Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

MOMS FOR LIBERTY, INC. OF WAYNE COUNTY and REVEREND JACOB MARCHITELL,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules

-against-

STATE OF NEW YORK STATE EDUCATION DEPARTMENT; BOARD OF EDUCATION OF CLYDE SAVANNAH CENTRAL SCHOOL DISTRICT,

Respondents.

Index No. 910036-24
Judge – Hon. Denise A. Hartman

[PROPOSED] BRIEF OF *AMICUS CURIAE* NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS STATE OF NEW YORK STATE EDUCATION DEPARTMENT, BOARD OF EDUCATION OF CLYDE SAVANNAH CENTRAL SCHOOL DISTRICT

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

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Dated: February 14, 2025
New York, N.Y.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes, Rules and Regulations

Other Authorities

PRELIMINARY STATEMENT

The central lessons offered by the Supreme Court in *Board of Education, Island Trees Union Free School District No. 26 v Pico* (457 US 853 [1982]) are that "the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library" (*id.* at 866) and that "school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books" (*id*. at 872).

Petitioners here claim that a school board must undertake to do precisely what the First Amendment prohibits it from doing. Petitioners seek to compel the removal of five books based upon political and cultural ideas conveyed by those books. Invoking the mantel of parental rights, petitioners seek to impose their dislike for these books upon all of the children in the school district. They seek, by their current request for injunctive relief, to prevent any student in the district from reading these books. In doing so, they also ignore the rights of parents in the school district who do not share Petitioners' opinions of these books. And Petitioners further discount the sound educational judgment of the librarian and book review committee that found these books age appropriate. They seek, instead, to arrogate to themselves the authority to dictate what ideas should be made available in the school library.

Each of Petitioners' arguments is without merit (*see generally* NY St Cts Elec Filing [NYSCEF] Doc Nos. 37 [brief for proposed intervenors-respondents], 40 [brief for respondent Clyde Savannah CSD), 65 [brief for New York State Education Department]). Proposed *amicus* brings specific expertise on the application of *Pico* and on related New York State Constitutional protections that go beyond those of the First Amendment. While we substantially agree with both respondents' and proposed intervenors-respondents' treatment of these issues, we write to offer additional analysis that could aid the Court.

First, contrary to Petitioners' argument, the Commissioner correctly interpreted and

applied First Amendment precedent, concluding that school districts "may not remove books from school library shelves simply because they dislike the ideas contained [there]in . . . " (affirmation of Emma Curran Donnelly Hulse ("Hulse aff"), exhibit B, *Appeal of Moms for Liberty of Wayne County & Marchitell,* 63 Educ Dept Rep [Decision No. 18,402] ["exhibit B"] at 4, quoting *Pico*, 457 US at 872). This proposition comports with long-standing First Amendment principles and was accepted by all five members of the majority in *Pico*. As such, *Pico* is not merely persuasive but is entitled to precedential weight (*see Marks v US,* 430 US 188 [1977]). Therefore, the Commissioner did not err in applying this holding to the facts of this case and the Commissioner's decision must be affirmed on these grounds.

Second, the New York State Constitution provides an additional, independent state law ground to affirm the Commissioner's decision. New York State Constitution article I, § 8 establishes an affirmative right to freedom of expression that provides protection beyond that guaranteed by the First Amendment. Furthermore, the New York State Constitution also guarantees all children in New York an opportunity for a "sound basic education," which encompasses skills that ensure "meaningful civic participation in contemporary society" (NY Const, art XI, § 1; *Campaign for Fiscal Equity v State of New York*, 100 NY2d 893, 905 [2003] [hereinafter *CFE II*]). Taken together, these core constitutional rights establish a broad right of access to information for students in the school library setting and prohibit school districts from restricting that right of access on ideological grounds. The Commissioner's opinion accords with these constitutional principes and, therefore, it must be affirmed.

BACKGROUND

In this Article 78 Proceeding, Petitioners Moms for Liberty of Wayne County and Reverend Jacob Marchitell challenge the New York State Commissioner of Education's ("the Commissioner") affirmance of a decision by the Clyde-Savannah Central School District ("the

District" or "Clyde-Savannah CSD") School Board ("the Board") to return five challenged books to school library shelves following their earlier removal (*see* generally NY St Cts Elec Filing [NYSCEF] Doc No. 1, petition ["petition"]). The books, which were originally challenged by Marchitell, include *People Kill People* by Ellen Hopkins, *It Ends with Us* by Colleen Hoover, *Jesus Land* by Julia Scheeres, *Red Hood* by Elana K. Arnold, and *All Boys Aren't Blue* by George M. Johnson (*id*. ¶¶ 40, 44). Petitioners object to the materials on the grounds that they are allegedly "obscene" (*id*. ¶ 13).

