



REGULATING LGBTQ SPEECH IN THE CLASSROOM

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INTRODUCTION

Public school teachers have found themselves in a free speech vise. Their speech has become more regulated than ever by both the left and right. In particular, public

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school teachers across the country have found their speech relating to LGBTQ students and issues tightly regulated by government-mandated speech codes.¹ In left-leaning states, some religious teachers have objected to schools forcing them to address their transgender and nonbinary students by their preferred names and pronouns under anti-discrimination policies.² In right-leaning states, teachers have objected to the silencing of any discussion around LGBTQ issues under “Don’t Say Gay” laws.³ In both cases, the government seeks to regulate the content of the teachers’ speech, an action which would, in other circumstances, raise serious First Amendment questions.⁴ Does this level of control over what public school teachers may say in their classrooms violate the Free Speech Clause? Should it?

Under existing free speech jurisprudence, anything that teachers say while discharging their job responsibilities is not protected by the Free Speech Clause. When teachers speak “pursuant to their official duties,” like classroom instruction, they are deemed to be speaking as the government and not as a private citizen.⁵ This classification as government speech is significant because the Free Speech Clause protects private speech from the government, not government speech from itself.

¹ Notably, these laws apply to public school teachers, not private school teachers. The government cannot regulate employers in the private sector in the way it can regulate the teachers who work for it.

² See, e.g., *Kluge v. Brownsburg Cmty. Sch. Corp.*, 548 F. Supp. 3d 814, 819 (S.D. Ind. 2021), *aff’d*, 64 F.4th 861 (7th Cir. 2023), *vacated on denial of reh’g*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023); *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 713 (Va. 2023).

³ See, e.g., *GLBT Youth in Iowa Sch. Task Force v. Reynolds*, 709 F. Supp. 3d 664 (S.D. Iowa 2023), *rev’d and vacated*, 114 F.4th 660 (8th Cir. 2024); *Smiley v. Jenner*, 684 F. Supp. 3d 835, 839 (S.D. Ind. 2023).

⁴ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Content-based laws . . . are presumptively unconstitutional.”).

⁵ *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022) (“If a public employee speaks ‘pursuant to [his or her] official duties,’ the Court has said [that] the Free Speech Clause generally will not shield the individual from an employer’s control and discipline because that kind of speech is—for constitutional purposes at least—the government’s own speech.”); *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019) (“[A] core postulate of free speech law [is] [t]he government may not discriminate against speech based on the ideas or opinions it conveys.”).

In fact, the relatively new government speech doctrine declares that the Free Speech Clause does not cover government speech.⁶

This essay argues that the fundamental problem with the government employee speech doctrine is that it mistakenly assumes that the Free Speech Clause protects only speakers and not audiences. After all, the premise of denying any free speech protection to public employees speaking pursuant to their official duties is that the government, rather than a private person, is the real speaker. But the Free Speech Clause cares as much about ensuring an unimpeded stream of speech for audiences as it does about ensuring that speakers have the freedom to speak their mind. Prior cases involving government employee speech astutely recognized that the Free Speech Clause protected audiences as well as speakers; indeed, it trained its sights on protecting audiences rather than speakers.⁷ Unfortunately, this insight has been lost in the abrupt adoption of the government speech doctrine.

If the LGBTQ regulations are evaluated with an eye on the value of the public school teacher's speech for audiences rather than speakers, then requiring teachers to use appropriate pronouns for transgender and nonbinary students benefits the students addressed, while barring teachers from discussing issues related to sexual orientation and gender identity actually harms rather than helps student audiences, which include many LGBTQ students.

Part I of this essay describes the competing laws regulating teachers' speech about LGBTQ students and LGBTQ subjects. One set requires public school teachers to use the names and pronouns that match their students' gender identity. Another, exemplified by so-called "Don't Say Gay" laws, forbids instruction on sexual orientation or gender identity altogether. Part II describes current law regarding government employee speech, particularly the rule that withholds free speech protection for public employees speaking pursuant to their official duties. Part III explains how this rule overlooks that the Free Speech Clause is as much about audiences as about speakers; therefore, the fact that the government alone may be speaking should not lead to the conclusion that government employee speech deserves

⁶ *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) ("When government speaks, it is not barred [by the Free Speech Clause] from determining the content of what it says.").

⁷ See *infra* Part III.A.1.

no free speech protection. Part IV applies a more audience-focused free speech test to public employee challenges to the laws from Part I.

I. PUBLIC SCHOOL TEACHERS AND SPEECH RELATED TO LGBTQ STUDENTS

States across the country have chosen very different policies with regard to their LGBTQ students and LGBTQ subject matter in general. Some have focused on making their classrooms as safe and welcoming as possible for LGBTQ students. Part of that endeavor may include requiring teachers to address transgender and nonbinary students with the names and pronouns that match their gender identity.⁸ Other states have sought to prevent children from being exposed to allegedly inappropriate LGBTQ topics and have passed laws barring teachers from discussing sexual orientation or gender identity with their students.⁹ Both regimes have resulted in free speech lawsuits. The former challenging pronoun policies argue that the government is compelling them to say things they don't want to say, while the latter challenging Don't Say Gay laws assert that the government is censoring things they want to say. Ordinarily, the Free Speech Clause protects against both government censoring speech and government compelling speech.¹⁰

A. *Mandating Pronouns Contrary to Religious Belief*

In an effort to ensure a welcoming and nondiscriminatory learning environment, some public schools have implemented policies that require teachers to address transgender and nonbinary students with the names and pronouns consistent with their gender identity. Certain Christian teachers have objected to acting in a way contrary to their faith and have argued that these policies compel their speech in violation of the Free Speech Clause.

In school districts with such policies, teachers, coaches, counselors, and other school personnel must address students with appropriate names and pronouns. A

⁸ See, e.g., *Kluge v. Brownsburg Cmty. Sch. Corp.*, 732 F. Supp. 3d 943 (S.D. Ind. 2024), *rev'd and remanded*, 150 F.4th 792 (7th Cir. 2025).

⁹ MOVEMENT ADVANCEMENT PROJECT, *Equality Maps: LGBTQ Curricular Laws*, <https://www.lgbtmap.org/img/maps/citations-curricular-laws.pdf> (indicating that Alabama, Arkansas, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, North Carolina, Ohio, Texas, and West Virginia have enacted Don't Say Gay bans).

¹⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (stating that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all").

typical policy might start with the observation that “[c]alling a person by their preferred name and pronoun shows respect and contributes to the District’s commitment to providing a safe and nondiscriminatory educational environment” and then proceed to order that “staff must use a student’s preferred/chosen name or pronoun in verbal, written, and electronic communications.”¹¹

These mandates are meant to ensure a safe and welcoming learning environment—something that is important to learning for all students, but especially key for transgender students. Whether due to stigma, hostility, or violence,¹² research has identified transgender students as especially high risk.¹³ Research also shows that affirming their gender identity cuts mental health risks. One study found that pre-adolescent transgender children who were supported in their gender identity and had socially transitioned—“a reversible medical intervention that involves changing the pronouns used to describe a child, as well as his or her name and (typically) hair length and clothing”—had almost the same levels of anxiety and depression as their cisgender counterparts as opposed the increased levels transgender students typically experience.¹⁴ Another study found that mental health dramatically improved for each additional environment (home, friends, work, and school) where people used their names and pronouns.¹⁵ As one school

¹¹ Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, 680 F. Supp. 3d 1250, 1265 (D. Wyo. 2023); *see also, e.g.,* Doe v. Pine-Richland Sch. Dist., No. 2:24-CV-51, 2024 WL 2058437, at *3 (W.D. Pa. May 7, 2024) (quoting school policy declaring “Every student has the right to be addressed by a name and pronoun that corresponds to the student’s gender identity.”), *appeal dismissed*, No. 24-1898, 2024 WL 4764262 (3d Cir. Aug. 16, 2024).

