IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

SOUTH CAROLINA STATE CONFERENCE OF THE NAACP; IBRAM X. KENDI; AYANNA MAYES; MARY WOOD; T.R., A MINOR BY AND THROUGH THEIR FATHER AND NEXT FRIEND, TODD RUTHERFORD; AND J.S., A MINOR BY AND THROUGH THEIR MOTHER AND NEXT FRIEND, AMANDA BRADLEY

Plaintiffs,

v.

ELLEN WEAVER IN HER OFFICIAL CAPACITY AS SOUTH CAROLINA SUPERINTENDENT OF EDUCATION; LEXINGTON COUNTY SCHOOL DISTRICT THREE; AND SCHOOL DISTRICT FIVE OF LEXINGTON AND RICHLAND COUNTIES,

Defendants.

Civil Action No.: 3:25-cv-487-SAL

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE SOUTH CAROLINA AND 16 OTHER STATES IN SUPPORT OF DEFENDANTS

The States of South Carolina, Alabama, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Dakota, Texas, Utah and West Virginia ("Amici States") respectfully move for leave to appear as Amici Curiae and file the proposed amicus brief, attached hereto, in support of Defendants' Motion to Dismiss and Motion in Opposition to Plaintiffs' Motion for Preliminary Injunction.[1]

[1] Pursuant to Local Civil Rule 7.02 (D.S.C.), counsel for *amicus curiae* State of South Carolina conferred with all counsel of record prior to the filing of this motion. Counsel for Defendants consent to this motion. Counsel for Plaintiffs oppose this motion.

STATEMENT OF INTEREST AND IDENTITY OF *AMICI CURIAE*

Attorneys General regularly file amicus briefs on behalf of their respective States in cases that involve matters of public importance. As Amici States' chief legal officers, the Attorneys General are authorized to make such filings in the names of their respective States. *See State ex rel. Condon v. Hodges*, 349 S.C. 232, 241, 562 S.E.2d 623, 629 (2002) ; *see also State ex rel. McLeod v. McInnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982) ("The Attorney General, by bringing this action in the name of the State, speaks for all of its citizens and may, on their behalf, bring to the Court's attention for adjudication charges that there is an infringement in the separation of powers area.").

The South Carolina General Assembly has the authority to establish the State's education policy. In collaboration with the South Carolian Department of Education and local school districts, the General Assembly can determine the scope of pedagogical materials included in the State's K-12 curricula. Once it does that, the Department of Education and local school district engage in the process of curricula curation that requires careful evaluation of essential academic materials to ensure scholastic merit, factual accuracy, and alignment with the State's need for a uniform curriculum. In exercising this "editorial discretion," the State engages in government speech.

No individual student, parent, teacher, or interest group has a First Amendment right to dictate the content of government speech in public school curricula. Nor is there a First Amendment right to tell the government what academic materials it must provide in the first place. The State bears the responsibility to shape educational content in its K-12 public schools. The Amici States have a substantial interest in preserving the State's authority to control education policy, free from undue influence by partisan or ideological actors. Without this authority, states

could not maintain a uniform curriculum essential to fostering the educational development of future generations.

The Amici States file this brief in support of Defendants to uphold the constitutional framework that vests States and their elected officials with the authority over their own education policies. States and local government officials must retain the ability to select educational materials without external interference. The Amici States urge the Court to reaffirm the government speech doctrine, which supports this authority. Furthermore, the Amici States respectfully submit that the democratic process, through elections, serves as the primary check on education policy decisions. Allowing federal courts to referee local disputes over pedagogical materials would undermine the separation of powers, effectively transforming judges into policy makers.

The Amici States have a profound interest in preserving the balance of our constitutional structure and respectfully request leave to file this amicus brief to advance these arguments.

CONCLUSION

For the foregoing reasons, the Amici States respectfully request this Court's leave to appear as *amici curiae* and deem the proposed amicus brief filed.

Dated this 23rd day of July 2025.

