LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-2450
LAA.Legal@akleg.gov
120 4th Street, Room 3

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

M E M O R A N D U M April 5, 2022

SUBJECT: Public education bill; constitutional issues (SB 196; Work Order No. 32-LS0768\O)

TO: Senator Roger Holland
Chair of the Senate Judiciary Committee
Attn: Ed King

FROM: Marie Marx
Legislative Counsel

You have asked whether SB 196 raises any constitutional concerns. The answer is yes, SB 196 poses a number of constitutional concerns, which are explained below.

1. Teacher speech in K-12 public schools. Section 14.18.160(a) of SB 196 prohibits "a state agency, school district's governing body, charter school, or public school" from allowing "a teacher, administrator, or other employee to require, include in a course, or award course grading, credit, or extra credit for political activism, lobbying or efforts to persuade members of the executive or legislative branch at the local, state, or federal level to take specific action, or any practicum or similar activity involving social or public policy advocacy." It also provides "a state agency, school district's governing body, charter school, or public school" may not "direct or otherwise compel a student or a teacher, administrator, or other employee to affirm, adopt, or adhere to" certain concepts. It is unclear whether this provision prohibits a public school from teaching certain concepts. To the extent that it does so, it raises a First Amendment concern.

The First Amendment "protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[1] In *Garcetti v. Ceballos*, the United States Supreme Court established as a general rule that this First Amendment protection does not apply "when public employees make statements pursuant to their official duties, [because] the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[2] However, the Court left open the question of whether this holding applied to

[1] *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (citations omitted).

[2] *Id.* at 421.

"speech related to scholarship or teaching."[3] Subsequently, in *Demers v. Austin*, the Ninth Circuit found that "teaching and academic writing are at the core of the official duties of teachers and professors,"[4] and explained that "[s]uch teaching and writing are 'a special concern of the First Amendment.'"[5] The Ninth Circuit concluded that the general rule established in *Garcetti* does not apply "to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."[6] In other words, a professor's teaching and academic writing may be protected under the First Amendment.

The Ninth Circuit has not explicitly held whether the *Garcetti* exception discussed above applies to K-12 teachers. In *Kennedy v. Bremerton School District* and *Johnson v. Poway Unified School District*, the Ninth Circuit held that speech made by an employee of a K-12 public school was not entitled to First amendment protection because the speech was made as an employee.[7] The *Johnson* court reviewed decisions of other circuit courts involving in-school teacher speech, and quoted a Seventh Circuit holding that "'the [F]irst [A]mendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.'"[8] The Ninth Circuit then went on to state, "We see no reason to depart from their company."[9]

Kennedy and *Johnson* did not specifically evaluate a teacher's academic speech. It is possible that the Ninth Circuit would find that the teaching and academic writing of a K-12 public school teacher is protected under the First Amendment if it meets the test

---

[3] *Id*. at 425.

[4] *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014).

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

[6] *Demers*, 746 F.3d at 412.

[7] *See Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017) (holding that a high school football coach was not entitled to First Amendment protection when kneeling and praying on the fifty yard line immediately after games because he was acting as coach and therefore speaking as public employee); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011) (holding that banners in teacher's classroom referencing god and creator were not protected speech because banners were within scope of teacher's job responsibilities).

[8] *Johnson*, 658 F.3d at 963 (quoting *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 – 80 (7th Cir. 2007)).

[9] *Johnson*, 658 F.3d at 963.

established in *Pickering v. Board of Education*.[10] Under *Pickering*, a professor's academic speech must address "matters of public concern" and the professor's "interest 'in commenting upon matters of public concern' must outweigh 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[11] A professor's speech addresses "a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'"[12] The court stated "the essential question is whether the speech addressed matters of public as opposed to personal interest."[13] With regard to the second prong of the *Pickering* test, the United States Supreme Court has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[14]

It is likely that a court would find a K-12 public school teacher's teaching and academic writing relating to the concepts prohibited in SB 196 is a matter of public concern under *Pickering*. However, because K-12 public schools are outside the "special niche in our constitutional tradition"[15] reserved for universities, a court may find the government interests in restricting a teacher's academic speech outweigh the teacher's interest in commenting on matters of public concern. It is therefore also likely that SB 196's speech prohibitions, as applied to a K-12 public school teacher, would survive a First Amendment challenge.

