He/She/They "Say Gay": A First Amendment Framework for Regulating Classroom Speech on Gender and Sexuality

ZACHARY A. KAYAL*

In an era of profound polarization over the nature of gender and sexuality, and children's exposure to discussions thereof, states and school boards of all political inclinations are moving swiftly to regulate educators' speech about such topics in public classrooms. Liberal authorities enact "pronoun policies" requiring teachers to use transgender and non-binary students' gender-affirming names and pronouns. Conservative authorities, meanwhile, largely prohibit teachers from talking about gender and sexuality through anti-queer curriculum (or "Don't Say Gay") laws. Despite their opposing goals, these policies seem constitutionally indistinguishable on their face—both are regulations of educators' classroom speech, subject to the same First Amendment standards.

This Note argues that constitutional lines can and should be drawn between these policies based on the effect of the regulated speech on third parties. Part I reviews the First Amendment standards that could apply to pronoun policies and anti-queer curriculum laws. Part II argues that these types of policies regulating educators' classroom speech can be distinguished from one another using an egalitarian framework, which accounts for the impact of the regulated speech on students' expression and the overall expressive environment of the classroom. Though First Amendment jurisprudence usually forecloses such arguments about third-party expressive interests, the standards governing classroom speech uniquely allow for their consideration. Part III applies that egalitarian framework to the two kinds of policies at issue. It posits that the negative effects of misgendering—chilling the protected expression of transgender students and poisoning the classroom speech environment—justify pronoun policies. But anti-queer curriculum laws regulate speech that poses no such risks, so they violate the First Amendment.

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* J.D. Candidate 2024, Columbia Law School. The author thanks Professor David Pozen for his invaluable guidance and the staff of the *Journal* for their editing assistance.

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INTRODUCTION

"All young people, regardless of sexual orientation or identity, deserve a safe and supportive environment in which to achieve their full potential."
Harvey Milk

Today, educators in public schools and universities express their views on gender and sexuality at their peril. Professors are threatened with termination for refusing to use transgender students' gender-affirming pronouns.[1] Schoolteachers are told not to wear clothing with rainbows, to remove LGBTQ+ safe-space stickers, and to hide photos of their same-sex spouses.[2] Fervent disagreement over the propriety of exposing students to queer topics and affirming students' queer identities has led to rampant regulation of educators' speech on these matters from authorities across the political spectrum. The result is a veritable minefield for teachers and professors to navigate.

In liberal areas, many institutions have enacted "pronoun policies" affirmatively requiring teachers and professors to use students' gender-affirming names and pronouns in the classroom.[3]

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1. Meriwether v. Hartop, 992 F.3d 492, 501–02 (6th Cir. 2021).

2. *See* Matt Lavietes, *As Florida's 'Don't Say Gay' Law Takes Effect, Schools Roll Out LGBTQ Restrictions*, NBC NEWS (June 30, 2022, 11:18 AM), https://www.nbcnews.com/nbc-out/out-news/floridas-dont-say-gay-law-takes-effect-schools-roll-lgbtq-restrictions-rcna36143 [https://perma.cc/E3RS-3H8D] ("Representatives of the Orange County Classroom Teachers Association accused school officials Monday of verbally warning educators not to wear rainbow articles of clothing and to remove pictures of their same-sex spouses from their desks and LGBTQ safe space stickers from classroom doors.").

3. *See, e.g.*, *Meriwether*, 992 F.3d at 498; Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 821–22 (S.D. Ind. 2021), *aff'd*, 64 F.4th 861 (7th Cir. 2023), *vacated*, No. 21-2475, 2023 WL 4842324 (7th Cir. 2023); *cf.* Eesha Pendharkar, *Parents Are Suing*

These policies operate at all levels of education[4] and apply regardless of educators' personal beliefs about gender identity and the mutability thereof. Proponents of such policies and other gender-affirming measures[5] argue that they are necessary to reduce dangerously high rates of depression among transgender youth,[6] who are at far greater risk of suicidality than their cisgender peers.[7] Using gender-affirming names and pronouns is associated with stark decreases in symptoms of depression, suicidal ideation, and suicide attempts.[8] Liberal institutions thus

Schools Over Pronoun Policies. Here's What You Need to Know, EDUC. WK. (May 12, 2023), https://www.edweek.org/leadership/parents-are-suing-schools-over-pronoun-policies-heres-what-you-need-to-know/2023/05 [https://perma.cc/FK4A-8RQ7] (reporting the recent attempt of six parents and teachers to sue Harrisonburg City Public Schools "over its gender identity policy, which requires teachers to ask students for their preferred names and pronouns and then use them").

4. *See, e.g.*, *Meriwether*, 992 F.3d at 498 (university); Ricard v. USD 475 Geary Cnty., 2022 U.S. Dist. LEXIS 83742, at *5–6 (D. Kan. May 9, 2022) (middle school); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F. Supp. 3d 118, 126 (D. Md. Aug. 18, 2022), *vacated* 2023 U.S. App. LEXIS 21097 (4th Cir. Aug. 14, 2023) (elementary school); *Kluge*, 548 F. Supp. 3d at 821–22 (S.D. Ind. 2021) (high school).

5. These include measures allowing transgender students to use restrooms that align with their gender identity. *See* Laura J. Wernick et al., *Gender Identity Disparities in Bathroom Safety and Wellbeing Among High School Students*, 46 J. YOUTH & ADOLESCENCE 917, 927 (2017) (explaining that forcing transgender students to use restrooms that do not align with their gender identities, or that otherwise police their gender identities, negatively impacts their wellbeing). They also include measures providing gender-affirming medical treatment. *See* Skyler Rosselini et al., *Gender-Affirming Care for Youth Is Good Health Care*, NAT'L HEALTH L. PROGRAM (Mar. 15, 2021), https://healthlaw.org/gender-affirming-care-for-youth-is-good-health-care/ [https://perma.cc/QJ2M-U6UG] (["P]roviding youth with gender-affirming care is clinically sound and the most effective way to alleviate symptoms of gender dysphoria, which can cause serious mental distress, anxiety, and depression when untreated.").

6. *See* Tanya Albert Henry, *For Transgender Kids, Gender-Affirming Names Can Be Lifesaving*, AM. MED. ASS'N (June 4, 2021), https://www.ama-assn.org/delivering-care/population-care/transgender-kids-gender-affirming-names-can-be-lifesaving [https://perma.cc/5WF9-NPKU].

7. *See* Daniel Shumer, *Health Disparities Facing Transgender and Gender Nonconforming Youth Are Not Inevitable*, 141 PEDIATRICS 1, 1 (2018) (reporting "a two-to threefold increase in the risk of negative mental health outcomes in transgender youth, including depression, suicidal ideation, and suicide attempt"); *see also* Amit Paley, *National Survey on LGBTQ Youth Mental Health*, TREVOR PROJECT (2021), https://www.thetrevorproject.org/survey-2021/?section=Introduction [https://perma.cc/TX2P-XABW] (asserting that more than seventy-five percent of transgender and nonbinary youth respondents reported symptoms of generalized anxiety disorder and that more than sixty-six reported symptoms of major depressive disorders within the two weeks prior to the survey).

8. *See* Stephen T. Russell et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior Among Transgender Youth*, 63 J. ADOLESCENT HEALTH 503, 503–05 (2018) (finding that, across multiple contexts, transgender youth who were able to use their chosen names and pronouns reported substantially lower levels of depressive symptoms, suicidal ideation, and suicidal behavior than those who were unable to use chosen names and pronouns).

cast pronoun policies as key to their pedagogical missions of creating welcoming educational environments and caring for students' overall well-being.[9]

Conservative states, on the other hand, are increasingly moving to stifle discussion and affirmation of queer identities in the classroom through anti-queer curriculum laws.[10] Commonly referred to as "Don't Say Gay"[11] or "No Promo Homo"[12] laws in the literature, these laws—which are currently in place in eleven states—operate to restrict teachers' ability to discuss gender and sexuality with students or require teachers to denigrate same-sex relationships.[13] Early iterations applied only to the contexts of sex-

9. *See, e.g.*, *John & Jane Parents 1*, 622 F. Supp. 3d 118, at 124 (school district adopted its pronoun policy to create "a safe, welcoming school environment where students . . . feel accepted and valued"); *Kluge*, 548 F. Supp. 3d at 822 (school district enacted its pronoun policy because "it afforded dignity and showed empathy toward transgender students who were considering or in the process of gender transition").

10. Anti-queer curriculum laws have thus far been limited to the K-12 context. But conservative lawmakers in states like Florida have exhibited a clear appetite to regulate public university professors' classroom speech on contentious political topics. *See* FLA. STAT. ANN. § 1000.05(4)(a) (prohibiting public school teachers and public university professors from discussing certain disfavored ideas about race, sex, color, and national origin in the classroom); *see also* Defs.' Resp. in Opp'n to Pls.' Mot. for a Prelim. Inj. at 10–19, Pernell v. Fla. Bd. of Govs. of the State Univ. Sys., No. 4:22-cv-304, 2022 U.S. Dist. LEXIS 208374 (N.D. Fla. Nov. 17, 2022) (asserting absolute state power to regulate public university professors' curricular speech). As such, public colleges and universities may soon be subject to similar curriculum laws. Indeed, in February 2023, a Florida legislator proposed a bill that would require state universities to eliminate any minors or majors in "Gender Studies . . . or any derivative [thereof]." 2023 Fla. Laws No. 999 (H.B. 999). The wholesale prohibition of instruction on such topics may not be far behind.

11. *See, e.g.*, Paige Hamby Barbeauld, *"Don't Say Gay" Bills and the Movement to Keep Discussion of LGBT Issues out of Schools*, 43 J.L. & EDUC. 137, 137–39 (2014); Jillian Lenson, *Litigation Primer Attacking State "No Promo Homo" Laws: Why "Don't Say Gay" Is Not O.K.*, 24, TUL. J.L. & SEXUALITY 145, 147 (2015); Ian Milhiser, *The Constitutional Problem with Florida's "Don't Say Gay" Bill*, VOX (Mar. 15, 2022, 12:30 PM), https://www.vox.com/2022/3/15/22976868/dont-say-gay-florida-unconstitutional-ron-desantis-supreme-court-first-amendment-schools-parents [https://perma.cc/E2M9-YRX8].

12. *See, e.g.*, Ashley McGovern, Note, *When Schools Refuse to "Say Gay": The Constitutionality of Anti-LGBTQ "No Promo Homo" Public School Policies in the United States*, 22 CORNELL J.L. & PUB. POL'Y 465, 467 (2012); Madelyn Rodriguez, *See No Evil, Hear No Evil, Speak No Evil; Stemming the Tide of No Promo Homo Laws in American Schools*, 8 MOD. AM. 29, 29 (2013); Brian Barrett & Arron M. Bound, *A Critical Discourse Analysis of* No Promo Homo *Policies in US Schools*, 51 EDUC. STUD. 267, 267 (2015); Ronny Hamed-Troyansky, *Erasing "Gay" from the Blackboard: The Unconstitutionality of "No Promo Homo" Education Laws*, 20 U.C. DAVIS J. JUV. L. & POL'Y 85, 89 (2016); Kameron Dawson, *Teaching to the Test: Determining the Appropriate Test for First Amendment to "No Promo Homo" Education Policies*, 13 TENN. J.L. & POL'Y 435, 437 (2019).

13. As detailed below, eight states restrict discussion of these topics: Alabama, ALA. CODE § 16-40A-5(a) (2022); Arkansas, ARK. CODE. ANN. § 6-16-157 (2023); Florida, FLA. STAT. § 1001.42(8)(c)(3) (2022); Indiana, IND. CODE. § 20-30-17-2 (2023); Iowa, IOWA CODE § 279.80 (2023); Kentucky, KY. REV. STAT. ANN. § 158.1415 (2023); Louisiana, LA. STAT. ANN. § 17:281(A)(3)–(4) (2022); and North Carolina, N.C. GEN. STAT. § 115C-76.55. Three

and health-related education.[14] In recent years, however, several states have enacted or introduced anti-queer curriculum laws that sweep more broadly, limiting teachers' discussion of gender and sexuality in any context. In March 2022, Florida enacted a first-of-its-kind "Parental Rights in Education Act," forbidding all "[c]lassroom instruction . . . on sexual orientation or gender identity" before the fourth grade and requiring that any such instruction thereafter be "age-appropriate."[15] Six other states have followed suit with copycat curriculum laws,[16] and Florida has since

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states—Mississippi, Oklahoma, and Texas—expressly require sexual educators to denigrate homosexuality by teaching that it is unnatural, MISS. CODE ANN. § 37-13-171(2)(e) (2022); the fount of sexually transmitted diseases, OKLA. STAT. tit. 70 § 11-103.3(D) (2022); or socially unacceptable, TEX. HEALTH & SAFETY CODE ANN. §§ 85.007(B), 163.002(8) (2022).

Clifford Rosky argues that, in addition to laws restricting the discussion of LGBTQ+ topics or requiring denigration of LGBTQ+ people, anti-queer curriculum laws also include those that require educators to affirmatively promote sexual abstinence or heterosexual relationships. *See* Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1463–64 (2017). The author does not contest Rosky's broader definition of anti-queer curriculum laws. For the purposes of this Note, however, the author uses the term "anti-queer curriculum laws" to refer only to laws restricting discussion of gender identity and sexual orientation or requiring the denigration of LGBTQ+ people.

14. Louisiana, for example, forbids its public schools from using "any sexually explicit materials depicting . . . homosexual activity" in sex education courses. LA. STAT. ANN. § 17:281(A)(3)–(4) (2022). Mississippi requires sexual educators to teach "the current state law related to . . . homosexual activity," MISS. CODE ANN. § 37-13-171(2)(e) (2022), including that sodomy is a "detestable and abominable crime against nature." *Id.* § 96-29-59 (2022). Oklahoma and Texas similarly mandate that sexual educators instruct students that same-sex relations are "primarily responsible for contact with the AIDS virus," OKLA. STAT. tit. 70 § 11-103.3(D) (2022), or "not an acceptable lifestyle." TEX. HEALTH & SAFETY CODE ANN. § 85.007(B) (2022); *see also id.* § 163.002(8) (requiring that "[c]ourse materials and instruction relating to sexual education or sexually transmitted diseases should include . . . that homosexuality is not a lifestyle acceptable to the general public"). For a detailed history of anti-queer curriculum laws, *see* Rosky, *supra* note 13, at 1476–1501.

15. 2022 Fla. Laws No. 1557 (H.B. 1557).

16. *See* ALA. CODE § 16-40A-5(a) (2023) ("An individual or group of individuals providing classroom instruction to students in kindergarten through the fifth grade at a public K-12 school shall not engage in classroom discussion or provide classroom instruction regarding sexual orientation or gender identity in a manner that is not age appropriate or developmentally appropriate for students in accordance with state standards."); ARK. CODE. ANN. § 6-16-157 (2023) (prohibiting instruction on gender identity and sexual orientation, among other topics, before grade five); IND. CODE § 20-30-17-2 (2023) (prohibiting instruction on human sexuality through grade three); IOWA CODE § 279.80 (2023) (prohibiting "any program, curriculum, test, survey, questionnaire, promotion, or instruction relating to gender identity or sexual orientation" through grade six); KY. REV. STAT. ANN. § 158.1415 (prohibiting instruction on human sexuality through grade five); N.C. GEN. STAT. § 115C-76.55 (prohibiting instruction on gender identity, sexual activity, or sexuality through grade four).

Florida's Act has inspired many additional conservative attempts to enact expanded anti-queer curriculum laws. A proposed federal bill would have denied federal funds to "any sexually-oriented program, event, or literature for children under the age of 10" and defines "sexually-oriented material" to include "any topic involving gender identity, gender dysphoria, transgenderism, sexual orientation, or related subjects." Stop the Sexualization

expanded its Act to prohibit almost all instruction on sexual orientation and gender identity through the twelfth grade.[17] The actual and desired effect of these laws is to chill classroom speech acknowledging the existence of queer people and same-sex relationships.[18] Proponents of anti-queer curriculum laws laud these results, often citing a need to preserve parental control over children's exposure to LGBTQ+ topics.[19] Others, in more openly anti-queer terms, argue that these laws fulfill schools' duty to

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of Children Act, H.R. 9197, 117th Cong. § 4(a) (2022). Bills proposed in Wyoming and Ohio would have prevented inclusion of any instruction about sexual orientation or gender identity before the third or fourth grade, respectively. S.F. 0117, 67th Leg., Gen. Sess. (Wy. 2023); H.B. 616, 134th Gen. Assemb., Reg. Sess. (Ohio 2022). Bills in Oklahoma and Georgia would have prohibited such instruction through the fifth or sixth grade. H.B. 2546, 59th Leg., 1st Sess. (Okla. 2023); S.B. 613, 2022 Gen. Assemb., Reg. Sess. (Ga. 2022). A Texas bill would have gone even further, banning all instruction on gender identity and sexual orientation through the twelfth grade. H.B. 890, 88th Leg., Reg. Sess. (Tex. 2023). Bills proposed in Tennessee and South Carolina would have prohibited any classroom instruction that serves to "promote, normalize, support, or address lesbian, gay, bi-sexual, or transgender issues or lifestyles," H.B. 800, 112th Gen. Assemb., 2021–2022 Sess. (Tenn. 2022), or that involves topics including "sexual lifestyles, acts, or practices," including "gender identity or lifestyles." H.B. 4605, 124th Gen. Assemb., 2021–2022 Sess. (S.C. 2021). And Tennessee enacted a bill requiring express parental consent for any instruction on gender identity and sexual orientation, TENN. CODE ANN. § 49-6-1308, a measure that was also proposed in Missouri. S.B. 134, 102nd Gen. Assemb., 1st Reg. Sess. (Mo. 2023).

17. *See* FLA. STAT. ANN. § 1001.42(8)(c)(3) (prohibiting classroom instruction on sexual orientation and gender identity from pre-kindergarten through third grade, except as otherwise required by state academic standards); FLA. ADMIN. CODE. ANN. r. 6A-10.081(2)(a)(7) (prohibiting such instruction through twelfth grade "unless such instruction is . . . expressly required by state academic standards").