Petitioners' objections to the books and the Board's decision were properly rejected by the Commissioner of Education in a well-reasoned decision resting upon a sound understanding of First Amendment law and appropriate public policy. Petitioners assert, in this proceeding, that the Board's decision to reinstate the books is arbitrary and capricious because it allegedly failed to protect minors from exposure to vulgar and obscene content or comply with the District's policies regarding the selection of appropriate library materials (*id*. ¶¶ 118-141). Petitioners further contend that the Commissioner "misapplied and misinterpreted Supreme Court precedent," particularly *Pico*, and "erroneously determined that the Supreme Court's decision in *Fraser* was not applicable" (*id.* at 26, 29-30). Lastly, they challenge the Commissioner's conclusion that school librarians enjoy academic freedom under state law (*id*. ¶ 171-175). Each of these arguments is without merit.

INTEREST OF AMICUS CURIAE

The New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the American Civil Liberties Union, and a non-profit, non-partisan organization with over 85,000 members and supporters. Through its Education Policy Center, the NYCLU advocates for equitable access to quality education for all young people in New York. The NYCLU is devoted to the protection and enhancement of fundamental constitutional rights, including freedom of

speech and the right, secured by the Education Article of the New York State Constitution, to the opportunity for a "sound basic education."

The NYCLU routinely litigates cases involving the First Amendment. As relevant here, the NYCLU represented the plaintiffs in *Pico*, the key Supreme Court case at issue in this case. The NYCLU has also filed *amicus curiae* briefs in cases involving article I, § 8 of the New York State Constitution, including *Immuno AG. v Moor-Jankowski* (77 NY2d 235, 238 [1991]). In addition, the NYCLU actively engages in advocacy at the district level regarding library book removals and classroom censorship. In 2023, the NYCLU released a model policy for school districts that sets out procedures and standards that maintain the fundamental values and principles of the First Amendment when controversies over educational materials arise (*see* NYCLU, *Model Policy for the Reconsideration of Curricular, Instructional, or Library Materials*, available at https://www.nyclu.org/uploads/2023/09/2023-nyclu-model-policy-reconsideration-_curricular-materials.pdf).

The NYCLU has regularly participated as *amicus curiae* in cases regarding students' right under the Education Article of the New York State Constitution to a "sound basic education." The NYCLU submitted *amicus curiae* briefs to the Court of Appeals in both *Campaign for Fiscal Equity* cases (*see Campaign for Fiscal Equity, Inc. v State of New York*, 86 NY2d 307, 311 [1995] [hereinafter *CFE I*]; *CFE II*, 100 NY2d at 897). Most recently, the NYCLU filed an *amicus curiae* brief to the Appellate Division, First Department in *IntegrateNYC, Inc. v State*, a case alleging that New York State and City policies have led to persistent segregation in New York City Public Schools that violates students' right to a "sound basic education" (*IntegrateNYC, Inc. v State of New York*, 228 AD3d 152, 155 [1st Dept 2024]).

ARGUMENT

I. THE COMMISSIONER'S DECISION CORRECTLY DETERMINED THAT THE FIRST AMENDMENT FORBIDS SCHOOL DISTRICTS FROM REMOVING BOOKS FROM LIBRARIES ON THE BASIS OF THE AUTHOR'S IDENTITY OR POLITICAL VIEWPOINT.

Petitioner erroneously contends that the Commissioner misapplied the First Amendment and "misinterpreted Supreme Court precedent" and was therefore "affected by errors of law" (petition at 1, 26, ¶ 144; *see also* CPLR 7803 [3]). In fact, the Commissioner correctly concluded that school districts "may not remove books from school library shelves simply because they dislike the ideas contained [there]in . . . " a proposition that comports with long-standing First Amendment principles and was accepted by all five members of the majority – and, arguably, the dissenters – in *Pico* (exhibit B at 4). The Commissioner appropriately applied this holding to the facts of the appeal, concluding that Petitioner Marchitell's objections ultimately rested on ideological grounds (*id*. at 6). The Commissioner also properly dismissed Petitioners' reliance on *Bethel School District No. 403 v Fraser* (478 US 675 [1986]) as "inapposite as [the District] has not proposed any restriction on speech" (exhibit B at 7). As such, the Commissioner's well-reasoned opinion was not based on a misapplication of First Amendment law or misinterpretation of Supreme Court precedent and must be affirmed.

A. *Pico* Supports the Commissioner's Conclusion that School Boards May Not Remove Books Because They Disagree with their Ideas.

