

While some rulings with fragmented opinions have created confusion, the plurality plus two concurring opinions in *Pico* have not created many problems. Lower courts have not had difficulty applying it. Indeed, there has been considerable certainty and predictability arising out of the application of *Pico* to school library-related issues. *See generally*, Berkolow, *supra*, at 301.

This Court has not hesitated to cite *Pico* as authority. *See Asociación de Educación Privada de Puerto Rico v. García-Padilla*, 490 F.3d 1, 11 (1st Cir. 2007) (“[T]he discretion of the States and local school boards must be exercised in a manner that comports with the transcendental imperatives of

the First Amendment”’) (quoting *Pico*, 457 U.S. at 864). Other courts have done so as well in cases involving removal of materials by school officials.

In *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184, 188 (5th Cir. 1995), the Fifth Circuit relied on *Pico* in stating that “school officials’ decisions regarding public school library materials are properly viewed as decisions that do not involve the school curriculum and that are therefore subject to certain constitutional limitations.” The Fifth Circuit concluded that the materials at issue in that case were “non-curricular” because “the students ... are not required to read the books contained in the libraries; neither are the students’ selections of library materials supervised by faculty members.” *Id.* at 189.⁶

In *Case v. Unified School District*, 895 F. Supp. 1463, 1469 (D. Kan. 1995), the court applied the *Pico* analysis to a decision regarding removal of books from a public school library. In *Silano v. Sag Harbor Union Free School District*, 42 F.3d 719, 723 (2nd Cir. 1994), the Second Circuit also cited *Pico* in distinguishing decisions about removing books from a school library and curriculum decisions. *See also Romano v. Harrington*, 725 F.

⁶ *Campbell* has not been superseded by *Chiras* in the Fifth Circuit. Rather, the cases analyze different school board actions, with *Chiras* focused on the authority of the Texas State Board of Education to select and approve textbooks for each subject and grade level in that state’s schools. In fact, in *Chiras*, the court declined to apply *Pico* because the case before it did not concern the removal of an optional book from a school library.

Supp. 687, 690 (E.D.N.Y. 1989) (applying *Pico* analysis in stating, “pedagogic concerns allow educators to exercise more control over the content of students’ required reading lists than over their voluntary, extra-curricular selections, even though the voluntary and required selections may exist side by side on the school library’s shelf”).

Even before *Pico* was decided by the Supreme Court, its reasoning was presaged by various court rulings applicable to removal of books from school public libraries for political reasons. For example, the Second Circuit in *Pico I*, reversed a grant of summary judgment in favor of the school board. 638 F.2d 404 (2nd Cir. 1980) Judge Sifton recognized significant First Amendment concerns raised by the substantial “procedural and other irregularities” involved in the school board’s decision to remove the books from the school library, the opposition of professional educators, and the “incoherence,” of the reasons for removal.⁷ *Id.* at 417. *See generally, id.* at 414-418. Judge Newman joined in the reversal of summary judgment and his concurring opinion strongly cautions against the official suppression of

⁷ The late-in-the-day justification for the removal of the “contra-Genocide” web sites by the Commissioner of Education, namely that the state law would not permit their inclusion in the Guide, is not necessarily “coherent” here. The statute on its face does not compel removal of all resources reflecting that point of view. Whether this was pretext or not and what the actual motives were would be fair territory for discovery and possibly summary judgment or trial. On a motion to dismiss, fact-finding about the true motivation cannot take place.

ideas in the context of public education: “It is one thing to teach, to urge the correctness of a point of view. But it is quite another to take any action that condemns an idea, that places it beyond the pale of free discussion and scrutiny.” *Pico I*, 638 F.2d at 432-33. He found that “the case presents a sufficient claim of constitutional violation,” but requires fact-finding on the school board’s motive in removing the books. *Id.*

Even earlier, in *Right to Read Defense Committee of Chelsea v. School Committee of Chelsea*, 454 F. Supp. 703 (D.Mass. 1978), Judge Tauro rejected the school committee’s argument that the decision to remove books from the public high school library was within its authority to oversee the curriculum. *Id.* at 704. After “several weeks of discovery, a six day bench trial and post trial submission of memoranda,” (*id.* at 706), he ruled that the removal of books from the public school library violated the First Amendment. *Id.* at 417.

II. THE COMPLAINT SUFFICIENTLY ALLEGED THAT THE RESOURCE GUIDE WAS A MODERN REPOSITORY OF MATERIALS MUCH LIKE A SCHOOL LIBRARY

The district court dismissed the complaint in this case on the government’s motion to dismiss, before creation of an adequate record about the very nature of the resource guide as a repository of materials - distinct from required curriculum - or about the motivations of those who removed

the resources deemed objectionable. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Here, the Second Amended Complaint contained allegations of fact sufficient to state a plausible claim for relief under the First Amendment, and the motion to dismiss should not have been granted.

