



THE GOVERNMENT SPEECH DOCTRINE GOES TO SCHOOL

*Heidi Kitrosser**

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INTRODUCTION¹

Judge Mark E. Walker, the chief judge for the Northern District of Florida, began his recent opinion in *Pernell v. Florida Board of Governors* by quoting George

¹ Shortly before this article was published, the U.S. Court of Appeals for the Eleventh Circuit issued its decision in *Pernell*. By a 2–1 vote, an Eleventh Circuit panel affirmed the district court's decision. *Pernell v. Florida Bd. of Governors of State Univ. Sys.*, 181 F.4th 1135 (11th Cir. 2026). Writing for the majority, Judge Grant invoked themes that I discuss throughout this essay, including the IFA's incompatibility with the very nature of higher education and the important distinction between *ex ante*, statutory restrictions on all public university professors and *ex post*, individualized disciplinary measures.

Orwell’s classic novel *1984*. Walker wrote: “‘It was a bright cold day in April, and the clocks were striking thirteen,’ and the powers in charge of Florida’s public university system have declared the State has unfettered authority to muzzle its professors in the name of ‘freedom.’”² The muzzle in question was Florida’s Individual Freedom Act (IFA). The IFA, which was first introduced as the “Stop W.O.K.E. Act,”³ prohibits “‘training or instruction that espouses, promotes, advances, inculcates, or compels . . . student[s] or employee[s] to believe [eight specified concepts].’”⁴ Among the prohibited concepts are the notions that “[a] person, by virtue of his or her race, color, national origin, or sex should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion”⁵ and that “[a] person, by virtue of his or her race, color, national origin, or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously.”⁶

In pointing to the law’s Orwellian aspects—including its name, which Walker deemed a classic example of “‘doublespeak,’”⁷ and its supporters’ insistence that it protects freedom by restricting speech—Walker touched on something fundamental to the cultural and political setting from which the IFA emerged. The IFA springs from a movement that treats much of the public knowledge sector,⁸ partic-

² *Pernell v. Florida Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1229–30 (N.D. Fla. 2022), *aff’d*, 181 F.4th 1135 (11th Cir. 2026).

³ “Stop W.O.K.E.” stood for “Stop Wrongs Against Our Kids and Employees.” Amended Complaint at ¶ 1, *Pernell v. Lamb*, No. 4:22-cv-304-MW-1 MAF (N.D. Fla. Feb. 22, 2023), 2022 WL 19763815. *See also Pernell*, 641 F. Supp. 3d at 1230.

⁴ *Pernell*, 641 F. Supp. 3d at 1231 (quoting FLA. STAT. § 1000.05(4)(a) (2022)).

⁵ *Id.* (quoting FLA. STAT. § 1000.05(4)(a)(6) (2022)).

⁶ *Id.* (quoting FLA. STAT. § 1000.5(4)(a)(2) (2022)).

⁷ *Id.* at 1230.

⁸ By public knowledge sector, I refer to individual and organizational “public knowledge producers.” Public knowledge producers—which I define very similar to Vicky Jackson’s definition of “knowledge institutions”—are “those government entities, officials, or employees who, in the ordinary course of their work, engage in ‘knowledge production or dissemination . . . according to disciplinary norms.’” This includes publicly employed educators and their institutions. Heidi Kitrosser, “A Government That Benefits from Expertise”: *Unitary Executive Theory & The Government’s Knowledge Producers*, 72 SYRACUSE L. REV. 1473, 1491 (2022) (citing Vicki Jackson,

ularly public education, as leftist and indoctrinating. It also relies on a populist sensibility that separates its supporters—“the people”—from those who would indoctrinate them. From this perspective, state control of pedagogical speech is the very opposite of censorship: It is freedom, liberating ordinary students and parents from mind control by the overreaching others.

The IFA’s supporters also rely heavily on a legal argument that parallels their political and cultural rhetoric: States are entirely unconstrained by the First Amendment when they restrict pedagogical speech in public schools because such speech belongs to the state and, through the state, to the people. The voice of the people is thus expressed, not restricted, through such legislation. This argument—which lies at the heart of the IFA’s defense in First Amendment challenges against it—represents a very broad interpretation of a line of judicial precedent known as government speech doctrine. Government speech doctrine embodies the notion that when the government employs personnel or subsidizes private speakers to convey the government’s own message, the First Amendment simply does not apply; the government may impose whatever restrictions it likes on the resulting speech.

The IFA is one of hundreds of state and local measures adopted since 2020 to restrict classroom teaching on race and gender in public schools (referred to in this essay as “pedagogical gag laws”). Although most of these laws apply to K-12 public schools, a significant minority also target public colleges and universities.⁹ The same movement that gave rise to these actions has also set its sights on public school libraries. PEN America reports that, since 2021, there has been a substantial rise in content-based removals of, and restrictions of access to,¹⁰ school library books due to “parent or community challenges, administrative decisions, or in response to

Knowledge Institutions in Constitutional Democracies: Preliminary Reflections, 2021 7 CAN. J. COMPAR. & CONTEMP. L. 156, 166 (2021)). See also Heidi Kitrosser, *Protecting Public Knowledge Producers*, 4 J. FREE SPEECH L. 473, 481 (2024).

⁹ More than 90% of those introduced between 2020 and 2022 apply to public schools serving grades K–12, and nearly 20% target public colleges and universities. See Taifha Alexander et al., *CRT Forward: Tracking the Attack on Critical Race Theory*, REPORT OF CRT FORWARD (UCLA L. Sch.), Apr. 6, 2023, at 5–6.

¹⁰ My reference to “full or partial removals” tracks PEN’s definition of a “school book ban,” which includes the element of a “previously accessible book being either completely removed from availability to students, or where access to a book is restricted or diminished.” *Book Bans: Frequently Asked Questions*, PEN AM., <https://pen.org/book-bans/book-bans-frequently-asked-questions/>.

direct or threatened action by lawmakers or governmental officials.”¹¹ During the 2022–2023 school year, individual and group-coordinated challenges to book titles were supplemented and “supercharged by a new source of state pressure”: state legislation imposing content-based restrictions on the types of books that public school libraries could make available to students (referred to as “book removal laws”).¹²

These measures are fueled by the same discourse of freedom and populism as is the IFA, and their defenders have raised similar government speech arguments in litigation as have the IFA’s supporters. A close look at this discourse and these arguments illuminates the nature and dangers of each and their relationship with one another. Indeed, a significant danger of an unfettered government speech doctrine is that it will constitutionalize a type of doublespeak, enabling the state to impose restrictions on public knowledge enterprises—such as public education or libraries—that fundamentally distort the very nature of those enterprises. For example, legislation requiring public school science teachers to refrain from expressing agreement with the scientific method or evolution while on the job would distort the very thing—science education—that a state purports to provide. Such distortion effectively leverages a field’s norms and perceived legitimacy to launder government messaging, making it appear to be something more than the product of a political directive. This skews public knowledge and debate in service of official state messaging and undermines a core function of free speech in the United States: to enable self-government through an informed and capable citizenry.

There is, however, a path to limit the reach of government speech doctrine when its effect would be distorting, and its rough beginnings can be found in existing judicial precedent. I call this path the anti-distortion principle. It amounts to a wariness of state-imposed conditions on public knowledge programs that distort the nature of the programs or their communicative outputs. For example, the Supreme Court has held that states may create speech forums and specify that those forums serve only limited purposes. When a state does so, however, “[it] must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not ‘reasonable in light of the purpose set by the forum,’ nor may

¹¹ See *id.* (defining book bans and noting that their prevalence “has expanded drastically and in unprecedented fashion since the beginning of a 2021–22 school year”).

¹² *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AM., <https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/>.

it discriminate against speech on the basis of its viewpoint.”¹³ Similarly, in evaluating the constitutionality of federal funding conditions imposed on public libraries, the Supreme Court has assessed their compatibility with the ordinary practices of libraries and librarians.¹⁴

In this essay, I use ongoing litigation involving three pieces of state legislation—the IFA, a New Hampshire pedagogical gag law, and an Iowa book removal law—as jumping-off points to consider the public discourse in support of such laws, its connection to the government speech arguments made by the defendants in their respective litigations, and the dangers that these arguments reveal about an overly broad government speech doctrine. I also explore the anti-distortion principle as a limit on the government speech doctrine’s reach and hence as an antidote to these dangers.

In Part I, I situate the recent wave of pedagogical gag laws and book removal laws (collectively “educational suppression laws”) within a broader movement, one that itself is grounded in a history of right-wing populist hostility to public education and employs rhetoric about freedom and democracy. In Part II, I provide a high-level overview of major judicial precedents relating to government speech doctrine, with special emphasis on cases involving educational institutions. In Part III, I discuss judicial decisions that bear traces of an anti-distortion principle, again highlighting those precedents that involve educational institutions and libraries. In Part IV, I discuss ongoing litigation involving three examples of state educational suppression laws from, respectively, Florida, New Hampshire, and Iowa. I focus especially on the government speech arguments and responses thereto raised in these cases. In Part V, I draw from the cases surveyed in Parts III and IV to consider how we might strengthen and build on anti-distortion reasoning to limit government speech doctrine going forward.

I. THE RHETORIC OF FREEDOM AND DEMOCRACY IN ATTACKS ON PUBLIC SCHOOLS

The recent wave of educational suppression laws did not emerge out of nowhere. Among the immediate catalysts was a political activist’s campaign against critical race theory (CRT) that was quickly seized on by the Trump administration

¹³ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

¹⁴ *United States v. American Libr. Ass’n*, 539 U.S. 194, 203–05 (2003) (plurality op. by Rehnquist, J.); *id.* at 216–17, 219 (Breyer, J., concurring).

and other right-wing politicians. From a longer perspective, such legislation and the furor that gave rise to it are in keeping with decades of conservative attacks on the expressive activities of teachers and students alike. A common thread running through these events, both recent and remote, is the belief that public academic institutions—from primary education through graduate school—are riddled with leftist indoctrination that justify state intervention in the name of protecting freedom and democracy.

A key moment in the relatively near term occurred in the fall of 2020. At that point, racial justice protests had been sweeping the country for months in response to the murder of an African American man named George Floyd by a white police officer in Minneapolis, Minnesota. Right-wing pundits and politicians seized on and stoked a backlash against the protests and then turned on an additional target: CRT.¹⁵ More precisely, they targeted any lessons or trainings pertaining to race or racism that they chose to label as CRT. The nation was introduced to the term on the then-hit show “Tucker Carlson Tonight” by conservative activist Christopher Rufo, who would later call CRT “the perfect villain”¹⁶ and describe it as his “goal . . . to have the public read something crazy in the newspaper and immediately think ‘critical race theory.’”¹⁷ Rufo had discovered CRT by following the footnotes of anti-racism training materials that he had received from civil servants around the country after he published a piece criticizing Seattle’s anti-bias training in the conservative publication *City Journal*.¹⁸

On Carlson’s show, Rufo referred to CRT as “cult indoctrination” that constitutes an “existential threat to the United States.”¹⁹ Pointing to anti-bias programs

¹⁵ See Fabiola Cineas, *The “Racial Reckoning” of 2020 Set off an Entirely New Kind of Backlash*, VOX (June 3, 2024), <https://perma.cc/PB8C-D2Q4>.

¹⁶ Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, NEW YORKER, June 18, 2021.

¹⁷ Trip Gabriel, *He Fuels the Right’s Cultural Fires (and Spreads Them to Florida)*, N.Y. TIMES, Apr. 24, 2022, at A27.

¹⁸ *Id.*

¹⁹ Wallace-Wells, *supra* note 16; HERITAGE FOUND., *Critical Race Theory Has Infiltrated the Federal Government: Christopher Rufo on Fox News*, YOUTUBE (Sept. 1, 2020), <https://perma.cc/87Z5-MMCH>; Sam Dorman, *Chris Rufo Calls on Trump to End Critical Race Theory ‘Cult Indoctrination’ in Federal Government*, FOX NEWS (Sept. 1, 2020), <https://perma.cc/CSA8-3BPG>.

in federal agencies, Rufo also warned that CRT had taken over as “the default ideology of the federal bureaucracy.”²⁰ He called on then-President Donald Trump to “‘immediately issue’ an ‘executive order and stamp out this destructive, divisive, pseudoscientific ideology at its root.’”²¹ Two days after Rufo’s appearance on Carlson’s show, Office of Management and Budget (OMB) Director Russell Vought issued a memorandum declaring that the “President has directed me to ensure that Federal agencies cease and desist from using taxpayer dollars to fund these divisive, un-American propaganda training sessions.”²² Retweeting a story about the Vought memorandum from the far-right Breitbart website, Trump himself commented: “[T]his is a sickness that cannot be allowed to continue.”²³ On September 22, 2020, Trump issued Executive Order 13950, restricting the teaching of certain “divisive concepts” regarding race or gender across federal government agencies and programs.²⁴ Although EO 13950 was very short-lived—President Joe Biden withdrew it on his first day in office²⁵—Rufo’s anti-CRT campaign helped to trigger the recent wave of state and local pedagogical gag and book removal laws. Much of this legislation, including the IFA and the New Hampshire legislation discussed in this essay, is patterned on the anti-“divisive concepts” framework of EO 13950.

