No. 24-1990

IN THE
United States Court of Appeals for the Eighth Circuit

RUTHIE WALLS; et al.,

Plaintiffs-Appellees,

v.

JACOB OLIVA, in his official capacity as Secretary of the Arkansas Department of Education, and individually; et al.,

Defendants-Appellants,

On Appeal from the United States District Court
for the Eastern District of Arkansas
Case No. 4:24-cv-00270-LPR
(The Honorable Lee P. Rudofsky)

BRIEF OF STATE OF IOWA, ET AL., AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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STATEMENT/INTEREST OF *AMICI CURIAE*

The Attorneys General of Iowa, Idaho, Florida, Indiana, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Carolina, South Dakota, Texas, Utah, and West Virginia are their States' chief law enforcement or legal officers. The *amici* States have a strong interest in the correct interpretation of the First Amendment and the authority to create a public-school curriculum that both adequately educates the youth while ensuring students do not feel pressured to submit to teachers who control their grades.

The States submit this brief to further those discrete interests. This brief shows that the district court erred when it applied *Pratt* as good law. Its reasoning is inconsistent with First Amendment precedent, and it conflicts with the original public meaning of the First Amendment. There is no constitutional right to compel schools to include certain materials in the curriculum.

The *amici* States have a crucial interest in ensuring that this Court correctly interprets the First Amendment and that it makes clear what we already knew—that *Pratt* is dead. Every State that has signed onto

this brief has laws that mandate certain materials be in the curriculum. Indeed, every State has mandatory curricular standards.

If allowed to stand, the district court's decision threatens to wreak havoc on States' ability to determine what is taught in their schools. Under the district court's logic, a student could assert a First Amendment right to force his class to read the Bible, listen to President Trump's campaign speeches, and watch white supremacist propaganda films. After all, "the right to receive information" does not stop with the information Plaintiffs like.

This Court should restore order to the curriculum formation process and make clear that students cannot force States to include whatever they want in the curriculum. In so doing, the Court should put the nail in *Pratt*'s coffin and recognize that it has been supplanted by subsequent Supreme Court precedent.

INTRODUCTION

Plaintiffs seek to force public school students to affirm beliefs they disagree with against their will. If that sounds strange, it is because it is. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Indeed, the First Amendment does not give teachers a right to compel their students to profess a belief they disagree with.

The district court countenanced this result. Not because the law allows it—indeed, the district court's opinion expressly said it did not. Instead, the district court relied on the mistaken belief that *Pratt v. Independent Sch. District No. 831, Forest Lake, Minnesota*, 670 F.2d 771 (8th Cir. 1982), is still good law and controls this case.

But it is not. Decades of subsequent Supreme Court precedent shows there is no First Amendment right to force States to adopt or retain certain curricular materials. The government speech doctrine, *Rust v. Sullivan*, 500 U.S. 173 (1991), *Morse v. Frederick*, 551 U.S. 393 (2007), and the original understanding of the First Amendment all show *Pratt* does not have a leg to stand on. *Pratt* is no longer good law, and this Court should so hold.

ARGUMENT

The district court held "*Pratt* is something akin to zombie precedent." R. Doc. 45 at 36. Then it held that "doubt" as to whether *Pratt* was dead took away its "authority to dispatch this ghoul to the grave." *Id.* at 36–37. But the district court's careful and cautious approach needlessly allowed the undead to continue walking. "[A] prior panel ruling does not control 'when the earlier panel decision is cast into doubt by an intervening Supreme Court decision.'" *United States v. Taylor*, 803 F.3d 931, 933 (8th Cir. 2015) (per curiam) (quoting *United States v. Anderson*, 771 F.3d 1064, 1067 (8th Cir. 2014)). The very doubt the district court thought constrained its decision in fact liberated it, and this Court should so hold.

Pratt is dead, and the Supreme Court killed it. Four more recent lines of First Amendment case law cast doubt on *Pratt*: The government speech doctrine means States, not students, control the public school curriculum. Viewpoint discrimination cases make clear that the State's subjective intent in making a curricular decision is not up for discussion in First Amendment cases. The Supreme Court's Establishment Clause cases make clear that students cannot force schools to promote religion.

And schools can ban speech that creates unwarranted racial tensions in schools. Finally, *Pratt*'s core holding, that students have a First Amendment right to force schools to include certain materials in its curriculum, is inconsistent with the First Amendment's original meaning.

