

No. 25-2216

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

SOUTH CAROLINA STATE CONFERENCE OF THE NAACP, ET AL.,
Plaintiffs-Appellants,

v.

ELLEN WEAVER, in her official capacity as
South Carolina Superintendent of Education, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of South Carolina
Case No. 3:25-cv-00487-SAL

**BRIEF OF *AMICI CURIAE* STATE OF SOUTH CAROLINA AND
20 OTHER STATES IN SUPPORT OF DEFENDANTS-APPELLEES**

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INTRODUCTION AND INTEREST OF *AMICI* STATES

The States of South Carolina, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and West Virginia (“*Amici* States”) respectfully submit this brief as *amici curiae* in support of Defendants-Appellees. The *Amici* States have a strong interest in the proper interpretation of the First Amendment, especially in the context of determining when the Free Speech Clause is applied to police a State’s own speech. The Free Speech Clause has no application—or at a minimum, a very different application than Plaintiffs-Appellants suggest—when States and their educational institutions choose what pedagogical materials to include or exclude from public school classrooms and their libraries. Reaching the opposite conclusion has grave consequences, not just for the *Amici* States, but also for our constitutional structure.

For purposes of resolving this appeal, this Court need not endorse the South Carolina General Assembly’s restriction on racially or sexually divisive materials in public schools as sound public policy. Rather, it need only follow precedent holding that there is no right to receive information in this context and that the selection, curation, and placement of curricula within public schools is a form of government speech.

SUMMARY OF ARGUMENT

The South Carolina General Assembly has repeatedly passed a series of budget provisos that, *inter alia*, restrict the use of public funds to “inculcate” students in public schools with the belief that one race or sex is inherently superior to another; or that an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive. *See* H. 5100, 2023–2024 Gen. Assem., 125th Sess., Part 1B § 1.79 (S.C. 2024)¹ (collectively, “Budget Provisos”). Selecting what pedagogical materials belong in public schools, including classrooms and libraries, necessarily involves making editorial decisions about what books or textbooks—out of millions—are educational, have scholastic merit, are factually accurate, and are worthy of expending taxpayer funds.

Despite Plaintiffs-Appellants’ claims to the contrary, a citizen’s right to receive information under the First Amendment is not a right to compel or extract information from the government at the taxpayers’ expense. Accordingly, there is no First Amendment right to compel state-funded schools to implement certain course curricula or require public school libraries to stock their bookshelves with inflammatory and prejudicial materials. *See Little v. Llano Cnty.*, 138 F.4th 834, 848 (5th Cir. 2025) (en banc), *cert. denied*, No. 25-284, 2025 WL 3507000 (U.S. Dec. 8,

¹ *See also, e.g.*, H. 4100, 2021–2022 Gen. Assem., 124th Sess., Part 1B § 1.105 (S.C. 2021); H. 5150, 2021–2022 Gen. Assem., 124th Sess., Part 1B § 1.93 (S.C. 2022); H. 4300, 2023–2024 Gen. Assem., 125th Sess., Part 1B § 1.82 (S.C. 2023).

2025); *see also Walls v. Sanders*, 144 F.4th 995, 1003 (8th Cir. 2025).

Moreover, because exercising “editorial discretion” within public education is “speech activity,” *Moody v. NetChoice, LLC*, 603 U.S. 707, 731 (2024) (citation modified), the curation decisions of what goes into a school curriculum or library must be considered speech. And because the curator of the public schools’ curricula and library shelves is the government itself, those decisions are expressive in nature, and therefore government speech. In short, the government “is not barred by the Free Speech Clause from determining the content of what it says.” *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

And because there are no First Amendment speech rights in these contexts, Plaintiffs-Appellants necessarily lack standing.

ARGUMENT

As ably explained by Defendants-Appellees, a plaintiff lacks standing when he fails to allege “a concrete and particularized invasion of a legally protected interest.” *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013) (citation modified). It follows then that in the absence of a “legally protected interest,” a plaintiff necessarily lacks standing.

Here, Plaintiffs-Appellants lack standing because the First Amendment does not provide them the “legally protected interest” they claim.

I. Plaintiffs-Appellants lack standing because the First Amendment does not guarantee a right to receive information from the government.