18. In the wake of Florida's "Parental Rights in Education Act," at least one school district rescinded its pronoun policy, which had required educators to affirm transgender and nonbinary students' identities. *See* Selene San Felice, *Sarasota Schools Change Pronouns Policy to Follow "Don't Say Gay,"* AXIOS (Aug. 17, 2022), https://www.axios.com/local/tampa-bay/2022/08/17/sarasota-schools-pronoun-policy-dont-say-gay [https://perma.cc/C2ZQ-7U9D]. Other districts have instructed teachers not to display LGBTQ+ safe space stickers. *See* Lavietes, *supra* note 2. Another repeatedly rejected resolutions to recognize LGBTQ+ history month, despite recognizing history months for other minority groups. *See* Second Am. Compl. at 29–31, M.A. v. Fla. St. Bd. of Educ., No. 4:22-cv-00134 (N.D. Fla. Feb. 15, 2023); *Miami-Dade school board votes against LGBTQ+ History Month*, CBS NEWS (Sept. 7, 2023, 3:02 PM), https://www.cbsnews.com/miami/news/miami-dade-school-board-votes-against-lgbtq-history-month/ [https://perma.cc/V27C-XL24].

19. The sponsor of the "Parental Rights in Education Act" in the Florida Senate, for example, stated that the law was needed in part because "parents are very concerned about the departure from the core belief systems and values." *Senate in Session*, FLA. SENATE, at 08:09:30–08:12:00 (Mar. 7, 2022, 10:00 AM), https://www.flsenate.gov/media/VideoPlayer?EventID=1_4gaky6b9-202203071000&Redirect=true [https://perma.cc/Y6JD-V4YK]. Governor Ron DeSantis similarly remarked that parents do not "want their kids to have transgenderism or something injected into classroom instruction." *Florida Governor DeSantis Defends Controversial 'Don't Say Gay' Bill*, CBS NEWS (Mar. 5, 2022, 9:26 AM), https://www.cbsnews.com/news/florida-governor-desantis-defends-dont-say-gay-bill/ [https://perma.cc/7AHM-9PWQ].

prevent the grooming and indoctrination of children by LGBTQ+ ideology[20] and to prevent the normalization of queer identities.[21] Such laws are thus part and parcel of the broader conservative movement to portray queer people and identities as endangering children.[22]

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20. Discussing the "Parental Rights in Education Act," Florida Governor Ron DeSantis explained that it was needed to combat the "indoctrination" of children by "woke gender ideology." Fox News, *DeSantis: Education Not Indoctrination*, YOUTUBE (Apr. 29, 2022), 4:12–6:40, https://www.youtube.com/watch?v=12IVeeq2ydk [https://perma.cc/46EM-HHQ3]. Governor DeSantis' Press Secretary described the "Parental Rights in Education Act" as an "Anti-Grooming Bill" and asserted that "[a]ny adult who wants to discuss sexual and gender identity topics with other people's 5- to 8-year-old children—while keeping this a secret from their parents—is either a groomer or is complicit in promoting an environment where grooming becomes normalized." Christina Pushaw (@ChristinaPushaw), TWITTER (Apr. 5, 2022, 9:12 AM), https://twitter.com/ChristinaPushaw/status/1511331024541782020 [https://perma.cc/RS68-CKYK]; *see also* Monica Hesse, *Fans of Florida's 'Don't Say Gay' Bill Have a New Favorite Word: 'Grooming,'* WASH. POST (Mar. 12, 2022, 6:00 AM), https://www.washingtonpost.com/lifestyle/2022/03/12/florida-dont-say-gay-bill [https://perma.cc/46Y7-QQYR] (describing various arguments in favor of the "Parental Rights in Education Act" as necessary to prevent grooming).

21. The sponsor of the "Parental Rights in Education Act" in the Florida House of Representatives, for example, criticized attempts to make "LGBTQ person[s] . . . 'mainstream'" as "just really out of line . . . with what the majority of Americans believe in and see." Jan Jekilek, *From Gender Theory Guides to 'Transition' Questionnaires—Florida State Rep. Joe Harding on the Fight for Parental Rights in Education*, EPOCH TIMES (Oct. 15, 2022), https://www.theepochtimes.com/from-gender-theory-guides-to-transitionquestionnaires-florida-state-rep-joe-harding-on-the-fight-for-parental-rights-in-education_4795734.html [https://perma.cc/PS5X-5DT7]. The sponsor of Alabama's copycat curriculum law said that the reason for the law was to prevent the "indoctrination" of students. Patrick Darrington, *Opponents Speak Out in Public Hearing on Expansion of "Don't Say Gay" Law*, ALA. POL. REP. (May 25, 2023, 9:28 AM), https://www.alreporter.com/2023/05/25/opponents-speak-out-in-public-hearing-on-expansion-of-dont-say-gay-law/ [https://perma.cc/3Z6B-UXVL].

22. This movement has seen a slate of measures censoring books about LGBTQ+ people in public schools or libraries and restricting drag performances. *See, e.g.*, Trudy Ring, *16 States Pushing 'Don't Say Gay' Bills and Censorship Laws Right Now*, ADVOCATE (Mar. 29, 2022), https://www.advocate.com/law/2022/3/29/16-states-pushing-dont-say-gay-bills-and-censorship-laws-right-now#media-gallery-media-1 [https://perma.cc/642N-TYRZ] (describing censorship measures); Scott McFetridge et al., *School Library Book Bans Are Seen as Targeting LGBTQ Content*, ASSOCIATED PRESS (Mar. 20, 2023, 11:23 AM), https://apnews.com/article/lgbtq-book-bans-91b2d4c086eb082cbecfdda2800ef29a [https://perma.cc/MFS3-66DN] (describing rise in bans of LGBTQ+ books); TENN. CODE. ANN. §§ 7-51-1401, 7-51-1407(c)(1) (2023) (prohibiting "adult cabaret performances," defined to include "male or female impersonators," on public property or in locations where they could be viewed by minors); H.B. 359, 68th Leg. (Mont. 2022) (prohibiting performances by "drag kings" or "drag queens" on public property or in any school or library receiving state funding). And at least nineteen states have enacted laws prohibiting best-practice medical care for transgender youth. *See Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare/youth_medical_care_bans [https://perma.cc/FKU3-QQ9W]; *see also Attacks on Gender-Affirming and Transgender Health Care*, AM. COLL. PHYSICIANS (Apr. 24, 2023), https://www.acponline.org/advocacy/state-health-policy/attacks-on-gender-affirming-and-transgender-health-care [https://perma.cc/3BSC-JMS5].

Despite their opposing goals and contrasting partisan alignments, pronoun policies and anti-queer curriculum laws have both been challenged on the same grounds: as violations of educators' First Amendment speech rights. Conservative critics allege that pronoun policies unconstitutionally sanction educators whose misgendering speech expresses their sincere belief that gender is immutable and based on biological sex, impermissibly compelling the educators to endorse the opposite view when in the classroom.[23] Progressive opponents of anti-queer curriculum laws similarly argue that the laws violate the speech rights of educators by restricting their freedom to discuss gender and sexuality in the classroom.[24] Indeed, because both types of laws regulate publicly employed educators' curricular speech, they appear on their faces to be indistinguishable under the Free Speech Clause.[25]

This Note argues that pronoun policies and anti-queer curriculum laws can, in fact, be distinguished from one another under existing First Amendment standards based on the impact of the regulated classroom speech on the expression of transgender and nonbinary students, as well as on the overall health of the

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23. *See, e.g.*, Meriwether v. Hartop, 992 F.3d 492, 499–502 (6th Cir. 2021); Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 836–37 (S.D. Ind. 2021); Loudoun Cnty. Sch. Bd. v. Cross, 2021 Va. LEXIS 141, at *5–6 (Va. Aug. 30, 2021); Verified Compl. for Decl. and Inj. Relief at 23–26, Geraghty v. Jackson Local Sch. Dist. Bd. of Educ., No. 5:22-cv-2237 (N.D. Ohio Dec. 12, 2022); Compl. for Decl., Inj., and Add'l Relief at 37–40, Figliola v. Sch. Bd., No. CL22-1304 (Va. Cir. Ct. Dec. 2, 2022); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs., 2023 U.S. Dist. LEXIS 113818, at *4 (D. Wyo. June 30, 2023).

24. *See, e.g.*, Lenson, *supra* note 11, at 152–55 (asserting that schools lack a sufficient interest to impinge on educators' speech about these topics); Barbeauld, *supra* note 11, at 143–45 (arguing that anti-queer curriculum laws cannot be justified by a need to avoid disruption or "because the subject [of the regulated speech] is distasteful to the state").

25. Other challenges to such regulations also abound. Educators have sought exemptions to pronoun policies under the Free Exercise Clause, asserting that the policies impinge on their sincere religious beliefs as to the nature of sex and gender. *See, e.g.*, *Kluge*, 432 F. Supp. 3d at 840–41; Vlaming v. West Point Sch. Bd., 480 F. Supp. 3d 711, 716 (E.D. Va. 2020). Parents have challenged pronoun policies under the Fourteenth Amendment as violating their substantive due process right to control the upbringing of their children because some pronoun policies either do not require parental assent to transgender students' use of new names and pronouns or prohibit educators from disclosing a student's gender identity to their parents. *See, e.g.*, Ricard v. USD 475 Geary Cnty., 2022 U.S. Dist. LEXIS 83742, at *9–10 (D. Kan. May 9, 2022); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 2022 U.S. Dist. LEXIS 149021, at *10 (D. Md. Aug. 18, 2022), *vacated* 2023 U.S. App. LEXIS 21097 (4th Cir. Aug. 14, 2023). Opponents of anti-queer curriculum laws have asserted that such laws are motivated by discriminatory animus and thus violate the Fourteenth Amendment's Equal Protection Clause. *See, e.g.*, Second Am. Compl., *supra* note 18, at 68–72; Rosky, *supra* note 13, at 1517–34. Others challenge curriculum laws on grounds of vagueness or overbreadth. *See, e.g.*, Second Am. Compl., *supra* note 18, at 75–77; Compl. for Decl. and Inj. Relief/Notice of Claim of Unconstitutionality of Statute at 9, Smiley v. Jenner, No. 1:23-cv-1001 (S.D. Ind. June 9, 2023); Milhiser, *supra* note 11.

classroom as an expressive environment. Part I summarizes the two relevant standards that govern regulations of educators' curricular speech. Part II explains that, under both standards, regulations of educators' curricular speech can be distinguished when viewed through an egalitarian lens, which accounts for the effect of the regulated speech on the expression of students and the overall expressive environment of the classroom. First Amendment jurisprudence often forecloses such egalitarian arguments, but the idiosyncrasies of the standards governing public educators' speech uniquely allow for their consideration. Part III examines the application of this egalitarian framework to pronoun policies and anti-queer curriculum laws. It asserts that pronoun policies are constitutionally justified by the negative effects of misgendering, which chills the classroom participation and gender expression of transgender and nonbinary students, poisoning the broader speech environment of the classroom. Conversely, anti-queer curriculum laws violate the First Amendment because they restrict educators' speech without attendant benefits to third parties.

I. FIRST AMENDMENT STANDARDS FOR REGULATIONS OF CLASSROOM SPEECH

Though the Supreme Court has frequently discussed the First Amendment rights of students,[26] it has yet to specify a standard for evaluating regulations of educators' curricular speech in public schools and universities. The courts of appeals consequently vary in their approaches, adopting one of two standards developed in other contexts. Most apply the public-employee speech doctrine established in *Pickering v. Board of Education*[27] and its progeny. But a minority instead rely on *Hazelwood School District v. Kuhlmeier*'s[28] standard for school-sponsored student speech,

26. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511–14 (1969) (discussing schools' ability to restrict students' private expression on school premises); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681–86 (1986) (discussing schools' ability to regulate students' lewd, indecent, or offensive speech); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–73 (1988) (discussing schools' ability to regulate students' expression in school-sponsored media).

27. 391 U.S. 563, 575 (1968).

28. 484 U.S. 260, 273 (1988).

extending it to cover speech by educators bearing the imprimatur of the institution.[29]

Though their particularities differ, both standards share the same core concern: ensuring that the state can maintain an effective learning climate in its public classrooms. But what speech by educators constitutes a sufficient threat to the educational environment to warrant restriction is often unclear, making it difficult to parse the constitutionality of different regulations of educators' speech.[30] This Part summarizes *Pickering* and *Hazelwood* as applied to the classroom contexts. Part II explains that the standards' uncertainties can be resolved by hinging the extent of educators' First Amendment protections on the effect their speech has on students' own expression and the overall expressive environment of the classroom.

A. *PICKERING* AND THE PUBLIC-EMPLOYEE SPEECH DOCTRINE

In a majority of circuits, courts evaluate regulations of public-school teachers' and public-university professors' speech in the classroom under the public-employee speech doctrine first

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29. At least one scholar has argued that a third doctrinal approach to regulations of educators' classroom speech exists, modeled on the government speech doctrine developed in *Rust v. Sullivan*, 500 U.S. 173, 193–95 (1995) and *Rosenberger v. University of Virginia*, 515 U.S. 819, 833–34 (1995). *See* Nicholas K. Tygesson, Note, *Cracking Open the Classroom Door: Developing a First Amendment Standard for Curricular Speech*, 107 NW. U. L. REV. 1917, 1932–34 (2013). Under this approach, educators' speech is deemed to be speech by the government lacking any First Amendment protection, as "when the government is the speaker, in the sense that the government is conveying a particular message through a person, that person receives no First Amendment protection." Cal. Teachers Ass'n v. Bd. of Educ., 271 F.3d 1141, 1149 n.6 (9th Cir. 2001). But the only two courts of appeals to adopt this approach—the Third and Ninth Circuits—have since abandoned it in favor of the public-employee speech doctrine. *Compare* Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1013–16 (9th Cir. 2000) (treating a public educator's curricular speech as unprotected "government" speech), *and* Edwards v. California Univ., 156 F.3d 488, 491–92 (3d. Cir. 1998) (same), *with* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 960–61 (9th Cir. 2011) (adopting *Pickering* as the test governing public educators' curricular speech), *and* Borden v. Sch. Dist., 523 F.3d 153, 168–69 (3d Cir. 2008) (same). As such, it does not merit discussion in this Note.

30. *See, e.g.*, Tygesson, *supra* note 29, at 1921 (lamenting the lack of clarity and inconsistency in lower courts' treatment of public educators' curricular speech); *see also* Jason R. Wiener, *The Right to Teach, the Right to Speak, and the Right to Be a Valuable Contributor to a Child's Upbringing*, 32 W. ST. U. L. REV. 105, 106 (2004) (concluding "that courts have equivocated and acted with uncertainty by applying a hierarchy of standards and disparate levels of protection" to public schoolteachers' speech); Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 16–19 (2001) (describing the "confusion among the circuits" over the appropriate standard to govern public educators' curricular speech).

established in *Pickering v. Board of Education*.[31] Under that doctrine, a public employee is eligible for First Amendment speech protections if she speaks both (1) as a private citizen and (2) on a matter of public concern.[32] A government employer may only restrict such expression if (3) the government's regulatory interest in maintaining the efficiency of its public services outweighs the speech interests of the employee.[33] This section summarizes federal courts' treatment of each of these three prongs.

1. *Determining Whether Curricular Speech Is Spoken "as a Citizen"*

To receive any First Amendment protection for their speech, a public employee must speak as a private citizen, rather than in their public capacity. In *Garcetti v. Ceballos*, the Supreme Court clarified that, when public employees speak "pursuant to their official duties," they are not speaking as citizens, and are thus "not insulate[d] . . . from employer discipline."[34] But the *Garcetti* Court declined to decide whether its analysis applied to "expression related to academic scholarship or classroom instruction," which may "implicate[ ] additional constitutional interests."[35] Every circuit court to apply the public-employee speech doctrine to public-university professors' in-class speech has thus held such speech to be exempt from *Garcetti*'s "official duties" test.[36]

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31. 391 U.S. 563, 575 (1968).

32. *See id.* at 568.

33. *See id.* at 573 ("In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."); Lane v. Franks, 573 U.S. 228, 236–37 (2014) (explaining that *Pickering* requires a court to "balance[e] the employee's interest in [their] speech against the government's efficiency interest).

34. 547 U.S. 410, 421 (2006).

35. *Id.* at 425; *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022) (acknowledging "questions of academic freedom may or may not involve additional First Amendment interests beyond those captured by [*Garcetti*'s] framework.").

36. The Second, Fourth, Fifth, Sixth, and Ninth Circuits have each applied an "academic exception" to *Garcetti* to find that professors' speech related to scholarship or teaching is protected citizen-speech for First Amendment purposes. *See* Heim v. Daniel, No. 22-1135-cv, 2023 WL 5597837, at *10–12 (2d Cir. Aug. 30, 2023); Inara Scott et al., *First Do No Harm: Revisiting* Meriwether v. Hartop *and Academic Freedom in Higher Education*, 71 AM. U. L. REV. 977, 1021 (2022) (citations omitted) (summarizing the other circuits' approaches). The Third and Seventh Circuits have also acknowledged the existence of such an exception in cases involving professorial speech unrelated to academic scholarship or teaching, though they found the exception inapplicable to the immediate circumstances. *See* Abcarian v. McDonald, 617 F.3d 931, 938 n.5 (7th Cir. 2010); Gorum v. Sessoms, 561 F.3d

Courts and scholars are divided, however, as to whether *Garcetti* similarly exempts schoolteachers' curricular speech in public K-12 classrooms from its "official duties" test. The Fourth Circuit has held that it does,[37] but the Fifth, Sixth, Seventh, and Ninth Circuits treat K-12 educators' classroom speech as unprotected speech in the educators' official capacities.[38] Those courts' differential treatment of speech in the K-12 and university contexts stems from their understanding of the divergent roles of each type of institution. Students willingly enter the university

179, 186 n.6 (3d. Cir. 2009). No circuit has interpreted *Garcetti* to deny First Amendment protections to public-university professors' classroom actions related to scholarship or teaching. *See* Gabrielle Dohmen, Comment, *Academic Freedom and Misgendered Honorifics in the Classroom*, 89 U. CHI. L. REV. 1557, 1569–70 (2022).