Petitioners assert that "the Commissioner's interpretation of *Pico*'s plurality as a holding of the Supreme Court is a clear error of law" and that "Justice Brennan's plurality opinion is not binding" (petition ¶ 148). But a close reading of the plurality opinion and concurrences demonstrates that every member of the *Pico* majority supported the proposition that "school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books . . ." (*Pico*, 457 US at 872). This shared holding comports with long-standing First

Amendment principles and constitutes binding precedent under *Marks*. Furthermore, the facts of *Pico* are strikingly similar to the case at issue and therefore the Commissioner correctly applied *Pico* to the Petitioners' claims.

1. The Holding in *Pico* Comports with Long-Standing First Amendment Principles.

The core principle that five justices agreed upon in *Pico* accords with long-standing First Amendment principles. As the Supreme Court has repeatedly asserted, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker v Des Moines Ind. Community Sch. Dist*, 393 US 503, 506 [1969]). School officials do not have "absolute authority over their students" and students retain "fundamental rights which the State must respect" (*id.* at 511). "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views" (*id.*).

These principles are rooted in the central role of schools as "nurseries of democracy" (*Mahanoy Area Sch. Dist. v B.L. by and through Levy*, 594 US 180, 190 [2021]). In *West Virginia State Board of Education v Barnette* (319 US 624 [1943]), also cited by the Commissioner in her decision, the Court held that students had a right to refuse to say the pledge of allegiance, reasoning that the fact that schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes" (*id*. at 637). *Pico* applied these principles to school districts' decisions to remove books from a school library.

2. The Holding of *Pico* is Controlling Because Five Justices on the Court Accepted the Premise that School Boards Cannot Remove Books Because They Disagree with their Ideas.

The facts of *Pico* are instructive and merit review. That case arose from a decision by a

school board in Levittown, Long Island to remove challenged books from the district's library (*Pico*, 457 US at 858). Three of the board members had attended a conference sponsored by Parents of New York United, "a politically conservative organization of parents concerned about education legislation in the state of New York," where they obtained lists of "objectionable" books (*id*. at 856). Listed titles later located in the library collection included *Slaughterhouse Five* by Kurt Vonnegut, *Best Short Stories of Negro Writers* edited by Langston Hughes, and *Soul on Ice* by Eldridge Cleaver (*id*. at 856 n 3). The board directed school staff to remove the books and deliver them to board offices for review, later issuing a press release stating that the books were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy" and claiming that "[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers" (*id*. at 857).

The board members disregarded the existing policy, which required the Superintendent to form his own review committee to consider the books, and appointed an ad hoc committee of its own (*id*. at 857 n 4). The review committee recommended that two of the books be removed, five be retained, and one be made available only with parental approval, failing to take a position or reach consensus on the remaining three (*id.* at 858). The board, however, overrode the review committee's recommendation without explanation, voting to remove nine books, retain one, and make the last available subject to parental approval (*id.*).

The NYCLU sued on behalf of five students in the district middle and high school, alleging violations of their First Amendment rights (*id.* at 856, 859). The District Court granted summary judgment to the district, the Second Circuit reversed, and the Supreme Court granted the district's *writ of certiorari* (*id.* at 859-861). Justice Brennan delivered the plurality opinion, which Justice Blackmun joined with the exception of a single subsection; Justice Blackmun filed a separate

concurrence; and Justice White concurred in the judgment (*id*. at 855, 875, 883).

Petitioners assert that Justice Brennan's plurality opinion did not command the views of a majority of the Court and can, therefore, be discounted (petition ¶ 148). But the Court has, in fact, provided courts and litigants with a framework for interpreting and applying plurality decisions. In *Marks*, the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'" (430 US at 193, quoting *Gregg v Georgia*, 428 US 153, 169 n 15 [1976]; *see also Thompson v Hebdon*, 589 US 1, 4 [2019] [remanding where Ninth Circuit declined to apply principles from plurality opinion that were supported by concurring justices]).[1] This rule applies where "'one opinion can meaningfully be regarded as narrower than another – only when one opinion is a logical subset of other, broader opinion,' that is to say, only when that narrow opinion is the common denominator representing the position approved by at least five justices'" (*US v Alcan Aluminum Corp*., 315 F3d 179, 189 [2d Cir 2003], quoting *King v Palmer*, 950 F2d 771, 781 [DC Cir 1991] [en banc]).

