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September 22, 2025

Fifth Circuit Holds That Government Speech Doctrine Applies to Public Library Book Removals, Creating Circuit Split With Eighth Circuit

On May 23, 2025, in *Little* v. *Llano County*,[1] an *en banc* U.S. Court of Appeals for the Fifth Circuit dismissed First Amendment claims challenging a Llano County, Texas public library's decision to remove 17 books due to complaints about their contents, and reversed a preliminary injunction requiring that certain of those books be reshelved. The Fifth Circuit rejected plaintiffs' arguments that the removal violated their First Amendment right to receive information and held that a public library's collection, curation, and presentment of third-party materials is protected "government speech" that is not subject to First Amendment challenge. In so holding, the Fifth Circuit overturned an earlier Fifth Circuit decision to the contrary[2] and created a split with the Eighth Circuit, which held in *GLBT Youth in Iowa Schools Task Force* v. *Reynolds*[3] that an Iowa statute requiring that books in public school libraries be "age-appropriate" did *not* implicate the government speech doctrine. In *Little*, the Fifth Circuit explicitly declined to follow *Reynolds* and found instead that the government engaged in its own "expressive activity" when removing the library books.

The creation of the circuit split is likely to result in an application for Supreme Court review.

I. *GLBT Youth in Iowa Schools Task Force v. Reynolds* (8th Cir.)

Reynolds concerned an Iowa statute that required public school libraries to remove books that were not "age-appropriate."[4] Plaintiffs, including publishers, authors, and students, alleged that the statute was overbroad and discriminated based on content and viewpoint in violation of the First Amendment.[5] Defendants argued that the First Amendment did not apply because the book restrictions constituted protected government speech.[6] The U.S. District Court for the Southern District of Iowa enjoined enforcement of the statute's restrictions on non-"age-appropriate" books from school libraries, finding that the restrictions were not a form of government speech, and that the

[1] 138 F.4th 834 (5th Cir. 2025) ("*Little III*").

[2] *Little* v. *Llano Cnty.*, 103 F.4th 1140 (5th Cir. 2024) ("*Little II*"); *Campbell* v. *St. Tammany Parish Sch. Bd.*, 64 F.3d 184 (5th Cir. 1995).

[3] 114 F.4th 660 (8th Cir. 2024).

[4] *Reynolds*, 114 F.4th at 666.

[5] *See GLBT Youth in Iowa Sch. Task Force* v. *Reynolds*, 709 F. Supp. 3d 664, 688–89 (S.D. Iowa 2023).

[6] *See id.* at 695.

restrictions violated the First Amendment by employing "broad and inflexible" definitions that encompassed "an extraordinary range of literature."[7]

Although the Eighth Circuit vacated the preliminary injunction entered by the district court—finding that the court engaged in a "flawed analysis" of the First Amendment test for facial validity under *Moody* v. *NetChoice, LLC*[8]—it agreed with the district court's holding that the statute did not implicate the government speech doctrine.[9] The Eighth Circuit explained that the government speech doctrine, under which the First Amendment does not impose a "requirement of viewpoint-neutrality on government speech," does not extend to the "placement and removal of books in public school libraries."[10] In reaching its conclusion, the Eighth Circuit conducted the "holistic inquiry" outlined by the Supreme Court in *Shurtleff* v. *Boston*, which considers, in determining whether the government "intends to speak for itself or to regulate private expression," (1) the history of the expression at issue, (2) whether the public would perceive the expression as the government speaking, and (3) the extent to which the government has actively shaped or controlled the expression.[11]

First, the Eighth Circuit identified the expression at issue as "the placement and removal of books in public school libraries," dismissing the defendants' comparison to *Pleasant Grove City* v. *Summum*, in which the Supreme Court held that the government speech doctrine applied to the city's selection of monuments for a public park, where the city decided to display a monument of the Ten Commandments, but declined to display a monument from another religious organization.[12] The Eighth Circuit explained that public school libraries do not share the same characteristics as park monuments, which governments "have used to speak to the public since ancient times."[13]