Florida recently asserted that *Garcetti* applies to its public-university faculty's curricular speech, denying any First Amendment protection against state regulation thereof. *See* Defs.' Resp. in Opp'n, *supra* note 10, at 11–12 ("[U]nder the square reasoning of Garcetti, educators in public universities do not have a First Amendment right to control the curriculum."). But most scholars agree with the judicial consensus that professors' curricular speech is that of citizens. *See, e.g.*, Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of* Garcetti v. Ceballos *to Public University Faculty*, 59 CATH. U. L. REV. 125, 165 (2009); Nick Cordova, *An Academic Freedom Exception to Government Control of Employee Speech*, 22 FEDERALIST SOC'Y REV. 284, 285 (2021); Michael A. Sloman, Note, *"A Kind of Continuing Dialogue": Reexamining the Audience's Role in Exempting Academic Freedom from* Garcetti*'s Employee Speech Doctrine*, 55 GA. L. REV. 935, 956–57 (2021). This consensus is motivated by the Supreme Court's "long recogni[tion] that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." Sloman, *supra* at 949–50 (quoting Grutter v. Bollinger, 539 U.S. 306, 329 (2003); *see also* Tepper & White, *supra* at 166 (arguing that *Garcetti* does not "conform[ ] to well-established institutional norms of academic freedom").

37. *See* Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694 n.11 (4th Cir. 2007).

38. The Sixth and Seventh Circuits have expressly applied *Garcetti* to K-12 teachers' classroom speech, denying it any First Amendment protection. *See* Tess Bissell, *Teaching in the Upside Down: What Anti-Critical Race Theory Laws Tell Us About the First Amendment*, 75 STAN. L. REV. 205, 233–34 (2023). Though the Fifth and Ninth Circuits have not addressed the particular applicability of *Garcetti* to such expression, their cases applying the *Pickering* framework in the K-12 context make clear that teachers' in-class expression is unprotected employee-speech instead of protected citizen-speech. *See, e.g.*, Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 799 (5th Cir. 1989) ("If the nature of the speech is purely private, such as a dispute over one employee's job performance, a nontenured school teacher enjoys no first amendment protection as to that speech."); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966–68 (9th Cir. 2011) ("If Johnson spoke as any ordinary citizen might, then our inquiry continues. But if Johnson's speech 'owes its existence' to his position as a teacher, then Johnson spoke as a public employee, not as a citizen, and our inquiry is at an end.") (citation omitted) (quoting *Garcetti*, 547 U.S. at 411).

Though the Second Circuit has held that university professors' speech related to scholarship and teaching is exempt from *Garcetti*, see *Heim*, 2023 WL 5597837, at *10–12, it has repeatedly declined to determine whether or how *Garcetti* applies to the speech of K-12 teachers. *See* Panse v. Eastwood, 303 F. App'x 933, 935 (2d Cir. 2008); Lee-Walker v. New York City Dep't of Educ., 712 F. App'x. 43, 45 (2d Cir. 2017).

classroom as a "marketplace of ideas," the preservation of which turns on professors' ability to speak freely.[39] By contrast, they reason, students are forced to enter K-12 classrooms to learn societal values that should be controlled by democratically accountable school boards, not subject to the idiosyncratic whims of individual teachers.[40] But many scholars criticize the application of *Garcetti* to schoolteachers' curricular speech as needlessly eviscerating teachers' First Amendment speech rights in the classroom, given that any governmental interest in regulating teachers' speech is adequately accounted for by *Pickering*'s balancing analysis.[41] And the Fourth Circuit's less extreme approach, offering a limited shield to K-12 teachers' curricular speech instead of categorically denying protection, better comports with the Supreme Court's bolstering of school employees' speech rights outside the classroom.[42]

This Note agrees that *Garcetti* is too blunt an instrument to account for the unique constitutional concerns that arise in the classroom context. It therefore adopts the Fourth Circuit's

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39. *See* Meriwether v. Hartop, 992 F.3d 492, 504–05 (6th Cir. 2021) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

40. *See* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479–80 (7th Cir. 2007); *see also Johnson*, 658 F.3d at 968 (noting that teachers, as agents of the Sate, "exert[ ] great authority and coercive power [due to] mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure") (quoting Edwards v. Aguillard, 482 U.S. 578, 584 (1987)); Paul Forster, *Teaching in a Democracy: Why the* Garcetti *Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 698–708 (2010/2011) (arguing that subjecting K-12 educators' speech to *Garcetti* does not unduly infringe upon teachers' speech rights or on norms of academic freedom).

41. *See, e.g.*, Stephen Elkind & Peter Kauffman, *Gay Talk: Protecting Free Speech for Public School Teachers*, 43 J.L. & EDUC. 147, 149–50 (2014) (explaining that *Pickering*'s balancing test is a more refined "chisel" that is preferable to the categorical "hammer" of *Garcetti*); Rosina E. Mummolo, Note, *The First Amendment in the Public School Classroom: A Cognitive Theory Approach*, 100 CORNELL L. REV. 243, 258 (2014) (arguing that *Pickering*'s balancing test better accounts for the varying strength of schools' regulatory interests depending on the age of the K-12 students exposed to a teacher's speech); Benjamin C. Galea, Note, *Getting to "Sometimes": Expanding Teachers' First Amendment Rights Through "*Garcetti*'s Caveat,"* 62 CASE W. RSRV. L. REV. 1205, 1235–36 (2012) (explaining that *Pickering* balancing maintains sufficient government control of in-school speech while better preserving the "robust exchange of ideas" in the classroom); Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 62 (2008) (lamenting that *Garcetti* "may ultimately prove the death knell for any meaningful First Amendment rights for classroom related communications made by teachers").

42. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424–25 (2022) (narrowing *Garcetti* and holding that a high-school football coach did not speak pursuant to his official duties even where he spoke on school grounds, during his work hours, and in a short period in between his performance of official responsibilities).

approach, treating educators' speech in both K-12 and university classrooms as excepted from *Garcetti* and eligible for protection by the First Amendment.[43]

2. *Determining Whether Curricular Speech Addresses a "Matter of Public Concern"*

The courts of appeals also disagree as to whether and when educators' classroom speech addresses a matter of public concern such that it remains eligible for First Amendment protection under *Pickering*'s balancing analysis. The Supreme Court has articulated a broad standard, casting speech as pertaining to a matter of public concern "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest[.']"[44] Most courts of appeals correspondingly define "matters of public concern" broadly in the context of educators' classroom speech.[45]

Under this majority approach, educators' classroom speech about gender and sexuality addresses a matter of sufficiently public concern to satisfy *Pickering*'s second step. Indeed, the Supreme Court has already indicated that "sexual orientation and gender identity" are "sensitive political topics" and "undoubtedly matters of profound 'value and concern to the public,'" which merit protection under *Pickering*.[46] Anti-queer curriculum laws expressly regulate speech on the matters of public concern of gender and sexuality.[47] Pronoun policies arguably have the same

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43. To the extent that courts reject these criticisms and apply *Garcetti* to educators' classroom speech, however, the arguments in Parts II and III are foreclosed.

44. Lane v. Franks, 573 U.S. 228, 241 (2014) (quoting Snyder v. Phelps, 562 U.S. 443, 452 (2011)) (further citations omitted). Under this definition, speech addresses a matter of public concern so long as it has more than "purely private significance," *Snyder*, 562 U.S. at 452, and is not "solely in the individual interest of the speaker and its specific [ ] audience." Dun & Bradstreet, Inc. v. Greenmass Builders, Inc., 472 U.S. 749, 762 (1985).

45. *See, e.g.*, Heim v. Daniel, No. 22-1135-cv, 2023 WL 5597837, at *12–13 (2d Cir. Aug. 30, 2023) (explaining that speech that has a "broader public purpose" almost invariably addresses a matter of public concern, even if the speech is "neither targeted toward nor consumed by the general public") (citation omitted); Demers v. Austin, 746 F.3d 402, 415 (9th Cir. 2014) ("We have adopted a 'liberal construction of what an issue of public concern is under the First Amendment.'") (quotation omitted); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 564–65 (4th Cir. 2011) ("For purposes of this inquiry, it does not matter 'how interesting or important the subject of an employee's speech is,' and 'the place where the speech occurs is [also] irrelevant.'") (alteration in original) (quotation omitted).

46. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2476 (2018) (quoting Snyder v. Phelps, 562 U.S. 443, 453 (2011)).

47. *See supra* note 16.

effect. As the Sixth Circuit explained in *Meriwether v. Hartop*, a policy that prohibits educators from misgendering students in the classroom restricts speech that "touch[es] on gender identity," a "hotly contested matter of public concern."[48] The Supreme Court of Virginia thus recently accepted that a schoolteacher's profession of his intent to misgender students was speech as a citizen on a matter of public concern, the restriction of which was governed by the *Pickering* balancing test.[49]

Two circuits, however, employ a narrower approach to determining whether educators' classroom speech addresses a matter of public concern. The Fourth and Fifth Circuits look not only to the content of the speech but also to its surrounding circumstances, asking whether the speech is germane to the subject matter of the class being taught.[50] But these two circuits

48. 992 F.3d 492, 506 (6th Cir. 2021) (citing *Janus*, 138 S. Ct. at 2476); *accord* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966 (9th Cir. 2011) (holding speech concerning an educator's religious views to be "unquestionably of inherent public concern"). In *Meriwether*, the court considered and rejected an argument that pronoun policies do not regulate speech about the *general* nature of gender and sexuality, a matter of public concern, but restrict only speech about an *individual's* gender identity, a matter of purely private concern. *See Meriwether*, 992 F.3d at 508 ("In short, the use of gender-specific titles and pronouns has produced a passionate political and social debate. All this points to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive topic of public concern."). The court reasoned that a professor who was forced to affirm one transgender student's identity is necessarily compelled to validate the broader notion that gender identity is mutable and not based on sex assigned at birth. *See id.* ("That is, his mode of address was the message. It reflected his conviction that one's sex cannot be changed."). But one district court recently took the opposite view, finding that a high school teacher's use of individual students' names and pronouns did not address a matter of public concern because the speech would not "convey any large-scale messages to her students regarding transgender rights." Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs., 2023 U.S. Dist. LEXIS 113818, at *58–60 (D. Wyo. June 30, 2023). Though it has not yet addressed the issue, the Supreme Court is likely to adopt the Sixth Circuit's approach, as it has previously proven willing to construe speech to have broad symbolic meaning beyond the speech's express content. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, for example, the Court held that a baker's creation of a custom wedding cake for one same-sex couple expressed validation for all same-sex marriages. 138 S. Ct. 1719, 1731 (2018). Soo too with pronouns, the Court would probably find the use of one person's gender-affirming pronouns to imply broader acceptance of transgender and nonbinary individuals.

49. *See* Loudoun Cnty. Sch. Bd. v. Cross, 2021 Va. LEXIS 141, at *18–21 (Va. Aug. 30, 2021).

50. *See, e.g.*, Buchanan v. Alexander, 919 F.3d 847, 853 (5th Cir. 2019) (determining that a teacher's "use of discussion of her sex life and the sex lives of her students was not related to the subject matter or purpose of training Pre-K-Third grade teachers"); Lee v. York Cnty. Sch. Div., 484 F.3d 687, 697 (4th Cir. 2007) ("Thus, when a First Amendment free speech dispute involves a teacher-employee who is speaking within the classroom, the determination of whether her speech involves a matter of public concern is dependent on whether or not the speech is curricular.").

take opposing views as to the import of the speech's germaneness to the course materials—the Fifth Circuit finds educator's speech to address a matter of public concern only when it relates to the class,[51] but the Fourth Circuit finds speech to be on a matter of public concern only when it does *not* relate to the class.[52] Both approaches also seem at odds with Supreme Court jurisprudence: while the Court has stated that the circumstances surrounding a public employee's speech may sometimes be relevant to determining whether it touches on a matter of public concern,[53] the Court's inquiry generally gives dispositive weight to the content.[54]

Lower federal courts clearly lack consensus as to what constitutes speech on a matter of public concern in the classroom context. Given the Supreme Court's emphasis on content and its indication that gender and sexuality are matters of public concern, the best path is to treat all classroom speech touching on gender and sexuality—including educators' use of students' gendered names and pronouns—as addressing matters of public concern. The Sixth Circuit's content-driven approach in *Meriwether* is thus superior to the Fourth and Fifth Circuits' contradictory and context-driven approaches. This Note accordingly presupposes that the speech regulated by pronoun policies and anti-queer curriculum addresses matters of public concern.

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51. *See Buchanan*, 919 F.3d at 853. Proponents of this approach argue that requiring that educators' curricular speech be germane to the course materials to receive protection as speech on a matter of public concern substantially preserves educators' speech freedoms while preventing them from using their public roles to distract from the government's pedagogical mission. *See* Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 973–79 (2006).

52. *See Lee*, 484 F.3d at 697 ("[I]f contested speech is curricular in nature, it does not constitute speech on a matter of public concern . . . [because] disputes over curriculum constitute ordinary employment disputes[,] . . . [which] do not implicate speech on matters of public concern.") (citing Boring v. Buncombe, 136 F.3d 364, 368–69 (4th Cir. 1998)).

53. *See* Connick v. Myers, 461 U.S. 138, 147–48 (1983) (considering the "content, form, and context" of a statement).

54. *See, e.g.*, Lane v. Franks, 573 U.S. 228, 241 (2014) (finding that the content of speech "obviously involve[d] a matter of significant public concern" and that the "form and context of the speech" merely "fortif[ied] that [content-based] conclusion"); Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415 n.4 (1979) ("When a teacher speaks publicly, it is generally the *content* of his statements that must be assessed to determine whether they 'in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally.'") (quoting Pickering v. Bd of Educ., 391 U.S 563, 572–73 (1968)); *see also* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 965 (9th Cir. 2011) (explaining that, when determining whether speech addressed a matter of public concern, "content is king").

3. *Balancing Educators' and Institutions' Competing Interests*

According to *Pickering*, a public employee's speech as a citizen on a matter of public concern is protected against regulation if the employee's speech interests outweigh the government employer's interest in maintaining the efficient functioning of its public services.[55] In *Connick v. Myers*, the Supreme Court specified that, under this balancing test, a government employer retains "wide discretion and control over the management of its personnel and internal affairs," including terminating or sanctioning "employees whose conduct hinders efficient operation."[56]

In the context of educators' speech in public classrooms, lower federal courts generally define the relevant government interest as the interest in an "efficient and regularly functioning school system,"[57] which the courts consider "one of the most important public services offered by state government."[58] Courts consequently measure an educational institution's interests in

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55. 391 U.S. at 568. In dicta in its cases concerning compelled union dues as a form of compelled speech, the Supreme Court indicated that this traditional *Pickering* balancing test applies to cases involving a government employer's choice to retroactively sanction one employee for their speech, but might not apply to policies proactively compelling the speech of a class of employees. *See* Harris v. Quinn, 573 U.S. 616, 648 (2014); Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2474 (2018). As such, it is possible that the Court would find this balancing test not to govern pronoun policies or "Don't Say Gay" laws. But Justice Kagan noted in her *Janus* dissent that the Court is unlikely to modify the public-employee speech doctrine in this way outside the union speech context. *Janus*, 138 S. Ct. at 2494 (Kagan, J., dissenting).

In the classroom context, all but one lower federal court has continued to apply the ordinary *Pickering* balancing analysis, even where the policy at issue proactively regulates the speech of a large class of employees. *Compare, e.g.*, Meriwether v. Hartop, 992 F.3d 492, 509–12 (6th Cir. 2021) (applying ordinary *Pickering* balancing), *with* Fuller v. Warren Cnty. Educ. Serv. Ctr., 2022 U.S. Dist. LEXIS 25659, at *17 (S.D. Ohio Feb. 14, 2022) (quotation omitted) (applying a modified balancing test requiring that the state show a non-conjectural regulatory interest sufficient to outweigh the interests of "both potential audiences and a vast group of present and future employees" potentially subject to the regulation); *see also* Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs., 2023 U.S. Dist. LEXIS 113818, at *57–58 (D. Wyo. June 30, 2023) (explaining that "[w]hile *Janus* certainly left open the possibility that *Pickering* may not apply to cases where the government compelled the speech of its employees, the clear majority of courts to address the issue have concluded *Pickering* still applies to such claims") (citations omitted).

56. 461 U.S. at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part)).

57. Anderson v. Evans, 660 F.2d 153, 159 (6th Cir. 1981); *see also* Smith v. Sch. Dist., 158 F. Supp. 2d 599, 608 (E.D. Pa. 2001) (noting that the "fair and efficient functioning of the . . . School" is the relevant state interest in regulating a school volunteer's speech); *Fuller*, 2022 U.S. Dist. LEXIS 25659, at *23 (relevant interest was in "efficient operation of [the] school").

58. Stroman v. Colleton Cnty. Sch. Dist., 981 F.2d 152, 158 (4th Cir. 1992).

restricting educators' curricular speech based on evidence that the speech impedes classroom teaching or otherwise disrupts the learning environment.[59] Lower federal courts have found public educational institutions to have a sufficient interest in restricting educators' classroom speech in cases where educators use profanity and sexually suggestive language,[60] lecture on anti-war stances,[61] or express opinions on diversity[62] in a disruptive manner unrelated to the course materials.