The *Marks* rule applies here. In *Pico*, the five justices who voted to affirm accepted the proposition that "school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books . . ." (*Pico*, 457 US at 872). Justice Brennan asserted this proposition in his plurality opinion (*id.*). Similarly, in his separate concurrence, Justice Blackmun wrote that "our precedents command the conclusion that the State may not act to deny

[1] In support of its assertion that the Commissioner's citation to *Pico* constituted legal error because it is not "legally binding," Petitioners cite to a footnote in *Jones v Jegley* (petition ¶ 148; 947 F3d 1100, 1106 n 3 [8th Cir 2020]). However, not only does this authority not support Petitioner's claim, it contradicts it. The cited footnote disagreed with the contention that a Supreme Court plurality opinion was not binding. "This is not how the Supreme Court has instructed us to read its opinions," the Court reasoned, proceeding to quote the standard announced in *Marks* and concluding that because the "plurality opinion is the narrowest in support of the judgment, it is binding" (947 F3d at 1106 n 3).

access to an idea simply because state officials disapprove of that idea for partisan or political reasons" (*id.* at 879).

Justice White did not disagree with the plurality's position that ideological censorship was impermissible. But he believed that a trial was necessary to determine whether or not the school board had, in fact, acted with such an improper motive. Justice White's ultimate conclusion is then a logical subset of the reasoning articulated by the plurality opinion (*see US v Capers*, 627 F3d 470, 488 [2d Cir 2010] [concluding that concurring opinion controls where Justice Kennedy applied narrower exception to the test proposed by the plurality]).

The prohibition against ideological censorship articulated by Justice Brennan was shared not only by Justice White. It was also accepted by the dissenters. In supporting the principle that school boards "may not remove books from school library shelves simply because they dislike the ideas contained in those books," Justice Brennan provided examples of such impermissible censorship:

> If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students … The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration (*id.* at 870–71).

Justice Rehnquist, writing for himself, Chief Justice Burger, Justice O'Connor, and Justice Powell, "cheerfully conceded" to the correctness of Brennan's proposition (*id.* at 907).

3. Multiple Lower Courts Have Applied *Pico*'s Holding in Book Removal Cases.

Petitioners also selectively cite lower court decisions to argue that the Commissioner's interpretation and application of *Pico* constituted legal error (petition ¶¶ 148-149). This argument cannot be squared with a complete review of the relevant case law. Petitioners conspicuously omit cases where courts have applied the holding in *Pico*, ultimately concluding that school districts

removed books on ideological grounds and therefore violated the First Amendment (*see*, *e.g.*, *Case v Unified Sch. Dist. No. 233,* 908 F Supp 864, 874-875 [D Kan 1995]; *Counts v Cedarville Sch. Dist.*, 295 F Supp 2d 996, 1004-1005 [WD Ark 2003]; *see also Monteiro v Tempe Union High Sch. Dist.*, 158 F3d 1022, 1027 n 5 [9th Cir 1998] ["*Pico* held that a school board could not remove books from a school library if it did so 'in a narrowly partisan or political manner.'"]; *Gonzalez v Douglas*, 269 F Supp 3d 948, 972-973 [D Ariz 2017, Tashima, J.] [concluding that *Pico* supports the proposition that "[a] plaintiff may establish a First Amendment violation by proving that the reasons offered by the state . . . in fact serve to mask other illicit motivations"]).

Furthermore, at least one circuit court has applied *Marks*, concluded that Justice White's concurrence represents the "narrowest grounds" for the result, and analyzed a book removal case on those grounds. In *Campbell v St. Tammany Parish School Board* (64 F3d 184 [5th Cir 1995]), cited by the Commissioner in her decision, parents challenged the removal of *Voodoo & Hoodoo*, a book on the origins and evolution of West African religious practices among enslaved people, from their school district's libraries (*id*. at 185). The Fifth Circuit applied *Marks* and concluded that "Justice White's concurrence in *Pico* represented the narrowest grounds for the result in that case, and it does not reject the plurality's assessment of the constitutional limitations on school official's discretion to remove books from a school library" (*id.* at 189). The court also recognized that the plurality's extended discussion of the First Amendment, while not binding, "may properly serve as guidance in determining whether the School Board's removal decision was based on unconstitutional motives" (*id*.). Furthermore, the court rejected the argument that its prior decision in *Muir v Alabama Educational Television Commission* (688 F2d 1033 [5th Cir 1982]), a case cited by Petitioners here, compelled them to reject *Pico* (64 F3d at 189 ["[N]owhere in the *Muir* opinion did [the Court] suggest that the *Pico* plurality does not provide useful guidance in

determining the constitutional implications of removing books from a public school library"]). Therefore, Petitioners' argument that the Commissioner's interpretation and application of *Pico* constituted an error of law is not supported by a review of the relevant case law.

4. The Factual Parallels Between *Pico* and Petitioner Marchitell's Challenge Support the Commissioner's Conclusion that Petitioners' Challenge to the Books Ultimately Rests on Ideological Grounds.