Like EO 13950, the recent laws are justified as enhancing freedom and democracy in two ways: by protecting would-be victims of indoctrination and by asserting political control over public funds.²⁶ It is fitting, for example, that one of the most

²⁰ Dorman, *supra* note 19.

²¹ *Id.*

²² Russell Vought, *Training in the Federal Government*, OFF. OF MGMT. & BUDGET (Sept. 4, 2020), <https://perma.cc/7YQT-TQSJ>.

²³ Brian Stelter, *Analysis: Fox News Segment Prompts Trump to Target Diversity Training*, CNN, Sept. 6, 2020, <https://www.cnn.com/2020/09/06/media/donald-trump-fox-news-critical-race-theory/index.html>.

²⁴ Exec. Ord. No. 13,950, 85 Fed. Reg. 60683 (Sept. 28, 2020). *See also* Alexander et al., *supra* note 9.

²⁵ *See* Exec. Ord. No. 13,985, § 10, 86 Fed. Reg. 7009, 7012 (Jan. 25, 2021).

²⁶ *See* Kitrosser, *Protecting Public Knowledge Producers*, *supra* note 8, at 507–08 (citing Nate Hochman, *Critical Race Theory and Academic Freedom*, CITY J. (June 17, 2021), <https://perma.cc/769R-KQEY>, and Christopher F. Rufo, *Critical Race Fragility*, CITY J. (Mar. 2, 2021), <https://perma.cc/728W-2U54>).

active and politically influential organizations behind pedagogical gag and book removal measures calls itself “Moms for Liberty” and embraces the slogan, “We don’t co-parent with the government.”²⁷ More so, many of the pedagogical gag measures, like EO 13950 itself, rely on a populist dichotomy between “the people – those (presumably white) students whom activists imagine will feel guilt or offense at learning of structural racism and its role in America’s past and present – and all others, including those whose experiences and ancestral histories might be illuminated by challenged materials and teachings.”²⁸ Indeed, among the “divisive concepts” targeted by EO 13950 and subsequent state legislation like the IFA is the notion that “any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex.”²⁹ As columnist Jonathan Capehart wrote in *The Washington Post* of these laws: Their “protection from ‘discomfort’ . . . is a one-way street accessible only to White students.”³⁰

These recent events are the latest in a long history of attacks on public schools as hotbeds of leftist indoctrination that warrant state intervention in the name of freedom and democracy. For example, historians observe that Moms for Liberty had 20th century counterparts in the form of right-wing women’s groups that “fought for the removal of textbooks, teachers, and administrators they judged to be tainted by progressive ideals.”³¹ Scholars also “have detailed how white mothers’ organizations . . . fought to eliminate books and teachings that highlighted white violence or white supremacy . . . [and] routinely attempted to remove books from the curriculum that highlighted Black contributions to the nation, its history, or its culture.”³² The women of these organizations engaged in what historian Michelle

²⁷ Michael Feola, *Moms for Liberty Is Part of a Long History of Rightwing Mothers’ Activism in the US*, *GUARDIAN* (July 6, 2023), <https://perma.cc/8ACD-CUEN>.

²⁸ Kitrosser, *Protecting Public Knowledge Producers*, *supra* note 9, at 508 (citing, on the topic of populism, Uri Friedman, *What Is a Populist? And Is Donald Trump One?*, *ATLANTIC* (Feb. 27, 2017), <https://perma.cc/PFA3-YMND>; SOPHIA ROSENFELD, *DEMOCRACY AND TRUTH: A SHORT HISTORY* locs. 1323–33 (2019) (ebook)).

²⁹ Exec. Ord. No. 13,950, § 4(1), 85 Fed. Reg. 60683 (Sept. 28, 2020).

³⁰ Jonathan Capehart, *What About Black Students’ ‘Discomfort’?*, *WASH. POST* (Feb. 8, 2022).

³¹ Feola, *supra* note 27.

³² *Id.* See also, e.g., Michelle M. Nickerson, *Politically Desperate Housewives in Southern California*, in *WOMEN’S AMERICA: REFOCUSING THE PAST* 581 (Linda K. Kerber et al. eds., 2016).

Nickerson has called “housewife populism,”³³ drawing “a sharp community boundary line between them on the inside and their opponents on the outside. This housewife populism contributed to the conservative movement’s identification with the everyman, real people, and middle America.”³⁴

Public colleges and universities were hardly immune from attacks themselves. Indeed, they were among the major targets of mid-20th century McCarthyism: “[H]istorian Ellen Schrecker estimates that ‘almost 20 percent of the witnesses called before congressional and state investigating committees [during the McCarthy era] were college teachers or graduate students.’”³⁵ In the name of protecting democracy against totalitarianism, “[l]oyalty oaths and similarly repressive measures proliferated,” and “[h]undreds, if not thousands, of schoolteachers and college professors” were impacted, with many losing their jobs.³⁶

Schrecker, who has studied and written about McCarthyism and American higher education for decades, thinks that today’s attacks on higher education are the most dangerous ones yet. She writes:

Even at the height of the Cold War Red Scare, when at least a hundred professors lost their jobs for political reasons, the inquisition never reached directly into the classroom. Joseph McCarthy, J. Edgar Hoover, and their allies focused on the past and present left-wing political activities and associations of individual academics but left their teaching and research alone. No longer. Today’s wave of partisan political repression aims directly at what gets studied and taught. And at the intellectual underpinnings of our all too fragile democratic system of government.³⁷

II. GOVERNMENT SPEECH DOCTRINE

A. *Parallels to Populist Discourse*

The discourse and history underlying educational suppression laws lend themselves to the belief that enjoining such laws is antithetical to freedom. Christopher

³³ Nickerson, *supra* note 32, at 588.

³⁴ *Id.*

³⁵ NEIL GROSS, WHY ARE PROFESSORS LIBERAL AND WHY DO CONSERVATIVES CARE? 25 (2013).

³⁶ Ellen Schrecker, *Academic Freedom and Political Repression from McCarthyism to Trump*, in THE RIGHT TO LEARN: RESISTING THE RIGHT-WING ATTACK ON ACADEMIC FREEDOM 19 (Valerie C. Johnson et al. eds., 2024).

³⁷ *Id.* at 17–18.

Rufo takes this position explicitly, calling it “totalitarian” to apply the First Amendment to educational suppression measures.³⁸ He elaborates:

The First Amendment protects the right of individuals to speak freely . . . the government itself . . . does not have a First Amendment right as such. This is the proper context for evaluating critical race theory, which is an almost entirely government-created and government-sponsored ideology, developed in public and publicly subsidized universities, formulated into policy by public bureaucracies, and transmitted to children in the public school system. The critical race theorists and their enablers . . . want the right to enshrine their personal ideology as official state dogma. They prioritize the “freedom of the state” over the “freedom of the individual” – the prelude, whether deliberate or accidental, to any totalitarian system.³⁹

Rufo’s statement offers a window into the extremes to which arguments grounded in the concept of government speech can be taken. The statement assumes, for example, that a college professor employed at a public university operates as “the government” when she writes articles or teaches classes. Her academic expression thus must be subject to complete control by political decree in the name of freedom and democracy.

In the remainder of this Part, I provide an overview of government speech doctrine. I explain that the doctrine can lend itself to extreme interpretations like Rufo’s, but that such breadth is not inevitable. I also observe that the Supreme Court justifies the doctrine partly on the basis that “the people” can hold government actors accountable for their speech at the ballot box.

B. *The Doctrine in the Supreme Court*

In a series of cases dating back to *Rust v. Sullivan* in 1991,⁴⁰ the Supreme Court has developed a body of law known as the government speech doctrine. At the heart of the doctrine is the notion that, “[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”⁴¹ This makes perfect sense as applied to policy messaging that the government transparently acknowledges as such. The Court has relied on examples of such expression to explain the doctrine’s necessity. In *Walker v. Texas Div., Sons of Confederate Veter-*

³⁸ Rufo, *supra* note 26.

³⁹ *Id.* (quoted in Kitrosser, *Protecting Public Knowledge Producers*, *supra* note 9, at 508).

⁴⁰ 500 U.S. 173 (1991).

⁴¹ *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

ans, for example, Justice Alito, writing for the majority, asked how a city government could “create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary?”⁴² And in *Rust*, Justice Rehnquist wrote for the majority that “[w]hen Congress established a National Endowment for Democracy . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism.”⁴³ There is little dispute about the doctrine as applied to these examples. The more difficult question is how far, if at all, the doctrine should extend to expression that is subsidized by the government but that purports to do something more than carry a politically scripted message.

An excessively broad government speech doctrine poses at least two problems. The first is that the government will subsidize private expression unevenly to favor its preferred viewpoints. The First Amendment would not permit viewpoint discrimination in a subsidy program that served as a forum for private speech.⁴⁴ The worry is that the government will mischaracterize such a forum as its own speech to escape the First Amendment’s restraints. For example, the Supreme Court held in *Walker v. Tex. Div., Sons of Confederate Veterans*⁴⁵ that specialty license plates in Texas, even those designed by private groups to reflect private hobbies and interests, constitute government speech.⁴⁶ Dissenting on behalf of himself and three other justices, Justice Alito lamented the Court’s “capacious understanding of government speech”⁴⁷ that “threatens private speech that government finds displeasing.”⁴⁸

The other problem posed by a very broad government speech doctrine is a central concern of this essay: its distorting effect on ostensibly expertise-driven

⁴² *Walker*, 576 U.S. at 207.

⁴³ *Rust*, 500 U.S. at 194.

⁴⁴ See *Rosenberger v. Rector*, 515 U.S. 819, 828–29 (1995).

⁴⁵ 576 U.S. 200 (2015).

⁴⁶ *Id.* at 204–05, 214–15; *id.* at 221–22, 225–26 (Alito, J., dissenting).

⁴⁷ *Id.* at 222 (Alito, J., dissenting).

⁴⁸ *Id.* at 221.

speech.⁴⁹ The risk of distortion is apparent in *Rust v. Sullivan* itself. In *Rust*, the Supreme Court upheld federal regulations barring family planning clinics from mentioning abortion in the course of providing federally subsidized counseling.⁵⁰ The *Rust* Court characterized the regulations as doing nothing more than setting boundaries on the scope of a government-funded program.⁵¹ A few years later, however, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court framed *Rust* as a government speech decision.⁵² It explained that in *Rust*, it had “recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”⁵³ Critics of *Rust* have argued that the challenged conditions forced medical providers to choose between funding and professional and ethical norms. As Robert Post put it, the regulations sought to “override [physicians’] necessary exercise of independent professional judgment.”⁵⁴ They also upended patients’ expectations of the care that they would receive from a funded clinic: “In a world where physicians routinely exercise independent judgment, patients come to expect and rely upon that judgment.”⁵⁵ Post’s insights help to illuminate the distorting effect of the regulation on the speech of subsidized medical professionals.

Fifteen years after *Rust*, the Supreme Court decided the government speech case that is most conducive to distortion—*Garcetti v. Ceballos*.⁵⁶ *Garcetti* established that public employees receive no First Amendment protection against termination or other job-related penalties for speech that they convey in the course of doing their jobs. Although the *Garcetti* Court’s reasoning is murky and at points

⁴⁹ The contents of the accompanying paragraph and of the one that follows it are drawn in large part from Heidi Kitrosser, *Distorting the Press*, 24–12 KNIGHT FIRST AMEND. INST. (Jul. 16, 2024), <https://perma.cc/5NDX-7LUY>.

⁵⁰ *Rust*, 500 U.S. at 191.

⁵¹ *Id.* at 196.

⁵² *Rosenberger*, 515 U.S. at 833.

⁵³ *Id.* See also *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (explaining that “*Rust* did not place explicit reliance” on the government speech rationale, but that, “when interpreting the holding in later cases . . . we have explained *Rust* on this understanding”).

⁵⁴ Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 174 (1996).

⁵⁵ *Id.* at 174.

⁵⁶ 547 U.S. 410 (2006).

even contradictory,⁵⁷ it relies at least partly on a government speech rationale, characterizing public employee work product speech as speech that “the employer itself has commissioned or created.”⁵⁸ To support this point, it cites *Rosenberger*’s description of *Rust*’s holding.⁵⁹ The assumption that government employees invariably convey a government-crafted message when they speak runs headlong into distortion concerns in the many cases in which employees are hired to provide professional judgment and expertise.

