No. 24-1075

IN THE

United States Court of Appeals for the Eighth Circuit

GLBT YOUTH IN IOWA SCHOOLS TASK FORCE, D/B/A IOWA SAFE SCHOOLS, *et al.*,
Plaintiffs-Appellees,

v.

KIMBERLY REYNOLDS, in her official capacity as GOVERNOR OF THE STATE OF IOWA, *et al.*,
Defendants-Appellants.

JULIE MITCHELL, *et al.*, in their official capacity as BOARD MEMBER OF THE URBANDALE COMMUNITY SCHOOL DISTRICT,
Defendants.

On Appeal from the United States District Court
for the Southern District of Iowa, No. 4:23-cv-474
The Hon. District Judge Stephen H. Locher

BRIEF OF *AMICI CURIAE* CONSTITUTIONAL LAW PROFESSORS AT LAW SCHOOLS THROUGHOUT THE EIGHTH CIRCUIT IN SUPPORT OF APPELLEES AND AFFIRMANCE

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DISCLOSURE STATEMENT

The amici curiae here, Professors Mark Kende, Gregory Magarian, Eric Berger, Jeremiah Ho, Kyle Langvardt, and Danielle Weatherby, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rule of Appellate Procedure 26.1.

None of these amici curiae are for-profit organizations, meaning that none of them have any parent company, and no person or entity owns them or any part of them. They are unaware of any publicly held corporations not a party to this proceeding with a financial interest in its outcome. Each of these amici curiae are (or previously have been) employed on the faculty of various law schools within the Eighth Circuit.

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INTEREST OF AMICI CURIAE[1]

Amici are professors or instructors with expertise in First Amendment legal principles who are on the faculty at law schools located throughout the Eighth Circuit.[2] They include:

Professor Mark Kende, a Professor of Law, the James Madison Chair in Constitutional Law, and Director of the Drake Constitutional Law Center at Drake University School of Law. Professor Kende has taught courses on constitutional law, comparative constitutionalism, and civil rights, among others. Professor Kende served as a law clerk to the Hon. Julian Cook Jr. of the U.S. District Court for the Eastern District of Michigan.

Professor Gregory Magarian, the Thomas and Karole Greene Professor of Law at Washington University School of Law. Professor Magarian has taught courses on constitutional law, First Amendment, free speech in schools, and political speech, among others. He has published a book on the First Amendment entitled *Managed Speech: The Roberts Court's First Amendment* (2017). Professor

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(2), amici curiae state that all parties have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

[2] The views expressed in this brief are those of the named individuals and do not reflect the opinions of the various institutions with which these faculty are or have been affiliated.

Magarian served as a law clerk to the Hon. John Paul Stevens of the United States Supreme Court and the Hon. Louis F. Oberdofer of the U.S. District Court for the District of Columbia.

Professor Eric Berger, a Professor of Law, the Earl Dunlap Distinguished Professor of Law at the University of Nebraska-Lincoln College of Law. Professor Berger has taught courses on the First Amendment, Constitutional Law, Constitutional History, Federal Courts, and Statutory Interpretation. Professor Berger served as a law clerk for Judge Merrick Garland of the D.C. Circuit.

Professor Jeremiah Ho, an Associate Professor at Saint Louis University School of Law. His scholarship has appeared in the *Yale Journal of Law & Feminism*, the *Harvard Journal on Legislation*, *The Georgetown Law Journal Online*, the *Journal of Legal Education*, the *Utah Law Review*, and the *Kentucky Law Journal*, among others.

Professor Kyle Langvardt, an Assistant Professor of Law at the University of Nebraska-Lincoln College of Law. Professor Langvardt has taught courses on constitutional law, speech and media, and technology regulation, among others.

Professor Danielle Weatherby, a Professor of Law at the University of Arkansas School of Law. Professor Weatherby has taught courses in Education Law and her legal scholarship focuses on First Amendment jurisprudence and its impact

on student speech. Professor Weatherby served as a law clerk to the Hon. Gary L. Sharpe of the U.S. District Court for the Northern District of New York.