Contrary to Petitioners' arguments, the Commissioner not only correctly interpreted *Pico* but also appropriately applied it. The factual parallels between the events at issue in *Pico* and Petitioner Marchitell's challenge are striking and support the Commissioner's conclusion that his objections to the books ultimately rest on ideological grounds.

First, in both cases, the chain of events that led to the complaint and the stated objections to the materials indicate that the objections were driven by ideological disapproval. Just like in *Pico*, Petitioner Marchitell identified the challenged books based on lists compiled by a conservative-leaning organization.[2] The lists of out-of-context passages Marchitell attached to his complaint were compiled by BookLooks, an organization started by a Moms for Liberty member[3] and listed on their web site as a resource.[4]

Second, the plurality in *Pico* suggested that the board members' stated objections appeared to be pretextual, reasoning that although the board asserted the books were removed because they contained "obscenities, blasphemies, brutality, and perversion beyond description" at least one of the books "was removed even though it contained no such language" (*Pico*, 457 US at 873). Similarly, in his written complaints and statement to the Clyde-Savannah Board, Petitioner

[2] Gregory Krieg, *How 'Moms for Liberty' Grew Into a 2024 Republican Power Player*, CNN, June 30, 2023, available at https://www.cnn.com/2023/06/30/politics/moms-for-liberty-2024/index.html [last accessed Feb. 14, 2025].
[3] Gregory Krieg, *How 'Moms for Liberty' Grew Into a 2024 Republican Power Player*, CNN, June 30, 2023, available at https://www.cnn.com/2023/06/30/politics/moms-for-liberty-2024/index.html [last accessed Feb. 14, 2025].
[4] Moms for Liberty, *Books*, available at https://portal.momsforliberty.org/resources/current-issues/books/ [last accessed Feb. 7, 2025].

Marchitell complained that the books were characterized by "sexual deviancy" (petition, exhibit B). But some of the passages cited – most notably those in *All Boys Aren't Blue* – do not reference sexual activity at all (*see Pico*, 457 US at 872-873). For example, the BookLooks report for *All Boys Aren't Blue* lists 87 "objectionable" passages, the vast majority of which describe the author's lived experiences as a Black LGBTQIA+ person (Hulse aff., exhibit C, BookLooks Reports at 31-44).

Third, the decisions to remove the books in both cases were marked by procedural irregularities. In *Pico*, the board disregarded the strong objections of school staff and established policy, instead creating an *ad hoc* committee to review the books. The board then disregarded the recommendations of the *ad hoc* committee without explanation (457 US at 874-875). Similarly, the Clyde-Savannah Board's initial vote to overturn the review committee's unanimous recommendation that the books be retained not only disregarded the professional opinions of the educators involved in contravention of District policy[5] but also failed to provide a rationale for the reversal, giving rise to an inference that the Board's "decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books, or upon a desire on [the Board's] part to impose upon . . . students . . . political orthodoxy" (*id*. at 875; *see also Case*, 908 F Supp at 876).

The Commissioner recognized these parallels, noting that Petitioner Marchitell's objections to *All Boys Aren't Blue* "can only be understood as an objection to author George M. Johnson's personal and political views" (exhibit B at 6). She described these objections as "emblematic of a 'dangerous nationwide trend of accusations used to intimidate and threaten

[5] *See* Hulse aff, exhibit D, District Policy 8320: Textbooks, Library Materials, and Other Instructional Materials ("The Board delegates its authority to designate library materials to be used in the District to the school library media specialist(s).")

schools and librarians into denying access to books on the basis of their content and the identities of their authors'" (*id.* at 6-7). "School boards considering the censorship of library materials," the Commissioner continued, "must carefully consider whose voices will be silenced thereby" (*id*. at 7; *see also Pico*, 457 US at 907 ["[F]ew would doubt that the order violated the constitutional rights of the students . . . if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration."]).

For all these reasons, the Commissioner's interpretation of the holding in *Pico* is amply supported by principles of First Amendment law and an analysis of all the concurring and dissenting opinions. The Commissioner also appropriately applied the principles of *Pico* to the facts and concluded that Petitioners object to the books, particularly *All Boys Aren't Blue*, because of the personal and political beliefs of the authors. Therefore, her decision was not affected by an error of law and Petitioners' effort to discount *Pico* should be rejected.

B. *Bethel School District No. 403 v Fraser* Does Not Compel School Districts to Remove Library Books and is Inapplicable to the Current Case.