The *Garcetti* Court itself implicitly recognized the risk of distortion as applied to academic speech by public school faculty members and left open the possibility, without deciding, that such speech is exempt from its holding.⁶⁰ I elaborate on this aspect of *Garcetti* in Part III. In Part IV, we will see that defendants in ongoing litigation regarding pedagogical gag laws argue that *Garcetti* should apply, without exception, in both K-12 and higher education settings.

To justify government speech doctrine, the Supreme Court relies not only on practical necessity but also on the premise that voters can hold the government politically accountable for its speech. In *Walker*, for example, Justice Breyer wrote for the majority that “it is the democratic electoral process that first and foremost provides a check on government speech.”⁶¹ He added that government speech itself is an expression of voters’ wishes: “[M]embers of the public . . . influence the choices of a government that, through words and deeds, will reflect its electoral mandate.”⁶²

As Helen Norton observes, however, the accountability rationale makes sense only if the government is transparent as to the fact of its authorship, and the Supreme Court has declined to make such openness a prerequisite to “insulat[ion] . . . from free speech challenge” under the government speech doctrine.⁶³ Distortion

⁵⁷ See Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301, 332–36.

⁵⁸ *Garcetti*, 547 U.S. at 422.

⁵⁹ *Id.* (citing *Rosenberger*, 515 U.S. at 833).

⁶⁰ *Garcetti*, 547 U.S. at 425.

⁶¹ *Walker*, 576 U.S. at 207.

⁶² *Id.* at 207. See also, e.g., HELEN NORTON, *THE GOVERNMENT’S SPEECH AND THE CONSTITUTION* 33–34 (2019) (citing *Board of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 235–36 (2000)).

⁶³ NORTON, *supra* note 62, at 34 (discussing *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550 (2005)).

poses a similar problem for the accountability rationale. Take the example of a climate scientist who works for NASA and contributes to publicly issued reports and testimony that purport to detail scientific findings. Presumably, it is no secret that the scientist works for a government agency and is paid with public funds. Yet an accountability concern remains insofar as the public can be expected to assume that the scientist's contributions to public reporting are based on professional judgment and scientific best practices. Were those contributions instead shaped by political directives, the public would effectively be duped through distortion that cloaks political messaging in the vestments of science. Distortion also poses a deeper problem for the accountability rationale insofar as it chips away at the capacity of the public to distinguish science and other forms of disciplinary thinking from mere assertions.

III. TRACES OF AN ANTI-DISTORTION PRINCIPLE IN SUPREME COURT PRECEDENT

A. *Initial Examples*⁶⁴

Although it is far from a coherent or well-theorized concept in the case law, traces of an anti-distortion principle can be detected in various areas of judicial precedent. Perhaps the best-known example to this effect is the standard for evaluating speech conditions in limited public forums. In such cases, courts ask whether the restriction is viewpoint-neutral and reasonable in light of the forum's nature and purpose.⁶⁵

The Supreme Court offered its most overt and detailed embrace of an anti-distortion principle in *Legal Services Corporation v. Velazquez*.⁶⁶ The *Velazquez* Court held unconstitutional a statutory restriction limiting the arguments that federally funded legal services corporation (LSC) attorneys could make in litigation. Pursuant to the restriction, LSC attorneys could argue only that state or federal statutes

⁶⁴ Part III.A is drawn mostly from Kitrosser, *supra* note 49.

⁶⁵ See, e.g., *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995) ("Once it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is 'not reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint.") (citations omitted). See also *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) (describing *Rosenberger* as premised on the idea that the government "could not elect to use . . . a college publication structure in a regime which prohibits speech necessary to the proper functioning of [that] system[]").

⁶⁶ 531 U.S. 533 (2001).

had been misapplied in their clients' cases; they were barred from challenging the laws themselves as unconstitutional or, in the case of the state laws, as violating federal law.⁶⁷ Writing for the Court, Justice Kennedy emphasized that LSC attorneys were not engaged in "government speech."⁶⁸ Their role, rather, was to speak on behalf of their private, indigent clients.⁶⁹ Crucially, they were charged to do so through "an existing medium of expression"—the legal system.⁷⁰ However, in limiting the stock of arguments from which LSC attorneys can draw to advise and advocate for their clients, the government impermissibly "distorts the legal system by altering the traditional role of the attorneys" as zealous advocates for their clients.⁷¹ Among the problems with such distortion is that it "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."⁷² The Court stressed that "[a]n informed, independent judiciary presumes an informed, independent bar."⁷³ Justice Kennedy thus relied partly on descriptive reasoning, observing that the restriction conflicts with "the traditional role of the attorneys" and with the judiciary's expectation that lawyers will conform to that role.⁷⁴ He also invoked normative concerns about the impact of such distortion on the legal system. Indeed, he suggested that normative considerations were especially strong in this case because the restriction "insulate[d] the Government's interpretation of the Constitution from judicial challenge,"⁷⁵ thus implicating "central First Amendment concerns."⁷⁶

Courts also have touched on anti-distortion reasoning in cases involving public libraries. For example, in *United States v. American Library Association*,⁷⁷ a plurality of the Supreme Court, as well as the two concurring justices, all relied partly on

⁶⁷ *Id.* at 537–39.

⁶⁸ *Id.* at 541–43, 547–48.

⁶⁹ *Id.*

⁷⁰ *Id.* at 542–43.

⁷¹ *Id.* at 544.

⁷² *Id.* at 545.

⁷³ *Id.*

⁷⁴ *Id.* at 544–45.

⁷⁵ *Id.* at 548.

⁷⁶ *Id.* at 547.

⁷⁷ 539 U.S. 194 (2003).

their understanding of ordinary library practices to assess the constitutionality of a statutory condition on federal funding for public libraries. The statutory provisions required public libraries that receive federal funding for internet access to use blocking software to prevent patrons from accessing child pornography, obscenity, and other “visual depictions” harmful to minors.⁷⁸ The libraries were permitted to disable the blocking software during periods of lawful adult usage and, in some cases, juvenile usage.⁷⁹ Writing for the plurality, Chief Justice Rehnquist reasoned that the law’s constitutionality could not be resolved without “first examin[ing] the role of libraries in our society.”⁸⁰ In performing this assessment, Rehnquist mixed a descriptive understanding of what libraries do with a normative take on what they should do to fulfill their “worthy missions of facilitating learning and cultural enrichment.”⁸¹ He concluded that libraries must make content-based judgments as to which materials “have ‘requisite and appropriate quality.’”⁸² In the same vein, public libraries should be free to offer patrons the “vast amount of valuable information” on the internet without also being forced to give them access to obscenity or child pornography.⁸³ The plurality thus upheld the statutory conditions. The two concurring justices—Kennedy and Breyer—cited the constitutional significance of the fact that the law permitted libraries to unblock the software upon request by adult patrons.⁸⁴ Justice Breyer also elaborated on the nature of libraries from both descriptive and normative perspectives, citing their role as “critically important sources of information”⁸⁵ and comparing their traditional practices—including content selection and the employment of closed stacks—to the challenged statutory condition.⁸⁶

⁷⁸ *Id.* at 201.

⁷⁹ *Id.* at 198–201.

⁸⁰ *Id.* at 203.

⁸¹ *Id.*

⁸² *Id.* at 204.

⁸³ *Id.* at 200. Indeed, Chief Justice Rehnquist observed that numerous public libraries had already begun to use filtering software before the statutory provisions at issue were enacted. *Id.*

⁸⁴ *Id.* at 214 (Kennedy, J., concurring); *id.* at 219 (Breyer, J., concurring).

⁸⁵ *Id.* at 216 (Breyer, J., concurring).

⁸⁶ *Id.* at 217–20 (Breyer, J., concurring).

B. Examples Involving Higher Education⁸⁷

Of particular relevance to this essay, an anti-distortion principle can be discerned in several cases involving free speech on university campuses. Echoing *Velazquez*, the Court in these cases drew on descriptive understandings of what university life and academia entail and on normative views regarding the features that imbue them with constitutional value. In *Rosenberger v. Rector and Visitors of the University of Virginia*,⁸⁸ for example, the Court held that the University of Virginia's (UVA) system for subsidizing student groups is akin to a limited public forum; as such, the subsidies cannot constitutionally be allocated on the basis of viewpoint or in a manner unreasonable in light of the subsidy program's purpose.⁸⁹ UVA had breached these limits by denying funds on the basis of viewpoint.⁹⁰ The Court stressed the denial's incompatibility with the nature and mission of universities, positing: "In the university setting, . . . the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."⁹¹

The constitutional salience of an anti-distortion principle for public academia is also reflected in *Garcetti v. Ceballos*.⁹² As we saw in Part II, the *Garcetti* Court left the door open to an exception from its general rule for the expressive work of public school academics. Writing for the majority, Justice Kennedy acknowledged that "[t]here 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."⁹³ An academic freedom exception is necessarily grounded in an anti-distortion principle, specifically in the notion that the state may not create or fund an institution of a type ordinarily characterized by academic freedom but then curtail that freedom.

Garcetti and *Rosenberger* stand on the shoulders of several McCarthy-era cases that extol the virtues of academic freedom and suggest that its compromise distorts

⁸⁷ Part III.B is drawn mostly from Kitrosser, *supra* note 49.

⁸⁸ 515 U.S. 819 (1995).

⁸⁹ *Id.* at 823–24, 829–30.

⁹⁰ *Id.* at 830–32, 834–35.

⁹¹ *Id.* at 835.

⁹² 547 U.S. 410 (2006).

⁹³ *Id.* at 425.

pedagogy and scholarship. In *Keyishian v. Board of Regents*, for example, the Court invalidated New York statutes “barring employment on the basis of membership in ‘subversive’ organizations. . . .”⁹⁴ The suit had been brought by a group of state university faculty members, and the Court stressed the laws’ incompatibility with academic freedom. “The classroom,” it wrote, “is peculiarly the ‘marketplace of ideas.’”⁹⁵ The laws would distort this core characteristic of the classroom. The Court framed this point partly in descriptive terms, telling readers what the classroom “is.”⁹⁶ But it also invoked normative concerns about the free speech value served by an undistorted classroom. For example, the Court quoted an earlier case to the effect that “[n]o one should underestimate the vital role in a democracy that is played by those who guide and train our youth. . . . Teachers and students must always remain free to inquire, to study and to evaluate, . . . otherwise our civilization will stagnate and die.”⁹⁷

C. Examples Involving Primary and Secondary Schooling

In the handful of Supreme Court cases involving public primary and secondary schools, the Court has sought to reconcile two sets of concerns: respect for school administration and community input regarding the contents of education and the importance of enabling children to become well-informed citizens capable of free thought. The result has been ample but not unlimited deference to states, school boards, and school officials in matters of classroom content and discipline. Most importantly for our purposes, the Court has looked to the nature and goals of public school education to inform the limits of state control over teachers and students.

For example, in *Tinker v. Des Moines Independent School District*, the Court held that public middle and high schools had acted unlawfully by punishing students for wearing black arm bands to silently protest the Vietnam War. Writing for the *Tinker* majority, Justice Fortas famously proclaimed that the First Amendment is applied in public schools “in light of the special characteristics of the school environment,” but that neither “students [n]or teachers shed their constitutional

⁹⁴ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605–06 (1967), *quoted in* *Connick v. Myers*, 461 U.S. 138, 144 (1983).

⁹⁵ *Keyishian*, 385 U.S. at 603.

⁹⁶ *Id.* (emphasis added).

⁹⁷ *Id.* (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

rights to freedom of speech or expression at the schoolhouse gate.”⁹⁸ Fortas emphasized the connection between those First Amendment protections and the very mission of public schooling. Quoting Justice Jackson’s soaring opinion for the Court in *West Virginia v. Barnette*, he wrote: “‘That they 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.’”⁹⁹

Even in cases in which the Court held that school officials acted constitutionally when they disciplined students for their expression, it treated officials’ discretion as broad but not unlimited and linked it to public education’s “‘objectives,’” including inculcating “‘fundamental values necessary to the maintenance of a democratic political system.’”¹⁰⁰ For example, in upholding a high school student’s suspension for sexually explicit speech at a school assembly, the Court in *Bethel School District v. Fraser* explained that school officials could reasonably have considered the suspension a lesson in the type of “civil, mature conduct” that democratic discourse requires.¹⁰¹ The *Bethel* Court stressed that “[u]nlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint.”¹⁰² More so, as Justice Brennan observed in concurrence, *Fraser* involved no “attempt by school officials to ban written materials they consider ‘inappropriate’ for high school students . . . or to limit what students should hear, read, or learn about.”¹⁰³

Finally, in *Hazelwood School District v. Kuhlmeier*¹⁰⁴—the only Supreme Court case to consider a K-12 student’s First Amendment claim regarding student curricular speech—the Court sided with school officials but did so only after concluding

⁹⁸ *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 506 (1969).

