CAN THE FREE SPEECH CLAUSE PROTECT TRANSGENDER EXPRESSION FROM THE TRUMP ADMINISTRATION?

*Daniel Cooper**

TABLE OF CONTENTS

* Daniel Cooper (pronouns: he/him) graduated in 2025, with high honors and as a member of the Order of the Coif, from The George Washington University Law School, where he focused on constitutional law, particularly issues involving freedom of speech and religion. Upon graduation, he received the Imogen Williford Award for demonstrating excellence in the area of Constitutional Law. He earned a B.S.J. in Journalism from Northwestern University in 2019. He is admitted to practice in Washington, D.C.

INTRODUCTION

This Article explores how the Free Speech Clause can provide protection to speakers implicated by the Trump administration's executive orders restricting gender-related speech. Part I will provide an overview of how the Trump administration has directed executive authority to stifle gender-non-conforming identity and expression, how those efforts fit within the larger context of right-wing efforts to marginalize transgender people, and why the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is not currently a useful tool for the protection of trans rights. Part II will examine efforts to regulate government employees' pronoun usage, focusing on whether such speech should be understood as employees' private speech or as an extension of government speech. Part III will examine whether the executive order regulating speech in K-12 schools impermissibly infringes on the free speech rights of students and/or their teachers. Ironically, by reviewing prior litigation that sought to prevent the mandated use of gender-affirming pronouns, advocates can develop strategies to use in defense of gender-affirming pronouns.

I. TRANSGENDER IDENTITY, EXPRESSION, AND THE FREE SPEECH CLAUSE

President Donald Trump's second term began with a flurry of executive action, signing 139 executive orders by the end of April 2025.[1] These orders lack a consistent focus, ranging from revoking COVID-19 vaccine mandates and pausing enforcement of the Foreign Corrupt Practices Act ("FCPA") to ending the procurement and usage of paper straws in federal facilities.[2] Yet, a pattern exists among a significant portion of the executive orders through their targeting of diversity, equity, and inclusion ("DEI") initiatives and, in particular, LGBTQ+ and transgender identity.[3] Several of these executive orders focus on excluding trans people from equal participation in societal institutions, such as the military or athletic activities covered by Title IX of the Education Amendments Act of 1972, while others aim to prohibit federal support for medical or surgical gender-affirming care.[4] While these executive orders pose significant constitutional issues in their own right (as evidenced by the ongoing legal challenges to their validity), an additional subset of the

[1] *See 2025 Donald J. Trump Executive Orders*, FED. REG., https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2025 [https://perma.cc/V89Z-GH7Z].

[2] *Id.*

[3] *Id.*

[4] *See* Exec. Order No. 14201, 90 Fed. Reg. 9279 (Feb. 11, 2025); Exec. Order No. 14187, 90 Fed. Reg. 8035 (Feb. 3, 2025); Exec. Order No. 14183, 90 Fed. Reg. 8035 (Feb. 3, 2025).

recent executive orders targeting "gender ideology" is seemingly in tension with the First Amendment's Free Speech Clause.[5]

Executive Order 14168, titled *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government* (hereinafter the "Gender Ideology order") states that it is the policy of the United States to recognize only the two "incontrovertible" biological sexes of male and female.[6] The order defines "gender ideology" as "replac[ing] the biological category of sex . . . permitting the false claim that males can identify as . . . women, and requiring all institutions of society to regard this false claim as true."[7] Accordingly, the order instructs agencies to take all necessary steps to "end the federal funding of gender ideology," including the removal of all external and internal communications that "promote or otherwise inculcate gender ideology" and the assessment of "grant conditions and grantee preferences" to ensure that federal funding recipients "do not promote gender ideology."[8] The order rejects the Biden administration's broad application of the Supreme Court's holding in *Bostock v. Clayton County* and seeks to limit *Bostock*'s prohibition on sex-based workplace discrimination based on gender identity to Title VII of the Civil Rights Act of 1964, rather than extending it to other federal non-discrimination policies.[9]

The Gender Ideology order works in tandem with Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity* (hereinafter the "DEI order"), which directs all executive departments and agencies to terminate "discriminatory and illegal preferences" and "combat illegal private-sector DEI preferences."[10] Though this order less explicitly targets gender identity, federal agencies cited both orders when instructing employees to remove pronouns from their email signatures.[11] Federal agencies including the Centers for Disease Control and

[5] *See* Orion Rummler, *'Horrible Discrimination': Federal Judges Say Trump's Anti-Trans Orders are Rooted in Bias, Not Law*, THE 19TH (Feb. 21, 2025), https://19thnews.org/2025/02/trump-anti-trans-executive-orders-animus [https://perma.cc/SN6X-4K7M]; *see* GLAAD, *"Unadulterated Animus": Judge Exposes Inaccurate and Absurd Claims in Trump's Executive Orders Targeting Transgender People*, GLAAD (Feb. 19, 2025), https://glaad.org/judge-exposes-inaccurate-and-absurd-claims-in-trumps-executive-orders-targeting-transgender-people [https://perma.cc/A5HK-4976] (suggesting that executive order banning trans people from military service reflects "unadulterated animus").

[6] Exec. Order No. 14168 § 2(d), 90 Fed. Reg. 8615 (Jan. 20, 2025) (defining "female" as a person belonging, at conception, to the sex which produces the large reproductive cell, which, ironically, would classify all human beings as female).

[7] *Id.* at §2(f).

[8] *Id.* at §3(e).

[9] *Id.*; *see* Bostock v. Clayton County, 590 U.S. 644, 659 (2020).

[10] Exec. Order No. 14173 §2, 90 Fed. Reg 8633 (Jan. 21, 2025).

[11] Selina Wang, Mark Abdelmalek, Anne Flaherty, & Will Steakin, *Federal Employees Told to Remove Pronouns from Email Signatures by the End of the Day*, ABC NEWS (Jan. 31, 2025),

Prevention, the Department of Defense, the Food and Drug Administration, and the White House itself have removed or discouraged the use of certain terms in internal and external communications, including "assigned . . . at birth," "gender-affirming care," "trans/transgender/transsexual," "they/them," and "gender ideology."[12] For example, the National Park Service's websites for the Stonewall National Monument and Washington D.C.'s historically-queer Dupont Circle neighborhood now refer only to "LGB" history, having removed all references to transgender identity.[13] In addition, an FBI employee with over a decade of experience was allegedly terminated for displaying a Pride flag near his desk, a practice FBI Director Kash Patel described as an "inappropriate display of political signage" in the employee's termination letter.[14]

More specifically, Executive Order 14190, titled *Ending Radical Indoctrination in K-12 Schooling* ("the Radical Indoctrination order"), aims to deny federal funding for schools that "directly or indirectly" support "instruction, advancement, or promotion of gender ideology or discriminatory equity ideology."[15] The Radical Indoctrination order states that modifying a person's name or pronouns in accordance with their gender

https://abcnews.go.com/US/federal-employees-told-remove-pronouns-email-signatures-end/story?id=118310483 [https://perma.cc/KYQ7-UHA9]; Dell Cameron, *Pronouns Are Being Forcibly Removed from Government Email Signatures*, WIRED (Feb. 3, 2025), https://www.wired.com/story/pronouns-removed-government-email-signatures [https://perma.cc/K7C6-A36C]. Several states have since passed legislation or imposed penalties prohibiting state employees from using pronouns in professional communications. *See, e.g.,* James Bickerton, *Texas Employee Fired After Refusing to Remove Pronouns from Email*, NEWSWEEK (Mar. 6, 2025), https://www.newsweek.com/texas-employee-fired-refusing-remove-pronouns-email-2040399#:~:text=A%20former%20employee%20of%20the,pronouns%20from%20his%20email%20signature [https://perma.cc/JU3T-D4CN]; *see also* Anita Wadhwani, *Tennessee Department of Health Bars Employees from Using Preferred Pronouns*, TENNESSEE LOOKOUT (Mar. 17, 2015), https://tennesseelookout.com/2025/03/17/tennessee-department-of-health-bars-employees-from-using-preferred-pronouns [https://perma.cc/92HS-FD9C]; Maya Smith*, Kansas Lawmakers Use State Budget to Police Pronouns, Threatening Workers' Constitutional Rights*, KANSAS REFLECTOR (Aug. 13, 2025), https://kansasreflector.com/2025/08/13/kansas-lawmakers-use-use-state-budget-to-police-pronouns-threatening-workers-constitutional-rights [https://perma.cc/DRM7-YUYW].

[12] Karen Yourish, Annie Daniel, Saurabh Datar, Isaac White, & Lazaro Gamio, *These Words Are Disappearing in the New Trump Administration,* N.Y. TIMES (Mar. 7, 2025), https://www.nytimes.com/interactive/2025/03/07/us/trump-federal-agencies-websites-words-dei.html [https://perma.cc/C3UK-TXT8]; AJ Connelly, *Federal Government's Growing Banned Words List is Chilling Act of Censorship*, PEN AM. (May 28, 2025), https://pen.org/banned-words-list [https://perma.cc/U3LT-2F8Q] (listing affected agencies).

[13] *Stonewall*, NAT'L PARK SERV., https://www.nps.gov/ston/index.htm [https://perma.cc/4XVJ-GUS6]; *Dupont Circle*, NAT'L PARK SERV., https://www.nps.gov/places/dupont-circle.htm [https://perma.cc/T2UZ-8C32].

[14] Scott MacFarlane, *Veteran FBI Employee Files Lawsuit Claiming He was Fired for Displaying Pride Flag,* CBS News (Nov. 19, 2025), https://www.cbsnews.com/news/fbi-lawsuit-employee-fired-pride-flag [https://perma.cc/XH8P-N2AS].

[15] Exec. Order No. 14190, 90 Fed. Reg 8853 (Jan. 29, 2025).

identity constitutes impermissible support of "social transition," and instructs the Attorney General to work with state and local district attorneys to bring legal action against K-12 school officials and teachers who "unlawfully facilitate the social transition of a minor student."[16]

Despite estimates that just over 5% of the adult population identify as LGBTQ+, with less than 1% of Americans over the age of 13 identifying as transgender, fear about the prevalence of LGBTQ+ content and expression has become increasingly common over the past decade, often couched in concern for the well-being of American youth.[17] The Trump administration's anti-trans policies represent an expansion of a campaign previously waged primarily in state legislative bodies and local school board meetings.[18] Over the past decade, state legislatures have introduced and passed legislation banning gender-affirming care for minors, preventing transgender girls from participating in youth sports, and requiring trans people to use the bathroom corresponding with their assigned sex.[19]

Moreover, the broader anti-LGBTQ+ aspirations of some on the political right are reflected in the Heritage Foundation's *Mandate for Leadership*, more commonly known as Project 2025.[20] Heritage Foundation President Kevin Roberts wrote that "pornography, manifested today in the omnipresent propagation of transgender ideology," merits no First Amendment protection, and that its "purveyors are child predators . . . [and] educators and public librarians who purvey it should be classified as

---

[16] *Id.*

[17] *Adult LGBT Population in the United States*, THE WILLIAMS INST. (Dec. 2023), https://williamsinstitute.law.ucla.edu/publications/adult-lgbt-pop-us [https://perma.cc/84M6-YMCT]; *How Many Adults and Youth Identify as Transgender in the United States*, THE WILLIAMS INST. (June 2022), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states [https://perma.cc/KFR5-5DTJ]; *see also* Laura Beth Nielsen, Elsinore Kuo, & Evan Zhao, *Misgendering, Academic Freedom, the First Amendment, and Trans Students*, 73 CASE W. RSRV. L. REV. 1177 (2023).

[18] Daniel Trotta, *US Republican Transgender Laws Pile Up, Setting 2024 Battle Lines*, REUTERS (May 18, 2023), https://www.reuters.com/world/us/us-republican-transgender-laws-pile-up-setting-2024-battle-lines-2023-05-18 [https://perma.cc/2ZDB-L4YN].

[19] *Id.* Parents groups such as Moms for Liberty have pushed to limit LGBTQ-inclusive books in school libraries and ban drag performers from "story-hour" events. *See* Kiara Alfonseca, *Report: LGBTQ Content Drove Book Banning Efforts in 2023*, ABC NEWS (Apr. 8, 2024), https://abcnews.go.com/US/report-lgbtq-content-drove-book-banning-efforts-2023/story?id=108992375 [https://perma.cc/D2KQ-EBFK]; *Unconstitutional Efforts to Ban Drag Queen Story Hour*, NAT'L COAL. AGAINST CENSORSHIP (Mar. 23, 2020), https://ncac.org/news/unconstitutional-efforts-to-ban-drag-queen-story-hour#:~:text=Efforts%20to%20ban%20Drag%20Queen%20Story%20Hour%20events%20and%20other,state%20funding%20if%20they%20do [https://perma.cc/AV4Y-GFQD].