Even if the *Pico* principles discussed above were discounted – which they should not be – Petitioners' additional cited authorities do not support the relief they seek here. As the Commissioner correctly concluded, *Fraser* does not stand for the proposition that a school district is affirmatively required to remove books with sexual content from a school library. Instead, it carves out an exception to *Tinker*, allowing schools to place limits on "vulgar and lewd" speech "that would undermine the school's basic educational mission" (*Fraser*, 478 US at 685; *see also B.L.*, 594 US at 187 [describing *Fraser* as delineating one of "three specific categories of student speech that schools may regulate in certain circumstances"]). In claiming otherwise, Petitioners turn the First Amendment on in its head, asking this Court to mandate censorship whenever a library book includes sexual content. No court has ever held that *Fraser* – or any other precedent

– *requires* that school districts censor student speech: this Court should not be the first.

Even if the Board had decided to remove the books, *Fraser* would still be inapplicable. In *Fraser*, a high school student gave a speech at a mandatory school assembly endorsing a classmate for student government office that relied on an extended sexual metaphor (*Fraser*, 478 US at 677). The Court relied heavily on the fact that Fraser spoke to a captive audience (*id.* at 684). In contrast, the books at issue here were made available to individual students to read in their free time: they were not presented to a "captive audience."

Most importantly, the Court in *Fraser* emphasized that the school's stated justification for the suspension was not pretext for viewpoint discrimination (*Fraser*, 478 US at 685; *see also Peck ex rel. Peck v Baldwinsville Cent. Sch. Dist.*, 426 F3d 617, 633 [2d Cir 2005] [holding that school districts may not engage in viewpoint discrimination even when they have a legitimate pedagogical interest in regulating student speech]). Petitioners try to obscure their ideological objections to the books by emphasizing their sexual content, but these arguments are unpersuasive (*supra* at 13). If the Board had not reversed its initial vote, *Fraser* would still be distinguishable on these grounds.

For all these reasons, the Commissioner's determination that *Fraser* is inapplicable is well-reasoned and supported by law. Overall, the Commissioner correctly interpreted and applied principles of First Amendment law and relevant precedent. Therefore, the decision is not affected by an error of law.

II. THE NEW YORK STATE CONSTITUTION'S EXPANSIVE PROTECTIONS FOR FREEDOM OF EXPRESSION AND THE RIGHT TO A SOUND BASIC EDUCATION FURTHER SUPPORT THE COMMISSIONER'S CONCLUSIONS.

The New York State Constitution provides an additional, independent state law ground for rejecting Petitioners' claim that the Commissioner's opinion was affected by an error of law. As explained above, the Commissioner correctly concluded that the First Amendment prevents school districts from removing books because they disagree with the ideas they present (*see* exhibit B).

The New York State Constitution provides further support for this conclusion. Article I, § 8 establishes an affirmative right to freedom of expression that provides protection beyond that guaranteed by the First Amendment. Furthermore, the New York State Constitution guarantees all children in New York an opportunity for a "sound basic education", which encompasses skills that ensure "meaningful civil participation in contemporary society" (NY Const, art XI, § 1; *CFE II*, 100 NY2d at 905). Taken together, these core constitutional rights establish a right of access to information for students and prohibit school districts from restricting that right of access on ideological grounds (*see East Meadow Community Concerts Assn. v Bd. of Educ. of Union Free Sch. Dist. No. 3, Nassau County*, 18 NY2d 129 [1966]). Applying these principles to the facts of this case demonstrates that the District complied with these constitutional requirements and the Commissioner reasonably affirmed its decision to retain the books on shelves.

A. Article I, § 8 and the Education Article of the New York State Constitution Establish an Affirmative Right to Freedom of Expression that Provides Protection Beyond that Guaranteed by the First Amendment.

Article I, § 8 of the New York State Constitution provides that "[e]very citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." As the New York Court of Appeals has held, this provision exceeds the scope of the First Amendment, establishing an affirmative right to freedom of expression (*O'Neill v Oakgrove Constr.*, 71 NY2d 521, 528-529 [1988]).

The Court of Appeals has repeatedly recognized that the scope of article I, § 8 goes beyond the First Amendment, siding with parties challenging the constitutionality of state action on the basis of New York's Constitutional speech protections, even where the Supreme Court found that it did not violate the First Amendment. For example, in *People ex rel Arcara v Cloud Books, Inc.*,

(68 NY2d 553, 559 [1986]), the Court of Appeals held that the closure of an adult bookstore to prevent illegal acts was overbroad and violated the freedom of expression guaranteed by article I, § 8, reasoning that "the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression" (*id.* at 557-558; *see also Bellanca v New York State Liq. Auth.*, 54 NY2d 228, 230 [1981]). In so doing, the Court of Appeals recognized our state's "long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community" (*People ex rel Arcara*, 68 NY2d at 557; *see also People v P.J. Video*, 68 NY2d 296, 309 [1986] [same]; *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 249 [1991] [same]).

