

THE WOKE WORLD: WHERE IS EDUCATION TODAY?

*Distinguished Panelists**

The Honorable Alice Batchelder: First of all, I'm really, really pleased to be here at Regent. It's my first time here, although I've certainly been hearing a lot about Regent over the years. It occurs to me that maybe I should tell you my first actual experience with Regent, which was probably fourteen or fifteen years ago. I was one of many judges who served as judges of the huge moot court competition that is hosted at William and Mary.¹ They don't tell you until you get there that they're not going to pay your transportation. But, anyway, that was the year that William and Mary had removed the cross from the chapel, which was something that I found extraordinary.² I judged in this competition—many other judges did. They had the big banquet at the end, and they announced the winners of the briefing competition and the oral advocacy competition, and there at William and Mary, where they had removed the cross from the chapel, Regent won both.³ I was just laughing at my banquet table, and some of the other people at my table didn't understand why I was getting such a kick out of this, but I thought it couldn't have been more right.

That first panel that you just heard is a hard panel to follow, but this panel is going to focus on the challenges presented by the landscape of education today. Those challenges are, I'm sure you all recognize, legion.⁴

* The Honorable Alice M. Batchelder is a federal appellate judge on the United States Court of Appeals for the Sixth Circuit.

Tyson Langhofer is Senior Counsel and Director of the Center for Academic Freedom at Alliance Defending Freedom.

Coke Morgan Stewart is the Virginia Deputy Attorney General for Health, Education, and Social Services.

Kurt Kreassig is the Dean of the School of Education at Regent University.

¹ See *About the Spong Tournament*, WM. & MARY L. SCH., <https://law.wm.edu/studentlife/studentorganizations/spong/about/index.php> (last visited Jan. 15, 2023).

² See *A Movement to Defend and Honor William & Mary's Honor*, SAVE THE WREN CROSS (2006), <http://www.savethewrencross.org/facts.php> [<http://web.archive.org/web/20070913145141/>] (noting that the cross was first removed in 2006).

³ See *Awards and Honors*, REGENT L., <https://www.regent.edu/school-of-law/about-regent-law/awards-honors/#moot-court-competitions> (last visited Feb. 6, 2023).

⁴ For examples of challenges in modern education, see generally *Why Is Critical Race Theory Dangerous for Our Kids?*, MARSHA BLACKBURN U.S. SENATOR TENN. (July 21, 2021), <https://www.blackburn.senate.gov/2021/7/why-is-critical-race-theory-dangerous-for-our-kids>, about children who are depressed or ashamed of being white because of CRT curriculum in schools, and Katie Reilly, *'This Isn't Just About a Pronoun.'* *Teachers and Trans Students Are Clashing Over Whose Rights Come First*, TIME (Nov. 15, 2019, 6:00 AM), <https://time.com/5721482/transgender-students-pronouns-teacher-lawsuits/>, about multiple teachers have filed lawsuits concerning school policies that required them to use students' preferred pronouns.

We will also be focusing on how we can respond to those challenges with a coherent vision that builds both on faith—which is essential to this institution and to this audience, obviously⁵—and reason, which is essential to education itself.⁶ Today’s educational landscape presents some critical questions, including this huge—at least, I think this one is huge: Does education today recognize objective truth, or have we been captured by the idea of “your truth,” which we see very often? Another big question is whether it is still true today that the religious freedom of Christians, at least in the classroom, is protected by the First Amendment.⁷

Another is whether science and consensus are coterminous.⁸ Those are just a few of the big questions which confront education today. There are many, many more.

We are so fortunate to have these three distinguished panelists who have real-world experience in confronting these challenges. I have the somewhat daunting task of directing some questions to them in a variety of areas, and then, like all of you, I will get to benefit from their knowledge and experience. So, we’re going to start out by having each of them give us just a few minutes of opening remarks. And I guess I don’t know. Do I do age before beauty? Do I do ladies before men?

Why don’t I start with Tyson?

⁵ *Philosophy & Mission*, REGENT L., <https://www.regent.edu/school-of-law/about-regent-law/philosophy-mission/> (last visited Jan. 15, 2023).

⁶ See *Philosophy of Education*, STAN. ENCYCLOPEDIA PHIL. (Oct. 7, 2018), <https://plato.stanford.edu/entries/education-philosophy/> (explaining that throughout history, philosophers have considered reason and education to be coextensive and concurrent).

⁷ See U.S. CONST. amend. I (prohibiting the establishment of religion and guaranteeing freedom of religious expression). For important Supreme Court cases addressing the rights of students to freely exercise their religions, see *Engel v. Vitale*, 370 U.S. 421, 422–23, 425 (1962), holding that a school-mandated prayer violated the Establishment Clause, *School District of Abington Township v. Schempp*, 374 U.S. 203, 205 (1963), holding that state-mandated readings from the Bible in school violated the Establishment Clause, *Wisconsin v. Yoder*, 406 U.S. 205, 207, 213 (1972), holding that requiring Amish to attend public school beyond the eighth grade violated the Free Exercise Clause, and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 626, 629, 641–42 (1943), holding that recitation of the Pledge of Allegiance with no exceptions for Jehovah’s Witnesses with religious objections was unconstitutional.

⁸ Compare Yehoshua Socol et al., *Interests, Bias, and Consensus in Science and Regulation*, DOSE-RESPONSE: INT’L J., Apr.-June 2019, at 1, 2 (claiming that consensus has no place in science because it prevents scientists from seeing flaws in theories), and Ethan Siegel, *What Does ‘Scientific Consensus’ Mean?*, FORBES (June 24, 2016, 11:00 AM), <https://www.forbes.com/sites/startswithabang/2016/06/24/what-does-scientific-consensus-mean/?sh=702a67b6bae9> (explaining that challenges to scientific consensus must be brought to refine theories), with Robert Sanders, *Scientific Consensus: Why Should We Accept It?*, FUTURISM (Sept. 25, 2016), <https://futurism.com/what-is-scientific-consensus> (contending that scientific consensus is valuable because it signals to the public that a majority of scientists, using different methods, have reached the same conclusion on a scientific theory).

Mr. Tyson Langhofer: I don't know what that says about your choice.

Hon. Alice Batchelder: You choose.

Mr. Langhofer: It's great to be back here at Regent, especially this room. This room has one of my favorite memories from law school. Specifically, I remember judging a moot court competition when I was a 3L. Professor Hernandez was the chief judge, and a couple of my classmates were sitting there. And the individual that was getting ready to come argue—she was very nervous, as we all are when we are doing our first argument—and she walks up and looks down and looks up and says, “Father God.” She had clearly been praying. I think she meant, “Mr. Chief Justice,” and Professor Hernandez says, “Well, I've been called a lot of things, but ‘Father God’ is not one of them.” But we can all, I think, remember praying beforehand—just do that in your head, not verbally.

We've heard a lot about the travails facing education, and I've been at ADF about seven years, leading the Center for Academic Freedom where we defend the rights of students and faculty.⁹ I'm trying to get my arms around, you know—what the current generation—what are they motivated by? What do they move by? What's influencing this change that I've seen since I've been in education? One of the things that I talk a lot about is this notion that our educational institutions have exchanged their original mission of the pursuit of truth for the pursuit of social justice.¹⁰ And it's a perverted view of social justice.¹¹ Every institution that was founded typically in education, historically, has been around this pursuit of truth to understand the world as it is.¹² But now most educational

⁹ *Tyson Langhofer*, ALL. DEFENDING FREEDOM, <https://adflegal.org/biography/tyson-langhofer> (last visited Feb. 5, 2023); see *Who We Are*, ADF CTR. FOR ACAD. FREEDOM, <https://centerforacademicfreedom.org> (last visited Jan. 16, 2023).

¹⁰ See Jonathan Haidt, *When Truth and Social Justice Collide, Choose Truth: Why I'm Resigning from My Professional Society*, CHRON. HIGHER EDUC. (Sept. 23, 2022), <https://www.chronicle.com/article/when-truth-and-social-justice-collide-choose-truth?> (explaining that the ultimate purpose of universities is truth, but this has been usurped by social justice initiatives).

¹¹ See generally Heather Mac Donald, *The Social Justice Drive to Destroy American Education*, N.Y. POST (Dec. 11, 2019, 7:35 PM), <https://nypost.com/2019/12/11/the-social-justice-drive-to-destroy-american-education/> (espousing the opinion that progressive policymakers have turned social justice into political advocacy); Thaddeus Williams, *Social Justice: Breakup or Breakthrough?*, GOSPEL COAL. (Apr. 5, 2021), <https://www.thegospelcoalition.org/article/carson-easter-poem/> (contrasting social justice from a biblical worldview with social justice from a secular worldview).

¹² See Brian Bird, *Rediscovering the Truth-Seeking Mission of Universities*, UNIV. AFFS. (Oct. 29, 2020), <https://www.universityaffairs.ca/opinion/in-my-opinion/rediscovering-the-truth-seeking-mission-of-universities/> (claiming that the primary purpose of all

institutions have embraced this version of social justice: it's not to understand the world, but to change the world through the pursuit of social justice.¹³ That has profound implications, right? When you think about ignoring truth through the pursuit of justice—truth and justice are inseparable.¹⁴ We have to first, as a society, find truth, and then we can pursue justice. But what we see today—through many of the things that we'll talk about, whether it be CRT, whether it be transgender ideology, whether it be through the role of parents—we have jettisoned truth, and instead, pursued this feel-good version of social justice.¹⁵

We'll be able to talk about a lot of the cases and how I see this play out in the real world, but I'll just give one brief example in this opening. I recently represented a teacher in rural Kansas, where I'm from, who had been suspended for referring to a student using the student's last name rather than the preferred name and pronoun.¹⁶ We challenged this policy because it [not only] forced teachers to use preferred names and pronouns, but it also provided that they could not reveal this information to the parents unless the student specifically consented.¹⁷ We had an evidentiary hearing on a preliminary injunction and put the principal on the stand and ask the principal, "Is there any list of preferred pronouns? Is there any kind of approved list?"

"No. No approved list."

"Okay. Well, have you heard of the fae/vaer pronouns?"

"No, never heard of that."

"Well, that's where you identify as partially human, partially feline.¹⁸ Would my teacher or my client have to use those pronouns?"

universities is to impart knowledge and seek truth); *cf. A Renewed Focus on Truth-Seeking*, CTR. FOR ADVANCEMENT TEACHING (Jan. 15, 2021, 9:30 AM), <https://teaching.fsu.edu/tips/2021/01/15/a-renewed-focus-on-truth-seeking/> (declaring that universities should be more intentional about truth-seeking to develop global citizens).

¹³ See Haidt, *supra* note 10 (explaining that universities are diverting their purpose from truth-seeking to promoting social justice across the nation).

¹⁴ To see how this is especially notable from a biblical worldview, see *Isaiah* 59:15, stating that the Lord sees truth is lacking and is displeased because there is no justice, and *Jeremiah* 4:2, proclaiming that the Lord glories in those who live in truth and justice.

¹⁵ See, e.g., *What Does Social Justice Mean?*, HUM. RTS. CAREERS, <https://www.humanrightscareers.com/issues/what-does-social-justice-mean/> (last visited Jan. 16, 2023) (explaining that today's social justice demands equity, as in equal outcomes, rather than equal opportunity).

¹⁶ *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-cv-04015-HLT-GEB, slip op. at 1–2 (D. Kan. May 9, 2022).

¹⁷ *Id.* at 1.

¹⁸ See generally Ezra Marcus, *A Guide to Neopronouns*, N.Y. TIMES, <https://www.nytimes.com/2021/04/08/style/neopronouns-nonbinary-explainer.html> (Sept. 18, 2022) (explaining that a neopronoun is "a word created to serve as a pronoun without expressing gender, like 'ze' and 'zir' . . . [or] 'kitten/kittenself'").

“Yes, but we definitely have a conversation with that student if that came up.”¹⁹

I’m like, “Well, how would you have a conversation?” You don’t even know what it means, first of all. Second of all, who are you to question this gender identity under your theory? There’s no framework, right?²⁰ And the judge had a lot of questions for the school’s attorney. One of them was “You have a parent-teacher conference where the parent and the student are both present. You have to use the legal name and biological pronoun with the parent but the preferred name and pronoun with the student. What do you call the student in that meeting?”²¹ Blank look on the attorney’s face. “Uh, you don’t have to use a name at all. You can just say, ‘student.’”²² The judge was like, “You’re going to get through a whole meeting saying, ‘hey, student,’ ‘your student,’ you know? That’s going to raise questions with the parents, right?”²³

But we have jettisoned truth, and we’re making up these rules on the fly.²⁴ This same school district had a policy which said that parents are full partners in education.²⁵ So I asked the principal, “This is your policy, right? Full partners in education, right? But you have a white notebook that says preferred names, and the student signs that and says ‘Please don’t tell my parents about this.’ You’re treating parents as the enemy.”²⁶ That’s the framework. When you stop pursuing truth, and you pursue this warped version of justice, and you try to separate truth and justice, you’re going to end up in the place where we’re at today. Which is a very confused world where you have the highest rates of depression and anxiety in K-12 students that we’ve ever seen.²⁷

Hon. Alice Batchelder: Thank you, Tyson. Coke?

¹⁹ Transcript of Motion for Preliminary Injunction at 74, Ricard v. USD 475 Geary Cnty., Kan. Sch. Bd. (No. 22-4015-HLT).

²⁰ See *id.* at 74–75 (showing that there were inconsistencies in the school’s policies and procedures for accommodating students’ chosen names and pronouns).

²¹ For the particular phrasing used by the court, see *id.* at 116.

²² See *id.* at 116–17.

²³ See *id.* at 117.

²⁴ See Douglas Groothuis, *The Biblical View of Truth Challenges Postmodernist Truth Decay*, 26 THEMELIOS 11, 12–13 (2000) (explaining that postmodernists have abandoned the idea of absolute, objective truth, and this new idea of truth pervades modern culture).

²⁵ Ricard v. USD 475 Geary Cnty., KS Sch. Bd., No. 5:22-cv-04015-HLT-GEB, slip op. at 6 n.8 (D. Kan. May 9, 2022).

²⁶ Transcript of Motion for Preliminary Injunction, *supra* note 19, at 75, 82 (showing that Langhofer highlighted the discrepancies in the school’s policy respecting children’s preferred pronouns and disclosing this to parents).

²⁷ See Lydie A. Lebrun-Harris et al., *Five-Year Trends in US Children’s Health and Well-Being, 2016-2020*, JAMA PEDIATRICS, July 2022, at 3–4, <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2789946> (stating that rates of anxiety and depression among school-aged children increased from 2016 to 2020).

Deputy Attorney General Coke Morgan Stewart: It's so great to be here and see so many of my former students. If I taught you, would you raise your hand? Wow, look at that, that's really exciting! I was thinking about my first experience at Regent, and it was actually at this very conference. I can't remember if it was 2019 or earlier. My father had been an adjunct faculty member here,²⁸ and I grew up in Virginia Beach, so I'd always kind of heard a lot about the great things that Regent was doing, but I hadn't really physically been on campus and heard from the teachers. I was so moved and impressed by my experience at that symposium. I particularly remember so many different speakers. But I think I remember Dean Walton talking about human trafficking and trying to get engaged with the community and protect people who are victims of human trafficking from prosecution and being pardoned.²⁹ It's such an amazing confluence of ideas, and it wasn't anything that was really breaking along political lines. It was just really seeking to do right by the community, and I was so impressed by that experience. That just was kind of the first moment of my re-engagement with Regent. I was so honored to be able to teach here and meet so many of you, and I'm so proud of everything that Dean Lingo is doing. I'm so honored to have had the opportunity to teach with him, and for him to mentor me. So, thank you for having me back.

My role, as many of you know, is—there are four Deputy Attorney Generals in the State of Virginia, and they have different roles.³⁰ We have a criminal deputy, we have a deputy that does general civil litigation, we have someone who does operations, and my role is over health, education, social services, and child support enforcement.³¹ I remember after the election, some folks had approached me about serving in the administration. I remember saying to my family, “The one role I definitely would not want to be involved in would be the deputy for HESS, as they call it—health, education, and social services.” I said, “Affirmative action, CRT, abortion; I don't want my name in the newspapers. I want to serve, but that's just going to be too intense.” And that's ultimately the position

²⁸ *Judge Henry Coke Morgan, Jr.*, H.D. OLIVER FUNERAL APARTMENTS, INC., <https://www.hdoliver.com/obituaries/Judge-Henry-Coke-Morgan-Jr?obId=24786806> (last visited Jan. 18, 2023).

²⁹ Deputy Attorney General Stewart was referring here to the Journal of Global Justice and Public Policy's Symposium held at Regent University. *Spring Symposium – Slavery to Bravery: Human Trafficking from A to Z*, J. GLOB. JUST. & PUB. POL'Y, <https://jgpp.regent.edu/event/spring-symposium-slavery-to-bravery-human-trafficking-from-a-to-z/> (last visited Jan. 27, 2023).

³⁰ *About the Office*, OFF. ATT'Y GEN., <https://www.oag.state.va.us/our-office/about-the-office> (last visited Jan. 25, 2023).

³¹ *Senior Leadership*, OFF. ATT'Y GEN., <https://www.oag.state.va.us/our-office/senior-leadership> (last visited Jan. 26, 2023); see *Assistant Attorney General*, OFF. ATT'Y GEN., <https://www.oag.state.va.us/15-about/careers/2404-assistant-attorney-general-00602> (last visited Feb. 27, 2023) (noting that the Assistant Attorney General of Health, Education, and Social Services is also responsible for child support enforcement).

that was offered to me.³² And now, looking back on it, I wouldn't have it any other way because of the importance of these issues to the state.