SUMMARY OF THE ARGUMENT

Iowa's Senate File 496 ("SF496") "requires the removal of any book from Iowa public-school libraries that contains a description or visual depiction of a 'sex act'," among other requirements. *See* App.481, R.Doc.65, at 3. This "incredibly broad" law "has resulted in the removal of hundreds of books from school libraries, including, among others, nonfiction history books, classic works of fiction, Pulitzer Prize winning contemporary novels, books that regularly appear on Advanced Placement exams, and even books designed to help students avoid being victimized by sexual assault." *Id.* Accordingly, the District Court enjoined these "sweeping restrictions" after finding them "unlikely to satisfy the First Amendment under any standard of scrutiny." *Id*.

The State Defendants advocated for a different result, and argued below and again here on appeal that "Plaintiffs' claims are foreclosed by the government speech doctrine." *See* App.254, R.Doc.53, at 10; *see also* Br. of State Defs.-Appellants (March 11, 2024) (hereafter "State App. Br.") at 33. The State says that because public-schools and their libraries are "creations of the State," that "their expressive decisions, including what books to make available in the library, are government speech" immune from First Amendment scrutiny. App.258, R.Doc.53, at 14; *see*

also State App. Br. at 34 (claiming "the State speaks when it curates the books it wants—or does not want—to place on school library shelves").

Plaintiffs disagree. They assert that the State's government-speech argument "ignor[es] a half century of precedent establishing that students enjoy free speech rights in school settings." *See* App.367, R.Doc.59, at 6 (citing U.S. Supreme Court precedent). Rather, Plaintiffs argue, SF496 "violates their right to receive information and ideas," which is "nowhere more vital than in schools." *Id.* Plaintiffs stressed that this Court's decision in *Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771 (8th Cir. 1982), foreclosed the State's government-speech argument. *Id.* at 368, 7. In *Pratt*, the Eighth Circuit held:

> There has been a flurry of cases recently in which the federal courts have considered First Amendment challenges to the removal of books from school libraries. Those courts have generally concluded that a cognizable First Amendment claim exists if the book was excluded to suppress an ideological or religious viewpoint with which the local authorities disagreed. . . . We believe that this focus provides the proper framework for analysis here.

Pratt, 670 F.2d at 776 (citations omitted). Plaintiffs urged the District Court to follow this binding circuit precedent, as other District Courts have recently done. App.368, R.Doc.59, at 7 (citing *United States v. Smith*, 460 F. Supp. 3d 783, 792 (E.D. Ark. 2020)).

In his Order, District Court Judge Locher found "several problems with the State Defendants' argument" that SF496 represented government speech. App.509-

11, R.Doc.65, at 31-33. One of those problems was that Judge Locher agreed with Plaintiffs that this Court's opinion in *Pratt* was "binding Eighth Circuit precedent" that the District Court could not ignore "without clear guidance from a higher court that it is no longer good law." *Id.* at 510, 32.

The Supreme Court has been reluctant to extend the government speech doctrine because it is "susceptible to dangerous misuse[.]" *Matal v. Tam*, 582 U.S. 218, 235 (2017). And rightly so. Courts should exercise extreme caution before extending the government speech doctrine's reach into public-school libraries, which are centers of public discourse and access to information. Such caution is of dire importance because the point at which courts would draw distinctions is, at best, murky and, at worst, legally unsound. For example, if *school* library curation is considered government speech, there would be no boundary to suggest that curation of all public library curation would not also be government speech. Or, if content can be censored on the basis of a "sex act," there would be no logical boundary to suggest it could not also be restricted on the basis of other ideas that a legislature's whim deems vulgar – perhaps gun use, war, violence, or an even broader interpretation of sex. In this brief, amici respectfully urge this Court to reaffirm its previous *Pratt* holding and to affirm the District Court's rejection of the State's argument that SF496 represents government speech immune from First Amendment scrutiny.

