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CHIEF JUDGE RICHMAN: Case on our docket this morning is 23-50224, Little v. Llano County. Mr. Mitchell.

JONATHAN F. MITCHELL (on behalf of Llano County, et al.): Thank you, Your Honors, and may it please the Court. 29 years ago, this Court held a panel in Campbell against St. Tammany Parish School Board that the Speech Clause limits the authority of librarians and school officials to remove books from a government-owned library. That holding is wrong and should be overruled. Campbell is wrong because a librarian does not and cannot abridge the freedom of speech by weeding or removing a book from a public library or from a school library. The government has no constitutional obligation even to provide these libraries, and it has no constitutional obligation to include any particular book within a library's collection. The Speech Clause may prevent the government from punishing or penalizing those who seek to access information and ideas. But it does not require the government to assist or facilitate anyone's efforts to obtain a particular book. It does not require Llano County to preserve access to library books that it previously provided as a matter of grace. Our Constitution is a charter of negative rights, not positive rights, and the plaintiffs cannot compel Llano County or any other governmental unit to open a public library, to add any particular book to a library's collection, or to keep any particular book on the library's shelves. The most straightforward way to overrule Campbell is to hold that library curation decisions are government speech. The Supreme Court's recent decision in Moody Against Netchoice holds that presenting a compilation of speech originally created by others is speech that belongs to the curator. That means that the public library's curation decisions are speech, and they can only be speech that belongs to the government and not a private party. These library curation decisions in a government-owned library cannot possibly be considered private speech because the librarian who weeds a library book is acting within the scope of her government employment. But if a court rejects a government speech argument, it should still overrule Campbell because the government does not and cannot abridge the freedom of speech by failing to include the plaintiff's preferred books within a public library's collection. The situation in this case is no different from a government that decides to withdraw or remove all handguns from a government-owned store, and it is no different from a governmental unit that decides to remove or cancel abortion services that were previously offered at a government-owned hospital. Campbell should be overruled because the government has no obligation to affirmatively assist those who seek to exercise a constitutional right, even if the government has previously provided that assistance. And the government's refusal to provide desired assistance does not abridge the freedom of speech or any other constitutional right. I welcome the court's questions.

JUDGE ELROD: Mr. Mitchell, does this have any application for the use of the rooms at the library, for the story hours from the certain groups on either cultural battle side?
Does this have any implication for those use of the spaces at the library?

MITCHELL: I haven't thought through that particular question, Judge Elrod, but my immediate reaction would be that I think the answer to your honor's question will depend on whether access to any of these rooms or spaces in the library somehow creates a limited public forum. To determine that, I think the court would have to look carefully at how the library has permitted access to these types of rooms in the past, much like the analysis the Supreme Court conducted in Shurtleff with respect to the flags that were being raised on Boston city property. If the library has been very generous and open to all comers, and hasn't really imposed any particular restrictions in the past, that would counsel in favor of a finding of a limited public forum. If it's been more selective and exclusionary of certain groups that are either espousing views that the library objects to or engaged in the perhaps propagation of content that the library does not wish to assist in propagating, then that might be more of a government speech type of cubbyhole. So it's going to be a very fact-bound and very fact-intensive inquiry. So I'm somewhat reluctant to just opine on that question in the abstract. Thank you.

JUDGE DOUGLAS: Mr. Mitchell, why wouldn't your government speech argument be waived or forfeited?

MITCHELL: It's not waived at all, Your Honor, because we could not make this argument before the panel consistent with Campbell. This is one issue on which the plaintiffs and us agree. Campbell foreclosed our government speech argument because the argument we're making is that public library curation decisions and school library curation decisions are government speech simply by virtue of the fact that the government owns both of these libraries. We could not, in our argument, draw the distinction that Judge Duncan drew in his dissent, where he suggested a different type of government speech argument that was limited only to public libraries, and he tried to distinguish school libraries to get around Campbell. That is not the argument we have ever made in this litigation. We did make this argument in the District Court. It's in Docket Entry 42, and the plaintiffs responded to our motion to dismiss by pointing out correctly that Campbell forecloses this argument. We could not, consistent with our ethical obligations to the District Court or to the three-judge panel, continue to press an argument that was directly foreclosed by the binding precedent of this court. It's no different from Mississippi, when it was seeking to overrule Roe against Wade in Dobbs. It did not present those arguments in the District Court for why Roe should be overruled, nor did it present the arguments to the three-judge panel of this court that heard Dobbs before it reached the Supreme Court. It waited until it filed its certiorari petition, and at that point, only at that point, did it first attack Roe against Wade and present its arguments for overruling Roe. We are taking the same approach here, and that's proper. We respect the precedent of this court even though we disagree with it, and when we argue in the district court, we're going to argue with the hand we've been dealt, which includes the binding precedent of this court, and we had no way of getting around Campbell at that time.

JUDGE HIGGINSON: On the theory of libraries as government speech exempt from First Amendment restrictions, three questions, one factual, two legal. Factually, I'm curious to hear who you would say was the government speaker here, because I think the testimony from Milam, Judge Cunningham, Rochelle Wells, all was that they never read books like Caste or KKK. They didn't read them. So curious who the government speaker is. Then legally, am I correct that no

federal court has ever asserted this view as to public library book removals, that those removals are exempt entirely?
And can you keep in track a third one?

MITCHELL: I believe I can, yes.

JUDGE HIGGINSON: In fact, then that question, just yes or no, has any court espoused the theory you're urging? The third question is a limiting principle one. In terms of your opponent points out, wouldn't this lead to silos of partisanship, which I read to be Rehnquist's concern in Pico. Alito then says it again when he talks about cover for censorship in Shurtleff. In other words, could books libraries elsewhere say, books on hunting, books on the crucifixion, those depict violence, we think they're harmful, we get to pull them out, government speech.

MITCHELL: So I'll go in the order in which your honor asked the question. Number one, who's the government speaker? Has to be Amber Milam, the head librarian, because she's the only person who had the authority to weed these books, and she was the ultimate decision maker on whether the books should be weeded. There were other people involved who expressed objections to some, but not all of these books in the library. They did so in their capacity as private citizens. Bonnie Wallace, at the time she sent the email criticizing some of the library books, she was a private citizen. Rochelle Wells, when she sent her email, she was also a private citizen. I don't see how any of that can be characterized as government. Okay. Might be a more difficult question if they were holding government office at the time, but they weren't at the time they sent these.

JUDGE HIGGINSON: They were on the reconstituted advisory.

MITCHELL: They are, yes.

JUDGE HIGGINSON: Okay, go ahead. I appreciate that correction.