Precedent and persuasive authorities plainly foreclose Plaintiffs-Appellants' claim that they have a right to receive information in this context. After all, Plaintiffs-Appellants are attempting to invoke "the First Amendment, not FOIA." *Little*, 138 F.4th at 866 (Ho., J., concurring). Because Plaintiffs-Appellants have no right to receive information in this context, they necessarily lack the requisite legally protected interest for standing in this case.

The First Amendment protects the right of citizens to speak freely, not the right to *compel* others—private persons or the government—"to supply information." *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (Burger, C.J., plurality opinion). It does not "create a right to receive information" from the government because it "does not regulate the government's own speech." *Walls*, 144 F.4th at 1003. The Supreme Court "has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Houchins*, 438 U.S. at 9. And neither the First nor the Fourteenth Amendment "guarantee[s] the public a right of access to [the] information generated or controlled by [the] government." *Id.* at 16 (Stewart, J., concurring).

Thus, the First Amendment right to "receive information" does not require a public-school library to shelve particular books, let alone require the use of curricula that is racially or sexually divisive. *See Muir v. Alabama Educ. Television Comm'n*,

688 F.2d 1033, 1045 n.30 (5th Cir. 1982) (explaining that a “majority” of the Justices in *Board of Educ. v. Pico*, 457 U.S. 853 (1982), agreed “there is no First Amendment obligation upon the State to provide continuing access to particular books.”); *see also Oliver v. Arnold*, 19 F.4th 843, 844 (5th Cir. 2021) (Ho., J, concurring in denial of rehearing *en banc*) (“[F]orcing a public school student to embrace a particular political view serves no legitimate pedagogical function and is forbidden by the First Amendment.”).

Instead, the Supreme Court recognizes that the First Amendment limits the government from preventing a *private citizen* from receiving another *private citizen’s* speech. *Little*, 138 F.4th at 836; *see also, e.g., Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 305–07 (1965) (concluding that the government cannot burden an individual’s right to receive political literature through the mail); *Thomas v. Collins*, 323 U.S. 516, 538–39 (1945) (holding a court could not bar a union organizer from delivering a speech to company employees); *Martin v. City of Struthers*, 319 U.S. 141, 142–43 (1943) (concluding that a city government’s prohibition on the distribution of literature violated the First Amendment based on a person’s “right to distribute literature” and another’s “right to receive” someone else’s speech). But none of these right-to-receive-information cases concerned the alleged right to receive information *from the government*. And there is no First Amendment obligation for the government to do so.

Contrary to Plaintiffs-Appellants' claims, the First Amendment is a *negative right*—that is, the government “shall make no law ... abridging the freedom of speech.” U.S. Const. amend. I. And the First Amendment is “only recogniz[ed] [as] a negative right against government interference with the exchange of information by private citizens.” Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 Duke J. Const. Law & Pub. Pol’y 113, 140 (2008). As a result, “[t]he First Amendment does not impose upon public officials an affirmative duty to ensure a balanced presentation of competing viewpoints” given that the “freedom of speech is a negative liberty.” *Pahls v. Thomas*, 718 F.3d 1210, 1239 (10th Cir. 2013). And since the First Amendment is *not* a positive right that requires the government to act, *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 319 (6th Cir. 1998), it follows that the right to receive information and ideas “does not carry with it the concomitant right to have those ideas affirmatively provided at a particular place by the government.” *Pico*, 457 U.S. at 888 (Burger, C.J., dissenting).

Accordingly, Plaintiffs-Appellants' First Amendment “right to receive” claim fails because there is no right to receive information from taxpayer-funded public schools, let alone any right that entitles students, parents, or interest groups to specify *what* information should be provided. *See id.*; *see also Walls*, 144 F.4th at 1002.

In other words, education officials and school boards can remove certain books, curricula, or other pedagogical material from their classrooms and libraries without implicating the First Amendment. *See Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 369 (4th Cir. 1998) (“[T]he First Amendment does not require school boards to allow individual teachers in the Nation’s elementary and secondary public schools to determine the curriculum for their classrooms consistent with their own personal, political, and other views.”) (Luttig, J., concurring).