¹² EMILY A. GREYTALK ET AL., *HARSH REALITIES: THE EXPERIENCE OF TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS* (2009) (finding that in the past year, because of their gender expression, 87% of surveyed transgender students had been verbally harassed at school; 53% had been pushed or shoved at school; and 26% had been punched, kicked, or injured with a weapon at school).

¹³ *See* Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. FREE SPEECH L. 615, 622–23 (2022) (collecting studies showing alarmingly high rates of suicide and attempted suicide among transgender youth).

¹⁴ Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 PEDIATRICS e20153223, e20153223-4 (Mar. 2016).

¹⁵ Stephen T. Russell et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior Among Transgender Youth*, 63 J. ADOLESC. HEALTH 503 (Oct. 2018) (“For transgender youth who choose a name different than the one given at birth, use of their chosen name in multiple contexts affirms their gender identity and reduces mental health risks known to be high in this group.”).

that adopted a Name Policy explained, “‘transgender students face significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying’ and that ‘these challenges threaten transgender students’ classroom experience, academic performance, and overall well-being.’”¹⁶

These speech codes may also have been motivated by a school’s desire to comply with Title IX of the Civil Rights Act. Title IX bars discrimination on the basis of sex in federally funded schools.¹⁷ Under the Biden administration, the Department of Education issued guidance explaining that sex includes sexual orientation and gender identity.¹⁸ This interpretative guidance follows the Supreme Court’s holding that “sex” under Title VII of the Civil Rights Act (which bars discrimination in employment) reaches sexual orientation and gender identity because “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹⁹

¹⁶ *Kluge v. Brownsburg Cmty. Sch. Corp.*, 732 F. Supp. 3d 943, 948 (S.D. Ind. 2024), *rev’d and remanded*, 150 F.4th 792 (7th Cir. 2025).

¹⁷ Specifically, Title IX states that “No person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

¹⁸ Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637, 32638 (June 22, 2021) (“[T]he Department has determined that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*—that discrimination ‘because of . . . sex’ encompasses discrimination based on sexual orientation and gender identity—properly guides the Department’s interpretation of discrimination ‘on the basis of sex’ under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.”). In April 2024, the Department of Education issued a Final Rule on Title IX regulations that incorporated this interpretation. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024). The Trump Administration has revoked this guidance. Lexi Lonas Cochran, *Department of Education Undoes Biden’s Title IX Rules on Gender*, THE HILL (Jan. 31, 2025), <https://thehill.com/homenews/education/5118925-trump-biden-title-ix-education-gender-lgbtq/>.

¹⁹ *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020); *see also id.* (“Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.”).

In explaining how schools may support transgender and nonbinary students, Biden’s Department of Justice’s Civil Rights Division encouraged schools to “adopt[] policies that respect all students’ gender identities,” including using the name and pronouns that students go by, even if they differ from their legal identities.²⁰ A fact sheet co-authored by the Department of Justice and the Department of Education makes clear that deliberate misgendering might contribute to a hostile environment and thus trigger an investigation for violations under Title IX.²¹

Nonetheless, certain public school teachers have refused to address transgender and nonbinary students with the names and pronouns that match their gender identity. These Christian teachers (for all those who have sued are Christian) believe that sex is binary, unchanging, and determined at conception. One high school teacher, “a professing evangelical Christian,”²² asserted in his complaint that “God created mankind as either male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual’s feelings or desires.”²³

²⁰ U.S. DEP’T OF EDUC., SUPPORTING TRANSGENDER YOUTH IN SCHOOL (June 2021).

²¹ U.S. DEP’T OF JUST. & U.S. DEP’T OF EDUC., CONFRONTING ANTI-LGBTQI+ HARASSMENT IN SCHOOLS: A RESOURCE FOR STUDENTS AND FAMILIES (June 2021), <https://perma.cc/2MER-DU25>. This guidance predates the newly finalized regulations and has been challenged as failing to comply with the Administrative Procedures Act. *See Tennessee v. United States Dep’t of Educ.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022), *aff’d*, 104 F.4th 577 (6th Cir. 2024). While federal courts have not yet addressed misgendering in the Title IX hostile school environment context, the EEOC has held that intentionally misgendering in the workplace may contribute to a hostile work environment in violation of Title VII of the Civil Rights Act of 1964. *See, e.g., Lusardi v. Dep’t of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2024-1, ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE (Apr. 29, 2024), <https://tinyurl.com/5d6t3wxb> (explaining that harassment based on gender identity includes “repeated and intentional use of a name or pronoun inconsistent with the individual’s known gender identity (misgendering)”).

²² *Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 833 (S.D. Ind. 2020) (“Mr. Kluge ‘is a professing evangelical Christian who strives to live by his faith on a daily basis.’”). This orchestra teacher also opined that being transgender is “‘a boringly old sin that has been repented for thousands of years,’ and because being transgender is a sin, it is sinful for him to ‘encourage[] students in transgenderism.’” *Kluge v. Brownsburg Cmty. Sch. Corp.*, 732 F. Supp. 3d 943, 947 (S.D. Ind. 2024), *rev’d and remanded*, 150 F.4th 792 (7th Cir. 2025).

²³ *Kluge*, 432 F. Supp. 3d at 833; *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021) (same); *see also Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-cv-04015-HLT-GEB, 2022 WL 1471372, at *1 (D. Kan. May 9, 2022) (stating that schoolteacher challenging school policy “is a

In their lawsuits, these public school teachers claim that they have a free speech right to decide which names and pronouns to use when addressing students in their classrooms. That is, while their opposition may be grounded in religion, their First Amendment claims are grounded in speech.²⁴ As these teachers see it, school rules against misgendering force them to speak untruths.²⁵ Consequently, they maintain, these rules compel speech in violation of the Free Speech Clause.

B. Censoring LGBTQ Subjects

Meanwhile, “Don’t Say Gay” laws prevent public school teachers in other states from speaking about entire subjects in their classrooms. Moreover, because the state-wide laws are so vaguely worded, schools and teachers are not even sure what is allowed, creating a chilling effect on what they talk about with their students. In response, some teachers (and students) in these states have challenged the laws as infringing their free speech rights.²⁶

Florida pioneered “Don’t Say Gay” laws, and several states, including Alabama, Arkansas, Indiana, Iowa, Kentucky, Louisiana, and North Carolina, have followed suit, as have numerous individual school districts.²⁷ Under Florida’s law, whose official name is the Parental Rights in Education Act, “[c]lassroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur.”²⁸ Others sweep even more broadly: Iowa’s version forbids any school personnel from “provid[ing] any program, curriculum, test, survey, questionnaire,

Christian who believes that God immutably creates each person as male or female; these two distinct, complementary sexes reflect the image of God; and rejection of one’s biological sex is a rejection of the image of God within that person”).