⁹⁹ *Tinker*, 393 U.S. at 506 (quoting *W. Va. State Board of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

¹⁰⁰ *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

¹⁰¹ *Bethel*, 478 U.S. at 683.

¹⁰² *Id.* at 685.

¹⁰³ *Id.* at 689 (Brennan, J., concurring in the judgment).

¹⁰⁴ 484 U.S. 260 (1988).

that “their actions [were] reasonably related to legitimate pedagogical concerns.”¹⁰⁵ In *Hazelwood*, several students who worked on their high school newspaper challenged the decision of their principal, in consultation with the journalism teacher, to pull two stories from an edition of the paper before it went to print.¹⁰⁶ The Court observed that the paper was written and printed as part of the school’s Journalism II course,¹⁰⁷ that the principal’s stated concerns related to journalistic ethics and best practices,¹⁰⁸ and that the paper’s faculty advisors concurred with the principal’s judgment.¹⁰⁹ In a footnote, the Court added that a former professional journalist had testified at trial and agreed that the stories did not meet journalistic standards for publication.¹¹⁰ The Court thus considered not only the nature of sound pedagogy but the nature of sound pedagogy about high school journalism in particular before concluding that the principal, the teacher, and other school officials had behaved reasonably.¹¹¹

D. The Supreme Court’s Public School Library Case

In its single case involving control by a political body over the contents of a school library, the Supreme Court sought again to honor both community control over public schools and the role of such schools in preparing students for democratic citizenship. The events giving rise to *Board of Education, Island Trees Union Free School District v. Pico* began when the president, vice-president, and several

¹⁰⁵ *Id.* at 273.

¹⁰⁶ *Id.* at 263–64.

¹⁰⁷ *Id.* at 262.

¹⁰⁸ The stated concerns were that one story made it too easy to identify its unnamed student subjects and the other discussed a student’s parents without giving the parents an opportunity to comment. *Id.* at 263.

¹⁰⁹ *Id.* at 275.

¹¹⁰ *Id.* at 275 n.8.

¹¹¹ *Id.* at 276 (“[Principal] Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered these portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and the ‘legal, moral, and ethical restrictions imposed on journalists within [a] school community’ that includes adolescent subjects and readers”).

members of a local school board obtained a list of “objectionable” books at a conference sponsored by a statewide conservative parents’ organization.¹¹² The board subsequently ordered most of the listed books that were present in district school libraries to be removed, despite the largely contrary recommendations of a “Book Review Committee” comprised of district parents and teachers that the board had itself appointed.¹¹³ Although the Supreme Court’s decision was a fractured one, a majority of justices agreed that the board did not have unfettered power to remove books and that summary judgment in their favor was unwarranted.¹¹⁴

The reasoning of four justices across two opinions—Justice Brennan writing for the plurality joined by Justices Marshall and Stevens and joined in part by Justice Blackmun, and Justice Blackmun writing separately—echoed the traces of anti-distortion reasoning from *Tinker*, *Barnette*, and *Keyishian*. The justices acknowledged, on the one hand, that “local school boards must be permitted ‘to establish and apply their curriculum in such a way as to transmit community values,’” calling “public schools . . . vitally important ‘in the preparation of individuals for participation as citizens,’ and as vehicles for ‘inculcating fundamental values necessary to the maintenance of a democratic political system.’”¹¹⁵ On the other hand, they cautioned that “the discretion of the States and the local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.”¹¹⁶ Although the justices framed the two points as being in opposition to one another, there is an important theoretical connection between them, one that is best understood in anti-distortion terms. That is, politically motivated book removals would distort a major purpose of public schooling in the United States: to inculcate democratic values and equip students with the capacity to participate in the project of self-government. In addition to citing earlier cases such as *Tinker* and *Barnette* to this effect, the justices added that “the special

¹¹² Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 856 (1982) (plurality op. by Brennan, J.).

¹¹³ *Id.* at 856–58.

¹¹⁴ *Id.* at 871–72; *Id.* at 875–76 (Blackmun, J., concurring); *Id.* at 883 (White, J., concurring).

¹¹⁵ *Id.* at 864 (plurality op. by Brennan, J.) (internal citations omitted); *see also id.* at 876 (Blackmun, J., concurring) (quoting part of the same language and additional language to the same effect).

¹¹⁶ *Id.* at 864 (plurality op. by Brennan, J.); *see also id.* at 876 (Blackmun, J., concurring) (making same point).

characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students.”¹¹⁷

IV. EXAMPLES FROM THE TRENCHES: FIGHTS OVER PEDAGOGICAL GAG AND BOOK REMOVAL MEASURES

Parts II and III provided an introduction to government speech doctrine in the Supreme Court and to a potential counterforce, the anti-distortion principle, that can also be gleaned from Supreme Court precedent. In Part IV, I continue to look at the reach and potential limits of government speech doctrine, but from a different vantage point: recent litigation involving educational suppression measures. The examples studied include a challenge to the IFA as applied to public higher education in Florida, a challenge to similar legislation in New Hampshire targeting K-12 schools, and a challenge to an Iowa state law requiring the removal of certain books from K-12 public school libraries.¹¹⁸ As of this essay’s completion in July 2024,¹¹⁹ aspects of each case have been appealed to their region’s federal appellate court.¹²⁰ My focus, however, is on the district court litigation in each case. This enables me to review a full cycle of arguments, from complaints to briefings to district court opinions, across the three litigations.

¹¹⁷ *Id.* at 868 (plurality op. by Brennan, J.).

¹¹⁸ To choose the first two examples, I did a Bloomberg Law dockets search for cases involving “divisive concepts” legislation. I selected two cases from two different states, one involving higher education and one involving K-12 education, that had each resulted in a First Amendment merits decision at the district court level. For the third example, I again used Bloomberg Law’s dockets search function, this time to find a case from a third state involving state legislation requiring public school library book removals that had resulted in a First Amendment merits decision.

¹¹⁹ As referenced earlier, this article was prepared for the Knight First Amendment Institute Symposium, *Permission to Speak Freely? Managing Government Employee Speech in a Democracy*, and posted online in 2024 as part of that symposium.

¹²⁰ The latest developments in each case as of July 2024 were: (1) The U.S. Court of Appeals for the Eighth Circuit had stayed proceedings in the Iowa library litigation pending appeal on May 28, 2024, *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 114 F.4th 660 (8th Cir. 2024). (2) The defendants in the New Hampshire case filed a notice on July 24, 2024 to appeal the district court’s granting of partial summary judgment for the plaintiffs on vagueness and due process grounds, *Notice of Appeal, Local 8027 v. Edelblut*, No. 1:21-cv-1077-PB (D.N.H. July 24, 2024) (No. 112), 2024 WL 2722254; thus far there has been no appeal of the aspect of the case discussed below, in which the district court dismissed plaintiffs’ First Amendment claims regarding their curricular speech; (3) the U.S. Court of Appeals for the Eleventh Circuit held oral arguments in defendants’ appeal from the district court’s grant of the plaintiffs’ preliminary injunction motion on June 17, 2024.

Although I mostly consider the First Amendment arguments in each case, I also briefly discuss, in subpart D, the role played by the contention that the respective laws are vague, in violation of the Constitution's Due Process Clause. As a practical matter, vagueness arguments have proven important across the cases. Indeed, in the New Hampshire litigation, the plaintiffs obtained relief against the challenged law as applied to their curricular expression only pursuant to their vagueness argument; the court had deemed their First Amendment arguments regarding curricular speech precluded by *Garcetti*. There are also important points of complementarity, even synergy, between due process vagueness and First Amendment anti-distortion analyses, a point that I explore through the example of the New Hampshire litigation.

A. Higher Education in Florida: Pernell v. Florida Board of Governors

On August 18, 2022, several instructors and students at Florida colleges and universities filed suit in the Northern District of Florida against officials in the state's public higher education system.¹²¹ The plaintiffs argued that Florida's Individual Freedom Act, or IFA, described in this essay's introduction, violates the First Amendment by imposing viewpoint-based restrictions on the ability of college instructors to teach and of college students to receive information.¹²² The plaintiffs filed a motion for a preliminary injunction against enforcing the Act's higher education provisions on August 24, 2022,¹²³ and the defendants filed a motion to dismiss the complaint on September 22, 2022.¹²⁴ In section 1, I detail the defendants' government speech arguments in their briefings on the motions. In section 2, I detail the responses to those arguments made by the plaintiffs in their briefings and by the district court in an opinion by Judge Walker partly granting the plaintiffs' preliminary injunction motion on November 22, 2022.¹²⁵

¹²¹ Verified Complaint, *Pernell v. Florida Bd. of Governors*, No. 4:22-cv-00304-MW-MAF (N.D. Fla. Feb. 22, 2023), 2022 WL 3573123.

¹²² See *id.* at ¶¶ 211–18, 219–25 (Counts One and Two, respectively).

¹²³ Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 3, *Pernell v. Florida Bd. of Governors*, No. 4:22-cv-00304-MW-MAF (N.D. Fla. Feb. 22, 2023), 2023 WL 2347487.

¹²⁴ See Defendants' Memorandum of Law in Support of Motion to Dismiss, *Pernell v. Florida Bd. of Governors*, No. 4:22-cv-00304-MW-MAF (N.D. Fla. Feb. 22, 2023), 2022 WL 18357416.

¹²⁵ See *Pernell v. Florida Bd. of Governors*, 641 F. Supp. 3d 1218 (N.D. Fla. 2022). As for the defendants' motion to dismiss, Judge Walker issued an order denying it with respect to the plaintiffs'

1. The government speech arguments

The defendants argued that the First Amendment “simply does not apply” in this setting, because the IFA pertains solely to the government’s own speech.¹²⁶ The IFA, they wrote, “governs the substance of the instruction and curriculum offered at public universities, which is heartland government speech.”¹²⁷ Because all of this—curricular content as well as pedagogical choices, including the words used by instructors in the classroom—is the speech of government itself, the government may dictate every aspect of it without constitutional limit. Defendants assured the court, however, that political accountability will protect against abuses, as plaintiffs and other like-minded persons remain free to seek recourse “[at] the ballot box.”¹²⁸

In addition to relying on the concept of government speech generally, the defendants cited *Garcetti* to support the notion that instructional speech in public schools, including public colleges, is constitutionally unprotected. They acknowledged that *Garcetti* “reserved the question whether its holding applies to classroom instruction.”¹²⁹ Nonetheless, they argued, *Garcetti*’s reasoning naturally extends to such speech, whether at the college level or at primary and secondary levels.¹³⁰ In this, they relied largely on *Garcetti*’s grounding in government speech doctrine. For example, they quoted the rationale of the Seventh U.S. Circuit Court of Appeals for extending *Garcetti* to elementary school teachers: Teachers “‘hire out their own

First Amendment claims, incorporating his reasoning from his opinion on the preliminary injunction motion. *Pernell v. Florida Bd. of Governors*, No. 4:22-cv-00304-MW-MAF, 2023 WL 2347487 at 7–8 (N.D. Fla. Feb. 22, 2023) (order denying motion to dismiss).

¹²⁶ Defendants’ Memorandum of Law in Support of Motion to Dismiss, *supra* note 124, at 15. See also Defendants’ Response in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 10, *Pernell v. Florida Bd. of Governors*, No. 4:22-cv-00304-MW-MAF (N.D. Fla. Feb. 22, 2023), 2022 WL 18357418.

¹²⁷ Defendants’ Response, *supra* note 126, at 10.

¹²⁸ *Id.* at 10.

¹²⁹ *Id.* at 12.

¹³⁰ *Id.* at 12–13.

speech.”¹³¹ Their instructional speech therefore belongs to their employer, meaning the government in the case of public school teachers.¹³²

Most significantly, the defendants collapsed the distinctions between various public institutions. In their telling, for example, a piece of state legislation that governs classroom speech is no different than an individualized assessment by a college dean or faculty committee, or by a secondary school principal. Such conflation enables the defendants to equate legislative control of classroom speech with academic freedom. Indeed, after positing that “any purported right to academic freedom is held by universities as an institution,”¹³³ the defendants narrowed the right further, deeming it “best understood as a right of institutional autonomy *from the judiciary*, not the State that chartered it, governs it, and provides its funding.”¹³⁴ In the defendants’ view, then, legislatures and governors’ offices themselves possess the academic freedom attributed to public universities. These political actors thus cannot violate the First Amendment by restricting classroom speech. To the contrary, passing such legislation itself is an act of academic freedom.¹³⁵

¹³¹ *Id.* at 12 (quoting *Mayer v. Monroe County Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007)).