The most recent Eighth Circuit decision in *Walls v. Sanders* is instructive for this Court’s analysis. There, high school students and the Arkansas chapter for the NAACP challenged Arkansas’s restriction on indoctrinating students with Critical Race Theory, claiming that it violated their Free Speech Clause rights to receive information. *Walls*, 144 F.4th at 999–1001. The law prohibited public school officials and instructors from providing classroom materials and instruction about Critical Race Theory that would indoctrinate students. *Id.* The Eighth Circuit held that the Free Speech Clause did not allow the students to compel the government to “retain certain materials or instruction in the curriculum of its primary and secondary public schools.” *Id.* at 1006. That’s because course curricula is itself “government speech” that “belongs to the government” and the government “gets to control what it says.” *Id.* And “[s]tudents do not possess a supercharged right to receive information in public schools,” nor can they “oblige the government to maintain a

particular curriculum or offer certain materials in the curriculum based on the Free Speech Clause.” *Walls*, 144 F.4th at 1003 (collecting cases).

The recent *en banc* decision in *Little v. Llano County* provides critical guidance too. 138 F.4th 834 (5th Cir. 2025). In *Little*, patrons of a Texas county library brought a First Amendment challenge against the librarian and county officials, alleging that the removal of 17 books from the library’s collection based on their treatment of racial and sexual themes violated the patrons’ constitutional right to access information and ideas. *Id.* at 836.

The *en banc* Fifth Circuit rejected this claim, concluding that “plaintiffs cannot challenge the library’s decisions to remove the 17 [books] by invoking a right to receive information” because there is no constitutional entitlement to access “a book of their choice at taxpayer expense.” *Id.* at 848, 850–51. The court’s reasoning rested on a distinction between government action that bans or suppresses speech and a governmental library’s curatorial decisions regarding its collection. Specifically, the court emphasized that a public library’s choice to remove a book does not constitute a prohibition on accessing the information contained therein, as the government was not banning the books outright or preventing individuals from obtaining them through private means—such as purchasing them or accessing them elsewhere. *Id.* at 850.

Walls and *Little* are instructive because Plaintiffs-Appellants cannot transmogrify the First Amendment to compel state-funded schools to provide the information *they* desire. Allowing this outcome would undermine our constitutional framework, where the citizens choose state and local officials that establish the education curricula of the state. It's one thing for Plaintiffs-Appellants to tell the government it cannot stop them from receiving a certain book or listening to a certain lecture, *see Lamont*, 381 U.S. at 305–06 (the Postal Service could not regulate receipt of “communist political propaganda”); it's another for a student or author to tell the government *which* classes it must teach or *which* books public school libraries must shelve. *See Pico*, 457 U.S. at 889 (Burger, C.J., dissenting) (“[T]here is not a hint in the First Amendment, or in any holding of the Supreme Court, of a ‘right’ to have the government provide continuing access to certain books.”)²; *see also, e.g., Boring*, 136 F.3d at 368; *Walls*, 144 F.4th at 1003.

Additionally, prohibiting books and course curricula that are racially or sexually divisive from K-12 public school libraries “does not prevent anyone from ‘receiving’ th[at] information” *per se*, but rather prevents children from accessing that

² Even though *Pico* holds no precedential weight, it did not purport to extend the proposition that the First Amendment applies to a public school's decision to remove books from its library. *See Muir*, 688 F.2d at 1045 n.30. Nevertheless, *Pico* does not compel a contrary conclusion.

material in public schools “at taxpayer expense.” *Little*, 138 F.4th at 848.³ The Supreme Court has repeatedly (and rightly) “reject[ed] the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.” *Regan v. Tax’n with Representation of Wash.*, 461 U.S. 540, 546 (1983) (citation modified). Those desiring racially or sexually divisive material with no pedagogical value “are as unconstrained now as they were before the enactment of the [Budget Provisos]”; “they are merely deprived of at the additional satisfaction of having [South Carolina’s citizens] taxed to pay for it.” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 595–96 (1998) (Scalia, J., concurring).

As a result, no First Amendment right is infringed by South Carolina’s decision to not subsidize racially or sexually divisive material its public-school classrooms and libraries.