²⁴ Some also assert claims based upon the free exercise of religion, but this essay focuses on the free speech claims.

²⁵ *Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300, 304 (4th Cir. 2021) (“Vlaming told [the school principal] that using male pronouns to refer to someone who was born a female violated his religious beliefs because it was untruthful.”).

²⁶ See *supra* notes 22–25 (listing challenges brought by teachers); *Cousins v. Sch. Bd. of Orange Cnty., Fla.*, 687 F. Supp. 3d 1251 (M.D. Fla. 2023) (dismissing case brought by parents and students).

²⁷ MOVEMENT ADVANCEMENT PROJECT, *supra* note 9.

²⁸ H.R. 1557, 2022 Leg., Reg. Sess. (Fla. 2022).

promotion, or instruction relating to gender identity or sexual orientation,”²⁹ while Indiana’s bans “any instruction . . . on human sexuality.”³⁰ Although some bans apply only to younger grades, others reach middle school and even high school.³¹

Given the ambiguity of these laws, not all school districts have responded in exactly the same way. For example, some but not all schools interpreted their state law to prohibit books with any LGBTQ characters,³² and so removed from classrooms even picture books like *And Tango Makes Three* (a story about gay penguins in Central Park Zoo who adopt and hatch an egg) and *A Day in the Life of Marlon*

²⁹ *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 709 F. Supp. 3d 664, 677–78 (S.D. Iowa 2023), *rev’d and vacated*, 114 F.4th 660 (8th Cir. 2024). Iowa’s law also bans from Iowa public school libraries any book that describes or depicts a “sex act.”

³⁰ *Smiley v. Jenner*, 684 F. Supp. 3d 835, 839 (S.D. Ind. 2023) (quoting House Enrolled Act 1607, Ind. Code § 20-30-17-2). Indiana’s bill applies to Pre-K to third grade. *Id.* Kentucky’s law is also broader, ensuring that “Any child, regardless of grade level, enrolled in the district does not receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation.” S.B. 150 Reg. Sess. (Kan. 2023). The same bill also “bans gender-affirming health care for transgender minors, . . . prohibits districts and schools from asking teachers and staff to use a trans student’s pronouns, and mandates districts create policies that prevent trans students from using restrooms that align with their gender identity.” Valerie Honeycutt Spears, *State Officials Disagree with Kentucky Removing Library Books Based on New Law*, LEXINGTON HERALD-LEADER (Oct. 20, 2023), <https://perma.cc/537V-CER4>. North Carolina’s law, meanwhile, prohibits “instruction on gender identity, sexual activity or sexuality” in kindergarten through fourth grade, including in textbooks and “other supplementary materials.” Rebecca Noel, *What Internal CMS Emails Reveal About NC Parents Bill of Rights Implementation*, CHARLOTTE OBSERVER (Apr. 9, 2024), <https://perma.cc/3T3R-DEJX>.

³¹ Iowa’s law applies to grades six and below. *GLBT Youth in Iowa Sch. Task Force*, 709 F. Supp. 3d at 674. Although Florida’s prohibition originally applied to kindergarten through third grade, it had been expanded, via administrative action, to all grades through the twelfth. Ashley Woo & Melissa Kay Diliberti, *How Florida’s Expansion of “Don’t Say Gay” Law Will Hurt Students and Teachers Across the United States*, RAND (May 13, 2023), <https://perma.cc/WK78-2GHQ>. Parts of Kentucky’s law also extend through the twelfth grade: “Any child, regardless of grade level, enrolled in the district [shall] not receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation.” KENTUCKY LEGISLATIVE RESEARCH COMMISSION, *Chapter 132 (SB 150)*, <https://perma.cc/NF69-3WGZ>.

³² Noel, *supra* note 30 (describing how teachers were instructed to remove from classroom libraries books with same-sex couples or the gender-neutral pronoun “they”); *see also* Emily Walkenhorst, *Removal of Books with Gay Parents Prompt Federal Complaint in Moore County Schools*, WRAL NEWS (May 15, 2024), <https://perma.cc/5MUZ-VRGT> (describing response to North Carolina’s Don’t Say Gay law in one school district).

Bundo (a story about a boy bunny with a bowtie who falls in love with another boy bunny).³³ In one Florida district, a teacher found herself under investigation for showing a Disney film featuring a gay character.³⁴ Public school teachers in more than one state have also been told to remove pride flags or other symbolic support for their LGBTQ students.³⁵

The plain language of the law certainly suggests that, at the very least, teachers cannot teach LGBTQ history or current events pertaining to the LGBTQ community, nor can teachers even provide basic age-appropriate explanations of why some students have two mothers or two fathers or why some students may be girls this year when they were boys last year.

Regardless of what the “Don’t Say Gay” laws actually ban, their ambiguity tends to chill teacher speech.³⁶ When in doubt about what is permissible, teachers will err on the side of caution, given that the potential penalties include losing one’s job or even forfeiting one’s license.³⁷ Consequently, teachers are likely to play it safe and avoid various topics altogether, even when not actually barred.

³³ Judd Legum, *Florida School District Orders Librarians to Purge All Books with LGBTQ Characters*, POPULAR INFO (Sept. 26, 2023) (noting the removal of *And Tango Makes Three* and *A Day with Marlon Bundo*); Tim Webber, *Which Banned Books Have Been Removed from Iowa Schools? Our Updated Database Lists Them*, DES MOINES REGISTER (Oct. 16, 2023), <https://perma.cc/TQ8Y-UQZY> (noting Iowa School districts that have banned *And Tango Makes Three*).

³⁴ Joe Hernandez, *Florida Is Investigating a Teacher Who Showed a Disney Movie with a Gay Character*, NPR (May 16, 2023), <https://perma.cc/7BV2-9PRG>.

³⁵ Emily Bloch, *Equality Florida slams Duval Schools for Removing “Safe Space” Rainbow Stickers Amid “Rebrand,”* FLORIDA TIMES-UNION (Aug. 15, 2022), <https://tinyurl.com/mrxjvukx>; Savannah Tryens-Fernandes, *Alabama Schools Take Down Pride Flags, Change LGBTQ Bathroom Access as New Law Takes Effect*, AL.COM (Aug. 31, 2022), <https://perma.cc/257Y-TLW4>.

³⁶ Although a legal challenge resulted in a settlement agreement that clarified the scope of Florida’s law, its terms do not control the laws of other states, especially when the language of their laws differ. The settlement agreement explains that Florida’s law applies to classroom instruction but not discussion during classes and not comments from students. It also clarifies that schoolrooms do not need to remove books with LGBTQ characters, and schools do not need to cease LGBTQ anti-bullying efforts or remove safe space stickers. Settlement Agreement, *Equality Florida v. Florida State Bd. of Educ.*, No. 4:22-cv-00134-AW-MJF (N.D. Fla. Mar. 11, 2024), <https://tinyurl.com/2xfh7v8v>.

³⁷ See, e.g., FLA. ADMIN CODE ANN. r. 6A-10.081(2) (2024) (“Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator’s certificate. . . . [The educator s]hall not intentionally provide classroom instruction to students . . . on sexual orientation or gender identity.”).