If you want to go back in a time machine—and I don't know how many of you are political junkies like I am—maybe you remember the debate between Terry McAuliffe and Glenn Youngkin when they were talking about issues with school.³³ Do you remember what Terry McAuliffe said? He said, “I don't think parents should be telling schools what they should teach.”³⁴ And if you were watching that, I think there was some muted applause,³⁵ depending on who was present for the debate. But I remember also feeling this, just, gasp. Mentally, I was just so thrown back by that statement. I don't even think that they knew at the time the importance that those words would have. In a later article before the election, the Hill—which I don't think is a particularly conservative publication—said, “Those [ten] words—deserving of a top listing in the Hall of Fame of Political Blunders—may prove to be the turning point in a race in which McAuliffe was expected to cruise to victory, especially since Joe Biden won the,” what they refer to Virginia as a “blue state by more than [ten] points on his way to the presidency in 2020.”³⁶ So, for those of you who are following Virginia politics, there probably is no greater issue in the political landscape right now, really, than education and parents' rights, and I'm so excited to be part of that in support of what the Attorney General and the Governor are trying to do.³⁷ I made a few notes of what I

³² *Senior Leadership*, *supra* note 31.

³³ *Virginia Gubernatorial Debate*, C-SPAN (Sept. 28, 2021), <https://www.c-span.org/video/?514874-1/virginia-gubernatorial-debate>.

³⁴ *Id.* at 30:10.

³⁵ *Id.* at 30:04.

³⁶ Joe Concha, *Education Blunder Igniting Suburban Parents Driving McAuliffe Panic in Virginia*, HILL (Oct. 28, 2021, 12:30 PM), <https://thehill.com/opinion/campaign/578885-education-blunder-igniting-suburban-parents-driving-mcauliffe-panic-in/>.

³⁷ See Matthew Barakat & Sarah Rankin, *Youngkin Looks to Root Out Critical Race Theory in Virginia*, AP NEWS (Feb. 15, 2022), <https://apnews.com/article/education-richmond-race-and-ethnicity-racial-injustice-virginia-8ad5da65b9cb05265f2b8081c41827cd> (noting that Governor Youngkin's first action as governor was to sign an executive order aimed at removing controversial theories from classrooms); Lexi Lonas, *Youngkin Delivers on Education Campaign Promises One Year into Governorship*, HILL (Oct. 11, 2022, 6:00 AM), <https://thehill.com/blogs/blog-briefing-room/news/3679166-youngkin-delivers-on-education-campaign-promises-one-year-into-governorship/> (explaining that Governor Youngkin aimed to improve education by passing an education spending bill and increasing choice about masks in schools); Anna Bryson, *Youngkin Administration Pushes School Choice Through Education Savings Accounts*, RICHMOND TIMES-DISPATCH (Jan. 5, 2023), https://richmond.com/news/local/education/youngkin-administration-pushes-school-choice-through-education-savings-accounts/article_08b7f9aa-89ff-57d9-a45d-e52b81b2110b.html (describing Governor Youngkin's continued dedication to education by establishing a school choice program); Hannah Natanson & Justin Jouvenal, *Va. Supreme Court Dismisses Lawsuit Against Youngkin's Mask-Optional Order on Technical Grounds*, WASH. POST (Feb.

think some of the most significant issues facing Virginia are right now, and when we started, it was definitely school closures and masking due to the pandemic,³⁸ and now the impact of those policies on students and their education and their mental health.³⁹ Obviously, parents' rights in school, including sexually explicit materials, and now transgender policies, and then kind of equity, affirmative action, and discrimination against Asian students in our public school system, I would say, are some of the top three issues.⁴⁰ Obviously, many of you heard on the first day of the new administration, on January 15, the Governor issued numerous executive orders dealing with education,⁴¹ and one of the first actions of the Attorney General was to issue an opinion that said that public colleges and universities in Virginia could not require that students obtain the COVID vaccine.⁴² Previously, that had been a requirement to attend school at most of the public colleges and universities in the state, despite the fact that their authority is limited in the Virginia code as to what vaccinations they can require as public institutions.⁴³ So it's an exciting time in

7, 2022, 2:33 PM), <https://www.washingtonpost.com/education/2022/02/07/va-supreme-court-dismisses-lawsuit-against-youngkins-mask-optional-order/> (explaining that the Virginia Attorney General won a case against a challenge to the mask-optional order, albeit on technical grounds).

³⁸ See Lonas, *supra* note 37 (noting Governor Youngkin made masks optional in schools); Glenn Youngkin, *Glenn Youngkin: Parents Matter in Education – Virginia Election Will Decide Fate of Students, Schools*, FOX NEWS (Nov. 1, 2021), <https://www.foxnews.com/opinion/virginia-parents-student-schools-youngkin-glenn>.

³⁹ See Youngkin, *supra* note 38 (explaining that student achievement in school dropped dramatically during the COVID-19 pandemic); Matt Hawrilenko et al., *The Association Between School Closures and Child Mental Health During COVID-19*, JAMA NETWORK OPEN, Sept. 2021, at 5, 7 (finding that older children receiving remote schooling had worse mental health outcomes than those attending school in-person).

⁴⁰ See Robert Kubica, *Let's Talk About Sex: School Surveys and Parents' Fundamental Right to Make Decisions Concerning the Upbringing of Their Children*, 51 VILL. L. REV. 1085, 1088–89 (2006) (sexually explicit materials); S. Ernie Walton, *Gender Identity Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 REGENT U. L. REV. 219, 261–62 (2021–2022) (transgender policies); Cory R. Liu, *Affirmative Action's Badge of Inferiority on Asian Americans*, 22 TEX. REV. L. & POL. 317, 330 (2018) (affirmative action and discrimination against Asian students).

⁴¹ *Governor Glenn Youngkin Signs 11 Day One Executive Actions*, GOVERNOR OF VA. (Jan. 15, 2022), <https://www.governor.virginia.gov/news-releases/2022/january/name-918519-en.html>; see, e.g., Va. Exec. Ord. No. 1 (2022) (prohibiting public education on Critical Race Theory and establishing parental rights to access information on the materials used for instruction).

⁴² *Legality of Pub. Inst. Requiring COVID-19 Vaccination*, 4 Op. Att'y Gen. Va. 1, 3 (2022).

⁴³ *Compare Legality of Pub. Inst. Requiring COVID-19 Vaccination*, Op. Att'y Gen. Va. 1, 4 (2021) (opining that universities may require the COVID vaccine to keep their campuses safe), with VA. CODE ANN. § 23.1-800(B)–(C) (LEXIS through ch. 22 of the 2022 Spec. Sess. I) (enumerating vaccines—not including the COVID vaccine—that schools must require for attendance).

Virginia. I'm so proud to be here as part of this conference, and to see all you all again. Thank you so much.

Hon. Alice Batchelder: Is it ok if I call you

Dean Kurt Kreassig: Kurt, please.

Hon. Alice Batchelder: Good. Thank you. That works.

Dean Kreassig: Great to see everybody. And looking around, not only am I outnumbered, but I'm looking around at all the young people who might not yet have kids in public schools or private schools or what have you. You reflect on your own experience, or there was parochial, private, or public school. What you're going to hear today is a common theme. I think that all of us have a moral imperative to better our public schools for the fate of our country. Our country's success is intertwined with the success of our public schools.⁴⁴ And I want you to keep that in mind throughout today's presentation and beyond because whether you agree or don't agree, it still matters for our country, and my responses today are going to be from a practitioner's orientation—whether a school principal, maybe a school board member, a classroom teacher. So, I'm going to bring a different perspective to the dialogue. Thank you.

Hon. Alice Batchelder: Thank you. Thank all three of you.

Kurt just mentioned some of you aren't, maybe, old enough yet to have children. None of you are as old as I am. I'm looking back on an awfully long time on what's going on in education and just in our country and in the world in general. I tried to order some supplements the other day to keep immune from a lot of other things and the person on the other end was trying to persuade me about how I should subscribe to the auto-ship program. I said, "Ma'am, when you're seventy-eight, you don't subscribe to the auto-ship program." I have a lot of years to look back on, and I'm particularly interested in primary and secondary education at this point because there really is a focus in the educational world and the rest of the current world on our children—the young ones.⁴⁵

So, starting with Tyson, you've already talked about one case, but you have considerable experience in defending parental rights in America—particularly with regard to public schools. So I would ask you, what rights do parents have respecting their children who attend public schools? What

⁴⁴ See Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 782–84 (1985) (emphasizing the role of public education in developing politically adept members of society).

⁴⁵ See Walton, *supra* note 40, at 277–79 (enumerating controversial policies that affect public school curricula from "kindergarten through twelfth grade").

do you think is the best approach to litigating those rights? One thing that kind of comes to mind is, are we talking substantive due process here—which Clarence Thomas doesn’t believe exists⁴⁶ and I tend to agree with him—or privileges and immunities?⁴⁷ Law students love to talk about all of this. The question is: how should we be approaching it? I know that was three questions, but I know you’ll sort through them.

Mr. Langhofer: Well, that could be the subject of an entire panel of an hour for sure, but it’s a great question because it’s one that I don’t recall having been discussed in my growing-up times. There wasn’t a real discussion on parental rights. It was kind of just an understanding about it. Of course, they have those rights.⁴⁸ And now, it is a huge conflict.⁴⁹ Most schools, like Geary County, where I was litigating, would have a policy that says, “Sure, parents are full partners in education.”⁵⁰ They know if they have something different, the parents would be like “Oh, this is a problem. What do you mean I don’t have a say?”⁵¹ But, unfortunately, the case law is not very well developed on parental rights. As Judge Batchelder acknowledges, the case law in—*Troxel v. Granville*—is a case that discusses it.⁵² Then the *Meyer v. Nebraska*⁵³ and *Pierce v. Society of*

⁴⁶ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2300–01 (2022) (Thomas, J., concurring) (quoting *Johnson v. United States*, 576 U.S. 591, 607–08 (2015) (Thomas, J., concurring)) (“[S]ubstantive due process’ is an oxymoron that ‘lack[s] any basis in the Constitution.’”).

⁴⁷ Earlier Supreme Court jurists debated whether the proper method of incorporating the Bill of Rights against state government is through the Fourteenth Amendment’s Privileges or Immunities Clause rather than its Due Process Clause. Compare *Slaughter-House Cases*, 83 (1 Wall.) U.S. 36, 96 (1872) (Field, J., dissenting) (arguing that the purpose of the Privileges or Immunities Clause was to prevent state governments from violating the rights enumerated in the Bill of Rights), and *Saenz v. Roe*, 526 U.S. 489, 521–22 (1999) (Thomas, J., dissenting) (asserting that the *Slaughter-House Cases* destroyed the meaning of the Privilege or Immunities Clause), with *id.* at 78–79 (finding that the Privileges or Immunities Clause only pertained to national rights and did not extend the protections of the Bill of Rights to the actions of individual states).

⁴⁸ See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1971).

⁴⁹ See, e.g., *Virginia Gubernatorial Debate*, C-SPAN (Sept. 28, 2021), <https://www.c-span.org/video/?514874-1/virginia-gubernatorial-debate>, at 30:10 (recording Terry McAuliffe, as Virginian gubernatorial candidate, stating, “I don’t think parents should be telling schools what they should teach.”).

⁵⁰ See *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-cv-04015-HLT-GEB, slip op. at 11 n.8 (D. Kan. May 9, 2022).

⁵¹ See David Aaro, *McAuliffe Criticized Online After Saying He Doesn’t Believe Parents Should Tell Schools What to Teach*, FOX NEWS (Sept. 29, 2021, 2:54 AM), <https://www.foxnews.com/politics/mcauliffe-receives-criticism-believe-parents-should-tell-schools-teach> (expressing parents’ incredulity at the suggestion that they might have no involvement in their children’s education).

⁵² 530 U.S. 57, 66 (2000) (describing a general right to parent).

⁵³ *Meyer*, 262 U.S. at 399 (finding that the Due Process Clause protects the right to “establish a home and bring up children”).

Sisters.⁵⁴ Those are kind of the only main cases on parental rights and they do essentially reference substantive due process.⁵⁵ That's why you see the *Meyer* case, and *Troxel*, and so forth—they're very divided opinions.⁵⁶ They're very divided. We know that parents have a fundamental right, and the Supreme Court has recognized parenting as a fundamental right.⁵⁷ But it's not mentioned in the Constitution. It just isn't there. Specifically, the right to parent.⁵⁸

So, courts are trying to figure out how to deal with that, and because the Supreme Court has not been clear about it, the district courts have gone all different ways; from rational basis, to intermediate, to strict scrutiny.⁵⁹ It is a difficult issue to litigate, but when it comes to the issues that we're specifically litigating, we can ground our arguments in other arguments as well. One of the issues is the right to participate in the decisions about whether your child is going to transition to another gender.⁶⁰ What will they be called at school? Both their actual name and their pronouns? What sex are you going to treat them as? The vast majority of schools today, if they've adopted a policy, most of them will have some vague reference to: "You should let the child decide whether you're going to tell the parents."⁶¹ Either they'll have that specifically

⁵⁴ 268 U.S. 510, 534–35 (1925) (expanding parental rights to include the right of parents to "direct the upbringing and education of children under their control").

⁵⁵ See Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J.L. & FAM. STUD. 71, 72–73 (2006) (presenting these cases as the only Supreme Court opinions that set the limits of constitutional parental rights under the Due Process Clause).

⁵⁶ See, e.g., *Troxel*, 530 U.S. at 66, 68, 75–76, 80–81, 91–95 (listing the Justice's differing opinions regarding the scope of parental rights, including the majority's affirmation that parental rights exist but do not extend to grandparents and Justice Scalia's dissenting assertion that the parental rights doctrine should not be further developed beyond its *Meyer-Pierce* scope).

⁵⁷ *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes [among others] the right[] . . . to direct the education and upbringing of one's children . . .").

⁵⁸ See, e.g., Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1, 66 (2020) ("The Court created parent[al] rights . . . without the benefit of any specific language in the Federal Constitution.").

⁵⁹ Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 128–29, 140–41 (2018) (noting instances where the U.S. District Courts have applied rational basis, intermediate, and strict scrutiny in parental rights cases in the absence of an overarching standard from the Supreme Court).

⁶⁰ See Walton, *supra* note 40, at 261–62 (asserting the state's facilitation of gender transition in public schools violates parents' constitutional right to make decisions regarding their children).

⁶¹ See, e.g., N.J. DEPT OF EDUC., TRANSGENDER STUDENT GUIDANCE FOR SCHOOL DISTRICTS §§ 2, 4, <https://www.nj.gov/education/safety/sandp/climate/docs/Guidance.pdf> (asserting the school's policy that there is no duty to inform parents of or obtain parental consent concerning a transgender student's identity); MADISON METRO. SCH. DIST.,

written out or they will say that specifically. So, we're challenging those policies because, one, is that now implicates teachers' rights because teachers are being forced to lie.⁶² In my case, I represented Pam Ricard.⁶³ When she emailed a parent, she had to use their legal name and biological pronoun.⁶⁴ But when she referred to the student, she had to use the preferred name and pronoun.⁶⁵ She felt like that was lying, being deceptive to the parents.⁶⁶ These are middle school girls who are going through clearly very difficult times, and the parents are being cut out completely.⁶⁷ There's some deception there. We've argued free speech arguments there.⁶⁸ We're like, "You can't force teachers to lie to parents," and we've been successful there.⁶⁹ As parents on the parental rights side, we are relying on cases like *Meyer* and *Troxel*, where they've said there is a fundamental right to parenting but they haven't really developed what

GUIDANCE & POLICIES TO SUPPORT TRANSGENDER, NON-BINARY & GENDER-EXPANSIVE STUDENTS 9 (2018), <https://resources.finalsite.net/images/v1625663725/madisonk12wius/m5x6tox6rhrufthykn30/guidancebooklet.pdf> (mandating that school staff in Madison, Wisconsin, obtain transgender and non-binary students' authorization before disclosing their gender identity to their parents); MICH. STATE BD. OF EDUC., STATE BOARD OF EDUCATION STATEMENT AND GUIDANCE ON SAFE AND SUPPORTIVE LEARNING ENVIRONMENTS FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING (LGBTQ) STUDENTS 5 (2016), <https://www.michigan.gov/-/media/Project/Websites/mde/2016/09/15/SBStatementonLGBTQYouth.pdf?rev=83c59267fc5f46a8ba30061969f91359> (explaining that disclosure of gender identity to a transgender student's parents will be examined on a case by case basis); CULVER CITY, CAL. UNIFIED SCH. DIST., TRANSGENDER STUDENTS, PRIVACY AND FACILITIES § 2 (2014), <https://www.ccusd.org/pdf/policies/> (indicating that teachers must use a transgender student's legal name when conversing with parents unless the teachers have first obtained student permission).

⁶² See, e.g., *Doe v. Madison Metro. Sch. Dist.*, 976 N.W.2d 584, 588–89 (Wis. 2022) (demonstrating the concern that some teachers are “deceiving parents by using different names and pronouns around parents than at school”).

⁶³ *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-cv-04015-HLT-GEB (D. Kan. May 9, 2022).

⁶⁴ *Id.* at 4.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Compare Why Are So Many Females Coming Out As Trans/Nonbinary?*, GENDER HEALTH QUERY, <https://www.genderhq.org/increase-trans-females-nonbinary-dysphoria> (last visited Feb. 17, 2023) (claiming that girls in the early stages of puberty may be more likely to struggle with gender dysphoria than their male counterparts due to angst about their changing bodies), and Myeshia Price-Feeney et al., *Understanding the Mental Health of Transgender and Nonbinary Youth*, 66 J. ADOLESCENT HEALTH 684, 687–88 (2020) (revealing that fifty-four percent of transgender youth considered suicide and eighty-three percent suffered from depression in the last year), with Walton, *supra* note 40, at 257–58 (discussing active school policies that deliberately obstruct parents' access to information about their child's gender identity).

