UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

LOCAL 8027, AFT-NEW HAMPSHIRE, AFL-CIO, RYAN RICHMAN, JOHN DUBE and JOCEYLN MERRILL, teachers in the New Hampshire Public Schools, and KIMBERLY GREEN ELLIOTT and MEGHAN EVELYN DURDEN, parents or guardians of children in the New Hampshire public schools. Plaintiffs, v. FRANK EDELBLUT, in his Official Capacity as Commissioner of the DEPARTMENT OF EDUCATION, CHRISTIAN KIM in his Official Capacity as the Chair of the NEW HAMPSHIRE COMMISSION ON HUMAN RIGHTS, and JOHN FOMELLA in his Official Capacity as ATTORNEY GENERAL of the State of New Hampshire. Defendants.	)	
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ANDRES MEJIA, CHRISTINA KIM PHILIBOTTE, and NATIONAL EDUCATION ASSOCIATION-NEW HAMPSHIRE, Plaintiffs, v. FRANK EDELBLUT, in his official capacity only as the Commissioner of the New Hampshire Department of Education, JOHN M. FORMELLA, in his official capacity only as the Attorney General of the State of New Hampshire, AHNI MALACHI, in her official capacity only as the Executive Director of the New Hampshire Commission for Human Rights, CHRISTIAN KIM, in his official capacity only as the Chair of the New Hampshire Commission for Human Rights, KEN MERRIFIELD, in his official capacity only as the Commissioner of the Department of Labor, Defendants.	)	Civil No. 1:21-cv-01077-PB

PLAINTIFFS' JOINT MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT
[*REDACTED PUBLIC VERSION***][1]**

[1] An unredacted, sealed version of this brief has been filed with the Court.

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Plaintiffs in the first above-captioned action (the "AFT Plaintiffs" or the "AFT Action") and Plaintiffs in the second above-captioned action (the "Mejia Plaintiffs" or "Mejia Action") each filed separate complaints in this consolidated case challenging the provisions of Sections 297 and 298 of 2021 House Bill 2 ("HB2"), codified at N.H. Rev. Stat. Ann. ("RSA") 354-A:29-:34 and RSA 193:40. These provisions were enacted on June 25, 2021 and ban teaching, instructing, inculcating, or compelling a student to express belief in (or support for) four concepts in public schools and places of public employment. They are herein referred to as the "Amendments" and are attached, along with Plaintiffs' other exhibits, as *Ex. 1* (Depo. Ex. 1) to Plaintiffs' contemporaneously-filed Statement of Undisputed Facts and the accompanying declaration of Attorney Gilles Bissonnette.

In its January 12, 2023 Memorandum and Order, this Court denied Defendants' Motion to Dismiss both Complaints, ruling that the Amendments' vague terminology, the lack of a scienter requirement, and the possibility that teachers could be found to violate the law (and potentially lose their teaching license) for teaching a banned concept solely by implication left "both teachers and enforcers to guess at what speech the amendments prohibit." *Local 8027 v. Edelblut*, No. 21-cv-1077-PB, 2023 DNH 005, 2023 U.S. Dist. LEXIS 5593, at *50 (D.N.H. Jan. 12, 2023). This Court also found that the AFT Plaintiffs sufficiently pled a plausible First Amendment violation based on the Amendments' exceedingly broad application prohibiting speech in all extracurricular activities, including in the school hallway, schoolyard, lunchroom, library, and even beyond school grounds.

Plaintiffs now move for summary judgment as to (i) the Fourteenth Amendment's procedural due process/vagueness claim alleged in Counts I and II of the AFT Action and in Count

I of the Mejia Action and (ii) the First Amendment's freedom of speech claim alleged in Count III of the AFT Action given the Amendments' impact on educators' private, extracurricular speech.[2]

SUMMARY OF THE RECORD

While Plaintiffs have contemporaneously filed a Statement of Undisputed Facts, below is a summary of the record created in discovery.

The Amendments are unconstitutionally vague under the Fourteenth Amendment. A law is impermissibly vague if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" or if it is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (internal citations omitted); *United States v. Williams*, 553 U.S. 285, 304 (2008). Both independent criteria are satisfied here. In this Court's decision denying Defendants' Motion to Dismiss, the Court concluded that the Amendments "do not give teachers fair notice of what they can and cannot teach." *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *45. This Court added that, "[g]iven the severe consequences that teachers face if they are found to have taught or advocated a banned concept, plaintiffs have pleaded a plausible claim that the amendments are unconstitutionally vague." *Id.* at *50-51. The language of the Amendments has not changed, and the developed record confirms this Court's reading of the text of the law and its vagueness.

Plaintiffs deposed the following state officials tasked with enforcing the Amendments: (i) Defendant Frank Edelblut, the Commissioner of the New Hampshire Department of Education ("DOE")[3]; (ii) Attorney Diana Fenton, the DOE's attorney who oversees investigations of alleged

[2] As to Count IV of the AFT Action, this Court concluded (and we accordingly assume here) that this Count encompasses the relief requested in Counts I-III of the AFT Action. *See* Sept. 14, 2022 Motion to Dismiss Hearing Transcript (Docket No. 55) at 2:19-23. Plaintiffs also incorporate by reference their legal arguments in Docket Nos. 45, 46, 52, and 53, and do not repeat them here.

[3] Commissioner Edelblut's deposition transcript referenced throughout is attached as *Ex. 2* to Plaintiffs' contemporaneously-filed Statement of Undisputed Facts and the accompanying declaration of Attorney Gilles Bissonnette.

violations of the Educator Code of Conduct[4]; (iii) Richard Farrell, the DOE's investigator who investigates alleged violations of the Educator Code of Conduct[5]; (iv) Defendant Ahni Malachi, the Executive Director of the New Hampshire Commission for Human Rights ("HRC")[6], and (v) Attorney Sarah Burke Cohen, the Assistant Director of the HRC, who also testified in a Rule 30(b)(6) capacity with respect to complaints the HRC has received under the Amendments.[7] None of these witnesses could explain the meaning of the Amendments or how they will be enforced. For example, Defendant Commissioner Edelblut and DOE Attorney Fenton admitted at deposition that there are no DOE policies or procedures as to the practical meaning of RSA 193:40, I's terms "taught, instructed, inculcated or compelled to express belief in, or support for" beyond what is in the July 2021 Frequently Asked Questions document ("FAQs") published by Defendants.[8] There are no policies, procedures, or training materials rebutting the terms' lack of a scienter requirement or rebutting the principle that the Amendments can be violated by implication. Nor have DOE employees received any training concerning the implementation of the Amendments that would, in any way, incorporate a *mens rea* requirement into their provisions.

Defendants' witnesses also were unable or unwilling to provide any concrete examples of a lesson or instruction prohibited under the Amendments. Defendants repeatedly declined at deposition to answer basic questions on whether specific course instruction or content would be covered under the Amendments' prohibitions, instead punting the issue among themselves, or

[4] Attorney Fenton's deposition transcript referenced throughout is attached as *Ex. 3* to Plaintiffs' contemporaneously-filed Statement of Undisputed Facts and the accompanying declaration of Attorney Gilles Bissonnette.
[5] Investigator Farrell's deposition transcript referenced throughout is attached as *Ex. 4* to Plaintiffs' contemporaneously-filed Statement of Undisputed Facts and the accompanying declaration of Attorney Gilles Bissonnette.
[6] Director Malachi's deposition transcript referenced throughout is attached as *Ex. 5* to Plaintiffs' contemporaneously-filed Statement of Undisputed Facts and the accompanying declaration of Attorney Gilles Bissonnette.
[7] Attorney Cohen's deposition transcript referenced throughout is attached as *Ex. 6* to Plaintiffs' contemporaneously-filed Statement of Undisputed Facts and the accompanying declaration of Attorney Gilles Bissonnette.
[8] RSA 193:40 explicitly addresses "Teaching Discrimination."

directing educators with specific questions to the text of Amendments and Defendants' July 2021 FAQs. Commissioner Edelblut and DOE Attorney Diana Fenton deferred these questions to the HRC. Yet when Plaintiffs asked HRC Assistant Director Cohen similar questions as to what specific books would be covered under RSA 354-A:29-34 if taught, she did not give a meaningful answer, stating instead that "I could not give a teacher or complainant legal advice on whether them teaching that would make a charge or not." If educators have specific questions, Assistant Director Cohen, like DOE Investigator Farrell before her, testified that they should ask a lawyer. *See* Cohen Depo. 94:14-19; *see also id.* 94:21-22, 95:12-20; Farrell Depo. 149:8-150:19. Putting aside the obvious impracticality of teachers consulting a lawyer for lesson plans and classroom discussions, DOE witnesses testified that even lawyers who regularly advise school districts expressed confusion as to what the Amendments mean. *See* Fenton Depo. 158:1-19. Defendants have also ignored or declined repeated requests from Plaintiffs NEA-NH and AFT, including union leadership on behalf of their members, to provide more details and guidance as to what the Amendments mean. *See* *Ex. 7*, Tuttle Decl. ¶ 9; *Ex. 8*, Howes Decl. ¶¶ 10-13.

These regulators refuse to provide useful guidance to educators in the field all while acknowledging the confusion created by the Amendments. In a July 26, 2021 email, Defendant Commissioner Edelblut admitted, in response to a question about the meaning of the Amendments, that the fourth banned concept's "double negative is confusing." *See* *Ex. 19*. HRC Commissioner Malachi acknowledged that the Amendments are "complex," and the HRC consulted with the DOJ about understanding them. *See* *Ex. 20 (Depo. Ex. 56)*; Cohen Depo. 55:4-21, 104:14-108:21.

Nor is there clarity with respect to how the Amendments are applied. At deposition, Defendants could not agree on who enforces one of the Amendments' key provisions—namely, RSA 193:40. That provision authorizes the DOE to sanction an educator for violating the

Amendments. *See* RSA 193:40, IV. The DOE repeatedly pointed the finger at the HRC as the enforcer of RSA 193:40. *See* Edelblut Depo. 65:8-10; Fenton Depo. 105:10-106:2; Farrell Depo. 39:18-20. The HRC repeatedly pointed the finger back at the DOE as the enforcer of RSA 193:40. *See* Malachi Depo. 12:18-20, 73:5-74:17, 78:3-9; Cohen Depo. 59:17-21. In fact, Defendant Commissioner Malachi and Assistant Director Cohen testified that the HRC has "no jurisdiction" to enforce RSA 193:40 and no familiarity with its provisions, which is in direct conflict with the testimony of all three DOE witnesses who uniformly asserted that the responsibility for applying RSA 193:40 lies with the HRC. *See* Edelblut Depo. 65:8-10; Fenton Depo. 105:10-106:2; Farrell Depo. 39:18-20; Malachi Depo. 73:5-74:17; Cohen Depo. 59:17-21. This testimony leaves a critical statutory element unclear.

Notwithstanding this "buck passing," Commissioner Edelblut is a vocal supporter of the Amendments, and his public comments have stoked even more confusion with educators and school administrators. The Commissioner and his supporters' public statements weaponize the law's ambiguity and show that the law can mean whatever one wishes it to mean. For example, the DOE Commissioner explained in a June 13, 2021 op-ed that the Amendments are an "important" and "needed" way to address "those who promote Critical Race Theory"—an undefined phrase which has evolved to become a catchall target encompassing opposition to instruction about systemic racism, diversity, equity and inclusion ("DEI") efforts, affirmative action, and "wokeness" in general. *See* *Ex. 21 (Depo. Ex. 4)*. Similarly, when the Senate version of the Amendments that eventually became law was introduced, supporter Senator Bob Giuda made clear that it is designed, in part, "to ensure that the minds of the future generations of our state are not being unduly influenced by advocacy for such toxins as critical race theory," whatever

that may mean.[9] After its enactment, one political group supporting the legislation issued a flyer suggesting topics addressing "Race," "Gender identity, or LGBT issues," "Sexuality," or "Equity" may be covered under the Amendments. *See Ex. 22 (Depo. Ex. 51)*. While not mentioning the Amendments specifically, one member of the DOE's State Board of Education (which has the power to sanction educators under the Educator Code of Conduct), also made clear his view during a June 8, 2023 meeting—with several other Board members agreeing—that DEI "teaching methodologies … [are] extremely divisive ideologies that … are counter towards students' productivity and counter towards their success" and are "destructive," as well as "degrad[e] our American excellence," "degrad[e] Western society," and have an "inherent Communist belief baked into" them.[10]

Following the lead of state officials, members of the public also have adopted an expansive interpretation of the Amendments. Because a violation of the Amendments constitutes a violation of the Educator Code of Conduct, *see* RSA 193:40, IV, the public has sent numerous complaints to the DOE under the Amendments about school districts promoting DEI principles and having students read certain books implicating race and gender. *See* Statement of Facts ¶¶ 136-138. Some of these complaints led the DOE to engage in varying degrees of inquiries or "initial reviews," *see* N.H. Code Admin. R. Ed 511.01(b), including using other potential violations (especially under RSA 186:11, IX-c and RSA 186:11, IX-d) to investigate or elevate these complaints to Superintendents. *Id.* And DOE Commissioner Edelblut, himself, published an April 15, 2022 op-ed attaching some complaint materials that the DOE received under the Amendments—materials that, he argued, showed both educators overstepping and "biases … beginning to seep into our

[9] Senate Finance Committee, May 27, 2021 HB2 Deliberations (at 27:13), https://www.youtube.com/watch?v=0AbLc51xKrU.

[10] *See* June 8, 2023 N.H. State Board of Education Meeting (starting at 3:24:00-3:28:14), https://vimeo.com/836403362.

own institutions." *See* Ex. 40 (Depo. Ex. 14); Statement of Facts ¶ 139. There have also been approximately [redacted] allegations of discrimination submitted to the HRC in various forms complaining that specific educators and school districts were violating the Amendments. The HRC determined that one of these complaints presented a *prima facia* claim of discrimination under RSA ch. 354-A and, as a result, has formally docketed the complaint [redacted]. *See* Statement of Facts ¶ 140. [redacted] It should not be overlooked that, apart from the DOE and the HRC's enforcement of the Amendments (as confused as that enforcement may be), there is also a separate private right of action that may be brought in superior court against a school or school district by any person aggrieved by a purported violation of the Amendments. *See, e.g.*, RSA 193:40, III. This is the hostile environment in which educators are expected to interpret and instantaneously apply the Amendments in the classroom, especially where students' questions require an instantaneous response.

This environment is even more challenging for educators because the DOE—including the Commissioner himself in his supervisory role—plays an active and attentive role in responding to any concerns made by purportedly aggrieved parents and community members, oftentimes elevating these concerns to school districts before there has been an investigation or assessment of whether a potential violation occurred under the Code of Conduct, or even before a formal complaint has been filed. *See* Statement of Facts ¶¶ 137-138. The impact of these inquiries or "initial reviews" in which Districts, Principals and Superintendents are contacted—however couched by the DOE—are powerful and cannot be minimized. Superintendents and teachers know

that, if they address concepts like race and gender that are arguably (or perceived by any student or parent to be) covered by the Amendments, a serious call from the Commissioner or the DOE's investigator could be on its way that could impact their career. In part because of the Commissioner's own actions, teachers now reasonably fear that students or parents will photograph lesson plans and send them to the DOE, where they may end up in the newspaper, as has been the case. *See Ex. 40 (Depo. Ex. 14)*.

As the ultimate enforcer of the Code of Conduct against educators where the "buck stops with him," *see* Farrell Depo. 40:12-25, the Commissioner's public statements and actions matter. The Commissioner's direct involvement in evaluating Code of Conduct violations, along with his public statements, effectively applies pressure to DOE staff and school Superintendents to enforce the Amendments consistent with his anti-"critical race theory" views. *See e.g.*, *Ex. 11*, O'Brien Decl. ¶¶ 7-9, 13-19 (noting teacher being subjected to a DOE inquiry because parent complained that she played two music videos created by two modern Black artists as part of a unit on the Harlem Renaissance, and where the teacher was told the context of the inquiry by the DOE was the Commissioner's April 15, 2022 op-ed). The result is the creation of a culture of fear and apprehension where teachers self-censor, thereby limiting students' education and teachers' ability to comfortably and effectively teach. *See Ex. 9*, Dube Decl. ¶¶ 11, 20; *Ex. 8*, Howes Decl. ¶ 16. This includes suppression of instruction vital to creating a sense of belonging for New Hampshire youth, including those from historically marginalized communities and identities.[11] This diversity of instruction is critical to serving our increasingly diverse state. *See Ex. 13*, Philibotte Decl. ¶ 7;

[11] *See* Saul Mcleod Ph.D., *Allport's Intergroup Contact Hypothesis: Its History and Influence*, SIMPLY PSYCHOLOGY ((Updated on June 15, 2023), https://www.simplypsychology.org/contact-hypothesis.html#:~:text=According%20to%20this%20hypothesis%2C%20interpersonal,different%20groups%20under%20certain%20conditions; Jenny Muñiz, *Culturally Responsive Teaching: A 50-State Survey of Teaching Standards*, NEW AMERICA (Mar. 28, 2019), https://www.newamerica.org/education-policy/reports/culturally-responsive-teaching/.