II. CURRENT DOCTRINE

Once, public school teachers might have had a viable free speech challenge to these government regulations. But the recent government speech gloss to the law on public employee speech—a gloss which holds that speech pursuant to official duties is not protected by the Free Speech Clause—precludes such an evaluation. Today, teachers essentially cannot challenge these restrictions.

At first glance, both types of regulations appear to infringe the free speech rights of public school teachers: the first by compelling teachers' speech and the second by censoring teachers' speech. However, the speech rules for government employees are different than they are for regular citizens precisely because the government is not the sovereign in these situations but an employer. In fact, speech pursuant to official duties—that is, speech public employees utter in the course of carrying out their job responsibilities—is considered the government's own speech³⁸ and merits no free speech protection at all.³⁹

At one time, government employees had absolutely no speech rights at work. This rule was summarized by Justice Holmes's famous quip: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."⁴⁰ Like any employer who needed a functioning workplace, the government as an employer could discipline its employees whose speech disrupted operations or otherwise displeased it.

Eventually the Supreme Court provided some protection for the speech of government employees like public school teachers under the *Pickering-Connick* test, named after the cases that created the test.⁴¹ The test balanced the free speech value of the employee's speech against the employer's need for a smoothly operating workplace. Specifically, employee speech was protected by the Free Speech Clause

³⁸ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

³⁹ *See, e.g., Matal v. Tam*, 582 U.S. 218, 235 (2017) ("[O]ur cases recognize that '[t]he Free Speech Clause . . . does not regulate government speech.'").

⁴⁰ *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

⁴¹ The two cases are *Pickering v. Board of Education*, 391 U.S. 563, 569 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983).

if it, first, covered a matter of public concern and, second, did not unduly disrupt the government workplace.⁴²

Speech addresses a matter of public concern “when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”⁴³ In devising this test, the Supreme Court noted that public employees, witnesses to the inner workings of government, often had important insights that the public should hear.⁴⁴

Government employee speech becomes disruptive to a government employer’s workplace if it, among other things, prevents the employee from fulfilling their job responsibilities, destroys important working relationships,⁴⁵ or undermines the reputation of the workplace.⁴⁶ Because *Pickering-Connick* is a balancing test, disruption is evaluated on a sliding scale. The more valuable the speech, the more disruption is permitted.⁴⁷

These two elements are still relevant considerations today, but they do not come into play unless the plaintiff first passes another test. Under the 2006 decision *Garcetti v. Ceballos*, the threshold question in any free speech lawsuit brought by a public employee is whether the speech was made “pursuant to official duties.”⁴⁸ If

⁴² See, e.g., *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (“The threshold question in applying this balancing test is whether McPherson’s speech may be ‘fairly characterized as constituting speech on a matter of public concern’”); *id.* at 388 (“Because McPherson’s statement addressed a matter of public concern, *Pickering* next requires that we balance McPherson’s interest in making her statement against ‘the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’”).

⁴³ *Lane v. Franks*, 573 U.S. 228, 241 (2014).

⁴⁴ *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (“Government employees are often in the best position to know what ails the agencies for which they work.”).

⁴⁵ *Connick*, 461 U.S. at 151–52 (“When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.”).

⁴⁶ *City of San Diego v. Roe*, 543 U.S. 77, 81 (2004) (holding that balancing favored employer in part because employee’s speech “brought the mission of the employer and the professionalism of its officers into serious disrepute”).

⁴⁷ *Connick*, 461 U.S. at 164 n.4 (“The degree to which speech is of interest to the public may be relevant in determining whether a public employer may constitutionally be required to tolerate some degree of disruption resulting from its utterance.”).

⁴⁸ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

so, the speech is deemed government speech and therefore falls outside of the reach of the Free Speech Clause: “We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁴⁹ In other words, the Free Speech Clause protects private speech, not government speech, and under *Garcetti*, employee speech pursuant to official duties is government speech.

Speech pursuant to official duties is speech that “owes its existence to a public employee’s professional responsibilities.”⁵⁰ It represents speech said while the government employee was performing the job they were paid to do.⁵¹ For example, a teacher’s classroom instruction is pursuant to official duties because that speech represents fulfillment of the teacher’s employment responsibilities.⁵² And because addressing students is part and parcel of classroom instruction, pronoun use is also pursuant to official duties.⁵³ In contrast, a teacher’s letter to the editor in the local newspaper about misplaced school priorities would not be speech pursuant to official duties because opining on school policy in a public setting is not what the school district hired the teacher to do. In deciding whether speech is “pursuant to official duties,” the Court examines the government employee’s actual responsibilities rather than their job description lest the government try to make all their speech “pursuant to official duties.”⁵⁴

⁴⁹ *Id.*

⁵⁰ *Id.* at 421–22.

⁵¹ Thus, for example, the Supreme Court has found that a public school coach’s private prayer on the football field was not pursuant to official duties because “When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech ‘ordinarily within the scope’ of his duties as a coach. . . . Simply put: Mr. Kennedy’s prayers did not ‘ow[e their] existence’ to Mr. Kennedy’s responsibilities as a public employee.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 529–30 (2022).

⁵² See, e.g., *Smiley v. Jenner*, 684 F. Supp. 3d 835, 842 (S.D. Ind. 2023) (finding that most interactions with students “even when spontaneous and not part of official curriculum, are within the scope of Ms. Smiley’s duties and responsibilities as an elementary school teacher and therefore not protected by the First Amendment”).

⁵³ Cf. *Wiley v. Sweetwater Cnty. Sch. Dist. #1 Bd. of Trustees*, No. 23-CV-0069-SWS, 2023 WL 9597101, at *8 (D. Wyo. Dec. 18, 2023) (“Referring to a student by their chosen or preferred names in a classroom, pursuant to a school district policy, is part of a teacher’s official duties.”).

⁵⁴ *Garcetti*, 547 U.S. at 444.

This new rule was made possible by the government speech doctrine. The government speech doctrine is one of constitutional law's more straightforward doctrines, and its basic premise is that the Free Speech Clause does not regulate the government's own speech.⁵⁵ Another way to frame the rule is that as far as the Free Speech Clause is concerned, the government has complete control over its own speech.⁵⁶ After all, the government must be able to decide what it does or does not say in order to function, especially when executing the policies it was elected to pursue.⁵⁷ For example, a government elected to promote vaccines should not be required to provide a platform for anti-vaxxers as well. Similarly, a government that has hired employees to administer vaccines should be able to stop them from dissuading their patients from taking them.

In sum, in order for a government employee like a public school teacher to successfully challenge the government's control over their workplace speech, three things must be true: (1) the contested speech is not pursuant to official duties (i.e., not government speech); (2) the speech is on a matter of public concern; and (3) it does not unduly disrupt the workplace. Failure to meet any of these requirements will result in a failed lawsuit.

III. *GARCETTI'S FUNDAMENTAL MISTAKE*

The *Garcetti* rule assumes that the purpose of the Free Speech Clause is to protect speakers. If it is the government speaking, the rule reasons, then there is no need for the Free Speech Clause to protect the speech since the clause protects private individuals, not the government. But the Free Speech Clause protects not only speakers' right to speak but also audiences' right to hear. In fact, in the public employee context, it primarily protects audiences. Therefore, it is a mistake to automatically eliminate all free speech scrutiny when speech is made pursuant to official duties. Pre-*Garcetti* government employee doctrine did not make this same error:

⁵⁵See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) ("[G]overnment speech is not restricted by the Free Speech Clause.").