⁶⁸ *Ricard*, slip op. at 6–7 (declining to address the teacher's asserted free speech argument that the school's policy coerced her to act dishonestly).

⁶⁹ See *id.* at 4, 8, 15–16.

that looks like or even the standard.⁷⁰ That's what we're trying to do is develop some additional case law—some frameworks around that. There is a big debate, even in the conservative community, over the substantive due process grounding of parental rights.⁷¹ It's a debate that needs to be had, and I think different people could come to different conclusions. But I think what most people can understand is that there is a fundamental right to parent.⁷² You have to have the right to be able to interact with your children on those important things. So, we need to figure out what does that look like. And with CRT, as you heard Mallory talk about a little bit earlier, we're challenging on behalf of parents where their children are being told your parents are racist, because they're white, or your religion is oppressive, because you're Christian.⁷³ They create these wrong principles about who they are intrinsically, and that's violating the parents' rights to be able to dictate these strong underlying beliefs that the parents want to inculcate.⁷⁴

So, the short answer is, it is a little bit murky area of law that still needs some developing. But there is enough grounding in these current Supreme Court cases that we believe we can successfully say: "You can't transition the child without the parents' rights, and you cannot inculcate a racist and religiously hostile curriculum—which tells certain kids they're not welcome because of the color of their skin or because of their religious beliefs."⁷⁵

⁷⁰ *Meyer v. Nebraska*, 262 U.S. 399–400 (1923) (listing the right to raise children as among the liberties ensured for Americans without describing the right particularly); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (recognizing a general right to parent).

⁷¹ *Compare Troxel*, 530 U.S. at 66, 68 (upholding but declining to expand parental rights), *with id.* at 91–92 (Scalia, J., dissenting) (asserting that parental rights should not have been grounded in the theory of substantive due process).

⁷² *Id.* at 66.

⁷³ See *Why Is Critical Race Theory Dangerous for Our Kids?*, MARSHA BLACKBURN U.S. SENATOR TENN. (July 12, 2021), <https://www.blackburn.senate.gov/2021/7/why-is-critical-race-theory-dangerous-for-our-kids> (citing an example of a student who was ashamed of being white because of the CRT curriculum being taught in school); Lance Izumi, *Parents Revolted Against Critical Race Theory. They Won*, FOX NEWS (Jan. 18, 2023, 8:00 AM), <https://www.foxnews.com/opinion/parents-revolted-against-critical-race-theory-how-they-won>.

⁷⁴ For more discussion on parental rights related to strong underlying beliefs, see Emily J. Brown, *When Insiders Become Outsiders: Parental Objection to Public School Sex Education Programs*, 59 DUKE L.J. 109, 125 (2009), positing that parents' constitutional rights include discretion regarding how to discuss controversial issues and foundational values, and *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1971), establishing the parental right to direct the religious upbringing of children.

⁷⁵ See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that parents, not schools, have the authority to decide what constitutes their children's "upbringing"); *Epperson v. Arkansas*, 393 U.S. 97, 106–07 (1968) (holding that schools may not teach a curriculum that promotes or opposes religion); see also Steven Siegel, *Ethnocentric Public School Curriculum in a Multicultural Nation: Proposed Standards for*

Hon. Alice Batchelder: Thank you. Kurt, you have to deal with this on a more every day, practical level.

Dean Kreassig: Absolutely. Well, let me just say that what Mallory said in the last panel about COVID—and parents, now, pay more attention to who’s directing the moral and ethical orientation of their children or their child—has come into play lately.⁷⁶ Boards and various organizations have created difficult policies for teachers and children to follow. There’s no question about it, and the golden key for student improvement and school improvement in this country is parent involvement.⁷⁷ Parents have to be involved. For those of you who are younger and don’t have kids yet, there are two types of parent involvement. First, there’s the stage-setting.⁷⁸ That’s typically when you have a youngster who’s not in school yet, and you’re talking about the value of education, or you’re yourself in law school—you’re sitting at the table doing work, and the child is watching.⁷⁹ You do work, and you’re able to explain, “This is my homework.” Then you have the traditional involvement for parents—which is part of the parents’ rights—to come in and observe the curriculum being taught, comment on textbooks, inspect

Judicial Review, 40 N.Y. L. SCH. L. REV. 311, 316–17, 319–20 (1996) (asserting that curriculum that promotes the superiority of any race “has no place in the public schools”).

⁷⁶ See Alyson Klein, *Pandemic Parents Are More Engaged. How Can Schools Keep It Going?*, EDUC. WEEK (Sept. 14, 2021), <https://www.edweek.org/leadership/pandemic-parents-are-more-engaged-how-can-schools-keep-it-going/2021/09> (reporting that the opportunity of at-home learning provided parents with greater awareness of what their children were learning during the COVID-19 pandemic).

⁷⁷ See Linda L. Schlueter, *Parental Rights in the Twenty-First Century: Parents as Full Partners in Education*, 32 ST. MARY’S L.J. 611, 613–14 (2001) (“[P]arent involvement increases student achievement and self-esteem.”).

⁷⁸ See Angel L. Harris & Keith Robinson, *A New Framework for Understanding Parental Involvement: Setting the Stage for Academic Success*, 2 RUSSELL SAGE FOUND. J. SOC. SCI. 186, 189 (2016) (describing “stage-setting” as a theory of parental involvement in education in which parents express the importance of education and thereby increase the student’s academic achievement).

⁷⁹ See *id.* (explaining that “[s]tage-setting reflects parents’ messages about the importance of schooling and the overall quality of life they create for their children”). The core components of stage-setting are met when a parent does schoolwork in front of a child because it both communicates the importance of education and creates a home environment conducive to learning. See *id.*

homework.⁸⁰ Those rights are pretty robust,⁸¹ but we want to make sure that they continue to be robust and even more so.

But one of the things I want to think about is, how do we incorporate civility and parent rights? Because what we hear from teachers in the field—Christian teachers in the field—is they feel so much pressure that they’ve done something wrong because some groups are so loud about the rights or what have you.⁸² So as a group, what are those things that we can do to soften that a little bit and have more civility in the conversation? And that’s one of the areas that’s on my plate now with our teachers that we put in the field.

As stakeholders, again, it’s important that we all have a voice in the upbringing of our students.⁸³ But one thing I want to read to you is a quote that I came across: “public schools are among the few unifying institutions with the potential to help solder together a diverse rising generation of Americans ready and equipped to live together, solve problems and help build a better nation.”⁸⁴

So, parents have the right to come in and inspect things that their child is doing.⁸⁵ They have a legal and moral obligation to do that.⁸⁶ But

⁸⁰ See *id.* at 189, 192 (describing traditional parental involvement as parents “reading to the child, helping with homework, [] meeting with teachers,” and other related activities); *Pierce*, 268 U.S. at 534–35 (explaining that parents have the right “to direct the upbringing and education of children under their control”).

⁸¹ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that parents have an essentially plenary right to “establish a home and bring up children”); *Pierce*, 268 U.S. at 534–35 (invalidating an act for obstructing parents’ rights to control their children’s “upbringing and education”).

⁸² *Compare Day of Silence*, GLSEN (Apr. 14, 2023), <https://www.glsen.org/day-of-silence> (advertising a national protest movement advocating for LGBTQ rights in schools), and Kiara Alfonseca, *Teachers Protests Bill Targeting Critical Race Theory, Race Education*, ABC NEWS (Aug. 26, 2021, 6:02 AM), <https://abcnews.go.com/US/teachers-protest-bills-targeting-critical-race-theory-race/story?id=79642784> (explaining that many teachers and students protested legislation that would remove CRT from the curriculum), with Jill Waggoner, *3 Christian Teachers Share About Their Work in Public Schools*, BIBLICAL RECORDER (Sept. 29, 2022), <https://www.brnow.org/news/3-christian-teachers-share-about-their-work-in-public-schools/> (explaining that teachers feel “single[d] out,” and like they are “walking on eggshells” because their Christian beliefs are unpopular in public schools).

⁸³ Anne Sliwka & David Istance, *Parental and Stakeholder ‘Voice’ in Schools and Systems*, 41 EURO. J. EDUC. 29, 29 (2006) (explaining that parents are stakeholders in their children’s education); S. Wilder, *Effects of Parental Involvement on Academic Achievement: A Meta-Synthesis*, 88 EDUC. REV. 377, 387 (2014) (finding a positive correlation between parental involvement in education and academic success).

⁸⁴ Suzanne Nossel, *Parents Should Have a Voice in Their Kids’ Education But We’ve Gone Too Far*, TIME (Sept. 20, 2022, 3:11 PM), <https://time.com/6215119/parents-rights-education-gone-too-far/>.

⁸⁵ See *Meyer*, 262 U.S. at 399; *Pierce*, 268 U.S. at 534–35.

⁸⁶ See, e.g., VA. CODE ANN. § 22.1-279.3 (LEXIS through ch. 22 of the 2022 Spec. Sess. I) (“Each parent of a student enrolled in a public school has a duty to assist the school in enforcing the standards of student conduct and compulsory school attendance.”); Hannah

prior to COVID, I think it was—not necessarily parents shirked that responsibility a little bit—it was just not that great.⁸⁷ In fact, traditionally, if you think about it, parents are more involved in elementary school, right?⁸⁸ If you remember, your parent was involved when you were in elementary school, waned a little bit in middle school, and then was almost nonexistent at times in high school.⁸⁹ That’s actually almost flipped where we have more involvement now at the high schools.⁹⁰ So that’s something to consider, too. Is that a positive thing for a student? If you’re a high school student, do you want mom and dad there? Yes, you want them advocating for you.

So, my message is, what can we do to bring civility back into that conversation so that our teachers feel comfortable and they’re not fleeing the classroom? The principals can sit down and engage and be trained as they’re training for principals on this, or teachers and parents to come together. PTA meetings are not attended like they used to be.⁹¹ Open houses are not attended like they used to be.⁹²

Xu, *What Should Parents Do for Their Children – A Philosophical View of Parental Obligation*, 11 OPEN J. PHIL. 427, 427–28, 431 (2021) (asserting that to give “their children . . . a reasonable expectation of a decent life . . . parents are obligated to provide their children with an adequate moral education”).

⁸⁷ Cf. Bho B. Balayar & Michael R. Langlais, *Parent Support, Learning Performance, and Socioemotional Development of Children and Teenagers During the COVID-19 Pandemic*, 3 FAM. J. 174, 178, 182 (2021) (explaining that parental involvement in their children’s education increased after the COVID-19 pandemic, therefore, implying that parents participate more in education when they have greater access to information about the contents of the curriculum).

⁸⁸ See JULIA MERLIN, NAT’L CTR. FOR EDUC. STATS., *PARENTAL INVOLVEMENT IN U.S. PUBLIC SCHOOLS IN 2017–18* (2021) (illustrating that middle schools generally experience less wide-spread parental engagement than primary schools, and high schools, even less).

⁸⁹ *Id.*

⁹⁰ Although the increase in high school students’ parents involvement has not caused their participation to exceed that of parents with young grade-school students, the increase has been significant. Alyson Klein, *Pandemic Parents Are More Engaged. How Can Schools Keep It Going?*, EDUC. WEEK (Sept. 14, 2021), <https://www.edweek.org/leadership/pandemic-parents-are-more-engaged-how-can-schools-keep-it-going/2021/09> (explaining that teachers reported higher rates of K-12 parental involvement since the COVID-19 pandemic).

⁹¹ Compare Michael Slater Cline, *An Analysis of Parent-Teacher Association Membership and Attendance* (1964) (M.A. thesis, Central Washington University) (on file with Central Washington University Library) (showing that 18.4 to 3.1 percent of parents attended PTA meetings at schools with a mean number of 796 students in 1963), with Michael Gaskell, *We Used Technology to Increase Attendance at PTA Meetings* (Oct. 11, 2018), <https://www.eschoolnews.com/2018/10/11/we-used-technology-to-increase-attendance-at-pta-meetings/> (explaining that 1.3 percent of parents attended PTA meetings in a school of 1,250 students in 2018).

⁹² Cf. Timo Nieuwoudt, *How to Boost Attendance at Your Schools Next Open House*, INSIGHTS (Oct. 6, 2022), <https://insights.digistorm.com/en-us/boost-school-open-day-attendance> (indicating that school closures and other COVID-era policies greatly limited recent attendance of open houses); *Increasing Open House Attendance*, EDUC. WORLD, https://www.educationworld.com/a_curr/strategy/strategy004.shtml (last visited Feb. 5,

I made a comment to an individual not too long ago. I was at an after-school function, and an executive for a school system came up, and the cat-calls began. I thought about how that individual felt. “Let me just get out of here. I’m not going to engage that.” So, what can we do with our society and our public to bring back the civility when we talk about parental rights?

Hon. Alice Batchelder: And Coke, as you address this, I wonder if perhaps you could give us your perspective from where you sit now on parents’ rights over the presentation of these kinds of materials as far as the state is concerned. I mean the parents who are saying, “I don’t want my child being indoctrinated in some of these sexually explicit ways and areas,”⁹³ and the transgender issue where there are some complaints that are coming to light about “my child wasn’t showing any of these problems until the school got all over her or him.”⁹⁴ Let’s have your perspective as an Attorney General.

Deputy AG Stewart: I think it’s obviously very important that parents and all of you understand what your rights are under state law. We spend a lot of time in law school and law schools can’t always dig into every single state’s law, so we talk about constitutional law and we talk about a lot of legal principles. But when the rubber hits the road, you need to understand what the laws are in your states. I’ll just share some information about Virginia state law. In the code of Virginia, a parent has a fundamental right to make decisions concerning the upbringing, education and care of their child.⁹⁵ That is in Virginia law. Virginia law

2023) (implying that the increasingly busy schedules that families now have keep them from attending open houses).

⁹³ See, e.g., *Voters Against Obscene Books in Public Schools*, RASMUSSEN REPS. (Oct. 3, 2022), https://www.rasmussenreports.com/public_content/politics/partner_surveys/voters_against_obscene_books_in_public_schools (explaining that a majority of voters “believe books containing explicit sexual depictions of sexual acts . . . should not be present in public high school libraries”).

⁹⁴ See e.g., Jay Keck, Opinion, *My Daughter Thinks She’s Transgender. Her Public School Undermined My Efforts to Help Her*, USA TODAY (Aug. 13, 2019, 2:22 PM), <https://www.usatoday.com/story/opinion/voices/2019/08/12/transgender-daughter-school-undermines-parents-column/1546527001/> (explaining that a child did not show indications of gender dysphoria before she came out as transgender at her school, which affirmed her new gender identity despite her parents’ protests); Emilie Kao, *Yes, Schools Are Secretly Trying to ‘Gender Transition’ Kids, and It Must Be Stopped*, DAILY SIGNAL (Mar. 22, 2022), <https://www.dailysignal.com/2022/03/22/yes-schools-are-secretly-trying-to-gender-transition-kids-and-it-must-be-stopped/> (describing how a public school prevented a mother from getting the psychological help she wanted for her daughter’s gender dysphoria).

⁹⁵ VA. CODE ANN. § 1-240.1 (LEXIS through ch. 22 of the 2022 Spec. Sess. I).

provides many rights to parents with respect to their children.⁹⁶ They can't be denied. As you were saying, they can't be denied access to academic or health records if they're minor children.⁹⁷

Just to give kind of a funny example, you can't even get a tattoo in the state of Virginia, if you're a minor, without your parent's permission.⁹⁸ Which I was delighted to hear, although, my son just turned eighteen. Parents have a lot of rights. Parents can object to immunizations required for school attendance if it conflicts with their religious tenets or practices, or if they have a statement from a physician saying that the particular medical intervention would be bad for their child's health.⁹⁹ Parents can opt a child out of the HPV vaccine in Virginia at the parents' sole discretion.¹⁰⁰ Parental consent is required in Virginia for COVID vaccinations for minors, and the COVID-19 vaccine is not a requirement for immunization for school attendance under Virginia law.¹⁰¹ Parents have rights as to family life education in Virginia.¹⁰² They have rights to review materials for bullying and suicide prevention.¹⁰³ So, there are quite a few rights.

But who is elected matters. The legislature in Virginia has been majority-Democrat for some time,¹⁰⁴ and there are other Virginia laws that are not as favorable that I think people should be aware of. For example, under Virginia law, a minor is deemed to be an adult for the purpose of consenting to four categories of treatment: STDs and infectious diseases; pregnancy, birth control, and family planning; outpatient substance-abuse care; and outpatient mental-health care.¹⁰⁵ Virginia law

⁹⁶ See, e.g., *id.* (explaining that parents have "a fundamental right to make decisions concerning the upbringing, education, and care of the parent's child"); *id.* § 22.1-207.2 ("Parents and guardians have the right to review the family life education program offered by their school division, including written and audio-visual educational materials used in the program. Parents and guardians also have the right to excuse their child from all or part of family life education instruction.").

⁹⁷ *Id.* § 20-124.6.

⁹⁸ *Id.* § 18.2-371.3.

⁹⁹ *Id.* § 22.1-271.2(C).

¹⁰⁰ *Id.* § 32.1-46(D)(3).

¹⁰¹ See *id.* § 32.1-47.1 (explaining that parental consent is required for minor to receive vaccines); *id.* § 32.1-46(A) (listing the vaccine requirements for school attendance, which does not include a COVID-19 vaccine); Vaccine Requirements Under § 32.1-46(A), Op. Att'y Gen. Va. No. 22-058 (2022) (interpreting the absence of the COVID-19 vaccine from § 32.1-46(A) to mean that children are not required to receive that vaccine even if it were added to the CDC's childhood immunization schedule).

¹⁰² VA. CODE ANN. § 22.1-207.2 (LEXIS through ch. 22 of the 2022 Spec. Sess. I) (explaining that parents have a "right to review the complete family life curricula, including all supplemental materials used in any family life education program").