Statement of Facts ¶¶ 40, 42 (noting that "New Hampshire is rapidly growing more racially diverse," and that "children are at the leading edge of the state's growing diversity"). And this fear and apprehension are only enhanced by the Commissioner's testimony that, with no more information on the Amendments forthcoming, "teacher[s] themselves would be in the best position to know if they are teaching, instructing, inculcating or compelling [a student] to express a belief in or support for" a banned concept. *See* Edelblut Depo. 75:11-20. But teachers have repeatedly said that they do not know if and when they are violating the Amendments. *See* *Exs. 41 (Depo. Ex. 9), 42 (Depo. Ex. 11), 43 (Depo. Ex. 54)*. Thus, teaching becomes a gamble, with possible licensure revocation and loss of livelihood at stake.

The Amendments' vague provisions leave Plaintiffs with an unconstitutional Hobson's choice: either avoid or gloss over important topics in classroom discussions and instructions related to race, gender, gender identity, sexual orientation, and disability—including topics like affirmative action, systemic racism, and even current events of racially-motivated violence—or risk losing their licenses and livelihoods for violating the Amendments, even by "implication." *See Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *46 (noting the "impermissible Hobson's choice" facing educators). Consider the quandary faced by a high school English teacher who is working through the classic 1987 novel *Beloved* by Toni Morrison which is about the legacy of slavery. *See* *Ex. 12*, Keefe Decl. ¶¶ 17-19 (noting how the Amendments changed the way this educator teaches *Beloved*). The teacher's students are certainly likely to be interested in how the themes of the book are playing out in current events like the June 29, 2023 affirmative action decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023), the May 2020 Minneapolis killing of George Floyd, the Buffalo murder of 10 Black people

by a White supremacist on May 14, 2022, the presence of Neo-Nazis in Concord,[12] or racial inequities in New Hampshire and nationally.[13] This teacher may be asked whether Justice Sonia Sotomayor is correct in her dissent when she says that one should not embrace "a veneer of colorblindness in a society where race has always mattered and continues to matter"? *See Students for Fair Admissions,* 143 S. Ct. at 2246 (Sotomayor, J., dissenting). This teacher also may be asked "why would the Buffalo shooter believe that he was superior to his victims?," "What is white supremacy?," and "What can our society do to stop these events?"[14] Despite the mandates of New Hampshire's Instruction in National and State History and Government statute, *see* RSA 189:11, I(j), what teacher would risk responding to such questions or addressing these underlying issues considering the ambiguity of the Amendments and the draconian penalties they may face?

Since the Amendments' enactment on June 25, 2021, New Hampshire classrooms have been chilled. *See* Statement of Facts ¶¶ 148-159. For example, texts like Tiffany Jewell's 2020 book *This Book is Anti-Racist* and Jason Reynolds/Dr. Ibram X. Kendi's 2020 book for individuals 12 and older entitled *Stamped: Racism, Antiracism, and You: A REMIX of the National Book Award-winning "Stamped from the Beginning"* have been removed from instruction. *See* Ex. 15, Mejia Decl. ¶ 16 (noting removal of Tiffany Jewell's book for professional development). This 2020 version of *Stamped* was expressly approved by at least one school Board for eighth graders, only to never come off the shelf following Commissioner Edelblut's July 13, 2021 public

[12] *NH Officials Say They're Looking into Neo-Nazi Incident Outside Drag Story Hour in Concord*, NHPR (June 19, 2023), https://www.nhpr.org/nh-news/2023-06-19/nsc131-neo-nazi-teatotaller-drag-story-hour-concord.

[13] *See* N.H. Fiscal Policy Institute, *Inequities Between New Hampshire Racial and Ethnic Groups Impact Opportunities to Thrive*, (June 30, 2020), https://nhfpi.org/resource/inequities-between-new-hampshire-racial-and-ethnic-groups-impact-opportunities-to-thrive/; *Jamison v. McClendon*, 476 F. Supp. 3d 386, 414 (S.D. Miss. 2020) (Reeves, J.) (in chronicling the history of racial issues in policing, noting that "[f]or Black people, this isn't mere history. It's the present" and that "Black people in this country are acutely aware of the danger traffic stops pose to Black lives").

[14] *See* Mike Hixenbaugh, *Laws Restricting Lessons on Racism are Making it Hard for Teachers to Discuss the Massacre in Buffalo*, NBC NEWS (May 18, 2022), https://www.nbcnews.com/news/us-news/buffalo-shooting-teachers-racism-laws-rcna29500.

statements concerning Dr. Kendi. *See* Ex. 16, O'Mara Decl. ¶¶ 9-19; Ex. 21 (Depo. Ex. 4) (Commissioner Edelblut's op-ed referencing Dr. Kendi).

While masquerading as an "anti-discrimination" law, the Amendments' ambiguities create an environment of self-censorship that harms both educators and students. And it is because of these ambiguities that the Amendments, like virtually identical laws enacted elsewhere, have been ruled unconstitutional. *See Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 543 (N.D. Cal. 2020) (holding that similar banned concepts in federal Executive Order are "so vague that it is impossible for Plaintiffs to determine what conduct is prohibited); *Pernell, et al. v. Fla. Bd. of Governors*, No. 4:22cv304-MW/MAF, 2022 U.S. Dist. LEXIS 208374 (N.F. Fla. Nov. 17, 2022) (preliminarily enjoining Florida's so-called "Individual Freedom Act"—or "Stop WOKE Act"—with respect to university classrooms in part on the grounds that it was "impermissibly vague") (appeal filed), *stay of injunction denied*, Nos. 22-13992-J, 22-13994-J, 2023 U.S. App. LEXIS 6591 (11th Cir. Mar. 16, 2023); *Honeyfund.com, Inc., et al v. Desantis*, 622 F. Supp. 3d 1159, 1184 (N.D. Fla. 2022) (preliminarily enjoining Florida's so-called "Individual Freedom Act"—or "Stop WOKE Act"—impacting workplaces in part on the grounds that it was "impermissibly vague") (appeal filed on Sept. 19, 2022).

The Amendments likewise violate the First Amendment insofar as they implicate the private, extracurricular speech of educators on matters of public concern. *See* Section II.A.2, *infra.* As to the AFT Plaintiffs' First Amendment claim, this Court earlier concluded that, "[b]ecause the education and antidiscrimination amendments are susceptible to an interpretation that encompasses extracurricular speech, they plausibly restrict teachers' speech as private citizens." *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *23. Discovery has confirmed this Court's initial view of the Amendments, and there is no dispute that the Amendments are being broadly applied

to the private, extracurricular speech of educators—including interactions "in a school hallway, schoolyard, lunchroom, or library, not to mention during extracurricular activities that take place on or off school grounds." *Id.* at *22. As Defendants' July 2021 FAQs confirm, "[t]he prohibitions apply to all activities carried out by public schools in their role as public schools, *including extracurricular activities that are part of the public school's work.*" *See Exs. 41 (Depo. Ex. 9), 44 (Depo. Ex. 24), 45 (Depo. Ex. 55)* (emphasis added); *see also Ex. 8*, Howes Decl. ¶ 11 ("The bill broadly reaches all discussions in all of these everyday activities."). The DOJ, HRC, and DOE also acknowledged this interpretation in their interrogatory responses. *See Exs. 46, 47 (Depo. Ex. 58), 48 (Depo. Ex. 57)* (DOJ Int. Resp. Nos. 8; HRC Int. Resp. 8; DOE Int. Resp. No. 8). The HRC's own intake questionnaire form under the Amendments also asks whether the "offered program/training" was "part of an extra-curricular activity." *See Ex. 49 (Depo. Ex. 60)*. And DOE Investigator Richard Farrell confirmed the Amendments' application to all extracurricular, private speech of educators on matters of public concern far beyond the confines of the school building, including on and off campus, and during and after school hours. *See* Farrell Depo. 174:23–177:3.

STANDARD ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

As this Court recently explained in *SEC v. LBRY*, Inc., 21-cv-260-PB, 2022 U.S. Dist. LEXIS 202738, __ F. Supp. 3d __ (D.N.H. Nov. 7, 2022), summary judgment is warranted "only if the record, construed in the light most amiable to the non-movant, presents no genuine issue as to any material fact and reflects the movant's entitlement to judgment as a matter of law." *Perea v. Editorial Cultural, Inc.*, 13 F.4th 43, 50 (1st Cir. 2021) (quoting *Irobe v. USDA*, 890 F.3d 371, 377 (1st Cir. 2018)) (cleaned up). This Court need not consider factual disputes immaterial to the legal issues under review in ruling on a motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary

judgment[.]") (emphasis in original). When parties cross-move for summary judgment, this Court "view[s] each motion separately, drawing all inferences in favor of the nonmoving party." *See Giguere v. Port Res. Inc.*, 927 F.3d 43, 47 (1st Cir. 2019) (quoting *Fadili v. Deutsche Bank Nat'l Tr. Co.*, 772 F.3d 951, 953 (1st Cir. 2014)); *see also Mandel v. Boston Phoenix, Inc.*, 456 F.3d 198, 205 (1st Cir. 2006) ("The presence of cross-motions for summary judgment neither dilutes nor distorts this standard of review."). Thus, this Court must "determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." *See Adria Int'l Grp., Inc. v. Ferré Dev., Inc.*, 241 F.3d 103, 107 (1st Cir. 2001).

Here, there are no material facts in dispute. Thus, the question of whether a final judgment in this case should be issued is ripe for summary judgment.

ARGUMENT

The Amendments ban teaching, instructing, inculcating, or compelling a student to express belief in or support for four concepts in public schools and places of public employment. These concepts are following:

> (1) That one's age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion or national origin is inherently superior to people of another age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin;
>
> (2) That an individual, by virtue of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
>
> (3) That an individual should be discriminated against or receive adverse treatment solely or partly because of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin; and
>
> (4) That people of one age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin cannot and should not attempt to treat others without regard to age,

> sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin.

As explained below, the Amendments are unconstitutionally vague under the Fourteenth Amendment. *See infra* Section I. They also violate the First Amendment insofar as they implicate the private, extracurricular speech of educators on matters of public concern. *See infra* Section II.

I. The Amendments Are Unconstitutionally Vague Under the Fourteenth Amendment (Counts I and II in the AFT Action and Count I in the Mejia Action).

By proscribing "teaching," "instruction," "inculcation," or "compelling an expression of belief in, or support for" a series of abstract ideas, the Amendments leave educators at a loss as to what is prohibited, and how they can engage with important concepts without crossing an unknowable line and risking the loss of their licenses and livelihood. And because the lines drawn by the Amendments are so vague—especially with multiple bodies having enforcement authority and applying it inconsistently—they invite arbitrary and discriminatory enforcement.

An enactment is void for vagueness if its "prohibitions are not clearly defined." *Grayned*, 408 U.S. at 108. A statute can be impermissibly vague if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" or if it "authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008); *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The Supreme Court further observed in *Kolender v. Lawson* that "the more important aspect of vagueness doctrine is … the requirement that a legislature establish minimal guidelines to govern law enforcement." 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)) (internal quotation marks omitted). In sum, "[a]s one court put it, 'all laws' 'ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate.'" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1226 (2018) (Gorsuch, J., concurring) (quoting *McConvill v. Mayor and Aldermen of Jersey City*, 39 N.J.L. 38, 42 (1876)).

In addition to these foundational principles, there are two relevant vagueness standards at issue here, both mandating a more exacting analysis of the Amendments. *First*, a heightened vagueness review is appropriate where there are severe sanctions for a violation. As this Court explained: "The need for clarity is likewise paramount when a statutory provision authorizes severe consequences for a violator. For example, it is well-settled that criminal laws are subjected to the most exacting vagueness review." *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *39. The Supreme Court in *Dimaya* rejected the notion that a less stringent standard applies in civil cases involving particularly severe consequences. *See* 138 S. Ct. at 1212-13. Given the "grave nature of deportation" there, the Supreme Court reasoned that the same standard of certainty required of criminal laws applies in the civil removal context. *Id.* at 1213 (cleaned up); *see also Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *39-40.

That reasoning applies with equal force here. The loss of an educator's license for violating the Amendments is similarly "grave." Indeed, as Justice Gorsuch observed in his concurrence in *Dimaya*, historical analysis of the void for vagueness doctrine demonstrates that the doctrine has long been applied equally in civil and criminal contexts since "civil laws regularly impose penalties far more severe than those found in many criminal statutes." *Dimaya*, 138 S. Ct. at 1228-31. Like the sanctions imposed in the challenged Amendments, those civil penalties include "remedies that strip persons of their professional licenses and livelihoods"—livelihoods for which there is also a property interest protected under the Fourteenth Amendment's Due Process Clause where state law provides a process for termination or decertification. *See id*. at 1229; *Perkins v. Bd. of Dirs. of Sch. Admin. Dist. No. 13*, 686 F.2d 49, 52 (1st Cir. 1982) ("whether or not appellant's interest in her job rises to the level of constitutionally protected 'property' depends upon whether the School Board could dismiss her only for 'cause'—an issue of state law").

Accordingly, as this Court explained, "[c]onsidering that teachers who are found to have advocated a banned concept can be stripped of their teaching credentials and thus deprived of their livelihoods, this factor points in favor of requiring the most exacting vagueness review." *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *40.

Second, though the existence of protected speech is not a requirement for the applicability of the more exacting vagueness analysis, "[t]he general test of vagueness applies with particular force" where speech or expression are implicated. *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 620 (1976); *see also Smith*, 415 U.S. at 573. This is because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (internal quotations omitted); *see also Procunier v. Martinez*, 416 U.S. 396, 418 (1974) (explaining that an interest "grounded … in the First Amendment[] is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment"), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). Indeed, the First Circuit has opined that, where a challenge to "a content-based restriction on speech" is at issue or the challenged law "applies to particular speech because of the topic discussed or the idea or message expressed …," a compelling state interest justifying the restriction must be shown and the restriction must be one "narrowly tailored to achieve that interest." *Rideout v. Gardner,* 838 F.3d 65, 70-71 (1st Cir. 2016), *affirming* 123 F. Supp. 3d 218 (D.N.H. 2015) (Barbadoro, J.) (internal citations omitted).

Here, as explained below in Section II *infra*—and as this Court previously held—"[t]he amendments at issue in this case are explicit viewpoint-based speech limitations that … arguably affect both the curricular and extracurricular speech of public primary and secondary school

teachers," and, thus, "a rigorous vagueness review is required." *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *39.[15]

A. The Standard in a Fourteenth Amendment Facial Vagueness Claim.

At the Motion to Dismiss stage, this Court already resolved the question of the standard to be applied in a facial vagueness claim brought under the Fourteenth Amendment. There, the Court opined that "the void-for-vagueness doctrine does not require a showing that a statute is vague in all of its applications, especially where, as here, the law subjects a violator to serious consequences, lacks a scienter requirement, and implicates First Amendment rights." *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *38. This Court added: "Therefore, that some conduct clearly falls within the amendments' scope is insufficient to defeat plaintiffs' vagueness claim." *Id.*

Summary judgment does not change that conclusion. As this Court previously noted, "[t]he Seventh and Ninth Circuits have interpreted [Supreme Court] cases as 'put[ting] to rest the notion—found in any number of pre-*Johnson* [*v. United States*, 576 U.S. 591 (2015)] cases—that a litigant must show that the statute in question is vague in all of its applications in order to successfully mount a facial challenge.'" *Id.* at *32 (quoting *United States v. Cook*, 914 F.3d 545, 553 (7th Cir. 2019), *vacated on other grounds*, 140 S. Ct. 41 (2019)). This Court agreed with the Seventh and Ninth Circuits. *See id.* at *33 ("I agree with the Seventh and Ninth Circuits that the *Johnson* trio heralded a more meaningful shift in the void for vagueness doctrine than the Second Circuit recognized."); *see also Guerrero v. Whitaker*, 908 F.3d 541, 544 (9th Cir. 2018). The Fourth Circuit recently stated its agreement. *See Carolina Youth Action Project; D.S. by and through Ford v. Wilson*, 60 F.4th 770, 781-82 (4th Cir. 2023) ("Finally, the Supreme Court has

[15] The Ninth Circuit recently characterized and applied the standard to require that the proponent (there, a school district, here the State) " … must satisfy 'strict scrutiny,' showing that 'its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end.'" *Wain v. Dysart School District*, 54 F. 4th 1154, 1163 (9th Cir. 2022) (citing *Kennedy v. Bremerton*, 142 S. Ct. 2407, 2426 (2022)).

now twice clarified that 'although statements in some of [its] opinions could be read to suggest otherwise,' the Court's 'holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'") (quoting *Johnson*, 576 U.S. at 602).