MITCHELL: Your honor, second question is, has any court adopted this argument we're making? No, we have not found one. We have not found any court that has even said that library weeding decisions are per se exempt from speech clause scrutiny, which is sort of our backup argument to government speech. We haven't been able to find any court to say that yet. I don't think that's fatal to our position, though, Judge Higginson, for several reasons. One, we're relying heavily on Moody against NetChoice. That case helps us a lot more than any of the precedents that Moody against NetChoice relied upon. I think if you look at the decision of Hurley with the parade, that's easily distinguishable from the library situation. There's a line in Justice Souter's opinion that talks about the parade being analogous to an orchestra director conducting a score. That's not really what goes on when a librarian is making curation decisions within a library. I think the newspaper case for Miami Herald is also easily distinguishable from the library. Moody against NetChoice comes out very strongly and says that curation decisions are independently speech of the curator. This court prior to the Supreme Court's ruling held otherwise. It ruled against the internet service providers in that case, and that decision was stayed. I'm not suggesting that was binding precedent on us at the time, but the legal landscape has changed since Moody against NetChoice came out.

JUDGE HIGGINSON: The third question.

MITCHELL: Then your third question was, and could Your Honor please remind me what it was.

JUDGE HIGGINSON: Or was the limiting principle Alito's concern about cover for censorship Rehnquist's concern in Pico? Could libraries elsewhere with different community political viewpoints take out books on hunting? Because those depict violence, they're harmful to kids.

MITCHELL: I believe they could under the speech clause. I would not support that as a matter of policy, and I would hope there would be political constraints in place that would deter them from doing that sort of thing. But I also would suggest to the court, there may be other legal constraints in play here. Number one, if there's racially motivated book removals, there are all sorts of laws that could come into play here. 42 USC 1981 would prevent the library from just saying, we're not going to buy any books that were written by black authors. There could be restraints imposed by the Equal Protection Clause, if there's racially motivated book selection or book removal policies. There could be equal protection constraints if there is sex discrimination in the accumulation of books. Still, at the very end of the day, Judge Higginson, there still will be rational basis review under the Equal Protection Clause. So if there's something akin to a bare desire to harm a politically unpopular group, the sort of language you see in the Moreno opinion, that might be a possible way for a plaintiff to get into court, if there is one of these just irrational book removals that can't be explained other than hatred or hostility or prejudice.

JUDGE ELROD: What about religious discrimination, Mr. Mitchell? Would that be, for example, if the book, Gay Girl, Good God, which has to do with a person who is gay, but then she ends up in a heterosexual marriage over a period of time and discusses her faith journey, I believe, is the book. Would that be a book the library could cull because they would find it offensive, that that was outdated or something, and then could then the religious people say that's can't be culled because it discriminates against their rights to religious views or something, or is that because it's all under the First Amendment umbrella, it would just be a curation decision?

MITCHELL: Well, under the Speech Clause, it would be a curation decision. There might, under your honor's hypothetical, be a potential claim under Supreme Court Establishment Clause doctrine. I think we'd have to know exactly what the reasons were for removing that book, but you did mention it had religious overtones. So if there is hostility toward a religion or a desire to promote a particular religious view over another, there might be a way into court on an establishment clause theory. We're not ruling any of that out in our brief. Our argument is limited to the Speech Clause. There may very well be other constitutional constraints. There may be other federal law constraints. There may even be state statutes that could constrain libraries if some local communities start to engage in abusive practices. We have seen states like Washington State recently enact laws that limit the ability of school officials and local officials to remove books from public libraries. I don't think we should fall into the fallacious view that just because the Speech Clause doesn't present constraints, therefore it means that anything goes and all these parades of horribles could occur. There still can be other laws in place and there can be

new laws enacted by the state legislature, by Congress, by other entities that can curb abuses if those abuses were to occur.

JUDGE WEINER: Let me ask you...

JUDGE SOUTHWICK: I'll wait.

JUDGE WIENER: You're familiar, obviously, with the Eighth Circuit case, the recent case in Reynolds. How is this case different from that which was a school library?

MITCHELL: I don't think this situation can be distinguished, Judge Wiener. We could try to make the argument that Judge Duncan made in his dissent about how school libraries should be subject to a different set of rules than public libraries. I just don't think we can do that with respect to government speech. These are both government-owned libraries. I think it is right to point out that in the school situation that courts have said the school officials act in loco parentis, so therefore they should have more authority, perhaps, to control what's in the curriculum, but that distinction cuts against us, not for us. So that's why we're really not trying to rely on the idea that school libraries should be subject to a different set of rules than public libraries. What we recommended in our brief is that the court respectfully disagree with the Eighth Circuit, and I think there's no way to overrule Campbell without creating a circuit split with the Eighth Circuit on this question, and that's unfortunate, but I think that's just the reality of what we're facing right now.

JUDGE SOUTHWICK: Counsel, isn't Moody distinguishable because it is private speech that was involved in Moody curating decisions by those platforms or whatever? It was private speech. We can't determine what is government speech until we go through the Shurtleff factors. Response?

MITCHELL: That's correct. So Moody is a case about private speech, but what Moody holds, and I think what binds this court, is that it is speech of some sort, and then it's up to this court to decide whether the weeding decisions of Amber Milam should be characterized either as government speech or as private speech. And to determine that, the court would apply the Shurtleff factors. What we're saying is that Moody requires a view that this is speech activity, and it doesn't weigh in.

JUDGE SOUTHWICK: But you're accepting this only part of the analysis. We can't stop with Moody, even if we're right. We have to then figure out, are these expressions consistent with the Shurtleff factors?

MITCHELL: That's correct. Yes.

JUDGE SOUTHWICK: And we don't think about Matal v. Tam, or whatever the name is, trademark case.

MITCHELL: Yes, Matal v. Tam.

JUDGE SOUTHWICK: It says, while the government speech doctrine is important, it's a doctrine that's susceptible to dangerous misuse. If private speech could be passed off as government by simply affixing a government seal of approval, government could silence some awful, unfavorable ideas. It seems to me that there is a risk of that occurring here, that we are calling this particular activity that occurred in this library government speech, when in fact it is suppression of unpleasant, unacceptable ideas to some group of people.

MITCHELL: The reason we don't think that's a concern, Judge Southwick, is because we've made clear in our briefing that the books themselves do not become government speech, simply by virtue of their-

JUDGE SOUTHWICK: Say that again.

MITCHELL: The library books themselves do not become government speech, simply by virtue of their inclusion in the public library. Just as the Supreme Court held in Matal against Tam correctly, that the trademarks do not become speech of the government simply because the PTO decides to register those trademarks. They're still private speech. It's speech of the author in the case of the books, it's speech of the person who created the trademark in the case of Matal against Tam. All we're claiming is that the decision to curate, to include or exclude a book from a library's collection, that decision and that decision alone constitutes government speech. When our request for the holding is limited in that fashion, it doesn't raise the concerns of censorship that so troubled the court in Matal against Tam. What the court was worried about is that if we call the trademarks themselves government speech, they could potentially be censored and they also raise the same concern with respect to copyright law. But here, we're only saying the curation decisions of government speech. We can't censor the library books or ban them in the traditional sense of the word censoring ban, not in the way the plaintiffs are using that term. We can't ban that speech just by calling it government speech because the books don't become government speech.