ARGUMENT

I. THE GOVERNMENT SPEECH DOCTRINE, AN EXCLUSION TO FIRST AMENDMENT PROTECTIONS, DOES NOT APPLY TO SENATE FILE 496.

The Supreme Court has articulated three factors for determining whether government conduct constitutes government speech. None of these factors supports the idea that library curation is government speech. The State's attempt to extend the narrow confines of the government speech doctrine to regulation of school libraries conflicts with the law and should be rejected. The government speech doctrine's exclusion from scrutiny under the Free Speech Clause of the First Amendment, *see Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009), renders the doctrine "susceptible to dangerous misuse," so courts must "exercise great caution" before extending its reach. *Matal*, 582 U.S. at 235.

To determine whether government activity is government speech, this Court, following U.S. Supreme Court precedent, considers three factors:

> (1) whether the government has long used the particular medium at issue to speak;
>
> (2) whether the medium is often closely identified in the public mind with the state; and
>
> (3) whether the state maintains direct control over the messages conveyed through the medium.

See Gerlich v. Leath, 861 F.3d 697, 708 (8th Cir. 2017) (citing *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209–13 (2015)). As explained

further below, amici respectfully submit that none of these three factors favor extending the government speech doctrine to depart from precedent and provide the State with unfettered discretion to censor books from school libraries.

A. The State Has Not Historically Communicated Messages Through School Library Curation.

On the first factor, the State has not historically used school libraries as a forum to convey messages. To the contrary, the school library has long been a place where a student can acquire knowledge from diverse sources, allowing a student to "literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 869 (1982) (quoting *Right to Read Def. Comm. v. Sch. Comm. Of Chelsea*, 454 F. Supp. 703, 715 (Mass. 1978)).

In *Walker*, where the U.S. Supreme Court held the case "likely marks the outer bounds of the government-speech doctrine," (*Matal*, 582 U.S. at 238), the majority held that Texas' specialty license plate designs were government speech immune from First Amendment scrutiny. *Walker*, 576 U.S. at 219. The majority found that the first factor (whether the government has long used the particular medium at issue to speak) favored the government because of the various ways in which the State of Texas historically used its license plate designs to communicate government messages. *Id.* at 211–12.

Similarly, in *Summum*, the U.S. Supreme Court held that monuments displayed on public property typically constitute government speech. 555 U.S. at 470. The Court noted that governments have "long used monuments to speak to the public," explaining that going back to "ancient times" monuments have been erected to convey government messages. *Id.* And in *Shurtleff v. City of Bos.,* 596 U.S. 243, 255 (2022), while the U.S. Supreme Court held that the City of Boston's program allowing private groups to raise flags in a public plaza did not constitute government speech, the majority opinion found that the first factor weighed in favor of the City. The majority explained that there is a long history of governments raising certain flags to convey messages. *Id.* at 254 ("Not just the content of a flag, but also its presence and position have long conveyed important messages about government."). Unlike monuments, flags, or license plates, books and the libraries holding them are not a historic means to communicate government speech. Quite directly the opposite, libraries are used to convey *access* to a multitude of content, viewpoints, and speech.

The facts of *Walker*, *Summum*, and *Shurtleff* are thus inapposite because there is no history showing that the State of Iowa has ever used libraries—much less public-school libraries—to communicate government messages to citizens. The State Defendants have presented no evidence that the government traditionally used school libraries that way, nor could they, because libraries are places where

individuals access information from diverse sources, not places where people go to hear the views of the local authorities. *Pico*, 457 U.S. at 869 (quoting *Right to Read Def. Comm.*, 454 F. Supp. at 715).

Here, we must distinguish among the different "state actors" who may use the library to communicate messages (*see infra Section I.C* for similar discussion). The State Defendants have presented no evidence to suggest the Iowa Department of Education, Iowa Legislature, or other *state-level* officials have ever used school libraries to communicate messages, other than perhaps the message that access to information is important in communities and schools across Iowa. *Individual librarians*, on the other hand, may communicate messages through the book curation of the school's library, such as an elementary school librarian curating the collection to include books regarding cooperation, respect, and responsibility, and placing such books on display. But messages that *individual libraries* may communicate in that context are *not* the same as the statewide coordinated, consistent messages that would be required to support the State Defendants' position that the *State Defendants* have historically communicated via public-school libraries. And messages communicated by *individual librarians* are certainly nothing like the coordinated government messages conveyed by displays of flags or monuments on state property, as considered in *Summum* and *Shurtleff*.