Courts are particularly inclined to permit restriction of an educator's speech when the speech has a detrimental impact on the educator's relationship with students[63] or "prevent[s] them from learning."[64] Courts of appeals have often found universities to have a sufficient interest to regulate professors' classroom speech that harasses or humiliates students, as "[p]rofessors who harass and humiliate students cannot successfully teach them, and . . . [a] university that permits professors to degrade students . . . cannot fulfill its educational functions."[65] The same logic applies to the K-12 context, where students have even less power to avoid or challenge harassing speech by educators. Courts of appeals have thus upheld schools' and universities' prohibition or punishment of educators' use of racist or denigrating language in the classroom.[66]

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59. *See, e.g.*, Melzer v. Bd. of Educ., 196 F. Supp. 2d 229, 245 (E.D.N.Y. 2002) (concluding that a school had sufficient interest to terminate a teacher for his association with a pedophilic organization, which was protected by the First Amendment, because disclosure of that association was "likely to impair [his] effectiveness as a teacher and cause internal disruption if he were returned to the classroom"); Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407, 1418 (C.D. Cal. 1995) (ruling that a public college could restrict a professor's speech where "substantial, uncontroverted evidence show[ed] that the educational process was disrupted by [his] focus on sexual topics and teaching style").

60. *See Cohen*, 883 F. Supp. at 1418.

61. *See* Calef v. Budden, 361 F. Supp. 2d 493, 500 (D.S.C. 2005).

62. *See* Scallet v. Rosenblum, 911 F. Supp. 999, 1016 (W. D. Va. 1996), *aff'd*, 106 F.3d 391 (4th Cir. 1997).

63. *See, e.g.*, *Calef*, 361 F. Supp. 2d at 500 ("[T]he School District was justified in halting Calef's proselytizing her political beliefs to her students. Calef's expression had a detrimental impact on her relationships with the students in her class, some of whom had parents in the military and were concerned enough about her activities to share them with parents and administrators."); *Melzer*, 196 F. Supp. 2d at 251 ("[T]he Court . . . has found that Melzer was discharged solely because of the likely disruption to the internal operations of the school as a consequence of the public exposure of the activities in which he participated.").

64. Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407, 1418 (C.D. Cal. 1995).

65. Wozniak v. Adesida, 932 F.3d 1008, 1010 (7th Cir. 2019).

66. *See, e.g.*, Anderson v. Evans, 660 F.2d 153, 159 (6th Cir. 1981) ("Mrs. Anderson's [racist] remarks were made to two black colleagues on the faculty of a school whose entire student body was black. The likely effect on her hearers and the community served by the school was obvious."); Piggee v. Carl Sandburg Coll., 464 F.3d 667, 672 (7th Cir. 2006)

And the Southern District of West Virginia recently held that a high school had the requisite interest to terminate a teacher whose Islamophobic remarks offended her Muslim students.[67]

By contrast, courts usually find educators to have a more substantial interest—and to be protected against sanction for or regulation of their speech—when their speech does not evidently impede the "proper performance of [their] daily duties in the classroom or . . . interfere[ ] with the regular operation of the [institution] generally."[68] In *Meriwether*, the Sixth Circuit held that a university had an insufficient interest to prohibit a professor's misgendering of a transgender student in the ordinary course of his teaching, as the student continued to attend and participate in class and ultimately received a high grade.[69] A public school district similarly lacked an adequate interest to sanction a schoolteacher for her presentation on industrial hemp. Though controversial, the presentation had not been totally unrelated to the topic of the class nor unduly harmful to her relationship with students, and it was thus protected.[70] Another school was unable to prevent a teacher from wearing Black Lives Matter t-shirts merely because it offended a few parents, as it did not detract from his ability to "creat[e] a positive learning climate."[71]

Under the public-employee speech doctrine, the key factor in determining whether a public school or university can regulate an educator's classroom speech is thus the extent to which that speech threatens to degrade the educational environment.[72]

(finding that a college had a sufficient interest to restrict an instructor's denigrating speech about the sinfulness of homosexuality and the inferiority of certain religions, which offended several students).

67. *See* Durstein v. Todd, 2022 U.S. Dist. LEXIS 156119, at *26 (S.D. W.Va. Aug. 30, 2022).

68. Meriwether v. Hartop, 992 F.3d 492, 511 (6th Cir. 2021) (quoting Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 681 (6th Cir. 2001)).

69. *See id.* at 511–12.

70. *See* Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1053–55 (6th Cir. 2001).

71. *See* Fuller v. Warren Cnty. Educ. Serv. Ctr., 2022 U.S. Dist. LEXIS 25659, at *21 (S.D. Ohio Feb. 14, 2022).

72. This assumes, of course, that the speech is made as a citizen on a matter of public concern. *See infra* Parts I.A.1 and I.A.2.

B. *HAZELWOOD* AND THE SCHOOL-SPONSORED SPEECH DOCTRINE

A minority of circuits have yet to adopt the public-employee speech doctrine as the governing standard in cases involving regulations of educators' in-class speech and instead rely on the standard for restrictions of students' school-sponsored speech provided by *Hazelwood School District v. Kuhlmeier*.[73] Under *Hazelwood*, unless a school has "'by policy or by practice' opened [its] facilities 'for indiscriminate use by the general public' . . . or by some segment of the public," school facilities are not a public forum.[74] As such, student speech in a school forum (like a school newspaper) bears the imprimatur of the school, and school authorities can regulate that speech "so long as their actions are reasonably related to legitimate pedagogical concerns."[75]

Before the Supreme Court's decision in *Garcetti*, the First, Second, Seventh, Eighth, Tenth, and Eleventh Circuits extended the *Hazelwood* standard to cover educators' curricular speech. Those courts of appeals presumed such speech to bear the imprimatur of the school and upheld restrictions only if an institution could show that they were motivated by legitimate pedagogical concerns.[76] "Whether a school official's action is reasonably related to a legitimate pedagogical concern 'will depend on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation.'"[77] But this standard is generally a lenient one for educational institutions, acknowledging that "the education of the Nation's youth," including the speech to which they are exposed, "is primarily the responsibility of parents, teachers, and state and

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73. 484 U.S. 260, 273 (1988).

74. *Id.* at 267 (quoting Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 47 (1983)).

75. *Id.* at 273.

76. *See* Mary L. Krebs, Note, *Can't Really Teach: CRT Bans Impose Upon Teachers' First Amendment Pedagogical Rights*, 75 VAND. L. REV. 1925, 1937 (2022) (tracing the development of *Hazelwood* as a standard for public educators' instructional speech); *see also* Cal. Teachers Ass'n v. Bd. of Educ., 271 F.3d 1141, 1149 n.6 (9th Cir. 2001) (describing the pre-*Garcetti* circuit split).

77. Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723 (2d Cir. 1994) (quoting Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993)).

local school officials, and not of federal judges."[78] Courts have accordingly held legitimate pedagogical concerns to include "limiting commercial solicitation during class time,"[79] "teach[ing] by example the shared values of a civilized order,"[80] "preventing [a teacher] from using his position of authority to confirm an unsubstantiated rumor,"[81] and "ensuring that teacher employees exhibit professionalism and sound judgment."[82]

The Seventh Circuit has since transitioned to using the *Pickering-Garcetti* framework for public-employee speech in all cases involving educators' curricular speech,[83] and the Second Circuit has done so in cases involving university professors' speech.[84] But *Hazelwood* is still the operative standard in the First, Eighth, Tenth, and Eleventh Circuits,[85] and it might still govern regulations of K-12 educators' classroom speech in the Second Circuit.[86] Ultimately, it may only be a matter of time before these circuits abandon *Hazelwood* as the standard for in-class speech;[87] for now, however, it remains applicable to many

78. Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991) (quoting *Hazelwood*, 484 U.S. at 272–73).

79. Panse v. Eastwood, 303 F. App'x 933, 935 (2d Cir. 2008).

80. Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718, 724 (8th Cir. 1998) (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986)).

81. Miles v. Denver Public Sch., 944 F.2d 773, 778 (10th Cir. 1991).

82. *Id.*

83. *See, e.g.*, Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479–80 (7th Cir. 2007) (applying the *Pickering-Garcetti* framework in the K-12 context); Piggee v. Carl Sandburg Coll., 464 F.3d 667, 669–74 (7th Cir. 2006) (applying the *Pickering-Garcetti* framework in the postsecondary context).

84. *See* Heim v. Daniel, No. 22-1135-cv, 2023 WL 5597837, at *10–12 (2d Cir. Aug. 30, 2023).

85. None of these four circuits has yet addressed the appropriate standard for regulations of educators' classroom speech in the wake of *Garcetti*, so their pre-*Garcetti* cases applying *Hazelwood* remain good law.

86. In its only two cases on the matter since *Garcetti*, the Second Circuit declined to decide whether the public-employee speech doctrine or *Hazelwood*'s school-sponsored speech standard applies to educators' classroom speech—in each case, application of either standard yielded the same result. *See* Panse v. Eastwood, 303 F. App'x 933, 934–35 (2d Cir. 2008); Lee-Walker v. New York City Dep't of Educ., 712 F. App'x. 43, 45 (2d Cir. 2017). District courts in the Second Circuit thus continue to use its pre-*Garcetti* standard based on Hazelwood in at least some cases. *See, e.g.*, Kirby v. Yonkers Sch. Dist., 767 F. Supp. 2d 452, 460 (S.D.N.Y. 2011).

87. Outside the classroom, every circuit already applies the public-employee speech doctrine to educators' speech, denying First Amendment protection to such speech under *Garcetti*'s "official duties" test. *See, e.g.*, Alberti v. Carlo-Izquierdo, 548 F. App'x. 625, 638–39 (1st Cir. 2013) (unpublished) (denying protection to professor who sent a grievance letter to a superior); Weintraub v. Bd. of Educ., 593 F.3d 196, 201–03 (2d Cir. 2010) (denying protection to a teacher who filed a grievance challenging his negative performance reviews); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1204 (10th Cir. 2007) (denying protection for teachers' out-of-class conversations about their school's expectations

contested regulations of educators' classroom speech. The Northern District of Florida, for example, recently invoked *Hazelwood* to strike down a state law prohibiting the teaching of critical race theory in public colleges and universities.[88] Litigants defending Florida's anti-queer curriculum law against First Amendment challenges have also invoked *Hazelwood* as the appropriate standard.[89] As such, *Hazelwood* remains relevant, and where it applies, states and school districts may enact such regulations pursuant only to legitimate pedagogical concerns—i.e., to provide an effective education to students.

C. ALTERNATIVES TO *PICKERING* AND *HAZELWOOD*

Though scholars have proposed alternatives to *Pickering* and *Hazelwood*, most proposals retain those standards' main emphasis: allowing educational institutions to regulate educators' classroom speech as needed to maintain healthy learning environments. Suggested alternatives include, for example, an amalgamation of the two doctrines that substitutes *Hazelwood*'s "legitimate pedagogical concern" as the relevant state interest in *Pickering*'s balancing test.[90] Other scholars propose standards less favorable to institutions that require a heavier burden to justify regulating educators' classroom speech.[91] Still others would

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regarding student behavior, curriculum, and pedagogy); Gilder-Lucas v. Elmore Cnty. Bd. of Educ., 186 F. App'x 885, 887 (11th Cir. 2006) (unpublished) (denying protection for a questionnaire completed in the plaintiff's capacity as a sponsor of the cheerleading team).

88. *See* Pernell v. Fla. Bd. of Governors of the State Univ. Sys., 2022 U.S. Dist. LEXIS 208374, *28–30 (N.D. Fla. Nov. 7, 2022).

89. *See* Brief of Texas et al. as Amici Curiae in Support of Defs. at 8–13, M.A. v. Fla. St. Bd. Educ., No. 4:22-cv-00134 (N.D. Fla. Feb. 15, 2023) (arguing that *Hazelwood* does not permit an educator to depart from the authorized curriculum).

90. *See, e.g.*, Tygesson, *supra* note 29, at 1945 (arguing that "[w]hether curricular speech implicates First Amendment protections should be determined by balancing a teacher's interest in speaking on matters of legitimate pedagogical concern against the school's interest in providing an effective educational environment"); Gregory A. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, N.Y.U. L. REV. 693, 702 (1990) (proposing that courts implement a standard of review "that balances the teacher's interest as an educator and autonomous individual against the state's interest in educating its youth").

91. *See, e.g.*, Joseph J. Martins, *Tipping the* Pickering *Balance: A Proposal for Heightened First Amendment Protection for the Teaching and Scholarship of Public University Professors*, 25 CORNELL J. L. & PUB. POL'Y 649, 680 (2016) (offering a modified *Pickering* test for regulations of public university professors' curricular speech that weighs universities' and professors' competing interests "with a presumption in favor of the professor," which "[t]he university may rebut" only by "carry[ing] a heavy burden"); Dawson, *supra* note 12, at 455–56 (2019) (proposing a standard modeled on *Tinker*, under which

impose a threshold requirement that educators receive notice of proscribed speech before regulations become eligible for a balancing analysis.[92] Though they tweak the details of *Pickering* and *Hazelwood*, these proposals do not diverge from the core value of providing schools and universities the necessary flexibility to educate effectively.[93] Even under the vast majority of alternative standards, then, the critical determinant of a public school or university's constitutional ability to regulate an educator's speech in the classroom will be whether the regulated speech threatens to disrupt the educational environment.

II. AN EGALITARIAN FRAMEWORK FOR DISTINGUISHING AMONG CLASSROOM SPEECH REGULATIONS

Under *Pickering*, *Hazelwood*, or proposed alternative standards that employ similar analyses, different regulations of educators' classroom speech on the same broad topics may appear constitutionally indistinguishable. So long as the state proffers a meaningful belief that an educator's speech will threaten its pedagogical interest or disrupt the efficiency of the learning environment, these standards do not consider the political or ideological valence of the regulation. Differentiating pronoun

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regulations of curricular speech require "substantial evidence that supports the school districts' belief that the speech conflicts with the schools' mission and that it will cause a material disturbance in school activities"); JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit's Post-Garcetti Jurisprudence*, 63 U. MIAMI L. REV. 761, 792 (2009) (proposing to protect teachers' in-class expression unless it substantially disrupts the educational process).

92. *See, e.g.*, Kimberly Gee, *Establishing a Constitutional Standard that Protects Public School Teacher Classroom Expression*, 38 J.L. & EDUC. 409, 412–13 (2009) (arguing that schools should be required "to give a teacher fair warning of prohibited conduct prior to taking any retaliatory action against the teacher for engaging in that conduct"); Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. REV. 959, 1022 (2003) (asserting that schools could feasibly comply with a notice requirement); Daly, *supra* note 30, at 53–56 (proposing a modified *Hazelwood* test that hinges the extent of protection for an educators' speech, and the government interest needed to restrict that speech, on the level of notice the teacher received that their speech was prohibited).

93. There are, of course, more extreme proposals using categorical rules. But these give educational institutions total, not less, control over educators' speech. *See, e.g.*, Emily White Kirsch, *First Amendment Protection of Teachers' Instructional Speech: Extending* Rust v. Sullivan *to Ensure that Teachers Do Not Distort the Government Message*, 58 CLEV. ST. L. REV. 185, 206–15 (2010) (arguing that educators' speech in the classroom is, for First Amendment purposes, speech by the government itself and therefore without any constitutional protection).

policies from anti-queer curriculum laws thus becomes difficult as matter of constitutional law. Both policies regulate educators' speech about gender and sexuality out of a purported desire to avoid classroom disruption, whether it stems from the emotional harm imposed by misgendering or the alleged impropriety of discussing LGBTQ+ topics.[94] But advocates hoping to challenge one without imperiling the other may gain traction for a distinction using an "egalitarian" grammar of free speech argumentation. Such a grammar looks beyond the interests of an individual plaintiff challenging the regulation of their speech. It considers the government's interest in fostering a healthy expressive environment (i.e., classroom culture) and in protecting the First Amendment rights of third parties (i.e., students) whose own expression may be compromised by the plaintiff. This Part first describes how the egalitarian framework operates in the abstract before examining its potential utility and doctrinal viability in the context of the public classroom. Part III will discuss the framework's particular application to pronoun policies and to anti-queer curriculum laws.

A. THE EGALITARIAN ARGUMENT FOR CONSIDERING THIRD-PARTY SPEECH INTERESTS

In recent years, progressive legal scholars have lamented the Supreme Court's embrace of an "aggressive, libertarian" view of the First Amendment "to protect the privileges of the economically powerful and to resist legislative and executive efforts to advance the interests of the economically marginal."[95] This jurisprudential trend, commonly labeled "First Amendment Lochnerism"[96] in an analogy to *Lochner v. New York*,[97] serves not only to entrench economic disparities but more generally "to crowd out egalitarian norms across the social field, propagating inequalities" of all

94. *See supra* Introduction.

95. Jeremy Kessler & David Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1962–63 (2018).

96. *See, e.g.*, *id.* at 1962–64; Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. ONLINE 1241, 1244–45 (2020); *see also* Sorrell v. IMS Health, Inc., 564 U.S. 552, 591–92 (2011) (Breyer, J., dissenting) (analogizing the Court's decision to *Lochner*).

97. 198 U.S. 45 (1905) (holding that a state labor statute prescribing maximum working hours for bakers violated the workers' freedom to contract under the Fourteenth Amendment).

sorts.[98] The result has been a transformation of the First Amendment from a shield for the expression of disfavored speakers into a sword for the powerful to strike down campaign finance reforms,[99] labor laws,[100] antidiscrimination statutes,[101] and other measures aimed at ensuring political, social, and economic fairness.

Finding contemporary free-speech doctrines and the abstract values underlying them to be inadequate to combat First Amendment Lochnerism, progressive scholars like Professors Jeremy Kessler and David Pozen have sought to recover an older, "egalitarian" grammar of arguments in order to push back against the inegalitarian trend.[102] This grammar aims to convert the First Amendment into a tool that "alleviates, or at least does less to aggravate" political and socioeconomic inequality.[103] It does so, in part, by ameliorating the structural bias of traditional First Amendment jurisprudence, which frames disputes as involving only private parties whose expressive freedom has been impinged upon by the state and which ignores the impact of those disputes on the rest of society.[104] In other words, it situates free-speech disputes in the broader social context, accounting for the interests of those outside the courthouse.