¹⁰³ *Id.* § 22.1-207.2:1.

¹⁰⁴ See *Legislators*, VPAP.ORG, <https://www.vpap.org/general-assembly/legislators> (last visited Feb. 17, 2023) (showing that Virginia's Senate has been Democratically controlled for the past four years, while the House was Democrat from 2020-2021).

¹⁰⁵ VA. CODE ANN. § 54.1-2969(E) (LEXIS through ch. 22 of the 2022 Spec. Sess. I).

also says that a minor is deemed to be an adult for purposes of accessing or authorizing disclosure of medical records relating to those four categories of treatment, and they aren't age limited.¹⁰⁶ Now, as a practical matter, they probably are age limited because students are going to be of a certain age and maturity to potentially need to seek out these treatments. But now we're seeing in the news that there are advocacy groups that want to approach the children in the schools,¹⁰⁷ and they don't—if the students don't feel like they're getting the support of parents—they facilitate potential mental-health or medical treatment that the parents don't consent to.¹⁰⁸ My takeaway is: know your rights and know your state's law.

Hon. Alice Batchelder: Which is a huge takeaway. So, in the context of primary and secondary education, possibly, to respond to some of these problems, and others, might be school choice. At the risk of interjecting something personal here, I worry sometimes whether school choice is even going to survive. A number of years ago, my husband, who was in the Ohio legislature for roughly ever¹⁰⁹—he was the guy who wrote the Ohio legislation that was at issue in *Zelman v. Simmons-Harris*,¹¹⁰

¹⁰⁶ *Id.* (including no minimum age for minors to be able to access and authorize disclosure of their medical records under this section).

¹⁰⁷ *See, e.g., Teaching About Gender Identity*, EDUCATORS 4 SOC. CHANGE, <https://educators4sc.org/topic-guides/teaching-about-gender-identity/> (last visited Jan. 21, 2023) (providing an example of an advocacy group, Educators 4 Social Change, advocating for schools to teach children about gender identity); *A Definition of Comprehensive Sexuality Education*, GUTTMACHER INST., https://www.guttmacher.org/sites/default/files/report_downloads/demystifying-data- (last visited Mar. 8, 2023) (advocating for comprehensive sexuality education that would teach children about contraception, STIs, and masturbation, among other sexually explicit topics); Brittany Bernstein, *Kindergarten Students in Connecticut Learn about Being Transgender in Line with 'Social Justice Standards'*, NAT'L REV. (Nov. 15, 2021, 5:37 PM), <https://www.nationalreview.com/news/kindergarten-students-in-connecticut-learn-about-being-transgender-in-line-with-social-justice-standards/> (explaining that “social justice standards” are being taught to children in Connecticut public schools, including content about gender identity).

¹⁰⁸ *See, e.g., Complaint & Request for Jury Trial, Foote v. Town of Ludlow*, No. 3:22-cv-30041-MGM, 2022 WL 18356421, at 15–21, 24 (D. Mass. July 21, 2022) (explaining that public school faculty disregarded parents' intent to secure independent, professional help for their child and assisted the student in transitioning at school without informing them); Kao, *supra* note 94 (describing how a public school supported a student's gender transition when it found the mother's support to be inadequate).

¹⁰⁹ *See William Batchelder Dedicated Life to Public Service*, OHIO WESLEYAN UNIV. (2022), <https://www.owu.edu/alumni-family-friends/owu-magazine/spring-2022/william-batchelder-dedicated-life-to-public-service/> (noting that William Batchelder served in the Ohio Legislature for thirty-eight years).

¹¹⁰ 536 U.S. 639, 645 (2002); OHIO REV. CODE ANN. §§ 3313.974–3313.979 (West 2023); *see* Gregory B. Bodwell, *Grassroots, Inc.: A Sociopolitical History of the Cleveland School Voucher Battle, 1992–2002* (2006) (Ph.D. dissertation, Case Western Reserve University) (on file with OhioLINK Electronic Theses and Dissertations Center) (listing William Batchelder as one of the state representatives responsible for “shaping [Ohio's] voucher proposal”).

and he always said he thought that was probably the most important thing that he had done while he was in the legislature. But he also said, as it was winding its way through the courts, and was clearly going to end up before the Supreme Court, he said to me one night “Al, I just keep having this recurring nightmare that I can see Justice Scalia sitting up there on the bench and saying, ‘Well, the idea here is okay, but who wrote this?’” Fortunately, it didn’t happen that way. But do any of you want to address the idea of school choice and whether it’s going to survive? And what is the importance of it in this context? And I was just thinking maybe I could start with Kurt, from a practitioner’s point of view here.

Dean Kreassig: Absolutely. First, I want you to know that I advocate for it for sure, and there’s all sorts of forms of school choice. You’ve heard of charter schools, vouchers, there are inter- and intra-district school choice.¹¹¹ In fact, Virginia Beach has the academies at the schools.¹¹² If you went to school here, maybe the Legal Studies Academy of First Colonial High School or Global Studies—that is a type of school choice.¹¹³ But the matter here is school choice is a win-win—not only for the students but also the parents and school administration.¹¹⁴ If you think about it, the big thing with school choice is funding.¹¹⁵ Who’s going

¹¹¹ See *Types of School Choice*, EDCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/> (last visited Jan. 21, 2023) (listing myriad forms of school choice, including charter schools (“independently run public schools”), school vouchers (scholarships given to parents to enhance school choice), and inter/intra district public school choice (districts allowing students to choose between multiple public schools in their district regardless of their ZIP Code)).

¹¹² See *Academies and Advanced Academic Programs*, VA. BEACH CITY PUB. SCHS., https://www.vbschools.com/academic_programs/academies_and_advanced_academic_programs (last visited Jan. 22, 2023) (listing Virginia Beach academies located at various high schools in the city, such as the Entrepreneurship and Business Academy at Kempsville High School, the Mathematics and Science Academy at Ocean Lakes High School, and others).

¹¹³ *Id.*

¹¹⁴ See Jude Schwalbach & James Selvey, *Here Are 10 Reasons School Choice Is Winning*, HERITAGE FOUND. (Jan. 24, 2019), <https://www.heritage.org/education/commentary/here-are-10-reasons-school-choice-winning> (lauding the various benefits of school choice for students, parents, and the school administration, such as ensuring school safety, providing options for impoverished students, increasing graduation rates, and saving taxpayer dollars).

¹¹⁵ See Corey A. DeAngelis & Adrian Moore, *Lockdown Highlights Why We Should Fund Students Instead of School Systems*, YOUR OBSERVER (Aug. 12, 2020, 8:00 AM), <https://www.yourobserver.com/news/2020/aug/12/lockdown-highlights-why-we-should-fund-students-instead-of-school-systems/> (explaining that funding should go directly to students to afford them greater freedom in educational choice); *Types of Private School Choice Programs*, AM. FED’N FOR CHILD., <https://www.federationforchildren.org/school-choice-in-america/programs-and-eligibility/> (last visited Jan. 22, 2023) (listing examples of programs that make school choice possible through public funds, such as Voucher Programs, Educational Savings Account Programs, Scholarship Tax Credit Programs, and Tuition Tax Credit Programs).

to fund the school choice?¹¹⁶ If a student decides to leave my school division or my school as a principal and go across town to another school—maybe a private school or what have you—does that money stay in the public school, or is it going to be funded in another way? School choice also is about local control,¹¹⁷ and local control is not what it used to be a few years ago.¹¹⁸ It's less now because of the inter- and intra-transitioning from school to school within school districts.¹¹⁹ But still, if I am in a community, and I move to that community for a particular elementary school—which, by the way, that was the only choice you had for school choice back then.¹²⁰ If you wanted your kids to attend a school, you move to the ZIP code, or right down the road, so your child can go to that school.¹²¹ Now it's different.

But with school choice, what if you move into that school area to be at that one neighborhood, and then a choice opens up and kids start leaving that school? What happens to your school? The verdict is still

¹¹⁶ *Compare How Are School Choice Programs Funded?*, EDCHOICE, <https://www.edchoice.org/school-choice/faqs/how-are-school-choice-programs-funded/> (last visited Jan. 22, 2023) (listing different avenues of school funding, such as Education Savings Accounts, School Vouchers, Tax-Credit Scholarships, Tax-Credit Education Savings Accounts, and Individual Tax-Credit and Deductions), with *The Debate Over School Choice*, CONST. RTS. FOUND., <https://www.crf-usa.org/bill-of-rights-in-action/bria-8-2-b-the-debate-over-school-choice> (last visited Feb. 17, 2023) (explaining that opponents of choice advocate for funding all schools rather than allowing some schools to be funded to the exclusion of others).

¹¹⁷ See LINDSEY M. BURKE, *ADVANCING SCHOOL CHOICE AND RESTORING STATE AND LOCAL CONTROL OF EDUCATION THROUGH A-PLUS 4* (2017) (explaining that local control of educational funding enables states to implement their own school choice programs more effectively); *Why the Fight for School Choice Matters*, CEAM, <https://www.ceamteam.org/fight-school-choice-matters/> (last visited Jan. 22, 2023) (identifying how school choice programs put control in the most local form of governance, the family).

¹¹⁸ Robert Rothman, *Historians Cite 'Steady Erosion' in Local Control*, EDUC. WEEK (Apr. 29, 1992), <https://www.edweek.org/education/historians-cite-steady-erosion-in-local-control/1992/04> (attributing the loss of local control in schools to an increase in factors like urbanization and federal education programs).

¹¹⁹ Intra-district school transferring requires significant supervision by the district. See Adrian B. Talley, *School Choice: A Study of the Factors that Motivated Parents to Select the No Child Left Behind School Choice Provision* (2014) (Ed.D. dissertation, George Washington University) (ProQuest) (highlighting the intra-district school transfer procedure, which requires district oversight). This divests some degree of control from the individual schools that the students are transferring between. See *Types of School Choice*, *supra* note 111 (explaining that some inter/intra-district transfer options allow schools to retain enough control to give students living within the school's district enrollment preference, implying that others are not provided even this level of control).

¹²⁰ See *School Choice: A User Guide*, MIT PRESS READER, <https://thereader.mitpress.mit.edu/school-choice-a-user-guide/> (last visited Jan. 23, 2023) (“For over 200 years, the vast majority of American parents ‘chose schools’ by moving to neighborhoods with the best schools.”).

¹²¹ *Id.*

out.¹²² We don't know if it does skim off the top best students. We do not know. For students that don't have parents with social capital—what I mean by that is, you can find low-income areas, single parent working, maybe didn't finish school themselves, they might not have the social capital, the with-it-ness, or really the education to know what forms to fill out for school choice.¹²³ That child could be trapped in a poor-performing school. So, with school choice is going to come an education piece that will have to be done for the public, for the teachers and for the community, as we move forward. But school choice is something that's very positive,¹²⁴ and I think it can help. Students could be struggling in one environment, maybe a virtual environment, a hybrid may be a better fit.¹²⁵ It gives choice to teachers to try other schools, other cultures to be inculcated to something different, and also puts pressure on every school out there to perform.¹²⁶ Because if you're a principal or superintendent in the division,

¹²² See *How Does School Choice Affect Public Schools' Funding and Resources?*, EDCHOICE, <https://www.edchoice.org/school-choice/faqs/how-does-school-choice-affect-public-schools-funding-and-resources/> (last visited Mar. 6, 2023) (suggesting that public schools may benefit from school choice programs by having lower overall costs when they retain state funding allocated to students who choose another form of education); Amy Hawn Nelson, *School Choice: Many Options but Conclusions Elusive*, EDUC. NC (Sept. 22, 2016), <https://www.ednc.org/school-choice-many-options-conclusions-elusive/> (describing school choice literature as “inconclusive” and noting that the impact of one plan is highly dependent on its “specific policies”); Frederick M. Hess, *Does School Choice “Work”?*, NAT'L AFFS. (2010), <https://www.nationalaffairs.com/publications/detail/does-school-choice-work> (describing inconsistent and inconclusive research on school choice, particularly in terms of student performance).

¹²³ See Osamudia James, *Risky Education*, 89 GEO. WASH. L. REV. 667, 695 (2021) (discussing how low-income families may be “limited by structural conditions” in which they lack the resources and education to “navigate enrollment obstacles” for school choice programs).

¹²⁴ See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2111 (2002) (describing how ten voucher studies have found there are “academic benefits” to voucher programs, which comports with studies showing higher levels of “socioeconomic integration” within private schools when voucher programs are in place). *But see* James, *supra* note 123, at 690–92 (arguing that school choice opens the door for parents to make decisions based on the demographic makeup of the school, perpetuating segregation).

¹²⁵ Cf. Yvonne M. Dutton, et al., *Assessing Online Learning in Law Schools: Students Say Online Classes Deliver*, 96 DENV. L. REV. 493, 507–08 (2019) (explaining that stronger learning outcomes are present for some in hybrid environments and discussing the benefits to the format, such as creating greater flexibility and collaboration between students).

¹²⁶ See Ryan & Heise, *supra* note 124, at 2073–74, 2086 (describing how charter schools face “the threat of closure” for inadequate performance; moreover, school choice allows students to choose freely regardless of geographic location or other limitations); see also Mary Clare Amselem, *How School Choice Could Improve Life for Teachers*, DAILY SIGNAL (Feb. 6, 2023, 3:03 PM), <https://www.dailysignal.com/2016/01/26/how-school-choice-could-improve-life-for-teachers/> (asserting that school choice provides flexibility for teachers because charter schools can provide more advantageous salaries than public schools, and education savings account funds can provide compensation for services like tutoring and online teaching).

and there's a charter school that students are flocking to, that will put pressure on you to perform as well.¹²⁷ However, I'll caveat this with: there are no guarantees. The verdict is still out. Do school-choice options work? Do vouchers work? Do charter schools work? All these other variations we don't know because it distills down to one thing in the classroom, and that's the quality of the teacher.¹²⁸ You can have a better teacher in a very poor-performing school that is doing outstanding things for his or her class right then and there, and those students are getting the best education you can imagine. You can have a charter school with a teacher that is not there for the right reasons.

Hon. Alice Batchelder: Coke?

Deputy AG Stewart: Charter schools in Virginia—it's not really a viable path. We have very few charter schools in this state.¹²⁹ The decision whether or not to permit a charter school is basically handled by the local school board level, and not surprisingly, most local school boards don't really favor charter schools.¹³⁰ There are some legal issues about whether the Board of Education or the Department of Education in Virginia can take a more active role in the selection of charter schools.¹³¹ So that's a big issue. I would say, personally, as a parent who sent my child both to public and private schools, I hear from a lot of private school parents that they are terrified of their private schools because if you are in public school, you can go to the school board meetings, you can pound on the table, you can be heard. Yes, you might be accused of being a domestic terrorist—

¹²⁷ See Ryan & Heise, *supra* note 124, at 2086 (explaining how school choice enables “schools . . . to compete on the basis of services”).

¹²⁸ See Noah B. Lindell, *Old Dog, New Tricks: Title VI and Teacher Equity*, 35 YALE L. & POL'Y REV. 189, 190, 194 (2016) (describing the measurable improvement that high teacher quality yields in education outcomes).

¹²⁹ See *What to Know About the Charter School Debate*, VPM NEWS (Feb. 6, 2023, 3:29 PM), <https://vpm.org/news/articles/28880/what-to-know-about-the-charter-school-debate> (noting that Virginia only has seven charter schools); *Charter Schools and Campuses by State by Year*, NAT'L ALL. FOR PUB. CHARTER SCHS. (Feb. 6, 2023, 3:43 PM), <https://data.publiccharters.org/digest/tables-and-figures/charter-schools-year/> (showing that only five American jurisdictions states have fewer charter schools than Virginia, while twenty jurisdictions have over one hundred).

¹³⁰ See *What to Know About the Charter School Debate*, *supra* note 129 (“It’s like asking McDonald’s to decide whether . . . they want Five Guys to open up. It’s never going to happen . . .”).

¹³¹ See Katherine E. Lehnen, Comment, *Charting the Course: Charter School Exploration in Virginia*, 50 U. RICH. L. REV. 839, 855, 858–60 (2016) (explaining that Virginia’s charter school law gives local school boards the exclusive authority to approve charter schools, and although it does require authorizers to report to the state Board of Education, the board cannot sanction but only confirm that statutory criteria are met).

and that's frightening,¹³² but in private school, if you go to your school administration and you try and advocate for your views, your child can be separated from the school.¹³³ You can be excommunicated from the school community, and there are a lot of parents that we talk to who kind of are begging the state to get involved and set some kind of outer boundaries and what can happen in the private school.¹³⁴ That gets into a lot of issues. Maybe that's a good idea, maybe that's a bad idea.

Another quick statistic I'll give about school choice when it comes to the pandemic: in September 2020, ninety-two percent of Catholic schools had reopened at least in part¹³⁵—I don't have the statistic for other private schools—but that was compared at the time with only forty-three percent of public schools.¹³⁶ It shows that I think it really is healthy to have a mix—to give people choices. And I think the pandemic more than anything really demonstrated that.

Hon. Alice Batchelder: Tyson?

Mr. Langhofer: As Kurt said, I think the issue of the success of charter schools, and the ultimate success in the battle of the constitutionality of charter schools, is still to be determined. I'm a big advocate of charter schools, and I do think that, ultimately, the argument is better that they are constitutional, and you do have the right to do that, and it's not somehow violating any rules.¹³⁷ The big obstacle in my mind

¹³² See John Malcom, *Are Parents Being Tagged as "Domestic Terrorists" by the FBI? Justice Department Needs to Show Its Cards*, HERITAGE FOUND. (Jan. 24, 2023, 7:52 PM), <https://www.heritage.org/crime-and-justice/commentary/are-parents-being-tagged-domestic-terrorists-the-fbi-justice> (describing how the National School Boards Association wrote a letter to President Biden claiming that disturbances in school board meetings by upset parents over "mask mandates and critical race theory curricula" are "equivalent to a form of domestic terrorism").