Second, the Eighth Circuit determined that the public would likely not perceive the removal of books to be the government speaking.[14] If a library's inclusion of books ranging from *The Prince* to *Mein Kampf*, as is "routine," were government speech, the government would be "babbling prodigiously and incoherently."[15] *Third*, the Eighth Circuit concluded that Iowa has not "historically asserted extensive control over removing books from public school libraries,"[16] which further supported the conclusion that the government speech doctrine did not apply. The Eighth Circuit concluded its government speech analysis by emphasizing the Supreme Court's "directive to 'exercise great caution before extending our government-speech precedents.'"[17]

II. *Little v. Llano County* (5th Cir.)

Little I – Preliminary Injuction and Motions to Dismiss

In 2021, the Llano County, Texas library system director removed 17 children and young adult books from the shelves of the Llano branch library due to complaints about their contents. The books dealt with topics such as

[7] *Id.* at 695, 699, 706.

[8] 603 U.S. 707 (2024).

[9] *Reynolds*, 114 F.4th at 667–70.

[10] *Id.* at 667.

[11] *Id.* (citing 596 U.S. 243 (2022)).

[12] *Id.* (citing 555 U.S. 460 (2009)).

[13] *Id.* at 667–68.

[14] *Id.* at 668.

[15] *Id.* at 668 (quoting *Matal* v. *Tam*, 582 U.S. 218, 238 (2017)).

[16] *Id.*

[17] *Id.* (quoting *Matal*, 582 U.S. at 235).

puberty, the history of racism, sexual orientation, and gender identity. County commissioners had instructed the library system director to remove books with "sexual activity or questionable nudity," among others.[18]

In April 2022, seven patrons of the Llano County library sued the county, the library system director, and members of the county's commissioners court and library advisory board in the U.S. District Court for the Western District of Texas. Plaintiffs challenged the book removals as viewpoint- and content-based restrictions on their First Amendment rights to "access and receive information and ideas."[19] In May 2022, plaintiffs moved for a preliminary injunction to require the defendants to return the books to the library shelves.[20] Defendants subsequently moved to dismiss in June 2022, asserting that the complaint failed to state a claim because the library engaged in government speech by deciding to remove certain titles, thus precluding a violation of the plaintiffs' First Amendment rights.[21]

On March 30, 2023, the district court partially denied the defendants' motion to dismiss and partially granted the plaintiffs' motion for a preliminary injunction. The court rejected defendants' government speech argument, distinguishing between a library's "initial selection" decisions, which may be government speech, and its "removal" decisions, which are not.[22] The court relied on *Campbell* v. *St. Tammany Parish School Board*, in which the Fifth Circuit held that a public school library's removal decisions are subject to First Amendment scrutiny and are evaluated based on whether the government's "substantial motivation in arriving at the removal decision" was discriminatory.[23] The court explained that *Campbell*'s acknowledgement of the right to receive information—adopted from the Supreme Court's plurality opinion in *Board of Education, Island Trees Union Free School District No. 26* v. *Pico*[24]—applied to public libraries with "even greater force," given that they are "designed for freewheeling inquiry" and do not implicate the "discretion" generally afforded to school boards.[25]

The court also held that the removals likely constituted viewpoint and content discrimination because defendants' conduct was "substantially motivated by a desire to remove books promoting ideas with which [it] disagreed," given that the removals occurred in response to complaints that certain of the books were inappropriate "pornographic filth" and "[critical race theory] and LGBTQ books."[26] The court rejected as pretextual defendants' argument that the books were removed as part of the library system's "routine weeding process."[27]

Little II – Preliminary Injuction and Motions to Dismiss

Defendants appealed to the Fifth Circuit on April 4, 2023, seeking reversal of the preliminary injunction. On June 6, 2024, a Fifth Circuit panel agreed 2-1 with the district court's holding that library patrons have a First Amendment right to receive information and ideas, and that the removal, substantially motivated by the library's desire to restrict access to viewpoints it disagreed with, violated that right.[28] The Fifth Circuit also rejected the application of the government speech doctrine, explaining that *Campbell* did not suggest that a "public official's decision to remove a

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[18] *See Little* v. *Llano Cnty.*, 2023 WL 2731089, at *2 (W.D. Tex. Mar. 30, 2023) ("*Little I*").