Amici respectfully submit that if school libraries are used to convey any coordinated statewide message to students, such messages would only be to encourage reading, education, and the exploration of arts and ideas of all kinds, a general principal true for both libraries and schools. *See Brown v. Louisiana.*, 383 U.S. 131, 142 (1966) (describing the "public library" as "a place dedicated to quiet, to knowledge, and to beauty"). As a district court in this Circuit recently wrote:

> *"'A library outranks any other one thing a community can do to benefit its people. It is a never failing spring in the desert.'* (quoting philanthropist Andrew Carnegie). For more than a century, librarians have curated the collections of public libraries to serve diverse viewpoints, helped high school students with their term papers, made recommendations to book clubs, tracked down obscure books for those devoted to obscure pastimes, and mesmerized roomfuls of children with animated storytelling."

Fayetteville Pub. Library v. Crawford Cnty., No. 5:23-CV-05086, 2023 WL 4845636, at *3 (W.D. Ark. July 29, 2023). Precisely because libraries are the "spring in the desert" offering patrons a variety of subjects and perspectives, a school library is *not* a medium the government uses to speak. For these reasons, the first factor weighs against a finding that SF496 represents government speech here.

B. The Public Does Not Consider School Libraries to Be a Medium for Government Speech.

The public does not consider a school library to be a medium for government messages and speech. Rather, as the Supreme Court explained, the school library serves a "unique role" in our society, giving students the opportunity for "self-

education and individual enrichment[.]" *Pico*, 457 U.S. at 869; *see also id.* at 868 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (explaining that a school library allows students to "remain free to inquire, to study and to evaluate, to gain new maturity and understanding."). This reflects the public perception of the school library, and the idea of a school library as a medium for government speech is at odds with this perception.

This is reinforced by the fact that school libraries contain books with contradictory messages—filled with books from different, and often opposing, religious and political traditions. *See Gerlich*, 861 F.3d at 708 (finding that the government speech doctrine did not apply to messages from "groups that have opposite viewpoints from one another like the Iowa State Democrats and the ISU College Republicans."); *see also Matal*, 582 U.S. at 236 ("In light of all this, it is far-fetched to suggest that the content of a registered mark is government speech. . . It is expressing contradictory views.").

The Court in *Walker* found that Texas license plate designs are often closely identified in the public mind with the state because they serve the governmental purposes of vehicle registration and identification, display "Texas" in large letters at the top of the plate, and essentially function as government IDs. *Walker*, 576 U.S. at 212. A school library, on the other hand, is filled with books written by non-state authors on a countless number of topics and expressing many views. The public

mind does not closely identify the messages in library books with the views of the government, or even that the editorial curation of the library contents is speech from the government. *See also PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, No. 3:23-cv-10385, 2024 WL 133213, at *2 (N.D. Fla. Jan. 12, 2024) ("[T]he Court simply fails to see how any reasonable person would view the contents of the school library (or any library for that matter) as the government's endorsement of the views expressed in the books on the library's shelves.").

As with the first factor, the second factor weighs against a finding that SF496 represents government speech here.

C. The State Does Not Directly Control the Messages Conveyed in Each Public-School Library.

On the final factor, the State does not maintain direct control over the messages conveyed in school libraries. First, the state does not control the messages conveyed by the books that sit on library shelves. *Authors*, not librarians, control the messages contained in those books. Mere curation of a vast assemblage of diverse authors' messages – messages that often directly conflict with one another – into the contents of a school library collection does not transform the messages of those collected books into government speech. *See Shurtleff*, 596 U.S. at 256–58 (holding that the flag-flying program was not government speech due in part to its encouragement of various viewpoints). There is simply nothing in the record to

suggest that the viewpoints of individual authors should be considered government speech when a librarian decides to either include or remove a book from the library.