I. *Pratt*—abrogated by the government speech doctrine—does not bind this Court.

Over the last 40 years, dozens of important First Amendment decisions came down. Chief among them are the Supreme Court's government speech doctrine cases. In those cases, the Court made clear that private citizens do not have a First Amendment right to control the government's own speech. And since the government is necessarily speaking a preferred message when it designs a curriculum, *Pratt* must fall.

A. *Pratt* is a constitutional outlier.

Pratt held that students have a First Amendment right to sue to compel a public school district to show a film the school district found to be inappropriate. 670 F.2d at 789. The Court explained that "school boards do not have an absolute right to remove materials from the curriculum." *Id.* at 776. Because "[s]tudents do not 'shed their

constitutional rights to freedom of speech or expression as the schoolhouse gate,'" this Court explained that attempts to "impos[e] a 'pall of orthodoxy' on classroom instruction" would violate the First Amendment. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

This Court continued by noting that a school did not have the right to remove materials from the curriculum if it "was excluded to suppress an ideological or religious viewpoint with which local authorities disagreed." *Id.* It instructed lower courts to look for "value-laden objections" to the material's content to tease out the school board's true motives. *Id.* at 777. It also instructed lower courts to reject "self-serving statements of the school board" when looking for the real reason for removing the material. *Id.* at 778.

But government "officials are presumed to act in good faith," *Mitchell v. Dakota Cnty. Soc. Servs.*, 959 F.3d 887 (8th Cir. 2020), yet *Pratt* requires courts to assume that a statement made by a school board after removing something from the curriculum is "self-serving" and, therefore, not in good faith, 670 F.2d at 778.

Pratt stands alone on an island of misfit precedents. In no other area do Courts presume bad faith and analyze the government's motives when the government speaks its own message. Yet, *Pratt* requires just that.

B. The government speech doctrine drastically changed the landscape.

Since *Pratt*, a robust government speech doctrine has changed the landscape of First Amendment law. Starting with *Rust v. Sullivan*, 500 U.S. 173 (1991), and continuing through more recent cases like *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), the Supreme Court has repeatedly held the government can discriminate based on viewpoint when it is speaking.

The First Amendment prevents the government from censoring others but it does not force the government to censor itself. What is more, the government is allowed to send the message it wants to send (so long as it does not become jawboning, *see Nat'l Rifle Ass'n of Am. v. Vullo*, 144 S. Ct. 1316, 1322 (2024)). If the government wants to promote a value system, it can. If it wants to condemn one, it can do that, too. And once the government is doing the talking, private citizens do not have a First Amendment right to control what is said.

Start with *Rust*. Then, a group of abortion providers challenged regulations barring use of federal funds "in programs where abortion is a method of family planning." *Rust*, 500 U.S. at 178 (quoting 42 U.S.C. § 300a–6). The abortion providers claimed the regulations were unconstitutional because they banned the providers from promoting abortion. *Id.* at 192.

The Court explained that "the government *may make a value judgment* favoring childbirth over abortion[] and implement that judgment by the allocation of public funds." *Id.* at 192–93 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)) (cleaned up; emphasis added). Allowing federal funding for abortion would have put the government's stamp of approval on abortion, so it was not required to subsidize it. *Id.* at 192–93. Put differently, the government did not have to subsidize abortion referrals because people might then assume the government supported abortion. *See id.* at 192–93. And it is axiomatic that the government cannot be forced to say something it disagrees with. *See id.* at 192–93.

After that came *Arkansas Educ. Television Commission v. Forbes*, 523 U.S. 666 (1998). In *Forbes*, an independent candidate was not allowed to take part in a debate on a public television station. *Id.* at 669.

The Court explained that television channels have broad discretion to choose who can and cannot appear on their networks. *Id.* at 673. It also explained that "the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination." *Id.* The Court then held that the channel was a nonpublic forum because the government had long restricted who could and could not appear on the channel. *Id.* at 680. As a result, refusing to host someone in a debate because they were unpopular did not violate the First Amendment. *Id.* at 683. The upshot, then, is that the government is allowed to control who can and cannot speak when it controls the forum.