Respectfully submitted,

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EXHIBIT 1

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INTRODUCTION AND INTEREST OF AMICI STATES

The States of South Carolina, Alabama, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Dakota, Texas, Utah and West Virginia ("Amici States") respectfully submit this brief as *amici curiae* in support of the Defendants.[1] 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 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 case, this Court need not endorse the State's restriction on racially or sexually divisive materials in public schools as sound public policy (although it likely is), rather it need only follow precedent holding that the selection, curation, and placement of curricula within public schools is a form of government speech. A contrary recognition risks turning separation of powers on its head and subverting the democratic process. Indeed, democratically accountable officials are the ones who decide the pedagogical materials of public-school libraries and course curricula—not unelected federal judges. The latter result would turn

[1] As the State's chief legal officer and on behalf of Amici States, the Attorney General of South Carolina respectfully files this amicus brief in support of Defendants' Motion to Dismiss and Motion in Opposition to a Preliminary Injunction. *See State ex rel. Condon v. Hodges*, 349 S.C. 232, 241, 562 S.E.2d 623, 629 (2002); *see also State ex rel. McLeod v. McInnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982) ("The Attorney General, by bringing this action in the name of the State, speaks for all of its citizens and may, on their behalf, bring to the Court's attention for adjudication charges that there is an infringement in the separation of powers area.").

the courts into the arbiters and referees of disputes between individual students, parents, authors, and interest groups over what books or topics should or should not be in the States' educational institutions.

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) (collectively, "Budget Provisos").[2] 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.

But because exercising "editorial discretion" within public education is "speech activity," *Moody v. NetChoice, LLC*, 603 U.S. 707, 731 (2024), the curation decisions of what goes into a school curricula 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. At the outset, this conclusion should resolve the case because the government "is not barred by the Free Speech Clause from determining the content of

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

what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc*., 576 U.S. 200, 207 (2015).

Moreover, 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 Walls v. Sanders*, No. 24-1990, 2025 WL 1948450, at *4 (8th Cir. July 16, 2025). This Court should therefore deny the Plaintiffs' motion for a preliminary injunction and dismiss this case.

ARGUMENT

I. The First Amendment right to receive information is not a right to retrieve information from the government.

At issue here is "the First Amendment, not FOIA." *Little v. Llano Cnty.*, 138 F.4th 834, 866 (5th Cir. 2025) (Ho., J., concurring). 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) (plurality op. of Burger, C.J.). It "does not create a right to receive information" from the government. *Walls*, 2025 WL 1948450, at *4. 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, 306 (1965 (The government cannot burden someone's right to receive political literature through the mail); *Thomas v. Collins*, 323 U.S. 516, 538 (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) (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' blanket claims, *see* ECF. No. 34, at 81-82, ¶¶ 241-45,[3] 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*

[3] All page cites are to the ECF-generated page numbers.

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.

Accordingly, Plaintiffs' 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 Pico*, 457 U.S. at 888; see also *Walls*, 2025 WL 1948450 at *3. 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). And educators do not "offend the First Amendment by exercising editorial control" over its educational content if those decisions are "reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

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*, 2025 WL 1948450, *at 1-2. The law prohibited public school officials and instructors from providing classroom materials and instruction about Critical Race Theory *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 6. That's because course curricula is itself "government speech," that "belongs to the government" and the government "gets to control what it says." *Ibid*. 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." *Id*. at 4 (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 Fifth Circuit, sitting *en banc*, rejected this claim, holding 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 the Plaintiffs 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 this State. It's one thing for the Plaintiffs 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 306 (the Postal Service could not regulate receipt of "communist political propaganda"); but it's another thing for a student or an author to tell the government *which* classes it must teach or *which* books public school libraries have to keep on their shelves. *See Pico*, 457 U.S. at 889 (Burger, C.J., dissenting) ("There 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." (cleaned up))[4]; *see also*, *e.g.*, *Boring*, 136 F.3d at 368; *Walls*, 2025 WL 1948450, at *4.