There is no evidence that at any point before enacting SF496, that state-level officials of the State of Iowa actively vetted books and removed those that contradict its messages from school libraries. In fact, the evidence post-enactment of SF496 confirms the opposite, as individual schools and librarians have struggled to determine what books would are covered by the State's Book Ban. The lack of meaningful involvement in the review of library books speaks volumes. *See Shurtleff*, 596 U.S. at 258 (holding that flag display in Boston plaza was not government speech given the city's previous "lack of meaningful involvement in the selection of flags or the crafting of their messages"); *see also Matal*, 582 U.S. at 235–36 (holding that trademarks are not government speech, and explaining, for the third factor, that there is no indication that the government makes registration decisions based on a trademark's message); *cf. Walker*, 576 U.S. at 213 (finding that this factor favored the state where a board was required to "approve every specialty plate design proposal before the design can appear on a Texas plate" and that this board "actively exercised this authority").

Unlike *Shurtleff*, the majority in *Summum* found that the City "effectively controlled" the messages conveyed by the monuments in a park where it exercised "final approval authority" over their selection. 555 U.S. at 473. Here, however,

there is no evidence that state-level officials of the State of Iowa have ever before meaningfully exercised any approval authority over the content of books in its school libraries. There is not even any evidence in the record to suggest that localized school board officials, such as at the county or district level, have ever before meaningfully exercised approval authority over the contents of each school library within its jurisdiction.

However, State Defendants incorrectly conflate state action in the context of school libraries. State App. Br. at 41. In school libraries, there are public employees involved in the approval authority of school library content. Individual librarians and other school staff public employees do exercise meaningful authority and control over the materials present within their own school library. For example, an elementary school librarian may exercise authority to include books regarding values such as friendship or responsibility, historical information such as the founding of the country, or appealing fictional content such as magic or fantasy. Amici do not suggest that these possible decisions, and others, would not constitute school librarians exercising control over library content, but this is not the meaningful state control contemplated by the government speech doctrine.

Librarians do exercise some approval authority over school library content. But that is not enough to make that control "government speech." Control over speech might be a sign of government speech, but it can also be a sign of

unconstitutional censorship. *Shurtleff*, 596 U.S. at 263-64 (Alito, J. concurring). "The ultimate question is whether the government is actually expressing its own views or the real speaker is a private party and the government is surreptitiously engaged in the 'regulation of private speech.'" *Id.* at 263 (Alito, J. concurring) (quoting *Summum*, 555 U.S. at 467). For something to be government speech, at a minimum the government must be exercising *active* control over speech in a context that reasonable people would understand as an *endorsement* of that speech.

In *Walker*, the state, through a coordinated and direct process, would "approve every specialty plate design proposal before the design can appear on a Texas [license] plate." 576 U.S. at 213. In *Summum*, the court noted that "[i]t certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." 555 U.S. at 471. Thus, observers know that the monuments reflect the views of whoever put them there. *Id.* In both of those decisions, the government spoke directly in a context that would ordinarily be understood to reflect the views of the speaker, which is why they are examples of government speech.

By contrast, school libraries collect multiple views from different authors, and patrons of libraries know that individual books may not reflect the views of the librarians, and may even be contradicted by other books in the same library. As a result, school librarians do not control state messaging through approval authority

of book curation. People do not reasonably assume that the content of every book on a library shelf represents the views of the government. In the absence of either direct, coordinated government control or any commonly held view that the government delivers its views through libraries, shelving decisions cannot be considered to convey messages from the government.

The third factor weighs against a finding that SF496 represents government speech. Because the State's enactment of SF496 fails to meet any of the Supreme Court's required three elements to demonstrate "government speech," amici respectfully submit that the State's attempt to extend the government speech doctrine to a school library should be rejected.

II. SENATE FILE 496 IS GOVERNMENT REGULATION, NOT GOVERNMENT SPEECH.

Library curation is not government speech because SF496 is a regulation, not speech. This regulation regulates the school library, which another federal circuit court has explained "is a storehouse of knowledge" that is "created by the state for the benefit of the students in the school." *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 581 (6th Cir. 1976). The contents of a school library cannot be removed by a state regulation that desires to "'winnow' the library for books the content of which occasioned [its] displeasure or disapproval." *Id.* at 581–82 (holding that students' First Amendment rights did not permit removal of books based solely on the "social or political tastes of school board members"). Such impermissible

content discrimination, is precisely what the Iowa State Legislature is doing through SF496.