[20] PROJECT 2025, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROJECT (2023), https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf [https://perma.cc/86PG-QZT4]. Project 2025 is an extensive document detailing conservative policy prerogatives for the next conservative presidential administration. *Project 2025, Explained*, ACLU, https://www.aclu.org/project-2025-explained [https://perma.cc/DA48-3ZSD].

registered sex offenders."[21] Roberts additionally writes that "gender ideology" should be "excised from curricula in every public school."[22] Despite President Trump's insistence on the campaign trail that he had no involvement with Project 2025, he has implemented a substantial number of the policies proposed in the document, including the administration's targeting of gender-affirming care.[23]

To the extent that anti-trans policy stems from animus against trans people, the Equal Protection Clause of the Fourteenth Amendment appears like a reasonable avenue to furnish some protection against discriminatory state action.[24] Under the Equal Protection Clause, a group classification may be considered "suspect" or "quasi-suspect," and thus subject to heightened judicial scrutiny, based on factors including whether the group has historically been subjected to discrimination, whether the group exhibits obvious or immutable characteristics which define them as distinct, and whether the group is a minority and/or politically powerless.[25] For example, laws that seek to discriminate on the basis of sex are subjected to heightened scrutiny, which requires the state to prove at least that the challenged classification and the discriminatory means employed are substantially related to achieving important government objectives.[26] Even if a group does not qualify as suspect or quasi-suspect and, therefore, receives deferential rational basis review for an equal protection claim based on that identity, state action taken with no plausible explanation other than to harm a particular class of people may struggle to survive even rational basis review.[27]

Scholars and lower court judges have recognized that transgender people have a colorable claim to suspect or quasi-suspect status.[28] Transgender identity is immutable, there is a history of discrimination against

---

[21] PROJECT 2025, *supra* note 20, at 5.

[22] *Id.*

[23] *See* Melissa Quinn, *How Trump's Policies and Project 2025 Proposals Match up after the First 100 Days*, CBS NEWS (Apr. 29, 2025, at 10:09 AM EDT), https://www.cbsnews.com/news/trump-project-2025-first-100-days [https://perma.cc/84YA-BNZU].

[24] *See* Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965, 966 (2024). Though the Court has not recognized LGBTQ people as belonging to a suspect class to trigger heightened scrutiny under the Equal Protection Clause, state action taken to harm a particular class of people may struggle to survive even rational basis review. *See* Romer v. Evans, 517 U.S. 620, 634 (1990) ("[A] bare…desire to harm a politically unpopular group cannot constitute a *legitimate* government interest.").

[25] Lyng v. Castillo, 477 U.S. 638 (1986).

[26] U.S. v. Virginia, 518 U.S. 515 (1996).

[27] *Romer*, 517 U.S. at 634 ("a bare…desire to harm a politically unpopular group cannot constitute a *legitimate* government interest").

[28] Kevin M. Barry, Brian Farrell, Jennifer L. Levi, & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507 (2016) (applying suspect class factors to transgender people); Adkins v. City of New York, 143 F. Supp. 3d 134 (S.D.N.Y. 2015) (holding that transgender people are a quasi-suspect class entitled to intermediate scrutiny in equal protection claims); Talbott v. United States, No. 25-cv-00240 (D.D.C. argued Aug. 1, 2025).

the transgender community, transgender people constitute less than 1% of the national population, and, based on the successes of the ongoing political campaign against them, lack the political power to sufficiently combat discrimination through electoral means.[29] Even if there is insufficient support to categorize transgender people as a suspect class in their own right, the Supreme Court has recognized that it "is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[30] The Supreme Court's own language in *Bostock* would seem to suggest that LGBTQ+ people should receive the same intermediate scrutiny as other plaintiffs challenging statutes that discriminate based on sex. Finally, even if a court failed to apply heightened scrutiny, a statute discriminating against trans people may yet fail rational basis review if there is no plausible explanation for the statute other than animus.[31]

In spite of these arguments, the Supreme Court in *United States v. Skremetti* held that a Tennessee state law prohibiting healthcare providers from providing gender-affirming care, including hormones and puberty blockers to transgender persons under the age of eighteen, did not require heightened review under the Equal Protection Clause and that, under rational basis review, the law did not violate equal protection.[32] Chief Justice John Roberts, writing for the majority, wrote that the law in question discriminated on the basis of age and medical use rather than on sex.[33] Notably, the majority declined to rule on whether the reasoning in *Bostock* "reaches beyond the Title VII context" to apply in an equal protection challenge.[34]

Justice Amy Coney Barrett, however, wrote separately to explain why "transgender status . . . does not" constitute a "suspect class."[35] She suggested that the existence of people who detransition indicates that "transgender status does not turn on an immutable . . . characteristic," and that the diverse spectrum of gender identities included under the umbrella of "transgender" meant that it is not a discrete population.[36] Justice Barrett also

[29] *See* Barry, Farrel, Levi, & Vanguri, *supra* note 28; *see supra* discussion of *Bostock* Section I.A.

[30] Bostock v. Clayton County, 590 U.S. 644, 659 (2020).

[31] *See Romer*, 517 U.S. 620, 634 (1990); *Talbott*, No. 25-cv-00240 (holding that military transgender ban would fail even rational basis scrutiny because executive order and enacting policies were "soaked in animus and dripping with pretext").

[32] United States v. Skrmetti, 145 S.Ct. 1816 (2025).

[33] *Id.* at 1829.

[34] *Id.* at 1834.

[35] *Id.* at 1849-50 (Barrett, J., concurring).

[36] *Id.* at 1851-52. Transgender people "detransition" when they go back to living as their sex assigned at birth. A 2021 study conducted by psychiatric experts from Boston University, Stanford University, and Harvard University found that among transgender and gender diverse people in the United States who reported a history of detransitioning, "the vast majority reported that their detransition was driven by external factors" such as "pressure from family and social stigma." Jack L. Turban, Stephanie S. Loo, Anthony N. Almazan, & Alex S. Keuroghlian, *Factors Leading to "Detransition" Among Transgender*

wrote that, even if transgender people have been subject to private animus for generations, a clear demonstration of state-driven *de jure* discrimination would be necessary for transgender people to qualify as a suspect class.[37] Though she did not foreclose the possibility that such a demonstration could be made, Justice Barrett noted earlier in her concurrence that, "in recognizing sex as a suspect class," the Court relied on "more than a century's worth of discrimination [against women] in the law."[38] Transgender rights advocates may have difficulty establishing a lengthy record of *de jure* discrimination against transgender people, considering that the term "transgender" itself only came into widespread usage in the last half-century.[39]

In the wake of the Supreme Court's apparent skepticism that statutes discriminating against transgender people as a class require heightened scrutiny review, advocates for transgender equality may be searching for alternative constitutional challenges to bring against discriminatory laws. At first glance, the Free Speech Clause of the First Amendment may appear inapposite for a constitutional challenge to anti-trans policy.[40] However, anti-trans policies that restrict atypical gender expression—particularly those which seek to prevent trans people from using their preferred name and pronouns—implicate some of the core objectives of the First Amendment.[41]

Government limitation of a person's ability to adequately communicate their views generally deprives that person of the autonomy and free self-expression the First Amendment is meant to protect, especially if the restriction is imposed based on disagreement with or disapproval of the speaker's ideas.[42] The Free Speech Clause protects not only a person's ability to express ideas, but also other individuals' ability to "receive information and ideas."[43] Restricting non-normative gender and sexual expression

and Gender Diverse People in the United States: A Mixed-Methods Analysis, 8 LGBT HEALTH 273 (2021).

[37] *Skrmetti*, 245 S.Ct. 1816 at 1853-54.

[38] *Id.* at 1853.

[39] *See Transgender*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/transgender_adj?tl=true [https://perma.cc/44FC-SYKG].

[40] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

[41] For an introduction to inclusive pronoun usage, see *Pronouns and Inclusive Language*, THE UC DAVIS LGBTQIA RES. CTR., https://lgbtqia.ucdavis.edu/educated/pronouns-inclusive-language [https://perma.cc/G9JA-65Z5].

[42] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 424, 428 (1996); *see also* Cohen v. California, 403 U.S. 15, 24 (1971) (explaining that freedom of expression is a "powerful medicine in a society" that can produce "a more capable citizenry" and comports with "individual dignity and choice").

[43] Stanley v. Georgia, 394 U.S. 557, 564 (1969) (invalidating a state law prohibiting private possession of obscene materials). Justice Marshall noted this right to receive information is the right to "satisfy [one's] intellectual and emotional needs" by consuming (even obscene) content and wrote that "our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 565.

corrodes not only an individual's ability to express themselves and be affirmed in that expression, but also inhibits robust discourse on a matter of political importance.[44] Preferred names and pronouns are significant tools for self-expression that "convey a powerful message implicating a sensitive topic of public concern."[45] In addition, state and federal courts have held that dressing in a manner that conforms with the gender with which a person identifies may constitute expression protected by the First Amendment's Free Speech Clause. [46]

Though policies restricting transgender expression would merit scrutiny even if their sole harm was the restriction of expression, misgendering—"the assignment of a gender with which a party does not identify, through the misuse of gendered pronouns, titles, names, and honorifics"—is not merely a semantic or rhetorical issue.[47] Nor is misgendering only a method to undermine the dignity and express disapproval of a gender-non-conforming individual's identity. It presents real threats to transgender peoples' mental, emotional, and physical health.[48] One study found that increasing the number of misgendering incidents was significantly associated with increased odds of depression within the prior year and suicidal ideation.[49] In contrast, studies have found that referring to a trans minor using the name and pronouns that correspond with the gender identity with which they identify significantly improves the minor's mental health, an effect that appears to be amplified by each separate community (family, friends, school, or work) that uses the minor's gender-affirming pronouns.[50]

II. GOVERNMENT SPEECH & PUBLIC FORUM DOCTRINE

The Free Speech Clause of the First Amendment restricts government regulation of private speech; accordingly, the government speech doctrine provides that the government's own speech is exempt from scrutiny under the

[44] *See* David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PENN. L. REV. 111, 122-23 (1994) ("[S]truggles over sexuality and its social meaning are now firmly fixed on our national political agenda.").

[45] Meriwether v. Hartop, 992 F.3d 492, 508 (6th Cir. 2021).

[46] *See* Monegain v. Dep't of Motor Vehicles, 491 F. Supp. 3d 117 (E.D. Va. 2020); Doe ex rel. Doe v. Yunits, No. 001060A, 2000 WL 3316199, at *3 (Mass. Super. Ct. Oct. 11, 2000).

[47] Chan Tov McNamarah, *Misgendering*, 109 CALIF. L. REV. 2227, 2232 (Dec. 2021).

[48] *Id.* at 2290-91. Misgendering is associated with increased feelings of invalidity, depression, and even suicidal ideation; gender-non-conforming minors contemplate suicide at rates significantly higher than their cisgender peers. *See* Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. FREE SPEECH L. 615, 622-24 (2022).

[49] N.J. Parr & B.G. Howe, *Heterogeneity of Transgender Identity Nonaffirmation Microaggressions and their Associations with Depression Symptoms and Suicidality among Transgender Persons*, 6 PSYCHOLOGY OF SEXUAL ORIENTATION AND GENDER DIVERSITY 461 (2019), https://psycnet.apa.org/record/2019-44751-001 [https://perma.cc/2HW4-979A].

[50] *See* Corbin, *supra* note 48 at 624.

Free Speech Clause.[51] When the government "appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes," including by retaining a level of control when the government disperses funds to private speakers to ensure that the government's message is not distorted.[52] If private citizens disagree with the viewpoint expressed by the government's message, the government speech doctrine suggests the proper remedy is replacing governmental decision-makers via the democratic electoral process rather than litigation.[53] The key determination in many government speech cases is whether the speech or expression in question should be attributed to the government, therefore falling outside the limits of the First Amendment, or to a private speaker.[54] In *Shurtleff v. City of Boston*, the Supreme Court articulated a framework for determining to whom speech should be attributed, requiring case-specific analysis of factors including the "history of expression at issue, the public's likely perception as to who . . . is speaking, and the extent to which the government has actively shaped or controlled the expression."[55]

Even though the government is not constrained by the First Amendment when it speaks for itself, government speech may still be limited by other statutory or constitutional provisions.[56] For instance, policies that potentially infringe upon free expression but do not clearly define what speech they prohibit may be void for vagueness under the Due Process Clause of the Fifth or Fourteenth Amendments, as "uncertain meanings inevitably lead citizens" to inhibit their own expression to a greater degree than a more clearly defined speech prohibition.[57] In addition, the Supreme Court has held that even categories of speech outside of the limits of the First Amendment are not "invisible to the Constitution . . . [such] that they may be made the vehicles for content discrimination."[58] If a speech regulation is motivated by a desire to undermine a "bedrock principle underlying the First Amendment" by "prohibit[ing] the expression of an idea . . . society finds . . . offensive or disagreeable," the regulation may be constitutionally impermissible.[59]

---

[51] *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467 (2009); Rust v. Sullivan, 500 U.S. 173, 194 (1991).

[52] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

[53] *See* Walker v. Texas Div., Sons of Confederate Veterans, 576 U.S. 200, 207 (2015).

[54] *See* Shurtleff v. City of Boston, 596 U.S. 243, 224-48 (2022).