The analysis is no different now. Plaintiffs need not show that the Amendments are vague in all of their applications to demonstrate their unconstitutional vagueness.

B. The Amendments Fail to Give a Person of Ordinary Intelligence a Reasonable Opportunity to Know What is Prohibited, So That They May Act Accordingly.

The Amendments fail to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited. They do so in at least three ways. *First*, the Amendments lack a scienter requirement and can be violated without any purposeful conduct, including simply by implication. *See infra* Section I.B.1. *Second*, the four banned concepts themselves are hopelessly unclear. *See infra* Section I.B.2. *Finally*, Defendants' failure to answer basic questions about what the Amendments mean compounds the concepts' ambiguity. *See infra* Section I.B.3.

1. The Amendments' Lack of a Scienter Requirement, and How They Can Be Violated by Implication.

The Amendments broadly proscribe any "teaching," "instruction," "inculcation," or "compelling to express a belief in, or support for" (*see* RSA 193:40, I; RSA 354-A:31-32), or "advocacy," "training," or "advancement" (*see* RSA 354-A:31-32) of a banned concept. And the Amendments do not merely prohibit an educator from personally espousing a concept on their face, but broadly state—in the passive voice—that no public-school student "shall be taught, instructed, inculcated or compelled to express belief in, or support for," a banned concept. *See* RSA 193:40. In *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967), the Supreme Court held that similar terms prohibiting employment of a higher education instructor

who "advocates, advises or teaches the [prohibited] doctrine" were impermissibly vague because they "may well [reach] one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others." 385 U.S. at 599–600. The same problem exists here. As the *Keyishian* Court recognized, there are many reasons why an instructor might "teach," "advocate," or "advance" a particular viewpoint during class, including simply as a means of prompting students to take it seriously, to contest it, to debate it, or to think critically about it. Yet it is entirely unclear whether the Amendments permit such traditional forms of teaching, and Defendants' continuing refusal to clarify the law only exacerbates this reality.

This problem is especially pronounced given the Amendments' lack of a scienter requirement. As this Court has correctly explained, "laws that fail to incorporate a scienter requirement may also receive greater scrutiny." *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *40; *see, e.g.*, *United States v. Nieves-Castaño*, 480 F.3d 597, 603 (1st Cir. 2007) (explaining that the statute's "scienter requirement ameliorates any vagueness concerns") (citing *Hill*, 530 U.S. at 732); *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (noting that the U.S. Supreme Court "has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*"), *abrogated on other grounds*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

Here, Defendants' counsel conceded during the Motion to Dismiss hearing that the Amendments do not have a scienter requirement "insofar as it doesn't say 'knowing,' it doesn't say 'purposely,' et cetera." *See* Sept. 14, 2022 Motion to Dismiss Hearing Transcript (Docket No. 55) at 12:17-24. This admission demonstrates that educators are not "protected from being caught in [the statute's] net by the necessity of having a specific intent to commit" a violation. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972).

This lack of a scienter requirement is particularly clear when examining what it means for a student to be "taught, instructed, inculcated or compelled to express belief in, or support for" a banned concept under RSA 193:40, I, what it means for a public employer to "teach, advocate, instruct, or train" a banned concept under RSA 354-A:31, and what it means for a government program to "teach, advocate, or advance" a banned concept under RSA 354-A:32. Nothing in any of these provisions requires that an educator or public employer *know* that they are advancing or *intend* to advance a banned concept. Thus, with educators' licenses on the line, "inadvertent statements that are later deemed to advocate a banned concept can violate the amendments." *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *41; *see also Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, No. 4:22cv304-MW/MAF, 2022 U.S. Dist. LEXIS 208374, at *138-139 (N.D. Fla. Nov. 17, 2022) (noting that "Defendants identify no explicit scienter requirement in the statute with respect to instructors' actions") (appeal filed), *stay of injunction denied*, Nos. 22-13992-J, 22-13994-J, 2023 U.S. App. LEXIS 6591 (11th Cir. Mar. 16, 2023).

For example, imagine if a high school educator assigns Dr. Ibram X. Kendi's 2019 book *How to be an Antiracist*, which Commissioner Edelblut quoted in his June 13, 2021 op-ed as an example for why the Amendments are "an important, and needed contribution to our education system." *See* Ex. 21 (Depo. Ex. 4) at PL00398. No one can know how an individual student will react to this reading, let alone whether the assignment might "compel" a student to "express [a] belief in, or support for" a banned concept. If an instructor offers a "compelling" argument, does she cross the line? No one knows, and the answer to this question may well depend more on the student's reaction than the educator's intention. This quandary perplexes even experienced teachers. *See* Ex. 12, Keefe Decl. ¶ 19 ("Some students will understand that I am simply 'throwing it out there' for discussion while others may go home and say 'my teacher told us BLM is good

because it is counteracting the effects of slavery.'"). Indeed, in at least one instance where a complaint was lodged against an educator, the DOE referred the educator's superior to the Commissioner's April 15, 2022 op-ed in which the Commissioner attached various materials (including a 2020 version of Dr. Kendi's book *Stamped* for individuals ages 12 and older) that he claimed showed both educators overstepping and "biases … beginning to seep into our own institutions." *See* Ex. 40 (Depo. Ex. 14), PL00718-723. This enforcement creates the strong suggestion that the Commissioner's public statements are a benchmark for permissible behavior, and that a deviation from these statements' implicit guidelines will lead to a warning or an initial inquiry from the DOE. *See* Ex. 11, O'Brien Decl. ¶¶ 13-19.

Discovery has also borne out the Amendments' lack of a scienter requirement. As both Defendant Commissioner Edelblut and Attorney Fenton admitted at deposition, there are no policies or procedures as to what the terms "taught, instructed, inculcated or compelled to express belief in, or support for" mean under RSA 193:40, I beyond the July 2021 FAQs. *See* Fenton Depo. 111:4-114; Edelblut Depo. 150:17-153:4. This includes no policies or procedures indicating that the Amendments include a scienter requirement. Commissioner Edelblut repeatedly testified that whether the Amendments have been violated depends, not on particular content, but on "how the teacher was teaching content," "how that material was used in class," and the "complete context" of the classroom discussion. *See* Edelblut Depo. 70:5-6, 72:1, 76:1-2. He testified that teachers "would be in the best position to know if" they are violating the Amendments, and that teachers "have clarity" as to whether the Amendments have been violated. *Id.* 75:11-20. Yet, teachers have no clarity at all. The DOE does not have any policies, much less a public protocol, as to whether the phrases "teach," "instruct" "inculcate" or "compel to express a belief in, or support for" include teacher-facilitated group discussion, a teacher playing "devil's advocate" in

presenting two sides of a controversial subject, assigning to a student a point of view to argue, engaging in "read alongs," assigning a book for general discussion in class, or simply answering a student's question. *See* Fenton Depo. 112:13-114:7; Edelblut Depo. 151:23-153:4. Nor have DOE employees received training concerning implementing the Amendments. *See* *Ex. 48 (Depo. Ex. 57)* (DOE Int. Resp. No. 4).

Similarly, the DOE's limited presentations referencing the Amendments have not explained what the banned concepts mean aside from reciting their terms verbatim, and none of these presentations make any reference to the Amendments having a mental state requirement. *See* *Ex. 50 (Depo. Ex. 3)*, at DOE-05665 (in presentation for Superintendents and Administrators focusing on the DOE's role with districts in evaluating misconduct, referencing Amendments on one slide without stating what they mean); *Ex. 51 (Depo. Ex. 7)*, at DOE-10079-10081 (in presentation addressing the Code of Conduct for credentialed educators, referencing the Amendments' terms); *Ex. 44 (Depo. Ex. 24)*, at DOE-09669-9671 (same); *see also* Fenton Depo. 118:6-119:15 (explaining audiences for presentations). The HRC also has no such criteria for interpreting the corresponding phrase "teach, advocate, instruct, or train" in RSA 354-A:31, including whether a scienter requirement exists. *See* Malachi Depo. 75:3-78:2. The HRC has conducted no trainings as to what these phrases mean. *Id.* 48:23-49:8. The DOJ, too, has "no memorandum or other written material that explains a procedure specific to evaluating and responding to complaints filed pursuant to the amendments specifically," nor has it provided "training to any employees concerning how to implement the amendments." *See* *Ex. 46* (DOJ Int. Resp. Nos. 3, 4); *see also* *Ex. 52* (in November 24, 2021 email, the Attorney General's Office indicating to DEI trainer James McKim that "I did speak to the General and it is my understanding

we will not be doing a training in the immediate future on how to interpret the statute. When that changes, I will be sure to reach out to you.").

Given this lack of clarity, it is obvious why teachers such as Plaintiffs Ryan Richman and John Dube curtailed and restrained their classroom discussions, and why teachers such as Plaintiff Jocelyn Merrill removed certain material altogether from typical curricular lesson plans. *See* Ex. 17, Richman Decl. ¶¶ 5, 11-12; *Ex. 9*, Dube Decl. ¶ 11; *Ex. 18*, Merrill Decl. ¶ 2. This curtailment of vital instruction also is extensively revealed by the testimony of Sean O'Mara. His School Board approved and purchased 250 copies of Jason Reynolds/Dr. Ibram X. Kendi's 2020 book entitled *Stamped: Racism, Antiracism, and You: A REMIX of the National Book Award-winning "Stamped from the Beginning,"* which was written for individuals ages 12 and older and was going to be used by eighth graders. After Commissioner Edelblut wrote his June 13, 2021 op-ed criticizing Dr. Kendi's 2019 book *How to Be an Anti-Racist* as a problematic book which "support[s] Critical Race Theory," *see* Ex. 21 (Depo. Ex. 4) at PL00398, O'Mara felt "that the Commissioner believed the work of Ibram X. Kendi violated the Act," and "[w]e did not want to violate the Act." *See* Ex. 16, O'Mara Decl. ¶¶ 17-18 (also attaching a portion of the book to his declaration). Another district removed Tiffany Jewell's 2020 book *This Book is Anti-Racist* from professional development. *See* Ex. 15, Mejia Decl. ¶ 16 (noting removal of Tiffany Jewell's book for professional development). And Plaintiff Christina Kim Philibotte, because of the Amendments, has recommended that teachers change the way they teach Jewell Parker Rhodes's 2018 book *Ghost Boys*. *See* Ex. 13, Philibotte Decl. ¶ 19.

The Amendments' lack of a scienter requirement is confirmed by Defendants' own acknowledgment that an educator can violate the law by implication. This Court correctly concluded that the Amendments "do not give either teachers or enforcers the guidance they need

to find the line between what the amendments prohibit and what they permit," especially because the Amendments "allow teachers to be sanctioned for speech that advocates a banned concept only by implication." *See Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *42. The Attorney General's September 7, 2021 opinion confirms this interpretation. *See* Ex. 53 (Depo. Ex. 12) at PL00431 ("But, if that web-based resource stated that it was designed to 'serve as a resource to white people' or to 'serve as a resource for our white employees,' then it could violate Section 297 because it *may imply* that white people, specifically and for no other reason, are in need of anti-racist resources—resources that could benefit people from all backgrounds.") (emphasis added); *see also Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *42-43 (citing Attorney General opinion).

This also was confirmed by the HRC. In an October 7, 2021 Commissioners' meeting, the Director and Assistant Director of the HRC explained that the "inspiration" for HB2 was instances in which information had been presented in K-12 classroom that "state[d] directly *and/or impliedly* that inherent traits establish a person's inferiority/superiority." Ex. 20 (Depo. Ex. 56) at HRC-00392 (emphasis added). What is the end result of the fact that the Amendments can be violated by implication? A regime where "a teacher could unknowingly violate the amendments by making a statement that does not expressly endorse a banned concept but that could be understood to imply it," especially where there are "countless applications where a teacher does not directly assert a banned concept but, in the view of an enforcer, [could] impl[y] its correctness." *See Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *43. Indeed, "[h]ow is an agency to determine whether a teacher has implied the truth of a banned concept? The amendments are silent on the matter, leaving it to the subjective ad hoc judgment of an enforcer." *Id.* at *48.

Defendants also repeatedly declined to explain at deposition what it means to "teach" or "instruct." Commissioner Edelblut even (and oddly) repeatedly testified at deposition that

"content is not the subject of the purported HB 2 or 193:40," *see* Edelblut Depo. 62:15-64:14, despite stating in a June 13, 2021 op-ed that certain forms of content justified the need for the Amendments. *See Ex. 21 (Depo. Ex. 4)*. Rather, he testified that it is the way the content is being conveyed in the classroom that implicates the Amendments, and that the educator is in the "best position to know if they" are violating the Amendments and what constitutes "teaching," "instruction," or "inculcation." *See* Edelblut Depo. 66:3-5 71:3-4, 72:1-2, 75:11-20. But teachers are neither legislators nor lawyers, and it is the DOE—not teachers—who are tasked with interpreting and enforcing RSA 193:40 as a violation of the Educator Code of Conduct. *See* RSA 193:40, IV. In the face of educators' numerous questions about what the Amendments mean, *see Exs. 41 (Depo. Ex. 9), 42 (Depo. Ex. 11), 43 (Depo. Ex. 54)*, the DOE repeatedly failed at deposition to explain what "taught, instructed, inculcated or compelled to express belief in, or support for" might include under RSA 193:40, I.

These questions are vital to educators who must make daily, quick decisions in the classroom as to what to cover and *how* to cover it. Do the terms "taught," "instructed," or "inculcated" in RSA 193:40 include assigning a book to a student? Do they include teacher-facilitated classroom discussion? Do they include a "read along"? Do they include answering student questions? No one within the DOE knows or is willing to say what the DOE believes these terms to mean, and, again, the DOE has no public policies on these important questions. *See* Fenton Depo. 112:13-114:7; Edelblut Depo. 151:23-153:4. HRC Assistant Director Cohen similarly testified that the only guidance that the HRC has as to whether any particular educational materials violate the Amendments are the materials "issued by the Attorney General's office in his opinion and our FAQ on the statutes." *See* Cohen Depo. 114:13-19. Once again, educators are left in the dark as to what the Amendments mean.

2. The Four Banned Concepts are Hopelessly Unclear.

In addition to the Amendments' lack of a scienter requirement, the Amendments' vagueness is compounded by the significant ambiguities embedded in the four banned concepts themselves. Plaintiffs will not rehash these ambiguities from their prior briefing (*see* Docket Nos. 45, 46, 52, and 53), as this Court has already highlighted them in its Jan. 12, 2023 order on the Motion to Dismiss.