Furthermore, the New York State Constitution provides broad protection for controversial and unpopular views. In *East Meadow Community Concerts Association v Board of Education of Union Free School District No.3, County of Nassau* (18 NY2d 129 [1966]), the Court of Appeals concluded that, in the absence of an immediate threat to public safety, a school district's decision to withdraw permission for a local community organization to put on a Pete Seeger concert in its high school auditorium would violate both the First Amendment and article I, § 8 of the New York State Constitution (18 NY2d at 134). The district denied permission on the grounds that Seeger, who had given a concert in Moscow and was critical of the Vietnam War, was a "highly controversial figure" whose presence might provoke a disturbance (*id.* at 132-133). "The expression of controversial and unpopular views, it is hardly necessary to observe, is precisely what is protected by both the Federal and State Constitutions," the Court reasoned, concluding that there was no threat of immediate and irreparable injury such that a prior restraint on expression was permitted (*id.* at 134).

The Commissioner's decision also finds support in the Education Article of New York's Constitution, which guarantees students the right to an education that prepares them for citizenship in a democratic society. The Education Article states that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (NY Const, art XI, § 1). The Court of Appeals has interpreted this provision to require that the state provide the "opportunity for a sound basic education" to all students (*Bd. of Educ., Levittown Union Free Sch. Dist. v Nyquist*, 57 NY2d 27, 48 [1982]). The precise meaning of "sound basic education" has evolved over time. Although the Court of Appeals initially held that the state was only required to provide "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" (*CFE I*, 86 NY2d at 316), the Court subsequently expanded this definition to encompass "skills fashioned to meet a practical goal: meaningful civic participation in contemporary society" (*CFE II*, 100 NY2d at 905; *see also IntegrateNYC, Inc.*, 228 AD3d at 164 [explaining that *CFE II* "contemplated that the requisite skills for meaningful civic participation might involve more than basic academic skills. . ."]). The Court noted that the "purposive orientation for schooling has been at the core of the Education Article since its enactment in 1894" (*CFE II*, 100 NY 2d at 905). "As the Committee on Education reported at the time," the Court continued, "the public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before . . ." (*id*. [internal quotation marks and citation omitted]).

In our current moment, students need more than basic academic skills to participate meaningfully in our democracy. In a recent essay on the definition of "sound basic education" laid out in the Restatement of Children and the Law, Justice Goodwin Liu of the California Supreme

Court suggested that providing "the knowledge and skills necessary for effective and responsible participation 'in society' and 'in a democratic system of self-governance'" requires teaching "our young people to engage in constructive dialogue and find common purpose across lines of race, class, religion and politics . . ." (Hulse aff, exhibit E, Goodwin Liu, *Some Thoughts on a Developmental Approach to a Sound Basic Education*, 91 U Chi L Rev 437, 446 [2024], quoting Restatement of Children and the Law § 5.10 [Revised Tentative Draft No. 4, 2022]). Legal scholar Anne C. Dailey arrives at a similar conclusion, arguing that "children's right of access to ideas . . . [is] a central, if not *the* central, right of developing citizens" (Hulse aff, exhibit F, Anne C. Dailey, *In Loco Reipublicae*, 133 Yale L J 419, 434 [2024]). Dailey identifies four ways that this right of access is "critical to democratic citizenship": "access to ideas helps to cultivate the capacity of free thought in developing children; it promotes the development of critical-thinking skills; it teaches the democratic values of tolerance, pluralism, and equality; and it gives children the expressive skills with which to develop their own values and beliefs in the present and as future adult citizens" (*id.* at 462). "Children's exposure to diverse and sometimes opposing views is exactly that to which a democratic education aspires," she concludes (*id.* at 468).

Reading the constitutional right to freedom of expression together with students' entitlement to an education in New York leads to the conclusion that young people possess the right to access ideas, including those that challenge their worldviews (*see P.J. Video*, 68 NY2d at 299, 303, 308-309 [reading article I, § 12 of the New York State Constitution to require a "more exacting standard for the issuance of search warrants authorizing the seizure of allegedly obscene material than does the Federal Constitution" in light of the state's commitment to freedom of expression]). Our state is a place "where freedom of expression and experimentation has not only been tolerated, but encouraged" (*id.* at 309). As such, limiting the ideas and information available

to students will not serve, in the long run, to safeguard their well-being. Instead, it will hamper their ability to meaningfully participate in the civic life of our state by preventing them from practicing the "free exchange of ideas" that is central to our political culture. Therefore, to provide students with a sound basic education, schools must create the conditions where students can engage across difference, practice the values of tolerance, and develop the skills necessary to take their place as citizens in the "pluralistic, often contentious society in which they will soon be adult members" (*Pico*, 457 US at 868).