JUDGE SMITH: Mr. Mitchell, I was a little bit surprised in your briefing that you didn't place more emphasis on the Walker case. You barely mentioned it. I'm partial to that decision because it vindicated my dissent in that case. I guess I placed some emphasis on it. But it seems to me that under Walker, this is a slam dunk for the definition of government speech. The court said, Texas maintains direct control over the messages conveyed on its specialty plates. This final approval authority allows Texas to choose how to present itself in its constituency. That's exactly what's happening in the library in terms of the final authority. But I'm curious that there must be a reason why you haven't placed more weight on that.

MITCHELL: I'll confess, Your Honor, I'm also somewhat partial to Walker because I unsuccessfully argued before Your Honor the position that Your Honor adopted. And the panel disagreed both with Your Honor and with me. But the reason I didn't place more heavy emphasis on Walker was because in the license plate context, the state is so actively involved in creating the plate, pounding out that plate into a state-issued, not document, but a thing that goes on the car with the state's name on it. And with a library book that's just being put on the shelves, it's not quite the same way that the state is embracing the message. And that's what troubled me about relying on Walker. The other problem I saw with Walker was we didn't want to suggest in any

way that the library books became government speech. And with Walker, the design was adopted by the state, even though it was created by a private citizen. And the Supreme Court's holding on Walker seems to say that that license plate design itself becomes government speech when it starts to appear on license plates. So that's what troubled me a bit about relying on Walker. And Moody against NetChoice didn't present any of those problems. So that's why I thought NetChoice was our stronger of the two. Not that Walker is useless. I think it is somewhat helpful for us. But it's not quite a slam dunk for us in the way that I think the holding of NetChoice is.

The court has no further questions. I see my time has expired. I have saved five minutes for rebuttal. Thank you, Your Honors.

HENRY CHARLES WHITAKER (on behalf of Amici Curiae States supporting Llano County): Thank you, Your Honor, and may it please the Court. Henry Whitaker from the Florida Attorney General's Office for the State Amici. Well, I wanted to start off with some of the questions that the Court has asked about the limiting principle that is on the government speech argument. It is important, I think, as Mr. Mitchell alluded to at the end there, to distinguish between the content of the books themselves and the message the government is sending in selecting and removing books. The government is not adopting the content of the books, as was, I think, the Supreme Court's concern in the tall where the government's claim, I take it, was that it was the content of the trademarks themselves, that the government was essentially adopting as its own. I think Judge Higginson, that was some of what Judge Alito was reacting to in his separate opinion in Shurtleff in asking about the dangers of government censorship and the like, but he carved out, in that opinion, if you'll recall, the situation which we have here, which is where the government has, where an author has, speaker, has voluntarily put forward its speech product here, books, and the government has adopted that as its own. There's no question of, I think, compelled speech in that instance. And I think the Summum case, which Judge Alito points to in his Shurtleff concurrence as well is a very good example of this. And we rely on Summum as our principal analogy because Summum did involve Judge Southwick, a case of government speech. And it equally involved an instance in which the government was taking privately created expressive products, in that case it was monuments, and establishing and presenting to the public an expressive compilation of its own that expressed the message that the court thought was quite distinct from the monuments themselves. Please.

JUDGE HIGGINSON: Only if you don't have uninterrupted time. So you're welcome to questions. I must just, with your perspective, looking at the states across the board, would you agree with me that states like Louisiana have approached the same concern about protecting children in a way that causes far less friction with the First Amendment, in that what they've done, as I understand it, is empower parents to limit their own children's access to books on library cards, as distinct from allowing parents through advisory boards to take books away from any and all parents using the library. Do you understand my question? Is there less First Amendment friction if a state's approach to protecting its children, if that's its theory, in public libraries, is to empower parents to restrict their own children, as distinct from removing the books entirely?

WHITAKER: I don't think that makes a First Amendment difference. Judge Higginson, I think you guys equally know, that maybe perhaps there are differences in policy there. I don't think

that there's a First Amendment problem, though, when the state makes viewpoint-based, removes books on a viewpoint-based basis in a public library. Those kinds of determinations are the very essence of what it means to provide a public library. A public library is supposed to provide a selection of books for the enlightenment and enrichment of the community. And as a matter of necessity, it is needed to, in the words of Chief Justice Rehnquist in American Library Association, separate out the gold from the garbage. And I think as Judge Duncan noted in his panel of Ascent, it would be essentially impossible to perform that task without giving the government the constitutional authority to make viewpoint-based decisions in.

JUDGE SOUTHWICK: Also, are you making that independently of the government speech argument to look at ALA, American Library Association, which isn't talking about that? Are you saying that's a right, regardless of what we do with government speech, that's an independent reason to rule in your favor? Or is it part of just teasing out what government speech means in this situation?

WHITAKER: I think both of those things, Judge Southwick, I guess. I think that it works both independent of the government speech argument. Obviously, we agree with government speech argument. Let me just comment on the ALA case. I mean, ALA, of course, did not straight out say that the provision of books in a public library was government speech. It did, however, reject the notion, I think, that any kind, that the public library provides any kind of a speech forum in providing books, including a limited public forum, which I think necessarily implies that viewpoint, the court endorsed, at least the plurality there. It's not a binding opinion. It didn't command a majority. I think the analysis is quite persuasive though, which necessarily means that viewpoint-based determinations would be just fine as far as the Parallel American Library Association goes. I do think Mr. Mitchell is right that another way to look at this case, even if the court had concerns about whether, in fact, a public library is producing an expressive product, there's still no affirmative right to have the state provide you with a piece of information.

CHIEF JUDGE RICHMAN: That's my question. Can we decide this case on who's got what enforcement rights from the standpoint of users of a library without getting into whether the librarian or the county has government speech rights?

WHITAKER: Yes, I believe you can. I believe you could say, and Mr. Mitchell makes this argument in his reply brief, that the selective provision of a government benefits as part of a government program where that restriction is reasonably necessary to administering the program. Here, we're talking about viewpoint-based restrictions on the provision of library books. That falls in the heartland of cases where the Supreme Court has said that the government does not have an obligation to subsidize constitutional rights. The case would be quite different if, for example, the government tried to impose an unconstitutional condition on imposing a government library. I mean, if the government said, for example, only Republicans can check out books or something, that would be quite a different case than the government making viewpoint-based decisions about what books can and can't be part of a library. That, of course, is an integral part of running a library. The Supreme Court, going back to cases such as Russ versus Sullivan, has recognized that if you have conditions that are a valid incident of running a government program, then that's not an unconstitutional condition, and the government can do that. There's no right to a gratuity under the government.