[55] *Id.* at 252.

[56] *Walker*, 576 U.S. at 208.

[57] *See* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

[58] R.A.V. v. City of St. Paul, 505 U.S. 377, 383-84 (1992); *see* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 725 (2011).

[59] *See* Texas v. Johnson, 491 U.S. 397, 414 (1989); *see* Blocher, *supra* note 58 at 748; *see also* Kagan *supra* note 42 at 421 ("[T]he government may not regulate (speech) based on hostility – or favoritism – towards the underlying message expressed.").

Over the past decade, legal scholars and justices across the political spectrum have grown concerned about the extent to which the government speech doctrine threatens to invade the realm of constitutional protections for private speakers.[60] Justice Samuel Alito, in particular, is a vocal critic of the unencumbered expansion of government speech, commenting in *Walker* that an overly broad extension of the doctrine "takes a large and painful bite out of the First Amendment."[61] Accordingly, Justice Alito has advocated for caution in cases "when a government claims that speech by one or more private speakers is actually government speech," as the government may be "using the doctrine 'as a subterfuge for favoring certain private speakers over others based on viewpoint.'"[62] Justice Alito has argued that government speech is not immune from First Amendment attack if it "uses a means that restricts private expression in a way that abridges the freedom of speech, as . . . with compelled speech."[63]

Even if the speaker is clearly not a governmental entity, the government still retains some ability to restrict speech on governmental property.[64] The Court has identified three categories of speech forums: the traditional public forum, the designated public forum, and the nonpublic forum.[65] Traditional public forums include those locations, such as parks and public streets, which have "immemorially been" used by citizens to communicate ideas; government regulation of private speech in a traditional public forum must survive strict scrutiny judicial review, meaning that it must be narrowly tailored to serve a compelling state interest.[66] Nonpublic forums are government properties not intended to be used for communicative purposes and which permit reasonable restrictions on private speech, as long as those restrictions are not merely about suppressing disfavored expression.[67] Designated public forums are government property that the state has expressly opened up for expressive activity; the state may impose limitations on the content to be discussed in a designated public forum, but may not discriminate against speech within the forum's limitations on the basis of that

[60] *See* Blocher, *supra* note 58 at 752 (suggesting that government speech and viewpoint neutrality towards private speakers cannot co-exist); Caroline Mala Corbin, *The Government Speech Doctrine Ate My Class: First Amendment Capture and Curriculum Bans*, 76 Stan. L. Rev. 1473, 1498 (2024) ("[O]nce speech is categorized as governmental, the government speech doctrine effectively protects government's attempts to censor views contrary to its own."); Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 481, 484-87 (2009) (Stevens, J., concurring) (Breyer, J., concurring) (Souter, J., concurring).

[61] *Walker*, 576 U.S. at 222 (Alito, J., dissenting).

[62] Shurtleff v. City of Boston, 596 U.S. 243, 262 (2022) (Alito, J., concurring in the judgment) (quoting *Summum*, 555 U.S. at 473).

[63] *Id*. at 269.

[64] *See Summum*, 555 U.S. at 469-70.

[65] *See* Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 677 (1998).

[66] *Id.* at 677*; see* Hague v. Committee for Indus. Organization, 307 U.S. 496, 515-16 (1939).

[67] *Arkansas Educ. Television Com'n*, 523 U.S. at 677-78.

speech's viewpoint.[68] In addition, designated public forums may be physical or "metaphysical" spaces.[69]

Even in traditional public forums in which private citizens' free speech rights are most protected, the government may still impose reasonable content-neutral time, place, and manner restrictions on speech so long as those restrictions survive intermediate scrutiny review, which requires the restrictions to be "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[70] The "principal inquiry in determining content neutrality," particularly in the context of time, place, and manner restrictions on speech, is "whether the government adopted a regulation of speech because of disagreement with the message it conveys."[71] Laws that are facially content-neutral but which "cannot be justified without reference to the content of the regulated speech" must also satisfy strict scrutiny.[72]

To analyze the Trump administration's executive orders regulating gender-related speech, it is first necessary to determine whether, in general, the contested speech should be attributed to the government or to private speakers, based on the factors identified in *Shurtleff*.[73] Even though it is permissible for speech attributed to the government to express a preference for a given viewpoint, government speech that is overly vague in a manner that chills the protected expression of private speakers may nevertheless violate the First Amendment rights of private entities. The government may make viewpoint-based funding decisions when the government itself is the speaker or in instances like *Rust v. Sullivan*, in which the federal government was able to prohibit private family planning organizations that received federal funding from using those funds for programs involving abortion because doing so could warp the government's own intended message.[74] However, the Court has held that viewpoint-based restrictions are not appropriate when the government "expends funds to encourage a diversity of viewpoints" from private speakers.[75]

---

[68] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995).

[69] *See Id.* at 829-30 (finding that student activities fund at a public university is a designated public forum); Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 47 (1983) (finding that an interschool mail system was a designated public forum).

[70] United States v. Grace, 461 U.S. 171 (1983).

[71] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984)).

[72] *See* Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015); *see also* TikTok Inc. v. Garland, 604 U.S. 56 (2025).

[73] *See* Shurtleff v. City of Boston, 596 U.S. 243, 247-48 (2022). Note that this analysis is intended to be applied on a case-by-case basis. *Id.*

[74] Rust v. Sullivan, 500 U.S. 173, 197(1991).

[75] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541-42 (2001) (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 834 (1995)).

If the speech is attributable to a private speaker but occurs on physical or virtual government property, then it is necessary to conduct a public forum analysis to determine the permissibility of restrictions on private speech in that setting. Even if the forum is nonpublic, restrictions on private speech must still be reasonable and not aimed at suppressing a disfavored viewpoint.[76] The Trump administration's policies should be analyzed as time, place, and manner restrictions subject to intermediate scrutiny only if they can be justified without reference to the content of the regulated speech; otherwise, the government must demonstrate that the policies are narrowly tailored to serve a compelling interest. In addition, even reasonable time, place, and manner restrictions must leave open "ample alternative channels of communication."[77]

A. Monuments, Websites, and Reports

The Trump administration is unquestionably entitled to issue statements of its own policy.[78] The administration is engaging in government speech when it offers its definition of biological sex in its executive orders.[79] The administration may also "selectively fund" programs that it believes to be in the public interest without funding an alternative program dedicated to the same matter.[80] This means that certain conditions on federal funding designed to advance the administration's position on "gender ideology" constitute government speech and therefore fall outside the First Amendment's constraints.[81] However, other than executive orders, which are clearly attributable to the government, the implementation of these policies through agency action spurs questions of to whom speech should be attributed based on the *Shurtleff* factors.

Permanent monuments displayed on public property are typically considered government speech, including sites managed by the National Park Service, which may contain privately-designed or funded objects.[82] The

[76] *See* Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 677-78 (1998).

[77] *See* United States v. Grace, 461 U.S. 171 (1983). *But see* McCullen v. Coakley, 573 U.S. 464, 480 (2014) ("[A] facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics . . . the question in such a case is whether the law is justified without reference to the content of the regulated speech").

[78] *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 468 (2009) ("[Government is] entitled to . . . select the views it wants to express.").

[79] *See* Exec. Order No. 14168, 90 Fed. Reg. 8615.

[80] *See* Rust v. Sullivan, 500 U.S. 173, 19-94 (1991).

[81] *See* Exec. Order No. 14201, 90 Fed. Reg. 9279; Exec. Order No. 14187, 90 Fed. Reg. 8035; Exec. Order No. 14183, 90 Fed. Reg. 8035.

[82] *See Summum*, 555 U.S. at 471; Monumental Task Comm., Inc. v. Foxx, 157 F. Supp. 3d 573, 594 (E. D. La. Jan. 26 2016) (suggesting that plaintiffs seeking injunction to prevent removal of Confederate statue were wise to not make First Amendment claim because of government speech doctrine expressed in *Summum*).

government has the right to shape the expression it intends to convey through these displays without being constrained by the Free Speech Clause, though it may be limited by other constitutional or statutory constraints and may ultimately be held accountable for its message through the democratic process.[83] This governmental ability to shape expression extends to the informational National Park Service websites about the historic sites, which clearly identify the United States Department of the Interior as their owners and operators.[84] Applying the *Shurtleff* factors, the federal government's physical monuments and their official websites are likely to be perceived as the government's own speech, with the government actively shaping the expression in question.[85]

Although posts by government-run social media accounts are also properly considered government speech, the government functionally opens a metaphysical designated public forum if it enables private users to respond or comment to its page or posts.[86] Though government-run social media sites may reasonably limit or remove content that is not suitable based on the purpose of the forum, it may not remove speech on the basis of viewpoint if that speech would otherwise "be within the forum's limitations."[87] In practice, this means that the Facebook page for the Stonewall National Monument, run by the National Parks Service, may publish posts that fail to acknowledge transgender identity, limit the ability of the public to comment or respond to its posts (thereby keeping the metaphysical forum closed to the public), or remove private users' responses to its posts if those responses are unrelated to the purpose of the forum.[88] However, the National Parks Service could not remove posts in favor of (or against) transgender identity if it left the comments for the post open to the public, as that would constitute impermissible viewpoint discrimination.[89]

---

[83] *See Summum*, 555 U.S. at 467-69.

[84] *See Stonewall*, *supra* note 13.

[85] *See* Shurtleff v. City of Boston, 596 U.S. 243, 247-48 (2022).

[86] *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) (finding that public forum principles are applicable to a "metaphysical" public forum); Packingham v. North Carolina, 582 U.S. 98, 108 (2017) (finding that social media access is essential for private First Amendment expression); Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 230 (July 9, 2019) (ruling that the President could not block Twitter followers from personal account because presidential tweets held out as official statements of state actor); *see also* Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. SCI. & TECH. L. 1, 33 (2019).

[87] *See Rosenberger*, 515 U.S. at 829-30.

[88] National Park Service, *Stonewall National Monument*, FACEBOOK (last accessed Oct. 28, 2025), https://www.facebook.com/StonewallNationalMonumentNPS [https://perma.cc/AD2P-RZRL].

[89] *Id.* Note that this commentary does not address Facebook or other social media services' hate speech policies. In addition, as of September 14, 2025, the Stonewall National Monument's Facebook page still contains references to "LGBTQ" rights as opposed to the official website's references to "LGB" rights. *Id.*

Reports issued by a government entity are also likely to be considered governmental speech, meaning that the government can discriminate in terms of the viewpoints expressed and the choice of words used to explicate them; this applies to reports produced directly by government staff and those created by outside contractors for a federal agency.[90] A report published by a government agency can reasonably be considered the statement of the federal government on the subject matter.[91] Determining which words may be used in a government report also qualifies as government speech; an entity "compiling and curating others' speech" and "'exercising editorial discretion in the selection and presentation' of content is 'engaged in speech activity.'"[92] The Court has in the past expressed concern that content-based regulation of professional speech poses the risk that "government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information."[93] Nonetheless, to the extent that the speech in an agency report is attributable to the government rather than any private author, the government will retain its ability to express its viewpoint while suppressing other perspectives.

B. Vagueness, Viewpoint Discrimination, and Implications of Policy

The government speech doctrine affords the government a wide berth to express particular viewpoints when it is acting as a speaker or funding programs with limited scope, but this ability to shape expression is not unlimited.[94] Though the Trump administration may curate the expression of the federal government on its own websites, social media accounts, and agency reports, the executive orders instructing the removal of DEI programs and "gender ideology" from federally-funded programs may be too vague and too discriminatory against specific viewpoints of downstream private speakers to be upheld.[95] In the probable event that a challenge to these executive orders reaches the Supreme Court, even the more conservative

[90] *See* Rust v. Sullivan, 500 U.S. 173, 198-99 (1991) (explaining that individuals employed for Title X grantee required to perform duties in accordance with federal restrictions on abortion counseling). Reports produced by government employees may also be analyzed under the standard for government employee speech, addressed *infra* Part II.A. For an example of the sort of reports implicated, see Erika Edwards and Berkeley Lovelace Jr., *HHS Official Halts CDC Reports and Health Communications for Trump Team Review*, NBC NEWS (Jan. 22, 2025), https://www.nbcnews.com/health/health-news/hhs-memo-cdc-report-communications-trump-team-rcna188733 [https://perma.cc/PBY8-2EQB].

[91] *See* Shurtleff v. City of Boston, 596 U.S. 243, 247-48 (2022).

[92] Moody v. NetChoice, LLC, 603 U.S. 707, 731 (2024) (quoting Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 674 (1998)).

[93] Nat'l Inst. of Family & Life Advocates v. Becerra, 585 U.S. 755, 771 (2018).

[94] *See supra* notes 56-59 (discussing limitations of government speech doctrine).