¹³² *Id.* at 13 (“Both the Sixth and Seventh Circuits recognized the difficulty the Supreme Court envisioned if the First Amendment were to apply to government speech.”).

¹³³ *Id.* at 17 (citing, *inter alia*, *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *Urofsky v. Gilmore*, 216 F.3d 401, 410–14 (4th Cir. 2000) (en banc); *Edwards v. California Univ. of Pa.*, 156 F.3d 488, 492 (3rd Cir. 1998)).

¹³⁴ *Id.* at 18.

¹³⁵ Indeed, it is telling that the defendants support this assertion with a citation to *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), accompanied by a parenthetical that describes *Ewing* as “citing *Keyishian* as representing *the Court’s* ‘reluctance to trench on the prerogatives of state and local educational institutions.’” Defendants’ Response, *supra* note 126, at 18 (citing *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985)). In *Ewing*, the Court refused to second-guess a *university’s* decision to dismiss a student after he failed an examination. *Id.* at 215. It noted that it is ill-suited to “evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require ‘an expert evaluation of cumulative information.’” *Id.* at 226. Importantly, the Court also noted that the Regents cannot “be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing; the District Court found that the Regents acted in good faith.” *Id.* at 225. The “faculty’s decision,” it noted, was “a genuinely academic decision” warranting “great respect for [their] professional judgment. . . . [Judges] may not override it *unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.*” *Id.* (emphasis added).

By collapsing distinctions between a state's political branches and its universities, the defendants also seek to mitigate the impact of any precedent suggesting that the First Amendment has some application to curricular speech. This approach is evident in their treatment of an Eleventh U.S. Circuit Court of Appeals case from 1991, *Bishop v. Aronov*.¹³⁶ *Bishop* employed a "case by case" balancing test¹³⁷ to review a state university's refusal to allow a professor to incorporate his religious beliefs into his exercise physiology courses.¹³⁸ *Bishop* relied partly on *Hazelwood*'s holding that educators may exercise "editorial control" over "school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."¹³⁹ Equating state legislation with decisions by university or high school administrators, the *Pernell* defendants argue that "*Bishop* is best read to hold that the government's 'interests in the classroom conduct of its professors' are *per se* a legitimate pedagogical concern."¹⁴⁰ Tellingly, the defendants' words, "the government's 'interests in the classroom conduct of its professors,'" were drawn from a phrase that originally read, in *Bishop*, "*the University's interests* in the classroom conduct of its professors."¹⁴¹ Having so conflated public schools and state legislatures, it is easy for the defendants to conclude that it is all government speech in the end. Thus, in the defendants' view:

Both *Bishop*'s reasoning and its holding . . . accurately anticipated the Supreme Court's later [government speech cases] and *Garcetti*: Where, as here, a State prescribes or restricts the curricular instruction taught in its schools and the in-class conduct of its educators, nothing but government speech is in play, and the First Amendment has no application.¹⁴²

¹³⁶ *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991).

¹³⁷ *Id.* at 1074–75.

¹³⁸ *Id.* at 1068–70, 1076–77. Employing this test, the *Bishop* Court concluded that the University of Alabama had not violated the First Amendment by directing the faculty member to cease incorporating his religious beliefs into his exercise physiology courses or into "optional" after-class meetings held prior to the submission of final grades. *Id.*

¹³⁹ *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988) (quoted in *Bishop*, 926 F.2d at 1074).

¹⁴⁰ Defendants' Response, *supra* note 126, at 15 (citing *Bishop*, 926 F.2d at 1076).

¹⁴¹ *Bishop*, 926 F.2d at 1076 (emphasis added).

¹⁴² Defendants' Response, *supra* note 126, at 15.

2. Court / plaintiff rejections of government speech arguments

The district court forcefully rejected the defendants' government speech argument in an opinion by Judge Walker partly granting the plaintiffs' request for preliminary injunctive relief.¹⁴³ Beyond depicting the argument as Orwellian,¹⁴⁴ Judge Walker concluded that neither *Garcetti* nor the government speech cases more broadly apply to instructional speech at post-secondary schools. Such application, he wrote, would ignore the Supreme Court's "clear constitutional concerns," reflected in *Garcetti* and elsewhere, for academic freedom.¹⁴⁵ Although neither the Supreme Court nor the Eleventh Circuit has treated academic freedom as a "stand-alone right,"¹⁴⁶ both have treated it as a constitutionally significant value that can influence decision-making in First Amendment cases.¹⁴⁷ Judge Walker cited numerous examples of such treatment, including the Supreme Court's reference to academic freedom in *Garcetti*¹⁴⁸ and its admonition in *Keyishian* that the First Amendment does not "tolerate laws that cast a pall of orthodoxy over the classroom."¹⁴⁹ Judge Walker thus found that judicial precedent cuts against the defendants' view that "university professors' in-class speech . . . amounts to government speech outside the First Amendment's protection."¹⁵⁰

At the same time, the district court declined the plaintiffs' invitation to treat the IFA as per se unconstitutional or to apply strict scrutiny to it.¹⁵¹ Judge Walker agreed that the IFA is viewpoint-based but interpreted the case law as counseling a balance between the state's interest in shaping curriculum and the value of academic freedom. More concretely, he deemed *Bishop* controlling. Unlike the defendants, however, Judge Walker read *Bishop* to demand that the court itself balance the

¹⁴³ *Pernell v. Florida Bd. of Governors*, 641 F. Supp. 3d 1218 (N.D. Fla. 2022).

¹⁴⁴ See *supra* text accompanying note 2 (quoting *Pernell*, 641 F. Supp. 3d at 1229–30).

¹⁴⁵ *Pernell*, 641 F. Supp. 3d at 1240.

¹⁴⁶ *Id.* at 1236.

¹⁴⁷ *Id.* at 1236–37.

¹⁴⁸ *Id.* at 1240 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)).

¹⁴⁹ *Pernell*, 641 F. Supp. 3d at 1237 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

¹⁵⁰ *Id.* at 1241.

¹⁵¹ Plaintiffs' Motion for a Preliminary Injunction, *supra* note 123, at 17–20, 28–29.

relevant interests, rather than deferring entirely to the state's pedagogical judgments as reflected in legislation. In particular, Judge Walker found that *Bishop* required courts to consider

three factors under its “case-by-case” approach – namely, (1) “the context,” (2) “the University’s position as a public employer which may reasonably restrict the speech rights of employees more readily than those of other persons,” specifically with respect “to reasonably control[ling] the content of its curriculum, particularly that content imparted during class time,” and (3) “the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment.”¹⁵²

Across his application of all three factors, Judge Walker emphasized two key distinctions between *Pernell* and *Bishop*. First, whereas *Bishop* had concerned an individual disciplinary action by a university in response to one professor’s actions, *Pernell* entails “the State of Florida’s passage of a sweeping prohibition on expressing certain viewpoints about eight concepts during training or instruction.”¹⁵³ In Judge Walker’s view, Florida’s “prophylactic ban” that “affects potentially thousands of professors” and “‘chills potential speech before it happens’” raises graver academic freedom concerns than did the individualized discipline at issue in *Bishop*.¹⁵⁴ More so, the restriction’s sweeping and viewpoint-based nature belies legitimate pedagogical concerns, negating any defense grounded in the second *Bishop* factor. As Judge Walker explained, “enacting a prophylactic ban on protected expression of certain viewpoints – in the interest of suppressing those viewpoints because the State of Florida finds them ‘repugnant’ – is neither sufficiently weighty nor reasonable.”¹⁵⁵

Second, Judge Walker drew a distinction between a state’s efforts to shape curriculum in its public schools and its imposition of viewpoint-based restrictions on professorial speech within those curricular boundaries. As he put it, a state “has great flexibility in setting curriculum, [but] it cannot impose its own orthodoxy of viewpoint about the content it allowed within university classrooms.”¹⁵⁶ *Bishop*, he explained, had entailed a valid curricular intervention; the University of Alabama

¹⁵² *Pernell*, 641 F. Supp. 3d at 1270 (quoting *Bishop v. Aronov*, 926 F.2d 1066, 1074–75 (11th Cir. 1991)).

¹⁵³ *Id.* at 1272 (quoting *United States v. Nat’l Treas. Emp’s Union*, 513 U.S. 454, 468 (1995)).

¹⁵⁴ *Pernell*, 641 F. Supp. 3d at 1271–72.

¹⁵⁵ *Id.* at 1276.

¹⁵⁶ *Id.* at 1273.

had disciplined Dr. Bishop for “injecting his religious beliefs into his class discussions on exercise physiology.”¹⁵⁷ In *Pernell*, on the other hand, the faculty plaintiffs did not seek to “hijack the established curriculum with their own personal agenda.”¹⁵⁸ Rather, they challenged “a prohibition on expressing approval as to eight specific concepts, when the State of Florida has already sanctioned these eight concepts as part of the curriculum.”¹⁵⁹

B. K-12 Education in New Hampshire: Local 8027 v. Edelblut

The plaintiffs, primary and secondary school teachers from public schools in New Hampshire,¹⁶⁰ sued several New Hampshire officials, including the state’s education commissioner, in the U.S. District Court for the District of New Hampshire.¹⁶¹ The plaintiffs challenged the constitutionality of the state’s “Divisive Concepts Statute” (DCS).¹⁶² Like Florida’s IFA, the DCS is based on Trump’s EO 13950.¹⁶³ However, the DCS identifies four rather than eight prohibited concepts and tweaks the language from the model provisions of the EO.¹⁶⁴ Among the prohibited concepts in the DCS, for example, are:

[t]hat an individual, by virtue of his or her age, sex, gender identity, sexual orientation, race, color, marital status, familial status, mental or physical disability, religion, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;¹⁶⁵

[and t]hat an individual should be discriminated against or receive adverse treatment solely or partly because of his or her age, sex, gender identity, sexual orientation, race,

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1272.

¹⁵⁹ *Id.*

¹⁶⁰ Complaint at ¶¶ 7–12, *Local 8027 v. Edelblut*, 651 F. Supp. 3d 444 (D.N.H. 2023) (No. 1:21-cv-01063), 2022 WL 9409739.

¹⁶¹ *Id.* at ¶¶ 13–15.

¹⁶² *Id.* at ¶ 1. The law’s proponents had initially tried and failed to pass DCA as a standalone bill. *Id.* at ¶¶ 30, 79. Eventually, it passed as part of the “biannual \$13.5 billion state budget bill.” *Id.* at ¶¶ 30, 80–83.

¹⁶³ *Local 8027 v. Edelblut*, No. 21-CV-1077-PB, 2024 WL 2722254, at *1 (D.N.H. May 28, 2024).

¹⁶⁴ *Id.* at *1–*2.

¹⁶⁵ N.H. REV. STAT. ANN. (“NHRSA”) § 193:40(b).

creed, color, marital status, familial status, mental or physical disability, religion, or national origin.¹⁶⁶

The DCS directs that “public primary or secondary school students may not be ‘taught, instructed, inculcated or compelled to express belief in, or support for’” the identified concepts.¹⁶⁷

The plaintiffs argued, among other things, that the DCS violates their First Amendment rights.¹⁶⁸ In their motion to dismiss the plaintiffs’ complaint, the defendants responded that public school teachers’ pedagogical speech is unprotected by the First Amendment; it belongs to the government pursuant to *Garcetti*.¹⁶⁹ The district court, in an opinion by Judge Paul J. Barbadoro, largely agreed with the defendants’ First Amendment position insofar as it pertained to the plaintiffs’ “curricular speech” and granted the motion to dismiss in part.¹⁷⁰ Below, I detail the defendants’ government speech arguments and the district court’s embrace of the same with respect to curricular speech. I also discuss the district court’s conclusion that *Garcetti* did not preclude the teachers’ First Amendment claims for their extracurricular speech.

1. Defendants’ government speech arguments

In their motion to dismiss, the defendants argued that the DCS only impacts the plaintiff teachers’ curricular speech and that such speech belongs to the government pursuant to *Garcetti*.¹⁷¹ Like their counterparts in *Pernell*, the defendants in *Local 8027* quoted the Seventh Circuit to the effect that “teachers hire out their own speech and must provide the service for which employers are willing to pay.”¹⁷² Additionally, they cited the Sixth U.S. Circuit Court of Appeals to the effect that

¹⁶⁶ *Id.* at § 193:40(c).

¹⁶⁷ *Local 8027*, 651 F. Supp. 3d at 447.

¹⁶⁸ Complaint, *supra* note 160, at ¶¶ 122–132.

¹⁶⁹ Memorandum of Law in Support of Motion to Dismiss at 14–17, 651 F. Supp. 3d 444 (D.N.H. 2023) (No. 1:21-cv-01077-PB), Dkt. No. 36.