It should be noted at the outset that, while the Commissioner professed at deposition that teachers are "very" or "quite clear" about what is covered under the Amendments, *see* Edelblut Depo. 157:23, 159:5, 162:15, the Commissioner conceded by email that some of the language in the Amendments "is confusing," attributing this confusion to the legislative process. *See* Ex. 19 (after noting this confusion as to the fourth banned concept, stating "welcome to legislative language"). Further evidencing this confusion, HRC Assistant Director Cohen testified that the HRC consults with the DOJ on allegations of discrimination depending "on the complexity of the case" and "the complexity of the law" being applied, and that the HRC has consulted with the DOJ concerning the Amendments because the HRC was "looking for clarity on how to apply the new amendments." *See* Cohen Depo. 55:4-21, 104:14-108:21. Director Malachi further acknowledged that the HRC requested the September 7, 2021 opinion from the Attorney General because the HRC received concerns from some members of the public that the Amendments were confusing and that some would struggle to understand their scope. *See* Ex. 53 (Depo. Ex. 12); Malachi Depo. 88:11-89:18 ("The Commission was aware of concern from the public about Sections 297 and 298 and requested the opinion."). DOE Attorney Fenton also testified that, if she received questions during educator presentations as to what might be covered under the Amendments, she thinks that she would have referred them "to the Attorney General's Office," as she "would not have felt comfortable answering them." *See* Fenton Depo. 94:7-14. She added that "there was a lot of

confusion in the field" concerning the Amendments, including among attorneys, Superintendents, and parents—many of whom are "fairly educated people." *Id.* 158:1-19. And when DOE Investigator Farrell was asked "[w]hat would [he] not be able to teach[] under" the Amendments if he knew, he said "I don't." *See* Farrell Depo. 52:12-18.

As to the third banned concept—which bars instruction "[t]hat an individual should be discriminated against or receive adverse treatment solely or partly because of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin"—this Court has explained that this concept arguably blocks discussion of affirmative action:

> In the coming months, the Supreme Court will decide whether colleges and universities can continue to use race-conscious admission policies. The plaintiffs in those cases assert that such policies improperly favor Black applicants at the expense of white and Asian-American applicants, whereas the defendants argue that the policies are necessary to ensure diversity in higher education. If a high school teacher attempts to explain the diversity argument to her class during a discussion of the case, will she face sanctions for teaching a banned concept? We simply don't know.

Local 8027, 2023 U.S. Dist. LEXIS 5593, at *8, *43-44.[16]

At deposition, Commissioner Edelblut would not answer whether teaching about affirmative action violates the Amendments, skirting the question by stating that he would need "more context." *See* Edelblut Depo. 65:11-66:5. DOE Investigator Farrell similarly did not know. *See* Farrell Depo. 206:7-13. Yet, given the breadth and scope of the language in this third concept, teachers may very well be barred from discussing or teaching that our institutions need diversity. Imagine a high school teacher echoing Justice Sonia Sotomayor's recent dissent stating that the guarantee of racial equality "can be enforced through race-conscious means," that "diversity in

[16] This concept arguably even bans teaching on one of the foundational premises of disability law, which recognizes that people with disabilities must be provided with reasonable accommodations, when necessary, to enable them to access and fully participate in school, work, and all aspects of community life.

higher education is of compelling value," that "[i]gnoring race will not equalize a society that is racially unequal," and that the United States should not embrace "a veneer of colorblindness in a society where race has always mattered and continues to matter." *See Students for Fair Admissions*, 143 S. Ct. at 2225, 2248, 2234, 2246 (Sotomayor, J., dissenting). Would this educator violate the Amendments' third prohibition on teaching that "an individual should be discriminated against or receive adverse treatment solely *or partly* because of his or her … race," especially where Chief Justice John Roberts, himself, has called affirmative action a practice that is racially discriminatory and engages in "racial stereotyping"? *Id.* at 2161 (Roberts., C.J.) ("Eliminating racial discrimination means eliminating all of it."), 2160 ("The time for making distinctions based on race had passed."), 2176 ("the student must be treated based on his or her experiences as an individual—not on the basis of race"). As this Court noted in its January 12, 2023 order, "[w]e simply don't know." Plaintiff Ryan Richman has confronted these very questions in his classroom. He previously taught about affirmative action, the 1965 Voting Rights Act, and the Equal Rights Amendment proposed by Congress in 1972 and whether similar protections are needed today. Those discussions are now fraught with potential liability, and he (and others like him) are now significantly restrained in what they are willing to teach. *See Ex. 17*, Richman Decl. ¶¶ 4-5; *see also Ex. 16*, O'Mara Decl. ¶¶ 10-18.

The same can be said if an educator explains or teaches about Chief Justice Robert's apparent exception to the ban on affirmative action, stating that race-conscious admissions programs at the Nation's military academies may further compelling interests and potentially should continue to exist. *Students for Fair Admissions*, 143 S. Ct. at 2166 n.4 (in a footnote, exempting the Nation's military academies from ban on affirmative action "in light of the potentially distinct interests that military academies may present."). No one knows if that

statement violates the third banned concept. The examples do not end there. After the United States Supreme Court's decision in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), how can an educator explain or discuss whether gay and lesbian customers who wish to marry "should be discriminated against or receive adverse treatment solely or partly because of" their sexual orientation by certain business owners because of those owners' First Amendment rights to not be compelled to engage in expressive speech? In a charged political environment created by the Amendments—where, for example, a state representative attended a school board meeting last fall to protest an extracurricular Gay-Straight Alliance[17] dance, proclaiming that "the LGBTQ community put on a dance," and insisting that the school board "stop this from happening" in the future, *see* *Ex. 17*, Richman Decl. ¶ 9—a teacher would be hard pressed to even attempt to discuss these topics for fear of being the subject of a complaint.

These are not hypothetical concerns. The very quotation that Commissioner Edelblut used in his June 13, 2021 op-ed as an example for why the Amendments are "an important, and needed contribution to our education system," *see* *Ex. 21 (Depo. Ex. 4)* at PL00983, was taken from Dr. Ibram X. Kendi's 2019 book *How to be an Antiracist* and addressed affirmative action. *See* *Ex. 54 (Depo. Ex. 50)*.[18] And, as discovery disclosed, in an October 19, 2021 email, one prominent

[17] "GSA" is a common abbreviated name for Gender and Sexuality Alliance or Gay-Straight Alliance—a club where students can meet to discuss, among other things, sexual orientation and gender identity in a safe and confidential setting.

[18] In the sentences of Dr. Kendi's 2019 book immediately following the three sentences quoted by Commissioner Edelblut in his June 13, 2021 op-ed, Dr. Kendi quotes Lyndon B. Johnson's commencement address at Howard University on June 4, 1965 (two months before the 1965 Voting Rights Act was signed into law), and Justice Harry Blackmun's opinion in an affirmative action case. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) ("In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.") (Blackmun, J., concurring in the judgment in part, and dissenting in part); A. Presidency Project, Lyndon B. Johnson, *Commencement Address at Howard University: 'To Fulfill These Rights'* (June 4, 1965), https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights ("You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."). *See* *Ex. 54 (Depo. Ex. 50)* (page of text in Dr. Kendi's *How to be an Antiracist* quoted in Commissioner Edelblut's op-ed in *Ex. 21 (Depo. Ex. 4)* and that contains these quotations from President Johnson and Justice Blackmun).

individual who has given DEI presentations throughout New Hampshire (including to the New Hampshire Department of Justice, *see* Ex. 76 and the state court system, *see* Ex. 77), James McKim, expressed concern to the DOJ that teaching affirmative action could, in fact, violate the Amendments in light of banned concept three—particularly its use of the phrase "*solely or partly* because of his or her … race." *See* Ex. 52.

The fourth banned concept—which *bars* instruction "[t]hat people of one age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin *cannot and should not* attempt to treat others *without regard to* age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin"—fares no better. This concept's triple negative is hopelessly confusing. *See Pernell*, 2022 U.S. Dist. LEXIS 208374, at *129 ("As this Court recognized in *Honeyfund*, concept four thus features a rarely seen triple negative, resulting in a cacophony of confusion" and is "mired in obscurity, bordering on the unintelligible"); *Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159, 1182 (N.D. Fla. 2022) ("Concept 4 is even worse, bordering on unintelligible …. Concept 4 thus features a rarely seen triple negative, resulting in a cacophony of confusion."); *see also Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 437 n.2 (3d Cir. 2019) (striking down prohibition on political speech with "a tangle of double negatives that [was] vague enough to ensnare nearly any message" and lacked "a sufficiently definite standard … to exercise discretion"); *Albanese v. McGinnis*, 823 F. Supp. 521, 563 (N.D. Ill. 1993), *aff'd sub nom. Albanese v. Peters*, 19 F.3d 21 (7th Cir. 1994) ("Triple negatives are not conducive to comprehension.").

At the September 14, 2022 oral argument on the Motion to Dismiss in this action, this Court asked Defendants' counsel to put on his "statutory construction hat" and interpret the fourth

banned concept because the Court had "spent several days kind of parsing it and trying to think about what it means." This Court underscored the obtuse nature of the language in the fourth banned concept:

> THE COURT: See, that you and I are having so much trouble even communicating about the fourth concept may tell us something about the challenge. First, we're both lawyers, and we do statutory interpretation for a living, but if we're having this much trouble [talking] about it, *do you think a person of ordinary intelligence looking at it with no special skills in the law could clearly discern what that provision means or doesn't mean*?

See Sept. 14, 2022 Motion to Dismiss Hearing Transcript (Docket No. 55) at 26:24-27:6 (emphasis added).

Discovery in this case confirms this Court's perception. Again, while publicly stating in late August 2021 that the Amendments created a "bright line … that we are not discriminating against one another,"[19] Commissioner Edelblut acknowledged in an email that "[t]he double negative is confusing (welcome to legislative language)." *See Ex. 19*. DOE Investigator Richard Farrell also stated at deposition that he had "no idea" what a teacher cannot teach under the fourth banned concept. *See* Farrell Depo. 144:23-145:13, 204:7-207:19 (while aiming to later clean up this telling testimony with the assistance of counsel, he acknowledged that he is not "aware of any book that is prohibited from being taught in New Hampshire public schools under subsection D of the law").

As this Court explained: this fourth concept "prohibits among other things, teaching or advocating that white people cannot treat Black people 'without regard to' their race …. Given that advocacy can take many forms, there is a real risk that a teacher could face sanctions for discussing the concept of implicit bias with a student." *Local 8027*, 2023 U.S. Dist. LEXIS 5593,

[19] Adam Sexton, *CloseUp: Commissioner expects to fund 1000-1500 Education Freedom Accounts this year*, WMUR (Aug. 29, 2021), https://www.wmur.com/article/closeup-commissioner-expects-to-fund-1000-1500-education-freedom-accounts-this-year/37424825 (starting at 9:58).

at *44. This is especially the case given that the Amendments can be violated by implication. As this Court noted, a discussion on implicit bias "may certainly imply" in the mind of the recipient the notion that a person in one group "cannot" treat a person in another group equally. *Id.* "For example, a teacher may state that white persons can have difficulty treating non-white persons without regard to their race. An enforcer may later decide that the discussion implied support for the proposition that a white person 'cannot' treat a Black person without regard to race, in violation of the fourth banned concept." *Id.* at *44-45. This similar problem exists with respect to the second banned concept that seems to target implicit bias directly in referencing the ability of a person, by virtue of their race, to be racist "unconsciously."

Defendants' efforts to demonstrate that concepts like "implicit bias" are not prohibited under the Amendments are belied by the law's origins and the Commissioner's public statements after it passed. The Amendments were modeled after President Trump's September 2020 Executive Order, which was drafted to specifically target DEI trainings and other instruction that used the phrases "white privilege," "intersectionality," "systemic racism," "racial humility," and "unconscious bias." *See Ex. 55* (Sept. 28, 2020 Executive Office of the President's Memorandum indicating that such phrases "may help to identify the type of training prohibited by the" Executive Order). Attacks on DEI instruction—and its labeling as "critical race theory"—were rampant as the Amendments were being discussed and debated. This history only highlights that the Amendments are so vaguely worded that they can mean whatever one wishes them to mean.

While an educator may teach the "historical existence of" the four banned concepts under RSA 193:40—though this exemption does not exist under RSA 354-A:31-32—the ability to teach the continuing relevance of this history, and make it personally relatable, to students remains unclear under the Amendments. Debating and discussing these topics from different perspectives

is instrumental to fostering critical thinking for New Hampshire students, as well as helping students relate to course material through the lens of their own personal experiences. As former AP History teacher John Dube puts it, "history is about patterns and parallels" and comparing the past to our present world circumstances. *See* Ex. 9, Dube Decl. ¶ 5. Where instruction crosses the line between permissible instruction about the "historical existence" of discrimination and present reality is impossible for educators to discern. This exemption also only exists "as part of a larger course of academic instruction," whatever that may mean. *See* RSA 193:40, II. But how much larger does the "larger course of academic instruction" need to be before it insulates discussion of a proscribed concept from becoming a violation? The Amendments provide no guidance on this question.

High School teacher Patrick Keefe has regularly faced this quandary. Prior to the Amendments' passage, he would use a technique when assigning books that asked students to "identify whether the legacy of slavery is evident in the modern world? Could they connect the characters' stories to their own experiences or observations?" Ex. 12, Keefe Decl. ¶ 18. However, he now feels "less comfortable placing these books in a contemporary framework and asking students, for example, if they think the Black Lives Matter movement could be considered a result of the destructive legacy of slavery or asking, 'does the legacy of slavery continue and if so, how?'" *Id.* ¶ 19. Further, prior to the Amendments' passage, he would ask "students to draw on things they saw in the news, popular culture, or their own experiences and use these frameworks to inform their analysis." *Id.* ¶ 15. He did this because "the state standards require students to be able to write about experiences" (both their own and others), understand different cultures and experiences other than their own, and critically examine the information they receive in the media every day. *Id.* Now he is concerned about doing so. *Id.*; *see also* Ex. 14, Given Decl. ¶ 12 (noting that,

because of the Amendments, she has "severely limited" her usage of the "widely understood best practice in teaching" of "analogizing material to students' own experiences and interests so that they can identify material and relate it to their own lives"—a practice that "is particularly important in social studies curriculums and historical courses where students can easily believe historical events only happened in the past"); *Ex. 13*, Philibotte Decl. ¶ 13 (noting how students have told her "that they want to talk about their own personal experiences in the classroom and how these experiences relate to course materials").

The language in RSA 193:40, II also does not eliminate the uncertainty as to an educator's ability to engage in instruction or discussion on whether the lessons of the past may require race-conscious remedies to mitigate present-day racial inequality emanating from historical discrimination. This Court suggested as much when it concluded that the language in RSA 193:40, II did "not fully encompass the broader scope of learning" that RSA 189:11(j) mandates. RSA 189:11(j) mandates instruction on "*how to prevent the evolution of*" "intolerance, bigotry, antisemitism, and national, ethnic, racial, or religious hatred and discrimination." As this Court correctly explained:

> For example, beyond teaching the historical existence of Jim Crow laws, teachers are supposed to discuss their evolution and how such practices can be prevented. In this context, it is not difficult to imagine that a discussion of remedies for past discrimination such as reparations would take place, which could subject a teacher to sanctions for teaching a banned concept. As a result, teachers could, in plaintiffs' words, be left with "an impermissible Hobson's choice": shirking their responsibilities under RSA § 189:11, or teaching what RSA § 189:11 requires and potentially violating the prohibition against teaching a banned concept in RSA § 193:40. See Doc. No. 46 at 9. This is even more reason to require clarity in the amendments. Teachers should not be put in a position where they must instruct students on certain concepts but face the threat of job loss if their instruction unintentionally and only by implication crosses the line drawn in RSA § 193:40.

Local 8027, 2023 U.S. Dist. LEXIS 5593, at *45-46.

3. The Ambiguities in the Four Banned Concepts Are Compounded by Defendants' Failure to Answer Basic Questions About What They Mean.

The ambiguities in the four banned concepts are further compounded by the fact that educators are not getting answers to basic questions about content when they attempt to consult with Defendants. If the Amendments' four prohibitions were clear, as Defendants suggest, then the state officials enforcing them would make themselves available to answer educators' questions or otherwise provide illumination, and the answers would be easy. But, with educators' licenses on the line, the DOE and the HRC—both at deposition and in response to questions from educators and stakeholders—have evaded or declined to answer questions about what is and is not specifically covered. Either they do not know or will not tell.

When asked at deposition about whether the *teaching* of specific books would be covered under RSA 193:40's four prohibitions, Commissioner Edelblut declined to give direct answers. Instead, he simply directed Plaintiffs, and other educators who may have specific questions, to the text of the Amendments and Defendants' July 2021 FAQs:

> Q. So if a teacher has questions about whether specific instruction is covered by the law, they could come to the Department [of Education] and work through individual circumstances that may be unclear to them; is that still something that could occur today?
>
> A. Correct, and the guidance that we would provide them today would be in the form of a Q & A guidance and questionnaire as well as reference to the statute.
>
> Q. Is that the only guidance that they would be provided to a teacher if they were confused, the Q & A from July 2021 and the statute? Is that all you'd give them?
>
> MR. KENISON-MARVIN: Objection. Vague and scope.
>
> A. And I believe pending this lawsuit that that would be the extent of the guidance that we would provide to them.