2. Student First Amendment rights. SB 196 prohibits "a state agency, school district's governing body, charter school, or public school" from allowing "a teacher, administrator, or other employee to require, include in a course, or award course grading, credit, or extra credit for political activism, lobbying or efforts to persuade members of the executive or legislative branch at the local, state, or federal level to take specific action, or any practicum or similar activity involving social or public policy advocacy." It also provides "a state agency, school district's governing body, charter school, or public school" may not "direct or otherwise compel a student or a teacher, administrator, or other employee to affirm, adopt, or adhere to" certain concepts. It is unclear whether this provision requires the removal of curriculum material currently taught in schools. To the extent that it does so, it also raises a First Amendment concern. Students have a First

---

[10] 391 U.S. 563 (1968).

[11] *Id.* at 412 (quoting *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968)).

[12] *Id.* at 415 (quoting *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 422 (9th Cir. 1995)).

[13] *Id*. (quoting *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709 (9th Cir. 2009)).

[14] *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

[15] *Id*.

Amendment right to receive information and ideas,[16] and this right applies in the context of school curriculum design.[17] By limiting the concepts that a K-12 public school may teach, SB 196 may violate a student's First Amendment right to receive information. The Ninth Circuit has held that "the state may not remove materials otherwise available in a local classroom unless its actions are reasonably related to legitimate pedagogical concerns."[18] The court explained that, "Granting wider discretion has the potential to substantially hinder a student's ability to develop the individualized insight and experience needed to meaningfully exercise her rights of speech, press, and political freedom."[19] Additionally, a student "may establish a First Amendment violation by proving that the reasons offered by the state, though pedagogically legitimate on their face, in fact serve to mask other illicit motivations."[20]

Please be aware that identification of legitimate reasons for the prohibition will not insulate SB 196 from potential claims that the prohibition is motivated by a desire to discriminate against certain viewpoints. For example, an Arizona prohibition on a specific curriculum that had been taught in prior years was supported by the stated policy of "reduc[ing] racism in schools . . . which is a legitimate pedagogical objective."[21] An Arizona district court nonetheless found that the stated reason was pretextual, and held that the curriculum prohibition violated students' First Amendment rights because "the statute was in fact enacted and enforced for narrowly political, partisan, and racist reasons."[22]

In short, if SB 196 requires the removal of curriculum material currently taught in schools, the bill may violate a student's First Amendment right to receive information unless there is a legitimate and non-pretextual pedagogical justification for the removal.

---

[16] *Gonzalez v. Douglas*, 269 F. Supp. 3d 948, 972 (D. Ariz. 2017) (citing *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866-867 (1982)).

[17] *Id*. (citing *Arce v. Douglas*, 793 F.3d 968, 983 (9th Cir. 2015)).

[18] *Arce v. Douglas*, 793 F.3d 968, 983 (9th Cir. 2015) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

[19] *Id*. (citing *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982)) ("the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.").

[20] *Gonzalez v. Douglas*, 269 F. Supp. 3d 948, 972 (D. Ariz. 2017) (citing *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982)).

[21] *Id.* at 973.

[22] *Id.*

3. Vagueness. SB 196's proposed prohibition on compelling certain concepts may be challenged as unconstitutionally vague. "An impermissibly vague statute violates due process because it does not 'give fair notice of conduct that is forbidden or required.'"[23] The Alaska Supreme Court has explained that "a law may be unconstitutionally vague if the scope of exceptions and the scope of defenses are unclear."[24] When evaluating a vagueness challenge the Alaska Supreme Court will determine "whether there is a history or a strong likelihood of arbitrary enforcement and uneven application . . . [and] whether the regulation provides adequate notice of prohibited conduct." SB 196 does not explain what it means to compel affirmance, adoption, or adherence to the enumerated concepts.

Because SB 196 does not specify exactly what is prohibited, there is some possibility of unequal application. Depending on individual district's interpretation of the prohibited concepts, teaching or discussing a specific concept could result in punishment or other employment action against one teacher while another teacher may be allowed, or even encouraged, to teach the same concept. Thus, SB 196 may be susceptible to a vagueness challenge.

Please let me know if I may be of further assistance.

MYM:boo
22-080.boo

[23] *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 906 (9th Cir. 2019) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)).

[24] *Fantasies on 5th Ave., LLC v. Alcoholic Beverage Control Bd.*, 446 P.3d 360, 372 (Alaska 2019) (quoting *Haliburton Energy Servs. v. State, Dep't of Labor*, 2 P.3d 41, 50 (Alaska 2000)).