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 material in public schools "at the taxpayer expense." *Little*, 138 F.4th at 848.[5] The Supreme Court has repeatedly (and rightly) "reject[ed] the

[4] 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.

[5] Of course, Plaintiffs are free to purchase the materials in question from a variety of vendors. *See* https://www.ibramxkendi.com/stampedbook (last visited July 15, 2025). Or if they wanted to access the material covered in AP African American Studies, they're able to do so as well. *See* The Gilder Lehrman Institute of American History, *AP African American Studies Guide*, available at https://www.gilderlehrman.org/ap-african-american-studies (last visited July 15, 2025).

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 who wish to read 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, there's no First Amendment right that's infringed by South Carolina's decision to not subsidize racially or sexually divisive material its public-school classrooms and libraries.

II. Public school curricula and library curation constitutes government speech.

The South Carolina General Assembly has the "constitutional prerogative" to make "policy and funding decisions" regarding the State's public education. *Abbeville Cnty. Sch. Dist. v. State*, 410 S.C. 619, 684, 767 S.E.2d 157, 192 (2014) (Kittredge, J., dissenting). And the State "has the discretion to promote the [education] policies and values of its own choosing" free from First Amendment scrutiny. *Chiras v. Miller*, 432 F.3d 606, 613 (5th Cir. 2005). Here, the Budget Provisos merely 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).[6] South Carolina has a more than legitimate pedagogical interest

[6] 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;

in declining to provide taxpayer dollars to school curricula that rejects color-blindness and advocates for a series of race or sex-conscious policies and books that violate the Fourteenth Amendment. Regardless, there is no First Amendment violation here because the Budget Provisos are regulations concerning government speech.

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.

Plaintiffs claim that the Budget Provisos compel the Department of Education and the School District Defendants' regulation of their own curricula, which in turn (somehow) violates the First Amendment. But 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 since public schools are "instruments of the state," *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986), the General Assembly, Department of Education, and School District officials can "say what [they] wish[] and select 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) (cleaned up); *but see*, *infra*, Section II.C. Indeed, "government statements (and government actions and programs that take the form of speech) do not normally trigger the First

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> (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).

Amendment rules designed to protect the marketplace of ideas." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc*., 576 U.S. 200, 207 (2015).

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 [with] the public mind[,]" it falls squarely within the Supreme Court's classification of government speech. *Id*. at 211-12. 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; *see also Walls*, 2025 WL 1948450, at *5-6 (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.[7] And in the scope of public education, "the government speaks through its selection of which books to put

[7] 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.

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) (*PETA)*. 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 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."); *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).

And although the First Amendment says nothing about public schools' and States' selection of pedagogical materials, 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 idealogues 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 207 ("[I]t is not easy to imagine how government could function if it lacked the freedom to select the messages it wished to convey." (cleaned up)).

B. The Budget Provisos regulate government speech.

Since the Budget Provisos regulate the "compilation of the speech of third parties" for public schools, their downstream effect on the Defendants is a direct regulation of government speech. *Bryant v. Gates*, 532 F.3d 888, 898 (D.C. Cir. 2008) (Kavanaugh, J., concurring). 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* H. 5100, 2023–2024 Gen. Assemb., 125th Sess., Part 1B § 1.79 (S.C. 2024). The Budget Provisos reflect the South Carolina General Assembly's judgment that classroom instruction and public-school library curation decisions should exclude racially or sexually divisive subjects because they lack pedagogical value.

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 (2024) (quoting *Denver*

Area Ed. Tele. Consortium, Inc., v. FCC, 518 U.S. 727, 737 (1996) (plurality opinion)). This "itself is an aspect of speech." *Id*. 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*. Accordingly, the Budget Provisos' effect necessarily involves editorial choices and the "exercise of judgment in selecting the material" provided to South Carolina's K-12 students. *United States v. Am. Libr. Ass'n, Inc*., 539 U.S. 194, 205 (2003) (plurality). So here, when government entities or officials decide to remove a book from public school library shelves or remove a certain class, their use of editorial discretion is government speech. *See supra,* Section II.A.

i. The Budget Provisos comply with the Fourteenth Amendment of the U.S. Constitution.