That same Term, the Supreme Court decided *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). In that case, potential grant awardees were denied grant funding because their art did not uphold the standards of decency that the NEA required. *Id.* at 572–73. There, the Court explained that the government can set priorities on how it spends its money, and it does not violate the First Amendment to only want taxpayer funds to endorse certain viewpoints or forms of art. *See id.* at 587–88. The upshot, then, is that the State need not provide a platform

for art or speech that it finds repugnant. It can set reasonable limits on who and what can speak.

The next major government speech case was *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). Legal Services provides grants to civil legal aid organizations. *Id.* at 536. Recipients could not use those funds "to amend or otherwise challenge existing welfare law." *Id.* at 537. The Supreme Court said that regulation had to fall. *Id.* The Court explained that "[t]he LSC lawyer . . . speaks on the behalf of his or her private, indigent client." *Id.* at 542. As a result, the funding "was designed to facilitate private speech, not to promote a governmental message." *Id.* at 542. Since the people were speaking, and not the government, it was not government speech. *Id.*

Shortly thereafter came *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005). In that case, the federal government had enacted a "policy of promoting the marketing and consumption of 'beef and beef products,'" *id.* at 553 (quoting 7 U.S.C. § 2901(b)), and collected fees from beef producers "to send communications supportive of the beef program." *Id.* at 555. The Court said "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal

Government," and "the Secretary [of Agriculture] exercises final approval authority over every word used in every promotional campaign." *Id.* at 561. Thus the messages were government speech.

After that, the Supreme Court decided *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47 (2006). *Rumsfeld*'s plaintiff law schools argued they had a First Amendment right to keep military recruiters out of recruiting events because the military banned homosexuals, and the law schools disagreed with those policies. *See id.* at 51. The Court explained that the government compelled speech when "the complaining speaker's own message [is] affected by the" government action. *Id.* at 63. But there, the schools were not endorsing the government's viewpoint when they hosted military recruiters, so the schools were not speaking—the government was. *See id.* at 65. As a result, the law schools' speech was not implicated, meaning they could not claim a First Amendment violation. *See id.*

Up next was *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). *Summum* explained placing a monument was "best viewed as a form of government speech and [] therefore not subject to scrutiny under the Free Speech Clause." *Id.* at 464. The Court explained that "[p]ermanent monuments displayed on public property typically

represent government speech" because "[g]overnments have long used monuments to speak to the public." *Id.* at 470. Additionally, even when private parties donate a monument, "the general government practice . . . has been one of selective receptivity," further demonstrating monuments in public parks are government speech. *Id.* at 471.

After *Summum* came *Walker v. Texas Division, Sons of Confederate Veterans*. *Walker* held that plaintiffs wanted to put a Confederate flag on their license plates. 576 U.S. at 203. The Court explained that license plates often communicate messages to the public "to urge action, to promote tourism, and to tout local industries." *Id.* at 211. And license plates usually "convey to the public that the State has endorsed the message"—that is why they put it on the license plate and not the bumper. *Id.* at 212. Finally, the State controlled what was said on the license plates. *Id.* at 213. That made the license plates government speech. *Id.*

The most recent case involving the government speech doctrine is *Matal v. Tam*, 582 U.S. 218 (2017). In that case, the Supreme Court refused to hold trademarks were government speech because "[t]he Federal Government does not dream up these marks, and it does not edit

marks submitted for registration." *Id.* at 234. Also, the trademark "examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register." *Id.* at 235. Finally, the examiner's decision is not subject to review unless someone challenges it. *Id.* For those reasons, "it is far-fetched to suggest that the content of a registered mark is government speech." *Id.* at 236; *see also Cajune v. Indep. Sch. Dist. 194*, ---F.4th---, 2024 WL 3169925, at *7 (8th Cir. June 26, 2024) (declining to apply government speech doctrine to limited public forum created by school for posters).

The upshot of these cases is clear. If the government is speaking, the public does not have a First Amendment right to control the message. If a private citizen is speaking, the First Amendment prevents the government from controlling the message. Finally, the government can use funding to promote certain messages, so long as the government is no co-opting a traditional medium for personal expression.