B. The Commissioner's Decision was Consistent with Students' Right to Access Ideas under the New York State Constitution.

Here, the Court can and should find that the Commissioner's decision is consistent with the requirements of the New York State Constitution as described above. To ensure a right of access to ideas in the school library setting, schools a) must provide exposure to a range of books and materials reflecting diverse views, and b) may not remove or restrict access to materials on ideological grounds. Such a right of access would not require that school districts select any particular book for their library but rather would mandate that they develop and apply library selection guidelines that lead to the creation of a wide-ranging collection reflecting a spectrum of political viewpoints and lived experiences. While librarians may remove books that contain factual inaccuracies or are in poor physical condition,[6] disapproval of controversial or unpopular viewpoints or the identities of authors or characters would never be a permissible basis for removing a book from a library collection.

As such, factors that courts should consider in determining whether a school district has complied with its constitutional obligation to provide access to ideas would include, among others,

[6] *See* American Library Association, *Collection Maintenance and Weeding* https://www.ala.org/tools/challengesupport/selectionpolicytoolkit/weeding (last updated Jan. 2018).

whether: a) the school district has adopted and applied library selection guidelines designed to lead to the creation of a wide-ranging collection; b) the district complied with established procedures in reviewing the challenged material; c) the district applied its selection guidelines in its review of any challenged material; d) the complainant's stated objections to the materials; and e) the district's ultimate explanation for the decision.

Applying those factors here, there is ample evidence that the Board acted in compliance with constitutional requirements and the Commissioner appropriately affirmed. First, Clyde-Savannah's library selection guidelines required the selection of materials that, among other criteria, "[p]resent various sides of controversial issues so that students may develop critical thinking and reading skills resulting in the ability to make informed decisions" and "[o]ffer global perspectives and promote diversity by including materials and authors and illustrators of all cultures – material will not be excluded because of the race, nationality, religion, gender, gender expression, sexual orientation, political views, or social views of the author" (*see* Hulse aff, exhibit D, Policy 8320: Textbooks, Library Materials, and Other Instructional Materials at 3-4).

Second, as the Commissioner reasoned, the Board's decision to return the books to shelves fully complied with Board policy. As required by the policy, the review committee prepared reports on the "educational, literary, and artistic values of each book," including an analysis of the relevant library selection guidelines (exhibit B at 5; see also petition, exhibit F). When the Board voted to reverse the removal in September, it stated that it had "'further consider[ed]' the Committee's report and determined that the review was in accordance with policy" (exhibit B at 6). "Respondent's deference to the views of the committee," the Commissioner continued, "which followed board policy and reached a reasoned conclusion, can hardly be considered arbitrary or

capricious" (*id.*).[7]

Third, the Commissioner recognized that Petitioner Marchitell's objections to the books, in particularly his objections to *All Boys Aren't Blue*, "can only be understood as an objection to author George M. Johnson's personal and political views" and as such, did not provide a valid basis for removal (*id.*). In contrast, the review committee's reports —which the Board ultimately relied upon in returning books to shelves— "outlined important themes and topics in the books," compiled reviews and awards and distinctions, and applied the guidelines (*id*. at 5-6; *see also* petition, exhibit F). As such, the District ultimately did not act on impermissible ideological grounds when it elected to retain the books in the school library and the Commissioner correctly affirmed this decision.

In the Commissioner's own words, "the right to academic, intellectual, and personal freedom lies at the very heart of this dispute" (exhibit B at 8). The students of Clyde-Savannah CSD have a right under the New York State Constitution to freedom of expression and a sound basic education that compels districts to ensure that students have access to ideas. Petitioners' attempt to remove books from the District's library collection on ideological grounds would have violated these essential rights, undermining the free exchange of ideas that the New York State Constitution aims to protect. Because these key state constitutional principles are foundational to the issue being considered, this Court should hold that they provide an independent, alternative state law ground to affirm the Commissioner's decision.

CONCLUSION

For the foregoing reasons, *amicus curiae* join in support of respondents and proposed

[7] As the NYCLU has argued elsewhere, the history and principle of "academic freedom" teaches that decisions regarding the content of educational materials should, in most cases, be left to professional educators (*see Keyishian v Bd. of Regents*, 385 US 589, 603-604 [1967]). The content of a school's library collection should be determined by the school's librarian and the content of a school's curriculum should be developed and approved by professional educators. Such decisions should be entitled to deference and a strong presumption of reasonableness.

intervenors-respondents to urge this Court to affirm the Commissioner's decision and deny Petitioners' claim for relief.

Dated: February 14, 2025
New York, N.Y.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR §202.8-b

I hereby certify that:

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Dated: February 14, 2025
New York, N.Y.

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