⁵⁶Although the government may not violate the Free Speech Clause by compelling or censoring speech, it may violate other provisions of the Constitution, like the Establishment Clause (e.g., if it forces students to recite a Christian prayer) or the Equal Protection Clause (e.g., if it punishes Black but not white students for the exact same speech).

⁵⁷*Matal v. Tam*, 582 U.S. 218, 234 (2017) ("As we have said, 'it is not easy to imagine how government could function' if it were subject to the restrictions that the First Amendment imposes on private speech.").

It protected government employee speech primarily for the benefit of audiences rather than speakers.

A small aside: The *Garcetti* rule also assumes that a government employee's speech pursuant to official duties captures when the government and the government alone is speaking. Arguably, however, there are both private and government components when a government employee speaks, even when speaking pursuant to official duties.⁵⁸ For purposes of this essay, however, I will assume that it is fair to characterize government employee speech pursuant to official duties as an example of speech with a single speaker—the government.

A. Audience Rights Generally

That the government is the sole speaker of speech pursuant to official duties should not inexorably compel the conclusion that there is no need to protect that speech. As explained above, the government speech doctrine assumes that the Free Speech Clause is solely about protecting speakers, and if there is no private speaker, then there are no free speech interests to protect. But this assumption overlooks the longstanding importance of audiences and their free speech right to receive information. Audience rights are crucial to the Free Speech Clause, even if those rights are not as well developed as speaker rights. That audience rights may play second fiddle to speaker rights negates neither their existence nor their importance.

1. Audience rights

The Free Speech Clause has never protected only speakers, not as a matter of legal theory and not as a matter of legal doctrine. To start, two of the three main theories of free speech focus primarily on audiences. In addition, free speech doctrine recognizes the importance of audiences in various ways, including as plaintiffs in free speech challenges and as reasons to extend Free Speech Clause coverage.

a. Audience rights: theory

As every First Amendment textbook explains, the three most commonly articulated goals of the Free Speech Clause are to (1) create a marketplace of ideas, (2)

⁵⁸ See generally Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Caroline Mala Corbin, *The Government Speech Doctrine Ate My Class: First Amendment Capture and Curriculum Bans*, 76 STAN. L. REV. 1473 (2024).

facilitate participatory democracy, and (3) encourage and protect individual autonomy and self-expression.⁵⁹ While the third centers on the speaker, the first two are more directed towards the benefit to audiences.

Most people instinctively understand the relationship between free speech and individual autonomy. The paradigmatic free speech violation is the government censoring someone's speech, which readily evokes the intrusion on an individual's freedom of conscience.⁶⁰ The need to protect the speaker's autonomy, although paramount when a private person is speaking, does not occur when the government is speaking.

But even when the government speaks, government control of that speech undermines the two other main goals of the Free Speech Clause, which zero in on the benefits to audiences of a free flow of speech. The "marketplace of ideas" rationale, rooted in the philosophies of John Milton and John Stuart Mill, maintains that the best way to advance human knowledge and the search for truth is to allow all viewpoints to be aired.⁶¹ If the government censors an idea, it might suppress the truth or at least part of it. Besides, even false ideas might be useful by sharpening our understanding of true ones.⁶² Notably, this marketplace of ideas is for the sake of those exposed to this back-and-forth, namely, audiences. As the Supreme Court has highlighted, "[i]t would be a barren marketplace of ideas that had only sellers and no buyers."⁶³

⁵⁹ See, e.g., RON KROTOSZYNSKI ET AL., *THE FIRST AMENDMENT: CASES AND THEORY* 14–20 (2023).

⁶⁰ This invasion of conscience occurs equally when the govt compels someone to parrot the government's ideology.

⁶¹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market That at any rate is the theory of our Constitution.").

⁶² "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (quoting J.S. MILL, *ON LIBERTY* 15 (Oxford: Blackwell 1947) (1859)).

⁶³ *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring); see also *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (lead op.) (same).

Along these lines, the reason speech is essential for our democratic form of government is that voters, as audiences, need access to information. The fundamental premise of our democracy is that our elected officials make policy decisions on our behalf and with our consent. We give or withhold that consent at the ballot box. But in order for that consent to be valid, it must be informed in two ways. First, we need to know if our representatives have been implementing, or failing to implement, our preferred policies.⁶⁴ Second, we need to develop those preferred policies in the first place. Enter the Free Speech Clause's protection of knowledge and ideas reaching the electorate. As the Supreme Court has written, "one of the central purposes of the First Amendment's guarantee of freedom of expression is to protect the dissemination of information on the basis of which members of our society may make reasoned decisions about the government."⁶⁵

I am not arguing that the free speech goals of promoting a marketplace of ideas and democratic self-governance are only about ensuring a comprehensive stream of speech for audiences, any more than I am arguing that promoting autonomy is only about protecting speakers. Each free speech theory has dual dimensions. Speech is important to citizenship for speakers as well as audiences because citizenship may involve contributing to the political discourse.⁶⁶ And just as control over one's own speech is central to autonomy, so is making life-changing decisions with all available information. The bottom line is that the audience's right to receive speech is at least as important as the speaker's right to speak, and arguably, audience rights are primary under the marketplace of ideas and democratic self-governance goals behind the Free Speech Clause.

b. Audience rights: doctrine

Supreme Court decisions have embraced the importance of audiences' free speech rights. The Court regularly comments on it; it has recognized audiences as free speech plaintiffs; and finally, it has expanded free speech coverage in the name

⁶⁴ We might also want to know if our elected representatives have been misbehaving. We cannot hold them accountable for their abuses of power if we lack information about those abuses.

⁶⁵ *Connick v. Myers*, 461 U.S. 138, 161 (Brennan, J., dissenting) (citing *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966)); see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776–77 (1978) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

⁶⁶ Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35 (2004).

of audiences' right to hear. In short, not only has the Court repeatedly noted that ensuring a free flow of speech to audiences is pivotal to the Free Speech Clause, but it has also developed free speech doctrine in a manner that spotlights audiences as free speech rightsholders.

There is no shortage of Supreme Court quotations that tout the importance of audience rights to Free Speech Clause jurisprudence. As early as 1943, the Court wrote about free speech that "This freedom embraces the right to distribute literature, and necessarily protects the right to receive it."⁶⁷ The Court repeats the sentiments when stating, "It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth, is fundamental to our free society."⁶⁸

The Supreme Court's recognition of audience interest has practical repercussions. For example, the Supreme Court has granted standing to audiences so that, in many cases, free speech challengers are not speakers who have been censored or compelled but audiences who have been denied access to speech. In *Lamont v. Postmaster General*, recipients of foreign mail deemed 'communist political propaganda' successfully challenged a law requiring the post office to hold such mail until specifically requested.⁶⁹ In *Stanley v. Georgia*, a devotee of films found obscene successfully challenged a law making it a crime to merely possess such material, even though the material itself fell into an unprotected category of speech.⁷⁰ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, potential viewers of commercial advertisements successfully challenged a law barring pharmacists

⁶⁷ *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read.").

⁶⁸ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also id.* at 565 ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

⁶⁹ *Lamont v. Postmaster Gen.*, 381 U.S. 301, 304–05 (1965); *see also id.* at 308 (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them.").