JUDGE ELROD: What if the librarians have personal animus against the authors? Would that be, does that complicate things or not at all?

WHITAKER: It might complicate things, Judge Elrod, to be sure. If you had, let's say, personal animus against the author, I think that would be perhaps a different case. The government speech argument is just to say that the Free Speech Clause, as a general matter, does not regulate the selection and removal of books. And as your, I think your first question to Mr. Mitchell quite rightly pointed out, the analysis may well be different as to other functions that the library provides that are not necessarily in the selection and removal of books. The provision of rooms, of course, would be, had to be governed by a completely different analysis. We'd have to look at-

CHIEF JUDGE RICHMAN: Your time has expired.

WHITAKER: Okay. Thank you, Your Honor.

MATTHEW BORDEN (on behalf of Little, et al.): Thank you, Your Honors, and may it please the Court, Matt Borden on behalf of Plaintiffs. American public libraries are a magical place where anyone can go and learn about a wide variety of topics. In libraries, just like everywhere else, the First Amendment prevents the government from getting rid of ideas that it disagrees with. That was the standard that this Court set out in Campbell. Libraries have wide discretion over their collections, but they cannot get rid of books when their substantial motivation is based on the viewpoint. Campbell has been the law in the circuit for 30 years, without a flood of litigation or other difficulties that my friends have alluded to. It's built on solid First Amendment foundation. It's built on Pico, where they were dealing with decades of First Amendment jurisprudence. Pico itself, eight of the justices, stated that they would have ruled and adopted a view very similar to what this court did in Campbell. It dovetails with every other line of First Amendment jurisprudence. The Forbes case, where you have a nonpublic forum and the government can't discriminate by viewpoint. The Finley case, and that line of authorities, where you have no right to a government subsidy, but if they're going to have a government subsidy program, they have to administrate it in a way that does not discriminate by viewpoint. And then there's the Rosenberger line of cases, where the government is making available funds to have to offer a wide variety of viewpoints and ideas to the public. And at that point, it can't pick and choose among the ideas based on viewpoint. The one through line that's running through all these cases is that the government cannot discriminate by viewpoint because that is the core of what the First Amendment prohibits. Defendants rule would overthrow all these cases, and it would turn libraries from institutions of knowledge and education and learning and ideas into political institutions. And that was a correct observation by you, Judge Higginson, that that's exactly what would happen, and the protections that they've offered in terms of other government amendments don't get rid of the big problem, which is political speech. Because if they were correct that the government could do whatever it wanted with books in a library, the national government could pass a law that outlawed any viewpoints in the library that discriminated or differed from what it wanted. And that's why the Supreme Court has said to be very cautious in the tall about expanding the government speech doctrine, because unlike the First Amendment, which has been written into the Constitution for 233 years, the government speech doctrine is a judge-made rule of relatively recent vintage that it chews into the First Amendment. And when you have it being

used to do the things that the First Amendment doesn't allow, discriminate by viewpoint, suppress unpopular ideas, the government can enter into the marketplace of ideas when it puts up a monument or wants to say something affirmatively. But when it's suppressing ideas, it's creating dysfunction in that market, and the doctrine has to give way. Removal of a book is not government speech. There's no clear message that's being sent. It's like Matal, where you have trademarks. All of the messages, and when you have a platform that the government offers, and it's not endorsing the message of any of the materials on that platform, cases have uniformly held that that is not government speech, and that was the case in Matal, and this case is exactly like that. They had a curation issue in Matal, and the court said, no, the government would be prodigiously babbling if it actually adopted all those messages. And that was the same holding by the Eighth Circuit in Reynolds. And it's consistent with the policy of the Galano County Library, which says, In no case should any book be excluded because of race or nationality or the political or religious views of the writer. And material should not be prescribed or removed from the library shelves because of partisan or doctrinal disapproval. This is a situation where the government has said that it's not speaking and that it's not adopting the messages of these books. And that puts it exactly square on with Matal. No court, as my friend agreed, has ever adopted this government speech argument, and this court should not be the first. I welcome the court's questions.

JUDGE DUNCAN: Counsel, as I understand your position before our court, you're saying the First Amendment says to a librarian, if you remove a book because you disagree with the viewpoint, you violate the First Amendment, right?
That's what I'm hearing you saying.

BORDEN: That's correct.

JUDGE DUNCAN: Right. So, the parties talk a lot, and the amici talk quite a bit about weeding, the weeding process, and the crew method. Your brief, page 3031, says weeding is based on neutral criteria, and it's more akin to maintenance work than intentional control of specific content. And then I noticed the American Library Association filed an amicus brief saying weeding is not the removal of books with inappropriate ideas or viewpoints. It is not deselection, a deselection tool for controversial materials. So the way I see the parties presenting this is that viewpoint discrimination is bad. It violates the First Amendment. But weeding is something necessary that libraries do all the time. And that's been my understanding of the case from the beginning. But since we're at en banc, I thought I'd go and look at the weeding guides, which are cited in the briefs, the Texas Weeding Guide, the ALA Weeding Guide, just to sort of check and make sure that, in fact, weeding is really a non-ideological viewpoint-neutral exercise. So here's what I find. I mean, I've got the weeding guide here. Here's what the Texas Weeding Guide says. It's described as the Bible of library curation. The Texas Weeding Guide says, Librarians should weed biased, racist, or sexist views, stereotypical views of people with disabilities or the elderly, outdated philosophies on sexuality, marriage, and family life, biased or inflammatory items about immigration, gender or race bias, children's books with erroneous and dangerous information. That's the Texas Weeding Guide. It's telling librarians to weed these books. So I ask you, isn't that in and of itself, viewpoint discrimination that's in the Texas Weeding Guide?

In other words, aren't libraries, according to the Bible of curation in Texas, already engaged in viewpoint discrimination, selection of some viewpoints over others, in making their curation decisions?

BORDEN: There's a couple parts to the answer here, Judge Duncan. First of all, this Weeding Guide was added to, or attempted to be added to the record by defendants after the close of evidence.

JUDGE DUNCAN: It's cited in the American Library Association amicus brief at page 9, note 26.

BORDEN: And what, there wasn't a single piece of testimony on this guide. All of the librarians in this case, defendants and plaintiffs side, testified that they followed the musty factor.

SPEAKER_9: What does the M stand for?

BORDEN: Misleading.

SPEAKER_9: How do you make a misleading determination without judging the viewpoint of the speaker?

BORDEN: I think misleading is a factual category. It's a content-based discrimination, or a content-based rule that would, regardless of the viewpoint of the speaker, would prohibit it in this narrow category if you could prove something was actually factual.

SPEAKER_9: This is the ALA's weeding handbook. Libraries would do well to remember the first M in musty is misleading. Crew goes even further to define that material that contains biased racist or sexist terminology or view should be weeded. But I don't understand how you can make a misleading determination without determining the viewpoint of the speaker.