¹³³ Cf. James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C.L. REV. 1321, 1338–40 (1996) (noting the significant independence of private schools from state regulation, which allows them broad discretion in structuring enrollment contracts, giving parents less leeway to challenge school operations and teachings).

¹³⁴ See Eric A. DeGross, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363, 379–80 (2003) (arguing that states have an interest in regulating private schools to ensure students receive an adequate education and certain standards are met, which may not exclude certain disciplinary actions).

¹³⁵ KATHLEEN PORTER-MAGEE ET AL., NAT'L CATH. EDUC. ASS'N, *CATHOLIC SCHOOL ENROLLMENT BOOMED DURING COVID. LET'S MAKE IT MORE THAN A ONE-TIME BUMP* 7 (2022).

¹³⁶ See *id.*

¹³⁷ See Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PA. ST. L. REV. 43, 47–51 (2004) (discussing how state constitutional control provisions and statutory classifications of charter schools can create constitutional issues, but these

as I've followed the debate for quite a long time in the court systems is the public¹³⁸—unfortunately, as attorneys, we'd like to think that the legal argument is all about the law, but it's not always. There is the kind of the public sentiment side, and I think there is more support now for the charter schools and for alternatives to public school systems.¹³⁹ Because of this, and I think that is going to impact ultimately the determination in the courts, because I think the argument on the other side is, "This is going to destroy public schools."¹⁴⁰ That's always been this big fear. The teachers' unions have said, "This will destroy public schools."¹⁴¹ That's been a big fear that's been used there, and I think as people realize what the public schools are teaching and kind of the bankruptcy of a lot of that stuff, they might be okay with that now, and okay with other alternatives.

I'd lived in Arizona for three years. Arizona is a huge school choice state.¹⁴² It just passed the first actual law that allows you to basically take your tax money and go to any school, essentially, and it's being challenged.¹⁴³ So we'll see what happens with that. But, in general, it was very popular there in Arizona—the school choice options there.¹⁴⁴ The

concerns can be avoided through clear drafting to establish that the charter school operates under state-level supervision and control).

¹³⁸ Matt Barnum, *Critics of Charter Schools Say They're Hurting School Districts. Are They Right?*, CHALKBEAT (Jan. 29, 2023, 5:17 PM), <https://www.chalkbeat.org/2019/6/11/21108318/critics-of-charter-schools-say-they-re-hurting-school-districts-are-they-right> (addressing public controversy over charter schools due to a belief that they deprive school districts of resources).

¹³⁹ See *Public Favorability for Choice Reform Trends*, EDCHOICE, <https://www.edchoice.org/what-we-do/research/schooling-in-america-polling-dashboard-2/> (last visited Feb. 20, 2023) (showing largely increasing support among the general population of charter schools and other school choice programs over the last decade).

¹⁴⁰ See Jonathan P. Krisbergh, *Marginalizing Organized Educators: The Effect of School Choice and 'No Child Left Behind' on Teacher Unions*, 8 U. PA. J. LAB. & EMP. L. 1025, 1034 (2006) (describing concern that school choice will eventually eradicate public education since it pulls away funding from public schools and allocates it toward private institutions).

¹⁴¹ See *id.* at 1034–35 (explaining how teacher unions consider school choice "public enemy number one" and have zealously fought against its implementation).

¹⁴² See Nicole Stelle Garnett, *A Radical Step in the Right Direction*, CITY J. (Oct. 2, 2022), <https://www.city-journal.org/arizona-embraces-universal-school-choice> (discussing Arizona's extensive embrace of school choice); *Charter Schools and Campuses by State by Year*, *supra* note 129 (illustrating that Arizona has a total of 559 charter schools, which is the fourth most in the nation after California, Texas, and Florida).

¹⁴³ See Arizona Empowerment Scholarship Accounts Act, 2022 Ariz. Sess. Laws §§ 15-2401–15-2403; Laura Williams, *Take the Money and Run: Taxpayers in AZ Will Fund Students, Not Schools*, AM. INST. FOR ECON. RSCH. (July 26, 2022), <https://www.aier.org/article/take-the-money-and-run-taxpayers-in-az-will-fund-students-not-schools/> (describing Arizona's law that gives each school-aged child \$6500 of taxpayer money to be used toward any school of the parent's choosing notwithstanding criticism over the loss of public school funding).

¹⁴⁴ See *Do Residents of Arizona Support School Choice Policies*, EDCHOICE, <https://edchoice.morningconsultintelligence.com/reports/arizona.pdf> (Feb. 6, 2023) (illustrating that over seventy percent of parents of K-12 children support school choice policies in Arizona and at least sixty percent of all adults in Arizona support the policies).

charter school system [is] very robust, and they had really, really good results from them.¹⁴⁵

So, I ultimately think that the charter school argument will prevail. It may be a little while still, but I think the public sentiment is moving that way, and I think you're seeing more and more alternatives—not just a single charter school, but lots of different alternatives,¹⁴⁶ and I think the parents need that. Frankly, the really sad part is the people that are most hurt by the lack of choice are the poor and underserved.¹⁴⁷ Yet, the teachers unions say, “Oh, we need to help those people.”¹⁴⁸ No, they're keeping them back.¹⁴⁹ The ones that can't afford to send their kid to private school. Many people cannot.¹⁵⁰ I can afford to homeschool because my wife can stay home. Many people cannot.¹⁵¹ They need those choices,

¹⁴⁵ See *National Charter School Law Rankings & Scorecard – 2022*, CTR. FOR EDUC. REFORM (2022), <https://edreform.com/wp-content/uploads/2022/05/cer-charterlaws-scorecard-2022.pdf> (showing that Arizona's charter school system ranked first in the nation based on its charter authorizers, growth, operations, and equity).

¹⁴⁶ See James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 844 (2007) (discussing the growing popularity of private education and school choice options, like charter schools, private schools, magnet schools, alternative schools, and specialty schools); Jon England, *Parents Want Non-Traditional School Options*, LIBERTAS INST. (July 29, 2022), <https://libertas.org/education-empowerment/parents-want-non-traditional-school-options/> (describing the decline in traditional learning and the rise of asynchronous education, microschoools, homeschooling, and hybrid learning).

¹⁴⁷ Cf. Brian P. Marron, *Promoting Racial Equality Through Equal Educational Opportunity: The Case for Progressive School-Choice*, 2002 BYU EDUC. & L.J. 53, 70 (2002) (“These choice proposals seek to grant . . . freedom to the impoverished citizens . . .”).

¹⁴⁸ See, e.g., Amanda Litvinov, *5 Ways Strong Educator Unions Help Public Schools*, NEA (Jan. 28, 2022), <https://www.nea.org/advocating-for-change/new-from-nea/5-ways-strong-educator-unions-help-public-schools> (asserting that teachers unions are working to help underserved minority groups by bargaining for and demanding equal treatment in discipline policies and advanced class accessibility).

¹⁴⁹ See Joseph P. Viteritti, *Stacking the Deck for the Poor: The New Politics of School Choice*, BROOKINGS (June 1, 1996), <https://www.brookings.edu/articles/stacking-the-deck-for-the-poor-the-new-politics-of-school-choice/> (discussing how teachers unions have hindered disadvantaged students' ability to access a quality education by blocking attempts to strengthen school choice policies).

¹⁵⁰ See Psyche Pascual, *Should I Send My Child to a Private School?*, GREAT!SCHOOLS.ORG (Nov. 17, 2022), <https://www.greatschools.org/gk/articles/private-schools-parochial-schools/> (stating that enrollment in private schools has declined in recent years due to an increase in tuition, which averages \$19,100 nationwide); Richard J. Murnane et al., *Who Goes to Private School?*, EDUC. NEXT (Feb. 21, 2023, 8:31 PM), <https://www.educationnext.org/who-goes-private-school-long-term-enrollment-trends-family-income/> (demonstrating that private school enrollment among children from low-income families over the last half century has remained consistently around five percent, while the same statistic has steadily decreased among children from middle-income families, dropping from twelve percent in 1968 to only seven percent in 2013).

¹⁵¹ See Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 U. BALT. L. REV. 57, 104 (2016) (explaining that only well-off families can typically afford to homeschool, and single-parent or low-income families usually cannot, leaving them no choice other than public school).

and I think the public is asking for them more. I do ultimately think that's where we're going to move.¹⁵² And these last several years have been a big—I think this is the biggest opportunity in my lifetime to push forward some of those things, and I've talked with some large charter school organizations in the country that are looking to capitalize on that.¹⁵³

Hon. Alice Batchelder: Interestingly, just this week, I saw that the effort in Arizona to block any expansion of the school voucher system had failed.¹⁵⁴ They were not able to get the signatures on the petitions that they needed,¹⁵⁵ and I would be tempted to say, “Well, they failed for now, but that effort is probably not dead.” But on the other hand, it's interesting to see that the public wasn't interested in signing on to trying to block it from a referendum-type perspective.

Mr. Langhofer: Yeah, I'm not terribly surprised. Like I said, overall, I felt like there was a pretty broad support for school choice in Arizona, even though it was the most robust in the country.¹⁵⁶

Hon. Alice Batchelder: Speaking as the grandparent of eight homeschooled grandchildren, I was tempted to move into homeschooling here, but I think instead, probably we should move on to the realm of higher education—education on the college and graduate level. One question that that comes to mind—and it's already been touched on both this morning in the first panel and certainly here—is whether teachers have a right not to use a student's preferred pronoun.

¹⁵² See *What States Passed School Choice Policies in 2022*, STATE POL'Y NETWORK (June 9, 2022), <https://spn.org/articles/what-states-passed-school-choice-policies-in-2022/> (suggesting that the nation is moving toward school choice by highlighting various states' recent school choice legislation on academic transparency and reviewing access to charter schools and scholarship programs).

¹⁵³ Cf. *'School Choice' Push Strengthens Voucher, Charter School Proposals Across the US*, AL.COM (Jan. 27, 2023, 9:16 AM), <https://www.al.com/news/2023/01/school-choice-push-strengthens-voucher-charter-school-proposals-across-us.html?outputType=amp> (stating that with the growing popularity of school choice, “school choice advocates are trying to capitalize on discontent with the public-school system”).

¹⁵⁴ See Bob Christie, *Huge Arizona School Voucher Plan in Effect After Foes Fail*, AP NEWS (Sept. 30, 2022), <https://apnews.com/article/business-education-arizona-doug-ducey-7ebd4c9149508e9875f47e67bdc0ef69>.

¹⁵⁵ *Id.* (stating that those attempting to block Arizona's school choice expansion law secured far fewer votes than the approximately 119,000 needed for their petition to prevent the law from taking effect).

¹⁵⁶ See *National Charter School Law Rankings & Scorecard – 2022*, *supra* note 145 (demonstrating that in 2022 Arizona's charter school program outranked every other state in the country); *Empowerment Scholarship Accounts*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/arizona-empowerment-scholarship-accounts/> (last visited Mar. 6, 2023) (describing how Arizona's education savings account scholarship program is the most “expansive” in the country).

I would have to say, this is a particularly hard issue for me. I started my adult life as an English teacher, and I know what pronouns are.¹⁵⁷ I think there are lots out there who don't know what pronouns are. But this is now descended all the way down to the elementary and secondary levels as well.¹⁵⁸ Very often this issue is being categorized as one of religious persuasion.¹⁵⁹ But I wonder if that's really fair or accurate. Whether maybe this is more a matter of objective truth, and a matter also of the First Amendment right to free speech.¹⁶⁰ Which brings me to another question—which I think we can kind of fold into this—to what extent can free exercise—that is your parents' right to say, “Look, you can't do this to my child, or make me do this, or prevent me from knowing that you're doing this with regard to pronouns,” for example—and free speech. How can those two things be separated or distinguished, or can they be? That's too many questions all rolled into one, but I know we'll be able to separate them out, and so I was thinking perhaps I would start with Tyson.

Mr. Langhofer: I first became aware of this issue back in 2016. It'd been about a year after *Obergefell*,¹⁶¹ a year after I joined ADF. A professor

¹⁵⁷ See generally *Pronoun*, MERRIAM-WEBSTER DICTIONARY (rev. ed. 2022) (defining “pronoun,” first, as “any of a small set of words . . . that are used as substitutes for nouns or noun phrases . . .” and, second, as a “third person personal pronoun[] . . . that a person goes by”); Laurel Wamsley, *A Guide to Gender Identity Terms*, NPR (June 2, 2021, 6:01 AM), <https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq> (providing a glossary of terms as they are used in modern parlance when discussing gender identity, including pronouns in reference to one's gender identity).

¹⁵⁸ See, e.g., *Elementary School Teachers Say 'No' to Parents' Wishes They Refer to Students by Pronouns Given at Birth*, FOX NEWS (May 12, 2022, 3:45 PM), <https://www.foxnews.com/media/elementary-school-teachers-parents-wishes-students-pronouns> (discussing how a group of elementary teachers stated that they would decline to call students by their pronouns given at birth if it conflicted with the student's wishes).

¹⁵⁹ See Gregory A. Smith, *Views of Transgender Issues Divide Along Religious Lines*, PEW RSCH. CTR. (Nov. 27, 2017), <https://www.pewresearch.org/fact-tank/2017/11/27/views-of-transgender-issues-divide-along-religious-lines/> (showing that Christians tend to think gender is determined at birth and those who are not religious think gender is not necessarily known at birth); Paige Smith, *Pronouns Spur Fight over Transgender, Religious Work Rights*, BLOOMBERG L., <https://news.bloomberglaw.com/daily-labor-report/pronouns-prompt-fight-over-transgender-religious-rights-at-work> (Feb. 18, 2020, 11:12 AM) (discussing litigation over whether public employees must honor people's pronouns or can choose not to for religious reasons).

¹⁶⁰ See Brett Kunkle, *Do Pronouns Matter?*, STAND TO REASON (Sept. 21, 2021), <https://www.str.org/w/do-pronouns-matter-> (arguing that Christians should not use preferred pronouns because pronouns reflect objective truth, and we are called to speak truth); *Meriwether v. Hartop*, 992 F.3d 492, 501, 511–12 (6th Cir. 2021) (holding that a university violated a professor's First Amendment right to free speech when it attempted to compel the professor to use a student's chosen pronouns).

¹⁶¹ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

called me and said, “Hey, Paul, I’ve got this issue.” There was no policy.¹⁶² The school had a policy that basically just said, “Nondiscrimination. Can’t discriminate on any basis—race, religion, sexual orientation, gender identity,” but no pronouns.¹⁶³ But a student was demanding that he use male pronouns for female student. He said, “Look, I’ll use whatever name the student wants. I just want to avoid the pronoun. I don’t want to say something that I believe is untrue.” So, this particular professor, Dr. Meriwether, Shawnee State University, was a philosophy professor—professor of religion and philosophy, and specifically Aristotelian philosophy—the discovery of truth.¹⁶⁴ And he said, “I want to teach my students that there is absolute truth, and you can discover that. If they know that I am being forced to say something that I believe is untrue—objectively—I really undermine my entire teaching purpose.”¹⁶⁵ So, he grounded his objections in both his philosophical and his religious beliefs, and there was no really way to distinguish those. They were intertwined very clearly. He was trying to take the best approach he could. “I don’t want to offend the student. I don’t have any problem using whatever name, because I don’t know that there’s any truth in a name. But there’s truth in pronouns. I’m saying, this person is biologically that sex, so just don’t make me say that.” In 2016, we were able to resolve that.¹⁶⁶ In 2018, another issue [came up], and we were unable to resolve it.¹⁶⁷

¹⁶² See Megan Henry, *Shawnee State to Pay Professor \$400,000 in Settlement of Student’s Preferred Pronouns*, COLUMBUS DISPATCH, <https://www.dispatch.com/story/news/2022/04/19/shawnee-state-pay-professor-400-000-settle-pronoun-lawsuit/7358716001/> (Apr. 19, 2022, 11:14 AM) (stating that “[t]here was no specific preferred pronoun policy” at the university). *But see Meriwether*, 992 F.3d at 498–99 (finding that the university informed its faculty via email that they must refer to students by their preferred pronouns and that it claimed this fell under the school’s existing policy against discrimination based on gender identity).

¹⁶³ See *Meriwether*, 992 F.3d at 500–01 (describing how the school’s policy prohibits discrimination based on gender identity, and gender identity is defined as a “person’s innermost concept of self as male or female or both or neither”).

¹⁶⁴ See *id.* at 498 ((detailing Dr. Meriwether’s twenty-five-year career at Shawnee State University and highlighting his contributions, including how he designed its bachelor’s degree program in Philosophy and Religion).

¹⁶⁵ See *id.*

¹⁶⁶ Plaintiff’s Verified Complaint at 15–17, *Meriwether v. Trs. of Shawnee State Univ.*, No. 1:18-cv-00753-SJD, 2020 WL 704615 (S.D. Ohio Feb. 12, 2020) (noting that after receiving notice of Shawnee State’s new policies for transgender students in 2016, Dr. Meriwether was informed by administration that there was no formal policy relating to transgender students outside of the non-discrimination policy); see *Meriwether*, 992 F.3d at 499 (explaining how the university adopted the pronoun policy that violated Dr. Meriwether’s religious beliefs back in 2016, but “Meriwether continued to teach students without incident” until 2018).

¹⁶⁷ See generally *Meriwether*, 992 F.3d at 499–501 (explaining the events, starting in 2018, that led Shawnee State University to suspend and terminate Dr. Meriwether’s employment for not referring to a biological male student with preferred female pronouns).