⁷⁰ *Stanley*, 394 U.S. at 564. The creators of the obscene film were not at all involved in the case.

from advertising the price of prescription drugs.⁷¹ In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, public school students challenged the school board's removal of books deemed "anti-American, anti-Christian, anti-Semitic and just plain filthy" from their school library.⁷² Thus, there is no denying that a long line of cases recognizes that audiences, too, have and can assert their free speech right to receive information.

In addition, the Supreme Court has regularly justified the expansion of free speech coverage in the name of audiences rather than speakers. Originally outside the ambit of the Free Speech Clause, commercial speech⁷³ became protected on the grounds that consumers should have access to commercial information: Such information might inform their consumer decisions as individuals,⁷⁴ as well as their economic policy decisions as citizens.⁷⁵ Similarly, free speech protection was originally extended to corporate speech not because corporations should have free speech rights but because audiences should have access to all viewpoints on political issues, regardless of the source.⁷⁶

⁷¹ *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756–57 (1976); see also *id.* at 756 ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.").

⁷² *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 857 (1982) (lead op.).

⁷³ Commercial speech is speech designed to encourage a sale and includes advertisements and product labels. It is often defined as speech that "does no more than propose a commercial transaction." *Va. State Bd. of Pharm.*, 425 U.S. at 762.

⁷⁴ *Id.* at 763 (noting that "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate").

⁷⁵ *Id.* at 765 (noting that "the free flow of commercial information is indispensable" to both "the proper allocation of resources in a free enterprise system [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered").

⁷⁶ *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (arguing that "the press does not have a monopoly on either the First Amendment or the ability to enlighten" and noting corporations' "role in affording the public access to discussion, debate, and the dissemination of information and ideas").

2. Audience rights secondary to speaker rights

Although it is uncontested that audiences are free speech rights-bearers and are indeed central to the Free Speech Clause, the theory and doctrine related to audiences are not nearly as well developed as those related to speakers. One reason for the underdevelopment of audience rights is the primacy of speakers. Phrased differently, audience rights take a back seat based on the assumption that putting speaker rights in the driver's seat will protect both speakers and audiences. Yet they do sometimes conflict, and when they do, speakers' free speech rights usually prevail, perhaps because the right to speak maps onto the most accessible understanding of free speech: protecting the right to self-expression.

Listener rights need less development if protecting speakers will also protect audiences. According to this belief, a speaker-focused theory of free speech suffices because protecting speakers is the best way to ensure a free flow of speech for audiences. After all, the information, ideas, and opinions necessary for a marketplace of ideas, particularly political ideas, originate with a speaker somewhere. Thus, speaker rights may accomplish all that is needed.

At the same time, when speaker rights to speak and audience rights to hear clash, the Court generally privileges speaker rights over audience rights.⁷⁷ For example, in an attempt to ensure that citizens in localities with one dominant newspaper are exposed to all sides of a debate, Florida enacted an audience-focused right-of-reply rule.⁷⁸ It provided that any time a newspaper's editorial board criticized a candidate for office, that candidate had the right to respond so that readers would hear more than a single viewpoint.⁷⁹ The Supreme Court struck down the law in *Miami Herald Publishing Co. v. Tornillo*, concluding that it violated the newspaper's rights to exercise editorial control over the content of its own pages.⁸⁰

⁷⁷ Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 878 (2020) ("In clashes between the right of private speakers to speak and the right of private audiences to a free flow of varied information that is neither distorted nor damaging, the Supreme Court has consistently favored speakers.").

⁷⁸ *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 251 (1974) (summarizing the government's defense of its law as "The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market").

⁷⁹ *Miami Herald*, 418 U.S. at 244.

⁸⁰ *Id.* at 258.

Similarly, although patients at “crisis pregnancy centers” might want to know that the pro-life workers collecting health information, administering ultrasounds, and dispensing advice are not licensed medical professionals,⁸¹ the Supreme Court held that such workers need not tell them.⁸²

Whether persuasive or not,⁸³ driving both decisions is the idea that speakers cannot enjoy freedom of conscience if compelled to speak against their will, even for the sake of audiences.⁸⁴ Yet, individual self-expression is not the only free speech value at play in these decisions. The *Miami Herald* case also recognized that audiences, too, might suffer if the newspaper decides to cease running controversial editorials if forced to allow political candidates to respond each time they do. Nevertheless, the speaker’s inviolable autonomy interests play center stage in most decisions where speaker rights trump audience rights.

B. Audience Rights in the Public Employee Context

In contrast, audience rights are prioritized in government employee speech doctrine, at least pre-*Garcetti*. Perhaps because a government employee at work never had the same right to self-expression as a citizen, earlier government speech doctrine focused more on the free speech rights of the employees’ audiences than

⁸¹ Nat’l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 799 (2018) (Breyer, J., dissenting) (“[I]t is ‘self-evident’ that patients might think they are receiving qualified medical care when they enter facilities that collect health information, perform obstetric ultrasounds or sonograms, diagnose pregnancy, and provide counseling about pregnancy options or other prenatal care.”).

⁸² *Id.* at 776. On the flip side, audiences may not want to hear what speakers are saying: Just because anti-abortion protesters want to explain that life begins at conception and abortion is murder does not mean women entering a clinic to end an unwanted pregnancy want to listen to their viewpoint as they go in for medical care. *McCullen v. Coakley*, 573 U.S. 464 (2014). Of course, this is assuming a free speech right to not hear as the flip side of a free speech right to hear, much like the flip side of a speaker’s right to speak is a free speech right to not speak. See generally Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 940 (2009).

⁸³ It is not quite clear how the crisis pregnancy centers’ freedom of conscience is impacted by clarifying their medical qualifications. Indeed, I do not think any organization’s right to deceive should trump a patient’s right to know whether or not her provider has a medical license.

⁸⁴ Another argument, at least in *Miami Herald*, is that compelling speech would actually stifle speech in the long run: If forced to host the opposite side every time the newspaper publishes a controversial op-ed, the paper may simply cease to run those opinion pieces, resulting in less diversity of opinion for readers than before. *Miami Herald*, 418 U.S. at 257 (“editors might well conclude that the safe course is to avoid controversy”).

the speakers themselves. *Garcetti* deals a double blow to the free speech rights of audiences: First, it drops this focus on audiences, and second, it forecloses the protection of audience rights through speaker rights for speech categorized as government speech. This is a mistake, and the government employee speech doctrine should be revised to recognize the free speech rights of audiences in their own right.

Although free speech doctrine usually concentrates more on speaker rights than audience rights, that was not the case in government employee speech doctrine under the *Pickering-Connick* test. This might be because speaker rights were always more limited in this context. Although the government employees were speakers protected by the Free Speech Clause, they were also employees over whom their employers had the right to exert some control. Consequently, speaker rights always had to give way to their employers' need for a smoothly functioning workplace.

Additionally, although the *Pickering-Connick* test is presented as striking a balance between the speaker's interests and the government's interests,⁸⁵ its analytical framework does not turn on employees enjoying any autonomy as speakers. When evaluating whether the government employee's speech warrants protection, the doctrinal question is whether the speech is on a matter of public concern. That is, it does not ask whether tamping this speech infringed on the self-expression or self-realization of the speaker but whether it deprived audiences of useful information. Only speech valuable for audiences deserved protection. The speaker's autonomy does not enter in the calculus at all. Thus, the *Pickering-Connick* test was geared towards protecting speech for the benefit of audiences rather than speakers.