BORDEN: I think you can look at facts. Facts can be misleading like Judge Duncan pointed out in his dissent. If you have Pluto as a planet, that would be factually untrue because the science on that has changed.

JUDGE HIGGINSON: Mr. Borden, I thought when you say facts, I thought the first witness here, the head librarian, Martina Castellana, who was not cross-examined at all, said books like KKK and CASP were not removed either according to policy or MUSTI or CRU. I thought the facts faced by this district judge was that these arguably neutral standards were not applied to the racial history books that were removed from this library.

BORDEN: That's correct, Judge Higginson. And all of the books that were removed with the possible exception of Freak Boy did not meet any of the MUSTI standard or the standard for removal under MUSTI.

JUDGE DUNCAN: Counsel, let me just ask you. I asked your co-counsel at the panel argument stage, if a public librarian found in the public library the autobiography of David Duke, a racist

book that says black people are inferior, I asked your co-counsel, does the First Amendment allow the librarian to remove the book?
She said no. What's your answer?

BORDEN: My answer is still no, Judge Duncan.

JUDGE DUNCAN: Okay. You have just said that the crew guide for Texas libraries is facially unconstitutional. Is that your position?

BORDEN: You don't know how this crew guide is actually applied in practice and just by way of example, the Lanham County Public Library has mind confident. That is a racist book that has racist views in it pretty clearly. There are a number of other books in that library that also have racist views. The fact that something is racist is not a determinative factor in removing it.

JUDGE DUNCAN: Does Dr. Seuss get constitutional protection against being removed from public libraries?

BORDEN: Every book gets protection.

JUDGE DUNCAN: Okay. So I have here the ALA weeding handbook, which is also cited in the party's briefs. At page 106, it says, removing the Dr. Seuss books that are purposefully no longer published due to their racist content is absolutely acceptable because it's an act of basic collection maintenance. So if a librarian removes the cat and the hat, because there are scholarly books that say the cat and the hat is based on menstrual stereotypes, it's racist. If a public librarian removes the cat and the hat, has the public librarian violated the First Amendment?

BORDEN: If the librarian removes the cat and the hat because he or she is substantially motivated by suppressing the viewpoint in it, then yes, the library policy that's in place here and the correct principle that's in place is that the parents have to be responsible for curating instead of the library.

JUDGE DUNCAN: So you are saying that the ALA Weeding Guide is unconstitutional?

BORDEN: I'm not saying that. We don't know how this guide is actually applied in practice because many of these...

JUDGE DUNCAN: If a librarian followed the ALA Weeding Handbook, which is cited in the briefs, the librarian violates the First Amendment.

BORDEN: I have talked to librarians outside the record and anecdotally these types of things get used as a proxy for whether a book is outdated. But if a book continues to be checked out, it would be unconstitutional to remove...

JUDGE DUNCAN: Wait, let me understand that. So if a librarian removed Dr. Seuss, Cat in the Hat, because it's racist, but it's outdated, because racism is outdated, then that doesn't violate the First Amendment?

BORDEN: I think racism can be in a book, could be a proxy for outdated, but it would have to meet the musty standards. If it didn't meet the musty standards in terms of people were still checking it out, people sometimes want to read racist books. It's something that you and I might not like, but they have a First Amendment right to do it.

JUDGE DUNCAN: Well, in your view, they have a First Amendment right to demand that the library have racist books on its shelves.

BORDEN: They don't have a First Amendment right to demand any specific book in the same way that in Finley or Reagan, you don't have the right to any particular subsidy, but what you have a right to is to make sure that the government is not administering that subsidy or that provision of benefits to the community in a way that discriminates by viewpoint.

JUDGE DUNCAN: But let me ask it this way then. Suppose someone goes to the library, public library, and is looking for the cat in the hat, and there's no cat in the hat, and you go to the librarian and say, where's the cat in the hat?
It's a classic children's book. The librarian says, well, we decided not to acquire the cat in the hat because it's racist. Does that person have the right to sue the library under the First Amendment to acquire the cat in the hat?

BORDEN: I think we're dealing with the right to information here.

JUDGE DUNCAN: Okay.

BORDEN: I think that there is a distinction between acquisition and removal. In the removal context, the government has already made the information available and now it's taking it away.

JUDGE DUNCAN: Well, what if the cat in the hat gets worn and smudged because so many people are checking it out and so it gets mustied and it's no longer there?
And the librarian decides, you know, we're not going to replace the cat in the hat because it's racist. So does that violate the First Amendment?

BORDEN: I think that acquisition is a different topic.

JUDGE HO: Why is it different if your concern is—over here, sorry. Your concern, I think, was the right to access information. Why does it matter if it was acquisition or removal? That's what I'm understanding from the right standpoint of the reader. It's the same effect, isn't it?

BORDEN: In one case, the government has already made it available. I'm not saying that there isn't...

JUDGE HO: The right is denied either way, isn't it? I'm just asking practically.

BORDEN: Well, practically speaking, I think, this is a case that has an evidentiary record about removal, and this court does not need to...

JUDGE HO: Okay, but presuppose another case where there's an evidentiary record about non-acquisition. Until you give me a principled reason to distinguish these two fact patterns, I don't see this as a terribly stable theory.

BORDEN: Well, Judge Ho, I think that there could be a situation where you had... Let's say you had a librarian, and he says, I'm not going to buy any books with the Christian viewpoint. They're just not going to be in my library. He writes it in an email, and then there's no books like that in the library. I think that you have a constitutional problem, and I don't think anybody else...

JUDGE HO: Okay, so it's not about acquisition versus removal. If I may, I want... Well, I have the floor. I'll have a quick question. I think your opening remarks said that there's nothing wrong with the government adopting certain viewpoints with respect to a monument. Did I understand you correctly?

BORDEN: That's correct.

JUDGE HO: What about museum?

BORDEN: I think with any kind of situation, you have to look to the three short-lift factors as...

JUDGE HO: I didn't say government speech. I'm just saying you said the government can absolutely express a viewpoint through a monument, and I think you're absolutely right. It would be weird to suggest otherwise. Governments could have monuments that further patriotism. Duh. Okay. Could the government also do that with a museum?

BORDEN: A museum, I suppose...

JUDGE HO: A government paid for a museum. There are lots of them in DC, for sure, that further certain viewpoints, patriotism being one, civil rights might be another. Would that be okay? I assume the answer is yes. What about a library?

BORDEN: I suppose, and this goes to the Walker example and some of the things Mr. Mitchell was saying about that. Walker was an example of a government speech case where...

JUDGE HO: I'm not talking about license plates. I asked about libraries. I'm just asking. If a museum is okay, as you said, a monument can express a viewpoint and exclude other viewpoints, by definition. Museums can favor certain viewpoints and exclude other viewpoints, by definition. Libraries, also.