Edelblut Depo. 166:13-169:8; *see also id.* 158:17-160:6; 162:23-164:14; *Pernell*, 2022 U.S. Dist. LEXIS 208374, at *128 ("Here, however, Defendants throw out their dictionary definitions from *Honeyfund* in favor of restatements of the statutory text and emphasis on the vagueness standard for public employees."). In declining to give direct answers regarding teaching specific content, Commissioner Edelblut repeatedly testified that "content is not the subject of the purported HB 2 or 193:40" and that it would depend on "context." *See* Edelblut Depo. 62:10-63:3, 75:21-76:2, 154:1-158:16. But this is a confusing explanation given the Commissioner's public condemnation of *content*—not a specific lesson—when criticizing (i) Dr. Ibram X. Kendi's 2019 book *How to be an Anti-Racist* in his June 2021 op-ed, *see* Ex. 21 (Depo. Ex. 4), and (ii) Tiffany Jewell's 2020 book *This Book is Anti-Racist* in his July 8, 2021 remarks before the State Board of Education, s*ee* Ex. 56. The Commissioner further admitted at deposition that he cited specific content as a basis for why the Amendments were needed in his June 2021 op-ed. *See* Ex. 21 (Depo. Ex. 4); Edelblut Depo. 164:8-165:2 (admitting that he cited Dr. Kendi's book as content).

Plaintiffs' specific questions at deposition about the four prohibited concepts were not conjectural, but rather concerned the very books that Commissioner Edelblut cited as justifying the Amendments' passage. Again, the Commissioner cited the 2020 book *This Book is Anti-Racist* by Tiffany Jewell—a book by a woman of color focusing on 11-to-15-year-old students of color—in his July 8, 2021 remarks before the State Board of Education. *See* Ex. 56 (Transcript of July 8, 2021 remarks). In doing so, he referenced the Amendments to rebut the claim of "people [who] will say like, well, this doesn't happen in New Hampshire." *See id*. Commissioner Edelblut also cited this book in an attachment to an April 15, 2022 op-ed in which he argued that educators were overstepping and that "biases are beginning to seep into our own institutions." *See* Ex. 40 (Depo. Ex. 14), at PL00682, 742-745 (attaching a chapter from this book). Evidencing the Amendments'

chill, one middle school temporarily set aside this book, which was to be used by a teacher group for professional development, because of concerns that it may implicate the Amendments. *Ex. 15*, Mejia Decl. ¶ 16. But at deposition, the Commissioner would not say if teaching this book is covered under the Amendments, even when confronted with his prior July 8, 2021 statements before the Board of Education. Instead, the Commissioner simply recited the Amendments' text. *See* Edelblut Depo. 171:7-172:10.

Similarly, the Commissioner quoted three sentences of the 2019 book *How to be an Antiracist* by Dr. Kendi in his June 13, 2021 op-ed as an example for why the Amendments are "an important, and needed contribution to our education system." *See Ex. 21 (Depo. Ex. 4)* at PL00398. The Commissioner also attached to his April 15, 2022 op-ed portions of Dr. Kendi's 2020 book *Stamped*, which was written for individuals ages 12 and older. *See Ex. 40 (Depo. Ex. 14)*, PL00718-723. At deposition, however, the Commissioner refused to say if Dr. Kendi's 2019 book was covered under the Amendments, even as he admitted that he had not read the book or the contextual language surrounding what he quoted. The Commissioner instead resorted to restating the Amendments' provisions and deflecting these questions back to the individual educators and the HRC to answer. *See* Edelblut Depo. 149:18-150:16 (acknowledging that he had not read Dr. Kendi's 2019 book); 155:8-156:14, 157:7-160:2; 167:9-169:4. As explained in more detail below in Section I.C *infra*, the HRC's two witnesses maintain that the HRC has no jurisdiction over RSA 193:40 and its application to educators. *See* Malachi Depo. 73:5-74:17; Cohen Depo. 59:17-21.

Notwithstanding the HRC's disclaimer of any jurisdiction over RSA 193:40, Commissioner Edelblut repeatedly stated that the DOE has no adjudicatory authority under the Amendments and RSA 193:40, instead deferring to the HRC as to whether specific content was

covered. *See* Edelblut Depo. 67:10-11, 70:5-15, 153:16-20, 159:16-160:2. For example, when asked whether a teacher could teach that "Affirmative Action is a wonderful thing," the Commissioner restated the Amendments' text and testified that whether there would be a violation was a decision "made by the Human Rights Commission." *See* Edelblut Depo. 64:15-65:10; *see also id.* 67:10-11, 70:5-15. DOE Investigator Farrell punted similar questions about whether the teaching of specific texts would be covered to the school district's counsel and to DOE Attorney Diana Fenton. *See* Farrell Depo. 149:8-150:19, 166:7-167:3. And Attorney Fenton punted these questions to the HRC (*see* Fenton Depo. 105:10-106:2), even while acknowledging that there was "a lot of confusion in the field" about what the Amendments mean (including from lawyers and Superintendents). *See* Fenton Depo. 158:1-19; *see also* Ex. 87 (Drummond Woodsum August 5, 2021 Presentation).

But when Plaintiffs asked HRC Assistant Director Cohen similar questions as to what specific content would be covered under RSA 354-A:29-24 if taught, she did not answer directly, stating that it is a "complicated question because you have to look at the context of things" and that "I could not give a teacher or complainant legal advice on whether them teaching that would make a charge or not." *See* Cohen Depo. 93:7-23, 94:1-19. Instead, she "would suggest that the educator read the law, read the [July 2021] FAQs that are available as well as the [September 2021] opinion issued by the Attorney General's office." *See* Cohen Depo. 95:21-96:8. And if there are further questions, Assistant Director Cohen testified that "I would suggest they contact their legal counsel for legal advice." *See id.* 96:9-17; *see also id.* 94:21-22, 95:12-20. Commissioner Edelblut similarly told at least one Superintendent that he should ask his district's counsel if he had questions under the Amendments. *See* Ex. 57, DOE 856-57 ("[i]f you have questions about the material, I would encourage you to reach out to your district's legal counsel"). As this Court

suggested, if educators must consult with legal counsel for advice on what can and cannot be taught under the Amendments, the Amendments do not provide a person of ordinary intelligence with adequate notice of their proscriptions. *See* Sept. 14, 2022 Motion to Dismiss Hearing Transcript (Docket No. 55) at 26:24-27:6. Consider the havoc that could ensue if a teacher had to call a lawyer every time they were asked a question potentially covered by the Amendments.

Defendants' document production underscores their continued evasiveness on these topics. Given the consequences for violating the Amendments' terms—namely, a teacher's loss of license and ability to earn a living—Superintendents, educators, and both Plaintiffs AFT and NEA-NH have asked for clarification as to what the Amendments mean and what specific instruction would be covered. The DOE declined a speaking invitation with NEA-NH officials by referring them to the HRC, and also ignored two NEA-NH letters from July and August 2021 (*see* *Exs. 42 (Depo. Ex. 11), 43 (Depo. Ex. 54)*) which posed specific questions about what was covered under the Amendments so teachers could be informed of how to prepare for the upcoming school year. *Ex. 7*, Tuttle Decl. ¶ 9. When AFT inquired in September 2021 about whether the Commissioner would speak about the Amendments, the Commissioner did not directly respond to the invitation, and instead "reiterate[d] our offer to try to work through individual circumstances that may be unclear to teachers." *See* *Ex. 41 (Depo. Ex. 9)*; *see also* *Ex. 8*, Howes Decl. ¶ 13 (noting that the Commissioner declined AFT's invitation to speak at a Town Hall).[20]

Commissioner Edelblut also has publicly called for educators to "reach out to the" DOE if there were questions.[21] But this was an empty offer where the Commissioner and DOE staff

[20] At least one specific question to the DOE from a media outlet asking whether an "anti-bias, anti-racist" workshop would be covered under the Amendments also may have been ignored, with no written response having been produced in this litigation. *See* *Ex.58 (Depo. Ex. 47)*; Edelblut Depo. 133:20-134:12 (not knowing whether there was a response).

[21] Defendant Commissioner Edelblut suggested during an interview on *WMUR* in late August 2021 that, "if there are educators who are concerned about a particular curricular material or something like that, they can reach out to the Department [of Education] and we can take a look at that for them and provide feedback for them on that." *See* Adam

testified in this case that they would only provide the FAQ as guidance or pass the concern along to the HRC. *See* Edelblut Depo. 159:21-160:2; 166:13-169:7; 167:9-169:4.[22] Of note, Commissioner Edelblut evades questions from educators but finds the time to discuss the Amendments with certain political committees. *See id.* 175:20-176:21 (noting that he has spoken to political groups where he "may have answered a question on" the Amendments); *see also* Ex. 59 (Depo. Exs. 37, 52) (Northwood GOP invitation to speak on the Amendments). And, the HRC has also refused to release to the public (and teachers) information concerning the substance of complaints in which the HRC has determined that there is no *prima facia* claim, despite having the authority to do so. This information is critical for educators to understand how the HRC is interpreting the Amendments. *See* Ex. 61; *see* RSA 354-A:21, II(a) ("the commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of").

The Commissioner's public statements decrying "critical race theory," combined with Defendants' failure to publicly answer basic questions as to what the Amendments specifically mean, have also tacitly encouraged members of the public to file complaints embracing expansive views on how to interpret the Amendments, including broadly interpreting them to address DEI themes and concepts like "white privilege." In addition to the complaints submitted by members of the public to the DOE explained below in Section I.C *infra*, *see also* Statement of Facts ¶¶ 137-

Sexton, *CloseUp: Commissioner expects to fund 1000-1500 Education Freedom Accounts this year*, WMUR (Aug. 29, 2021), https://www.wmur.com/article/closeup-commissioner-expects-to-fund-1000-1500-education-freedom-accounts-this-year/37424825 (starting at 9:58).

[22] *See also* Ex. 60 (Depo. Ex. 10) (in a January 18, 2023 response to an inquiry from a Superintendent asking whether "[i]s there somebody at DOE who can speak with a teacher and principal … with specifics about what she can say or not say regarding issues that might pertain to divisive topics," DOE Attorney Fenton stated that the issue of "divisive topics is handled by the Human Rights Commission and the AG's office" and the DOE "has not issued much information on this topic"); Fenton Depo. 105:10-106:2 ("matters falling within HB 2 are to be handled by the Human Rights Commission"); *see also* Farrell Depo. 39:18-20 ("We would only be – involve ourselves after the Human Rights Commission process is over.").

138, there have been approximately [redacted] allegations of discrimination sent to the HRC in various forms complaining that specific educators and school districts were violating the Amendments by engaging in DEI instruction and teaching certain books implicating race and gender. *See also* Statement of Facts ¶ 140.[23]

[redacted]

[23] The HRC has deemed one these complaints as presenting a *prima facia* claim of discrimination under RSA ch. 354-A and, as a result, has formally docketed the complaint [redacted] It also merits note that the HRC does not have internal policies or procedures to determine when a *prima facie* case has been made under RSA 354-A:29-34, and the HRC solely refers to the text of the statute in making this determination. *See* Malachi Depo. 78-79.

[redacted]

Defendants' failure to answer basic questions about what the Amendments cover leaves educators in the dark and exposes them to expansive public complaints. But what Defendants never get around to saying is what specific texts, techniques, conversations, lessons, or materials are actually *prohibited* by the Amendments. For example, before the Amendments were enacted, New Hampshire's Law Against Discrimination as amended in 2019, as well as the DOE's administrative rules, already banned discrimination on the basis of race, gender, and other classes. *See* RSA 354-A:27-28; RSA 193:38; N.H. Code Admin. R. Ed 510.01(b)(1), 510.02(b)(1), 510.03(b)(1) (banning discrimination under RSA 354-A:1). Given the pre-existing anti-discrimination provisions that were enacted in schools in 2019 and that were seemingly already embedded in the Code of Conduct as of June 25, 2021, it is reasonable to ask what exactly the Amendments are intended to do. Neither Commissioner Edelblut, DOE Attorney Fenton, DOE Investigator Farrell, nor Assistant HRC Director Cohen could cite at deposition a single example of instruction occurring in New Hampshire before the Amendments were enacted on June 25, 2021 that would be barred under the Amendments terms. *See* Edelblut Depo. 174:2-8; Fenton Depo. 172:23-173:9; Farrell Depo. 169:12-18, 170:20-24; Cohen Depo. 35:15-23. This adds to the confusion among educators because the political rhetoric—enflamed by the Commissioner himself in op-eds (*see, e.g.,* Ex. 21 (Depo. Ex. 4); Ex. 40 (Depo. Ex. 14))—is premised on the assertion that something nefarious *is currently* being taught in public schools. But with Defendants unable to identify such nefarious instruction, teachers are left to wonder if they are engaging in this

unnamed instruction. *Ex. 7*, Tuttle Decl. ¶ 12. Of course, it is a cardinal rule that statutes are not meant to be meaningless. The Amendments must mean something. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) ("As this Court has noted time and time again, the Court is obliged to give effect, if possible, to every word Congress used.") (internal quotations omitted); *Honeyfund.com*, 622 F. Supp. 3d at 1181 ("For example, concept 1"—which is analogous to the first banned concept in this case—"is mired in obscurity. It is not clear what is prohibited beyond literally espousing that, for example, 'White people are superior to Black people.'"). But here, the Amendments, as this Court initially found in its decision on the Motion to Dismiss, are mired in obscurity.

C. The Amendments are Susceptible to Arbitrary and Discriminatory Enforcement Given the Multiple Entities That Can Enforce (and Have Enforced) their Provisions.

A statute also can be unconstitutionally vague if it allows for "arbitrary and discriminatory enforcement." *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Where there is an absence of "minimal guidelines to govern law enforcement," *see Kolender*, 461 U.S. at 357-58, or established "standards" to guide enforcement authorities, *see City of Chicago v. Morales,* 527 U.S. 41, 42 (1999), an independent basis exists for invalidation. That independent basis is satisfied here.

Aside from the lack of clarity with respect to the Amendments' text, discovery has revealed that Defendants have no established process for interpretating or enforcing the Amendments, much less a publicly understood one, thereby making the Amendments highly susceptible to arbitrary and discriminatory enforcement. The "order of operations" that Defendants first introduced in the briefing on the Motion to Dismiss is, in reality, both unsupported by any writing and inconsistent with actual practice. This risk of arbitrary enforcement is further enhanced by the fact that, as referenced above, the Amendments expressly seek to suppress ideas—here, viewpoints that some,

including Defendant Commissioner Edelblut, have called "critical race theory." *See, e.g., Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1229 (11th Cir. 2017) (holding that vague regulations create the "risk that speech will be chilled or effectively censored on the basis of content or viewpoint.").

Here, and critically, the Amendments' terms setting out their enforcement mechanism introduce vagueness because different bodies have the ability to process complaints, with the prospect of different results. For example, under RSA 193:40, IV, the DOE is one of *five* bodies that has *independent* enforcement authority under the Amendments—along with (i) the state courts under RSA 354-A:29-34 and RSA 193:40, III, (ii) the DOJ under RSA 354-A:29-34 and RSA 193:40, III[24], (iii) the HRC under RSA 354-A:29-34 and RSA 193:40, III[25], and (iv) the Department of Labor under RSA 354-A:34 given that section's reference to RSA ch. 275-E, which is New Hampshire Whistleblowers' Protection Act.[26] *See* RSA 193:40, IV ("Violation of this section by an educator shall be considered a violation of the educator code of conduct that justifies disciplinary sanction by the state board of education."). In particular, RSA 193:40 can be independently enforced by "aggrieved" members of the public, the Attorney General, the HRC, and the superior court, in addition to the DOE through the Code of Conduct. *See* RSA 193:40, III-IV. Reflecting these multiple layers of enforcement, the HRC's original intake questionnaire form

[24] The Law Against Discrimination specifically gives the Attorney General the authority to "make, sign, and file [a] complaint" under the Law, which would include a complaint for an alleged violation of the Amendments. *See* RSA 354-A:21, I(a). In connection with the filing of a complaint under the Law Against Discrimination, the Attorney General also is "authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules." *See* RSA 354-A:21, I(b). The Amendments' provisions at RSA 193:40, III also state that the Attorney General "may initiate a civil action against a school or school district in superior court for legal or equitable relief" for a violation of RSA 193:40, I. *See* RSA 193:40, III.