[19] *Id.* at *1.

[20] *See id.* at *4.

[21] *See id.* at *7.

[22] *Id.*

[23] *Id.* (quoting 64 F.3d at 190).

[24] 457 U.S. 853 (1982) (plurality).

[25] *Little I*, 2023 WL 2731089, at *8.

[26] *Id.* at *10.

[27] *Id.* at *11.

[28] *See Little II*, 103 F.4th 1140.

book from a school library was government speech."[29] The court further explained that, although a public library may need to exercise discretion as part of its book curation process, those curation decisions are restricted by the patrons' free speech rights.[30]

The court also determined that the preliminary injunction was overbroad, however, and modified it to allow the library to remove books on the grounds permitted by *Campbell*, including if the books were "pervasively vulgar" or "educational[ly] unsuitable."[31] The majority agreed that, under *Campbell*, 8 of the 17 books should be reshelved.[32]

Little III – Preliminary Injuction and Motions to Dismiss

The Fifth Circuit granted the defendants' petition for an *en banc* hearing on July 3, 2024. Defendants argued that the *en banc* court should overrule *Campbell*, limit *Pico* to its facts, and find that a public library's shelving decisions constitute government speech. The parties also raised arguments about how the *Shurtleff* factors should be applied. Over the succeeding months, eight *amicus* briefs were filed, including from the NAACP and ACLU, state attorneys general, Penguin Random House, and authors Stephen King and James Patterson.

On May 23, 2025, in a 10-7 ruling,[33] the Fifth Circuit reversed the preliminary injunction. The majority opinion, authored by Judge Stuart Kyle Duncan,[34] held that (1) the right to receive information did not empower patrons to challenge book removals or tell a library what books to keep, (2) *Campbell* was wrongly decided, and (3) a library's curation of its book collection is government speech. Dismissing comparisons to book bans and burns by plaintiffs and several *amici*, the majority insisted that everyone "[t]ake a deep breath," explaining that Llano County merely continued the two-century tradition of libraries determining "which ideas belong on the shelves, and which do not."[35]

First, the Fifth Circuit found that the right to receive information did not empower plaintiffs to challenge library book removals. The court acknowledged that while the right to receive information may prohibit the government from impeding an individual's right to receive another's speech, that right is distinct from one to demand that the government *provide* that speech.[36] The Fifth Circuit rejected *Pico*'s expansion of the right to challenge book removals from a public school library, reasoning that *Pico* was "highly-fractured" and non-binding, with five separate opinions and only three justices fully joining the decision.[37] The Fifth Circuit explained that the majority of justices in *Pico* did, however, agree that there "is no First Amendment obligation upon the State to provide continuing access to particular books."[38] It further explained that ruling to the contrary would result in endless challenges and implicate a standard that would "tie courts in endless knots," as evidenced by the fact that *Little II*'s majority could not even agree on whether certain of the 17 books should have been removed.[39]

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[29] *Id.* at 1151–52 & n.10. The Fifth Circuit acknowledged that the defendants arguably waived their government speech doctrine argument on appeal, but nonetheless addressed it "because of its import." *Id.* at 1151 n.10.

[30] *See id.* at 1151–52.

[31] *Id.* at 1154.

[32] *See id.* at 1157.

[33] Judges Jones, Smith, Willett, Ho, Duncan, Engelhardt, and Oldham joined the majority in full. Judges Elrod, Haynes, and Wilson joined in part.

[34] Judge Duncan authored the dissent in *Little II*.

[35] *Little III*, 138 F.4th at 838.

[36] *See id.* at 843, 845

[37] *Id.* at 843–44.

[38] *Id.* at 844 (citation omitted).

[39] *Id.* at 846–47.