One genre of argumentation using this grammar considers "speech on both sides," examining whether government restriction of one party's speech is justified due to the threat posed by that speech to the interests of third parties whose own speech is crowded out of the expressive field.[105] Those third parties tend to be disempowered individuals, like workers and students, who are easily smothered by more dominant speakers, like corporations and teachers. "Speech on both sides" arguments operate in two ways. First, they contend that the regulated party has no protected interest in stifling third parties' speech, diminishing the First Amendment protections owed to that party. Second, they claim that shielding third-party expression from suppression by

98. Kessler & Pozen, *supra* note 95, at 1963.
99. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 372 (2010); Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 727–28 (2011).
100. *See, e.g.*, Harris v. Quinn, 573 U.S. 616, 648 (2014); Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2459–60 (2018).
101. *See, e.g.*, 303 Creative v. Elenis, 143 S. Ct. 2298, 2321–22 (2023).
102. *See* Kessler & Pozen, *supra* note 95, at 1994–2006.
103. *Id.* at 1978.
104. *See id.* at 1994.
105. *See id.*

the regulated party's speech is a valid state concern, bolstering the state's regulatory interest.[106] Professor Michal Lavi, for example, has used such reasoning to assert that the First Amendment permits government censorship of online terrorist and hate speech, which chills the expression of the people targeted, as well as disinformation on social media, which drowns out those seeking to spread the truth.[107] Professors Kessler and Pozen posit that the "speech on both sides approach" serves "to promote the positive liberty of those disempowered speakers who find it difficult to vindicate their expressive interests as First Amendment plaintiffs."[108]

A second genre of argumentation using this egalitarian grammar takes a macro-level approach to advocate in favor of regulations that "best serve the expressive environment as a whole . . . taking into account the informational and expressive interests of as many listeners and speakers as practicable."[109] Professor Kate Andrias has used this reasoning to support the constitutionality of laws requiring non-union employees to pay agency fees.[110] Such regulation of non-union employees' speech is permissible, the argument goes, because it is critical to the democratic speech environment in elevating union voices as political counterweights to the voices of business interests.[111] This type of systemic argument thus attends to the widest possible array of interests, accounting for "the perspective of listeners as

106. *See id.* at 1994–95.

107. *See, e.g.*, Michal Lavi, *Do Platforms Kill?*, 43 HARV. J.L. & PUB. POL'Y 477, 529–30 (2020) (arguing that state regulation of online terrorist speech is justified because such speech "chill[s] the speech of others, hinder[s] their autonomy, and compromise[s] participation in the marketplace of ideas"); Michal Lavi, *The Good, the Bad, and the Ugly Behavior*, 40 CARDOZO L. REV. 2597, 2644 (2019) (suggesting that online platforms have a "right to delist" posts that shame third parties because such posts "may exclude the shamed individual or cause self-exclusion from conversations"); Michal Lavi, *Publish, Share, Re-Tweet, and Repeat*, 54 U. MICH. J.L. REFORM 441, 469–470 (2021) (calling for online platforms to remove defamatory posts that "infringe[ ] upon the victim's free speech" by "lead[ing] to self-exclusion and deny[ing] victims the ability to engage with others as equals") (internal quotations omitted). As early as the late 1980s, scholars like Professor Mari Matsuda suggested that the First Amendment permits governments to regulate at least some hate speech because of the effects of such expression on third-party speakers. *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2337 (1989).

108. Kessler & Pozen, *supra* note 95, at 1995.

109. *Id.* at 2001.

110. Kate Andrias, *Janus's Two Faces*, 2018 SUP. CT. REV. 21, 56–57 (2018).

111. *See id.* (envisioning a First Amendment doctrine that permits compelled agency fees that constitute a "minimal speech harm to objecting workers" but are "essential to an overall system of free speech, expression, and association).

well as speakers" and "taking into account the . . . interests of as many . . . as practicable."[112]

B. THE EGALITARIAN FRAMEWORK IN THE PUBLIC CLASSROOM

In recent decades, most lines of free-speech jurisprudence have foreclosed the consideration of third-party interests necessary to arguments about "speech on both sides" and the broader expressive environment.[113] As noted above, the default in First Amendment doctrine—like most areas of contemporary constitutional law[114]—is to view disputes as involving only one private plaintiff combating government interference with their rights, avoiding any balancing

112. Kessler & Pozen, *supra* note 95, at 2001. Some scholars have denounced such egalitarian First Amendment arguments for prioritizing social values like the preservation of democratic self-government and the enrichment of public debate over the needs of individuals to express their opinions. *See, e.g.*, Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1110–12 (1993) (summarizing and criticizing the normative values underlying egalitarian theories of the First Amendment). Perhaps most famously, Professor Robert Post has argued that egalitarian approaches contradict traditional First Amendment doctrine and its normative emphasis on individual autonomy. *See id.* at 1122. That emphasis on autonomy, he argues, better protects minority participation in the public square—egalitarian principles enable the majority to silence unpopular viewpoints in the name of the greater good (*e.g.*, to ensure a healthy expressive environment). *See id.* at 1115–16, 1122.

But Post's criticisms run headlong into reality. As Professor Genevieve Lakier has documented, there is nothing untraditional about considering the social impact of speech in assessing the degree of protection owed to it under the First Amendment. *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2119 (2018) ("For much of the twentieth century, the Court interpreted the guarantee of expressive equality in a manner that was sensitive to the economic, political, and social inequalities that inhibited or enhanced expression."). And rather than protect minority participation in public debate, prioritizing individual autonomy and the rights of all to speak regardless of harm to others has a "tendency to suppress the expressive and associational activity of vilified individuals and groups." Kessler & Pozen, *supra* note 95, at 1998 (describing and compiling scholarship on the effect of unregulated hate speech on minority groups). Proponents of autonomy as the normative focus on free-speech jurisprudence have nevertheless won the day in most areas of contemporary First Amendment law. *Cf.* Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1396–97 (2017) (noting that, in recent years, the Supreme Court has moved from viewing listeners as "a stand-in for the public, whose interest in free expression is to achieve collective self-determination and self-government," to a conception of listeners "as individual consumers or voters whose interest in free expression is to make informed choices in the market for goods or candidates").

113. *See* Kessler & Pozen, *supra* note 95, at 2006 (positing that, to succeed, such arguments would require imagining "a very different First Amendment regime from the one we have now").

114. *Cf.* Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28, 31–32 (2018) (describing the contemporary Supreme Court's constitutional jurisprudence as defined by a "zero-sum frame" in which, instead of balancing parties' competing rights, the Court must choose one party's rights as "trumps" that completely override those of the other).

of one speaker's rights against the rights of a third party.[115] Because the standards governing public educators' speech permit courts to account for the expressive interests of students, however, egalitarian arguments continue to have doctrinal salience in the context of the classroom. *Pickering* authorizes regulation of educators' curricular speech where the government has a sufficient interest in preserving the efficiency of its educational services.[116] *Hazelwood* similarly allows such regulation if reasonably related to the government's legitimate pedagogical interests.[117] Those government interests naturally include protecting the expression of students from the chilling effects of educators' speech and preserving a healthy expressive environment across the whole institution. Under either standard, then, egalitarian arguments are feasible.

Some courts have already begun factoring students' interests and systemic concerns about the institutional environment into their analyses of regulations of educators' speech. In *Meriwether v. Hartop*, for example, the Sixth Circuit evaluated a public university's pronoun policy using a *Pickering* analysis.[118] In doing so, the court included as a factor in its balancing analysis the interests of students "in receiving informed opinion," though it erroneously concluded that students' interests weighed in favor of the professor challenging the policy.[119] And at least one court of

115. *See* Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 897–900 (2017) (asserting that "[c]urrent Supreme Court free speech doctrine is relentlessly speaker-centered" and documenting numerous cases in which the Court has downplayed the competing interests of other actors in the speech environment).

116. *See infra* Part I.A.3.

117. *See infra* Part I.B.

118. 992 F.3d 492, 505 (6th Cir. 2021).

119. *See id.* at 509–10. The *Meriwether* court identified the three relevant interests to be balanced as those of (1) the professor-speaker, (2) the students, and (3) the university. *Id.* at 507. The court accurately described the professor's interest in expressing his views, which weighed heavily against the pronoun policy. *Id.* at 509–10.

But it misconstrued the interests of both the students and the university. First, the court found the students' relevant interest to be "hearing . . . contrarian views." *Id.* at 510. Under *Pickering v. Board of Education*, however, the relevant student interest is not in exposure to controversial viewpoints—it is in efficiently accessing the university's educational services. 391 U.S. 563, 568 (1968). Exposure to different viewpoints is but one part of those educational services, the core of which is learning the substantive contents of the lecture (not the professor's personal opinion). *See* Dohmen, *supra* note 36, at 1593–94 (arguing that a central concerns of First Amendment principles of academic freedom is preserving students' ability to engage with course content, even at a cost to professors' expressive interests). And in *Meriwether*, the speech clearly disrupted the learning of both the student being misgendered and her peers, as two other students attested. *See* Brief of Intervenors-

appeals has held that concerns about the broader classroom environment constituted a "legitimate pedagogical concern" under *Hazelwood*. In *Miles v. Denver Public Schools*, the Tenth Circuit held that a school's "legitimate pedagogical interest" in "providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers" was adequate to sanction a teacher for spreading an unsubstantiated rumor that two students had been observed having sexual intercourse on school grounds.[120] Other courts have tacitly considered students' interests as listeners in permitting government institutions to restrict educators from speaking in ways that impaired their relationship with students or that degraded students' learning experience.[121]

Appellees Jane Doe and Sexuality and Gender Acceptance at 5–7, *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

Second, the *Meriwether* court downplayed the university's interest in restricting the professor's misgendering speech. Ignoring ample evidence that the professor had created a hostile educational environment for transgender students, *see id.*, the court cast the university's reason for restricting his speech as merely to avoid offense. *See Meriwether*, 992 F.3d at 510–11 ("When the university demanded that Meriwether refer to Doe using female pronouns, Meriwether proposed . . . using Doe's last name alone. That seemed like a win-win. Meriwether would not have to violate his religious beliefs, and Doe would not be referred to using pronouns Doe finds offensive."). The court pointed to the lack of tangible harm to the student being misgendered, who nevertheless received a high grade. *See id.* at 511. But the student's ability "to persevere and learn despite their teacher's refusal to acknowledge their identity is a testament to their fortitude in the face of adversity, not the lack of adversity," nor the lack of a strong interest on the part of the university in protecting that student from immeasurable emotional trauma. Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. FREE SPEECH L. 615, 660 n.214 (2022). Because of its imbalanced *Pickering* analysis, the *Meriwether* court found the professor to have the greater interest and thus held that the university violated the First Amendment by firing him for his misgendering speech. *See Meriwether*, 992 F.3d at 511–12.

120. 944 F.2d 773, 778 (10th Cir. 1991).

121. *See, e.g.*, Wozniak v. Adesida, 932 F.3d 1008, 1010 (7th Cir. 2019) (permitting a state university to terminate a professor who "harass[ed] and humiliate[d] students," as he could not "successfully teach them" and left them so "shell-shocked" that they had "difficult[y] learning in other professors' classes"); Piggee v. Carl Sandburg Coll., 464 F.3d 667, 672 (7th Cir. 2006) (finding that a public college had a sufficient interest to regulate an instructor's religious proselytizing, which "undermin[ed] her relationship with . . . students who disagreed with or were offended by her expressions of her beliefs"); Martin v. Parrish, 805 F.2d 583, 585–86 (5th Cir. 1986) (allowing a public college to terminate an instructor whose belittling comments caused students to "los[e] interest in economics" and "express[ ] . . . reticence to asking questions in class"); Calef v. Budden, 361 F. Supp. 2d 493, 500 (D.S.C. 2005) (holding that a middle school had a sufficient interest to ban a substitute teacher who "foist[ed] her [political] views on an impressionable, captive audience" of students); Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407, 1418 (C.D. Cal. 1995) (finding that a public college had a sufficient interest to regulate an instructor's sexually suggestive remarks and use of vulgarities because they "prevented [students] from learning").

Several legal scholars have advocated for the consideration of the interests of students, albeit as listeners rather than as speakers, in evaluating the permissibility of restrictions on educators' curricular speech. Professors Inara Scott, Elizabeth Brown, and Eric Yordy posit that the state's interest in regulating educators' classroom speech is in providing an effective education to students.[122] Rather than balancing only the interests of the state and the educator-speaker, they urge courts to give explicit weight to "the interests of students . . . in learning in a nondiscriminatory and inclusive environment."[123] Michael Sloman argues that considering these third-party interests better comports with the purpose of public education and teaching, which is not merely for educators "to express their own ideas" but rather to "engage in a dialogue with their students."[124] Accounting for students' interests as listeners also protects their First Amendment right to "receive information and ideas."[125] Taking a cognitive theory approach, Rosina Mummolo highlights the importance of accounting for the interests of K-12 students in evaluating regulations of schoolteachers' speech, as children are a "captive audience" in this context who "learn new skills, alter their behavior," and adopt "moral values" based on the adult models they observe in the classroom.[126] Gabrielle Dohmen proposes that university students' right to access the contents of a lecture should swing the pendulum in favor of a public university seeking to regulate professorial speech inhibiting that right.[127] While these scholars argue for judicial attention to students' interests as listeners, their arguments equally warrant attending to students'

122. *See* Scott et al., *supra* note 36, at 1023.

123. *Id.* at 981.

124. Sloman, *supra* note 36, at 951.

125. *Id.* (citing Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972)). While Sloman's argument focuses on college students, K-12 students also have a constitutional right to receive information beyond the preferred content and ideas of individual educators. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 867–68 (1982) (plurality opinion) (holding that the First Amendment prohibited a school from removing library books based only on disagreement with their content).

126. *See* Mummolo, *supra* note 41, at 258–60. Mummolo argues that the captivity of impressionable K-12 students warrants giving schools more flexibility in regulating the speech to which those students are exposed. *See id.* But her reasoning also implicates parents' right to control the upbringing of their children, which is protected by the Fourteenth Amendment. *See* Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (providing an overview of the fundamental right of parents "to make decisions concerning the care, custody, and control of their children"). For a discussion of parental rights, see *infra* Part III.A.4.

127. *See* Dohmen, *supra* note 36, at 1593–94.

interests as speakers whose expression may be impacted by educators' speech.

This approach also comports with longstanding Supreme Court jurisprudence concerning the purpose of public education. The Court has long recognized that the "classroom is peculiarly the 'marketplace of ideas,'" and that the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a *multitude of tongues*[.]'"[128] As such, the Court in *Keyishian v. Board of Regents* held that the First Amendment "does not tolerate laws" that have the effect of chilling that exchange of ideas by casting a "pall of orthodoxy over the classroom."[129] Put another way, pollution of the classroom speech environment is anathema to the First Amendment. And in *Grutter v. Bollinger*, the Court reaffirmed the importance of maintaining public classrooms as venues in which diverse viewpoints can be expressed, for "'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"[130]

Opponents of this approach may argue that, even where speech by educators chills the expression of students, the appropriate solution is counterspeech by the students, rather than impingement on the educator's rights. It is, after all, a common judicial refrain that "the remedy to be applied" to harmful speech "is more speech" by competitors of the opposite view, "not enforced silence" of the allegedly dangerous speaker.[131] But counterspeech

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128. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Assoc. Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)) (emphasis added); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (saying the same of K-12 schools).

129. 385 U.S. at 603.

130. 539 U.S. 306, 330 (2003) (citation omitted). Though the Supreme Court has since held that this diversity interest is insufficiently measurable for strict scrutiny purposes, it has nevertheless continued to recognize the achievement of classroom diversity as a "commendable goal," which is likely still sufficient to outweigh an individual educator's speech interests and to constitute a legitimate pedagogical concern under *Pickering* and *Hazelwood*. *See* Students for Fair Admissions v. President & Fellows of Harvard Coll., 143 S.Ct. 2141, 2166 (2023). That diversity interest could require preventing teachers from speaking in a manner that chills the speech of some students in the classroom, as doing so would limit the diversity of viewpoints shared. Further, while *Grutter* does not extend directly to the K-12 school context, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725 (2007), Justice Kennedy's controlling concurrence in *Parents Involved* indicated that public K-12 schools also have a compelling interest in achieving a broadly diverse student body. *See id.* at 788 (Kennedy, J., concurring in part and concurring in the judgment).

131. United States v. Alvarez, 567 U.S. 709, 727–28 (2012) (plurality opinion) (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

is not a viable solution in the classroom context. First, counterspeech in response to an educator may not be feasible. The traditional public square and its modern equivalents, like social media, can host unlimited speech. But speech opportunities in the classroom are more limited, both due to bounded class time and educators' ability to control whether and when students speak.[132] There is thus little guarantee that a student faced with chilling speech by a teacher will be able to counter that speech with their own views, if the student even stays in the class.[133] Second, the remedial logic of counterspeech does not hold in the context of educators' classroom expression.[134] Counterspeech is said to solve the problem of harmful speech by providing competition in the "marketplace of ideas," in which the better and truer speech will naturally amass a greater following.[135] But that presumes an expressive equality that simply does not exist in the classroom, where students and educators are not equally able to attract an audience.[136] Given the vastly greater authority and coercive power that inheres to the role of teacher or professor, an educator is likely to win the day even in the face of more persuasive counterspeech by a student.[137]

Nor are students able to avoid harmful speech in the classroom, as the First Amendment would require in other contexts.[138] That

132. *See* Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today—Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 110–11 (2002) (noting that, while counterspeech is available to adults in the general marketplace of ideas, that may not be so for students in the "inherently authoritarian" school environment).

133. That is far from a guarantee, as a student's very presence in class may be threatened by an educator's chilling speech. *See infra* Part III.

134. And empirical evidence "justif[ies] skepticism about the causal efficacy" of counterspeech "in identifying true propositions and rejecting false ones" in *any* context. Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1163 (2015).

135. *See Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

136. Justice Brandeis—the father of the counterspeech doctrine—indicated that counterspeech is only an effective remedy where the counterspeaker is able to "expose through discussion the falsehood and fallacies [and] to avert the evil by the processes of education." *Id.* at 377. For that to be true, the counterspeaker and the original speaker must be on somewhat level expressive ground, both able to command an audience's attention and respect such that the audience can determine whose opinion is superior.