¹⁷⁰ 651 F. Supp. 3d 444, 464 (D.N.H. 2023).

¹⁷¹ Motion to Dismiss, *supra* note 169, at 14–17.

¹⁷² *Id.* at 18 (quoting *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477, 479 (7th Cir. 2007)).

“several other circuits” have concluded that “[a] teacher’s curricular and pedagogical choices are categorically unprotected’ by the First Amendment”¹⁷³ and that, “when it comes to in-class curricular speech at the primary and secondary school level, no other court of appeals has held that such speech is protected by the First Amendment.”¹⁷⁴

The *Local 8027* defendants also invoked the political accountability rationale, much as the *Pernell* defendants did and as the Supreme Court has done in defending government speech doctrine. Recall that, from this perspective, any problems caused by state control of public education can be resolved at the ballot box. Indeed, the prospect of political accountability is among the reasons why elected officials must retain control over instructors’ speech. For example, the *Local 8027* defendants quoted the Seventh Circuit in *Mayer v. Monroe County Community School Corporation* to the effect that, although “[m]ajority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination,’ . . . ‘if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers.’”¹⁷⁵ The *Local 8027* defendants also cited *Mayer* to bolster the political accountability rationale with the “captive audience” rationale. The *Mayer* Court, they noted, “emphasized . . . that ‘[t]he Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials.’”¹⁷⁶

2. The Court’s embrace of the government speech arguments

The district court adopted the defendants’ view that *Garcetti* applies to curricular speech at the primary and secondary school levels. Judge Barbadoro observed that although several circuit courts have recognized an exception to *Garcetti* for curricular speech at the college and university level,¹⁷⁷ none have done so for primary and secondary education.¹⁷⁸ Barbadoro added that there are “compelling” reasons “for treating curricular speech by college and university faculty differently

¹⁷³ *Id.* at 19 (citing *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village School Dist.*, 624 F.3d 332, 342 (6th Cir. 2010)).

¹⁷⁴ *Id.* (citing *Evans-Marshall*, 624 F.3d at 343).

¹⁷⁵ *Id.* at 18.

¹⁷⁶ *Id.* at 19 (quoting *Mayer*, 474 F.3d at 480).

¹⁷⁷ *Edelblut*, 651 F. Supp. 3d at 451.

¹⁷⁸ *Id.* at 452.

from similar speech by primary and secondary school teachers.”¹⁷⁹ To support this point, he cited multiple references by the Supreme Court to the “‘special niche’” that “‘universities occupy . . . in our constitutional tradition,’”¹⁸⁰ including the Supreme Court’s characterization of “a university ‘classroom [as] peculiarly the ‘marketplace of ideas’”¹⁸¹ and its view that, “[i]n such environments, ‘academic freedom is of transcendent value to all of us and not merely to the teachers concerned.’”¹⁸²

Judge Barbadoro did not respond directly to the plaintiffs’ point that some Supreme Court precedent extols the importance of academic freedom in primary as well as secondary education. In their opposition to the defendants’ motion to dismiss, for example, the plaintiffs observed that the Supreme Court has called K-12 public schools the “‘nurseries of democracy’”¹⁸³ and has said that our “‘future [therefore] depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”¹⁸⁴

Judge Barbadoro did, however, suggest that different treatment is warranted for K-12 schooling versus higher education due to the roles that political accountability and captive student audiences play in the former. He observed that “[p]ublic primary and secondary school teachers . . . are hired to teach the curriculum by the politically accountable branches of state and local government.”¹⁸⁵ Furthermore, “[n]o one is required to attend a public college or university, but primary and secondary school education is compulsory.”¹⁸⁶ He concluded that “[w]hen disagreements arise” between “parents, students, and teachers . . . about what should be

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)).

¹⁸¹ *Id.* (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

¹⁸² *Id.* (quoting *Keyishian*, 385 U.S. at 603).

¹⁸³ AFT Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss Counts II-IV of the AFT Complaint at 6, *Local 8027 v. Edelblut*, 651 F. Supp. 3d 444 (D.N.H. 2023) (No. 1:21-cv-01077-PB), 2022 WL 9409752 (quoting *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 594 U.S. 180, 190 (2021)).

¹⁸⁴ *Id.* at 6 (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 512 (1969)).

¹⁸⁵ *Edelblut*, 651 F. Supp. 3d at 452.

¹⁸⁶ *Id.*

taught in public school classrooms . . . they generally are better resolved by politically accountable officials than by federal judges.”¹⁸⁷

Although the district court accordingly dismissed the First Amendment claims regarding teachers’ curricular speech, it allowed the claims to proceed insofar as they related to “extracurricular speech.”¹⁸⁸ The DCA “provides that ‘[n]o pupil . . . shall be taught, instructed, inculcated or compelled to express belief in, or support for,’ a banned concept.”¹⁸⁹ Judge Barbadoro reasoned that this “can plausibly be read to cover interactions with pupils outside the classroom and even beyond the school grounds.”¹⁹⁰ Drawing on his descriptive sense of schoolhouse dynamics, Barbadoro elaborated that “a pupil in a public school may interact with a teacher in a school hallway, schoolyard, lunchroom, or library, not to mention during extracurricular activities that take place on or off school grounds.”¹⁹¹ In subpart D, we will see that Judge Barbadoro ultimately declined to rule on the merits of the plaintiffs’ remaining First Amendment claim. Instead, he granted summary judgment in the plaintiffs’ favor regarding both curricular and extracurricular speech on different grounds—that the DCA’s vagueness violates the Fourteenth Amendment.

C. *Public School Libraries in Iowa: GLBT Youth In Iowa Schools Task Force v. Reynolds*

Iowa Senate File 496 (SF 496) was passed by the state legislature in April 2023 and signed into law by Governor Kim Reynolds the following month.¹⁹² It imposes several restrictions on public schools regarding the topics of sex, sexual orientation, and gender identity. For our purposes, the relevant restriction is the one imposed on libraries. SF 496 “requires the removal of any book from Iowa public school libraries that contains a description or visual depiction of a ‘sex act.’”¹⁹³ Specifically, it directs “each school district to establish a ‘[K-12] library program that . . . con-

¹⁸⁷ *Id.* at 452–53.

¹⁸⁸ *Id.* at 453.

¹⁸⁹ *Id.* (quoting NHRSA § 193:40).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 709 F. Supp. 3d 664, 675 (S.D. Iowa 2023).

¹⁹³ *Id.* at 673.

tains only age-appropriate materials.” Elsewhere, it defines “‘any material with descriptions or visual depictions of a sex act’” as age-inappropriate and describes the various actions that can constitute a “sex act.”¹⁹⁴ SF 496 explicitly exempts “certain religious texts such as the Bible, Torah, and Koran” from its strictures.¹⁹⁵

As the district court describes it, SF 496 does not “on its face . . . permit school officials to take context into account when determining whether a book is ‘age-appropriate’ or contains a ‘sex act.’”¹⁹⁶ In other words, “the law prohibits such books even if the ‘sex act’ was, say, an impetus for legislation . . . important for historical reasons . . . or played an important role in an award-winning work of fiction like explaining a character’s emotional development.”¹⁹⁷ The district court also notes that the law

has led to the removal from school libraries of non-fiction and fiction books alike, across a variety of genres,” including “works of classic fiction by authors such as James Joyce (*Ulysses*), William Faulkner, (*As I Lay Dying*), Joseph Heller (*Slaughterhouse Five*), Aldous Huxley (*Brave New World*), and Richard Wright (*Native Son*) . . . They have also removed award-winning books by contemporary authors like Toni Morrison (*Beloved*, *Song of Solomon*, *The Bluest Eye*), Malinda Lo (*Last Night at the Telegraph Club*), Sapphire (*Push: A Novel*), John Green (*The Fault in Our Stars*, *Looking for Alaska*), Jodi Picoult (*Nineteen Minutes*), Laurie R. King (*Speak, Shout*), and Maya Angelou (*I Know Why the Caged Bird Sings*), among many others.”¹⁹⁸

SF 496 requires school districts to create and publicize “policies and procedures to allow a parent or guardian of a student enrolled in the school district to request anonymously the removal of books or other materials from school . . . libraries.”¹⁹⁹ School districts “also must post on their websites a comprehensive list of books available to students in school libraries.”

The plaintiffs, several Iowa public school students and an Iowa nonprofit organization for LGBTQ+ youth,²⁰⁰ filed a complaint and a motion for preliminary

¹⁹⁴ *Id.* at 675.

¹⁹⁵ Complaint at ¶ 56, *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 709 F. Supp. 3d 664 (S.D. Iowa 2023) (No. 4:23-cv-00474-SHL-SBJ), 2023 WL 8239151.

¹⁹⁶ *GLBT Youth*, 709 F. Supp. 3d at 676.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 677 (internal citations omitted).

¹⁹⁹ Complaint, *supra* note 195, at ¶ 60.

²⁰⁰ *Id.* at ¶¶ 8–19.

injunction on November 28, 2023 against a number of state and local officials and agencies.²⁰¹ On December 29, 2023, the district court, in an opinion by Judge Stephen Locher, granted the plaintiffs’ request to preliminarily enjoin the library book removal provisions of SF 496.²⁰² Below, I explore the defendants’ government speech defenses and Judge Locher’s reasoning in rejecting it.

1. Defendants’ government speech arguments

The *GLBT Youth* defendants relied on government speech doctrine, arguing that Iowa public schools “are creations of the state and many of their expressive decisions, including what books to make available in the library, are government speech.”²⁰³ As such, the library book removal directives of SF 496 “[do] not trigger the Free Speech Clause of the First Amendment.”²⁰⁴

The defendants insisted that *Pico* does not impact their conclusion, dismissing it as “badly fractured” and as predating the development of government speech doctrine.²⁰⁵ “Since *Pico*,” they wrote, “courts have recognized that public libraries are not public forums for private speech and that ‘the government speaks through its selection of what books to put on the shelves and what books to exclude.’”²⁰⁶ Their quoted language is from a 2005 U.S. Court of Appeals for the D.C. Circuit case, *PETA v. Gittens*.²⁰⁷ The *PETA* Court had concluded that a city-sponsored out-

²⁰¹ *Id.* at ¶¶ 20–38; Plaintiffs’ Brief in Support of Motion for a Preliminary Injunction, *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 709 F. Supp. 3d 664 (S.D. Iowa 2023) (No. 4:23-cv-00474-SHL-SBJ), 2023 WL 11903604.

²⁰² *GLBT Youth*, 709 F. Supp. 3d at 45–46.

²⁰³ Resistance to Plaintiffs’ Motion for Preliminary Injunction at 14, *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 709 F. Supp. 3d 664 (S.D. Iowa 2023) (No. 4:23-cv-00474-SHL-SBJ), 2023 WL 11903606.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 18 (quoting *ACLU of Florida v. Miami-Dade County School Bd.*, 557 F.3d 1177, 1200 (11th Cir. 2009)).

²⁰⁶ *Id.*

²⁰⁷ 414 F.3d 23 (D.C. Cir. 2005).

door art exhibit in Washington, D.C., amounted to government speech and analogized it to a library.²⁰⁸ The *GLBT Youth* defendants also cited *United States v. American Library Association*,²⁰⁹ discussed earlier in this essay,²¹⁰ to similar effect.²¹¹

Alternatively, the defendants argued that they should prevail even if the reasoning of the *Pico* plurality—“that school library materials may not be removed ‘in a narrowly partisan or political manner’”—were to govern the case. “[T]here is nothing partisan,” they assert, “about removing depictions and descriptions of sex acts from school libraries.”²¹³ Rather, they posit that SF 496’s library book removal provisions simply “ensure school libraries contain age-appropriate books.”²¹⁴

The defendants’ reasoning is also underscored by a political accountability rationale that emphasizes parental and local control. They observe that SF 496 was passed “[d]uring a national conversation about schools and parental rights” and that it “affirmed the longstanding American and Iowa tradition of strong parental rights along with the state’s unique role in forming its citizenry.”²¹⁵ In other words, SF 496 is the product of popular interest and demand. It empowers parents especially, both because parents are a part of the electorate and because the law enables them to initiate book removals through anonymous complaints.

2. The district court’s rejection of the government speech rationale

The district court granted the plaintiffs’ request to preliminarily enjoin the library book removal provisions of SF 496, concluding that they are “unlikely to satisfy the First Amendment under any standard of scrutiny.”²¹⁶ Judge Locher rejected the defendants’ government speech defense, judged the defendants unlikely to prevail under the approach of the *Pico* plurality, and concluded, in any event, that a

²⁰⁸ *Id.* at 28–29.

²⁰⁹ Resistance to Plaintiffs’ Motion, *supra* note 203, at 18.