Second, the Fifth Circuit overruled *Campbell*. *Campbell* had relied on *Pico* to hold that a school board's removal of the book *Voodoo & Hoodoo* from school libraries implicated students' right to receive information.[40] The Fifth Circuit noted that only three justices in *Pico* joined in that conclusion and reiterated its rejection of *Pico* as precedent.[41] The court also rejected plaintiffs' argument that *Campbell* instituted a straightforward prohibition on "viewpoint animus," reasoning that while ideas such as Holocaust denial are viewpoints, the First Amendment would not prevent a librarian from removing books expressing that viewpoint.[42]

Third, the Fifth Circuit applied the *Shurtleff* factors—(1) history of the expression at issue, (2) public perception of whether the government is speaking, and (3) extent of the government's control—and held that a library's collection and curation decisions are government speech and thus not subject to challenge under the First Amendment. It explained that the government may speak by "crafting and presenting a collection of third-party speech."[43]

> *History of the Expression*. The Fifth Circuit concluded that modern libraries continue the tradition of expressing a message about which books are worth reading.[44] Early state and municipal libraries often focused on selecting books to "promote virtue" and weeding books that promoted "improper morality."[45] According to the Fifth Circuit, these choices were the libraries' "loud[] and clear[]" speech that the books it makes available will "educate and edify" its patrons.[46] The court explained that Llano County's library system made similar recommendations by weeding books with outdated moral values or political ideas. The Fifth Circuit concluded that this shared history of expression through curation was "quintessential government speech."[47]
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> *Public Perception.* The Fifth Circuit determined that the selection of books and "presenting them as worthwhile literature" could only be perceived as the government speaking, because it is a message from the *library*. The court noted that, in *Reynolds*, the Eighth Circuit mistakenly identified the speech at issue as the *words* of the books, rather than the *selection and exclusion* of the books, stating that "a library that includes *Mein Kampf* on its shelves is not proclaiming 'Heil Hitler!'"[48] The Fifth Circuit similarly rejected the Eighth Circuit's application of *Summum*—that is, just as the government expressed a particular message by deciding what image would be displayed by the monument, Llano County expressed a message by identifying the books it deemed "worth reading."[49] In both cases, the government expressed a message by "selecting, compiling, and presenting" third-party speech.[50]
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> *Extent of Government Control.* The Fifth Circuit found that this factor also supported the application of the government speech doctrine, because the tradition of intentional library curation, as discussed under the first

[40] *See id.* at 848.

[41] *See id.* at 849.

[42] *See id.* at 849–50.

[43] *Id.* at 852.

[44] *Id.* at 861.

[45] *Id.* at 862.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 864.

[49] *Id.* at 852–53.

[50] *See id.* at 853.

factor, presents a message to the public.[51] The court also noted that libraries continue to make selection decisions for "specific educational, civic, and moral purposes."[52]

On these bases, the Fifth Circuit reversed the preliminary injunction, rendered judgment dismissing plaintiffs' First Amendment claims, and remanded for further proceedings consistent with its opinion.

III. Conclusion

By holding that the government speech doctrine applies to public libraries' book-selection choices, the Fifth Circuit has created a circuit split with the Eighth Circuit's holding in *Reynolds.* And it is notable that, rather than allow *Little II* to stand, which would have kept the Fifth and Eighth Circuits in unison, the Fifth Circuit granted *en banc* rehearing and overruled itself. These sensitive issues continue to drive litigation in federal courts, as individuals and entities concerned about censorship and speech discrimination consistently challenge restrictions on library materials.[53]

On September 9, 2025, the non-prevailing parties in *Little* filed a petition for a writ of certiorari to the U.S. Supreme Court.[54] It remains to be seen if the Supreme Court will resolve the circuit split or let the issue percolate further.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; Jason Rozbruch (Associate) at 212.701.3750 or jrozbruch@cahill.com; Justine Woods (Associate) at 212.701.3525 or jwoods@cahill.com; or email publicationscommittee@cahill.com.

[51] *Id.* at 865.

[52] *Id.*

[53] *See, e.g.*, *Pen Am. Ctr., Inc.,* v. *Escambia Cnty. Sch. Bd.*, 711 F. Supp. 3d 1325 (N.D. Fla. 2024); *Penguin Random House LLC* v. *Labrador*, No. 25-cv-61 (D. Idaho).

[54] Petition for a Writ of Certiorari, *Little* v. *Llano Cnty.*, No. 25-284 (U.S. Sept. 9, 2025).