[25] RSA 193:40, III states that "[a]ny person claiming to be aggrieved by a violation of this section … may initiate a civil action against a school or school district … with the New Hampshire commission for human rights as provided in RSA 354-A:34."

[26] The Department of Labor has the authority to investigate and hold hearings on complaints under RSA ch. 275-E. *See* RSA 275-E:4; RSA 275-E:8.

initially contained a line (that has since been deleted) asking complainants whether they had filed a "complain[t] with another entity," including the "Court," "NH DOE," or "Other." *See* Ex. 34 (Depo. Ex. 72) at HRC-00037 (December 2021 questionnaire containing line); *see also* Ex. 49 (Depo. Ex. 60) (current questionnaire omitting that line); Cohen Depo. 107:7-17 (noting that she supposes there was confusion amongst the public as to where to file a complaint shortly after the passage of the amendments).

To avoid this "multiple enforcer" reality mandated by the Amendments' plain text, the DOJ has improperly sought to rewrite the Amendments by creating a new "order of operations." As the DOJ wrote in its March 25, 2022 Motion to Dismiss, "[i]t is only after a finding of discrimination becomes final that the Department of Education may begin the process of bringing a claim before the Board of Education to determine whether discipline against the licensed educator is warranted." *See* Docket No. 36-1, at p. 34. Consistent with this attempted rewriting of RSA 193:40, Defendant Commissioner Edelblut and Attorney Fenton testified at deposition that they have no adjudicatory power over the Amendments, *including RSA 193:40*. *See* Edelblut Depo. 65:8-10, 67:10-11, 67:23, 70:5-15, 153:16-20; Fenton Depo. 77:22-78:7, 105:20-21. DOE Investigator Farrell also told AFT in a November 2021 email that "[w]e have had allegations of Educator Misconduct related to the new law. Each has been triaged and sent to the HRC for their review." *See* Ex. 62 (Depo. Ex. 34).

However, this contrived "order of operations" interpretation flies in the face of the Amendments' plain text giving DOE independent enforcement authority over RSA 193:40. RSA 193:40, IV makes clear that a violation of RSA 193:40 constitutes an independent violation of the Educator Code of Conduct. In other words, the alternative "order of operations" interpretation "is

neither a statutory nor a regulatory requirement," and, in fact, is contradicted by the DOE's own rules. *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *49. As this Court aptly noted:

> [N]othing precludes a person from reporting a teacher to the department of education for violating the educator code of conduct. Under that department's regulations, "[a] case shall be opened when a complaint of possible misconduct against a credential holder has come to the attention of the department either through direct reporting or other means." N.H. Code Admin. R. Ed 511.01(a). Further, an investigation must be opened if there is a 'possible violation' of the educator code of conduct. *Id.* Ed 511.01(b). Thus, *the department of education must investigate possible violations of RSA § 193:40, which provides an avenue for directly pursuing teachers*.

Id. at *48-49 (emphasis added); *see also* *Ex. 109 (Depo. Ex. 2)* (Educator Code of Conduct). The DOE's own rules state that it cannot turn a blind eye to a report under the Amendments, which constitute a violation of the Code of Conduct. The DOE is required to investigate such a report and conclude whether a violation has occurred no matter how minor or trivial the offense. *See* Statement of Facts ¶ 14.

Moreover, a licensed educator's failure to report a suspected violation of the Code of Conduct is itself punishable as a violation of the Code. *See* N.H. Code Admin. R. Ed 510.05(a) (stating that "[a]ny credential holder shall report any suspected violation of the code of conduct following the school, school district, or SAU reporting procedures"); *id.* Ed 510.05(f) (stating that, "[i]f the department has reason to suspect that any violation of the code of conduct enumerated in Ed 510.01 through Ed 510.04 was known by a credential holder and not reported, the department shall undertake an investigation, as enumerated in Ed 511.01, against that credential holder as required by Ed 510.05(a), (b), or (c)"); *see also* Fenton Depo. 40:24-41:2, 51:18-52:4, 55:1-13, 56:13-58:13; Edelblut Depo. 124:4-17; Farrell Depo. 33:3-37:15; *Ex. 51 (Depo. Ex. 7)*, at DOE-10078; *Ex. 44 (Depo. Ex. 24)*, at DOE-09668 (DOE presentation noting duty to report). This duty to report includes suspected violations of the Amendments. *See* *Ex. 63 (Depo. Ex. 45)* (in Aug. 17, 2021 email responding to a school board member "about possibly sending out an advisory to

all NH districts highlighting the fact that if an educator disregards the [Amendments], they would be violating the educator code of conduct and would face disciplinary action by the state board of education and their local school board," Commissioner Edelblut acknowledged the duty to report in the Code). In fact, Attorney Fenton acknowledged at deposition, as she must, that the Educator Code of Conduct is investigated and enforceable by the DOE. *See* Fenton Depo. 24:24-25:15, 151:25-152:2), and that a violation of the Amendments constitutes a violation of the Educator Code of Conduct. *See* Fenton Depo. 35:18-36:6, 151:25-152:5; *see also* Edelblut Depo. 124:18-126:12. And one lawyer even directly wrote the DOE in August 2022 explaining that Defendants' stated alternative "order of operations" interpretation was not compliant with the law. *See Ex. 64 (Depo. Ex. 48)*.

What Defendants cannot do is rewrite a law that, on its face, "flouts the Constitution" in order to save it. *VAMOS, Concertación Ciudadana, Inc. v. Puerto Rico*, 494 F. Supp. 3d 104, 126-27 (D.P.R. 2020); *see also United States v. Dávila-Reyes*, 23 F.4th 153, 193 (1st Cir. 2022) ("we have no license to rewrite [the statute] to satisfy constitutional requirements"), *reh'g en banc granted, opinion withdrawn*, 38 F.4th 288 (1st Cir. 2022). Yet this is precisely what Defendants are aiming to do here by rewriting the Amendments' enforcement provisions and creating a "new order of operations."

To make matters worse, Defendants' alternative "order of operations" interpretation of RSA 193:40 exists nowhere in any formal writing. The answers to Question Nos. 11 and 12 in the July 2021 FAQs do not explicitly state that a complaint under the Amendments cannot be filed with the DOE. *See Exs. 41 (Depo. Ex. 9), 44 (Depo. Ex. 24), 45 (Depo. Ex. 55)*.[27] These FAQs were issued not only by the HRC and DOJ, but also the DOE. *Id.* And even if the alternative

[27] *See also* Farrell Depo. 57:22-58:3, 92:11-15 (noting that "it doesn't say either way" whether "a complaint can be filed for a code of conduct violation with the Department of Education").

"order of operations" interpretation existed in a writing, it is not binding on the state courts interpreting the Amendments and could be withdrawn at any time. *See Stenberg v. Carhart*, 530 U.S. 914, 940 (2000) ("[O]ur precedent warns against accepting as authoritative an Attorney General's interpretation of state law when the Attorney General does not bind state courts or local law enforcement authorities.") (internal quotation marks and citations omitted); *Chapdelaine v. Neronha*, No. 15-450-JJM-LDA, 2023 U.S. Dist. LEXIS 45656, at *21 (D.R.I. Mar. 16, 2023) ("even were the Attorney General able to articulate a standard that is not vague, it is unclear that his office would have the authority to do so").

There also appears to be another undisclosed process in place that runs parallel to Defendants' alternative "order of operations" interpretation. There was a suggestion during DOE Attorney Diana Fenton's March 2023 testimony before the House Judiciary Committee and at deposition that another guidance or standard operating procedure ("SOP") document is being formulated setting forth a process for referring matters from the DOE to the HRC. *See* Ex. 65 (Depo. Ex. 6), at PL806; Fenton Depo. 85:23-86:10. However, no such policy or procedure document has been produced in this litigation despite this new process already being in place and, perhaps, in practice as of February 14, 2023, and certainly the public-at-large does not know of its existence. *See* Fenton Depo. 90:24-91:18 (answering "yes" when asked whether the agreement as to how to transfer matters from the DOE to the HRC that was reached during a February 14, 2023 meeting has "been in effect since that meeting"). Indeed, DOE Attorney Fenton and HRC Executive Director Malachi agreed that the HRC was not invited to participate in the February 14, 2023 discussion at the DOJ when this new process was formulated. *See id.* 81:2-88:19. Secrecy among those agencies and officials charged with enforcement not only begets confusion, it also can beget abuse. *Cf., Grayned,* 408 U.S. at 108-109 ("A vague law impermissibly delegates basic

policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

But perhaps more glaringly, the record in discovery shows that (i) this alternative "order of operations" is not actually how the Amendments are enforced, and (ii) there is disagreement among Defendants about how the "order of operations" operates.

First, in practice and according to rule, the DOE "opens a case" and conducts an "initial review" on every complaint it receives in which any misconduct is alleged, including before the DOE has determined that a "possible violation of the code of conduct" exists and before the DOE has opened a formal investigation under N.H. Code Admin. R. Ed 511.01(b). *See* Fenton Depo. 47:17-21; Farrell Depo. 23:19-25, 25:1-3. These "initial reviews" occur any time a case is "opened" under N.H. Code Admin. R. Ed 511.01(a) and are done so the DOE can determine whether there has been a "possible violation of the code of conduct" that would then require the opening of a formal investigation under N.H. Code Admin. R. Ed 511.01(b). These "initial reviews" can take many forms depending on the facts of the case. They include interviewing the complainant, contacting Superintendents and other school administrators to interview them or request information, contacting witnesses including other rank and file teachers or other school employees, and requesting documents. *See* Fenton Depo. 45:8-15, 48:20-49:6; Farrell Depo. 17:16-18:5.

Unexplained is whether these one-sided communications with a teacher's supervisors impact the supervisors' ensuing treatment of the teacher or the teacher's colleagues. The consequences for teachers are real. DOE Investigator Richard Farrell contacted school officials because a parent submitted an April 2022 complaint alleging that an educator played two music videos created by two modern Black artists as part of a unit on the Harlem Renaissance. The

teacher was told by school officials in internal meetings that the context for the DOE's inquiry was the Commissioner's April 15, 2022 op-ed, which had just been published. Not only does this incident show that the DOE engages in intimidating inquiries even before a complaint is opened, but also that educators may be summoned to appear before school administrators as part of the inquiry, thus necessarily impacting the Supervisors' impressions of that teacher. And this educator's experience shows the persuasive effect that the Commissioner's words have with respect to how DOE investigators and the public practically apply and interpret the Amendments. *See* Ex. 11, O'Brien Decl. ¶¶ 7-9, 13-19.

This educator's experience is not an isolated incident. While the DOE may disclaim any formal and legal adjudicatory role in the Amendments' enforcement until the HRC acts, the DOE—including the Commissioner himself—are attentive to all concerns raised by parents under the Educator Code of Conduct. *See* Edelblut Depo. 20:22-22:4, 29:4-8, 77:15-78:8. They will directly uplift those concerns to Superintendents and Principals, even when there is no possible violation of Code of Conduct raised. *See* Edelblut Depo. 20:22-22:4, 29:4-8, 77:15-78:8. In one example, a parent complained in an August 27, 2021 email to Commissioner Edelblut that his "sons have been informed by high school teachers that they are inherently racist and sexist because they are white males …. I do hope this Bill [the Amendments] makes a difference." The Commissioner responded that day: "If you could share with me the names of those educators (if the incident happened after 6/29/2021, the effective date of the statute) I would be happy to look into it." *See* Ex. 66. The record contains numerous other examples. *See, e.g.,* Ex. 67 (in October 21, 2021 email from Commissioner Edelblut to a Superintendent, Commissioner Edelblut indicating that he tried to call back the Superintendent with respect to a person's September 23, 2021 email to that Superintendent where that person stated, in part, that "[e]xamples of

discriminatory ideas [under the Amendments]", include "[w]hite [p]rivilege," "[w]hite [g]uilt," and "[e]quity"); *Ex. 68 (Depo. Ex. 15), 57* (exchanges between Commissioner Edelblut and a Superintendent where the Commissioner elevated a December 2021 parental concern about usage of the film "White Like Me" under the Amendments without determining whether there was a violation).

Other complaints referencing the Amendments led the DOE to engage in varying degrees of inquiries or "initial reviews," including using other potential violations (especially under RSA 186:11, IX-c and RSA 186:11, IX-d) to investigate or elevate these complaints to Superintendents. *See* Statement of Facts ¶ 138. The DOE investigator has even elevated complaints under the Code of Conduct to school districts concerning school library books before a case has been opened and before there has ever been a finding that the book even potentially violates the Code of Conduct. As part of this process, DOE Investigator Farrell testified that he has gone to various public school libraries in response to complaints about books and read certain books.[28] The Commissioner and DOE engaged in these inquiries or "initial reviews" in response to parental complaints, in part, because the Commissioner views parents as his "customers"[29] and believes teachers have a "[r]esponsibility to support the parents and not undermine their values."[30]

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[28] *See* Farrell Depo. 124:24-129:9 ("Q. And each time you go and you speak with the superintendent about the book being where it was complained of, something similar? A. Yeah. You know, is it in the high school library? Is it the middle school library? Is it in the elementary school library? Those have bearings. You know, those are important facts to know. Or is it even in the building at all? And is it in the SORA app? So it's a fact-based question. Is it there? Isn't it there? Once I get the facts, I provide it to Diana Fenton for her review. Q. And just in the stage of, you know, sort of from the code of conduct, what you're describing is not a formal investigation, but it's when a complaint—a case has been opened because of a complaint? A. It's even before the case has been opened. I mean, so a parent is angry and upset about a book being in a library. So let's collect the data and determine whether or not we even go to the triage phase."); *see also Ex. 69 (Depo. Ex. 19)* (Commissioner Edelblut asking DOE Attorney Fenton for a copy of a book that was the subject of a complaint).

[29] *See* Edelblut Depo. 29:4-8 ("So my duty is to support my customers to the agency which include a variety of constituencies. Parents are one of them. So I try to be as prepared as possible to support my constituencies.").

[30] *See Ex. 40 (Depo. Ex. 14)* at PL00683. The Commissioner is active in this process. While Attorney Diana Fenton testified that the Commissioner is not involved in deciding whether to open a case, *see* Fenton Depo. 45:14-20, Commissioner Edelblut and DOE Investigator Farrell testified that the Commissioner is present in monthly "educator misconduct meetings" in which the DOE decides next steps in how to handle a complaint and whether there has been

Although the Commissioner attempted to minimize the impact of his outreach at deposition as being simply informational, its intimidating effect cannot be overstated. The practical impact of this outreach by the highest education official in the State and DOE officials with the ability to recommend sanctions against any credentialed educator enhances the Amendments' chill. Superintendents and teachers know that if they address concepts like race and gender that are arguably (or perceived by any student or parent to be) covered by the Amendments, they could receive a call or visit from the Commissioner or DOE investigator. And when Superintendents investigate teachers, whether at the urging of the DOE or on their volition, there is an adverse impact, if only in the perceptions of colleagues and immediate superiors that can have a detrimental effect on teaching careers. *See generally* Ex. 11, O'Brien Decl. Understandably, educators do not want to be under the stress and scrutiny that even a preliminary inquiry or "initial review" can bring on. This stress has caused some to leave materials out of lessons, or leave the profession altogether. *See, e.g.*, Ex. 14, Given Decl. ¶ 5 (noting departure from the profession because "of the frustrating conditions that public school teachers are subjected to, like the Banned Concepts Act"); Ex. 9, Dube Decl. ¶ 20 (describing departure from the profession because of the Amendments "despite feeling that I have more to give to my students"); Ex. 10, Munz Decl. ¶ 18 ("I left teaching feeling squeezed out by the actions of trans/homophobic individuals that were given a social and political platform to question my professionalism, reputation, and cause fear for my profession and my person because of the Divisive Concepts Statute and the politically charged environment it created."); Ex. 7, Tuttle Decl. ¶ 17 ("Since the Act passed, I have heard from

a violation, and that he is the final up or down decision maker on sanction decisions. *See* Edelblut Depo. 41:8-42:12, 44:2-6, 45:6-19, 116:15-120:6; Ferrell Depo. 28:2-30:1, 40:7-25. While the DOE attempted in depositions to disavow responsibility for investigating parent complaints about teachers, the documents speak for themselves, and they paint a picture of a Department and Commissioner very much engaged in how the Amendments are perceived and enforced. *See* Statement of Facts ¶¶ 137-138.

numerous members that they feel targeted, scared, and that they are considering leaving the profession.").