[95] *See supra* notes 4, 6, 10, & 14.

justices might be reticent to extend the government speech doctrine much further, given the potentially dire implications for private expression.[96]

District Judge Adam B. Abelson's order granting a partial preliminary injunction, which terminates and prevents the enforcement of the DEI Executive order, provides a valuable roadmap for analyzing the concerns regarding vagueness and viewpoint discrimination and demonstrating where the government speech doctrine may fall short.[97] Judge Abelson's order held that plaintiffs were likely to succeed on their claim that the DEI order violates the First Amendment because it facially constitutes a content-based restriction on the speech rights of federal contractors and grantees, which may expand to all of the funding recipients' work.[98] Though the government may fund one activity to the exclusion of another and may define the limits of a government spending program without running afoul of the First Amendment, it may not punish contractors because of their speech on matters of public concern, particularly speech outside of the ambit of government funding.[99]

In addition, there was no language in the DEI order indicating the intended breadth of the order, or whether federal funding recipients should understand the order to only apply to the use of federal funds.[100] When a law "threatens to inhibit the exercise of constitutionally protected rights," there is a more stringent burden on the government to avoid vagueness, as vague language increases the potential for "arbitrary and discriminatory enforcement" of the order against disfavored entities.[101] Judge Abelson's order notes that the inherent vagueness of the terms "equity" and "equity-related" gives funding recipients very little notice as to what will constitute as actionable promotion of DEI; though a reasonable person might understand that some actions or policies would violate the DEI order, the lack of defined limits deprives grantees of notice of what is "prohibited, so that [they] may act accordingly."[102]

---

[96] *See* Walker v. Texas Div., Sons of Confederate Veterans, 576 U.S. 200, 222 (2015) (Alito, J., dissenting); *Shurtleff*, 596 U.S. at 262, 269 (Alito, J., concurring in the judgment) (quoting Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 473 (2009) (discussing Justice Alito's reticence to expand government speech doctrine).

[97] Memorandum Opinion, Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243 (D. Md. Feb. 21 2025) (No. 1:25-cv-00333-ABA, 2025 U.S. Dist. LEXIS 31747 (granting preliminary injunction in part).

[98] *Id.* at 45.

[99] *Id.* at 48 (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

[100] *Id.*

[101] *Id.* at 38-39.

[102] *Id.* at 41-44 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)). In April 2025, the District Court for the District of New Hampshire issued federal injunction barring implementation of the anti-DEI aspects of the Radical Indoctrination order on vagueness, viewpoint discrimination, and statutory

Though the preliminary injunction against the DEI order has been temporarily lifted, Judge Abelson's analysis offers useful insight as to how the Gender Ideology order may be challenged on First and Fifth Amendment grounds.[103] The plain text of the Gender Ideology order defines "gender ideology" as "internally inconsistent," suggesting that gender ideology aims to replace the biological category of sex and, in doing so, requires "all institutions of society to regard this false claim as true."[104] The order then requires agencies to take all necessary steps to end federal funding of gender ideology, including by analyzing grant conditions and grantee preferences.[105] In other words, as in the DEI order, the Trump administration impermissibly seeks to condition federal grantees' receipt of funds on compliance with a standard without any clear guidelines, as it is unclear what might constitute "federal funding of gender ideology."[106]

Even if the Gender Ideology order were held to be sufficiently clear for a "person of average intelligence to . . . know what is prohibited," it still attempts to restrict federal funding of entities based on "grantee preferences."[107] Under the plain language of the order, it appears that grantee funding could be withheld or revoked because the "preferences" of the grantee—the grantee's decision to treat trans identity as valid—do not align with the government's viewpoint.[108] Withholding or revoking funding on these grounds would violate the prohibition on punishing contractors for speech on matters of public concern, especially when the speech in question is not directly funded by the government.[109]

Indeed, several nonprofit arts organizations that have previously produced—and intend to continue producing—work addressing the lived experiences of transgender people filed suit seeking to enjoin the Gender Ideology order, raising both vagueness and viewpoint-discrimination claims.[110] The plaintiffs argue that the National Endowment for the Arts

grounds. Preliminary Injunction Order, Nat'l Educ. Ass'n v. United States Dep't of Educ., 779 F. Supp. 3d 149 (D. N.H. Apr. 24 2025) (No. 25-cv-091-LM), 2025 U.S. Dist. LEXIS 77874.

[103] *See* U.S. v. Williams, 553 U.S. 285, 304 (2008) ("Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment.").

[104] *See* Exec. Order No. 14168, 90 Fed. Reg. 8615.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *See Id.*; *see also* Rust v. Sullivan, 500 U.S. 173 (1991).

[109] *See Rust*, 500 U.S. at 192-96 ("'[U]nconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside of the scope of the federally funded program.").

[110] Complaint, R.I. Latino Arts v. Nat'l Endowment for the Arts, 777 F.Supp.3d 87 (D. R.I. May 12 2025) (No. 1:25-cv-00079-WES-PAS), 2025 WL 2689296. Plaintiffs also argue that the NEA's broad regulation violates the Administrative Procedure Act. *Id.*

constitutes a limited-purpose public forum through which the federal government subsidizes a diversity of viewpoints from private speakers.[111] The plaintiffs argue that the government can prevent National Endowment for the Arts ("NEA") funds from going to programs outside of the reasonable limitations of the program, but may not withhold funding because the programs express disfavored views on gender and sexuality.[112] To hold otherwise would establish "a precedent that threatens private speech that government finds displeasing."[113]

In response to the possible constitutional deficiencies outlined above, it is possible that the Trump administration could argue that the Gender Ideology order is merely the government permissibly exercising its authority to shape expression that a reasonable person would perceive as the government's own speech.[114] Such an expansive reading of the government speech doctrine could, however, enable the government to pretextually claim private speech as its own and, as Justice Alito has suggested in other contexts, favor certain private speakers over others based on viewpoint.[115] Though the government speech doctrine instructs that the Trump administration should be able to express *its own* views on DEI and gender expression, and that accountability for disagreement with those views should come through the democratic process, the Court should reject an understanding of government speech that would threaten withdrawal of funding and impose civil and criminal penalties to punish private expression the government disfavors.

III. GOVERNMENTAL EMPLOYEES

The government speech doctrine gives the government significant leeway to dictate its viewpoint and the manner in which it is expressed when the government issues statements or funds programs. However (at least until artificial intelligence becomes more sophisticated), government action remains the work product of constitutionally protected human beings, either employed directly or contracted by the government. Private contractors retain the ability to speak freely on matters of public concern, particularly when the speech is unrelated to the scope of governmental funding they

111 Memorandum of Law in Support of Motion for Preliminary Injunction at 22-23, R.I. Latino Arts v. Nat'l Endowment for the Arts, 777 F.Supp.3d 87 (D. R.I. May 12, 2025) (No. 1:25-cv-00079-WES-PAS), 2025 WL 2689296.

112 *Id.*

113 Walker v. Texas Div., Sons of Confederate Veterans, 576 U.S. 200, 221(2015) (Alito, J., dissenting).

114 *See* Shurtleff v. City of Boston, 596 U.S. 243, 247-48 (2022).

115 *See Id.* at 247-48 (Alito J., concurring); *Walker*, 576 U.S. at 207 (Alito J., dissenting) (barring specialty license plates honoring the Confederacy was "blatant viewpoint discrimination" in limited purpose public forum).

receive.[116] When the speaker is directly employed by the government, however, their right to free expression is murkier.

The Supreme Court's original method for analyzing the extent to which the government as employer may regulate its employees' speech sought to balance the government's interest in "promoting the efficiency of the public services it performs through its employees" with employees' interests as citizens in "commenting upon matters of public concern."[117] In *Pickering v. Board of Ed*., the Supreme Court determined that high school teacher Marvin Pickering was wrongfully dismissed from his job for submitting a letter to his local newspaper regarding a proposed Board of Education tax increase, noting that Pickering's ability to express his views on an issue of legitimate public concern did not undermine harmony among co-workers or the school board's general functioning.[118] In addition, the Court noted the importance of the public's ability to learn from Pickering's unique perspective as a schoolteacher who observes how school funds are spent.[119] Fifteen years later in *Connick v. Myers*, the Supreme Court noted that whether a government employee's speech addresses a matter of public concern must be determined "by the content, form, and context of a given statement," and that not all matters within a government office are of public concern.[120]

The Supreme Court most recently discussed First Amendment protection afforded to government employee speech in *Garcetti v. Ceballos*.[121] The Court noted that by entering government service, a citizen does accept "certain limitations on his or her freedom," including some level of government "control over their . . . words and actions" to promote the "efficient provision of government services," but only those "restrictions that are necessary for their employers to operate efficiently and effectively."[122] Accordingly, the Court held that the deciding factor should be whether the expression was made pursuant to the employee's official duties, because restricting speech "that owes its existence to a public employee's professional responsibilities does not infringe" on an employee's rights as a private

[116] *See* Rust v. Sullivan, 500 U.S. 173, 198-99 (1991) (explaining that employees of a Title X grantee must perform their duties related to the Title X project in accordance with federal restrictions on abortion counseling, but "remain free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X project"). Reports produced by government employees may also be analyzed under the standard for government employee speech, addressed *infra* Part II.A. For an example of the sort of reports implicated, see Edwards & Lovelace, *supra* note 90; *Shurtleff*, 596 U.S. at 247-48; Moody v. NetChoice, LLC, 603 U.S. 707, 731 (2024) (quoting Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 674 (1998)); Nat'l Inst. of Family & Life Advocates v. Becerra, 585 U.S. 755, 771 (2018).

[117] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[118] *Id.*

[119] *Id.* at 572.

[120] Connick v. Myers, 461 U.S. 138, 147-49 (1983).

[121] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[122] *Id*. at 418-20.

citizen, but rather "simply reflects the exercise of employer control over what the employer itself has commissioned or created."[123] Though employees may still seek constitutional protection for "contributions to the civic discourse," the *Garcetti* test allows supervisors to ensure that "official communications are accurate, demonstrate sound judgment, and promote the employer's mission."[124]

A. Applying Garcetti to Government Employee Speech

The essential question in determining whether the Trump administration's anti-trans executive orders violate free speech protections for government employees depends on whether the speech at issue is categorized as made pursuant to an employee's official duties or the employee's speech as a private citizen. As addressed above, reports issued by government agencies are likely to be considered speech made pursuant to an employee's official duties, even if attributed to individual authors; the language in a report "owes its existence to a public employee's professional responsibilities" and, to borrow from the *Shurtleff* factors, is clearly attributable to and shaped by the government.[125]

Whether a government employee's use of preferred names and gendered pronouns while interacting with other employees, or within their email signature, should also be categorized as speech made pursuant to official duties is a closer question.[126] It is undeniable that a government employee is only in the position to speak with colleagues or to have an email signature associated with a government agency because the employee has entered into government service, but this does not automatically render all employee speech made while on duty government speech.[127] Rather, the test established in *Garcetti* applies to only those "restrictions that are necessary for . . . employers to operate effectively and efficiently," and employees can still seek protection for "contributions to the civic discourse."[128] Accordingly, analysis of the permissibility of pronoun restrictions should begin by determining whether gendered pronouns qualify as a topic of public concern—i.e., whether discussion of them contribute to civic discourse. If so, the inquiry should turn to whether allowing or restricting employees' use

[123] *Id.* at 421-23 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995))). Note that the Court explicitly declined to rule on whether this limitation applies in the same manner to cases "involving speech related to scholarship or teaching." *Id.* at 425.

[124] *Garcetti*, 547 U.S at 422-23.

[125] *See Id.* at 421-22; *see also supra* notes 90-91 (discussing government reports).

[126] *See supra* note 11 and accompanying text.

[127] *See* Connick v. Myers, 461 U.S. 138, 148-49 (1983).

[128] *Garcetti*, 547 U.S. at 418-20, 422-24.

of preferred pronouns would materially impair the efficient and effective performance of government functions.

Though the decision to use and or share gendered pronouns may be based on one's intimate understanding of their own gender identity, gendered pronouns may nevertheless qualify as a topic of public concern for this analysis. A person's gender identity is their "personal sense of what [their] own gender is," and pronouns are a relatively straightforward manner for a person to externally communicate their gender identity.[129] Reviewing courts have, on occasion, held that referring to a student or a colleague's pronouns in conversation is not always attempting to opine on gender as a matter of public discourse.[130] Yet the Supreme Court has recognized that sexual orientation and gender identity are "sensitive political topics . . . [that] are undoubtedly matters of profound 'value and concern to the public.'"[131] More specifically, the Sixth Circuit has held that gender pronouns "can and do convey a powerful message implicating a sensitive topic of public concern."[132]

Determining whether discussion of pronouns qualifies as a topic of public concern depends on the "content, form, and context of" the expression, meaning that not all references to pronouns will qualify as contributing to public discourse.[133] A colleague using a gendered pronoun to refer to another colleague may not necessarily qualify as a contribution to civic discourse. However, the pronoun-usage restrictions at issue here do not directly target individual use of pronouns, but are rather broad, agency-wide regulations aimed at suppressing use of gendered pronouns as a method of implementing the Trump administration's Gender Ideology and Anti-DEI orders.[134] Within this context, even interpersonal uses of gendered pronouns—such as listing pronouns in one's email signature—may be understood as "powerful messages implicating a sensitive topic of public concern."[135]

---

[129] *Understanding Gender Identities and Pronouns*, TREVOR PROJECT (Sep. 5, 2024), https://www.thetrevorproject.org/resources/article/understanding-gender-identities-and-pronouns [https://perma.cc/A4PF-QHAQ]; Corbin, *supr*a note 48, at 621-22. Pronouns are method of outwardly expressing one's internal gender identity. *Id*.