137. *Cf.* Redish & Finnerty, *supra* note 132, at 110–11 (noting that public classrooms are not ordinary "marketplace[s] of ideas" but rather sites where powerful educators indoctrinate and inculcate values in impressionable students).

138. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 322 (1988) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)) ("As a general matter . . ., in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment."); Cohen v. California,

principle does not apply where the audience cannot readily escape the speech.[139] Students are captive audiences who have no reasonable means of escaping educators' speech and its attendant chilling effects on their own expression.[140] As a consequence, in at least some circumstances, the only meaningful remedy for an educator's chilling speech is restriction.

The existing public-employee speech and school-sponsored speech doctrines, current practice among many federal courts, and the core values underlying the Supreme Court's education-related jurisprudence thus indicate that the government's interest in regulating educators' speech in public classrooms includes protecting students' expression and the health of the classroom as an expressive environment. Where educators' speech has the effect of chilling students' expression or deteriorating the classroom's expressive environment, courts should consequently find the government interest in restricting that speech to overcome the educator's own speech interests.

III. AN EGALITARIAN FRAMEWORK ENABLES CONSTITUTIONAL DISTINCTION BETWEEN PRONOUN POLICIES AND ANTI-QUEER CURRICULUM LAWS

Applied to regulations of educators' in-class speech about gender and sexuality, the egalitarian framework usefully distinguishes pronoun policies and anti-queer curriculum laws. Under this framework, governments have a strong interest in prohibiting misgendering, which is sufficient to justify pronoun policies because educators' speech misgendering students chills

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403 U.S. 15, 21 (1971) (holding that a state could not restrict distasteful expression to protect sensitive viewers where those viewers "could effectively avoid further bombardment of their sensibilities simply by averting their eyes").

139. *See* Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 541–42 (1980); *see also* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 943–46 (2009) (summarizing the captive audience doctrine).

140. *See e.g.*, Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007) (holding that K-12 "pupils are a captive audience"); Suzanne Eckes & Charles J. Russo, *Teacher Speech Inside and Outside of Classrooms in the United States: Understanding the First Amendment*, 10 LAWS 1, 6 (2021) (documenting that "[c]ourts have recognized that PK–12 public school classrooms are captive audiences"); Corbin, *supra* note 137 at 962 (explaining that college "students on campus are often a captive audience"); *see also* Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 88 MINN. L. REV. 1801, 1825 (2017) (questioning whether the captive audience doctrine applied to college students but acknowledging that among "[t]he strongest settings for [its] application . . . [is] in classrooms.").

the protected speech of transgender and nonbinary students and degrades the classroom as a speech environment. Governments lack an adequate interest to enact anti-queer curriculum laws, however, because the mere mention of gender and sexuality in the course of an educator's instruction does not pose an inherent threat to the speech interests of any student or the expressive environment of the classroom. Accordingly, this framework offers a humane path forward for the jurisprudence.

A. PRONOUN POLICIES PERMISSIBLY REGULATE SPEECH UNDER AN EGALITARIAN FRAMEWORK

Egalitarian arguments support the permissibility of pronoun policies under *Pickering* and *Hazelwood* because such policies further the government's substantial interests in protecting students' expression and fostering healthy classroom speech environments. First, pronoun policies regulate educators' speech to prevent the chilling of speech 'on the other side' in the form of class participation. Second, such policies protect against the chilling effect of misgendering on transgender and nonbinary students' authentic gender expression, which constitutes protected speech within the scope of the First Amendment. Finally, pronoun policies ensure that public classrooms remain a welcoming environment for discussion and exploration by all students.

1. *Misgendering Chills Students' Class Participation*

"Speech on both sides" arguments support pronoun policies because educators' speech misgendering students has the effect of chilling the targeted students' verbal participation. As such, public educational institutions have a legitimate interest in preventing educators from misgendering students in the classroom.

Misgendering chills targeted students' participatory speech in class both by making the students feel unwelcome and by discrediting them in the eyes of their peers. Even the bare knowledge that another student has experienced gender prejudice in a particular environment has been shown to reduce transgender and nonbinary students' feelings of ease and belonging in that

space.[141] Transgender and nonbinary students who are targeted by or learn of a professor's misgendering speech are thus likely to feel unwelcome in the classroom and to not participate.[142] And because educators' misgendering speech denigrates transgender and nonbinary students' lived experiences,[143] calling their identities into question, such speech reduces the credibility of targeted students in the eyes of peers who witness the misgendering.[144] Lacking credibility may further disincentivize class participation.

Testimony by transgender and nonbinary students subjected to educators' misgendering demonstrates the silencing effect of such speech. For example, an undergraduate student misgendered by a professor in *Meriwether v. Trustees of Shawnee State University* stated that she experienced "significant psychological strain and distress, including an increase in both the severity and duration of her gender dysphoria" as a result of the professor's speech.[145] She consequently feared participating in class discussions and withdrew socially.[146] And she predicted that other transgender students at risk of being misgendered by professors would "do all

141. *See* MATSON LAWRENCE & STEPHANIE MCKENDRY, SUPPORTING TRANSGENDER AND NON-BINARY STUDENTS AND STAFF IN FURTHER AND HIGHER EDUCATION: PRACTICAL ADVICE FOR COLLEGES AND UNIVERSITIES 79 (2019).

142. *See* Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. FREE SPEECH L. 615, 648 (2022) ("Misgendering students . . . is likely to have a significant chilling effect on the participation of transgender students. . . . [I]t may even lead them to avoid the class altogether.").

143. *See* Dohmen, *supra* note 36, at 1598.

144. *See* Chan Tov McNamarah, *Misgendering*, 109 CAL. L. REV. 2227, 2278–79 (2021) ("[N]egative stereotypes about the speaker's socially disfavored group status impair her competence and believability in the eyes of the listener, and she is consequently placed in a credibility deficit. This deficit, in turn, leads to a discounting of her testimony.")

145. Jane Doe and Sexuality and Gender Acceptance's Mot. to Intervene as Defs. at 3, Meriwether v. Trs. of Shawnee State Univ., No. 1:18-cv-753, 2020 U.S. Dist. LEXIS 24674 (S.D. Ohio Feb. 12, 2020).

146. *Id.* at 6. The Sixth Circuit ignored this evidence, finding no meaningful disruption to learning or chilling of the student's speech because she felt forced to continue participating despite her discomfort in order to avoid receiving a poor grade. *See* Meriwether v. Hartop, 992 F.3d 492, 511 (6th Cir. 2021). But in a later interview, the student pushed back on the Sixth Circuit's analysis, asserting that misgendering speech deprives transgender students of "an equal chance to learn" and that "there is no question that trans, nonbinary, and gender nonconforming students will be deterred from taking classes with [professors who misgender students], including Meriwether." Mark Joseph Stern, *What It Feels Like When a Federal Court Gives a Professor the Right to Misgender You*, SLATE (Apr. 13, 2021, 4:02 PM), https://slate.com/news-and-politics/2021/04/transgender-student-misgender-amul-thapar-jane-doe.html [https://perma.cc/4LER-A5VR].

they can to stay silent and avoid being called on in class."[147] In *Kluge v. Brownsburg Community School Corporation*, a transgender high school student reported that his orchestra teacher's refusal to address the student using his gender-affirming name and honorifics caused him to feel "alienated, upset, and dehumanized" such that he "did not want to continue taking orchestra."[148] In other words, the teacher's misgendering speech threatened the student's presence, and therefore participation, in the classroom. A young transgender boy in *Prescott v. Rady Children's Hospital-San Diego* reported similar psychological distress resulting from being misgendered at his charter school, leading him to withdraw entirely and to participate in private independent study.[149] In a study on California community colleges, transgender and nonbinary students repeatedly described situations in which misgendering by professors induced, or at least encouraged, the students' silence as a method of conflict-avoidance.[150] One graduate student interviewed for another study reported that frequent misgendering by advisors drove them to leave their graduate program, and a second graduate student indicated that they were considering doing the same.[151] Each of these examples demonstrates that the effect of misgendering is to suppress students' participation, and therefore speech, in the classroom.

Transgender and nonbinary individuals' experiences with misgendering speech in other contexts further highlight the potential of such speech to chill the participatory expression of the targeted individual. Transgender and nonbinary people who are unable to change the gender-markers on their identity documents,

147. *Id.* A student leader of the university's LGBTQ+ affinity group confirmed that prediction, testifying that another transgender student had been driven to drop out of the professor's class in a previous semester due to persistent misgendering, and that transgender students at the university generally avoided taking classes with the professor, preventing their participation in his courses. *See* Brief of Intervenors-Appellees Jane Doe and Sexuality and Gender Acceptance, *supra* note 115, at 7–8.

148. Decl. of Aidyn Sucec Supp. Indiana Youth Group Mot. to Intervene as a Def. at 4, Kluge v. Brownsburg Cmty. School Corp., 548 F. Supp. 3d 814, 826 (S.D. Ind. 2021), *vacated* 2023 WL 4842324 (7th Cir. July 28, 2023).

149. 265 F. Supp. 3d 1090, 1096 (S.D. Cal. 2017).

150. *See* Sheryll A. Samoff, Transgender Community College Students' Perceptions of Campus Climate and Inclusiveness 100–20 (2018) (Ph.D. dissertation, California State University–Fullerton) (ProQuest).

151. Whitley et al., *I've Been Misgendered So Many Times: Comparing the Experiences of Chronic Misgendering among Transgender Graduate Students in the Social and Natural Sciences*, 92 SOCIOLOGICAL INQUIRY 1001, 1020–21 (2022).

and who are consequently forced to misgender themselves when using those documents, often choose "not to pursue jobs, services, or opportunities" that they would pursue absent the misgendering.[152] Studies involving transgender and nonbinary adults indicate that, when they are misgendered, "they sometimes remain silent out of concern for their physical safety."[153] Several studies in both the United States and Australia have also found that young transgender and nonbinary people who experience misgendering in mental health or medical settings consequently delay or avoid seeking care.[154]

Educators' in-class speech misgendering students thus implicates a substantial government interest in protecting against the chilling of students' participation, justifying pronoun policies that prohibit the misgendering speech.

2. *Misgendering Chills Students' Protected Gender Expression*

"Speech on both sides" arguments also support pronoun policies because misgendering speech by educators chills the targeted students' gender expression.

Given the expansive categories of expression protected as "speech" under the First Amendment, an individual's gender

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152. *See* Ray v. McCloud, 507 F. Supp. 3d 925, 933 (S.D. Ohio 2020) (quoting expert testimony).

153. David M. Edmonds & Marco Pino, *Designedly Intentional Misgendering in Social Interaction: A Conversation Analytic Account*, 0 FEMINISM & PSYCH. 1, 4 (2023) (citing STEF M. SHUSTER & ELLEN LAMONT, THE EMERGENCE OF TRANS: CULTURES, POLITICS, AND EVERYDAY LIVES 108–109 (Ruth Pearce et al. eds., 1st ed., 2019)).

154. *See* Irene J. Dolan et al., *Misgendering and Experiences of Stigma in Health Care Settings for Transgender People*, 212 MED. J. AUSTL. 150, 150–51 (2020) (summarizing studies). Though little statistical or anecdotal data is available on the effect of misgendering on the youngest school-age children, there is little reason to believe that its chilling effect would be any less among younger transgender and nonbinary students. Children generally have a stable sense of their gender identity by age four. Jason Rafferty, *Gender Identity and Gender Confusion in Children*, HEALTHYCHILDREN.ORG, http://www.healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Identity-and-Gender-Confusion-In-Children.aspx [https://perma.cc/A296-ENWM]. And most transgender individuals first experience gender dysphoria before age seven. *See* Michael Zaliznyak et al., *Age at First Experience of Gender Dysphoria Among Transgender Adults Seeking Gender-Affirming Surgery*, 3 JAMA NETWORK OPEN 1, 4 (2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2762788 [https://perma.cc/32KN-PMQK]. And courts have long recognized that younger students are particularly susceptible to the influence of teachers, *see, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 584 (1987) ("Students in . . . [elementary and secondary] institutions are impressionable and their attendance is involuntary."), such that they would be as impacted by the effects of educators' misgendering speech as older students or even more so.

expression should be understood as protected speech.[155] The Supreme Court has long held that "the Constitution looks beyond written or spoken words as mediums of expression."[156] As such, an individual's "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[.]'"[157] This protected expressive conduct includes a wide range of physical self-expression, including nude dancing, cake-baking, burning or flying flags, and conducting sit-ins.[158] Of particular note, the Supreme Court has recognized that the wearing of clothes, including military uniforms and armbands, is sufficiently expressive to invoke constitutional protection.[159]

Gender expression falls well within the broad category of protected expressive conduct. Conduct is generally protected by the First Amendment where it both (1) "was intended to be communicative" and (2), "in context, would reasonably be understood by the viewer to be communicative."[160] Gender expression satisfies both prongs, conveying a message of an individual's gender identity that is easily understood by those who witness the individual's physical presentation.[161] Several scholars have consequently argued that modes of gender expression—e.g., dress, appearance, and other behavior—are constitutionally protected speech, infringement of which violates the First Amendment.[162] At least three courts have agreed. The Eastern

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155. To the extent this argument extends First Amendment protections to new forms of expression—including gender expression, as discussed below—it represents what Professors Kessler and Pozen refer to as a "maximalist" argument. *See* Kessler & Pozen, *supra*, note 95 at 1989–90.

156. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

157. Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).

158. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1741–42 (2018) (Thomas, J., concurring in part) (summarizing cases in which expressive conduct was found to be protected by the First Amendment).

159. *See* Schacht v. United States, 398 U. S. 58, 62–63 (1970); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969); *see also* Zalewska v. Cnty. of Sullivan, 316 F.3d 314, 320 (2d Cir. 2003) ("[A] particular style of dress may be a sufficient proxy for speech" if it sends "a clear contextual message.").

160. *Masterpiece Cakeshop*, 138 S. Ct. at 1742 (Thomas, J., concurring in part) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984)); *see also Spence*, 418 U.S. at 410–11.

161. *See* Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 120–22 (2015).

162. *See, e.g.*, *id.* at 93 ("Because a transgender student's outward expression of gender . . . conveys an important message to others about that student's identity, her expressive conduct should be treated as speech that falls within the protective umbrella of the First

District of Virginia held that a transgender public employee stated a plausible claim that her female gender presentation—"a thoughtful ultimate expression of her gender identity to society"—constituted speech on a matter of public concern that was protected by the First Amendment.[163] The District of Arizona similarly held that a transgender woman's expression of her gender and consequent refusal to use the men's restroom was speech on a matter of public concern, eligible for First Amendment protection.[164] And a Massachusetts state court found a transgender girl's make-up and clothing at school to be protected speech.[165] Transgender and nonbinary students' gender expression is thus shielded by the First Amendment under current doctrine.[166]

Amendment."); Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 187 (2013) ("[D]ress, appearance, and other behavior communicate the social meaning of gender and should be understood as communicative under the First Amendment."); Kara Ingelhart et al., *LGBT Rights and the Free Speech Clause*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2020/march-april/lgbt-rights-free-speech-clause/ [https://perma.cc/3MAM-XTVZ] (last visited Sept. 10, 2023); Miles M. Gray, *Viewpoint, Not Content: Strengthening First Amendment Protection for Nonconforming Gender Expression* 6–10 (Feb. 6, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4345399 [https://perma.cc/4EGB-KE4A].

163. *See* Monegain v. Va. DMV, 491 F. Supp. 3d 117, 134–36 (E.D. Va. 2020).

164. *See* Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. CIV 02-1531, 2004 U.S. Dist. LEXIS 29825, at *30–33 (D. Ariz. June 3, 2004).

165. *See* Doe v. Yunits, 00-1060-A, 2000 Mass. Super. LEXIS 491, at *10–11 (Mass. Super. Ct. Oct. 11, 2000).

166. As Miles Gray has noted, some acts that express gender identity may not be considered symbolic conduct. *See* Gray, *supra* note 162, at 7. Opponents of providing First Amendment protections to gender expression could argue that certain acts of gender expression lack a sufficiently particularized message to be deemed communicative. But "[t]he threshold burden [of showing that conduct is communicative] is not an onerous one," and conduct expressing gender identity almost certainly passes it. Weatherby, *supra* note 161, at 119. And in any case, the Supreme Court "has arguably expanded [the test] to cover messages which lack even a 'particularized' message." Gray, *supra* note 162, at 6; *see also* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1742 (Thomas, J., concurring in part) (quoting *Hurley*, 515 U.S. at 569) (arguing that "a 'particularized message' is not required" to protect expressive conduct).

That gender expression is sufficiently communicative to receive First Amendment protection is evidenced by federal courts' treatment of states' efforts to restrict drag performances. While gender expression uses dress, appearance, and behavior to convey a message about an individual's authentic gender identity, drag performance employs similar elements (*e.g.*, stylized modes of masculine or feminine dress) as a form of artistic expression. *See Understanding Drag*, NAT'L CTR. FOR TRANSGENDER EQUAL. 1, 1 (Apr. 2017), https://transequality.org/sites/default/files/docs/resources/Understanding-Drag-April-2017.pdf [https://perma.cc/FS4U-8T44]. Though distinct, gender expression and drag performance use sufficiently similar communicative elements to be comparable for First Amendment purposes. And in recent months, five federal district courts have deemed drag

Critics of pronoun policies may assert that, even if gender expression is a generally protected form of expression, schools should only be concerned with the chilling of *pure* speech, not merely expressive conduct. But courts have long prevented schools from unduly restricting the expressive conduct of students in addition to shielding students' pure speech.[167] Opponents may alternatively allege that claims of a free-speech right to express one's gender identity have no historical basis and are novel inventions designed only to trample the rights of educators. That argument, too, is without merit. As early as the mid-1960s, even before legal protections for expressive conduct were clearly established, transgender people sued to invalidate anti-crossdressing ordinances as unconstitutional violations of their protected gender expression.[168] Neither doctrine nor history warrant denying First Amendment protections to students' gender expression in the classroom.