Second, further contradicting Defendants' alternative "order of operations" interpretation in which the HRC makes a final determination of discrimination before other agency involvement is the fact that two HRC witnesses testified that the HRC has *no enforcement authority whatsoever* over RSA 193:40, explaining that the entity that enforces RSA 193:40 would be the DOE. While Commissioner Edelblut testified that a finding of a violation of the Amendments is a decision "that would be made by the Human Rights Commission," *see* Edelblut Depo. 65:8-10, HRC Director Malachi disclaimed any responsibility for such decisions, testifying as follows:

Q. Okay. I'm just going to direct your attention back to Exhibit 1, and page PL 006 starting at line 23. It goes on to page 7, line 15. So this is the statute RSA 193:40, and when you see that language just let me know.
A. I'm sorry. Line 23 through?
Q. I'm sorry. Line 23 to the next page, line 19, and it's RSA 193:40 on Exhibit 1.
A. I see it.
Q. Okay. Do you have any authority in enforcing that statute?
MR. KENISON-MARVIN: Objection. Legal contention. You can answer.
A. The [Human Rights] Commission does not have jurisdiction over 193:40.
Q. So if someone brought a claim to the Human Rights Commission under RSA 193:40, your view is you would have no jurisdiction to adjudicate it; is that correct?
MR. KENISON-MARVIN: Same objection.
A. The Commission has jurisdiction over 354-A.
Q. And RSA 193:40 is not within RSA 354-A so is it fair to say in your view you do not believe the Commission has jurisdiction to hear a claim under RSA 193:40?
MR. KENISON-MARVIN: Same objection.
A. As I sit here today it would be my understanding that the Commission only has authority over 354-A.
Q. Do you know sitting here today who would have jurisdiction over a complaint made exclusively under 193:40?
MR. KENISON-MARVIN: Same objection.
A. I do not have expertise in 193 so whose RSA that belongs to would be the body that has authority over 193:40.

See Malachi Depo. 73:5-74:17; *see also id.* 12:18-20 (testifying that RSA 193:40 is "not the statute that I work with"). Similarly, Assistant HRC Director Sarah Burke Cohen testified that she was not familiar with RSA 193:40, and that the DOE appears to be the enforcer of its provisions.[31] But all the DOE witnesses said the opposite at deposition, punting the application of RSA 193:40 to the HRC.[32]

The conflicting testimony of Defendants' witnesses as to who enforces RSA 193:40 only highlights the Amendments' vagueness. Is it the DOE or the HRC that has initial enforcement authority over RSA 193:40? Even Defendants do not seem to know, with each disclaiming responsibility over who enforces RSA 193:40 and pointing the finger at the other.

Accordingly, the Amendments violate the Fourteenth Amendment's procedural due process protections against vague and ambiguous laws.

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[31] *See* Cohen Depo. 25:4-26:1 ("I can only testify as to 354-A. The remaining sections of 006 and 007 [at Exhibit 1, including RSA 193:40] are not the statute that I am familiar with."; "Q. Okay. So I just want take make sure I understand your testimony that you're prepared to, you're prepared to talk about with respect to complaints in particular those made under 354-A:29 to 34. Correct? A. That is correct. Q. And that's not the case with respect to RSA 193:40. Is that fair to say? A. That is correct. Q. And I just want to make sure I understand your testimony that is not a statute that you're familiar with, correct? A. correct."), 59:9-21 ("Q.…With respect to on Exhibit 1, the amendments that have been challenged in this case, with respect to RSA 193:40 on the page Bates stamped 006 to 007, I believe your testimony earlier was you're not familiar with that section; is that correct? A. Not familiar. Have I read it before, yes. Am I familiar with it, not particularly. Q. Is it the Department of Education that's tasked with enforcing those provisions? MR. KENISON-MARVIN: Objection. Scope. Calls for legal conclusion. You can answer. A. It appears that is what RSA 193 does.").

This testimony from the HRC disclaiming any responsibility over RSA 193:40 is consistent with HRC's own intake questionnaire form and "charge of discrimination" form under the Amendments, which make no reference to RSA 193:40. *See* *Ex. 49 (Depo. Ex. 60)* (questionnaire); *Ex.24 (Depo. Ex. 62)* (charge of discrimination). The "denial" letters sent by the HRC under the Amendments also make no reference to RSA 193:40. *See* *Exs. 34 (Depo. Ex. 72), 35 (Depo. Ex. 73)* (denial letters).

[32] *See* Edelblut Depo. 65:8-10 (stating that the "adjudication of that [whether a teacher could teach that affirmative action is a wonderful thing] is something that would be made by the Human Rights Commission"), 67:10-11 ("My response is not to adjudicate whether or not they are violations of the particular law"), 67:23 ("So my responsibility is not to adjudicate [HB2]"), 70:5-15 ("I don't have adjudicatory responsibility" for HB2), 153:16-20 ("So I will start with the fact that it's not my job, it's not within the purview of my responsibility to adjudicate whether or not certain actions by an educator would be some type of an action under 193:40.").

II. The Amendments Violate Plaintiffs' First Amendment Rights by Restricting Educators' Private, Extracurricular Speech (Count III in the AFT Action).

In denying Defendants' Motion to Dismiss Plaintiffs' First Amendment claim, this Court recognized a critical distinction between instructional, curricular teacher speech occurring within the confines of the classroom and a teacher's expression "outside the classroom and even beyond the school grounds." *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *22. This Court found that the Amendments "plausibly restrict teachers' speech as private citizens" because the exceedingly broad coverage of the Amendments applies to "*all activities* carried out by public schools in their role as public schools, including extra-curricular activities that are part of the public school's work." *Id.* (emphasis added). The Amendments prohibit discussion of the so-called "banned concepts" not only as part of school course work in the classroom, but also in any "interact[ion] with a teacher in a school hallway, schoolyard, lunchroom, or library, not to mention during extracurricular activities that take place on or off school grounds." *Id.*

Long-standing precedent holds that teachers and students are entitled to First Amendment protection, even while at school. In *Bremerton*, the Supreme Court recently reaffirmed that "the First Amendment's protections extend to 'teachers and students,' neither of whom 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Kennedy v. Bremerton*, 142 S. Ct. 2407, 2423 (2022) (hereinafter "*Bremerton*") (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). In *Bremerton*, the Supreme Court found that a football coach's prayer on the fifty-yard line during a school-sponsored football game was private speech not "ordinarily within the scope of his duties as a coach." *Bremerton*, at 2424 (citation omitted). The Court reasoned that the coach was not "instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach." *Id.* The Court further recognized that teachers frequently engage in

personal speech and activities when they are on and off school grounds; they wear certain clothing in the classroom, pray during lunch, check text messages, or socialize. *See id.* at 2424–25 (noting it is not "dispositive" whether the public employee's speech "took place 'within the office' environment").

District courts applying *Bremerton* have found that personal political expression, even on school grounds, is protected speech under the First Amendment. *See Beathard v. Lyons*, 620 F. Supp. 3d 775, 782 (C.D. Ill. 2022) (applying *Bremerton* and finding that plaintiff's replacement of a Black Lives Matter poster with an All Lives Matter poster on his office door was private speech protected by the First Amendment); *see also Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cnty.*, 513 F. Supp. 3d 593, 612 (W.D. Pa. 2021), *aff'd*, 39 F.4th 95 (3d Cir. 2022) ("[S]peech on the clock is not categorically exempt from First Amendment protection.") (internal quotation marks and citations omitted). "Just because a student or other staff members can see one exercising their freedom of speech does not transform private speech into government speech." *Beathard*, 620 F. Supp. 3d at 781; *see also Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) ("Nothing in the *Pickering* line of cases requires us to uphold every speech restriction the government imposes as an employer.") (Alito, J.); *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1158, 1161 (9th Cir. 2022) (extending *Bremerton* speech protections and strict scrutiny standard to high school's graduation ceremony dress code).

Here, there is no question that the Amendments restrict New Hampshire public school teachers' private, protected First Amendment speech. As this Court recognized, the agencies' FAQs advise that the Amendments' speech prohibitions cover all school activities that take place on and off school grounds. *See* Exs. 41 (Depo. Ex. 9), 44 (Depo. Ex. 24), 45 (Depo. Ex. 55). The only activities carved out of its restrictions are "third party events or activities, such as voluntary

after-school programs administered by outside organizations." *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *22-23. Discovery confirms this boundless reach. DOE Investigator Richard Farrell explained that "extracurricular activities" in New Hampshire schools include "anything that happens within the curtilage of the school," and even extend to programs occurring at off-site private facilities, such as hockey rinks, that are part of the schools' activities. *See* Farrell Depo. 174:23–177:3.[33] Thus, the Amendments severely curtail teachers' private speech on matters of public concern that can be received by students inside and outside of school. That is constitutionally impermissible.

As set forth below, this Court's rationale for denying Defendants' Motion to Dismiss on the grounds that the Amendments "plausibly" restrict extracurricular speech has been confirmed through discovery. First, the Amendments place an unconstitutional chill on educators' private speech relating to matters of public concern *before* the speech can even be expressed in violation of *United States v. NTEU*, 513 U.S. 454 (1995). Second, the Amendments are unconstitutionally overbroad.

A. The Amendments Chill Educators' Speech Outside the Classroom.

The Amendments unconstitutionally chill educator speech outside the classroom. When a law "chills potential speech before it happens," a more exacting *Pickering* analysis governs. *See NTEU*, 513 U.S. 454, 466–68, 475 (1995) (striking down honoraria ban imposed on all federal employees below GS-16 as a "sweeping statutory impediment to speech"). After all, prospective

[33] Investigator Farrell's role within DOE is more expansive than his title might suggest. Not only does he initially conduct or coordinate all factual inquiries, he also acts with DOE Attorney Diane Fenton in the DOE's Office of Governance to selectively filter concerns that in their view warrant further consideration, even where the Commissioner had first addressed the issue. *See* Farrell Depo. 28-9, 60. Additionally, in deciding whether concerns presented to the several school districts merit DOE review, Investigator Farrell and Attorney Fenton meet monthly with the Commissioner to review complaints before determining next steps. *See id.* 67.

restrictions on speech have "widespread impact[s]" and "give[] rise to far more serious concerns than could any single supervisory decision." *Id.* at 468.

Under this stringent *Pickering-NTEU* standard, the government's burden is "heavy." *Id.* The analysis unfolds in two parts. First, this Court must "determine[] whether the restriction regards matters of public concern" by analyzing the text of the challenged restriction. *Brady v. Tamburini*, 518 F. Supp. 3d 570, 581 (D.R.I. 2021). Next, if the challenged restriction "inhibits" speech on matters of public concern, this Court must consider "whether the First Amendment interests of the plaintiff and the public outweigh the government's interest in functioning efficiently." *Id.* (quoting *NTEU*, 513 U.S. at 468); *see also Kessler v. City of Providence,* 167 F. Supp. 2d 482, 485 (D.R.I. 2001) (striking down Police Department ordinance requiring members to obtain permission before giving interviews, speaking on matters of private interest, or on public matters that may disturb the workplace).

Here, the plain text of the Amendments imposes a "sweeping statutory impediment to speech" for teachers on matters of public concern. Moreover, none of the legislative history, the guidance documents, evidence or testimony in this case suggests a legitimate rationale for the Amendments' restrictions on speech—let alone an interest that outweighs the significant infringement of teachers' constitutional rights. Instead, the Amendments severely burden educators' and the public's right to share different viewpoints of public concern by blanketly curtailing educator speech outside the classroom without any—let alone adequate—justification.

1. The Amendments Restrict Educators' Speech as Private Citizens.

To assess the breadth and severity of the Amendments' prohibition on speech, courts typically begin with the text of the Amendments. Here, RSA 193:40 provides: "No pupil in any public school in this state shall be taught, instructed, inculcated or compelled to express belief in, or support for," a banned concept. By its terms—including through the usage of passive voice—

the Amendments contain no geographic limitation. The Amendments, therefore, cover interactions with pupils far beyond the classroom and school grounds and beyond strictly speech made in their capacity as public school teachers in the classroom.

AFT President Deborah Howes explained the innumerable interactions and touchpoints that AFT members have with students outside the classroom. *See* Ex. 8, Howes Decl. ¶ 11; Ex. 10, Munz Decl. ¶ 2; Ex. 17, Richman Decl. ¶ 10; *see also* Ex. 13, Philibotte Decl. ¶ 20 ("I have also spoken to public school students about issues concerning race at events in my individual capacity."). The Amendments restrict speech at sporting events, bus rides to and from events, chess competitions, yearbook club meetings, newspaper meeting discussions, orchestra rehearsals, and all spontaneous run-ins between students and teachers outside the classroom and in the halls of the school. The Amendments cover off-campus, non-instructional interactions with students, often without pay and frequently in response to searching questions, at student-led initiatives such as the Young Republicans Club, the Gay-Straight Alliance, and Students for Racial Justice. In these off-campus or after-hours conversations, teachers must be wary that any interaction they have may be construed as "inculcating" or causing a student to express support for a particular personal view.

The July 2021 FAQs are the only formal guidance or explanation from Defendants on their view as to the scope of the Amendments, and these FAQs do nothing to narrow the Amendments' sweeping application. The FAQs provide that: "[t]he prohibitions apply to *all* activities carried out by public schools in their role as public schools, *including extracurricular activities that are part of the public school's work*." *See* Exs. 41 (Depo. Ex. 9), 44 (Depo. Ex. 24), 45 (Depo. Ex. 55) (emphasis added). Again, "the only acknowledged exception in the FAQs for activities that take place on a public school's property is for third-party events or activities, such as voluntary after-

school programs administered by outside organizations." *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *22-23. The DOJ, HRC, and DOE similarly acknowledged in their interrogatory responses that "the amendments apply to all activities carried out by public schools in their role as public schools, including extra-curricular activities that are part of the public school's work." *See Exs. 46, 47 (Depo. Ex. 58), 48 (Depo. Ex. 57)* (DOJ Int. Resp. Nos. 8; HRC Int. Resp. 8; DOE Int. Resp. No. 8). And the HRC's intake form for filing formal complaints under the Amendments asks complainants whether the alleged violation was "part of an extra-curricular activity." *See Ex. 49 (Depo. Ex. 60)*.

When confronted with the FAQ guidance, DOE Investigator Farrell confirmed the Amendments' wide-ranging scope of what "extra-curricular" means at deposition:

> Q. How would you define "extracurricular activities" [referenced in the July 2021 FAQs]?
>
> A. Extracurricular activities could be anything from sporting situations, coaching, dance, plays. . . . Anything that happens within the confines of the definition of the Safe Schools Act.[34] So anything—if it's defined as a safe school, the property of the Safe Schools, anything that happens within the confines of that Safe Schools Act would apply.
>
> . . .
>
> So, for example, under the Safe Schools Act, a teacher on a bus to and from a field trip, that's Safe Schools. That's covered. A teacher that's becoming a coach and working as a coach, theater, drama. Anything within the curtilage or the extended portion of a school. It gets kind of creative because many hockey programs—for example, hockey rinks are not—they're private facilities, but if a hockey team for a high school is playing and/or practicing on that facility, it becomes an extension of Safe Schools. So I would say the answer to that would be anything that falls within the curtilage of the Safe Schools definition.

[34] RSA 193-D Safe School Zones governs the school district and police department's efforts to create a safe and healthy environment for students, staff, and visitors. The "Safe School Zone" is defined as "an area inclusive to any school property or school buses." *Id.* at 193-D:1(II). In turn, "school property" means "all real property, physical plant and equipment used for school purposes, including but not limited to school playgrounds and buses, whether public or private." *Id.* at 193-D:1(V). "School purposes" is defined as "school-sponsored programs, including but not limited to educational *or extra-curricular activities*." *Id.* at 193-D:1(VI) (emphasis added).