II. Plaintiffs-Appellants lack standing because the challenged actions constitute government speech.

Plaintiffs-Appellants also claim that the School District Defendants violated the First Amendment by excluding the work of Plaintiff-Appellant Kendi. Implicit in this claim is the argument that the First Amendment somehow requires the School District Defendants-Appellees to include Plaintiff-Appellant Kendi’s work in school

³ Of course, Plaintiffs-Appellants are free to purchase the materials in question from a variety of vendors.

libraries. Precedent and persuasive authorities foreclose this claim and require that it be dismissed for lack of standing.

A. The First Amendment is not implicated because public school curricula and library collections are government speech that are not subject to the Free Speech Clause.

The First Amendment only “restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove v. Summum*, 555 U.S. 460, 467 (2009). And “government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas.” *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

Public schools regularly engage in forms of government speech. After all, public schools are often considered “instruments of the state,” *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986), for many purposes. And various state and local entities play roles in “select[ing] the views that [they] want[] to express” in the education policies and programs they develop. *Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 187 (2024) (citation modified); *see also Chiras v. Miller*, 432 F.3d 606, 613 (5th Cir. 2005) (noting that the State generally “has the discretion to promote [the education] policies and values of its own choosing” free from First Amendment scrutiny); *but see, infra*, Section II.B.

Here, the South Carolina General Assembly made one such choice and, in doing so, engaged in government speech. The challenged Budget Provisos restrict public funds from being used in any school district or school to “inculcate” students with racially or sexually divisive material. *See* H. 5100, 2023–2024 Gen. Assemb., 125th Sess., Part 1B § 1.79 (S.C. 2024).⁴ Indeed, they restrict how the Department of Education and school boards make educational and curation decisions—namely by prohibiting them from expending public funds for the instruction on topics that are racially or sexually divisive. *See id.* The Budget Provisos reflect the South Carolina General Assembly’s judgment that classroom instruction and public-school

⁴ Proviso 1.79 prohibits the expenditure of state funds for instruction on certain concepts identified by the General Assembly as partisan or ideologically divisive, including teaching that:

(1) one race or sex is inherently superior to another race or sex; (2) an individual, by virtue of his race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (3) an individual should be discriminated against or receive adverse treatment solely or partly because of his race or sex; (4) an individual’s moral standing or worth is necessarily determined by his race or sex; (5) an individual, by virtue of his race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (6) an individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his race or sex; (7) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by members of a particular race to oppress members of another race; and (8) fault, blame, or bias should be assigned to a race or sex, or to members of a race or sex because of their race or sex.

H. 5100, 2023–2024 Gen. Assemb., 125th Sess., Part 1B § 1.79 (S.C. 2024).

library curation decisions should exclude racially or sexually divisive subjects because they lack pedagogical value.

This choice bears all the relevant hallmarks of government speech. For one, in passing the Budget Provisos, the General Assembly enacted measures of “editorial discretion” by prohibiting state funds from going to schools inculcating students with racially and sexually inflammatory or prejudicial material. *Moody*, 603 U.S. at 731 (citation modified). This “itself is an aspect of speech.” *Id.* (citation modified). And when it comes to selecting school library books or classroom instructive material, a decision regarding “the third-party speech that will be included in or excluded from a compilation ... is expressive activity” that’s categorically speech. *Id.*

For another, and as a more general matter, in South Carolina public schools, the government “maintains direct control over the messages [it] convey[s]” to its students. *Walker*, 576 U.S. at 213. And since classroom curricula is used to “communicate messages from” the government and is “closely identified in the public mind with the State,” it falls squarely within the Supreme Court’s classification of government speech. *Id.* at 211–12 (citations modified).

Examples of other forms of government speech only underscore the conclusion. For example, when Texas offered “more than 350 varieties” of specialty license plates for display on private citizens’ vehicles, that was considered government speech. *See id.* at 221 (Alito, J., dissenting). And when a city displayed monuments

in a public park, that was considered government speech. *See Summum*, 555 U.S. at 470. Same with curricular materials from a State Board of Education. *See Chiras*, 432 F.3d at 618–20. And when a public library makes curation decisions about what books to keep on its shelves, that’s also considered government speech. *Little*, 138 F.4th at 860 (plurality); *see also Walls*, 144 F.4th at 1004–06 (school curricula).