SF496 requires that public-school libraries contain only "age-appropriate materials." Iowa Code § 256.11(9)(a)(2). "Age-appropriate" is defined to specifically exclude "descriptions or visual depictions of a sex act[,]" which is defined in Section 702.17. Iowa Code § 256.11(19)(a)(1).

Via SF496, the Iowa State Legislature unconstitutionally seeks to impose a "pall of orthodoxy" intended to suppress the content depicted in certain books, which is precisely what the First Amendment precludes. *See Pratt*, 670 F.2d at 776 (*citing Keyishian*, 385 U.S. at 603); *Pico*, 638 F.2d at 433 (Newman, J., concurring); *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980). In fact, the Supreme Court has emphasized that the "special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students." *Pico*, 457 U.S. at 868 (emphasis in original).

Amici respectfully submit that government regulation, especially the type of government regulation embodied in SF496, cannot be considered government speech.

III. THE GOVERNMENT-SPEECH DOCTRINE DOES NOT APPLY TO BOOK REMOVAL.

According to the State, "***[c]urating*** library books in public-funded school libraries is government speech." State App. Br. at 37 (emphasis added). But the State ignores that there is a difference between simply "curating" course curricula and affirmatively ***removing*** materials from school libraries — the conduct the District Court found constitutionally suspect below. *See* App.509-10, R.Doc.65, at 31-32. Removal of educational materials is not government speech, but the curation of curriculum (including the acquisition of books and other curricular decisions), should likewise *not* be considered government speech, primarily because students' First Amendment rights must be considered in the school library context.

In *Pratt*, this Court considered whether the government-speech doctrine precluded First Amendment scrutiny when a state sought to remove a film from public-school curriculum due to its purported effect on the "religious and family values of students." 670 F.2d at 774–76. The *Pratt* court found the government-speech doctrine inapplicable, and in applying the First Amendment, found that the government's discretion to "determine the curriculum that is most suitable for students" did not provide the state with "an absolute right to ***remove*** materials." *Id.* at 775–76 (*citing Minarcini*, 541 F.2d at 581) (emphasis added). In reaching that decision, the Eighth Circuit emphasized that students have "a right to be free from official conduct that [is] intended to suppress the ideas expressed in these [books]." *Id.* at 776 (*citing Pico*, 638 F.2d at 433 (Newman, J., concurring)).

Indeed, every other Circuit Court that has considered a constitutional challenge to a state's attempt to ***remove*** content, such as books, from school curricula has applied the First Amendment. *See, e.g.*, *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184 (5th Cir. 1995) (considering the removal of books discussing voodoo and hoodoo in African-American communities as well as the presentation of "spells," "tricks," "hexes," and "recipes"); *Virgil v. Sch. Bd. of Columbia Cty.*, 862 F.2d 1517 (11th Cir. 1989) (considering the removal of "vulgar" and "sexually explicit materials"); *Minarcini*, 541 F.2d 577 (considering the removal of certain books from the public-school library). As far as amici are aware, no federal appellate court has ever endorsed the idea that *removal* of such content is immune from First Amendment scrutiny because of the government speech doctrine.

This unanimity of circuit-court precedent is no surprise; these holdings align with the U.S. Supreme Court's *Pico* decision. In *Pico*, students of a public-school district challenged the state's decision to remove certain books from the library shelves that were characterized as "objectionable" and "improper fare for school students" by members of the school board. *See Pico*, 457 U.S. at 856. There, a controlling plurality expressed concerns about the "reason or reasons" underlying the state's removal of certain books, sending the clear signal that the Supreme Court did not view removal as immune from First Amendment scrutiny. *Id*. at 883. The state there, like the State Defendants here, claimed unfettered discretion to remove

books from school libraries, but the Supreme Court rejected that proposition outright. *Id.* at 868–70. The U.S. Supreme Court reasoned that a state cannot remove books "simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Id.* at 872. This opinion made clear, as federal courts have recently held, that "the First Amendment imposed some degree of limitations upon the discretion of the removal of books from a public-school library." *C.K.-W. by & through T.K. v. Wentzville R-IV Sch. Dist.*, 619 F. Supp. 3d 906, 914 (E.D. Mo. 2022); *see also Fayetteville Pub. Library*, 2023 WL 4845636, at *20; *Little v. Llano Cnty.*, No. 1:22-CV-424-RP, 2023 WL 2731089, at *7 (W.D. Tex. Mar. 30, 2023).