Farrell Depo. 174:23–177:3. Investigator Farrell's confirmation that the Amendments extend beyond curricular speech to all activities within the confines of the Safe Schools Act is dispositive of the Amendments' unconstitutional scope. He also testified that the Educator Code of Conduct can apply to educators or credential holders when they are off duty. *See* Farrell Depo. 197:22-198:1. And Commissioner Edelblut amplified this in a late August 2021 WMUR interview where he agreed that, while there is "not a bright line" with respect to the Amendments, the "bright line … that we all share is that we are not discriminating against one another, whether that is in the classroom or *outside the classroom*."[35]

It is hard to fathom a broader restriction on speech than what has been set forth in the Amendments as explained by Investigator Farrell and the guidance documents promulgated by the HRC, DOE, and DOJ. A comment made by a teacher during an extracurricular activity like Model U.N. may expose a teacher to potential discipline in response to a question that touches upon the Amendments' sweeping proscriptions. *See* Ex. 17, Richman Decl. ¶ 10 ("I worry that if controversial topics such as the war in Ukraine are made topics at Model UN competitions, I will not be able to speak freely about the conflict and my views on the war, including the various views being espoused in the United States."). Teachers' responses to students' questions about current events—for example, ranging from the potential ramifications of the Supreme Court's affirmative action decision, *Students for Fair Admissions, Inc. v. Harvard*, 143 S. Ct. 2141 (2023), and its holding overturning *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022)—would test any educator's ability to provide complete and instant answers.

[35] Adam Sexton, *CloseUp: Commissioner expects to fund 1000-1500 Education Freedom Accounts this year*, WMUR (Aug. 29, 2021), https://www.wmur.com/article/closeup-commissioner-expects-to-fund-1000-1500-education-freedom-accounts-this-year/37424825 (starting at 9:58) (emphasis added).

In practice, the Amendments have caused extracurricular activities to be canceled. A diversity and inclusion after school group formed after the COVID-19 pandemic and comprised of both students and staff members at Nashua High School North stopped meeting and was promptly disbanded shortly after HB 544 was proposed and the Amendments were enacted. *Ex. 18*, Merrill Decl. ¶ 7. Following a Gay-Straight Alliance dance at Timberlane High School in the fall of 2022 (with faculty participation), an angered district state representative argued at a school board meeting that "the LGBTQ community put on a dance," and that administrators should "stop this from happening" in the future. *Ex. 17*, Richman Decl. ¶ 9.

Even if the Amendments were meant to principally apply to educators' interactions with students, in reality this vague law has also been interpreted by the public-at-large to apply to private speech by educators. The public is weaponizing the Amendments to target educators outside the classroom. One teacher restricted access to his Twitter feed following a DOE presentation regarding the Amendments. *See Ex. 70*. Similarly, a "concerned parent" emailed DOE Investigator Richard Farrell to report a DEI coordinator's "openly racist blog." *See Ex. 71 (Depo. Ex. 36)*. The parent, citing the Amendments, attached images of the coordinator's personal blog, which that parent maintained "clearly fuel[s] racism which isn't needed in our schools." *Id*.

Since the passage of the Amendments, teachers have also been made the subject of online harassment and vicious attacks for speech. An individual from a political group emailed the Commissioner of Education indicating that the group had created a "hotline for [their] town to report concerns" about teachers. *See Ex. 59 (Depo. Exs. 37, 52)*. After the passage of the Amendments, "Moms for Liberty" announced a $500 bounty for anyone reporting on a teacher violating the Statute, a fact that even DOE personnel found "very upsetting." *See Ex. 72 (Depo. Ex. 22)*; Fenton Depo. 164:18. Teachers raised grave concerns about these vigilante tactics to the

DOE, with one fearing that "people will be rushing to report educators for even broaching the topics of racism, sexism, or other forms of discrimination along the lines of a McCarthy-era witch hunt." *Ex. 73*.

These concerns were well-founded. Plaintiff and U.S. History and A.P. U.S. History teacher John Dube still worries for his personal safety at home. After the Amendments' passage, he was targeted by a New Hampshire group called "No Left Turn" that pledged to report teachers that had signed an online petition outside of school in 2021 (before enactment of the Amendments) promising to teach "honest" history. Mr. Dube was targeted not long thereafter. Interestingly, the school at which Mr. Dube was teaching—and that of the other signatories to the online petition—was pinpointed with the assistance of Commissioner Edelblut in response to a request from the Executive Director of "No Left Turn." *See Ex. 74 (Depo. Ex. 43)*. The threats Mr. Dube received precipitated an FBI investigation and required him to install personal security and safety equipment at his home. *Ex. 9*, Dube Decl. ¶ 17. The impact of that letter and any subsequent investigation on Mr. Dube's reputation in his supervisors' eyes remains a mystery. *Cf. Sweezy v. State of N.H. by Wyman,* 354 U.S. 234, 247–48 (1957).

In this climate, what teacher would risk discussing a banned concept in front of any student even outside of school, especially now that a private right of action places an all-encompassing target on their back? *See* RSA 193:40, III. Teachers must now think twice before discussing these subjects. Evidence of threats, coercion, and intimidation chilling teachers' speech outside the classroom demonstrates that the Amendments reach educators' private speech and are resulting in, at the very least, self-censorship.

2. The Amendments Restrict Educators' Speech on Matters of Public Concern.

It cannot reasonably be disputed that the Amendments implicate matters of public concern. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (cleaned up). "Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community." *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000). This includes speech, especially extra or non-curricular speech, about "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy." *Snyder v. Phelps*, 562 U.S. 443, 454 (2011) (Roberts, CJ.). Similarly, academic inquiry merits protection. "The content of academic inquiry involves matters of political and social concern because academic freedom is of transcendent value to all of us and not merely to the teachers concerned." *Urofsky*, 216 F.3d at 428 (Wilkinson, J. concurring).

The Amendments strike directly at the heart of these principles. They preclude teachers from discussing with students present "broad issues of interest to society at large." *Snyder*, 562 U.S. at 454. The Amendments' vague language bars discussion, even in answering student questions outside the class setting, about oppressive regimes taking root around the world, systemic racism, sexism, implicit bias, race, and gender in the United States. *See supra* Section I.B.1-2; *see also* Ex. 10, Munz Decl. ¶ 6 (describing Amendments' censorship on discussions about gender-neutral pronouns). These are topics of public concern.

3. Plaintiffs' and the Public's Interests Outweigh Defendants' Interests.

Defendants have not demonstrated that the Amendments' significant burden on teachers' personal speech outweighs any governmental interest. *See NTEU*, 513 U.S. at 454-55 (finding that defendants' "burden here is even greater than it was in *Pickering* and its progeny, which usually

involved individual disciplinary actions taken in response to a particular government employees' actual speech."). Rather, given the Amendments' expansive reach and vague terms, Plaintiffs have been muzzled from expressing any opinion or personal view that arguably fits within the Amendments' purview and that could even be indirectly exposed to a public school student.

Educators have a substantial interest in commenting on matters of public concern outside the classroom, including during extracurricular activities where students may be present. Teachers do not know what is and is not prohibited under the Amendments and have, therefore, refrained from teaching and discussing certain topics outside the classroom. *See* Ex. 9, Dube Decl. ¶ 11. Plaintiff Ryan Richman, for example, is the faculty advisor for the Timberlane High School Model United Nations ("Model UN"). In Model UN, students frequently have to espouse positions from different countries and political perspectives. Consider the dilemma of advising the student playing the role of Russia's or China's U.N. delegate or, worse, the teacher-advisor who must guide that student. Mr. Richman feels increasingly reticent about speaking openly with students about his own viewpoints and positions. Ex. 17, Richman Decl. ¶ 10. He worries that, if controversial topics such as the war in Ukraine are topics at Model UN competitions, he cannot speak freely about his opinion and views on the war being espoused across the political spectrum. *Id.* And what of his recitation in the context of Model UN discussion of the President's views or those of leading members of the Congress or those of the British Prime Minister or the German Chancellor concerning the war?

Censoring educators on public discourse, policy, politics, and culture is anathema to our First Amendment jurisprudence. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy*, 354 U.S. 234 at 250. The Amendments' all-encompassing ban on

extracurricular speech outside the classroom does not just deprive educators of their First Amendment rights to comment on matters of public interest; they deprive the public of valuable insight from teachers regarding history, culture, and current events. *See City of San Diego, Cal. v. Roe*, 543 U.S. 77, 82 (2004) ("The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.").

On the other side of the balancing, Defendants cannot meet their burden to show the Amendments' severe curtailment of educator speech is necessary to prevent workplace disruption. *See NTEU*, 513 U.S. at 470. *See also Providence Firefighters Loc. 799 v. City of Providence*, 26 F. Supp. 2d 350, 356 (D.R.I. 1998) (finding that defendants have no substantial interest that requires such sweeping censorship, except vague "speculation about the pernicious effects" of speech that the Supreme Court explicitly rejected). Defendants fail to demonstrate that the Amendments address *any substantial government interest*, let alone demonstrate a *speculative harm* purportedly caused by the speech in question. None of the evidence produced in discovery suggests there has been any articulated reason why the Amendments, even if they were not unconstitutionally vague, should reach so comprehensively. Rather, the legislative history here demonstrates that the Amendments' goal (as pressed by its sponsors) was to censor speech based on subjective political partisan beliefs and little, if anything, else. *See* Statement of Facts ¶¶ 54-76 (reciting legislative history). Importantly, during discovery, none of the Defendants' witnesses could articulate any specific objectionable educational material that was permissible before the passage of the Amendments, but that was now prohibited by the Amendments' passage. Edelblut Depo. 174:2-8; Fenton Depo. 172:23-173:9; Farrell Depo. 169:12-18, 170:20-24; Cohen Depo. 35:15-23.

To the extent Defendants have any government interest (let alone a compelling interest) in passing the Amendments—which they do not—they fail to show how the Amendments are narrowly tailored to address that interest. *See Lodge No. 5 of Fraternal Order of Police ex rel.*

McNesby v. City of Phila., 763 F.3d 358, 375 (3d Cir. 2014) ("While *NTEU* did not explicitly establish a tailoring requirement, we have noted that such a requirement seems to be implicit in this Court's discussion") (internal quotation marks omitted); *Wolfe v. Barnhart*, 446 F.3d 1096, 1107 (10th Cir. 2006) ("Other courts have recognized that the tailoring requirement is an important aspect of the *Pickering/NTEU* analysis."); *see also Waln*, *supra,* 54 F.4th at 1158,1161. Instead, the Amendments directly target all employees on endless topics of discussion to which a student could be exposed. *See NTEU*, 513 U.S. at 477 (ban reached all executive branch employees below GS-16); *Kessler*, 167 F. Supp. 2d at 485-86 (ban on all police department personnel). The statutory language belies any effort by legislators to tailor a specific ban to speech where there could be heightened risk of disruption.

Broadly restricting First Amendment rights based on mere speculation that additional anti-discrimination measures are needed, or that potential discord may ensue, is also unfounded. *Harman v. City of New York*, 140 F.3d 111, 123 (2d Cir. 1998) (explaining that a government-employer "cannot justify broad restrictions on First Amendment rights by supposition alone"). New Hampshire already has a robust and historic array of enforced and enforceable anti-discrimination laws. *See supra* Section I.B.3. Nothing in discovery or the legislative record points to specific unaddressed discrimination in New Hampshire that needed fixing, let alone one or more as to which the Amendments would fill that void. There is also no evidence in the record of actual disruption in schools from discussing banned concepts. The DOE's own investigator, Richard Farrell, stated that he stays informed on safety concerns in schools. *See* Farrell Depo. 184:1-6. Yet, Mr. Farrell was not aware of any instance where extracurricular activities were disrupted because a teacher discussed a topic that was banned under HB 2. *Id.* 184:10-13. Nothing in the record shows that the topics sought to be censored by the Amendments previously inhibited any

student's education. In any event, the Amendments are overbroad in that these alleged concerns could have been addressed through non-speech related policies.

The Amendments undoubtably violate educators' First Amendment rights. Defendants' side of the heighted *NTEU*/*Pickering* balancing scale is entirely empty, while Plaintiffs' freedom of expression outside the classroom is severely curtailed on a daily basis.

B. The Amendments Are Facially Unconstitutional Under the Overbreadth Doctrine.

The Amendments are also unconstitutionally overbroad. As the Supreme Court has explained, "the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *Morales*, 527 U.S. at 52 (internal citations and quotations omitted). To assess whether a governmental enactment is invalid for overbreadth under the First Amendment, courts engage in a sequential analysis. *See Guadalupe Police Officer's Ass'n v. City of Guadalupe*, No. CV 10-8061 GAF (FFMx), 2011 U.S. Dist. LEXIS 165101, at *28 (C.D. Cal. June 8, 2011) (describing sequential analysis). First, the Court must construe the reach of the law's provisions. *See United States v. Williams*, 553 U.S. 285, 293 (2008); *United States v. Stevens*, 559 U.S. 460, 474 (2010). Second, the Court must inquire whether the statute punishes a substantial amount of protected expressive activity. *See Williams*, 553 U.S. at 297; *Stevens*, 559 U.S. at 473 ("In the First Amendment context . . . a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep") (internal citation and quotation marks omitted)); *id.* at 480 ("But the First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige."). Finally, the Court must consider whether the statute is "readily

susceptible" to a narrowing construction that would make it constitutional. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988).

It requires no extensive analysis to find that the Amendments are overbroad under this test. Under the first prong, the Amendments reach educators' extracurricular speech as private citizens outside the four corners of the classroom. *See supra* Section II.A.1. As to the second prong, the Amendments punish a substantial amount of protected expressive activity by threatening to discipline teachers for their private speech on matters of public concern. *See supra* Section II.A.1, 2; *see also Bremerton*, 142 S. Ct. at 2424–25. Consider for example the following:

- An off-duty educator, who is attending an after-school and off campus student art exhibition sponsored by the school, discusses the art with students attending. In viewing one piece of art addressing racial justice, the educator remarks that implicit bias instruction is especially critical for White individuals in the wake of George Floyd's May 2020 murder (thereby implicating banned concept two and four). This speech is of public concern and not disruptive to the school's educational mission, and the educator has a strong individual interest in engaging in the speech. Here, the educator's statement was private speech, as it was not "ordinarily within the scope" of her duties as an educator, she "did not speak pursuant to government policy," she "was not seeking to convey a government-created message," and she "was not … engaged in any other speech the District paid" her to produce as an educator. *Bremerton*, 142 S. Ct. at 2424.

- After school hours, while attending a school-sponsored event at the local community center that students have organized in order to advocate for disability rights, an educator in attendance discusses with a few students that people with disabilities must be provided with reasonable accommodations, when necessary, to enable them to access and fully participate in school, work, and all aspects of community life (thereby implicating banned concept four). This speech is of public concern and not disruptive to the school's educational mission, and the educator has a strong individual interest in engaging in the speech. Here, the educator's statement was private speech, as it was not "ordinarily within the scope" of her duties as an educator, she "did not speak pursuant to government policy," she "was not seeking to convey a government-created message," and she "was not … engaged in any other speech the District paid" her to produce as an educator. *Id.*

As these examples demonstrate, there are "countless applications" of the Amendments' impact on private, extracurricular speech. *See Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *43. And these

examples implicate speech on political matters of public concern to which the courts generally have given special protection and are not otherwise disruptive to the school environment.

Finally, no narrowing construction that would exclude private, extracurricular speech from the Amendments' scope is reasonable. A federal court is "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000). By its plain terms, RSA 193:40, I and its use of passive voice implicate private, extracurricular speech. This Court "cannot simply rewrite a statute to make it sufficiently clear." *Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *47; *see also Guadalupe Police Officer's Ass'n*, 2011 U.S. Dist. LEXIS 165101, at *33.

In any event, that ship has sailed. The Attorney General, speaking in his role as New Hampshire's chief law enforcement officer, has already issued a formal construction of the Amendments that make clear that the Amendments encompass extracurricular speech, which would include speech of public concern in a private capacity where the interests of the educator outweigh the interests of a school district. *See* Exs. 41 (Depo. Ex. 9), 44 (Depo. Ex. 24), 45 (Depo. Ex. 55). Any interpretation that private, extracurricular speech is excluded from the Amendments' scope would be "at odds with the position that the AG has taken and that … remains his official opinion on the subject." *See Local 8027*, 2023 U.S. Dist. LEXIS 5593, at *47. Once permitted, what would prevent subsequent recanting? Allowing Defendants to rewrite the Amendments again in an effort to cure the statute's severe constitutional infirmities only underscores the language's ambiguity and constitutional invalidity.

Accordingly, the Amendments are unconstitutionally overbroad as they encompass the extracurricular speech of educators engaged in as private citizens on matters of public concern.

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Respectfully Submitted,

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