Misgendering speech in the classroom chills this protected gender expression, as transgender and nonbinary students often respond to such speech by "masking" or "covering" their authentic

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performances to be constitutionally protected expression and enjoined government efforts to restrict them. *See* Friends of Georges, Inc. v. Mulroy, No. 223CV02163TLPTMP, 2023 WL 3790583, at *23 (W.D. Tenn. June 2, 2023) (holding that "the expressive conduct of those who wish to impersonate a gender that is different from the one with which they were born . . . is protected by the First Amendment"); S. Utah Drag Stars v. City of St. George, No. 4:23-CV-00044-DN-PK, 2023 WL 4053395, at *20 (D. Utah June 16, 2023) (concluding that "drag shows . . . are indisputably protected speech and are a medium of expression, containing political and social messages regarding . . . self-expression, gender stereotypes and roles, and LGBTQIA+ identity"); HM Fla.-ORL, LLC v. Griffin, No. 6:23-CV-950-GAP-LHP, 2023 WL 4157542, at *6–7 (M.D. Fla. June 23, 2023) (finding a Florida statute prohibiting certain "adult live performances," which targeted drag shows, to be a facially content-based restriction of speech); Imperial Sovereign Ct. of Montana v. Knudsen, No. CV 23-50-BU-BMM, 2023 WL 4847007, at *3–5 (D. Mont. July 28, 2023) (holding that plaintiffs challenging Montana's "drag ban" demonstrated a substantial likelihood of success on the merits of their claim that the ban was an impermissible viewpoint-based restriction of speech); The Woodlands Pride, Inc. v. Paxton, No. H-23-2847, slip op. at 37 (S.D. Tex. Sept. 26, 2023) (permanently enjoining Texas's drag ban and holding that "[d]rag shows express a litany of emotions and purposes" and that "[t]here is no doubt that . . . [they] warrant some level of First Amendment protection"). Only one court has questioned whether drag performances constitute protected speech, though it acknowledged the possibility that they do. *See* Spectrum WT v. Wendler, No. 2:23-CV-048-Z, 2023 WL 6166779, at *9 (N.D. Tex. Sept. 21, 2023) ("[I]t is not clearly established that all drag shows are inherently expressive."). Gender expression is likely to receive similar protection.

167. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (protecting the expressive conduct of students who wore black armbands to school in protest of the Vietnam War); Fricke v. Lynch, 491 F. Supp. 381, 384–85 (D.R.I. 1980) (protecting the expressive conduct of a student who brought a same-sex date to a school dance).

168. *See* Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86*, 40 L. & HIST. REV. 679, 703–08 (2022).

gender identity. One study of transgender and gender nonconforming graduate students, for example, found that some students responded to misgendering by attempting to "conceal or mitigate expression of their authentic gender identity—a frustrating yet potentially adaptive response to mistreatment."[169] Another study of five nonbinary and genderqueer university students found that each struggled with coming out in the classroom due to anxiety about revealing their chosen name and pronouns.[170] Had those students' fears of misgendering been realized upon coming out, the likely result would be "masking" or returning to the closet.[171] Conversely, transgender students who are correctly gendered report becoming "more involved on campus" and feeling "more comfortable . . . participat[ing] and collaborat[ing]."[172]

More generally, studies have shown that "an individual who is misgendered may then begin to feel higher levels of body dysphoria and conflict between their assigned and experienced gender."[173] Such conflict may reasonably produce an incentive to silence one's transgender or nonbinary gender expression to bring their assigned and experienced gender into greater cohesion. That is particularly true when students are subjected to misgendering by educators in the classroom, as students want to impress such instructors. In at least one study, transgender individuals "who reported more frequent experiences with misgendering also reported more anxiety about being negatively evaluated by others."[174] Misgendering by a teacher or professor thus likely gives rise to fears that the teacher or professor will negatively evaluate transgender students, leading transgender students to chill their gender expression to stay in the instructor's good graces.[175]

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169. Abbie E. Goldberg et al., *Transgender Graduate Students' Experiences in Higher Education: A Mixed-Methods Exploratory Study*, 12 J. DIVERSITY HIGHER EDUC. 38, 39 (2019).

170. *See* Jonathan T. Pryor, *Out in the Classroom: Transgender Student Experiences at a Large Public University*, 56 J. COLL. STUDENT DEV. 440, 451 (2015).

171. *See id.* at 443.

172. Samoff, *supra* note 150, at 122.

173. Cooper et al., *The Phenomenology of Gender Dysphoria in Adults: A Systematic Review and Meta-Synthesis*, 80 CLINICAL PSYCH. REV., Aug. 2020, at 1, 7.

174. Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 SELF AND IDENTITY 51, 65 (2014).

175. Such fears are reasonable in light of data showing that misgendering increases the likelihood that students will have negative academic outcomes. *See* Dohmen, *supra* note 36, at 1597 (summarizing studies showing that misgendering interferes with misgendered

Data on misgendering speech in the workplace further illustrate the chilling effect of such speech on the gender expression of transgender and nonbinary individuals. In a study of nearly one thousand LGBTQ+ adults, roughly fifty-eight percent of transgender people reported "covering" (i.e., minimizing their expression of) their authentic gender identity in the workplace, often in response to actual or expected misgendering.[176] These "covering" behaviors included changing physical appearance, dress, voice, and mannerisms.[177] Notably, immediate targets of misgendering speech were not the only people whose gender expression was chilled. One nonbinary participant expressed that they refrained from 'coming out' or otherwise discussing their gender identity at work after witnessing co-workers misgender *other* transgender and nonbinary employees.[178] Another study of more than 31,000 transgender employees found that misgendering by co-workers was associated with a substantial decrease in the employees' well-being, measured in part by their comfort "being themselves" (i.e., authentically expressing their gender identity) in the workplace.[179] As there is little reason to believe that students are less susceptible than workers to the effects of misgendering, these data further establish that the likely effect of educators' misgendering speech is to chill the gender expression of transgender and nonbinary students, whether they are targets or observers of the speech. And while chilling gender expression in workplaces likely raises no First Amendment issues, courts have ample cause for concern over chill in the "special niche" of the classroom,[180] where governments have a unique interest in protecting students' speech.[181]

Viewed through an egalitarian lens, the chilling effect of educators' misgendering on the protected gender-expression-as-speech of transgender and nonbinary students supports

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students' classroom experience by reducing their feelings of belonging on campus and increasing the likelihood of negative academic outcomes).

176. BRAD SEARS ET AL., LGBT PEOPLE'S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT 21 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf [https://perma.cc/8XQB-R83B].

177. *Id.* at 22.

178. *See id.* at 20.

179. Francisco Perales et al, *Exposure to Inclusive Language and Well-Being at Work Among Transgender Employees in Australia, 2020*, 112 AM. J. PUB. HEALTH 482, 483–86 (2022).

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

181. *See supra* Part II.B.

governments' assertion of a regulatory and pedagogical interest in pronoun policies.

3. *Pronoun Policies Preserve Equal Access to the Expressive Marketplace of the Classroom*

Egalitarian concerns about the health of the classroom as an expressive environment further bolster the government interest in restricting educators' misgendering speech via pronoun policies.

As noted above, the government's regulatory interests and legitimate pedagogical concerns under *Pickering* and *Hazelwood* include maintaining the classroom as a "marketplace of ideas" in which diverse viewpoints can be shared through robust exchange.[182] Because misgendering chills the participatory speech and gender expression of transgender students, it reduces their contribution to that exchange, shutting them out of the classroom's marketplace. Pronoun policies serve to prevent this degradation of the classroom speech environment. Scholars have thus argued that pronoun policies in public universities and municipal workplaces are permissible in furtherance of the government's interest in creating a welcoming environment (i.e., a healthier expressive environment), which outweighs an employee's speech interest in misgendering.[183] That interest in producing a welcoming expressive environment also applies in the context of K-12 classrooms and justifies restrictions on teachers' misgendering speech.

There is some argument that pronoun policies actually limit the diversity of viewpoints shared in the classroom by chilling the speech of students who believe that gender is immutable and based on sex assigned at birth. Under this view, pronoun policies degrade rather than enhance the classroom expressive environment. But that argument misunderstands the relative chilling effects of misgendering speech and policies prohibiting

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182. *See id.*

183. *See, e.g.*, Comment, Meriwether v. Hartop*: Sixth Circuit Holds Public University Professor Plausibly Alleged Free Speech Right Not to Use Trans Student's Pronouns*, 135 HARV. L. REV. 2005, 2008–12 (2022); Tyler Sherman, *All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns*, 26 WM. & MARY BILL RTS. J. 219, 222 (2017); Steve Sanders, *Pronouns, "Academic Freedom," and Conservative Judicial Activism*, AM. CONST. SOC'Y EXPERT F. (Apr. 12, 2021), https://www.acslaw.org/expertforum/pronouns-academic-freedom-and-conservative-judicial-activism/ [https://perma.cc/J6UU-UC9Q].

such speech. As detailed above, misgendering chills the expression of transgender and nonbinary students not only by asserting that the students' *opinions* are wrong but by attacking their very *identity* as illegitimate.[184] The consequence is to stifle students' verbal participation in class, sometimes by driving them out of the classroom entirely, and to suppress their authentic gender expression.[185] The purported chilling effect of pronoun policies, by contrast, does not operate by attacking any student's identity—it simply presents students with an opinion with which they may disagree. Hearing a teacher or professor express a viewpoint contrary to one's own could certainly make a student less likely to speak their mind in class. But such a chilling effect is far weaker than that of identity-based attacks like misgendering. As one federal district court recently explained in dismissing a free-speech challenge by high school students who were prohibited from misgendering their peers, "[s]tudents do not enjoy a right to be free from mere offense or from the exchange of ideas . . . [but] there exists a 'basic distinction between an attack on a body of beliefs and an attack on the basic social standing and reputation of a group of people.'"[186]

4. *The Government Interest in Protecting Speech on Both Sides and the Classroom Expressive Environment Outweighs Educators' Interests in Misgendering Students*

In contrast to the sizeable government interests in promulgating pronoun policies—i.e., in protecting transgender and nonbinary students' expression against the chilling effects of misgendering and in preserving a healthy classroom speech environment—educators' competing interests in misgendering students in the classroom are comparatively weak. Such policies only regulate how an educator refers to individual students but do not necessarily preclude educators from expressing their own

184. *See supra* Part III.A.1.

185. *See id*; *supra* Part III.A.2.

186. Parents Defending Educ. v. Olentangy Local Sch. Dist. Bd. of Educ., No. 2:23-cv-01595, 2023 WL 4848509, at *12 (S.D. Ohio, July 28, 2023) (quoting JEREMY WALDRON, THE HARM IN HATE SPEECH 120 (2012)). The court upheld the school's policy compelling students to use each other's gender-affirming names and pronouns under *Tinker*, finding that the regulated speech was likely to cause "substantial disruption" and warranted restriction. *Id.* at *12– 13.

views on matters of gender and sexuality in general.[187] While opponents of pronoun policies allege that they compel educators to endorse a message of accepting transgender and nonbinary gender classifications,[188] pronoun policies are more accurately understood as compelling only accommodation of other speakers' messages (i.e., of transgender and nonbinary speakers' gender expression).[189] That is because, in their most limited form, pronoun policies do not restrict educators from expressing opinions that gender identity is not mutable—they merely prevent educators from targeting individual students with assertions that those students' identities are invalid.[190] There are, of course, schools that have enacted policies prohibiting both misgendering and broader expression about the nature of gender identity, as in *Meriwether*.[191] Those cases will be closer calls. But even the court in *Meriwether*, which struck down a pronoun policy under a *Pickering* analysis, implied that a narrow policy limiting misgendering while permitting a professor's other expression that gender is based on sex assigned at birth might be constitutional.[192]

Critics of pronoun policies may attempt to diminish the government's interest by arguing that the policies infringe on parents' rights. Indeed, parents of schoolchildren have filed

187. Where, as in *Meriwether v. Hartop*, schools not only prohibit misgendering but also prohibit educators from sharing their broader beliefs about gender and sexuality, their policies more likely violate the First Amendment. 992 F.3d 492, 510 (6th Cir. 2021).

188. *See, e.g.*, *id.* at 508–10 (misgendering reflects a "conviction that one's sex cannot be changed"); Taking Offense v. California, 66 Cal. App. 5th 696, 712 (2021) ("[W]illful refusal to refer to transgender persons by their preferred pronouns conveys general disagreement with the concept that a person's gender identity may be different from the sex the person was assigned at birth."); Terri R. Day, *Revisiting* Masterpiece Cakeshop*—Free Speech and the First Amendment: Can Political Correctness Be Compelled?*, 48 HOFSTRA L. REV. 47, 70 (2019) ("Compelled use of politically correct pronouns requires a speaker to convey the message of accepting non-binary gender classification, which may, in fact, contradict the personal beliefs of the speaker.").

189. For a thorough refutation of the argument that pronoun policies compel endorsement of a particular message about the nature of gender identity, see McNamarah, *supra* note 144, at 2297–2304.

190. *See* Sherman, *supra* note 183, at 230–32 (arguing that requiring use of gender-affirming pronouns in the context of municipal workplaces is constitutional because it does not prevent speakers from expressing their own messages); Sanders, *supra* note 183 (asserting that pronoun policies are "best understood as creating a respectful, and thus more effective, classroom," not as compelling ideological conformity).

191. 992 F.3d at 500.

192. The university in *Meriwether* denied the professor's request to explain his personal views on gender identity in his syllabus while otherwise complying with the pronoun policy. *Id.* The court repeatedly emphasized the university's refusal to permit this alternative mode of expression in explaining why the university's policy violated the First Amendment. *Id.* at 506, 510, 516.

challenges claiming that pronoun policies violate their fundamental right under the Fourteenth Amendment's Due Process Clause to "make decisions concerning the care, custody, and control of their children."[193] But that is only arguably true where pronoun policies require educators to use students' gender-affirming names and pronouns without the knowledge or consent of those students' parents. Affirming the identity of one transgender student does not implicate the rights of *other* students' parents, even if those parents do not want their children exposed to such speech. That is because parents have no right to total control over the information their children receive in school.[194] Courts have consequently found that parents have a substantial likelihood of success only when challenging pronoun policies that limit their control of their own children's treatment, not when contesting their children's exposure to speech generally affirming transgender or nonbinary identities.[195] And the Fourth Circuit recently held that parents lacked standing to challenge a pronoun policy absent evidence that the school was actually depriving the parents of information about their children.[196] In

193. Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion) (describing the fundamental rights of parents). For examples of parental challenges to pronoun policies, see Complaint at 10–13, B.F. v. Kettle Moraine Sch. Dist., No. 21-CV-1650 (Wis. Cir. Ct. Nov. 17, 2021); Complaint for Inj. Relief, Decl. Relief, and Damages at 13–15, Lavigne v. Great Salt Bay Cmty. Sch. Bd., No. 23-cv-00158 (D. Maine Apr. 4, 2023); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs., 2023 U.S. Dist. LEXIS 113818, *2–5 (D. Wyo. 2023); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 2022 U.S. Dist. LEXIS 149021, *14–20 (D. Md. 2022), *vacated*, No. 22-2034, 2023 U.S. App. LEXIS 21097 (4th Cir. Aug. 14, 2023).

194. *See* Parker v. Hurley, 514 F.3d 87, 106 (1st Cir. 2008) ("Public schools are not obliged to shield individual students from ideas which potentially are [ ] offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas[.]").

195. *See, e.g.*, *Willey*, 2023 U.S. Dist. LEXIS 113818, at *35 (finding no likelihood of success on the merits where parents challenged a pronoun policy to which their cisgender child was not subject, but noting that "a parent's established fundamental right to direct the upbringing and education of their children would appear to be burdened if a parent was misinformed or the District or a teacher refused to respond to a parent's inquiry regarding their minor child's request to be called by a different name, absent a showing of some danger to the health or wellbeing of the student"); Ricard v. USD 475 Geary Cty., No. 22-cv-04015, 2022 U.S. Dist. LEXIS 83742, at *20, *21 n.12 (D. Kan. May 9, 2022) (noting that it is "difficult to envision why a school would even claim—much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns" and that "it is illegitimate to conceal information from parents for the purpose of frustrating their ability to exercise a fundamental right").

196. John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., No. 22-2034, 2023 U.S. App. LEXIS 21097, at *13–18 (4th Cir. Aug. 14, 2023). Even where parental rights are

any case, where they are implicated, parental rights weigh as much in favor of pronoun policies as against them, given that pronoun policies prevent educators from misgendering students against the express wishes of their parents.[197]

Governments' egalitarian concerns about "speech on both sides" and the broader expressive environment, and governments' interest in preserving parental rights, easily overshadow educators' interest in not respecting the messages of student-speakers about their own gender identity. Therefore, under an egalitarian framework, the First Amendment permits pronoun policies in public classrooms.

B. ANTI-QUEER CURRICULUM LAWS IMPERMISSIBLY RESTRICT SPEECH

Egalitarian arguments provide no such support for anti-queer curriculum laws. These curriculum laws neither protect against the chilling of students' speech nor contribute to a healthy classroom speech environment. Indeed, such laws actively chill speech and poison the expressive environment of schools.

1. *Anti-Queer Curriculum Laws Do Not Prevent the Chilling of Students' Speech*

In contrast to pronoun policies, anti-queer curriculum laws do not regulate speech that has a chilling effect on the protected expression of third parties. The speech restricted by these curriculum laws—touching on matters of gender and sexuality—

implicated, they may not be subject to the same degree of protection as other substantive due-process rights under the Fourteenth Amendment. Unlike for other fundamental rights, the Supreme Court has never applied strict scrutiny to policies that burden the parental right to direct the upbringing of one's children, instead subjecting such policies to a level of scrutiny that more closely approximates rational basis review. *See John & Jane Parents 1*, 622 F. Supp. 3d at 130–33 (summarizing the development of the Supreme Court's parental-rights jurisprudence). Even in its most recent case on the matter, the Supreme Court did not apply strict scrutiny, instead leaving open the question of what level of constitutional scrutiny to apply in challenges to violations of parents' due process rights. *See Troxel*, 530 U.S. at 80 (Thomas, J., concurring in judgment). Given the lower level of protection owed to parental rights to control the upbringing of children, it is likely that schools' interest in pronoun policies (i.e., in avoiding the chilling effects of misgendering on transgender students' speech) outweighs parents' constitutional interest in opposing those policies, except as applied to their own children.