This essential insight—that government employee speech deserves protection because of the value it may hold for audiences—was lost with the incorporation of the government speech doctrine into the government employee speech doctrine. Recall that the government speech doctrine now assumes that there is no reason to protect speech if there is no private speaker. This same assumption infects *Garcetti*. Because there is no private speaker when a government employee speaks pursuant to their official duties, this government speech is assumed to merit no free speech

⁸⁵ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (requiring “balanc[ing] between the interests of the [government employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees”).

protection. That the stream of speech might benefit audiences is utterly unacknowledged.

Not only are audiences overlooked but they are left unprotected by a doctrine that relies on speakers to protect audiences. But the free speech rights of private audiences should not vanish with the free speech rights of private speakers. In other words, one problematic consequence of making speaker rights the central focus of any free speech doctrine is that if there is no private speaker, the lack of speaker rights automatically extinguishes the audience's rights, even if the audience continues to profit from hearing the speech. This should be reason enough to insist on independent audience rights rather than have audience rights always depend on speaker rights.

Moreover, reviving the idea that audience rights are first-order rights and not merely byproducts of speaker rights will not cause clashes with speaker rights in the context of government speech because the government has no free speech rights. Insofar as the Constitution is concerned, the government has various powers, but it does not enjoy individual rights. One of those powers may be the ability to control its own speech, but that power does not equate to a right protected by the Free Speech Clause.⁸⁶ On the contrary, much like other provisions of the Constitution, the Free Speech Clause limits the government's powers. Thus, any concern about audience rights usurping speaker rights should not prove a barrier to developing stronger free speech rights for those on the receiving end of government speech.⁸⁷ In short, recognizing audience rights will not jeopardize speaker rights because there are no private speakers and therefore no speaker rights.

In sum, government employee speech used to care about protecting audiences' right to hear information. This insight was lost when the Supreme Court removed speech pursuant to official government duties from the ambit of the Free Speech Clause. The Free Speech Clause should directly protect audience rights, including when the government employee is speaking pursuant to official duties, since private

⁸⁶ Thanks to Howard Wasserman for bringing this point into focus; *see also supra* notes 55–57 and accompanying text (explaining government speech doctrine); *cf.* *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (“The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government.”).

⁸⁷ Corbin, *Government Propaganda*, *supra* note 77, at 878 (“In other words, with government speech, there are no protected speakers, only protected audiences.”).

speaker rights cannot carry the day (to the extent they ever did). There is no need to worry about audience rights supplanting private speaker rights since there are no private speaker rights with speech pursuant to official duties. The next Part turns to how an audience-focused government employee speech doctrine might address the regulations of public school teachers described in Part I.

IV. GOVERNMENT EMPLOYEE SPEECH PRIVILEGING AUDIENCES

If the Court were to jettison *Garcetti* and revert to its earlier understanding that the Free Speech Clause protects audiences as well as speakers, especially in the government employee speech context, a finding that an employee is a government speaker would not foreclose free speech scrutiny of government-mandated speech. This might translate into a return to the *Pickering-Connick* test, which holds that valuable speech that does not upset the workplace should merit some level of free speech scrutiny. That is, government employee speech would be protected if it is (1) on a matter of public concern and (2) not unduly disruptive.⁸⁸

A. Free Speech Scrutiny of Don't Say Gay Laws

Under existing doctrine, teachers essentially cannot challenge restrictions on their classroom teaching. Yet, were these laws subject to the *Pickering-Connick* test—a test firmly rooted in protecting audiences—the “Don’t Say Gay” laws would probably not be found to be constitutional.

Public school teachers teaching their courses are quintessential government employees speaking pursuant to official duties. Accordingly, under *Garcetti*, they have little chance of successfully attacking these laws via a free speech challenge. They might have better luck under the Equal Protection Clause, the Due Process Clause, or, for some, the Free Exercise Clause, but those clauses are beyond the scope of this paper.⁸⁹

⁸⁸ See *supra* notes 41–47 and accompanying text (describing the *Pickering-Connick* test).

⁸⁹ On the one hand, the “Don’t Say Gay” laws might violate the Equal Protection or Due Process Clauses. Under the Equal Protection Clause, laws that discriminate on the basis of sex are unconstitutional unless they pass intermediate scrutiny, although it is still an open question whether that constitutional protection extends to discrimination on the basis of gender identity. Meanwhile, a law that does not provide adequate notice of what is forbidding runs afoul of the Due Process Clause. Laws with vague or ambiguous wording fail to provide that notice, and the “Don’t Say Gay” laws have left a trail of uncertainty in their wake. See Corbin, *The Government Speech Doctrine Ate My Class*, *supra* note 58, at 1481. On the other hand, the pronoun policies trigger the Free Exercise

Teachers' odds would change if the doctrine returned to the *Pickering-Connick* test, which would protect their classroom instruction on sexual orientation if that instruction is on a matter of public import that did not disrupt public schools. Core components of identity, whether they be race, religion, sex, sexual orientation, or gender identity, would seem to "plainly relate[] to broad issues of interest to society at large."⁹⁰ Indeed, the Supreme Court has already held that sexual orientation and gender identity are topics that qualify as matters of public concern.⁹¹

The next question is whether their discussion would unduly upset the workplace, which here means the public school and classroom. The answer would be more fact-bound and would require examination of both the dynamics of the classroom and the missions of public schools.⁹² It is possible to talk about sexual orientation and gender identity in a way that hinders a classroom from running smoothly or undermines school goals.

It is also possible to teach about these topics in an age-appropriate way that improves the classroom environment and promotes the goals of public education, which includes teaching about diversity and modeling tolerance. After all, part of preparing students for future citizenship is educating them on how to live with people whose lives and values do not exactly mirror their own.⁹³ Reading books with gay characters or talking about different types of families, the legality of which is uncertain under "Don't Say Gay" laws, certainly seems like it would not disrupt

Clause, which may require religious exemptions from laws that impose a substantial burden on someone's religious conscience unless applying the laws would pass strict scrutiny.

⁹⁰ *Snyder v. Phelps*, 562 U.S. 443, 454 (2011).

⁹¹ *Id.* at 454 (finding that hateful signs were related to topics of public concern given they discuss moral issues surrounding homosexuality); *Janus v. Am. Fed'n of State, County & Mun. Emps., Council 31*, 585 U.S. 878, 913–14 (2018) (describing "sexual orientation and gender identity" as "sensitive political topics" that "are undoubtedly matters of profound value and concern to the public" (internal quotations and citations omitted)).

⁹² *Connick v. Myers*, 461 U.S. 138, 151–53 (1983) (considering, in analyzing whether a questionnaire following a dispute was disruptive, "the manner, time, and place in which the questionnaire was distributed" as well as "the context in which the dispute arose," among other things).

⁹³ There's a reason why the military and businesses feel so strongly about ensuring that students are exposed to people from diverse backgrounds: "Major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003). The military agreed the same was true for national defense. *Id.*

education but further it. Moreover, to the extent that studies demonstrate that LGBTQ students fare better when they feel welcome and included in the classroom, embracing these topics enhances teaching in areas beyond these particular subjects, and upgrades the quality of education for LGBTQ students.