BORDEN: The government could, in theory, create a library where it only had its viewpoints. Like, it wrote all the books. It approved of all the books.

JUDGE HO: Does it have to write them themselves or can it just go to the private market?

BORDEN: I think to have something that sort of satisfies the standard in Walker, it would have to maintain exclusive control over...

JUDGE HO: Again, I'm open on the government speech question. I'm not asking my government speech. I'm asking literally if it's okay to express a viewpoint through a monument and through a museum, as you've conceded that it could be. Why not a library?
I think you're saying yes, probably.

BORDEN: The government could express its view in a library if it maintained editorial and content control over every single book, and it was adopting the viewpoint of those books, because that's what government speech is, is when you take control of the viewpoints. This idea of-

JUDGE HO: Why does it have to adopt the viewpoint? Why can't the government say, you know what, I want you to have this museum where you can hear this range of viewpoints, some of which are contradictory, but we think this museum will teach you. I assume that'd be okay. You're both sides of this museum.

BORDEN: I think if you're starting to exclude viewpoints from a library, you have a constitutional problem.

JUDGE HO: What about a museum?

BORDEN: Again, if this museum is the Museum of Patriotism and the government is adopting the viewpoint of every single piece within the museum for purposes of sending out a message to the world, that's fine. The government can do that. That's like a monument. But the key is the endorsement of the message, and that's the through line that runs through all these cases.

JUDGE ELROD: Sir, does the Smithsonian have any current or past exhibits about the Civil War and about the Confederacy?

BORDEN: I'm sorry, I don't know the answer to your question.

JUDGE ELROD: Well, were they endorsing the Confederacy by having displace about it?

BORDEN: I don't know enough about it. In any kind of government speech situation, you would have to look at the short-lived factors.

JUDGE SOUTHWICK: Mr. Whitaker, let me ask you, you haven't used this phrase, I don't think, the right to receive information. Is that what we're talking about in your view under Pico, a constitutional right to receive information?

BORDEN: It is a constitutional right to receive information.

JUDGE SOUTHWICK: And that's the one that you're relying on?

I've got a few steps I want to go with you. I want to make sure I'm going in the right direction. So do you agree with that? That is what you're basing at least part of your argument on?

BORDEN: I do agree with you, Judge.

JUDGE SOUTHWICK: In the EECO, Rehnquist's dissent talks about if there is such a right, obviously, he's dissenting, there's got to be a corollary right. And he uses the example that authors would have a right to insist that certain books be purchased. Work with that with me. Can you have the right to receive information without a corollary right to provide the information to the same library? And if not, why not?

BORDEN: I think that it's a right to receive information is more of a general right. Some of the cases have referred to it as the sort of flip side of the right to speak. But take a case like Virginia Pharmacy Board. The consumers of the library books are in the exact same shoes as the consumers of the drugs in that case, because they're trying to get information from the books, just as the consumers in Virginia Pharmacy Board are trying to get information about drug prices. So that is how the right to information works. It's more of a general right. You don't look in a context-specific way. The court in Murthy approved that right, for example, to receive information from the internet. And the internet has a wide plurality of speakers, obviously, and it's the same right to information that would apply in the context of a library.

JUDGE WEINER: Mr. Borden, is the issue of government speech even properly before us?

BORDEN: Well, it is our position, your honor, that it has been waived because they did fail to raise it at the panel stage. We are dealing with this issue for the first time in these unbanked proceedings in a type of doctrine where the Supreme Court has cautioned against expanding its scope. I think the best case for making a government speech argument would be one, where the parties tried the case on that theory, and they made the arguments in a orderly and proper fashion. That's the reason for the waiver rule. But I understand that it is of high concern to this court, which is why we've been talking about it so much.

SPEAKER_15: Counsel, how would you—over here—how would you define the term outdated or outdatedness when we consider a curator's decision? Is it simply a matter of popularity that people are no longer interested in checking out Nancy Drew and Hardy Boy mystery books? Or is there something more to it? It sounds like from Judge Duncan's, the material Judge Duncan was asking you about, that there's a whole set of factors that go into what is, what makes a book or a publication outdated. How would you define the contours?

BORDEN: Well, so in library standards, they have a certain objective criteria. So if a book hasn't been checked out for a certain amount of time, and it might be different for fiction and non-fiction, they have different standards. That would be the outdated part. If people in the community really were not interested in this book, that's how outdated books get.

SPEAKER_15: It's not based on content at all. It's based on simply the popularity of the book with the citizenry that uses the library.

BORDEN: That's correct. It's an objective, non-viewpoint-based factor, and that's the way all the must-be factors are supposed to be.

JUDGE HIGGINSON: I'm just reflecting on Judge Ho's questions, and I often do. Would you have to draw a distinction between, say, the public, the presidential library system, which is run by the archives? Would that fit in or be in tension with your theory, inasmuch as those libraries are run by the federal government, and clearly there is full editorial content, quite a bit of viewpoint selection?

BORDEN: That's correct, Your Honor. It's still the short-lived test, and you have to look at the history of the institution. You have to look at its historical practices. Is it controlling for the viewpoints historically? How much editorial control does it have over the viewpoints? That's why Walker is such an interesting case, because in that situation, Texas had traditionally had its own messages on the license plate, and it controlled everything about it. Then when it turned over the process to the private sector, it maintained control over every single license plate. It actually took the IP after the license plate was issued.

JUDGE HIGGINSON: I remember in the oral argument in Woolley, it was brought out that the New Hampshire live free and die. It turns out that the prisoners up in New Hampshire are the ones who actually make the license plates.

JUDGE DUNCAN: Well, so counsel, I think Judge Higginson and you just were talking about the history of libraries. I have to say the parties briefing on history of libraries is a little bit thin. There's typically a citation to Ben Franklin and not much else. But they're actually books on the history of libraries. They're in libraries. It's well known that libraries, which arose in the mid-19th century, didn't stock novels for many, many years. They didn't stock novels, even though novels were very popular. They didn't stock novels because the people who ran public libraries thought novels were trashy. So they might not have had Madame Bovary or the Woman in White in the public library. So doesn't that count strongly against your argument that historically public libraries have not curated their collections based on their viewpoints about the worth of books? They didn't have novels.

BORDEN: Well, I think that's a content-based distinction, fiction or non-fiction. It's not judging the worth of any particular novel. It's not looking at whether Madame Bovary has controversial ideas in it.

JUDGE DUNCAN: I'm sure it did. People thought it was trash. People wanted theological works in the Bible, in libraries. They didn't want Madame Bovary in it because it was trashy. That's like the word used. They didn't want trashy books. Those books, you'd have to go to circulating libraries to get those books. Now, today is different, right?
Today we have all kinds of trashy books in libraries.

BORDEN: But what you just gave me would be the Odyssey and the Iliad, which are not trashy, and any other kind of classics, any kind of fiction would be out under that rule. So it would be a content-based distinction as opposed to viewpoint. The ALA has...