[130] Kluge v. Brownsburg Community School Corp., 548 F. Supp. 3d 814, 839 (S.D. Ind. July 12, 2021) (finding that teacher misgendering of trans student on individual basis was not matter of public concern); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Tr., 680 F.Supp. 3d 1250, 1287 (D. Wyo. Jun. 30, 2023).

[131] Janus v. Am. Fed'n. Of State, County and Mun. Employees, 585 U.S. 878, 913-14 (2018). (quoting Snyder v. Phelps, 562 U.S. 443, 453 (2011)).

[132] Meriwether v. Hartop, 992 F.3d 492, 508 (6th Cir. 2021).

[133] *See* Connick v. Myers, 461 U.S. 138, 148-49 (1983).

[134] *See supra* note 11 (discussing agency memos on email signatures).

[135] *See Meriweather*, 992 F.3d at 508.

Assuming that pronoun use qualifies as a matter of public concern, *Garcetti* instructs that government employee speech on the subject may be regulated only insofar as necessary to ensure the efficient and effective operation of government.[136] The Trump administration would likely argue that permitting government employees to use pronouns that do not correspond with the employee's biological sex would undermine the government's "mission" as "employer," given the administration's statements rejecting the existence of trans-inclusive gender identity.[137] However, while gendered pronouns may *appear* within a governmental forum because of a person's status as a governmental employee, the person's use of gendered pronouns presumably does not owe *its existence* to their professional responsibilities; this distinction would make it more difficult to argue that this speech is something that the government has "commissioned or created."[138] As Justice Thomas recently commented, "it undermines core First Amendment values to allow a government employer to adopt an institutional viewpoint on the issues of the day and then, when faced with a dissenting employee, portray this disagreement as evidence of disruption."[139]

Additionally, the imposition and maintenance of gender pronoun restrictions for governmental employees seems likely to produce more disruption in the provision of government services than permitting employees to use their preferred pronouns would. Though not overly burdensome, requiring government employees to take time to remove pronoun references from email signatures or third-party applications like Slack does detract from those employees fulfilling their actual duties.[140] For cisgender employees with gender-neutral first names, pronoun removal may impose additional time burdens in requiring them to clarify their gender in internal or external correspondence.

Yet it is the psychological and social impact of these policy changes, especially for gender-non-conforming government employees, that is most likely to disrupt the effective operation of government. As noted above, misgendering carries with it not only dignitary harm but also a substantial risk of emotional, psychological, and even physical harm. Before President Trump assumed office in January, the Equal Employment Opportunity Commission ("EEOC") recognized that repeated intentional misgendering

136 Garcetti v. Ceballos, 547 U.S. 410, 418-20 (2006).

137 *See Id.* at 422-23.

138 *Id.* at 421-23 (emphasis added).

139 MacRae v. Mattos, 145 S.Ct. 2617, 2620 (2025) (Thomas, J., respecting the denial of cert.).

140 *See supra* note 11 (discussion of agency memos). There is some indication that federal agencies implemented automated processes to remove pronouns from email clients or other software. *See* Cameron, *supra* note 11.

may create a hostile work environment.[141] As one anonymous LGBTQ+ federal worker told the Washington Blade in response to the Trump administration's anti-LGBTQ+ executive orders, "if you feel like you don't have the psychological safety to do your job . . . it kind of kills your psychological availability to do your job. People are not engaged."[142]

While employers are permitted to direct their employees to "deliver any *lawful* message" related to their official duties, employers may not direct employees to deliver messages that run afoul of the law.[143] As the Supreme Court established in *Bostock*, discriminating against an individual on the basis of sexual orientation or gender identity is illegal sex discrimination under Title VII of the Civil Rights Act of 1964.[144] Even though the Trump administration's Gender Ideology order states the intention to limit the Biden administration's broader interpretation of *Bostock* to other provisions of the Civil Rights Act, it does not purport to reverse the Supreme Court's holding on sex-based employment discrimination.[145] As of September 2025, the Trump administration's EEOC website still identifies "treating someone . . . unfavorably because of that person's sex, including . . . transgender status" as illegal sex discrimination under Title VII.[146]

In practical terms, the Trump administration's restrictions on gendered pronouns create a climate of intimidation and fear for gender-non-conforming government employees that places emotional strain on employees and ultimately may force them to leave government service.[147] The Trump administration may express a hostile position on gender ideology as government speech, but while the government's control of employee speech on pronouns as a topic of public concern may advance the government's general anti-trans mission, these restrictions are not "necessary for . . . [government agencies] to operate efficiently and effectively" because in practice they impose additional burdens and psychological harms on cisgender and gender-non-conforming employees that detract from those

---

[141] *See supra* notes 47-50 (discussing misgendering harms); Mackenzie O'Connell, *"What's in a [Dead] Name?": Title VII Protections Against Misgendering and Deadnaming of Gender Diverse Individuals*, 33 U. FLA. J. L. & PUB. POL'Y 445, 468 (Summer 2023) (analyzing recent EEOC decisions on employee misgendering).

[142] Joe Reberkenny, *Federal Workers, Trans Service Members Cope with Trump Attacks*, WASHINGTON BLADE (Feb. 18, 2025), https://www.washingtonblade.com/2025/02/18/federal-workers-trans-service-members-cope-trump-attacks [https://perma.cc/GK37-YZNM].

[143] Janus v. Am. Fed'n. Of State, County and Mun. Employees, 585 U.S. 878, 908 (2018).

[144] *See* Bostock v. Clayton County, 590 U.S. 644, 660 (2020).

[145] *See* Exec. Order No. 14168, 90 Fed. Reg. 8615.

[146] *Sex-Based Discrimination*, EEOC, https://www.eeoc.gov/sex-based-discrimination [https://perma.cc/4BLU-HA3P].

[147] A federal employee was quoted saying "I see an exodus [of LGBTQ employees] coming—whether it is forced or voluntary"). Reberkenny *supra* note 142.

employees' actual duties.[148] To the extent the Trump administration's policies discriminate against non-gender-conforming employees with respect to the "terms, conditions, or privileges of employment," those polices may violate Title VII of the Civil Rights Act; and, as the Court explained in *Janus*, the government as an employer may not compel employees to convey unlawful messages.[149]

B. Time, Place, and Manner Regulations Are Inapplicable

The government may argue in the alternative that its pronoun restrictions are merely content-neutral time, place, and manner restrictions on its employees' private speech, and that the government is attempting to restrict speech of its employees in either non-public or limited-purpose public forums where content-based restrictions may be appropriate.[150] A blanket restriction on the use of pronouns in email signatures or instant messaging applications could theoretically constitute a content-neutral restriction on speech; however, facially content-neutral laws nevertheless must satisfy strict scrutiny if they "cannot be justified without reference to the content of the regulated speech."[151] Furthermore, even content-neutral time, place, and manner restrictions must leave open "ample alternative channels of communication."[152]

Here, the justification for the facially content-neutral restriction on pronouns is compliance with the Trump administration's anti-DEI and Gender Ideology executive orders, which seek to restrict gender expression inconsistent with the government's understanding of biological sex.[153] Even in limited-purpose public forums where the government may restrict private expression to preserve the forum for its intended purposes, the regulation must not be "an effort to suppress expression," and the pronoun restrictions plainly appear to be an effort to suppress non-normative gender expression.[154]

Even assuming that the pronoun restrictions could be justified without reference to the content of speech, the restrictions fail to leave open "ample alternative channels of communication."[155] Though an adequate alternative channel need not be the speaker's first choice, the alternative channel must

[148] *See* Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).

[149] *See* 42 U.S.C. § 2000e-2(a)(1); Janus v. Am. Fed'n. Of State, County and Mun. Employees, 585 U.S. 878, 908 (2018).

[150] *See supra* notes 64-71 (discussing public forum doctrine).

[151] Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015).

[152] *See* United States v. Grace, 461 U.S. 171 (1983).

[153] *See supra* note 11.

[154] Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983).

[155] *Grace*, 461 U.S. at 171.

permit the speaker to "reach the intended audience."[156] The government's restriction on pronoun use means that employees who seek to express gender identity through their virtual communications may not effectively reach their "intended audience" of governmental colleagues. Thus, even if the government's pronoun restrictions were justifiable without reference to content, the denial of "ample alternative channels" for employee expression could be grounds for invalidating the government's time, place, and manner restrictions.

IV. TEACHER AND STUDENT SPEECH IN K-12 SCHOOLS

Freedom of expression within the academic environment, and particularly in K-12 schools, is a frequent topic of litigation, owing to the countervailing interests in educating and inculcating civic values in the nation's youth while still protecting their constitutional right to speech.[157] Justice Jackson suggested in his opinion invalidating a school district's compelled flag salute in *West Virginia State Board of Education v. Barnette* that "probably no deeper division of our people could proceed from any provocation than . . . cho[osing] what doctrine . . . public educational officials shall compel youth to unite in embracing."[158] And, as the Supreme Court famously suggested in *Tinker v. Des Moines Independent Community School District*, neither "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[159]

However, governmental authorities and school officials do retain the ability to "prescribe and control conduct in the schools" in the interest of promoting a non-disruptive learning environment.[160] In particular, schools may be able to restrict student expression that "materially and substantially disrupt[s] the work and discipline of the school . . . or the lives of others."[161] This section of the Article will explore the free speech rights of students and teachers within the K-12 environment in light of the Trump administration's executive orders; in particular, this section seeks to determine whether the Radical Indoctrination order's proscription on encouraging social transition through the use of gender-non-conforming people's preferred names and pronouns can withstand First Amendment scrutiny.

---

[156] *See* Weinberg v. City of Chicago, 310 F.3d 1029, 1041 (7th Cir. 2002); *see also* Bay Area Peace Navy v. U.S., 914 F.2d 1224, 1229 (9th Cir. 1990) ("[A]n alternative is not ample if the speaker is not permitted to reach the intended audience.").

[157] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506-07 (1969).

[158] West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

[159] *Tinker*, 393 U.S. at 506.

[160] *Id.* at 507-10.

[161] *Id.* at 514.

Executive Order 14190, *Ending Radical Indoctrination in K-12 Schooling*, suggests that in recent years schools have functioned as "echo chamber[s]" in which students are "indoctrinat[ed]" to "accept . . . ideologies without question or critical examination," including "young men and women" being "made to question whether they are born in the wrong body."[162] The executive order frames education on topics like gender ideology and diversity and inclusion as an "anti-American, subversive, harmful, and false" infringement on parental rights, and instructs that children should instead be provided a "patriotic education" rooted in the concept that "celebration of America's greatness and history is proper."[163] The order defines "social transition" as "adopting a 'gender identity' or 'gender marker' that differs from a person's sex," including by allowing access to opposite-sex facilities, permitting participation in school athletic competitions inconsistent with a student's biological sex, or using alternate names or pronouns.[164]

The order purports to eliminate federal funding or support for K-12 schools that engage in "illegal and discriminatory treatment and indoctrination, including based on gender ideology;" several cabinet secretaries are charged with producing a strategy which summarizes and analyzes "all Federal funding sources and streams, including grants or contracts, that directly or indirectly support or subsidize the instruction, advancement, or promotion of gender ideology" in K-12 curriculum or teacher education, certification, or employment.[165] The requested strategy also aims to restrict funds for K-12 educational institutions that "directly or indirectly support or subsidize the social transition of a minor student."[166] The order additionally instructs the Attorney General to coordinate with state attorneys general and local district attorneys to file appropriate actions against K-12 teachers and school officials who "sexually exploit[] minors, unlawfully practic[e] medicine by offering diagnoses and treatment . . . or otherwise unlawfully facilitat[e] the social transition of a minor student."[167]

To begin, one must acknowledge the naked hypocrisy of labeling disfavored viewpoints as "indoctrination" in an order which seeks to, in the terms of *Barnette*, violate the "fixed star in our constitutional constellation" by "prescrib[ing] what shall be orthodox."[168] The Radical Indoctrination order also presents similar vagueness and viewpoint discrimination issues as

[162] Exec. Order No. 14190, 90 Fed. Reg 8853.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*; *see* West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

the Trump administration's other anti-DEI and gender ideology orders.[169] The order does provide a definition of social transition, but threatening K-12 educators who "directly or indirectly support or subsidize" a minor student's social transition does not provide those educators with sufficient notice as to what qualifies as impermissible behavior, particularly given the serious potential civil or criminal penalties.[170] Would a teacher run afoul of the Radical Indoctrination order by allowing a trans or non-binary student to remain in her classroom, thereby directly supporting the instruction of that student? Could a school theater production include a trans student in its cast?[171] The order provides little clarity, yet enforcement actions related to the order are likely; in early April 2025, the Department of Justice and Department of Education announced the creation of the "Title IX Special Investigations Team" to handle cases involving the "pernicious effects of gender ideology in school programs and activities."[172]

Putting aside its other potential constitutional deficiencies, it is important to assess the Radical Indoctrination order as applied to students and to teachers, respectively, because student speech enjoys significantly greater constitutional protection than teacher speech.