²¹⁰ See *supra* text accompanying notes 77–86.

²¹¹ Resistance to Plaintiffs’ Motion, *supra* note 203, at 18.

²¹² *Id.* at 17 (quoting Bd. of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 870 (1982) (lead op.)).

²¹³ Resistance to Plaintiffs’ Motion, *supra* note 203, at 17.

²¹⁴ *Id.* at 17.

²¹⁵ *Id.* at 6.

²¹⁶ *GLBT Youth*, 709 F. Supp. 3d at 674.

standard higher than that articulated in *Pico* applies and that the defendants are unlikely to meet it either.

The court identifies “several problems” with the government speech defense.²¹⁷ First, both *Pico* and precedent from the Eighth U.S. Circuit Court of Appeals “recognize that the *removal* of books from a school library is different for First Amendment purposes than the *acquisition* of books.”²¹⁸ The Eighth Circuit case that the court cites—*Pratt v. Independent School District No. 831*²¹⁹—involved the removal of the film version of the classic Shirley Jackson story *The Lottery* from the school district’s curriculum.²²⁰ In *Pratt*, the Eighth Circuit agreed that it is up to the school board to determine whether material is suitable for the curriculum, but that it may not use that authority to impose ideological orthodoxy.²²¹ Therefore, the *Pratt* Court required the board to “establish that a substantial and reasonable governmental interest exists for interfering with the students’ right to receive information.”²²² The Eighth Circuit also made clear that it would not merely accept the board’s say-so that it had such an interest. Indeed, it refused to credit the board’s asserted interest in *Pratt*, citing its conclusory nature, its conflict with the testimony of teachers and education experts, and the sequence of events leading up to the board’s decision that indicated that the board acted for ideological reasons.²²³ In light of *Pico*, *Pratt*, and similar precedent, Judge Locher concluded that book removal decisions are not invariably government speech. Nor can authorities escape the consequences of the First Amendment’s application by asserting a legitimate interest in the face of contrary evidence.

Judge Locher also rejected the notion that courts’ only options are either to deem libraries government speech or to treat them as traditional public fora subject to the highest levels of First Amendment scrutiny. To the contrary, Locher cited

²¹⁷ *Id.* at 696.

²¹⁸ *Id.* (citing *Pratt v. Independent School District No. 831*, Forest Lake, Minn., 670 F.2d 771, 776 (8th Cir. 1982); *Fayetteville Pub. Libr. v. Crawford Cnty.*, 684 F. Supp. 3d 879, 909 (W.D. Ark. 2023)).

²¹⁹ 670 F.2d 771 (8th Cir. 1982).

²²⁰ *Id.* at 774.

²²¹ *Id.* at 778.

²²² *Id.* at 777.

²²³ *Id.* at 777–79.

precedent from the Third U.S. Circuit Court of Appeals to the effect that a library is a “‘limited public forum’ for which the government may not impose unreasonable or viewpoint-specific restrictions.”²²⁴ Locher called this standard “similar – if not identical – to the ‘substantial and reasonable governmental interest’ standard applied in *Pratt*.”²²⁵ He also rejected the defendants’ suggestion that *American Library Association*, or *ALA*, gave Congress carte blanche to regulate public libraries however it pleased. To the contrary, Judge Locher noted that Justice Kennedy had based his “decisive fifth vote” in *ALA* on the fact that the “library patrons in [*ALA*] had the ability to access the restricted content” upon request.²²⁶ He also referenced Justice Breyer’s separate concurrence in *ALA*, arguing that intermediate scrutiny should apply.²²⁷

Finally, Judge Locher concluded not only that library book removals are not government speech, but that a standard higher than the *Pico / Pratt* approach applies when removals are triggered by statewide legislation. Whereas *Pico* and *Pratt* entailed decisions by local school boards concerning case-by-case complaints about particular titles, “the Iowa Legislature enacted [SF] 496 because local school boards would not remove books from school libraries.”²²⁸ As Judge Locher put it, “the Iowa legislature has used a bulldozer where school boards in prior cases merely employed a scalpel.”²²⁹ As such, he concluded that the *Pico / Pratt* approach, which “contemplates that courts will analyze the subjective motivations of each school board member,”²³⁰ would be inappropriate. Instead, he invoked the “obscenity-light” standard applied by the Supreme Court in cases involving access by minors to sexually oriented materials.²³¹ Ultimately, Judge Locher concluded that the defendants

²²⁴ *GLBT Youth*, 709 F. Supp. 3d at 696 (citing *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1261 (3d Cir. 1992)).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 692.

²²⁹ *Id.* at 693.

²³⁰ *Id.*

²³¹ *Id.* at 695.

were unlikely to prevail under either the obscenity-light standard or the *Pico/Pratt* standard.²³²

D. *The Role of Due Process Vagueness Arguments*

I turn briefly in this section to an argument made by the plaintiffs in each case pursuant not to the First Amendment, but to the Fourteenth Amendment's Due Process Clause. The due process argument—that the challenged educational suppression measures are vague—succeeded in all three cases. In the Florida and Iowa cases, each district court agreed that the plaintiffs were likely to succeed on the merits of both their vagueness and First Amendment arguments. Each court thus identified two independent bases for granting preliminary injunctive relief.²³³ In the New Hampshire litigation, the vagueness claim was even more consequential. Recall that the *Local 8027* court dismissed the plaintiffs' First Amendment claims with respect to curricular speech, finding them precluded by *Garcetti*. After subsequent motions and briefings, however, the court granted summary judgment to the plaintiffs on Fourteenth Amendment vagueness grounds.

Apart from the practical significance of the vagueness claims, they also have a complementary, even synergistic, relationship to First Amendment anti-distortion claims. Judge Barbadoro's reasoning in *Local 8027* helps to illustrate this phenomenon. Despite having partly dismissed the plaintiff's First Amendment claims, he drew on his descriptive understanding of pedagogy's nature to support his vagueness finding. For example, he described certain common teaching techniques, explaining that the DCA would make it dangerous for teachers to employ them:

While teaching can sometimes consist of merely instructing students on objective facts, teachers often employ more nuanced techniques designed to encourage the development of critical thinking skills. For example, teachers may attempt to stimulate discussion by asking students pointed questions or encourage debate by presenting students with ideas contrary to their own. When such techniques are used to explore a banned concept, it is impossible to know whether a banned concept has been impermissibly taught.²³⁴

²³² *Id.* at 696–703.

²³³ See *Pernell v. Florida Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1278–87 (N.D. Fla. 2022); *GLBT Youth*, 709 F. Supp. 3d at 703–07.

²³⁴ *Local 8027 v. Edelblut*, No. 1:21-cv-01077-PB, 2024 WL 2722254, at *12 (D.N.H. May 28, 2024).

The court shone further light on the distorting effect of the DCA’s vagueness through examples of teachers impacted by it:

Consider, for example, Jennifer Given, a former high school social studies teacher at Hollis / Brookline High School with 19 years of experience in the field. Doc. 85-15 at 3. Based on the “constant confusion with students and parents” caused by [the DCA], Given felt the need to significantly modify her teaching methods “out of fear that [she] would be accused of” violating the Amendments, regardless of whether she was actually doing so. *Id.* at 3. For example, Given stopped assessing student performance through essay and open-ended short questions out of concern that those methodologies might be misinterpreted by students who believed they had to agree with a certain position to score well on an assessment. *Id.* Given also significantly restricted open class discussion and stopped allowing her students to choose their own topics for research papers out of a concern that the students would include subject matter in their papers that could violate the Amendments. *Id.* at 3–4. Additionally, Given refrained from “analogizing material to students’ own experiences and interests” – despite the [pedagogical] value of doing so “in social studies curriculums and historical courses where students can easily believe historical events only happened in the past” out of fear that such discussions could lead to a complaint against her. *Id.* at 4. Given found that these changes negatively impacted student learning and resulted in decreased class participation. *Id.* at 3–4. Given was so troubled by this fact, and so frustrated by the difficulties presented by the Amendments, that she decided to leave teaching altogether. *Id.* at 3.²³⁵

**V. TOWARD A STRONGER AND MORE COHERENT ANTI-DISTORTION
PRINCIPLE²³⁶**

The arguments described in Parts II through IV reflect two things about existing free speech precedent. First, government speech doctrine is potentially a very expansive means to empower states and localities to enforce viewpoint-based, even partisan, orthodoxies throughout much of civic life, including public educational institutions. Second, extant judicial doctrine contains the makings of an important counter-force—the anti-distortion principle—to guard against such expansion.

In this Part, I consider how we might build on those traces of an anti-distortion principle currently embodied in judicial doctrine. I seek especially to build on two aspects of the principle that are currently underdeveloped in the case law. First, the *why* of anti-distortion—specifically, why distortion is a problem from a First

²³⁵ *Id.* at *16 (internal citations are to the case docket).

²³⁶ Some of the language in Part V is drawn from Kitrosser, *supra* note 49.

Amendment perspective—is not explained with depth or consistency across the cases. Second, the *how* of the principle—that is, how one determines whether and when distortion exists—has not been considered with deliberateness, although aspects of it can be inferred from existing cases. In subpart A, I dig more deeply into the why question. In subpart B, I take a closer look at the how question.

A. *Why Distortion Is a First Amendment Problem*

Distortion is a First Amendment problem for reasons involving both negative First Amendment theory, which focuses on the dangers of speech regulation, and positive First Amendment theory, which emphasizes free speech’s affirmative benefits.

1. Negative free speech theory

With respect to negative theory, distortion enables the government to pull the wool over people’s eyes, leveraging its largesse to present political, even partisan, messaging as the product of disciplinary expertise. The short-term harm of this phenomenon is the immediate misleading of those who consume such messaging. The longer-term damage includes the degradation of the populace’s ability to think critically or to distinguish disciplinary expertise from uninformed assertions. These dangers are very much evident in the context of public education. Rather than reflecting the best pedagogical and disciplinary judgments of teachers, subject-matter experts, or librarians, students’ lessons and materials may be shaped largely by political directives. We see traces of concern regarding these dangers, for example, in the *Pico* plurality’s admonition that school boards may not exercise their discretion to remove library books “in a narrowly partisan or political manner”²³⁷ and in the *Pernell* court’s distinction between a legislature’s permissible setting of curricular boundaries and impermissible ideological interference with classroom speech that takes place within those boundaries.²³⁸

For K-12 students, the problem is compounded by their youth and their status as captive audience members. Indeed, when parties or courts take the view that the captive audience factor supports the application of the government speech doctrine

²³⁷ Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870 (1982) (plurality op. by Brennan, J.).

²³⁸ See *supra* text accompanying notes 156–159.

to K-12 education,²³⁹ they get things exactly backwards. The fact that young students are impressionable, captive audience members provides more reason, not less, to guard against their being fed partisan orthodoxies. This is not to suggest that pedagogical or subject-matter expertise is a politics-free panacea. There is, however, a distinction between teaching that uses effective pedagogical techniques and expert subject-matter guidance as its lodestars, however imperfectly, versus teaching that is subject to purely partisan messaging control. To put it in terms of negative free speech theory, the risk that states will leverage financial largesse to seize ideological, even partisan, control over public school teaching counsels in favor of limiting overt political manipulation of pedagogical speech, all the more so when young, captive audiences are involved.

In the higher education context, as students and faculty advance into more specialized areas of disciplinary study, the potential bases for political offense and interference multiply. For example, critical race theory, the ostensible initial target of the recent wave of educational suppression laws, is predominantly studied in graduate schools. Furthermore, the potential for academic growth and discovery on the parts of both faculty and students is particularly expansive in the higher education context, a point reflected in the Supreme Court's repeated embrace of academic freedom's constitutional value. In this realm, too, negative free speech theory counsels against unfettered government capacity to leverage its largesse to demand ideological conformity.