The plaintiffs alleged that the Massachusetts Board of Education submitted a guide to the legislature pursuant to Chapter 276 of the Massachusetts Session Laws of 1998. The guide contained a section of citations to resource materials. Second Amended Complaint, ¶ 24; App. at A28-29. As submitted to the legislature, the resources included the website of Georgetown University’s Institute for Turkish Studies and other organizations with a viewpoint different from those of other scholars and Armenian groups on whether the treatment of the Armenians constituted genocide. App. at A29. These materials were allegedly included after the head of curriculum services for the Department of Education reviewed them and consulted with various academics. *Id.* at ¶ 23; App. at A.27-28. The plaintiffs also alleged that these “contra-genocide” materials were removed from the guide after its submission to the legislature based on non-

pedagogical, political complaints. *Id.* at ¶¶ 25-27; App. at A29-31. The Guide section on resource materials states explicitly that “The Massachusetts Department of Education does not endorse or mandate any curriculum materials...” Guide at 21; App. at A70. The defendants thus have acknowledged that the collection of resources was not required to be taught, that it was purely advisory, and that the materials listed were not being recommended by the state. The resources were available to teachers as well as students for their free choice in using or learning from the materials, just as selections on traditional school library shelves might be viewed. See Second Amended Complaint ¶ 24; App. at A29.

These allegations were specific enough for the plaintiffs to survive a motion to dismiss and to require development of the record as to whether school board authorities acted impermissibly in light of First Amendment concerns. The plaintiffs should have been permitted to establish facts relating to the nature of the collection of resources, whether they were in the nature of a modern on-line library or were more in the nature of curriculum, and as to whether impermissible concerns led to the removal of the material.

Notably, like *Pico* itself, most cases dealing with the issue of whether school-related materials were curricular or like a library were not decided on motions to dismiss. In *Virgil v. School Board of Columbia County*, 862 F.2d

1517 (11th Cir. 1989) (appeal from summary judgment based on stipulated facts⁸), the Eleventh Circuit considered a school board's removal of a previously-approved humanities textbook from an elective high school class. In order to apply the appropriate First Amendment standard, the Court discussed the threshold factual determination as to whether the book was curricular. *Id.* at 1522. According to *Virgil*, materials are curricular if they are "used in a regularly scheduled course of study in the school." *Id.* In finding the textbook curricular, and not analogous to a school library, the court cited the *Pico* plurality's special noting of the "unique role of the school library" as a repository for "voluntary inquiry." *Id.* at 1523, n.8.

Other cases have made similar distinctions. *See, e.g., Campbell v. St. Tammany Parish School Board*, 64 F.3d at 188-89 (materials at issue were "non-curricular" because "students ... are not required to read the books contained in the libraries; neither are the students' selections of library materials supervised by faculty members"); *Silano v. Sag Harbor Union Free School District, supra*, 42 F.3d at 723 (citing *Pico* on distinguishing library resources from curriculum).

The facts alleged here suggest that the resource list with its on-line set of references may be more in the nature of the school library than

⁸ *Id.* at 1522 n.6 and at 1518.

curriculum. No teacher is required to use any of them; all are advisory and the education authorities take pains to state that they are not recommending any of them for use. The resources in the Guide, as alleged in the Complaint, appear to be less curricular and more a “repository for ‘voluntary inquiry.’” *Id.* at 1523 n.8, quoting *Pico*, 457 U.S. at 869 (plurality opinion).

Traditional libraries are familiar to us as collections of resources that have been selected by librarians out of the multitude of materials available for purchase. In schools, both teachers and students may browse the library and peruse the selections. They voluntarily pick and choose from among the offerings. In the age of the Internet, selections of resources may take on a different form from the traditional shelves and books. *See, e.g.,* David, Abel, *Welcome to the Library; Say Goodbye to the Books*, Boston Globe, Sept. 4, 2009, available at http://www.boston.com/news/local/massachusetts/articles/2009/09/04/a_library_without_the_books/ (“Cushing Academy” decided the 144-year-old school no longer needs a traditional library. The academy’s administrators have decided to discard all their books and have given away half of what stocked their sprawling stacks”). Thus, removal of materials from public school resource collections based on political considerations, not

pedagogical ones, whether on book shelves or in their modern digital form, raises the same concerns under the First Amendment.