C. *Pratt* is irreconcilable with the government speech doctrine and *Rust v. Sullivan*.

As one district court explained, "[t]he *Pratt* decision has not aged well in the forty years of First Amendment jurisprudence since its issuance." *C.K.-W. by & through T.K. v. Wentzville R-IV Sch. Dist.*, 619 F. Supp. 3d 906, 915 n.4 (E.D. Mo. 2022). And that makes sense: *Pratt* "did not have the benefit of the Supreme Court's clarification of the government's authority over its own message," so it could not have addressed the simple fact that the State is speaking when it chooses its curriculum. *Chiras v. Miller*, 432 F.3d 606, 617 (5th Cir. 2005).

The straightforward principles embodied in the government speech doctrine show Pratt is dead. Giving private citizens a First Amendment right to control school curricula would mean "every citizen" would "have a right to insist that no" teacher "express a view with which he disagreed." *Summum*, 555 U.S. at 468. "[I]t is not easy to imagine how" a school "could function" under those circumstances. *Id.*

After all, *Pratt*'s logic does not stop with including a morally dubious movie in the curriculum. Students could force the State to require classes on underwater basket weaving because failing to include that would violate the student's right to receive information. They could

also force the State to mandate classes on the interdisciplinary study of Call of Duty: World at War—Zombies, critical film analysis of World War Z, or the physiology of the undead.

But there are only so many hours in the day, and States and their school districts need to prioritize certain subjects over others. It is hard to see how a school could adequately teach reading, writing, and arithmetic if it was forced to include several dozen extra class periods to cover whatever novelty topic a student wanted to learn about.

Taken to its logical conclusion, routine tasks in schools, like changing to new textbooks or getting rid of old library books would become impossible. Every single decision to remove those books would become subject to a First Amendment challenge predicated on the idea that the student has "the right to receive" the information in that

textbook.[1] One expansive reading of *Pratt* would mean that once a book is purchased, it can never be removed.[2]

This is why the Fifth Circuit does not allow private citizens to bring First Amendment challenges to curricular decision-making. In *Chiras*, that Court explained that, when the State "selects the textbook with which teachers will teach to the students, it is the state speaking, not the textbook author." 432 F.3d at 614. It added that the State *must* "exercise editorial judgment over the content of the instructional materials it selects for use in the public school classrooms" and that schools are not "for[a] for the expression of the views of the various authors of textbooks." *Id.* at 615. In other words, curriculum development is government speech.

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[1] *Pratt* assumed without deciding that students had standing to bring their "right to receive" claim. 620 F.2d at 777. The Supreme Court recently dramatically curtailed private plaintiffs' standing to bring those claims. *See Murthy v. Missouri*, 2024 WL 3165801, at *16–17 (U.S. June 26, 2024). It is not clear that *Pratt* could have reached the merits under a modern standing analysis.

[2] Although *Pratt* purported to limit its holding to when a school board tries "to suppress an ideological or religious viewpoint," 670 F.2d at 776–77, viewpoint discrimination includes preferential treatment for teachers' unions and increased criminal penalties for hate crimes, which are neither political nor religious in nature, *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972) (teachers' unions); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (racism).

And that makes sense. Schools teach about inherently ideological matters, like religion all the time. *See, e.g.*, *Doe v. Wilson Cnty. Sch. Sys.*, 564 F. Supp. 2d 766, 782–83 (M.D. Tenn. 2008) (students said prayers as part of a class lesson on the Pilgrims' fight for religious freedom); *see also Stone v. Graham*, 449 U.S. 39, 42 (1980) ("This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."). But no one would argue those lessons reflect the teacher's religion. That would make the teacher a Buddhist during the unit on ancient India, a Catholic during the unit on medieval Europe, and a Muslim during the unit on the Middle East. That is patently untrue, and those examples only show how teachers are really speaking on behalf of the government when they are teaching. *See Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987) (explaining how teachers cannot deviate from the State's curriculum).

Indeed, *Pratt* itself demonstrates it is irreconcilable with the government speech doctrine and *Rust v. Sullivan*. This Court faulted the school board in *Pratt* for relying on "value-laden objections" to remove the film from the curriculum. 670 F.2d at 777. But the whole point of the

government speech doctrine is to ensure the government can promote its preferred message. *See Summum*, 555 U.S. at 470 ("When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure."); *see also Rust*, 500 U.S. at 193 ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.").

Some have tried to distinguish between, on the one hand, students who seek to force a school to add the students' preferred content to the curriculum and, on the other hand, students who seek to prevent the school from removing the students' preferred content from the curriculum. *See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 862 (1982) (lead op. of Brennan, J.). But that distinction lacks a principled basis. It presumes that the First Amendment "protects the right to receive information and ideas." *Id.* at 867.