A. Student Speech

Much of the Supreme Court precedent concerning freedom of speech in the K-12 academic environment, including *Barnette* and *Tinker*, focuses on student expression.[173] In *Barnette*, the Court emphasized that local school boards must perform their discretionary functions "within the limits of the Bill of Rights" to avoid "strang[ling] the free mind at its source."[174] In *Tinker*, the Court suggested that interference with student speech on the basis of an "undifferentiated fear or apprehension of disturbance" was insufficient to "overcome the right to freedom of expression."[175] A school's prohibition of a particular expression of opinion must be predicated on more than "a mere

[169] *See supra* notes 73-77 (discussing of vagueness and viewpoint discrimination); *see* Parents Defending Educ. v. Linn Marr Cmty. Sch. Dist., 83 F.4th 658, 667 (8th Cir. 2023) (finding that a school policy requiring students to "respect" peers' gender identity was sufficiently vague to uphold First Amendment claim).

[170] *See* Radical Indoctrination order *supra* Section I.

[171] *See supra* notes 110-112 (discussing NEA case).

[172] Jamie Joseph, *Trump DOJ, Education Dept form task force to protect female athletes from 'gender ideology' in schools, sports*, FOX NEWS (Apr. 4, 2025), https://www.foxnews.com/politics/trump-doj-education-dept-form-task-force-protect-female-athletes-from-gender-ideology-schools-sports [https://perma.cc/7F42-KQMF].

[173] *See Barnette*, 319 U.S. at 624; *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

[174] *Barnette*, 319 U.S. at 637.

[175] *Tinker*, 393 U.S. at 508-09.

desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[176] To sustain a prohibition on student speech, the school should make a showing that the proscribed conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," or that the speech "collides with the rights of others."[177] As Justice Alito suggested in concurrence in one of the Supreme Court's most recent student speech-related cases, though "enrollment in a public school should not result in the diminution of a student's free speech rights," schools "must have the authority to protect everyone on its premises . . . therefore schools must be able to prohibit threatening and harassing speech."[178]

Within the past decade, several district and circuit court cases have involved public-school students (or their guardians) arguing that school-imposed restrictions on expressing anti-LGBTQ views violates students' First Amendment rights; in some instances, however, courts have upheld such policies under *Tinker's* exceptions.[179] In 2024, for example, the First Circuit sustained a middle-school dress code barring clothing depicting hate speech or imagery targeting protected characteristics, including sexual orientation and gender identity, under *Tinker*'s "material-disruption" framework—holding that school officials may prohibit even "passive and silently expressed messages by students at school that target no specific student if the expression is reasonably interpreted to demean . . . characteristics of personal identity" and "the demeaning message is reasonably forecasted to 'poison the educational atmosphere' due to its serious negative psychological impact on students with the demeaned characteristic."[180]

Although hurt feelings alone are insufficient to trigger *Tinker's* material-disruption exception, the First Circuit upheld the district court's conclusion that a student's shirt asserting that there are only two genders

[176] *Id.* at 513.

[177] *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[178] Mahanoy Area School District v. B.L. by and through Levy, 594 U.S. 180, 197, 201 (2021).

[179] *See* Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., 109 F.4th 453 (6th Cir. 2024); L.M v. Town of Middleborough, Massachusetts, 103 F.4th 854 (1st Cir. 2024), *cert denied*, No. 24-410 (2025). *But see* Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Tr., 680 F.Supp. 3d 1250, 1250 (D. Wyo. Jun. 30, 2023); Tennessee v. Cardona, 737 F.Supp.3d 510 (E.D. Ky. June 17, 2024). As part of this litigation, parents have occasionally alleged violation of their substantive due process rights to direct their children's upbringing; however, courts have been cautious to avoid expanding the "contours of . . . parental rights" in a manner not clear in the nation's history and tradition. *Id.* at 1276; *see also* Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

[180] *See Town of Middleborough*, 103 F.4th at 873 (quoting Nuxoll ex rel. Nuxoll v. Indian Prairie School Dist. # 204, 523 F.3d 668, 671 (7th Cir. 2008), cert. denied, 605 U.S. ___ (2025). In his dissent from the denial of certiorari, Justice Alito wrote of the need to "reaffirm the bedrock principle that a school may not engage in viewpoint discrimination when it regulates student speech." *Town of Middleborough*, 145 S. Ct. 1489 (2025) (Alito, J., dissenting from denial of certiorari).

could reasonably be perceived as demeaning by gender non-conforming students and as likely to disrupt the academic environment, in part because of the "serious nature of the struggles, including suicidal ideation," that such students had experienced in connection to their identities.[181] The First Circuit's opinion suggests a presumption that "denigrating messages" more explicitly "directed at students" should be subject to restriction.[182] In general, though, the court emphasized that it should be up to the local educators to determine what would "make an environment conducive to learning," not federal judges.[183]

The Sixth Circuit more directly addressed school district prohibitions on student misgendering of their peers in *Parents Defending Education v. Olentangy Local School District Board of Education*, in which the court affirmed the district court's denial of a preliminary injunction for plaintiffs alleging that the polices violated their children's free speech rights.[184] The plaintiffs acknowledged the insulting and humiliating impact and likely psychological harms of misgendering on gender non-conforming students, but argued that the defendant school board had insufficient evidence of the likelihood of substantial disruption to warrant its restrictive policies.[185] However, the Sixth Circuit dismissed this as a consequence of the plaintiffs' bringing a pre-enforcement challenge and, in any case, not necessary to uphold the school district's policies.[186] The court held that plaintiffs were unlikely to succeed on their claims that the district's prohibition on intentional use of non-preferred pronouns constituted impermissible compelled speech, because, while the "intentional use of preferred or non-preferred pronouns . . . represents speech protected by the First Amendment," "constitutional compulsion analysis considers whether people 'have options' to act in a way that does not violate their conscience;" students who did not want to use peers' preferred pronouns could "compromise" by using classmates' first names to avoid "violat[ing] their conscience," which the Sixth Circuit considered an acceptable alternative particularly given the special characteristics of the school environment.[187]

The plaintiffs in *Olentangy Local School District* also argued that the school policies constituted viewpoint discrimination because the district

[181] *Town of Middleborough*, 103 F.4th at 882.

[182] *Id.* at 869.

[183] *Id.* at 886.

[184] *See Olentangy*, 109 F.4th at 459.

[185] *Id.* at 459.

[186] *Id.* at 464.

[187] *Id.* at 466-68. Whether or not this would actually be an acceptable alternative for transgender students may depend on whether other students use the transgender student's preferred first name or the name the student was given at birth.

permitted the use of preferred pronouns but prohibited the use of non-preferred pronouns to refer to transgender students.[188] The Sixth Circuit, however, held that the viewpoint discrimination challenge was unlikely to succeed because the ban on non-preferred pronoun use was part of the district's general policy to eliminate harassment and other forms of disruptive speech rather than a targeted effort to quell anti-trans sentiments, and because use of non-preferred pronouns was likely to have a debilitating impact on transgender students whereas use of preferred pronouns was not likely to cause students to be "similarly debilitated."[189] The court additionally noted that while the school district could not bar students from general discussion of their views on gender identity because those views might be offensive, "speech criticizing the identity of specific classmates, including the use of non-preferred pronouns, is more likely to cause disruption than speech about social issues in the abstract."[190]

The dissent in *Olentangy Local School District* provides useful insight into how courts might consider preferred pronoun policies compelled speech or viewpoint discrimination.[191] Judge Alice M. Batchelder describes the plaintiffs as disbelieving the very existence of gender transition, whereas the school district's position is that gender transition is real and worthy of protection in public schools; Judge Batchelder thus considered the school district policy to be viewpoint discrimination requiring students to engage in compelled speech.[192] Judge Batchelder rejects the majority's contention that reasonable alternatives suffice to undermine the plaintiffs' compelled speech claims, suggesting that requiring students to use transgender students' first names would "force students to fundamentally alter the message they wish to send."[193] "Student speech receives *greater* First Amendment protection than employee speech," including when "student speech . . . is not about a matter of public concern;" what matters is if the school district's policies require "affirmation of a belief and an attitude of mind," which Judge Batchelder suggest the preferred pronoun polices do require.[194]

The dissent also suggests that the pronoun requirements are a viewpoint-based regulation of speech rather a content-based regulation, because even though the regulation applies evenly to speakers on both sides

[188] *Id.* 469.

[189] *Id.*

[190] *Id.*

[191] *Id.* at 474 (Batchelder, J., dissenting).

[192] *Id.* at 475 (Batchelder, J., dissenting) (comparing the preferred pronoun requirement to requiring students to engage in a debate over "whether ghosts are good or evil," while "the plaintiffs' point would be that *there is no such thing as ghosts*").

[193] *Id.* at 484 (quoting 303 Creative v. Elenis, 600 U.S. 570, 596 (2023).

[194] *Id.* at 483 (quoting West Virginia State Board of Education v. Barnette, 319 U.S. 624, 633 (1943)) (emphasis added).

of the issue, "one side of the issue loses nothing."[195] To determine whether a student's use of pronouns is permissible under the school district's policies, school officials are required to "determine what message the pronouns advance," thus the district's polices constitute "viewpoint-based regulations."[196] The school district's determination that the use of non-preferred pronouns would be divisive is not sufficient to permit "a complete end run around the First Amendment."[197]

Upon en banc review, the Sixth Circuit reversed the prior appellate decision in *Olentangy* and remanded with instructions to narrow the preliminary injunction so that students could not be punished for "the commonplace use of biological pronouns."[198] The majority declined to decide whether the school district's pronoun policy amounted to compelled speech, instead concluding that the policy failed because the record did not show that the use of biological pronouns would cause the level of disruption required to justify restricting student speech under *Tinker*—particularly given the political valence often associated with a speaker's choice of pronoun.[199] The majority asserted that the district engaged in viewpoint discrimination by restricting speaker usage of biological pronouns while allowing students to use whichever pronouns they preferred, thereby imposing First Amendment and mental and psychological harm on the students who refuse to use their classmates' preferred pronouns.[200]

Judge Jane B. Stranch, in her dissent, asserts that the majority misstates the level of disruption which must have already occurred for a school district to restrict student speech under *Tinker*, noting that "*Tinker* does not require school authorities to wait for a disturbance" or for certainty that a disturbance will occur before regulating speech."[201] Even assuming a more stringent evidentiary standard, Judge Stranch pointed out that the record reflected that the District "forecast[ed] disruption" to non-binary and gender-non-conforming students if those students "are subjected to harassment and discrimination in the form of intentional use of non-preferred pronouns," particularly given that the narrow form of speech covered by the policy of pronoun usage is typically targeted at "the identity of specific classmates" rather than used as part of the general discussion of the broader issue of

[195] *Id.* at 487.

[196] *Id.* at 488.

[197] *Id.* at 487.

[198] Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., 2025 WL 3102072 at *1 (6th Cir. 2025).

[199] *Id.* at *8-10.

[200] *Id.* at *14, *35.

[201] *Id.* at *53 (Judge Stranch, dissenting).

gender identity.[202] Indeed, the plaintiff and member families acknowledged in the record that the use of non-preferred pronouns will be "insulting, humiliating, dehumanizing, derogatory, and unwanted" to those who wish to go by different pronouns.[203] Students who disagree on issues of gender identity remain free to express their disagreement through means other than the narrow restriction on pronoun usage, providing an alternative avenue for communicating their viewpoint and underscoring that the school district was not engaging in impermissible viewpoint discrimination.[204]

Even setting aside Judge Stranch's critiques of the majority's articulation of the evidentiary standard under *Tinker* and accepting the majority's reasoning as sound, the opinion nonetheless acknowledges that "a school" that "required students to use biological pronouns and barred students from referring to others by preferred pronouns that differed from their biological sex . . . [would] discriminate based on viewpoint."[205] "The government may not restrict the speech that individuals use to alter the beliefs they hold," as that constitutes impermissible "thought control."[206]

Based on the First and Sixth Circuit opinions on student LGBTQ-related speech, it seems unlikely that school directives mandating student compliance with the Trump administration's Radical Indoctrination order could survive First Amendment challenges. Under the *Tinker* standard, school districts are permitted to regulate student speech that "materially and substantially interfere[s]" with school operations or that "collides with the rights of others."[207] The First Circuit permitted a school district to regulate student expression rejecting the existence of transgender identity because the districts were attempting to prevent the disproportionately debilitating impact the speech likely would have on transgender students, which, in the districts' judgment, outweighed the harms of restricting anti-LGBTQ speech, while the Sixth Circuit held that a school district's regulation of student expression was too severe an abridgement of free speech rights to be justified under *Tinker* given the present evidentiary record.[208] Implementing the Radical Indoctrination order to prevent the use of preferred gender pronouns would mean that both of these harms—expressive injury and the demonstrable psychological, emotional, and physical injury of misgendering—would be

[202] *Id.* at *60-61.