So, we had to sue, and because in this particular case, the student remained in class the entire time, got a good grade, didn't make a single other complaint against Dr. Meriwether—not a single one.¹⁶⁸ The only issue was “you use pronouns for other students, but you use my name only.” That created a hostile environment, and the school agreed and wrote a letter of discipline in his record, and said, “If you do this again you could get fired.”¹⁶⁹ So, we filed a lawsuit under [the] First Amendment—both free exercise and free speech and some other grounds—in [the] Southern District of Ohio.¹⁷⁰ We lost on a motion to dismiss—dismissed all of our claims.¹⁷¹ We appealed that to the Sixth Circuit, and last year we got a great opinion from Judge Thapar on both free exercise and free speech grounds.¹⁷²

So, it does implicate both. Let me go back and say, as we've talked about earlier, I think you know I've talked with Christians that have different opinions on whether you should use pronouns or not, you can maybe come to different conclusions here. That's not the argument. The argument is: should the Government be able to tell you that you must speak a specific word?¹⁷³ And most of my clients believe that this is an ideological choice. When you're saying that you get to choose your pronouns, you're saying that gender is fluid, that sex is not immutable. That's the message you're sending, and you're not doing it just at the university level, but this is now down all the way through K-12.¹⁷⁴ Kindergarteners, first-graders get to choose this; you think about the confusion that causes. Many teachers have conscientious objections.¹⁷⁵ I've

¹⁶⁸ See *id.* at 500 (noting the student's excellent performance in Dr. Meriwether's class and that although the student did subsequently complain to administration about Dr. Meriwether's refusal to use female pronouns when calling on the student in class, there were no complaints on other grounds).

¹⁶⁹ See *id.* at 500–01 (explaining how Dr. Meriwether's solution of referring to the student without using pronouns resulted in a threat of termination from the administration, which eventually occurred).

¹⁷⁰ *Meriwether*, 2020 WL 704615, at *1–2.

¹⁷¹ *Id.* at 2–3.

¹⁷² *Meriwether*, 992 F.3d at 498, 511–512, 517.

¹⁷³ See *id.* at 509–10 (raising a potential compelled speech issue); cf. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (explaining how “validity of the asserted power to force an American citizen publicly to profess any statement of belief, or to engage in any ceremony of assent to one, presents questions of power”).

¹⁷⁴ See CATHY RUSE, *SEX EDUCATION IN PUBLIC SCHOOLS: SEXUALIZATION OF CHILDREN AND LGBT INDOCTRINATION* 9, 12–14, 24, 26 (2020) (describing the efforts of influential groups such as the Human Rights Campaign and the National Education Association to infuse K-12 education with concepts like sexual orientation and gender identity and highlighting the many objections parents have to the ways schools promote these concepts).

¹⁷⁵ Teachers in elementary, middle, and high school often feel that acquiescing to their districts' pronoun policies would violate their sincerely held religious beliefs. See, e.g., *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-cv-04015-HLT-GEB, slip op. at 2–4 (D. Kan.

had non-Christians call me, and I've had Christians call me. They say the same thing, "I don't want to cause confusion, and I don't want to say something that I think is untrue." I think that is a bedrock principle—the First Amendment.

The government—Mallory mentioned *Barnette*¹⁷⁶— that's one of the best articulations—"[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion . . ."¹⁷⁷ That's really the heart of the issue. It seems silly. This is a pronoun. Just this one little word, this pronoun, but it really strikes at the heart of who we are as Americans and what does our First Amendment really say. But the complexity of it is that you have the public. You have a government employer. They have more rights over employees.¹⁷⁸ Teachers have rights.¹⁷⁹ Parents have rights.¹⁸⁰ Students have rights.¹⁸¹ The school has rights on curricular choices.¹⁸² So there's a lot of competing rights that come in, and it tries to make it complex. But, ultimately, we believe that there is a good solution, that we can live in a pluralistic society where you cannot force teachers to say things they think are untrue, but they can still treat their students with dignity and respect.

Deputy AG Stewart: Can I jump in on this one?

Hon. Alice Batchelder: Please do. You were next on my list.

May 9, 2022) (a middle school math teacher in Kansas); *Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 833–34 (S.D. Ind. 2020) (a high school music and orchestra teacher in Indiana); *Loudoun Cnty. Sch. Bd. v. Cross*, No. 210584, 2021 WL 9276274, at *1 (Va. Aug. 30, 2021) (an elementary school physical education teacher in Virginia).

¹⁷⁶ *Barnette*, 319 U.S. at 624.

¹⁷⁷ *Id.* at 642.

¹⁷⁸ The Government can restrict the speech of its employees when they speak in an official capacity more than it can the speech of private citizens, but government employees also have First Amendment protections that private employees do not enjoy, in that the government cannot fire them for their speech when they speak as citizens on issues of public concern. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022).

¹⁷⁹ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (establishing the landmark holding that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Kennedy*, 142 S. Ct. at 2416, 2423 (protecting Coach Kennedy's First Amendment right to pray on the football field after games).

¹⁸⁰ See *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (establishing that the rights of parents to teach and educate their children are "within the liberty of the [Fourteenth] Amendment"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (reaffirming the *Lochner* era principle that parents have the right and duty to raise and educate their children).

¹⁸¹ See *Tinker*, 393 U.S. at 511, 513 (holding that students have constitutional rights to express their views as long as their speech does not "materially and substantially disrupt the work and discipline of the school").

¹⁸² See *Bd. of Educ., Island Trees Union Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) (affirming that local school boards have certain rights to set their own curriculums).

Deputy AG Stewart: I don't want to demoralize our audience, but I also think we need to be understanding of what's actually happening in the landscape right now when we're talking about truth and the right to be able to speak the truth. The definition of truth is changing before our eyes. People are changing the definition of words in the dictionaries. So, what is going to be cited against you is going to be evidence of "truth." The American Medical Association said in 2021 that the AMA—which should be looked to as a guiding source of medical consensus—has come out and said they are opposed to state legislation that would prohibit gender transition-related care for minors, including "mental health counseling, non-medical social transition, gender-affirming hormone therapy, and[] gender-affirming surgeries" for minors.¹⁸³ This is the American Medical Association. You have government docents—passports are changing, whether it's male, female, other.¹⁸⁴ This is all happening. So, to kind of answer the judge's question, is this really the realm of free expression? Is this about truth? And what are we trying to fight here? I believe in the current environment that religious expression may very well be the place to have these battles, because the definition of truth and science and words outside religious institutions is rapidly changing, and the silent majority is really not engaged in this discussion.¹⁸⁵

Hon. Alice Batchelder: Before I turn this over to Kurt, that sort of implicates a question that I asked at the very outset, which is: are—in the current world—science and consensus coterminous? Are they the same thing? Because the AMA has rather indicated that they are, as you just pointed out. So, what do we do about that as parents?

Deputy AG Stewart: I don't have the right answer to it. I think what we can do, and what I think is a sign for optimism, is that organizations like the ABA or the AMA—they're not government institutions. They're professional organizations, and I think ever being looked at as more advocacy organizations. So, I think some of their influence in the public

¹⁸³ Letter from Dr. James L. Madara, M.D., Chief Exec. Officer & Exec. Vice President of the Am. Med. Ass'n, to Mr. Bill McBride, Exec. Dir. of the Nat'l Governors Ass'n (April 26, 2021), <https://www.ama-assn.org/press-center/press-releases/ama-states-stop-interfering-health-care-transgender-children>.

¹⁸⁴ *E.g.*, Press Statement, Anthony J. Blinken, Secretary of State, U.S. Dep't of State, X Gender Marker Available on U.S. Passports Starting Apr. 11 (Mar. 31, 2022), <https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/>.

¹⁸⁵ See DAVID CLOSSON, BIBLICAL PRINCIPLES FOR POLITICAL ENGAGEMENT 1–2 (2022) (instructing believers on the best way to be engaged in the public sphere and warning that although Christians have the numbers to make a large political impact, those who do not apply the gospel to the issues of the day risk losing influence). See also PRESTON SPRINKLE, EMBODIED: TRANSGENDER IDENTITIES, THE CHURCH & WHAT THE BIBLE HAS TO SAY 59–62 (2021).

domain is lessening. These are being seen as more political.¹⁸⁶ But where we really have the opportunity to address this is in the ballot box. I mean, you have to vote for people so that you have balance in the state legislatures and balance in statewide elected officials. I'm not even saying it would be great if it were all Republican representatives or all Democrats. I think you need that—just like we have in the courtroom, right? You have to have that debate in the public square about what's happening, and I think the place that's really going to happen is in the state legislatures, where you can actually define terms as a matter of state law and move away from a lot of these professional associations.

Hon. Alice Batchelder: Kurt?

Dean Kreassig: Great points. I'm looking at this, also, as our country in regard to the family. So, I take a look at teachers right now. It's not the same as teaching twenty years ago where little William wanted to be called "Billy" or Tamara want to be called "Tam," or maybe even Edward said, "Please use my middle name." This is something totally different. Kids may not see that. But when we look at what our teachers have to do with the record keeping and everything like that. In fact, let me read you something from—this is the model policies for the treatment of transgender students in public elementary and secondary schools for the state of Virginia. It says, "When a student asserts that they have a name [or pronoun affirming their gender identity, school staff should abide by the student's wishes as to how to address the student A school employee's intentional and persistent refusal to respect a student's asserted name and pronoun is considered discriminatory."¹⁸⁷ And then it goes on to say, "In the situation where parents or guardians of a minor student (under [eighteen] years of age) do not agree with the student's request to adopt a new name and pronouns, school divisions will need to determine whether to respect the student's request [or] abide by the parent's wishes"¹⁸⁸ Can you imagine that? When we think about this, and we look at pronouns—and again, I think that the Christian front on

¹⁸⁶ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2267, 2279 (2022) (describing how in 1973, the ABA and AMA influenced the Court to read an unenumerated right to abortion into the Constitution but ultimately rejecting those lobbying efforts by overruling *Roe*).

¹⁸⁷ Here, Dean Kreassig was reading from the 2021 guidelines, which are no longer legally binding. VA. DEP'T OF EDUC., MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA'S PUBLIC SCHOOLS 5, 12 (2021). In 2022, Governor Youngkin's administration abandoned these guidelines and published new ones to counter the "cultural and social transformation in schools." VA. DEP'T OF EDUC., 2022 MODEL POLICIES ON THE PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA'S PUBLIC SCHOOLS 1 (2022).

¹⁸⁸ MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA'S PUBLIC SCHOOLS, *supra* note 187, at 13.

this is the family unit, really talking with kids early—we have as a nation, I think a lot of parents have—and I’ll use that word—“shirked” their responsibilities. They don’t engage the children in conversations at the dinner table anymore about their school day or what’s happening.¹⁸⁹ And you’d be surprised how many parents will come to meetings and have—they had no idea this was going on with their child.¹⁹⁰ That has to change. I think the fabric of who we are as families in our country has to change. To go back to raising kids and having those conversations, and really talking about Christ with kids early.¹⁹¹ Because, again, the way I see this, when a teacher is forced to use pronouns, you are bearing false witness, and a child to make that determination—we’re seeing this now, where students who have transitioned early as youngsters now are transitioning back.¹⁹² And you hear those stories. Now they are blaming Mom and Dad, “Why did you let me do this? Why didn’t you counsel me on this?” So, I think there’s a need in our country, more ever now for Christ, but also for good attorneys, like you, to find out where the best place is for this to be met.

Hon. Alice Batchelder: Which brings me to the next question that I wanted to throw out to you three, which is: we’re talking about free speech; does free speech—and I’m thinking particularly in terms now of the students, but for all of the various entities and constituencies we’ve been talking about—does that include the right of students and others to hear diverse or divergent views? And if it doesn’t include that right to hear, what impact does that have on education? One of the examples that comes to mind right now is in the in the field of medical education, where California—I’m sure you’re all aware now—has this wonderful new law

¹⁸⁹ See Michelle Watson Canfield, *How to Talk with Your Daughter About Sexual Orientation, Gender-Identity, and Same-Sex Attraction*, FOCUS ON THE FAM. (Jan. 19, 2022), <https://www.focusonthefamily.com/parenting/how-to-talk-with-your-daughter-about-sexual-orientation-gender-identity-and-same-sex-attraction/> (describing the difficulties that keep many parents from talking about issues of gender and sexuality and providing biblical advice for Christian fathers to address those issues with their daughters); cf. David Brooks, *The Nuclear Family Was a Mistake*, ATLANTIC, Mar. 2020, at 56, 57 (examining the decline of the nuclear family and using the image of broken relationships around a dinner table).

¹⁹⁰ Loudoun County Public Schools, *10-22-2019 4th Tuesday School Board Meeting*, VIMEO, at 20:55 (Oct. 23, 2019), <https://vimeo.com/368135621> (livestreaming a school board meeting in Loudoun County, VA, where over 100 parents came to give comment, many of them were in response to the sexual content in public school libraries).

¹⁹¹ See *Proverbs* 22:6 (exhorting parents to “[t]rain up a child in the way he should go,” according to Christ-centered principles, so that when that child grows up, “he will not depart from it”).

¹⁹² See, e.g., Rikki Schlott, *‘I Literally Lost Organs:’ Why Detransitioned Teens Regret Changing Genders*, N.Y. POST (June 18, 2022, 9:01 AM), <https://nypost.com/2022/06/18/detransitioned-teens-explain-why-they-regret-changing-genders/> (mentioning the stories of people who transitioned as teenagers and explaining why they came to regret that decision).

where, if physicians disseminate, I'm quoting now, "false information that is contradicted by contemporary scientific consensus contrary to the standard of care," they can lose their licenses.¹⁹³ So what does that mean for the future of education in the medical and scientific fields? And maybe sort of attached to that, what impact that has on the future of Christianity and higher education? If we say that the right of free speech doesn't include the right to hear diverse views, what does that really mean? And I'm not picky on this one. Anybody jump in.

Deputy AG Stewart: I'll jump in for a moment. I do feel like we can take advantage of some of the activities that are happening on college campuses and in particular the new emphasis on diversity, equity, and inclusion. I know there are a lot of conservatives who want to stamp that out.¹⁹⁴ They want to remove the administrators and shrink their budgets¹⁹⁵ and, you know, question whether or not that's realistic. But maybe there's an opportunity to really leverage this discussion about DEI as the first panel discussed. I mean, what does DEI mean? And what does

¹⁹³ See CAL. BUS. & PROF. CODE § 2270(a)(4) (current through 2023) (defining as unprofessional conduct the distribution of "misinformation and disinformation" about the COVID-19 vaccines); *id.* § 2234 (allowing the Medical Board of California to review the case of a doctor licensed in the state charged with unprofessional conduct). *Id.* § 2227(a)(1) (permitting revocation of one's license to practice medicine as a power of the Board in its review). Within a month of the law taking effect, it was enjoined by a Federal Judge in the Eastern District of California. *Høeg v. Newsom*, No. 2:22-cv-01980 WBS AC (E.D. Cal. Jan. 25, 2023).

¹⁹⁴ See, e.g., Exec. Order No. 13,950, Combating Race and Sex Stereotyping, 85 Fed. Reg. 60,683, 60,683–85 (Sept. 28, 2020) (stating that the purpose of the executive order from President Trump is to stop divisive race and sex based training in the federal government; "[I]t shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes. In addition, Federal contractors will not be permitted to inculcate such views in their employees."); CHRISTOPHER F. RUFO ET AL., ABOLISH DEI BUREAUCRACIES AND RESTORE COLORBLIND EQUALITY IN PUBLIC UNIVERSITIES 1–12 (2023) (providing model legislation that would eliminate DEI offices on campus, mandatory diversity trainings, mandatory diversity statements from faculty, and preference in admissions for protected categories like race); Adrienne Lu, *Race on Campus: Diversity Efforts Under Fire*, CHRONICLE HIGHER EDUC. (Jan. 31, 2023), <https://www.chronicle.com/newsletter/race-on-campus/2023-01-31> ("The diversity bureaucracy in higher education is under attack. In recent months, conservative critics have taken aim at the infrastructure built to promote and support diversity, equity, and inclusion in higher education, arguing that it is an attempt to indoctrinate students, a waste of tax dollars, and in some cases, illegal.").

¹⁹⁵ See, e.g., RUFO, *supra* note 194 (proposing model legislation specifically aimed at abolishing the DEI administrative apparatus of a public university: "Public or land-grant institutions of higher education in the state of [STATE] may not expend appropriated funds or otherwise expend any funds derived from bequests, charges, deposits, donations, endowments, fees, grants, gifts, income, receipts, tuition, or any other source, to establish, sustain, support, or staff a diversity, equity, and inclusion office or to contract, employ, engage, or hire an individual to serve as a diversity, equity, and inclusion officer.").

diversity mean? What is having a marketplace of ideas? Are veterans represented, are Christians represented, are rural and agricultural communities represented on these faculty committees and in hiring? And so, I think sometimes rather than trying to fight the efforts that are becoming parts of the structure of our educational institutions, we can use those structures to expand the dialogue in a way that's actually more inclusive. Inclusive in the way that we used to use that terminology.

Hon. Alice Batchelder: You mean diversity means more than just the surface things? Ideas?

Deputy AG Stewart: Also, in Virginia, again, to just talk a little bit about the structure of government. Really, these decisions are made by the boards that oversee these academic institutions, and the board members are appointed by the governor, and the governor can appoint about twenty-five percent of the board in a given year.¹⁹⁶ So just having board members in the room when these discussions are happening is such a change of the landscape in Virginia, and in another year, those four members will make up half, or in some cases a majority, of the governing boards for all of our public institutions in the state.¹⁹⁷ So that kind of dialogue is happening, and I think there is room for optimism in that regard.

Hon. Alice Batchelder: Kurt?