2. Positive free speech theory

With respect to affirmative theory, consider the two free speech values most closely associated with public education. The democracy theory of free speech posits that such liberty helps to make republican government possible, enabling the people to discover and share information and ideas relevant to politics and policy and to acquire the skills necessary to understand such exchanges. A closely related theory of free speech value is that it enables the people to check and oversee those who govern them. Pedagogy generally, and the conveyance of disciplinary expertise in particular, are essential parts of the speech ecosystem that fosters such values. As Alexander Meiklejohn, among the scholars most closely associated with the democracy theory of free speech, wrote: "Education, in all its phases, is the attempt to so inform and cultivate the mind and will of a citizen that he shall have the wisdom,

²³⁹ See *supra* text accompanying notes 175–176, 185–187.

the independence, and, therefore, the dignity of a governing citizen.”²⁴⁰ Meiklejohn concluded that “[f]reedom of education is, thus . . . a basic postulate in the planning of a free society.”²⁴¹ Such reasoning, of course, is widely reflected across Supreme Court precedent. Recall the Court’s dire warning, for example, that “[t]eachers and students must always remain free to inquire, to study and to evaluate, . . . otherwise our civilization will stagnate and die.”²⁴²

Joseph Blocher’s recent work on free speech theory further illuminates the essential ties between free speech value, education, and democracy. Blocher suggests that free speech is valuable not because it will necessary lead us to “truth,” but because it fosters “the individual habits of mind and social practices” that enable us to evaluate information and opinions critically, helping us to formulate “justified true belief[s].”²⁴³ A justified true belief may be disproven in the long run, but it stands on the shoulders of accumulated disciplinary knowledge and practice, setting it apart from mere assertion. Indeed, the disciplinary standards that give rise to justified true beliefs are the very things that enable them to be re-thought, fine-tuned, and even rejected in time. It is about cultivating habits of mind, including critical thought, more than reaching a particular conclusion. This knowledge-based theory of free speech fits nicely with Meiklejohn’s insight that pedagogical and academic speech are essential to democracy not only because of the information that they convey, but also because of the habits of mind and character that they foster. It also complements Vincent Blasi’s conclusion, in his groundbreaking work on the value of free speech to government accountability, that “[o]ne of the great bulwarks against totalitarianism is an open educational system . . . devoted to developing in future citizens a critical attitude toward government.”²⁴⁴

Distortion robs educational speech of these values. Rather than relying on the pedagogical judgment of people with teaching expertise, the disciplinary expertise of subject-matter experts who teach and write textbooks, or the pedagogical and

²⁴⁰ Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257 (1961).

²⁴¹ *Id.*

²⁴² See *supra* note 97.

²⁴³ Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 444 (2019).

²⁴⁴ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 521, 642 (1977).

literary expertise of professional school and research librarians, a distorted system of public education treats pedagogical content and technique as matters that can be governed by politics alone. This robs students of the tools to distinguish justified true beliefs from mere assertions and to form the habits of mind conducive to critical thought and inquiry. Put differently, an educational system whose content can be dictated by political fiat is not equal to a society premised on the notion that its citizens have both the right and the capacity meaningfully to oversee those who govern them.

B. Identifying Distortion

Even if one supports the principle of anti-distortion, there remains the practical question of how to determine when distortion is afoot. To make matters trickier still, identifying distortion is a two-step process. One must first define the baseline: What *is* the nature or ordinary practices of the knowledge institution or type of expression at issue? One then must ask whether the challenged condition or directive is reasonably compatible with that baseline.

These are not easy questions, but they are also not impassable ones. Because they are deeply fact-driven, there is no one-size-fits-all formula to resolve them. One can, however, identify factors for courts, legislatures, and other decision-makers to consider. The existing case law itself is a useful starting point toward this end. Recall from Part III that, although the Supreme Court has not identified anti-distortion as a distinct legal principle, it has implicitly considered whether distortion exists on a number of occasions. Furthermore, in Part IV we saw some elements of anti-distortion reasoning in courts' and parties' responses to defendants' government speech arguments. In the following sections, I draw from some of these cases to suggest several factors that courts, legislatures, and other decision-makers can use to guide distortion inquiries.

1. Descriptive considerations

a. The government's own representations

In a sense, the anti-distortion principle amounts to a rule that the government cannot have its cake and eat it too in the realm of public education and other public knowledge enterprises. That is, it cannot purport to sponsor expression grounded in disciplinary expertise but set conditions that sabotage that goal. In determining the nature of a given expressive enterprise, then, the government's own public rep-

resentations are important starting points. Governments often make such assertions through statutory and regulatory authorities establishing and defining the relevant programs or through other public pronouncements.

Two aspects of Judge Walker’s reasoning in *Pernell* are illustrative in this respect. First, Judge Walker framed the IFA—that is, the Individual Freedom Act—as Orwellian in nature, pledging to “muzzle its professors in the name of ‘freedom.’”²⁴⁵ Although Judge Walker’s point was mostly rhetorical, it also bears on a substantive consideration. That is, it is appropriate to assess whether a piece of legislation accurately describes the program that it is creating or revising in determining whether distortion is afoot. Second, Judge Walker drew a distinction between setting curriculum and dictating what teachers may say in teaching that curriculum. Walker agreed that the state has substantial leeway to set curricular boundaries, but that it may not impose viewpoint-based restrictions on pedagogy within those boundaries.²⁴⁶ Walker’s distinction can be framed in anti-distortion terms: The state may determine whether a particular topic shall be taught in public schools; having done that, however, the state may not unreasonably undermine teachers’ capacity to teach the topic.

b. Structure and decision-maker identity

Structural factors, including the source and scope of challenged actions or directives, are also probative of distortion. We see hints of these structural considerations in two of the recent educational suppression measure cases. In *Pernell*, Judge Walker distinguished the IFA’s “prophylactic ban” affecting “potentially thousands of professors” from the ad hoc, individual disciplinary action involved in a previous case. He found that the IFA’s broad reach and its inevitable chilling effect raised comparatively substantial academic freedom concerns.²⁴⁷ The IFA’s sweeping and viewpoint-based nature also undermined the defendants’ insistence that it furthered legitimate pedagogical concerns.²⁴⁸ Although not framed in anti-distortion terms, these points are certainly adjacent to anti-distortion reasoning. First, an important distinction between state legislation and ex post corrective action by a

²⁴⁵ *Pernell v. Florida Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1230 (N.D. Fla. 2022).

²⁴⁶ *Id.* at 1237–42.

²⁴⁷ *Id.* at 1276, 1272.

²⁴⁸ *Id.* at 1273–74.

university department or administration is that the former is made by a political body, whereas the latter is made by subject-matter and/or educational experts. Although legislative decision-making is not invariably distorting and expert decision-making is not invariably non-distorting, these are relevant factors in a distortion inquiry. Second, the relative scope of ex ante legislation versus ex post discipline matters not only because the former impacts more speech, but also because the former's breadth bears on whether it targets legitimate pedagogical concerns or instead hits wide of the mark.

In *GLBT Youth*, Judge Locher similarly applied a higher standard to a state law governing public school library book removals than the *Pico* and *Pratt* courts had applied to case-by-case removal decisions by school boards.²⁴⁹ Judge Locher lamented that, rather than employing the “scalpel” of case-by-case decision-making by a school board, the legislature had employed “a bulldozer.”²⁵⁰ His reasoning focused on SF 496's breadth and on the inapplicability of a standard based on school board members' “subjective motivations” to state legislation.²⁵¹ But an additional rationale can be gleaned from aspects of Judge Locher's analysis: There is less reason to trust that sweeping, ex ante state legislation stems from legitimate pedagogical concerns than there is to think the same of a district-wide inquiry into specific titles. Two observations by Judge Locher lend themselves to this rationale. First, SF 496, given its breadth, “makes no attempt to target [truly age-inappropriate books] in any reasonable way. Instead, it requires the wholesale removal of every book containing a description or visual depiction of a ‘sex act,’ regardless of context.”²⁵² Second, SF 496 was enacted precisely because “local school boards would *not* remove books from school libraries.”²⁵³ The Iowa state legislature, in short, “was dissatisfied with local decision-making by local officials and decided an across-the-board solution was necessary for a problem that local school boards apparently did not believe existed in the first place.”²⁵⁴

²⁴⁹ 709 F. Supp. 3d at 692–95.

²⁵⁰ *Id.* at 693.

²⁵¹ *Id.*

²⁵² *Id.* at 697.

²⁵³ *Id.* at 692.

²⁵⁴ *Id.* at 693.

Finally, recall that in *Hazelwood*, the Supreme Court relied partly on the participation of journalism teachers in the school principal's decision-making process to conclude that the principal's action was "reasonably related to legitimate pedagogical concerns."²⁵⁵ Specifically, the Court observed that the principal pulled two stories from the student-produced newspaper in consultation with the journalism teacher and that this pre-publication consultation was a standard part of the school paper's production cycle.²⁵⁶ Indeed, the Court notably framed the question in *Hazelwood* as one regarding the extent of "educators' authority over school-sponsored publications."²⁵⁷

c. Evidence of expert judgments regarding pedagogy or relevant subject matter

Courts also consider evidence bearing on whether political directives interfere with the academic or pedagogical judgments of subject-matter or teaching experts. Looking back to *Hazelwood*, for example, the Court observed not only that the paper's faculty advisors concurred with the principal's judgment²⁵⁸ but that a former professional journalist who testified at trial agreed that the pulled stories did not meet journalistic standards for publication.²⁵⁹ Similarly, in *GLBT Youth*, Judge Locher's extensive references to the classroom experiences of teachers impacted by SF 496, although raised in the context of a vagueness inquiry, demonstrated the law's distorting effect on day-to-day teaching.

In addition to record evidence, courts also draw on judicial precedent or on their own experiences to identify standard or best practices in educational institutions. In *Local 8027*, for example, in addition to citing the testimony of affected teachers,²⁶⁰ Judge Barbadoro articulated his own understanding of classroom practices. He noted, for example, that teachers do more than convey information by

²⁵⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

²⁵⁶ *Id.* at 268–69, 275.

²⁵⁷ *Id.* at 271 (emphasis added).

²⁵⁸ *Id.* at 275.

²⁵⁹ *Id.* at 275 n.8.

²⁶⁰ *See supra* text accompanying note 234.

rote; often they “employ more nuanced techniques designed to encourage the development of critical thinking skills.”²⁶¹ In the context of higher education, the Supreme Court has spoken broadly of the nature of the university, citing its “tradition of thought and experiment that is at the center of our intellectual and philosophic tradition”²⁶² and calling college and university campuses among “the vital centers for the Nation’s intellectual life.”²⁶³

2. Normative considerations

Courts do not rely solely on descriptive factors to determine the nature of particular knowledge producers. They also lean heavily on normative considerations, emphasizing the importance of identifying those features that carry First Amendment value and protecting them against distortion. Indeed, the Supreme Court’s reference in *Rosenberger* to “our intellectual and philosophic tradition” can be taken as a statement of ideals as much as a description. The same may be said of the Court’s statement in *Keyishian* that “[t]he classroom is peculiarly the ‘marketplace of ideas.’”²⁶⁴ These two examples reflect a key characteristic to which the judiciary repeatedly returns as an aspect of public education that warrants constitutional protection: anti-orthodoxy. The *Pernell* court, for example, quoted the Supreme Court’s classic statement in *Keyishian* that the First Amendment does not “‘tolerate laws that cast a pall of orthodoxy over the classroom.’”²⁶⁵ More importantly, Judge Walker put that sentiment into practice when he held that a state “has great flexibility in setting curriculum, [but] it cannot impose its own orthodoxy of viewpoint about the content it allowed within university classrooms.”²⁶⁶

Courts embrace anti-orthodoxy not in a vacuum but as a means to achieve public schools’ most constitutionally salient mission: to prepare students for democratic life. Just three years ago, the Supreme Court reiterated its view that “America’s public schools are the nurseries of democracy. Our representative democracy

²⁶¹ See *Pernell v. Florida Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1278–87 (N.D. Fla. 2022); *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 709 F. Supp. 3d 664, 703–07 (S.D. Iowa 2023).

²⁶² *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 835 (1995).

²⁶³ *Id.* at 836.

²⁶⁴ *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967).

²⁶⁵ *Pernell*, 641 F. Supp. 3d at 1237 (quoting *Keyishian*, 385 U.S. at 603).

²⁶⁶ *Id.* at 1273.

only works if we protect the ‘marketplace of ideas.’ This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People’s will.”²⁶⁷ This was, of course, the same philosophy that led the Court to reject, among other things, the notion that school boards have an unfettered power to order school library books removed for ideological reasons,²⁶⁸ that public school professors can be fired for their political affiliations,²⁶⁹ and that public school students can be required to salute the flag.²⁷⁰

CONCLUSION

Widespread access to educational resources is essential to a functioning democracy. As a practical matter, this demands substantial public funding and state involvement. With this, of course, comes the risk of political, even partisan capture. An anti-distortion principle is an important part of the toolkit to address capture, both in litigation and as guidance for policymakers contemplating legislation. By identifying anti-distortion as a principle that can be gleaned from existing judicial precedent, and by building on that principle going forward, courts, litigants, and policymakers can help to keep public education alive while preserving its democratic and constitutional legitimacy.

²⁶⁷ *Mahanoy Area Sch. Dist. v. B.L. by & through Levy*, 594 U.S. 180, 190 (2021).

²⁶⁸ *See supra* text accompanying notes 112–117.

²⁶⁹ *See supra* note 94 and accompanying text.

²⁷⁰ *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *see also* note 99 and accompanying text (quoting Justice Jackson’s opinion in *Barnette*).