197. *See, e.g.*, Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 824 (S.D. Ind. 2021) (noting that a teacher's failure to follow a school's pronoun policy upset the parents of a transgender student whom the teacher misgendered).

has no identifiable effect of silencing students' participation in the classroom. If anything, anti-queer curriculum laws themselves chill the speech of students, rather than prevent chill. Because educators are barred from speaking about gender and sexuality, students are denied the classroom as a forum in which to express their own views on the topic, even though they are "entitled to freedom of expression of their views" absent a reasonable prediction that such expression would substantially disrupt the school's operation.[198] In the wake of Florida's "Parental Rights in Education Act," for example, some teachers in Palm Beach County were instructed to remove references to sexual orientation and gender identity from course materials, ensuring that the topics would not be raised in classes for student comment.[199] Teachers in Florida have expressed repeated concerns about the chilling effect of the Act on their own curricular speech about gender and sexuality at all levels of K-12 education,[200] predicting knock-on effects for students' speech on the same topics.[201] And at least one study of anti-queer curriculum laws found that they "can have a silencing effect on students and teachers who identify as LGBT."[202]

A survey of LGBTQ+ parents of school-age children in Florida bolsters these predictions that anti-queer curriculum laws chill student speech, rather than protect against the chilling thereof. Six months after Florida's implementation of its "Parental Rights in Education Act," fifty-six percent of LGBTQ+ parents reported that they had considered leaving the state; sixteen percent had

198. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

199. *See* Lavietes, *supra* note 2.

200. *See* Melissa Block, *Teachers Fear the Chilling Effect of Florida's So-Called 'Don't Say Gay' Law*, NPR (Mar. 30, 2022, 5:00 AM), https://www.npr.org/2022/03/30/1089462508/teachers-fear-the-chilling-effect-of-floridas-so-called-dont-say-gay-law [https://perma.cc/8JCT-CQZS] (citing teachers' concerns that the Act will have a "chilling effect" or create a climate that is "too restrictive" on expression); Ileana Najarro, *With Their Licenses in Jeopardy, Florida Teachers Unsure How the 'Don't Say Gay' Law Will Be Applied*, EDUC. WK. (Oct. 27, 2022), https://www.edweek.org/teaching-learning/with-their-licenses-in-jeopardy-florida-teachers-unsure-how-the-dont-say-gay-law-will-be-applied/2022/10 [https://perma.cc/97MD-A7LK] (describing teachers' feelings that the Act "create[s] a learning environment where LGBTQ-identifying teachers may end up second-guessing whether they can truly be themselves in the workplace, lest discussions of their own identity get interpreted as violating the rule").

201. *See* Jim Saunders, *South Florida Students, Teachers, Schools at Center of Revised 'Don't Say Gay' Lawsuit*, MIAMI HERALD (Oct. 31, 2022, 2:59 PM), https://www.miamiherald.com/news/local/education/article268089937.html [https://perma.cc/WY9N-UD46] (describing complaints that Florida's anti-queer curriculum law will have the effect of ostracizing LGBTQ+ students and depriving them of spaces in which to discuss their sexuality and gender identity).

202. Barrett & Bound, *supra* note 12, at 279.

taken affirmative steps to do so; and eleven percent had considered moving their children to a different school.[203] News coverage in subsequent months was rife with stories of LGBTQ+ students stating that the Act made them feel less safe going to school.[204] The Act thus practically silenced transgender and nonbinary students, or the children of LGBTQ+ people, by inducing their withdrawal from classrooms and from the entire state. Additionally, twenty-one percent of LGBTQ+ parents reported that the Act had caused them to become "less out," masking expression of their authentic gender and sexual identities.[205] Given that parents were only indirectly impacted by the Act, it is likely that transgender and nonbinary students directly impacted by the Act experienced similar or stronger chilling effects on their gender expression in the classroom.

Proponents of anti-queer curriculum laws argue that they are necessary to counter the imposition of non-traditional views about gender and sexuality on children.[206] Some, like Justice Alito in his *Obergefell v. Hodges* dissent, may also cite a need to counter the "new orthodoxy" on issues of gender and sexuality, to prevent

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203. *See* ABBIE E. GOLDBERG, IMPACT OF HB 1557 (FLORIDA'S DON'T SAY GAY BILL) ON LGBTQ+ PARENTS IN FLORIDA 2 (2023), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Dont-Say-Gay-Impact-Jan-2023.pdf [https://perma.cc/XB8P-SZXK].

204. *See, e.g.*, Yacob Reyes, *Tampa Bay Students Brace for More Curriculum Fights*, AXIOS (Apr. 20, 2023), https://www.axios.com/local/tampa-bay/2023/04/20/dont-say-gay-expanded-tampa-bay [https://perma.cc/J99H-2H7T] (quoting a transgender high school student stating that the Act has "made me very uneasy about going to school"); Annie Ma et al., *As Conservatives Target Schools, LGBTQ+ Kids and Students of Color Feel Less Safe*, WESA (June 10, 2023), https://www.wesa.fm/education/2023-06-10/conservatives-schools-lgbtq-kids-students-of-color-safety [https://perma.cc/93Q5-E26V] ("As conservative politicians and activists push for limits on discussions of race, gender and sexuality, some students say the measures targeting aspects of their identity have made them less welcome in American schools—the one place all kids are supposed to feel safe."); Curtis McCloud & Molly Duerig, *Expanding Parental Rights Law Could Do More Harm than Good, Community Members Say*, SPECTRUM NEWS (Apr. 17, 2023), https://www.mynews13.com/fl/orlando/news/2023/04/17/expanding--don-t-say-gay--could-do-more-harm-than-good--community-members-say?web=1&wdLOR=cBF74AD20-2C7D-ED49-A070-7DDD782985CE [https://perma.cc/X6FM-WDM8] ("We are discovering it is affecting all students, and now, church leaders and mental health counselors in Brevard County say they are stepping in to help LGBTQ+ students who feel they can no longer have trusted conversations at school.").

205. GOLDBERG, *supra* note 203, at 2.

206. *See, e.g.*, *Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education*, FLORIDA GOVERNOR (Mar. 28, 2022), https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education [https://perma.cc/37WV-5R4Y] ("We're taking a firm stand in Florida for parents when we say instruction on gender identity and sexual orientation does not belong in the classroom where 5- and 6-year-old children are learning. It should be up to the parent to decide if and when to introduce these sensitive topics.").

vilification of "those who cling to old beliefs" and to prevent them from being "labeled as bigots and treated as such by governments, employers, and schools."[207] Anti-queer curriculum laws could thus be cast as ensuring that students who do not adhere to progressive views of gender and sexuality feel equally comfortable sharing their views. But in fact, as discussed further below, anti-queer curriculum laws do not preserve any person's ability to speak on these matters. Whatever students or teachers believe, laws like that in Florida limit discussion of their beliefs in the classroom.

As such, anti-queer curriculum laws cannot be defended by "speech on both sides" arguments. They operate not to protect one party's speech from threat by another but to restrict speech without any benefit to the expressive interests of third parties.

2. *Anti-Queer Curriculum Laws Poison the Classroom Speech Environment*

Egalitarian arguments that the government needs to ensure a healthy classroom speech environment are similarly unavailing as a justification for anti-queer curriculum laws. As discussed above, states have an interest in maintaining the public classroom as a "marketplace of ideas" with a "robust exchange" of viewpoints.[208] And states have an interest in ensuring the participation of diverse voices in such classroom exchanges.[209] Courts thus generally find that schools may regulate educators' speech where it threatens to disrupt students' access to the expressive marketplace of the classroom.[210] To warrant restriction, purportedly "disruptive" speech must go beyond simply causing "the discomfort and unpleasantness that always accompany an unpopular viewpoint."[211]

Anti-queer curriculum laws do not serve to protect against disruption of the classroom as a speech environment open to a diversity of views. "[T]here is no precedent that LGBT advocacy, let alone mere discussion of the subject [of sexual orientation and gender identity], would ever create a disruption sufficient to justify

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207. Obergefell v. Hodges, 576 U.S. 644, 741 (2015) (Alito, J., dissenting).

208. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); *see also supra* Part II.B.

209. *See* Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

210. *See supra* Parts I.A.3 and I.B.

211. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

[categorical] limitation."[212] Indeed, rather than preserve the "marketplace of ideas," anti-queer curriculum laws cast the very "pall of orthodoxy"[213] that the state has an interest in *preventing*, "impos[ing a] strait jacket" upon teachers[214] and thereby cutting off one input to the marketplace.[215] For that reason, education studies scholars have found anti-queer curriculum laws to have deleterious, rather than beneficial, effects on the overall classroom learning environment.[216] Egalitarian concerns about maintaining healthy classroom speech environments consequently undermine, rather than support, the basis for anti-queer curriculum laws.

3. *Educators' Interests in Speaking about Topics of Gender and Sexuality in the Classroom Outstrip the Government Interest in Regulating that Speech*

Relative to the minimal government interest in anti-queer curriculum laws under an egalitarian framework, educators' interests in escaping these laws are substantial. As discussed above in relation to potential "speech on both sides" arguments about anti-queer curriculum laws, such laws sweep broadly to chill much classroom speech touching on gender and sexuality.[217] Indeed, educators' interest in speaking on these broad matters is much greater than their limited interest in misgendering individual students.[218] Paige Hamby Barbeauld and Jillian

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212. Lenson, *supra* note 11, at 153–54. Indeed, courts have held LGBTQ+ advocacy to be "core political speech" and rejected schools' attempts to deny the expressive rights of LGBTQ+ students even where the regulated speech gave rise to an actual threat of violence. *Id.* (citing Nat'l Gay Task Force v. Bd. of Educ. of Okla. City, Okla., 729 F.2d 1270, 1274 (10th Cir. 1984) and Fricke v. Lynch, 491 F. Supp. 381, 387 (D.R.I. 1980)).

213. *See Keyishian*, 385 U.S. at 603 ("[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom.").

214. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

215. For an explanation of the ways in which contemporary curriculum laws prohibiting the teaching of certain controversial subjects, like critical race theory, violate traditional First Amendment principles of academic freedom first articulated in cases like *Sweezy* and *Keyishian*, see Keith E. Whittington, *Professorial Speech, the First Amendment, and Legislative Restrictions on Classroom Discussions*, 58 WAKE FOREST L. REV. 463, 492–98 (2023).

216. *See* Barrett & Bound, *supra* note 12, at 278–80 (explaining that such laws make teachers reticent to combat anti-LGBTQ+ bullying, leave LGBTQ+ students without critical sources of in-school support, teach all students that homosexuality is "shameful and wrong," and generally "create[ ] a climate of fear and repression and harassment").

217. *See supra* Part III.B.1.

218. *See* Corbin, *supra* note 142, at 621 n.27 ("In contrast [to pronoun policies], discussing sexual orientation or gender identity (*e.g.*, same-sex families or LGBTQ history) as currently forbidden by 'Don't Say Gay' laws harms no one and can be done in a way that

Lenson have accordingly argued that the government lacks sufficient justification to warrant this impingement on educators' interest in speaking about gender and sexuality in the classroom.[219]

Supporters of anti-queer curriculum laws have attempted to bolster the government's interest by citing a need to preserve parents' rights under the First and Fourteenth Amendments to direct the upbringing of their children and to inculcate their religious values.[220] Discussions of LGBTQ+ people and topics in schools, they argue, violate parental rights by exposing children to content and viewpoints with which the parents disagree.[221] But parental rights are not absolute, and the Supreme Court has for decades recognized that such rights do not entitle parents to control what is taught in public classrooms.[222] In short, parents' constitutional rights do not "encompass[ ] a fundamental constitutional right to dictate the curriculum at the public school to which [parents] have chosen to send their children."[223]

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is accurate and relevant to course material. And insofar as academic freedom is about ensuring educators can welcome free and open debate about topics covered by their course, the 'Don't Say Gay' laws clash with academic freedom.").

219. *See* Barbeauld, *supra* note 11, at 144–45 (arguing that "there is little proof" that speech about LGBTQ+ topics is disruptive and that schools consequently "lack a viable constitutional argument for prohibiting the LGBT speech in schools," as they "cannot censor LGBT speech simply because the subject is distasteful to the state.") (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508, 511, 513 (1969)); Lenson, *supra* note 11, at 153–54 (asserting that "there is no precedent that LGBT advocacy, let alone mere discussion of the subject in order to support an LGBT student, would ever create a disruption sufficient to justify this limitation").

220. *See supra* Introduction.

221. *See, e.g.*, Jones v. Boulder Valley Sch. Dist. Re-2, No. 20-cv-03399, 2021 U.S. Dist. LEXIS 223090, *5–28 (D. Colo. Oct. 4, 2021) (involving a claim that a school's transgender tolerance training for students violated parents' substantive due process and religious rights); Tatel v. Mt. Lebanon Sch. Dist., No. 22-837, 2022 U.S. Dist. LEXIS 196081, *5–17 (W.D. Pa. Oct. 27, 2022) (involving a claim that a teacher's discussion of gender dysphoria and transgender people violated parents' substantive due process rights).

222. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (holding that parents' rights raise "[n]o question . . . concerning the power of the state reasonably to regulate all schools" and to require "that nothing be taught which is manifestly inimical to the public welfare."); *see also* Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (White, J., concurring) (There is "no support [for] the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society.").

223. Parents for Privacy v. Barr, 949 F.3d 1210, 1229 (9th Cir. 2020) (quoting Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1205 (9th Cir. 2005) (alterations in original)); *see also* Parker v. Hurley, 514 F.3d 87, 102 (1st Cir. 2008) (explaining that, "while parents can choose between public and private schools, they do not have a constitutional right to 'direct how a public school teaches their child.'"). For a thorough summary of cases refuting the notion that parents have an affirmative constitutional right to control the ideas to which their children are exposed in public schools, see *Parker*, 514 F.3d at 101–105.

Conservative parents' desire to avoid exposing their children to LGBTQ+ topics in public-school curricula consequently adds little weight to the government interest in anti-queer curriculum laws and certainly does not outweigh educators' speech rights.

States enacting curriculum laws may proffer that, particularly in conservative areas, permitting any discussion of LGBTQ+ people or topics in class would be "so repulsive to a large number of students that it would be sufficiently disruptive to warrant regulation."[224] But the Supreme Court has repeatedly warned that speech that "deviates from the views of another person" cannot be totally banned in schools simply because it "may start an argument or cause a disturbance."[225] Indeed, so long as it does not unduly chill students' expression, the dissemination of controversial speech serves the pedagogical mission of public educational institutions by fostering the exchange of ideas.[226]

States may alternatively argue that their longstanding authority to prescribe public-school curricula[227] permits enactment of anti-queer curriculum laws, as "public education in our Nation is committed to the control of state and local authorities" and "courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems."[228] But "the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."[229] Dylan Saul has accordingly explained that curriculum laws prohibiting the teaching of critical race theory, which impinge on students' First Amendment right to receive information, must satisfy *Hazelwood*'s

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224. Lenson, *supra* note 11, at 154.

225. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969); *see also* Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'").

226. *See* Blum v. Schlegel, 18 F.3d 1005, 1012 (2d Cir. 1994) (noting that public universities' core services include the dissemination of controversial ideas on topics of public concern).

227. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 107 (1968) (referencing "[t]he state's undoubted right to prescribe the curriculum for its public schools" in the context of an Arkansas law that prohibited teachers from instructing students, whether through lessons or textbooks, that mankind evolved from animals).

228. *Id.* at 104.

229. Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982); *see also Epperson*, 393 U.S. at 107 (explaining that curricular decisions cannot be "based upon reasons that violate the First Amendment").

requirement of a legitimate pedagogical interest.[230] So too must states meet *Pickering* or *Hazelwood*'s demand for a sufficient interest in avoiding educational disruption—i.e., from the chilling of students' expression or the degradation of the classroom environment—before they can enact anti-queer curriculum laws that trample on the speech rights of educators. Because anti-queer curriculum laws serve no such interest, egalitarian arguments offer them no salvation.

CONCLUSION

In an era of rampant efforts to control what is said about gender and sexuality in public classrooms, an egalitarian grammar provides a useful tool to parse the constitutionality of restrictions on educators' curricular speech. The current Supreme Court may be reluctant to adopt such a grammar given its general skepticism of efforts to regulate speech in the name of protecting third parties.[231] But unlike in other areas, egalitarian arguments in the classroom context are not cut from whole cloth—indeed, they follow naturally from the Court's existing doctrine. Under either *Pickering* or *Hazelwood*, analyses of the constitutionality of classroom speech regulations can account for concerns about students' expressive interests and the overall speech environment. Regulations of educators' speech on gender and sexuality thus offer a uniquely viable locus in which to consider the power of egalitarian arguments, which favor laws that prevent the chilling of students' speech and that maintain the classroom as a welcoming expressive environment.

Beyond its doctrinal viability, an egalitarian grammar offers compassion to LGBTQ+ students at a time when they often receive none. Egalitarian considerations support pronoun policies because such policies prevent the chilling of students' participation and gender expression, ensuring their continued ability to engage in the classroom's expressive marketplace. But no egalitarian justification exists for anti-queer curriculum laws, which erase

230. Dylan Saul, Note, *School Curricula and Silenced Speech: A Constitutional Challenge to Critical Race Theory Bans*, 107 MINN. L. REV. 1311, 1340 (2023).

231. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2431 (2022) (rejecting argument that a high school could justify restricting an employee's prayers based on the potentially coercive effects on students); 303 Creative v. Elenis, 143 S. Ct. 2298, 2321–22 (2023) (holding that a state could not compel expression affirming the validity of same-sex marriages in order to prevent discrimination against same-sex couples).

LGBTQ+ identities without benefit to students' expressive interests or the health of the classroom speech environment.