Dean Kreassig: I agree. Especially with the DEI initiatives that are out there. We do want children to grow up, understand, know viewpoints, and determine, based on their own values, what the best direction and decisions that they make. The way that it's been introduced and the way that it's been forced at times have caused people to say, "No, I don't want that. I don't want my child . . ." ¹⁹⁸ But knowing about that, being educated

¹⁹⁶ See VA. CODE ANN. § 23.1-1300(A) (LEXIS through ch. 22 of the 2022 Spec. Sess. I) (empowering the Governor of Virginia to appoint members of the governing boards of public universities to serve four-year terms); see, e.g., *Members as of July 1, 2022*, BD. OF VISITORS (July 1, 2020), <https://bov.virginia.edu/visitors-staff> (showing that four of the seventeen board members on the Board of Visitors of the University of Virginia were appointed by Governor Youngkin thus far).

¹⁹⁷ See *Members as of July 1, supra* note 196 (showing that by the end of 2023 eight of the seventeen board members will have been appointed by Governor Youngkin); *Board of Visitors*, CHRISTOPHER NEWPORT UNIV., <https://cnu.edu/whoweare/bov/> (last visited Mar. 9, 2023) (showing that in the fall of 2023, eight of the fourteen members of the Christopher Newport University Board of Visitors will have been appointed by Governor Youngkin).

¹⁹⁸ *Woke Schooling: A Toolkit for Concerned Parents*, MANHATTAN INST. (June 17, 2021), <https://www.manhattan-institute.org/woke-schooling-toolkit-for-concerned-parents> (outlining some of the ways DEI has been pushed on students and how parents have pushed back against it).

in various aspects of it, I think, is appropriate so that we can—as again, I go back to all of us living together, and everyone getting along and about that type of inclusivity. But what I’ve witnessed as things have rolled out in school systems have been dramatically different and very much offensive to many groups, not just white, but also black, also Asian—doesn’t matter your ethnicity. The way that some of these DEI things that roll out have been very, not only intrusive, but obviously embarrassing for us as a state or as a school system. So, I do think, knowing the viewpoints and DEI aspects is vital as kids grow up and start to interact and become professionals and whatever they choose to do.

Mr. Langhofer: Can I add something here real quick?

Hon. Alice Batchelder: Please.

Mr. Langhofer: I see this kind of on both sides in a lot of ways. We actually have multiple lawsuits going on kind of surrounding these issues one right now against SUNY Binghamton, where the Young America’s Foundation brought the Nobel Peace Prize-winning economist, Art Laffer, to campus to speak on the very controversial topic of tariffs.¹⁹⁹ Alright, tariffs. Can’t talk about tariffs, right? Well, the local College Progressives and a local Antifa group got together, and they stopped the event from happening.²⁰⁰ And this college’s police just kind of walked away.²⁰¹ We follow the lawsuit against them under § 1983 grounds for violation of First Amendment rights and so forth.²⁰² But I had heard from so many parents saying, “My child just wanted to hear a discussion on these topics. He’s an economics major, and he can’t hear from a Nobel Peace Prize-winning economist, whether you like him or not?” This is now shut down by an Antifa group, and the school knew about it and told the police—I mean

¹⁹⁹ *Young Am.’s Found. v. Stenger*, No. 3:20-CV-0822 (LEK/ML), 2021 WL 3738005, at *3 (N.D.N.Y. Aug. 24, 2021). Art Laffer has not received a Nobel Prize in Economics; he did, however, receive the Presidential Medal of Freedom from President Trump in 2019. *Medal of Freedom*, WHITE HOUSE, <https://trumpwhitehouse.archives.gov/medaloffreedom/> (last visited Mar. 4, 2023).

²⁰⁰ *Stenger*, 2021 WL 3738005, at *2, *4–5; see Shawn M. Carter, *Protesters Shut Down Another Event, Leading to Two Arrests and Outcry Online*, FOX BUS. (Nov. 19, 2019, 8:40 PM), <https://www.foxbusiness.com/lifestyle/antifa-protesters-shut-down-another-event-leading-to-two-arrests-and-outcry-online> (noting that the chairman of the College Republicans blamed antifa for the disruption of the event).

²⁰¹ *Cf. Stenger*, 2021 WL 3738005, at *5 (noting that college progressives disrupted the event with megaphones and police did not effectively stop the counterdemonstrations and ushered Laffer out after a few minutes).

²⁰² See Complaint at 1, 25, *Stenger*, 2021 WL 3738005 (suing university officials under §§ 1983, 1985(3), and others for deprivation of the right of free speech); see also *Stenger*, 2021 WL 3738005, at *7, *9, *13 (denying the university’s motion to dismiss after analyzing both § 1983 and § 1985).

here's how crazy it is. They knew that this was coming.²⁰³ They met Art Laffer—eighty-two year old guy, who had just flown in across the country and met him at the airport and said, “Go back home. You're not going to be able to speak tonight.” And he said, “No, I'm coming to speak,” and they said, “Keep the car running,” and they did. Within a minute, he was moved off the stage.²⁰⁴ Under their theory, we can't platform anybody that has a different viewpoint.²⁰⁵ So they're stopping people from hearing it.

But on the other side, I currently represent some law students at the University of Idaho.²⁰⁶ Christian Legal Society members who went to a moment of community in front of their law school to denounce an LGBTQ slur that was put on some chalkboard somewhere, and another student at the meeting asked them, “Hey, why do you as CLS require your members to sign a statement of faith on marriage being between one man and one woman?”²⁰⁷ And one of them said, “Well, that's what the Bible says,” and she said, “No, it's not,” and he was like “Well, yes, it is.” And they had a little dialogue, and then they left.²⁰⁸ They then had a meeting on Monday—a whole school meeting, an ABA meeting—and she raises her hand and says, “CLS is hateful, here's why blah blah blah.” Another CLS student raised his hand and said, “I disagree.” And they had a little discussion in this public meeting.²⁰⁹ Four days later, all three of them receive a no contact order from their Title IX office, saying, “You cannot talk with this student indirectly or directly. If you're in a class with her, you have to sit across the room from her, and if you violate it, you're going to be kicked out of school.”²¹⁰ And when we went to argue the PI at the court, their argument was, “She has a right to be left alone.”²¹¹ She had never asked them not to talk to them.²¹² She had initiated the

²⁰³ *Stenger*, 2021 WL 3738005, at *4 (explaining that, before the event, the University Police showed Laffer social media posts of planned disruption at his talk and warned him not to attend).

²⁰⁴ *See id.* at *4–5 (noting that security moved Laffer off stage within minutes of the event starting).

²⁰⁵ *See id.* at *2, *4; Complaint, *supra* note 202, at 18 (asserting that another progressive campus group decried Laffer's economic theories as reinforcement of class stratification); *see also* Julia Musto, *Art Laffer Shouted Out of Campus Lecture by Protesters: They 'Clearly Don't Want Free Speech'*, FOX NEWS (Nov. 20, 2019, 9:27 AM), <https://www.foxnews.com/media/art-laffer-binghamton-university-free-speech-first-amendment-protesters> (noting that College Progressives expressed general disdain for Laffer and encouraged students to disrupt his lecture).

²⁰⁶ *Perlot v. Green*, No. 3:22-CV-00183-DCN, 2022 WL 2355532 (D. Idaho June 30, 2022).

²⁰⁷ *Id.* at *3.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at *4.

²¹¹ *Id.* at *10–11; *see also id.* at *1 (clarifying that “PI” here means preliminary injunction).

²¹² *Id.* at *11.

conversation, and they didn't try to talk to her after that.²¹³ But the school was arguing that she has this right to be left alone, and they unilaterally issue this no contact order saying that she's got the right to be shielded from ideas that she essentially doesn't like, even though she'd asked the question.²¹⁴ So, these conversations are important.

Obviously, you're never going to go harass somebody. There are harassment laws.²¹⁵ I know if a person is harassing somebody because of their sex, we need Title IX for those reasons.²¹⁶ But there were no allegations of harassment here. It was simply, "I didn't like your response, and I don't want to hear that response again." And so, we're having to talk about that and try to figure out how do we live in this society and discuss these ideas that are . . . that are pretty controversial, but do it in a way that respects everybody's rights.

Hon. Alice Batchelder: You can't open a newspaper—well, I guess nobody really reads newspapers except people in my generation. But you know, get on your social media or just anywhere without seeing the extent to which some groups are being labeled hate groups merely because the positions and the ideas which they expound are not that the ones that are accepted right now.²¹⁷ It has worried me for a long time that it—as Coke was talking about the redefinition of terms in the dictionary—it has worried me for a long time that we are in danger of having the term "tolerance" be redefined to mean, "you will either accept my point of view and affirm it and further it or we will destroy you." That's an alarming place to be, and I'm not sure we have completely reached that point, but I think we're in danger of it if we don't make some effort to see that tolerance doesn't become defined that way. I hope I don't sound overly pessimistic on this score. In the interest of being absolutely truthful and forthright, I would have to admit that sitting on my desk at all times is a

²¹³ *Id.* at *3, *4 (noting that one plaintiff left a note on Doe's desk immediately after the first conversation but did not contact her after that).

²¹⁴ *Id.* at *10.

²¹⁵ 20 U.S.C. §§ 1681–1683; *see also, e.g.*, 5 U.S.C. § 1692(d) (proscribing harassment in debt collection).

²¹⁶ 20 U.S.C. §§ 1681–1683; *see also* 34 C.F.R. § 106.45 (2021) (explaining the process for making a formal complaint under Title IX).

²¹⁷ *See* Jeff Johnston, *SPLC Continues to Label Conservative Christian Organizations as 'Hate Groups,'* DAILY CITIZEN (Mar. 9, 2022), <https://dailycitizen.focusonthefamily.com/splc-continues-to-label-conservative-christian-organizations-as-hate-groups/> (explaining how organizations supporting free speech have been categorized as hate groups by the Southern Poverty Law Center); *see also* CASSIE MILLER & RACHEL CARROLL RIVAS, S. POVERTY L. CTR., *THE YEAR IN HATE AND EXTREMISM 2021*, at 51, 54–55, 61 (2022) (including on the 2021 list of hate groups, for example, organizations such as Alliance Defending Freedom, American College of Pediatricians, American Family Association, and Family Research Council; the list also generally equates the parental rights movement with the anti-trans movement), <https://www.splcenter.org/sites/default/files/splc-2021-year-in-hate-extremism-report.pdf>.

small Eeyore who sits on a black crêpe-covered box. I had a law clerk many, many years ago who was a very, very liberal kid; great clerk, and I loved him. But he said to me one day, “Judge, I don’t want to be disrespectful, I really don’t, but you’re just an Eeyore. You just are.” And I said, “Yeah, what’s wrong with that?” I guess I subscribe to the “eleventh beatitude”: “Blessed is she who expects the worst, for she shall not be disappointed.” But I don’t like that beatitude very much.

Up until now, we certainly haven’t been shy here about addressing some hot-button issues, so, in our remaining time, let’s maybe hit a couple more which are—as lawyers always like to say—inextricably intertwined. To what extent do parents have a right to insist on, or object to, having some things taught in the schools? Now that obviously is the very broad question, but the more difficult one, I guess, is more specific. To what extent do parents have the right to object to the concepts, for example, of CRT being taught in the public schools? I’m going to start, I think, with Dean Kreassig on this one.

Kurt, first of all, what is CRT? And I will interject at this point that, when you start asking that question in the academic setting, it always kind of brings to mind the old wonderful Lincoln jury question, “How many legs does a donkey have if you call a tail a leg? Well, four. Because calling a tail a leg doesn’t make it one.”²¹⁸ And so, typically, when you ask about “what is CRT and is it being taught,” and the answer often is, “No, it’s not being taught. We just don’t do that here.”²¹⁹ They don’t call it that, but some of the things that it consists of are.²²⁰ So what’s your experience with that?

Dean Kreassig: First, Critical Race Theory—let me emphasize theory and what a theory is. A theory is when a man or woman comes in, doesn’t have the full story, and puts things in that story so it makes

²¹⁸ This quote is widely attributed to President Lincoln, but the exact identity of the animal is disputed. *Suppose You Call a Sheep’s Tail a Leg, How Many Legs Will the Sheep Have?*, QUOTE INVESTIGATOR (citing *What the President Said*, DAILY MILWAUKEE NEWS, Sept. 23, 1862, at 1), <https://quoteinvestigator.com/2015/11/15/legs/> (last visited Feb. 3, 2023) (describing the animal as a sheep); William Safire, *Calling a Tail a Leg*, N.Y. TIMES, Feb. 22, 1993, at A17 (recognizing the animal as a dog).

²¹⁹ See Bryan Anderson, *Critical Race Theory Is a Flashpoint for Conservatives, but What Does it Mean?*, PBS NEWS HOUR, <https://www.pbs.org/newshour/education/so-much-buzz-but-what-is-critical-race-theory> (Nov. 4, 2021, 9:18 AM) (“There is little to no evidence that critical race theory itself is being taught to K-12 public school students, though some ideas central to it, such as lingering consequences of slavery, have been.”).

²²⁰ Joe Setyon, *Schools Swear They Don’t Teach CRT. They’re Lying.*, GOLDWATER INST. (Nov. 8, 2021), https://www.goldwaterinstitute.org/schools-swear-they-dont-teach-crt-theyre-lying/?gclid=EAIaIQobChMIkKX1-Yn6_AIVzuzICh0rrwrZEAAYAiAAEgKFjvD_BwE.

sense.²²¹ Just like the theory of evolution; it's a theory. A lot of people forget when they say CRT, they forget about that word—"theory." This is a hot-button issue, but make no mistake about it; racism is plain evil. It is evil, but critical race theory is a legal and academic framework that asserts that the America, our country—the founding of our country—is based on institutions that systemically are biased, racist against black individuals and at times other races.²²² A lot of our students, a lot of our Ph.D. and Ed.D. students, come to our school thinking that CRT is social justice. They want to change the world, and they think, "I'm going to do my dissertation on social justice. I'm going to spend two years researching this," and the first thing we say is, "Let's back up a second. Let's take a look at it. Go back to the original source and read CRT, and can you ground CRT biblically?" Personally, I can't ground it biblically, because just because of the color your skin, I don't believe white are oppressive people and blacks are oppressed, or that our country is set up with Marxist institutions that discriminate against individuals. Again, there is racism out there, whether it is institutional or individual, it is happening out there, and it has to be addressed and stopped, but the theory of CRT, I don't believe that it's biblically—you can't ground it biblically, bottom line. But a few things about this, and I'll go into their book one of the questions with the book about the book with Chua and Rubinfeld. The authors wrote a book called *The Triple Package*, and they talked about individual groups, heritage ethnic groups, and why some are more successful than others.²²³ Why do we have immigrants coming into our country that seem to not only have a niche, but also do very well, whether it's in the banking industry, whether it's in the housing industry, whether it's in the restaurant industry?²²⁴ And one of the things that comes into play is, "Why aren't blacks successful in America?"²²⁵ What the book doesn't cover, really, is the history, the history of slavery.²²⁶

That goes into a whole other gamut of a lot of immigrants that came to this country. You could say black Nigerians. A lot of them came from

²²¹ See *Theory*, MERRIAM-WEBSTER DICTIONARY (rev. ed. 2022) (defining "theory" as "a plausible or scientifically acceptable general principle or body of principles offered to explain phenomena").

²²² *Critical Race Theory*, ENCYCLOPEDIA BRITANNICA (2023).

²²³ AMY CHUA & JED RUBENFELD, *THE TRIPLE PACKAGE: HOW THREE UNLIKELY TRAITS EXPLAIN THE RISE AND FALL OF CULTURAL GROUPS IN AMERICA* 41–45, 48–50 (2014) (examining the educational and career success of groups of various national origins).

²²⁴ See *id.* at 43–45, 48–50 (describing how Nigerian immigrants outperform black Americans in terms of median income and that immigrants from India and Asia have performed exceptionally well in the business and financial sectors).

²²⁵ See *id.* at 8–11, 44–45 (arguing that some of the disparity in economic outcomes between Black Americans and immigrants of color is due to the lack of the triple package: shared cultural traits of a superiority complex, insecurity, and impulse control).

²²⁶ See *id.* at 73–76 (discussing, briefly, the historical factors of slavery and discrimination).

middle-class families;²²⁷ they had a head start. They had that social capital when they came over, and even the financial capital, which many of our black brothers and sisters in America did not have because of slavery.²²⁸ Just to piggyback on that, blacks struggle in higher education,²²⁹ and I'm going to flip that script a little bit. What's interesting with this, one of our own students wrote their dissertation—Antwan Perry is a black male student—and wanted to find out why African-Americans struggle so much in higher education at the Ivies, or even a school like Regent.²³⁰ Well, what he did is he examined successful black males that completed their studies and graduated from the University, and his research showed a few things. First, that University of Baltimore, Maryland, where he studied a group called the Meyerhoff Scholars—they purposely developed a community to acclimate African-Americans, especially males, to the college campus because it's culture shock.²³¹ Most universities are what we call PWIs, primarily white institutions.²³² And many of our African-American brothers and sisters come from a black home, typically a black high school or black community.²³³ They come to

²²⁷ See, e.g., Yomi Kazeem, *Nigeria's Ongoing Middle-Class Brain Drain Is Costing It Two Generations in One Swoop*, QUARTZ (May 25, 2019), <https://qz.com/africa/1615518/nigerias-middle-class-keep-emigrating-to-canada-australia> (stating that many middle-class Nigerians are emigrating to North America and Europe to seek better opportunities for their children).

²²⁸ See Eleanor Marie Lawrence Brown, *An Alternative View of Immigrant Exceptionalism, Particularly As It Relates to Blacks: A Response to Chua and Rubenfeld*, 103 CALIF. L. REV. 989, 1004–05, 1015 (2015) (articulating the legal and institutional differences that have given African migrants advantages over African Americans).