The scant authorities that Appellants cite for the proposition that removing books is a form of government speech (*see* State App. Br. at 39–42) are distinguishable. For example, the facts in *United States v. Am. Library Ass'n, Inc*., 539 U.S. 194 (2003), a case about congressional spending power, showed that people could still access the restricted works, they just had to ask for filtering software to be disabled. 539 U.S. at 209. No case cited by State Defendants stands for the broad proposition that any shelving decision a library makes is protected government speech not subject to First Amendment considerations, nor does either case change the status of a library as a limited public forum. *See infra* Section IV.

The same pall of orthodoxy principle applies here, where the State is attempting to suppress what it determines to be "age-appropriate" through affirmative book removal of books containing a broad conception of "descriptions or visual depictions of a sex act." Iowa Code § 256.11(19)(a)(1). Through SF496, the State denies students "free access to information in the continuing process of their education." *Johnson*, 702 F.2d at 197.

IV. COROLLARY CONSIDERATIONS MAKE CLEAR THAT SENATE FILE 496 SHOULD REMAIN ENJOINED.

A. The Government Speech Doctrine Should Not Be a Vehicle for State Censorship.

The "Constitution does not permit the official suppression of *ideas*." *Pico*, 457 U.S. at 871 (emphasis in original). Yet Defendants claim that SF496 is "government speech" and thus itself excluded from First Amendment protection review, rather than what it really is—censorship of views that Defendants find distasteful. This leads Defendants to the Orwellian conclusion that an individual's free speech rights are served by laws that restrict the dissemination of ideas and viewpoints. That cannot be the law. *Cf. Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 679–80 (1990) (Scalia, J., dissenting), maj. op. overruled by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) ("[T]he Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that [is] … incompatible with the absolutely central

truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate.").

As the Supreme Court has implied, the government speech doctrine does not protect government conduct that itself violates the free speech and association rights of individuals. *Erznoznik v. City of Jacksonville* 422 U.S. 205, 209 (1975) ("But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.") (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)). The government may not use its own expressive rights as an "end-run" around the protections that we all have to voice our opinions, worship freely, and petition the government for redress. To find otherwise would turn the First Amendment on its head. Justice Alito, joined by Justice Thomas and Justice Gorsuch, addressed censorship as part of his government speech doctrine analysis in his concurrence in *Shurtleff v. City of Boston*. Justice Alito stated "we have . . . recognized that 'the Free Speech Clause itself may constrain the government's speech' under certain conditions, as when a 'government seeks to compel private persons to convey the government's speech.'" 596 U.S. at 268 (citing *Walker*, 576 U.S. at 208). Under SF496, educators necessarily must carry

out the government's speech, for example, by removing books and curtailing instruction.

Justice Alito instructed that to "prevent the government-speech doctrine from being used as a cover for censorship, courts must focus on the identity of the speaker." *Id.* at 263. Continuing, Justice Alito stated that "neither 'control' nor 'final approval authority' can in itself distinguish government speech from censorship of private speech," but are relevant factors when distinguishing such speech. *Id.* at 264. In regards to SF496, educators (who are employees of Iowa schools) necessarily become the "speakers." Further, SF496 allows for the government to control speech related to gender identity, sexual orientation, and sex acts. This is why the Western District of Arkansas, in *Fayetteville Public Library v. Crawford County*, found that Plaintiffs "established a likelihood that Section 5 would permit, if not encourage, library committees and local governmental bodies to make censorship decisions based on content or viewpoint, which would violate the First Amendment. 2023 WL 4845636, at *21. "[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik*, 422 U.S. at 209. The implementation of SF496 necessarily requires control, censorship, and ultimately the suppression of the ideas

of educators and students alike, under First Amendment jurisprudence that cannot be meaningful distinguished within the government speech doctrine.