The Budget Provisos also serve as a protective measure against the ideologically divisive subject matters they preclude. That's because if there's any "fixed star" under the First Amendment, it's that the government (including public school officials) may not force students to embrace a particular viewpoint that serves no legitimate pedagogical function. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). This, in turn, comports with the constitutional rights guaranteed and protected under the Fourteenth Amendment. Indeed, the State's operation of the public school system "implicates direct, coercive interactions" between the government and its students. *Mahmoud v. Taylor*, No. 24-297, 2025 WL 1773627, at *19 (U.S. June 27, 2025). And students don't "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

South Carolina maintains a compulsory attendance law for minor students. *See* S.C. Code Ann. § 59-65-10. So, it goes without saying that students in public K-12 education therefore maintain a familiar and extended relationship with their teachers and school faculty throughout the school year. *See Mahmoud, supra*. The Budget Provisos comport with the Fourteenth Amendment because they prevent students from being inculcated via state actors with racially or sexually divisive subject matter that is the type of fractious pedagogy likely to compel "a belief and an attitude of the mind." *Barnette*, 319 U.S. at 633. Steering clear of that sort of "government indoctrination" is a result of state decisionmaking. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000). And students with "conscientious scruples against" this subject matter should be free from the "petty tyranny" that could result if school officials' force their students to assent to these sexually or racially divisive beliefs. *Barnette v. West Virginia State Bd. of Educ*., 47 F.Supp. 251, 255 (S.D. W. VA. 1942), *aff'd*, 319 U.S. 624 (1943).

In *Barnette*, the Supreme Court struck down a statute requiring every schoolchild to salute the American flag and recite the Pledge of Allegiance to the United States. 319 U.S. at 642. Even though it was a sign of homage and patriotism to this Nation, the Pledge was used as a tool to *compel* that patriotism—which the Supreme Court found unacceptable. *Id*. Indeed, state measures that force individuals to "be an instrument for fostering public adherence to an ideological point of view" are wholly incompatible with the First Amendment. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Thus, the Budget Provisos fall squarely in line with the Fourteenth Amendment because they prohibit the State from encroaching upon the fundamental rights that belong to all K-12 students. *See United States v. Morrison*, 529 U.S. 598, 620-22 (2000).

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

Because the Budget Provisos regulate government speech, Plaintiffs' claims fail as a matter of law. That's because "[w]hen the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 576 U.S. at 207. Nor is the government required to "maintain viewpoint neutrality." *Summum*, 555 U.S. at 479. Rather, it's "the very business of government to favor and disfavor points of view." *Id*. at 468 (quoting *Finley*, 524 U.S. at 598 (Scalia, J., concurring)). To put it simply, the Free Speech Clause "does not regulate government speech," so the Budget Provisos' regulatory effects about how the government will speak through its public-school classrooms and libraries cannot violate the First Amendment. *See Summum*, 555 U.S. at 467; *accord Walls*, 2025 WL 1948450, at *6-7.

That conclusion, however, does not mean "that a government's ability to express itself is without restriction." *Walker*, 576 U.S. at 208. There are other "[c]onstitutional and statutory provisions" that may provide significant limits. *Id*. For example, "government speech must comport with the Establishment Clause," *Summum*, 555 U.S. at 467, and possibly the Equal Protection Clause as well. *Id*. at 482 (Stevens, J., concurring). 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 to 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 disagree with a public school's library curation or course curricula, unelected judges will 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 federal judges." *Hazelwood*, 484 U.S. at 273. 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).

CONCLUSION

The Court should therefore deny the motion for a preliminary injunction and dismiss this case. Doing so would help ensure that important decisions regarding the education of children and the contents of public-school curricula remain with the constitutionally appropriate decisionmakers: democratically accountable state and local officials.

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of South Carolina by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served automatically by the CM/ECF system.

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