That right goes both ways.

For example, the Supreme Court has held that preventing sex offenders from going on social media violated the First Amendment right to receive information. *Packingham v. North Carolina*, 582 U.S. 98, 104, 108 (2017). In this context, that right to receive information would relate to books being removed from the shelves. Just as the social media sites were active, and then the sex offenders were blocked from accessing them, the books were there, and the school board prevented students from borrowing the books from the school library.

But the Supreme Court has also held that the government violates the First Amendment right to receive information when it intercepts mail that is labeled as "communist political propaganda." *Lamont v. Postmaster Gen. of U. S.*, 381 U.S. 301, 302, 306 (1965). In that context, this would be like when the school board refuses to acquire a new book for its library.

These cases make clear that a right to receive information means both a right to prevent the government from blocking access to information that already exists and a right to force the government to grant access to information that does not already exist. There is no precedential principle to differentiate between the two. Either you

always have a right to receive whatever information you want, or you do not.

The government speech cases show why such a distinction should carry no weight. In *Summum*, plaintiffs were trying to force the city to put up a statue, and the Supreme Court said that the government speech doctrine allowed the city to refuse. 555 U.S. at 464. Meanwhile, in *Johanns*, plaintiffs were trying to stop the federal government from promoting the benefits of eating beef. 544 U.S. at 555. Since the government can both speak and refuse to speak, it both has the choice to include materials in the curriculum and to stop including other materials in the curriculum. Reasoning that the government can do one without the other would make no logical sense.

Upholding *Pratt* in light of the government speech doctrine would force this Court to speak out of both sides of its mouth. When the government is speaking through its Department of Motor Vehicles, it can control the message. *See Walker*, 576 U.S. at 212. But when it is speaking through its public schools, it cannot. Both cannot be true at the same time, so *Pratt* has been abrogated.

II. *Pratt* is inconsistent with modern First Amendment cases.

Pratt is dead because the government speech cases have undermined its reasoning. But it is dead also because other, more modern First Amendment cases undercut much of its reasoning in three ways. *First*, modern Supreme Court cases require an objective inquiry, not the subjective inquiry *Pratt* demands. *Second*, *Pratt* runs headlong into the Establishment Clause. *Third*, schools can restrict speech that promotes illegal conduct or causes tensions in school.

A. Supreme Court precedent forecloses analyzing the government's motives.

Pratt is just another flavor of the ban on viewpoint discrimination. *Compare Pratt*, 670 F.2d at 776 (explaining that books cannot be "excluded to suppress an ideological or religious viewpoint"), *with Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

Yet Pratt directly conflicts with the Supreme Court's more recent viewpoint discrimination case law. In *Pratt*, this Court deployed a two-step framework for determining whether a school district's curricular

decision violates the First Amendment. *First*, courts need to look beyond the plain text of the statute or resolution to the school district's subjective motivations. *See Pratt*, 670 F.2d at 776, 778. *Second*, courts need to decide whether the real reason the school district made its decision reflects "a substantial and reasonable governmental interest . . . . Bare allegations that such a basis existed are not sufficient." *Id.* at 777.

More recent viewpoint discrimination cases use an objective approach. For example, in *R.A.V. v. City of St. Paul*, the Supreme Court looked just at the plain text of the ordinance (as interpreted by Minnesota's Supreme Court) and found it was unconstitutional viewpoint discrimination because the ordinance did not ban anti-gay fighting words but did ban anti-African American fighting words. 505 U.S. 377, 391 (1992). Similarly, in *Lamb's Chapel v. Center Moriches Union Free Sch. District*, the Supreme Court looked only at the plain text of the ordinance to find it unconstitutionally discriminated against religious viewpoints. 508 U.S. 384, 393 (1993). Finally, in *Iancu v. Brunett*, the Supreme Court looked only at the plain text of the Lanham Act to find it was a form of unconstitutional viewpoint discrimination. 588 U.S. 388, 393–94 (2019).

All these cases show courts are not supposed to try to analyze the government's subjective intent when assessing the constitutionality of a statute. *Pratt*, however, requires courts to do precisely that, so it is no longer good law.

And that makes sense. Conducting the subjective inquiry that *Pratt* requires is almost virtually impossible.