[203] *Id.* at *64 (cleaned up).

[204] *Id.* at *59.

[205] *Id.* at *15.

[206] *Id.* at *18.

[207] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 514 (1969). The First Circuit questioned whether the distinction between the two *Tinker* tests is primarily "semantic." *See* L.M v. Town of Middleborough, Massachusetts, 103 F.4th 854, 873 (1st Cir. 2024).

[208] *See supra* notes 181-183 and accompanying text; *see also* notes 198-200 and accompanying text.

imposed on gender non-conforming students.[209] Restrictions on the use of preferred pronouns to acknowledge gender identity would likely be perceived by impacted students as speech regarding specifically their "identity" rather than commentary about "social issues in the abstract," which would only amplify the disruptive impact of that speech on gender non-conforming students.[210] It is difficult to see how implementing the Radical Indoctrination order itself would *not* "poison the educational atmosphere" for transgender students in a manner that would otherwise offend the *Tinker* standard.[211]

Even if a reviewing court held that regulations on the use of gender-affirming pronouns were reasonable restrictions on speech under the *Tinker* standard, litigants could draw the en banc opinion in *Olentangy Local School District* or Judge Batchelder's dissent upon initial appellate review in *Olentangy* to argue that pronoun restrictions constitute compelled speech and/or viewpoint discrimination.[212] Judge Batchelder suggested that requiring students to use appropriate gender pronouns for classmates might constitute compelled speech because it would "force students to fundamentally alter the message they wish to send."[213] The same could be said for requiring students to use *inappropriate* pronouns for their classmates, with more dire potential consequences given the harms of misgendering.[214] Under the Radical Indoctrination order, school officials would be required to "determine what message the pronouns advance" to ascertain whether student speech should be permitted, which constitutes a "viewpoint-based regulation."[215] As the majority opinion for the Sixth Circuit sitting en banc pointed out, "[t]he government may not restrict the speech that individuals use to alter the beliefs they hold," as that is "thought control," no matter the viewpoint the government is seeking to advance among the population.[216]

---

[209] *See* Radical Indoctrination order *supra* notes 15-16; *see also supra* notes 47, 48 (discussing misgendering).

[210] *See* Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., 109 F.4th 453, 469 (6th Cir. 2024).

[211] *See Town of Middleborough*, 103 F.4th at 882.

[212] *See Olentangy*, 109 F.4th at 482 (compelled speech); Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., 2025 WL 3102072 (6th Cir. 2025).

[213] *See Olentangy*, 109 F.4th at 484.

[214] *See Id.* at 469; cf. Bates v. Pakseresht, No. 23-4169 at *785 (9th Cir. 2025) (finding an Oregon rule requiring prospective adoptive parent to respect, accept, and support adoptee's gender identity and expression violated Free Speech Clause) ("[T]he situation would be no different if the state had restricted parental speech favoring more 'progressive' views of sexuality and gender identity, while compelling speech along the lines of . . . more traditional understanding. That law would likewise be content- and viewpoint-based.").

[215] *Olentangy*, 109 F.4th at 488.

[216] *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 2025 WL 3102072 at *18.

B. Teacher Speech

Though *Tinker* provides that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the free speech rights of public school teachers are considerably more restrained than those of their students.[217] Though not all of a teacher's on-duty speech should be considered government speech, the government possesses a greater ability to regulate speech resulting from teachers' official duties.[218] This is not an unlimited ability to restrain public school employee speech; after all, the Supreme Court held in *Pickering* that a letter to the local newspaper on a relevant matter of public concern such as school funding could not serve as the basis for a public school teacher's dismissal.[219] Yet although *Garcetti* makes First Amendment protection for employee speech turn on whether that speech was made pursuant to the employee's official duties, how that framework applies to elementary classroom instruction remains unsettled.[220]

The several district and circuit courts which have heard cases concerning teacher use of, or refusal to use, preferred pronouns have consistently begun their analyses by applying the *Garcetti* test.[221] As noted in the government employee speech discussion above, the use of gendered pronouns will generally qualify as a topic of public concern for the purposes of *Garcetti*.[222] Thus, the threshold question is whether a teacher's use of—or refusal to use— preferred pronouns constitutes speech made pursuant to the teacher's official duties and therefore falls outside the First Amendment protection that a private citizen's statements would receive.[223] This requires

[217] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969); *see Olentangy*, 109 F.4th at 483 ("[S[tudent speech receives *greater* First Amendment protection than employee speech.").

[218] *See* Corbin, *supra* note 48 at 618-19.

[219] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 564-65 (1968).

[220] Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) ("[W]e . . . do not decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

[221] *See* Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021); *Wood v. Florida Department of Education*, 729 F.Supp.3d 1255 (N.D. Fla. Apr. 9, 2024); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Tr., 680 F.Supp. 3d 1250, 1285 (D. Wyo. Jun. 30, 2023).

[222] *See supra* notes 117-120 and accompanying text; *Meriwether*, 992 F.3d at 508 (involving a public university professor's refusal to use student's preferred pronouns implicated topic of public concern). There is some precedent to suggest that if the "content, form, and context" of the speech indicates that, even though it addresses publicly controversial topics, it is solely meant to personally target an individual, it may not merit the same First Amendment protection. *See* Synder v. Phelps, 562 U.S. 443, 454-55 (2011) (suggesting that anti-LGBT protesting of soldier's funeral may have been impermissible if the solider himself were homosexual because it would constitute personal attack). Misgendered students could argue that misgendering speech targeted them specifically is too personally harmful to qualify as speech on a topic of public concern.

[223] *See Garcetti*, 547 U.S. at 421-22.

a "practical inquiry," analyzing the context and nature of the speech in question.[224]

Courts generally treat a teacher's classroom instruction and the manner in which a teacher addresses students as speech made pursuant to the teacher's official duties.[225] Although some decisions have suggested an academic freedom carveout from *Garcetti* that could protect instructional speech, those cases largely involve university faculty rather than K-12 educators.[226] The academic freedom entrusted to universities, which the Supreme Court often cites as essential to American democracy, is not understood to apply in the same manner to elementary education.[227] Unlike university students, elementary school students are compulsorily enrolled into being "a captive audience," and "the Constitution does not entitle teachers to present personal views to captive audiences against the instruction of elected officials."[228] Free speech protections do not apply to the "in-class curricular speech of teachers in primary and secondary schools made 'pursuant to' their official duties," as that speech is prescribed by democratically-elected local school boards.[229]

The instances in which courts have found that teacher speech was not made pursuant to official duties have often concerned speech made outside of the classroom and which did not owe its existence to the employee's governmental duties, as in *Kennedy v. Bremerton School District*.[230] In

[224] *Wood*, 729 F.Supp.3d at 1275 (quoting Kennedy v. Bremerton School District, 597 U.S. 507, 529 (2022)).

[225] *See* Brown v. Chicago Board of Education, 824 F.3d 713, 715-16 (7th Cir. 2016) ("A teacher's in-classroom speech is not the speech of a 'citizen' for First Amendment purposes.") (quoting Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007).

[226] *See Meriwether*, 992 F.3d 492, 514; Adams v. Trustee of the University of N.C.-Wilmington, 640 F.3d 550, 561 (4th Cir. 2011); Demers v. Austin, 746 F.3d 402, 409 (9th Cir. 2014).

[227] *See generally* Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589 (1967) (discussing academic freedom within the university context); Regents of the Univ. of Mich. v. Ewing, 640 F.3d 550 (4th Cir. 2011); Rust v. Sullivan, 500 U.S. 173, 200 (1991) ("[T]he university is . . . so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of government funds is restricted . . . ."). Unfortunately, university academic freedom concerning gender identity is also under assault, as evidenced by the firing of a Texas A&M professor filmed by a student complaining that the professor's course assignments broke the law by acknowledging more than two genders. Vimal Patel & J. David Goodman, *Texas Professor Fired After Accusations of Teaching 'Gender Ideology*', N.Y. TIMES (Sep. 10, 2025), https://www.nytimes.com/2025/09/10/us/texas-professor-fired-gender-ideology.html [https://perma.cc/T78S-3R4Q].

[228] *Mayer*, 474 F.3d at 480.

[229] Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 340-41 (6th Cir. 2010) (drawing distinction between Pickering's extra-curricular letter and teacher Evans-Marshall's in-class instruction). In-class non-curricular speech is presumed to be more protected than curricular speech. *See* Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 373 (4th Cir. 1998) (Luttig, J., concurring).

[230] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 530 (June 27, 2022). Though it is beyond the scope of this Article, several teachers' facing punishment for misgendering transgender students have

Kennedy, the Supreme Court held that, by preventing Kennedy, a high school football coach, from praying at midfield after games, the public school district violated the coach's Free Exercise and Free Speech rights under the First Amendment.[231] The Court held that Kennedy's prayers were "private speech, not government speech," because the prayers were not uttered within the scope of Kennedy's government employment duties such as instructing players or discussing strategy, but rather during a "private moment after the game."[232] The Court cautioned against arguments that "treat[] everything teachers and coaches say in the workplace as government speech subject to government control."[233]

Consider *Wood v. Florida Department of Education*.[234] The Northern District of Florida held that a transgender teacher's sharing of her own preferred pronouns with her Algebra class qualified as speech as a private citizen because her pronouns were a uniquely personal method of expressing her identity and as such constituted speech which did not owe its existence or was limited to her role as a teacher.[235] Making explicit comparison to *Kennedy*, the court held that no reasonable observer would believe that Wood's expression of her gender identity conveyed a governmental message and rejected the Florida Department of Education's argument that the State's pronoun restriction was concerned with only pedagogical outcomes, as the regulation applied to all school district employees, including those with no role in educating students.[236] The court held that Florida's interest in restricting Wood's speech to promote its interests as an employer in the "normal operations of the workplace" was unfounded, as there was no evidence that Wood's pronoun usage "impeded her duties as a teacher."[237]

The Eleventh Circuit, however, vacated and remanded the decision in *Wood*, holding that Wood was speaking as a government employee rather than as a private citizen.[238] The majority held that any interaction which

alleged violation of their rights under the First Amendment's Free Exercise clause. *See* Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Tr., 680 F.Supp. 3d 1250, 1285 (D. Wyo. Jun. 30, 2023); *Kluge*, 548 F. Supp. 3d at 943, 948-49. In June, the Supreme Court heard oral arguments and held that parents have the right to opt children out of LGBTQ-related educational material which would violate their children's Free Exercise rights; the Court's decision is pending. *See* Mahmoud v. Taylor, 145 S. Ct. 2332 (2025).

231 *Kennedy*, 597 U.S. at 514.

232 *Id.* at 531. For what it is worth, the factual record belies the claim accepted by the majority that Kennedy's prayer was "private," as he "consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location." *Id.* at 546 (Sotomayor, J., dissenting).

233 *Id.* at 530-31.

234 Wood v. Florida Department of Education, 729 F.Supp.3d 1255 (N.D. Fla. Apr. 9, 2024).

235 *Id.* at 1276-77.

236 *Id.* at 1277-78.

237 *Id.* at 1283.

238 Wood v. Florida Dept. of Ed., 142 F.4th 1286, 1290 (11th Cir. 2025).

Wood had with her students within the classroom constituted government employee speech.[239] The Eleventh Circuit distinguished *Kennedy* on the grounds that Kennedy was not "on duty" or performing tasks associated with his government position when he prayed, even though he was able to pray on the field only because of his role as a football coach.[240] In *Kennedy*, the coach's prayer was treated as speech by a "private citizen" while he was "off the clock" and therefore not subject to speech restrictions imposed by his government employment; by contrast, Wood's speech occurred while she was addressing her students in the classroom, where she was on duty and thus subject to speech limitations imposed by the Florida Department of Education.[241]

In his dissent, Judge Adalberto J. Jordan emphasized that Wood's "preferred personal title and pronouns" should be considered her expression as a private citizen because "[they] exist outside of, and do not depend on, the school or the government for their existence."[242] A teacher's personal pronouns "do not bear any of the characteristics of government speech," as there is "no evidence that the public associates them with the government, they have "not traditionally been used to convey a government message," and the government has not "manufactured, owned, or designed" them.[243] Judge Jordan points out that the majority seemingly ignored the Supreme Court's warning in *Kennedy* to avoid assuming that "everything teachers and coaches say in the workplace as government speech subject to government control."[244] Judge Jordan echoes Justice Alito in noting that the "majority's expansive application of the government speech doctrine . . . '[is being] used as a subterfuge for favoring certain private speakers over others based on viewpoint.'"[245] Concluding that portion of his dissent with a warning, Judge Jordan wrote that "those who wield the power of the government today . . . will be the ones at risk of being compelled to speak against their beliefs, or silenced, when their opponents are in charge."[246]

Indeed, Judge Jordan's warning for "those who wield the power of the government today" is borne out in the District Court of Wyoming's holding in *Willey v. Sweetwater County School District No. 1 Board of Trustees*, in which the court held that a school district policy requiring teachers to use students' preferred pronouns during instruction was government speech

[239] *Id.* at 1291-92.