JUDGE DUNCAN: So today you're saying if a public library decided to remove all fiction, that doesn't violate the First Amendment?

BORDEN: I think it would be... It might not be as an exciting library as you might think.

JUDGE DUNCAN: Well, it would be an awful library, but it would... But I mean, and I assume the people of whatever county would rise up with pitchforks and cast out the county commissioner. But we're talking about the First Amendment. Does it violate the First Amendment for a library to say, enough with this trashy fiction. No more Stephen King. Violate the First Amendment?

BORDEN: You're going to Stephen King. I think that if it was based on the viewpoint of trying to get rid of certain authors, I think you'd have a problem. I think if it was just a-

JUDGE DUNCAN: Do the authors sue? Do they have a right to be in the library?

BORDEN: I don't think that an author has a right to be in the library. I think that as long as you have a content-based distinction, like you're drawing between fiction and non-fiction, and the substantial motivation of that content-based restriction was not somehow to get rid of great writers like Stephen King, then-

SPEAKER_9: I don't understand that at all. Why wouldn't the author have a right?
I mean, if your whole point is that viewpoint discrimination is bad, whose viewpoint are we talking about? It's the author's, obviously. So perhaps that's the perfect plaintiff.

BORDEN: Well, there's a couple kinds of viewpoint discrimination, and one kind is the kind described in Robinson versus Hunt County, which is if you are offended by the content of the work, and you remove it for that reason. So that would be one kind of viewpoint discrimination. Then the other is if you're trying to suppress the viewpoint expressed, and I think we've had both of those kinds in the factual record in this case.

SPEAKER_9: But you have a hidden mismatch in this case between the right that you're claiming. The right you're claiming is right of access of information, and then all of the ways that you cash that out, right? You don't have a right to actually demand that the library purchase the book. You obviously, every single curation decision is going to involve the removal of that idea from the library for whatever reason. Even if it was done on a totally content neutral, just because it was destroyed or damaged or whatever, that information is now gone from the library, and your constitutional right has been protected. You said earlier that your understanding of the First Amendment applies to every book. You said every book demands protection. I don't understand who's right it is that you're demanding to be protected, or the remedy in which you're actually asking to protect it.

BORDEN: It is the right of the library patrons like our clients to receive information from a public library.

SPEAKER_9: Why can't they demand that the books be purchased in the first place then?

BORDEN: People ask to have libraries purchase books, but it's different once the book is actually there and they want to get it, and the government has made this.

CHIEF JUDGE RICHMAN: Let's suppose that one of these books that was actually removed from the children's section, that the facts were that the opportunity to purchase the book came up, and the library looked at that book and said, we don't think it's appropriate for ten and under kids who are not going to purchase it. How is that possibly distinguishable from removing it from the children's section?

BORDEN: I think that once you have made the book available to the public, you have given them the information, and now you're taking it away from them. It's a lot easier to suss out what's going on, as the court pointed out in the Campbell decision itself. Once you have made it available, a lot of the gating items that you look at in an acquisition, is this a good book relative to other books? Does it, is it within our budget? Is there room on the shelves? All of those things go away, and the removal decision is easy to review in isolation. I do think that if, you know, the example that I gave to where you had a librarian who was simply refusing to purchase books for a certain viewpoint, I think you would have a constitutional problem, and I don't think it would be a good idea to adopt a rule that gave the government absolute power over that kind of decision.

JUDGE ELROD: So you would agree, wouldn't you not, sir? And I don't know what those musky or whatever those criteria say. You would agree that a librarian cannot remove the Scarlet Letter, which treats sex outside of marriage rather unfavorably, the Merchant of Venice, or Huck Finn, for obvious reasons. None of those can be removed from libraries. Would you agree with that?

BORDEN: I would say...

JUDGE ELROD: If they're even there anymore.

BORDEN: I would hope all those books would be there, but you can't remove it from a library if your substantial motivation is based on the viewpoint. Huck Finn...

JUDGE ELROD: No, no, no, no, no. You were citing the criteria about outdated views of sex, race, and religion. All these classics have been criticized for that reason.

BORDEN: That was my point to Judge Duncan is you have books like Mein Kampf that are in the library. You have books like...

JUDGE ELROD: Well, are they even in? Does the American Library Association even endure? What bothers me about your argument is that what you are really trying to do is substitute the judgment of the public, the pays for the libraries, with the judgment of self-styled curators that are outside and unaccountable to the public, to it, organized library associations. That's all.

BORDEN: The first...

JUDGE ELROD: Counsel... I'm sorry, go ahead. Go ahead and answer.

BORDEN: The First Amendment protects unpopular speech. It protects the things that minority viewpoints say. In those circumstances, the majority can oppress the minority. That's why you have a First Amendment.

JUDGE ELROD: Library associations speak for the minorities. Is that your point?

BORDEN: My clients in this case are a minority in their community. They wanted certain books. They tried the political process. Ms. Green Little went and the commissioner wouldn't talk to her. The political process doesn't protect minority views in this. The right to receive controversial ideas or unpopular ideas. That's what the First Amendment protects. It's an easy case to say the First Amendment protects things that everybody agrees about. It's the hard case, like this one, where you have some controversial books, some controversial ideas.

JUDGE ELROD: Counsel, what do you do, though, with Chief Justice Berger's dissent, where it says that regardless of whether it's being couriers of third-party speech or whether it's government speech, the courts are the least institutionally competent people to be doing this because we're going to sit as some sort of super board, rather than it being in the communities of whether we're couriers of third-party speech. Can you help us on that?

BORDEN: Sure, Your Honor. Campbell has been the law in the circuit for almost three decades. There has not been a flood of litigation under Campbell. There's not been a difficulty caused by that case. Judges are very good at figuring out intent. That's part of civil practice across a wide range of cases, employment discrimination, trademarks, patents even. Judges figure out intent. That's one of the things that judges are very good at doing. It hasn't been an issue under Campbell. There's been just a very small number of cases.

CHIEF JUDGE RICHMAN: Thank you, counsel. We have your argument.

BORDEN: Thank you, your honors. I appreciate the extra time.

MITCHELL: Mr. Borden's presentation relies heavily on Matal against Taum, but it bears repeating that the holding of Matal is only that the trademarks themselves are private speech and not government speech. That's entirely consistent with our argument. We acknowledge that the library books themselves do not become government speech, and they remain private speech, despite their inclusion in a public library's collection.

JUDGE SOUTHWICK: Matal. If we go to the direction of government speech, looking at Shurtleff as a place where we find a lot of our guidance, there there was a substantial record of how flags were flown at the Boston City Hall and even the history of flag flying in the country. Maybe the record was mentioned in the opinion anyway. Maybe not the history of libraries, but the history of flag flying. We don't have such a record in this case. If there's a sense on this court that government speech might be the way to go, won't it be appropriate to remand for some fact

finding on the factors and how this particular libraries and libraries in general have acted under those factors?