For one thing, obtaining discovery against legislators is extremely difficult. Many States and the federal government recognize some form of legislative privilege, which might make it impossible to develop the facts required to demonstrate that intent. *E.g.*, *Smith v. Iowa Dist. Ct. for Polk Cnty.*, 3 N.W.3d 524, 527 (Iowa 2024); *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 145 (Fla. 2013); U.S. Const. art. I, § 6, cl. 1.

For another, discerning "the intent of the legislature" is exceptionally difficult. Floor speeches are often contradictory, so they tend to be unhelpful. *See, e.g.*, *NLRB. v. SW Gen., Inc.*, 580 U.S. 288, 307 (2017). What is more, they are not (and cannot be) the words of the entire legislative body because they have not been agreed to by the entire

legislature. *E.g.*, *United States v. Tan*, 16 F.4th 1346, 1352 (9th Cir. 2021); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

Finally, inquiries like this ignore the presumption of legislative good faith. Courts have long recognized "that government officials act in good faith." *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). That is true in government contracting disputes, criminal cases, and discrimination cases, among others. *E.g.*, *id.* (contracting dispute); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (criminal cases); *Mitchell*, 959 F.3d at 899 (discrimination cases); *cf. Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 550–51 (2013) (setting aside section 4 of the Voting Rights Act because it wrongly presumed States were discriminating based on race). That is also why the constitutional avoidance canon exists. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 381–82 (2005) (explaining that Congress does not normally intend to enact a statute that is unconstitutional).

But *Pratt* requires courts to ignore the more modern cases holding that the government ordinarily acts in good faith. Simply by labelling the school board's resolution as "self-serving," *Pratt* ignored the respect that the more modern presumption of governmental good faith requires. 670

F.2d at 778. So not only is *Pratt* completely unworkable, but it contradicts more modern Supreme Court cases that require a presumption of good faith and bar the very psychoanalysis that *Pratt* engaged in.

Pratt is dead, and this Court should so hold.

B. *Pratt* creates a virtually irreconcilable clash with the Establishment Clause.

"[G]overnment speech must comport with the Establishment Clause." *Summum*, 555 U.S. at 468. For example, States cannot "requir[e] either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety." *Edwards*, 482 U.S. at 596. That means States can neither question evolution's validity nor argue creationism makes up for evolution's shortcomings. *See Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708–09, 765–66 (M.D. Pa. 2005); *see also Freiler v. Tangipahoa Par. Bd. of Educ.*, 185 F.3d 337, 341 (5th Cir. 1999).

It is impossible to comply with *Edwards*, *Kitzmiller*, and *Freiler*'s more modern rules on teaching creationism while also complying with *Pratt*'s older bar on ideologically or religiously motivated removals of certain materials from the curriculum. Under *Pratt*, schools cannot remove curricular materials based on "value-laden objections" with

"religious overtones." 670 F.2d at 776–77. But the rules on creationism in schools are "value-laden" with "religious overtones": "[T]he Board's [Intelligent Design ("ID")] Policy violates the Establishment Clause. In making this determination, *we have addressed the seminal question of whether ID is science*. We have concluded that *it is not*, and moreover that ID cannot uncouple itself from its *creationist*, and thus *religious*, antecedents." *Kitzmiller*, 400 F. Supp. 2d at 765 (emphases added).

Claiming an idea is "religious" and not "science" is precisely the type of "value-laden" objection *Pratt* condemned. If a student wanted to force a school district to teach creationism, it could simply point to cases like *Kitzmiller* and say "the real reason" the school district is refusing to teach creationism is because of a desire to suppress a religious viewpoint. It could then invite (perhaps even require) the district court to ignore the school district's stated desire to comply with *Edwards* as "self-serving" and force the school district to identify "a substantial and reasonable governmental interest." *Pratt*, 670 F.2d at 777.

Identifying that interest would be impossible. *Pratt* explicitly forbids a school district from relying on the potential for the material to "distort[]" "educationally important themes" as a justification. 670 F.2d

at 778. And excluding it on the grounds that it is inherently religious because it would fail because that would require relying on the very justification that *Pratt* condemns. *Cf. J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138 (1994) ("We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'").

So Pratt would leave the State with two choices: violate older precedent on freedom of speech or violate more recent precedent on freedom of religion. Since the more recent precedent would require violating the older precedent, *Pratt* needs to fall.