[240] *Id.* at 1292-93.

[241] *Id.* at 1293.

[242] *Id.* at 1297 (Jordan, J., dissenting).

[243] *Id.* at 1298-99.

[244] *Id.* at 1299 (quoting Kennedy v. Bremerton School District, 597 U.S. 507, 530-31(2022)).

[245] *Id.* at 1301 (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 473 (2009)).

[246] *Wood*, 142 F.4th at 1301.

because it concerned speech made pursuant to official duties.[247] The court concluded that the school district's policy only implicated her interactions with individual students inside the classroom, meaning that the "content, form, and context" of the speech did not "give rise to matters of public concern."[248] Because the policy only compelled Willey's speech related to her official duties rather than as her speech as a citizen opining on a topic of public concern, and because employers "may insist that . . . the employee deliver any lawful message" if that speech "is part of an employee's official duties," Willey's refusal to use students' preferred names and pronouns was not protected under the Free Speech clause.[249]

As is evident, governmental control of teacher speech is jurisprudentially messy. Still, the doctrine leaves room for advocates for transgender teachers to test the boundaries of government-speech principles. Ideally, a teacher's personal pronouns and preferred name would be treated as personal expression that does not owe its existence to the teacher's government employment. Even if a court were inclined to treat a teacher's personal pronouns and preferred name as government speech, litigants can invoke the Supreme Court's caution against collapsing all school-employee speech into government speech, as well as Justice Alito's reluctance to expand the doctrine, as persuasive reasons to avoid that conclusion. Otherwise, those who are restricting teachers from using preferred pronouns today might be compelled to use preferred pronouns in the future.

C. Statutory Restrictions

The application of *Garcetti* in the cases discussed suggest that, if a school district—acting in compliance with the Radical Indoctrination order—required teachers and other school employees to misgender transgender students during classroom instruction, an employee's refusal to comply would likely fall outside the protection of the Free Speech Clause because that speech would occur pursuant to the employee's official duties. However, such a restriction could be challenged as inconsistent with federal or state anti-discrimination law, potentially including Title VII and IX's prohibitions on sex discrimination.[250] Employers may direct employees to "deliver any *lawful* message" related to their official duties, but that authority remains bounded by applicable.[251] Moreover, the Supreme Court has noted

[247] Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Tr., 680 F.Supp. 3d 1250, 1287 (D. Wyo. Jun. 30, 2023).

[248] *Id.* at 1287.

[249] *Id.* at 1286-87 (quoting Janus v. Am. Fed'n. Of State, County and Mun. Employees, 585 U.S. 878, 908 (2018)).

[250] 42 U.S.C. §2000e; 20 U.S.C. §1681.

[251] *Janus*, 585 U.S. at 908.

that within the *Pickering* framework, "speech-restrictive law[s] with 'widespread impact' . . . 'give[] rise to far more serious [First Amendment] concerns than could any single supervisory decision.'"[252] Thus, a school district requiring all of its staff to deliver misgendering messages that potentially violate federal or state anti-discrimination protections should trigger enhanced scrutiny for judicial review.[253]

Several circuits and district courts have analyzed school district policies affirming transgender identity through the use of preferred pronouns using this statutory compliance framework.[254] In *Willey*, the District Court of Wyoming denied granting a preliminary injunction against the school district's preferred names policy in part because the policy was implemented to comply with the Biden administration's expansion of the definition of sex discrimination in Title VII in *Bostock* to Title IX, and the threat of losing federal funding for non-compliance with Title IX was too severe a risk for the district to ignore.[255] In *Linn Mar Community School District*, concurring Judge Jane L. Kelly noted that Title IX and Iowa anti-discrimination law created a duty for the school district to "protect students from harassment and discrimination on the basis of sex," which prompted the school board to create policy recognizing the right of students to be addressed by the name and pronouns which correspond with their gender identity.[256] Judge Kelly noted that the school board's policy was not just consistent with the scope of its educational mission, but that it was mandated by law.[257]

---

[252] *Id*. at 907.

[253] Several states have introduced or passed legislation requiring school employees to use the pronouns which correspond with students' sex assigned at birth, effectively requiring staff to misgender students or else risk civil liability. *See* Kaitlin Riordan*, Gov. Lee Signs Bill Opening Schools up to Lawsuits for Using Trans Students' Preferred Names or Pronouns,* WBIR (May 12, 2025), https://www.wbir.com/article/news/local/gov-lee-signs-bill-opening-schools-up-lawsuits-for-using-trans-students-preferred-names-pronouns-passes-legislature/51-6d59496b-13a0-413b-bd24-bc5c04353792 [https://perma.cc/DWL5-P24G]; Lucio Vasquez, *Texas Senate Passes Bill that Would Allow Teachers, Students to Misgender Others Without Punishment*, KERA NEWS (May 9, 2025), https://www.keranews.org/texas-news/2025-05-09/texas-misgender-senate-punishment [https://perma.cc/548F-RJP7]; Avery Kreemer, *Ohio Bill Would Block Schools from Using Trans Students' Preferred Names, Pronouns Without Parent Consent*, WCPO (Apr. 3, 2025), https://www.wcpo.com/news/government/state-government/ohio-state-government-news/ohio-bill-would-block-schools-from-using-trans-students-preferred-names-pronouns-without-parent-consent [https://perma.cc/99AG-YXWX].

[254] *See* Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., 109 F.4th 453, 669 (6th Cir. 2024) (J. Kelly, concurring); *Willey*, 680 F.Supp. 3d at 1289.

[255] *Willey*, 680 F.Supp. 3d at 1289-90.

[256] Parents Defending Educ. v. Linn Marr Cmty. Sch. Dist., 83 F.4th 658, 670-71 (8th Cir. 2023).

[257] *Id.* at 672. In its amicus brief in support of petitioner in *L.M. v. Town of Middleborough*, the Foundation for Individual Rights and Expression suggested that the anti-discrimination protections established through the implied rights of action under Titles VI and IX were preferable methods of countering student harassment compared to speech-based restrictions. *See* Brief for Foundation for

Gender identity-based discrimination may no longer qualify as discrimination "on the basis of sex" under Title IX.[258] In January 2025, a federal district court held that the Biden administration's Department of Education rule, including gender identity as a basis for sex discrimination under Title IX, exceeded the agency's statutory authority and violated constitutional and administrative powers, in part because the rule would compel speech by requiring teachers to use preferred names and pronouns.[259] The Gender Ideology order labelled the Biden administration's definition of sex-based discrimination under Title IX "legally untenable" and stated it "harmed women," and accordingly ordered agency heads to rescind all related documents related to advancing transgender equality in the educational system.[260]

Yet even if Title IX does not currently protect transgender students or educational staff who wish to avoid misgendering them, such protections are still available under Title VII and state anti-discrimination laws. As noted above, the Supreme Court's interpretation of sex-based discrimination in *Bostock* remains good law, even according to the Trump administration's EEOC website.[261] Local school boards have consistently been held as employers subject to Title VII liability, and the Supreme Court has analogized a school's duty to prevent teachers from sexually harassing their students to an employer's duty to prevent supervisors from sexually harassing their subordinates.[262] Litigants could therefore argue that Title VII obligates school districts to take reasonable steps to prevent teacher conduct that constitutes sex-based harassment of students, including conduct that demeans students on the basis of their transgender identity.

More pointedly, many states and local jurisdictions explicitly protect transgender rights within their anti-discrimination policies.[263] Twenty states and the District of Columbia prohibit discrimination in schools on the basis of sexual orientation and gender identity, and Pennsylvania and North Dakota interpret their existing prohibitions on sex discrimination to protect against

Individual Rights and Expression as Amicus Curiae Supporting Petitioners at 5, L.M v. Town of Middleborough, No. 24-410 (2025).

[258] *See* 20 U.S.C. §1681.

[259] Tennessee v. Cardona, No. 2:24-072-DCR, 2025 WL 63795, at *2-4 (E.D. Ky. Jan. 9, 2025).

[260] *See* Exec. Order No. 14168 §2 (f), 7, 90 Fed. Reg. 8615.

[261] *See Sex-Based Discrimination, supra* note 146.

[262] Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75 (1992)*;* Gulino v. N.Y. State Educ. Dep't*,* 460 F.3d 361 (2d Cir. 2006); Ass'n of Mexican-Am. Educators v. California, 183 F.3d 1055, 18 (9th Cir. 1999).

[263] *Nondiscrimination Laws,* MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws [https://perma.cc/4KW6-E2UY].

gender identity-based discrimination.[264] Hundreds of municipalities and local school districts have adopted guidelines to support gender-non-conforming students in K-12 schools, including by directing teachers and school staff to honor students' name and pronoun preferences.[265] As in *Willey*, courts may treat compliance with state or local law, alongside the interest in preventing disruption to the academic environment and avoiding harm to transgender students, as factors that weigh in favor of policies protecting students' pronoun preferences.

Teachers, as government employees, should not be compelled to deliver unlawful messages.[266] This argument lacks some of the weight that it had under the Biden administration, given the changes to Title IX interpretation. In fact, the Department of Education's Office for Civil Rights is launching investigations into municipal school districts for gender-inclusive bathroom policies on the basis that gender inclusivity in facilities violates Title IX's protections for female students.[267] Yet even as the Trump administration seeks to wield Title IX as a cudgel against transgender students' ability to exist in public schools, President Trump also has signed an Executive Order to (unconstitutionally) shutter the Department of Education to ostensibly return its "main functions . . . to the States."[268] The Order does stipulate that the Secretary of Education is still required to ensure the termination of DEI and "gender ideology" programs in schools receiving federal funding, but this is logically and rhetorically inconsistent with the notion of returning control over public schools to local entities.[269] Litigants might consider making the argument that because "no single tradition in public education is more deeply rooted than local control over the operation of schools," it should be up to local school districts to determine the appropriate gender inclusive policy for educational staff in their own communities to follow—a notion rooted in an understanding of federalism that the Trump administration would seem to support.[270]

---

[264] *Safe Schools Laws,* MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/safe_school_laws (last updated Aug. 12, 2025).[https://perma.cc/62CL-MJFP].

[265] *Guidelines to Support Transgender and Gender Expansive Students*, NYC DEP'T OF EDUC., https://www.schools.nyc.gov/school-life/school-environment/guidelines-on-gender/guidelines-to-support-transgender-and-gender-expansive-students [https://perma.cc/9FB5-26R3].

[266] *See* Janus v. Am. Fed'n. Of State, County and Mun. Employees, 585 U.S. 878, 908 (2018); Garcetti v. Ceballos, 547 U.S. 410, 421-22 (2006).

[267] Press Release, Off. of Comms and Outreach, *U.S. Department of Education Launches Investigation into Denver Public Schools for Converting Girl's Restroom to All-Gender Facility*, U.S. DEP'T OF EDUC. (Jan. 28, 2025), https://www.ed.gov/about/news/press-release/us-department-of-education-launches-investigation-denver-public- schools-converting-girls-restroom-all-gender-facility [https://perma.cc/WKT3-BD68].

[268] Exec. Order No. 14242, 90 Fed. Reg. 13679 (Mar. 20, 2025).

[269] *Id.*

[270] *See* Milliken v. Bradley, 418 U.S. 717, 741-42 (1974).

CONCLUSION

The Free Speech Clause is perhaps not the first-place litigants would think to look in the search for constitutional or statutory protections from the Trump administration's Executive Orders targeting gender ideology and diversity and inclusion, and admittedly, its protective capacity is limited given the potent reach of the government speech doctrine. Yet, the constitutional restrictions on overly vague speech proscriptions and viewpoint discrimination may be—and have already been—effective arguments in litigation against the Executive Orders.[271]

Government employees can challenge restrictions on their ability to use pronouns in the workplace as a speech restriction on a matter of public concern that is unnecessary and even detrimental to the accomplishment of their official duties, as well as violative of Title VII anti-discrimination law. Students may characterize mandated misgendering policies as viewpoint discrimination and/or compelled speech, which itself could register under the *Tinker* standard, which permits regulation of speech that is disruptive to the academic environment and debilitating to the rights of others.[272] Finally, teachers and school boards may assert that a teacher's personal use of pronouns is personal speech not owing its existence to official duties or, alternatively, that expansion of the government speech doctrine to teachers' preferred names and pronouns goes much too far. Further, there are grounds to argue that teachers cannot be compelled to deliver messages that conflict with local and state anti-discrimination laws, and that maintaining local control over school policies, including those protecting transgender students, is an existential necessity for public schools.

These Free Speech Clause arguments do not—and should not—exist in isolation as a litigation strategy. As noted, there are statutory and other constitutional avenues for challenging the anti-trans Executive Orders. However, the author hopes that these arguments will prove useful for prospective litigants in the fight to preserve the dignity, autonomy, and freedom of transgender individuals.

---

[271] *See supra* notes 97-113 and accompanying text.

[272] *See* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 514 (1969).