Furthermore, the plaintiffs' allegations are sufficient factually to demonstrate procedural irregularities leading to the removal of the disputed resources, irregularities that raise significant questions as to the motives of the officials who decided to remove them. *See Pico I*, 638 F.2d at 417-18 (Sifton, J.). Here, because the district court ended the case upon the granting of a motion to dismiss, the record necessarily does not contain sufficient information relevant to the actual motive of government officials in excising resources relating to the point of view that the deaths of a large number of Armenians did not constitute genocide.

The "government speech doctrine" does not compel a different result on a motion to dismiss in the context of this case. Most courts applying the doctrine have done so on a fuller record. *See, e.g., Johanns v. Livestock Marketing Association*, 544 U.S. 550, 555 (2005) (after bench trial); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541-545 (2001) (extensive fact-based and context-based analysis in upholding injunction against government restriction on speech).

Indeed, courts have cautioned against expanding doctrines which curtail First Amendment rights outside "the confines of the classroom and its

assignments.” *Romano v Harrington*, 725 F. Supp. at 690 (denying summary judgment on nature of student newspaper and whether school sponsored speech). *Cf. Pleasant Grove City v. Summum*, ___ U.S. ___, 129 S. Ct. 1125, 1140 (2009) (Breyer, J., concurring) (“government speech doctrine is a rule of thumb, not a rigid category. Were the City to discriminate in the selection of permanent monuments on grounds unrelated to the display’s theme, say solely on political grounds, its action might well violate the First Amendment”). Justice Souter, also concurring, cautioned: “Because the government speech doctrine ... is ‘recently minted,’ it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored.” *Id.* at 1141 (Souter, J., concurring).

The recent decision of this Court in *Sutcliffe v. Epping School District*, ___ F.3d ___, 2009 WL 2973115 (1st Cir. 2009) is not to the contrary. There, the substantive First Amendment issue was not decided on a motion to dismiss; it was decided on summary judgment after discovery had taken place. *Id.* at *7, *12. *Sutcliffe* concerned whether a Town website was a public forum for expression, not a question of removal of materials from a possible repository in the nature of a school library. The discussion of the government speech doctrine in *Sutcliffe* is not easily reconciled with numerous decisions about removal of materials from public school libraries.

The doctrine should not simply be applied to issues about the removal of materials from an educational collection of resources without careful thought and scrutiny. Any such effort should await discovery and fact-finding before application of the doctrine here.⁹

One other decision cited in *Sutcliffe* relates to education officials, but that decision, *Page v. Lexington Cty. School Dist.*, 531 F.3d 275 (4th Cir. 2008) (affirming summary judgment finding government speech), is not about a repository of materials like a school library; rather it involved a school district's own web page expressing opposition to an education bill pending in the legislature. Here, the Second Amended Complaint alleges that the defendants did not urge any particular viewpoint in its list of resources, thus weakening an application of the "government speech" doctrine. *See Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000) (case did not "raise the issue of the government's right ... to use its own funds to advance a particular message"). *See, in contrast, Johannis v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (government speech found because government sending particular message).

⁹ Even the majority opinion in *Summum* raises a caution about "the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint." 129 S.Ct. at 1134.

It is often said that “the First Amendment ... does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Keyishian*, 385 U.S. at 603. To make that statement meaningful and not just a platitude, it is important that any decision in this case be based on a fuller development of the relevant facts than was possible on a motion to dismiss.

CONCLUSION

For the foregoing reasons, amicus ACLU of Massachusetts urges that this Court reverse the judgment of the district court and remand for further fact-finding.

Respectfully submitted,

ACLU of Massachusetts
By its attorney,

Sarah R. Wunsch
Sarah R. Wunsch
First Circuit # 28628
ACLU of Massachusetts
211 Congress St., 3rd Fl.
Boston, MA 02110
617-482-3170, ext. 323

Dated: October 15, 2009

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that this brief complies with the type-volume, typeface, and type style requirements of Fed. R. App. P. 32(a)(7)(B) and 32(a)(5) and (6), because it was prepared in a proportionally spaced typeface in 14-point Times New Roman typeface, and it contains 4722 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count of the word processing system (Microsoft Word 2003).

/s/ Sarah R. Wunsch

Sarah R. Wunsch

Attorney for American Civil Liberties Union of
Massachusetts, *Amicus Curiae*

Dated: October 15, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2009, I caused two copies of the foregoing Brief Amicus Curiae to be served on counsel for the parties by First Class Mail, postage prepaid, addressed as follows:

William W. Porter
Department of the Attorney General
One Ashburton Place, Room 2019,
Boston, MA 02108

Harvey A. Silverglate
David Duncan
Norman Zalkind
Zalkind, Rodriguez, Lunt & Duncan, LLP
65a Atlantic Avenue
Boston, MA 02110

/s/ Sarah R. Wunsch

Sarah R. Wunsch