C. The government can restrict speech that creates racial tension.

Although "students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," "the rights of students must be applied in light of the special characteristics of the school environment." *Morse*, 551 U.S. at 396–97 (quotation marks omitted). That is why students have no right to promote illegal conduct. *See, e.g.*, *id.* at 403 (ban on promoting illegal drug use).

Some speech can also be banned from schools if it creates an objectively harmful environment for learning. For example, this Court held a school did not violate the First Amendment when it punished

students for wearing shirts with the Confederate flag because it created an objectively harmful learning environment. *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 736, 741 (8th Cir. 2009). This Court explained the shirts "subjected" "15 to 20 minority students" to extreme "racial tension from a white majority student and community population sufficient to motivate some to withdraw." *Id.* at 741. Because "[r]acial tension can devolve to violence suddenly," the students created conditions that could "hardly be considered an environment conducive to educational excellence." *Id.*

So too here. Just as the community in *B.W.A.* was encouraged to discriminate against minority students, some ideologies, like CRT, openly encourage discrimination based on race: "The only remedy to negative racist discrimination that produces inequity is positive antiracist discrimination that produces equity." Ibram X. Kendi, *How to Be an Antiracist* 24 (2019). To say that overtly discriminating based on race would not create racial tensions is to ignore basic history. And by making clear that schools cannot "compel[] a person to adopt, affirm, or profess an idea" that calls for discrimination based on race, Ark. Code

Ann. § 6-16-156(b), Arkansas has narrowly tailored its curriculum to ensure its schools do not become overwhelmed with racial tensions.

Pratt allows a student to force the school to permit that speech, and the case law is clear that students cannot force the government to permit speech that promotes illegal conduct or causes racial tensions. Students, like Plaintiffs here, have no right to force schools to stand idly by while that type of illegal conduct is promoted. Because *Pratt* is irreconcilable with that line of cases, it has been abrogated on this ground too.

III. *Pratt* is inconsistent with the First Amendment's original public meaning.

"[T]he history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools." *Morse*, 551 U.S. at 411 (Thomas, J., concurring). "Public schooling arose, in part, as a way to educate those too poor to afford private schools." *Id.* In essence, public schools were "substitutes for private schools" and so "no one doubted the government's ability to educate and discipline children as private schools did." *Id.* As such, "schools were not places for freewheeling debates"—they existed to "instill a core of common values in students." *Id.* (quotation marks omitted).

Traditionally, schools have been understood to serve *in loco parentis*. *Id.* at 413. That means "teacher[s are] the substitute of the parent" and can treat the child as their own. *State v. Pendergrass*, 19 N.C. (2 Dev. & Bat.) 365, 366 (1837). The result was that schools generally had broad discretion to do what was needed "to maintain order" in the classroom. *Morse*, 551 U.S. at 414 (Thomas, J., concurring); *see, e.g.*, *Patterson v. Nutter*, 7 A. 273, 274 (Me. 1886).

This extended to student speech. The case law is full of examples of schools punishing students for what would ordinarily be considered protected speech. For example, courts in Indiana and Vermont allowed a teacher to punish a student for mocking him, *Vanvactor v. State*, 15 N.E. 341, 343 (Ind. 1888); *Lander v. Seaver*, 32 Vt. 114, 121 (1859), even though mockery is protected speech, *see, e.g.*, *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 57 (1988). Meanwhile, a California court allowed a school to expel a student for criticizing the school board. *Wooster v. Sunderland*, 148 P. 959, 960 (Cal. App. 1915). That, too, is protected speech. *See, e.g.*, *Rinne v. Camden Cnty.*, 65 F.4th 378, 383–84 (8th Cir. 2023).

The history of public schooling shows the government can control what is said in schools. To the extent *Pratt* gives students a right to control a school's curriculum, it is inconsistent with the original public meaning of the First Amendment and is, therefore, not good law.

CONCLUSION

The judgment below should be reversed, and this Court should make clear the *Pratt* is no longer the law in this Circuit.

Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(g) and Local R. 25A, I certify the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,054 words, excluding those parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because the brief has been prepared in Century Schoolbook 14-point font using Microsoft Word for Microsoft Office 365.

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July 8, 2024

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on July 8, 2024. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

July 8, 2024

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