Students have a fundamental First Amendment right to receive information, specifically when considering whether a school board violated the right by removing books from a school library. *Pico*, 457 U.S. at 871–72. And the Supreme Court has recognized that "minors are entitled to a significant measure of First Amendment protection." *Erznoznik*, 422 U.S. at 212–14 ("Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."). Appellants may not use the government speech doctrine as a shield to enact SF496, when the effect of the law is to deprive students of their Constitutional rights.

As previously articulated, the government speech doctrine exists to distinguish that when the government speaks—when the government uses a medium to convey ideas rather than regulating the ideas of others—the government is not limited by the First Amendment's Free Speech Clause in determining the content of the speech. But SF496 cannot practically be limited to only encompass government speech as contemplated by the government speech doctrine. SF496 necessarily is First Amendment censorship.

B. Even If Senate File 496 Is Government Speech, That Finding Would Not Evade Its Void-For-Vagueness Deficiencies.

Even if this Court finds that SF496 is government speech, the law is still constitutionally infirm because it is too vague. Although Plaintiffs' briefs provide the full analysis of why SF496 is overbroad, as amici, this brief only adds that void-for-vagueness analysis is required even when the government engages in its own protected speech, because vague regulations are unconstitutional, even if considered government speech.

"The Fifth Amendment guarantees every citizen the right to due process. Stemming from this guarantee is the concept that vague statutes are void." *United States v. Cook*, 782 F.3d 983, 987 (8th Cir. 2015). "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Imprecise or overbroad statutes violate an individual's due process when the statute "fails to give ordinary people fair notice of the conduct it punishes, or . . . invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015).

That government speech is itself a form of protected conduct does not exempt regulations, even those found to be speech, from the rest of the Constitution. A federal law that passes First Amendment muster might still violate the Commerce Clause, and a state law that is otherwise considered government speech might still

unconstitutionally restrict a different right. Vagueness doctrine is based on Fifth and Fourteenth Amendment due process rights. *See Sanimax USA, LLC v. City of S. St. Paul*, No. 23-1579, — F.4th —, 2024 WL 878914, at *13 (8th Cir. Mar. 1, 2024). Thus, were this Court to find that SF496 is government speech, it would still need to also find that the law provides Iowans with due process.

Amici recognize that the seminal Supreme Court cases addressing the government-speech doctrine – *Walker*, *Pleasant Grove City*, and *Shurtleff* – do not conduct a void-for-vagueness analysis. But that was because vagueness was not an issue in those cases. As Justice Alito, concurring in *Shurtleff*, wrote, "those cases did not set forth a test that always and everywhere applies when the government claims that its actions are immune to First Amendment challenge under the government-speech doctrine." 596 U.S. at 262 (Alito, J., concurring). None of the three cases considered statutes that regulated forbidden and *punishable* conduct. Such regulated forbidden and *punishable* conduct is prescribed under SF496. Therefore, SF496 implicates due process rights within the government speech doctrine that have not been previously considered.

Both the Library Section and Instructional Section of SF496 subject Iowan educators to discipline if the provisions are violated. Iowa Code § 256.11(9). The Iowan educators potentially subject to discipline would include teachers, librarians, administrators, school counselors, and any other school professionals making book

availability or instructional content decisions for students. Penalties for failure to abide by SF496 are acute and disciplinary, including license sanctions and adverse employment actions. *Id.*; Iowa Code § 256.146(13). Therefore, Iowan educators due process protections are invoked, as the educators must have adequate notice of the described content to avoid arbitrary enforcement. *Johnson*, 576 U.S. at 595.

As the district court concluded, SF496 is vague because the "the State will have unfettered discretion to decide when to enforce it and against whom, thus making it all but impossible for a reasonable person to know what will and will not lead to punishment." App.482, R.Doc.65, at 4. Regardless of the analysis outcome, the district court did properly address the void for vagueness claim.

CONCLUSION

Amici respectfully urge the panel to affirm the District Court's holding that Senate File 496 is not "government speech" immune from First Amendment scrutiny.

Dated: April 17, 2024 By: **CROWELL & MORING LLP**

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5), because this brief contains 6,302 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: April 17, 2024

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I hereby certify that on April 17, 2024, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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