The Fifth Circuit’s *en banc* decision in *Little* is, once again, instructive here. There, the court held that the public library’s removal of racially biased and sexually explicit books was considered government speech because (1) case law instructed that the government engages in expressive activity by selecting and presenting a curated collection of third-party speech; (2) its conclusion that a library’s collection is not a public forum; and (3) application of the factors outlined in *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). *See Little*, 138 F.4th at 865 (plurality).⁵ And in the scope of public education, “the government speaks through its selection of which books to put on the shelves and which books to exclude.” *People for the Ethical Treatment of Animals, Inc., v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005). So, pedagogical materials contained in public schools, “from beginning to end[,]” are indeed government speech because the course material is selected by the government, and nothing becomes part of a school’s curriculum unless the Department of Education

⁵ Rather than belabor this specific argument, *Amici* States instead encourage this Court to consider the points made in the Fifth Circuit’s *en banc* analysis regarding government speech. *See Little* 138 F.4th at 851–65 (plurality).

or School District puts it there. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560 (2005).

Additionally, courts have little difficulty concluding that public-school course curricula are government speech. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (“When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker”); *Griswold v. Driscoll*, 616 F.3d 53, 58–59 (1st Cir. 2010) (Souter, J.) (holding states have plenary “curricular discretion” under the First Amendment given “the government’s authority to choose viewpoints when the government itself is speaking”); *Chiras*, 432 F.3d at 616 (“[S]chools engage in government speech when they set and implement education policy through the curriculum.”); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) (“Few activities bear a school’s ‘imprimatur’ ... more significantly than speech that occurs within a classroom setting as part of a school’s curriculum.”) (citation modified); *Downes v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1015–16 (9th Cir. 2000) (“[S]chool teachers have no First Amendment right to influence curriculum as they so choose.”) (collecting cases).

In response to these authorities, it is no answer to say that the First Amendment is violated when the government excludes certain works or ideas from its

speech. After all, the government may and must “choose viewpoints when the government itself is speaking.” *Griswold*, 616 F.3d at 58–59. If that were not the case, then logically it follows that public schools and libraries would be required to maintain “Flat-Earth” or “Holocaust-denial” materials even though these ideas lack pedagogical value altogether. And if every plaintiff were to have the constitutional right to challenge the public-school system’s curricula or library materials via the First Amendment, then school boards “would be without even the most basic authority to implement a uniform curriculum.” *Boring*, 136 F.3d at 373 (Luttig, J. concurring).

Such an egregious outcome would result in schools becoming “mere instruments for the advancement of the individual and collective social agendas” of ideologues and partisan proselytizers. *Ibid*. Thus, the government must be able to choose what it inculcates to students, or it would be impossible to establish a coherent curriculum for K-12 pupils. *See Walker*, 576 U.S. at 208 (“[I]t is not easy to imagine how government could function if it lacked the freedom to select the messages it wishes to convey.”) (citation modified).

B. Although there are some restrictions on government speech, the Free Speech Clause does not constrain the Provisos’ effect.

The above conclusion, however, does not mean “that a government’s ability to express itself is without restriction.” *Id*. There are other “[c]onstitutional and statutory provisions” that may provide significant limits. *Id*. For example, “government speech must comport with the Establishment Clause,” *Sumnum*, 555 U.S. at 468.

But the “first and foremost” guardrail on government speech, however, is “the democratic electoral process.” *Walker*, 576 U.S. at 207. Our Constitution relies “on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks.” *Shurtleff*, 596 U.S. at 252.

Therefore, it’s the democratic process and the voters who provide the main check on the State and local governments. That is how the Founders envisioned our Constitutional structure would work—democratically accountable officials are supposed to be the decisionmakers. So, if every student, teacher, author, or interest group were able to bring a First Amendment challenge when they disagreed with a public school’s library curation or course curricula, unelected judges would effectively replace democratically accountable State and local officials as the curators of government speech. However, “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Courts should have no role in this because having judges become the arbiters of educational materials effectively turns the separation of powers on its head. These decisions are to be “committed to those who write the laws rather than those who interpret them.” *Ziglar v. Abbasi*, 582 U.S. 120, 135–36 (2017) (citation modified).

CONCLUSION

The Court should affirm the district court's ruling.

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Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,057 words. This brief complies with the typeface and typeset requirements of Federal Rule of Appellate Procedure 29(a)(4) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

January 20, 2026

s/ Joseph D. Spate
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