In short, while no outcome can be guaranteed, especially when so many judges today gleefully manipulate doctrine to obtain the answer they want, teachers should be able to successfully argue that “Don’t Say Gay” laws violate the Free Speech Clause—if not for their sake, then for the sake of their charges.

B. Free Speech Scrutiny of Pronoun Policies

Opening the door to teachers’ challenges of “Don’t Say Gay” laws would also permit teachers to challenge laws requiring them to address transgender students with the names and pronouns that match their gender identity. But while learning about LGBTQ history and the LGBTQ community are topics of public import that promote public school education and benefit public school children—especially LGBTQ ones—a teacher’s refusal to employ a student’s chosen name and pronouns does not.

With *Garcetti* gone, teachers could more easily challenge school anti-discrimination policies. As it happens, the *Garcetti* rule has not proven a roadblock for courts intent on finding in favor of Christian teachers. Drawing on a potential academic freedom exception to the *Garcetti* rule,⁹⁴ the Sixth Circuit held in favor of a university professor challenging his school’s pronoun policy.⁹⁵ And despite the seemingly inescapable fact that when public school teachers teach their classes, they

⁹⁴ *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) (“There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”).

⁹⁵ *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021). Whether the Supreme Court will officially establish an academic freedom exception to the government employee speech doctrine is still an open question. Also uncertain is whether the exception would belong to the institution or the professor when the two interests clash; most lower courts assign it to the institution over the professor when the two are at odds. Finally, the academic freedom exception is meant to ensure that academics have the freedom to explore their area of expertise, not give them the right to say whatever they want in the classroom. See Corbin, *When Teachers Misgender*, *supra* note 13, at 642–45.

speak pursuant to official duties, the Supreme Court of Virginia concluded otherwise.⁹⁶ Its first dubious claim was that different rules applied to compelled speech as opposed to censored speech.⁹⁷ Next, the court held that the *Garcetti* rule applied differently to its case because the school was forcing the teacher to become a conduit for the school's controversial ideological message.⁹⁸ One wonders if the same court would allow a schoolteacher to refuse orders to lead students in the pledge of allegiance every morning—another area that has become rather fraught. In any event, the teacher's misgendering is only protected if it also meets the *Pickering-Connick* requirements. That is, the misgendering must benefit its audience by dealing with a topic of public concern, and it cannot unduly disrupt the school's mission or the classroom environment. Neither is satisfied.

That teachers meet the topic of public concern requirement is doubtful. While there is no question that gender identity is a matter of public import, school rules on names and pronouns do not regulate classroom discussion of this subject matter. They regulate how teachers address students in the midst of discussions on other subjects, be it French, math, or political science. Nor is the Christian teachers' name or pronoun misuse calculated to invite discussion. Instead, it is merely meant to satisfy a personal religious belief—or perhaps it is more accurate to describe it as imposing a personal religious belief onto students who lack the power to protest. In short, as a district court observed, “the act of referring to a particular student by a particular name does not contribute to the broader public debate on transgender issues. Instead, choosing the name to call a student constituted a private interaction with that individual student.”⁹⁹

⁹⁶ *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 713 (Va. 2023). Although the claim was brought under the free speech clause of the Virginia Constitution, the Virginia courts interpret its protection to be co-extensive with the Free Speech Clause of the U.S. Constitution. *Id.* at 737.

⁹⁷ *Id.* at 741. This is not a distinction that the court has recognized and is blurry in any case. After all, is disciplining a teacher for calling a pupil by their deadname a punishment for their speech or for their failure to speak?

⁹⁸ *Id.* at 741–42. Lest you think that the court applies this reasoning equally to “Don’t Say Gay” laws, it does not. Almost as though it has those bans in mind, the court opines that, of course, “The concept of a curricular-speech exception is rational and legally sound” without explaining why a state government can impose controversial ideology by regulating the teacher’s curriculum but not by regulating how a teacher addresses students. *Id.* at 742.

⁹⁹ *Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 839 (S.D. Ind. 2020).

Finally, a teacher's failure to use their students' appropriate names and pronouns invariably disrupts both the teacher's instruction and the school's missions. A teacher who misgenders is not, when performing this activity, an effective teacher and therefore cannot successfully carry out their official duties. A student is less likely to develop trust, never mind a productive working relationship, with someone who deliberately misgenders them.¹⁰⁰ Indeed, such dismissive treatment may compromise students' ability to focus and learn.¹⁰¹ Misgendering also tends to ostracize nonbinary and transgender students and may even contribute to a hostile learning environment.¹⁰² Therefore, the teacher's free speech will undermine their students' education.¹⁰³ It will also undercut the school's messages about respecting people's identity and welcoming diversity. To the extent it harms LGBTQ students, it may even bring the school into disrepute as well.¹⁰⁴ In short, a teacher's deliberate misgendering is highly disruptive.

What about other students in the classroom? Although the teacher's personal autonomy is not at stake when evaluating government employee speech, an audience-focused free speech analysis must consider not only the object of the teacher's communications but the other listeners as well. Some students may belong to religions that, like the teacher's, preach about the impossibility and sinfulness of transgenderism. Might their school's pronoun policy disrupt their education? Although these students may feel discomfort when faced with beliefs discordant with their own, they are not targeted in the way misgendered students are.¹⁰⁵ Such exposure may actually be beneficial in helping them understand that not everyone agrees with their religion—a life-saving realization if they themselves are nonbinary or

¹⁰⁰ See Corbin, *When Teachers Misgender*, *supra* note 13, at 655.

¹⁰¹ See *id.* at 625 (“The anxiety and humiliation of being misgendered in class may make it difficult to concentrate. One student explained that ‘the first time being misgendered by a professor is like being snapped with a rubber band’ and that with successive experiences, ‘the feeling gets worse, until it makes him want to vomit.’”).

¹⁰² See *id.* at 656 (“In any event, ensuring compliance with Title IX is on its own a government interest that would justify a minimal intrusion on a teacher's free speech rights.”).

¹⁰³ See *supra* notes 17–21 and accompanying text (describing Department of Education and EEOC guidance on hostile classroom environments).

¹⁰⁴ *City of San Diego v. Roe*, 543 U.S. 77, 81 (2004) (finding public employees' speech was disruptive because it tarnished the reputation of the government office).

¹⁰⁵ No one is denying their gender identity or misgendering them, for example.

trans.¹⁰⁶ Furthermore, given that learning about diverse values and learning to tolerate diversity are among the goals of a public school education, it furthers rather than detracts from them.

CONCLUSION

Under existing free speech rules, public school teachers cannot challenge restrictions on their classroom instruction. As “speech pursuant to official duties,” classroom instruction is government speech, and government speech receives no free speech protection under the government speech doctrine. The government speech doctrine, however, mistakenly assumes that the Free Speech Clause reaches only speakers and not audiences. That assumption is false. The Free Speech Clause protects an audience’s right to receive a free flow of information. Indeed, both free speech theory and free speech doctrine recognize the importance of audiences. Therefore, government speech’s lack of a private speaker should not automatically strip it of all free speech protections.

¹⁰⁶ Exposure to alternate views may also benefit other LGBTQ students.