MITCHELL: No, Your Honor, I don't think that's proper at all. We have a robust record about how libraries engage in weeding practices. We have numerous weeding manuals in the record of this case that make clear that this is nothing at all like the flagpole in Shurtleff. Libraries have quality control. They are supposed to exercise quality control over the materials in their collection. They're also supposed to use weeding to ensure that their collection remains relevant to the needs of the community. This is not a situation where libraries are supposed to be taking all commerce in the way that Boston was with the flag until the Christian flag person showed up and wanted to fly his flag. So we have a robust record on this point about what libraries are supposed to do, what libraries have done historically, what weeding practices have been historically, and it's not a limited public forum. The panel recognized that as well. This is not a limited public forum, and the panel opinion, the lead panel opinion says that forum principles are out of place in a public library, and that's absolutely right, and it's supported by the record in this case. Second point that I want to make goes to Judge Higginson's question about Tina Castellan's testimony in the record. Castellan did testify that she disagreed with Amber Milam's application of the musty factors, but Castellan never said and no witness said that Milam was engaging in viewpoint discrimination when she weeded the books. Not only is there no accusation of viewpoint discrimination from any witness in this case, there is no evidence in the record that any of these books even have a viewpoint. This is a point Judge Southwick made in his panel concurrence, where he said that the books about flatulence and backsides do not express a viewpoint. There's an even more fundamental problem here. None of the books were introduced into evidence, with one exception, in The Night Kitchen. That book is in the record at page 1821, and the court can read it and see for itself. That book has no viewpoint expressed. It's about a child who wakes up in the middle of the night or has a dream, that he's falling into a bat of cake batter, and then he looks for milk, and then he winds up-

CHIEF JUDGE RICHMAN: You're saying basically we shouldn't reach any constitutional issues, that on this record there's been no viewpoint discrimination, and there's not even a viewpoint. So we should not reach any constitutional questions.

MITCHELL: If the court declines to overrule Campbell, it cannot affirm the preliminary injunction on a theory of viewpoint discrimination. The plaintiffs made a crucial concession before this en banc court. They previously argued throughout this entire litigation that content discrimination was constitutionally impermissible in public library weeding decisions. They have now abandoned that stance, and they are saying only viewpoint discrimination is problematic. They have accused us falsely of weeding books like In the Night Kitchen because of a picture of a naked toddler. That is not viewpoint discrimination, that is content discrimination. They have accused us of weeding It's Perfectly Normal because of pictures in the book that show adults engaged in sexual acts. That again has nothing to do with viewpoint. That is an objection to content, nudity. Now that they have said that only viewpoint discrimination is constitutionally problematic, they need to point to evidence in the record that shows, one, what the viewpoints of these books are, and two, they need to point to evidence to show that my clients were somehow hostile to the viewpoints in the books. They can't even get the first base. The books weren't introduced into the evidence except for In the Night Kitchen, so we don't even know whether

these books have viewpoints. There's no way to figure that out. With the possible exception of the book on the KKK, because the title seems to imply the birth of the KKK, an American terrorist organization.

JUDGE HIGGINSON: Mr. Mitchell, in your rebuttal argument, you're now saying this case doesn't present a big First Amendment question, that instead the District Court was clearly erroneous, dead wrong in its fact finding that someone like Tina Castillon, who said these books were not weeded, KKK and CAST were not weeded according to the library policy, CRU or MUST-E. You're saying without cross-examining her, we would still say the District Court was dead wrong when it said viewpoint discrimination here?

MITCHELL: Because Judge Higginson, Castillon didn't testify on viewpoint discrimination. She just said that she disagreed with Milam's application of the MUST-E factors. And the District Court says in a footnote.

JUDGE HIGGINSON: I think 3903 to 315, she said these were not weeded according to the Llano County Library policies or pursuant to CRU or MUST-E.

MITCHELL: That is what she said, that's right. The District Court says in his opinion, in footnote 7, that reasonable librarians can disagree over how the MUST-E factors.

JUDGE HIGGINSON: The argument now in rebuttal, where opposing counsel will not get back up, is this case is just a clear error case?

MITCHELL: No, no, that's not our argument, Judge Hingison. The court should overrule Campbell, that's our lead argument. If the court declines to overrule Campbell and keep Campbell as the governing standard, it still should vacate the preliminary injunction because Judge Pittman relied on the plaintiff's representation in the district court that content discrimination was impermissible. And if you look at Judge Pittman's opinion, he hits us both on viewpoint discrimination and he also says we discriminated on the basis of content. Now before this court, the plaintiffs are saying, content discrimination is constitutional, only viewpoint discrimination is impermissible. So in order to support the preliminary injunction, this court needs to find in the record clear evidence, evidence sufficient to make a clear showing that viewpoint discrimination occurred. We don't even have evidence in the record to show what the viewpoints of these books might be.

JUDGE GRAVES: I guess, Counsel, one of the concerns for me, because you keep talking about a preliminary injunction, and that's what we're here on.

MITCHELL: Yes.

JUDGE GRAVES: The grant of a preliminary injunction in part. So doesn't it seem premature that we'd be making determinations about merits and overruling Campbell, when if we rule against you, all that happens is this case goes back to the trial court, and then there has to be some evidence or some hearing on whether or not to grant a permanent injunction.

MITCHELL: Yes, but Judge Graves-

JUDGE GRAVES: Isn't that the posture of the case?

MITCHELL: I think the court needs to make clear to the district court on remand what the legal standard is. There is so much disagreement and confusion right now because of Campbell. Campbell says it turns on the librarian's substantial motivation. That's all we have from the Campbell opinion. That's it. There's a piece of Campbell that quotes the Brennan plurality opinion in Pico, but I don't think that's the holding of Campbell. That's just a description of what Justice Brennan's plurality opinion is. There needs to be more clarification on remand about whether content discrimination is allowed, whether viewpoint discrimination is permissible, what counts as viewpoint discrimination, how to distinguish that, and whether we have any evidence in the current record that viewpoint discrimination incurred sufficient to support a preliminary injunction. All of that guidance is needed not only for the District Court on remand, but also for the parties because we need to figure out how we're supposed to develop a factual record, and we don't have anything to go on just with Campbell. It's too vague of a test. I see my time has expired. I'm happy to answer any other questions that the court might have. I think the only other point that I would make is on Under the Moon, A Catwoman Tale, there is an Article III standing question that I believe the court needs to address before it can reach any of the merits questions, because there is no evidence in the record that any of the plaintiffs are suffering injury in fact from the removal of that book. If you look at the plaintiff's declarations-

CHIEF JUDGE RICHMAN: My time's expired. My time's expired.

MITCHELL: Thank you, Your Honors.

CHIEF JUDGE RICHMAN: The court will stand adjourned.