²²⁹ See *College Enrollment Rates*, NAT'L CTR. EDUC. STAT., <https://nces.ed.gov/programs/coe/indicator/cpb/college-enrollment-rate?tid=74> (May 2022) (reporting fewer black students enrolled in college than white or Asian peers); *Postbaccalaureate Enrollment*, NAT'L CTR. EDUC. STAT., <https://nces.ed.gov/programs/coe/indicator/chb/postbaccalaureate-enrollment> (May 2022) (reporting fewer black students enrolled in graduate programs than white peers).

²³⁰ See generally Antwan L. Perry, *Black Male Student Success in Higher Education: A Case Study of the Meyerhoff Scholars Program 10–11* (Mar. 2018) (Ed.D. dissertation, Regent University) (ProQuest) (focusing on the determinative factors leading to high levels of success for black males in the Meyerhoff Scholars Program at UMBC).

²³¹ *Model, Meyerhoff Scholars Program*, UNIV. MD. BALT. CNTY. [hereinafter *Meyerhoff Model*] <https://meyerhoff.umbc.edu/about/model> (last visited Jan. 20, 2023). The program began admitting women in 1990 and people from any background that are committed to minority representation in science and engineering in 1996. *History, Meyerhoff Scholars Program*, UNIV. MD. BALT. CNTY. [hereinafter *Meyerhoff History*] <https://meyerhoff.umbc.edu/about/model> (last visited Jan. 21, 2023).

²³² See *Characteristics of Postsecondary Students*, NAT'L CTR. EDUC. STAT., <https://nces.ed.gov/programs/coe/indicator/csb> (May 2022) (reporting that public and private nonprofit schools have a majority white undergraduate and post-graduate enrollment).

²³³ See Stephen Menendian et al., *The Roots of Structural Racism Project: Twenty-First Century Racial Residential Segregation in the United States*, OTHERING & BELONGING INST., <https://belonging.berkeley.edu/roots-structural-racism> (June 30, 2021) (explaining that many schools “replicate the demographic profiles of the communities and neighborhoods they serve”).

higher education and it is culture shock.²³⁴ So, they have a purposeful program to inculcate African-Americans to higher education.²³⁵ They also purposely develop tight-knit groups, so that they can work off each other and support each other throughout.²³⁶ Another thing, all these individuals had successful mentors in their life, especially professionals out there in the field that came back and mentored them one on one.²³⁷ It's a lot of work to do those things, but that's one of those things that really has taken off at the University of Maryland in the Baltimore campus,²³⁸ and one thing that I think can be replicated across the board at all universities. When we go back and look at CRT, I don't subscribe to that. It doesn't mean I don't acknowledge that racism has happened, and currently is happening, but the critical race theory cannot be grounded biblically.

Hon. Alice Batchelder: Coke?

Deputy AG Stewart: I think there is disagreement on what CRT means,²³⁹ and I think, in Virginia, we have to approach the issue with a lot of humility because Virginia, frankly, has an absolutely horrendous record of treatment of minorities in our school systems.²⁴⁰ For any of you

²³⁴ Khandi Bourne-Bowie, *Retention Depends on New Models of Student Development*, 17 BLACK ISSUES HIGHER EDUC. 96, 96 (2000) (arguing that cultural differences play a significant role in the lower retention rate of black students at universities).

²³⁵ *Meyerhoff History*, *supra* note 231.

²³⁶ *Meyerhoff Model*, *supra* note 231.

²³⁷ Perry, *supra* note 230, at 75–77.

²³⁸ See *About, Meyerhoff Scholars Program*, UNIV. MD. BALT. CNTY., <https://meyerhoff.umbc.edu/about/> (last visited Jan. 21, 2023) (noting that the program has 1,600 members and alumni and has been praised as a national model for minority achievement).

²³⁹ Compare RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3 (3d ed. 2017) (“The critical race theory (CRT) movement is a collection of activists and scholars engaged in studying and transforming the relationship among race, racism, and power. . . . Unlike traditional civil rights discourse, which stresses incrementalism and step-by-step progress, critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.”), and Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743 (1994) (defining Critical Race Theory as a tension between “a commitment to being ‘critical,’ which in this sense means also to be ‘radical’—to locate problems not at the surface of doctrine but in the deep structure of American law and culture,” and “confiden[ce] that crafting the correct theory of race and racism can help lead to enlightenment, empowerment, and finally to emancipation”), with Douglas Groothuis, *American Exceptionalism and Critical Race Theory*, 12 J. CHRISTIAN LEGAL THOUGHT 8, 8 (2022) (defining Critical Race Theory as “a neo-Marxist philosophy that divides societies according to racial struggles between the oppressors (white) and the oppressed (people of color, especially Blacks)”).

²⁴⁰ See, e.g., JEFFREY L. LITTLEJOHN & CHARLES H. FORD, *ELUSIVE EQUALITY: DESEGREGATION AND RESEGREGATION IN NORFOLK’S PUBLIC SCHOOLS 6–7* (2012) (outlining the discriminatory treatment of minorities in Norfolk Public Schools from the 1930s through its continued effects today).

all that know the history of Massive Resistance in Virginia, the schools were closed.²⁴¹ In Norfolk, where my family grew up, the schools were closed for over a year.²⁴² You couldn't go to the Ocean Front in Virginia Beach if you were a person of color.²⁴³ There were restricted beaches.²⁴⁴ You're restricted in the movie theaters.²⁴⁵ You're restricted in restaurants.²⁴⁶ In my father's fraternity at Washington and Lee, Asian-Americans weren't allowed inside the building and the fraternity house, according to the rules of the fraternity.²⁴⁷ It's a truly horrendous and appalling history in our state of treatment of minorities, and I think we have to approach this issue with humility.

I also think there's a lot of benefit to look at history from the perspective of groups who were not necessarily a majority in the given time. Like what about looking at World War II through the lens of Jewish Americans? Looking at the founding of our country through the lens of women who at the time could not own property? As we were saying, sing the song sweetly, right? We can be very angry about these issues, and there are a lot of really offensive components of it, but I think, in order to persuade folks of where we're coming from, we also need to acknowledge the problem. And I think when we fail to acknowledge the problem, we lose the argument before we've even started. I think the real problem is that we're skipping over the learning aspect of what the treatment of all types of individuals in our history have faced and we're really jumping right into political theory, and the Ibram X. Kendi view of the world that the only way to combat past discrimination is to have present discrimination.²⁴⁸ I mean that, to me, is as equally as appalling to say in our day and time, because, to make up for the suffering of others in our past, we have to affirmatively discriminate against certain groups in our present. There isn't really time to delve into this issue. But you know one group that's really being aggressively attacked under a lot of these CRT

²⁴¹ *Id.* at 78–79.

²⁴² *Id.* (noting that the schools were closed from September 29, 1958 to February 2, 1959).

²⁴³ Margaret Matray, *To Some, Stately Hotel; To Others, Symbol of Segregation*, VIRGINIAN PILOT (July 15, 2013, 12:00 AM), https://www.pilotonline.com/news/article_9d2a4d36-0f99-5bf7-a778-3fdc3b5a07b2.html.

²⁴⁴ *Id.*

²⁴⁵ *Jim Crow Laws and Racial Segregation, Social Welfare History Project*, VA. COMMONWEALTH UNIV., <https://socialwelfare.library.vcu.edu/eras/civil-war-reconstruction/jim-crow-laws-andracial-segregation/> (last visited Mar. 15, 2023).

²⁴⁶ *Id.*

²⁴⁷ *Cf.* Julie J. Park, *Asian American Women's Perspectives on Historically White Sorority Life: A Critical Race Theory and Cultural Capital Analysis*, 7 ORACLE: RSCH. J. ASS'N FRATERNITY/SORORITY ADVISORS 1, 1–2 (2012) (stating that historically white sororities and fraternities explicitly barred Asian Americans for decades, although only one sorority formally banned minority students by 1955).

²⁴⁸ IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 24 (paperback ed. 2023).

theories are Asian-Americans.²⁴⁹ We have this case going to the Supreme Court now about discrimination at Harvard against Asian-Americans in admissions.²⁵⁰ I think that there are some folks that are just turning this idea of discrimination on its head and saying that you can discriminate if there's a laudable purpose behind it, or you can discriminate if it's for the benefit of certain groups, or you're trying to achieve racial balancing.²⁵¹ The Supreme Court has repeatedly said that racial balancing for its own sake is unlawful and unconstitutional.²⁵² So, it's a very complicated topic. It's a very troublesome on many levels. But I think the best that we can do as Christians is really approach it with kindness and humility, and really understanding the pain that a lot of these groups have dealt with, and how they're trying to approach the issue in the academic forum.

Hon. Alice Batchelder: Tyson?

Mr. Langhofer: Well, I'll just address that issue of how much rights do parents have to dictate curriculum? In general, the school boards have a lot of—you have the Department of Education at the top of the state, and then they have some general rules.²⁵³ Obviously, legislature can set some general rules as well.²⁵⁴ But parents don't have a lot of rights to dictate actual curriculum.²⁵⁵ That's the school board's role.²⁵⁶ So, one of the most important things to do as parents is to get involved with your school board, and to actively either run or vote for individuals that you

²⁴⁹ See, e.g., *CACAGNY Denounces Critical Race Theory as Hateful Fraud*, CHINESE AM. CITIZENS ALL. GREATER N.Y. (Feb. 23, 2021), <https://nebula.wsimg.com/9499c73d959b9f49be9689476a990776?AccessKeyId=45A6F09DA41DB93D9538&disposition=0&alloworigin=1> (denouncing Critical Race Theory as “racist, repressive, discriminatory, and divisive”).

²⁵⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 163 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

²⁵¹ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003) (articulating University of Michigan Law School's policy of “enrolling a ‘critical mass’ of [underrepresented] minority students” for the laudable purpose of producing diverse and academically outstanding classes).

²⁵² *Id.* at 329–30 (first citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); and then citing *Richmond v. J.A. Cronson Co.*, 488 U.S. 469, 507 (1989)).

²⁵³ *About VDOE*, VA. DEP'T EDUC., <https://www.doe.virginia.gov/about-vdoe> (last visited Feb. 17, 2023).

²⁵⁴ VA. CONST. art. VIII, §§ 1, 4 (providing that the General Assembly of Virginia shall provide a high-quality system of free public elementary and secondary education and may revise the standards of quality for school divisions set by the Board of Education).

²⁵⁵ See, e.g., VA. CODE ANN. § 22.1-207.2 (LEXIS through ch. 22 of the 2022 Spec. Sess. D) (“Parents and guardians have the right to review the family program offered by their school division, including written and audio-visual educational materials used in the program. Parents and guardians also have the right to excuse their child from all or part of family life education instruction.”).

²⁵⁶ *E.g., id.* § 22.2-253.13:1 (tasking school boards with implementing curriculum aligned with the Board of Education's standards of learning).

believe are going to promote curriculum that you think are best for society at large—that are going to promote the best education. So that’s the best way to affirmatively impact the curriculum in your public schools.²⁵⁷ Historically, ADF has done very little challenging of actual curriculum because there is a lot of discretion given to local school boards and departments of education.²⁵⁸ The challenges that we’ve currently brought are against gender identity ideology and CRT—typically where they are either impacting parental rights or they’re creating a racially or religiously hostile environment.²⁵⁹ So, under Title VI, the Federal Government prohibits racial discrimination, and it prohibits it not only individually where you’d specifically discriminate against the individual, but to create an environment that is racially hostile.²⁶⁰ And that’s the Albemarle County challenge that we currently have pending, where they adopted a curriculum that specifically said things like, “all whites are racist,” or that America is a fundamentally racist nation, or the issue of collective guilt or opposition to specific religious beliefs.²⁶¹ It essentially is telling these students that they are guilty because of their association, because of their immutable characteristics, such as race or sex, or their religion.²⁶² In those instances, a parent could challenge, not because of the curricular choice specifically, but because the curriculum creates a hostile environment which violates some protected status, such as religion, race, or sex—something like that.²⁶³ So, obviously, the best way is to stop the curriculum from being put in there in the first place by being on the school

²⁵⁷ *E.g.*, Terri Huggins Hart, *5 Very Good Reasons to Attend a School Board Meeting*, PARENTS, <https://www.parents.com/parenting/better-parenting/very-good-reasons-to-attend-a-school-board-meeting/> (Feb. 9, 2023).

²⁵⁸ *Cf.*, *e.g.*, Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863–64 (1982) (recognizing that local school boards have broad discretion to implement curriculum).

²⁵⁹ *See, e.g.*, *Ibañez v. Albemarle County School Board*, ALL. DEFENDING FREEDOM, <https://adflegal.org/case/ci-v-albemarle-county-school-board> (Feb. 9, 2023) (arguing that the county school board enacted racially discriminatory policies and compels students to support ideas against their deeply held beliefs); *Figliola v. Harrisonburg City Public School Board*, ALL. DEFENDING FREEDOM, <https://adflegal.org/case/df-v-harrisonburg-city-public-school-board> (Feb. 16, 2023) (asserting that the school board usurps parents’ roles in upbringing their children and forces school staff to violate their religious beliefs through its gender identity policies).

²⁶⁰ Civil Rights Act of 1964, Pub. L. No. 88-352, Title VI, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d); *Racial Incidents and Harassment Against Students at Educational Institutions*; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (Mar. 10, 1994).

²⁶¹ *Parents to VA Court of Appeals: Racially Divisive Ideology, Religious Stereotypes Don’t Belong in Classroom*, ALL. DEFENDING FREEDOM (Oct. 28, 2022), <https://adflegal.org/press-release/parents-va-court-appeals-racially-divisive-ideology-religious-stereotypes-dont-belong>.

²⁶² *Id.*

²⁶³ *E.g., id.* (stating that parents and their children sued the school district because the district’s policy divides or demeans students based on their race, religion, or ethnicity).

boards.²⁶⁴ But if it violates one of those fundamental premises, then, potentially, the parents can do that. But it is an uphill battle, and it's not an easy road.

Hon. Alice Batchelder: I think I would say that none of what we've been discussing this morning is an easy road. I think all of it is an uphill battle. But looking back, of course, over the whole history of this country, maybe I should interject at this point that I wish there were more looking back over the history of the country with an objective view. But looking back, we've never had a really easy road; we've always had to fight a lot of battles, and we've done an awfully good job of it, especially in the context of human history. But I think the battle has to still be waged.

I think we're coming to the point where we need to be closing this up, and I think to do that, I would just make a couple of points. One of them is that I've been enlightened a lot by listening to the three of you. That was what my hope was as I started out, and it certainly has been fulfilled. But I would also say, speaking as a mother and a grandmother and a lawyer and a judge and a former teacher, I honestly don't think there's anything more important than the education of our children—both in a family sense and with regard to the nation. And I'm pretty confident that most parents would second that. And I think that they would also agree with me that this is at the top of the list of what is really important to the nation.²⁶⁵

One of the things that we're battling right now is this inability of some points of view to be publicized—the insistence on the suppressing and cancelling of points of view that don't conform to the popular or politically popular or any other form of popularity to those views.²⁶⁶ And I have found myself lately particularly asking law students this question: If there really is only one side to all of these various extremely important issues, how are you as a lawyer going to make a living? I always love the

²⁶⁴ See, e.g., *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863–64 (1982) (recognizing that local school boards have authority to dictate curriculum).

²⁶⁵ See, e.g., Ariel Edwards-Levy, *CNN Poll: Economy and Education Could Shape How Americans Vote in 2022*, CNN (Feb. 11, 2022, 10:04 AM), <https://www.cnn.com/2022/02/11/politics/cnn-poll-economy-education-2022/index.html> (stating 46% of voters said education would be extremely important in the 2022 midterms); Anya Kamenetz, *Why Education Was a Top Voter Priority This Election*, NPR (Nov. 4, 2021, 6:00 AM), <https://www.npr.org/2021/11/04/1052101647/education-parents-election-virginia-republicans> (stating that education was a highly influential factor in the 2021 gubernatorial elections in Virginia and New Jersey).

²⁶⁶ E.g., Aimee Picchi, *Twitter Files: What They Are and Why They Matter*, CBS NEWS (Dec. 14, 2022, 6:46 PM), <https://www.cbsnews.com/news/twitter-files-matt-taibbi-bari-weiss-michael-shellenberger-elon-musk/> (reporting how Elon Musk argued that the “Twitter Files” demonstrate evidence that Twitter’s former management censored certain stories, topics, and accounts).

old story of the frontier town where there was only one lawyer in town, and he was at a church supper one night, and he was asked if he would say grace before they ate, and he prayed, "Oh, Lord, stir up strife amongst thy people, lest thy servant starve." Well, we don't really want to be in the position of being starving in the legal profession because we can't have real arguments, maybe even fights, in a civilized way, over these issues which are of so much importance to us.

I came across an observation by Abraham Lincoln the other day. He said, "The philosophy of the school room in one generation [will become] the philosophy of government in the next,"²⁶⁷ and I would commend that to your attention. I think it is well worth considering. But I wonder at this point if it would be appropriate, since what we've been talking about here is education, freedom of speech, free exercise of religion—all things which are critical to the survival of not just our country, really, but Western civilization.²⁶⁸ So I wonder if it would be appropriate if I asked you, as we close this, to join me in prayer.

Almighty God, who has given us this good land for our heritage: We humbly beseech thee that we may always prove ourselves a people mindful of thy favor, and glad to do thy will. Bless our land with honorable industry, sound learning, and pure manners. Save us from violence, discord, and confusion; from pride and arrogance and from every evil way. Defend our liberties, and fashion into one united people the multitudes brought hither [from] many kindreds and tongues. Endue with the spirit of wisdom those to whom in thy Name we entrust the authority of government, that there may be justice and peace at home, and that, through obedience to thy law, we may show forth thy praise among the nations of the earth.

In the time of prosperity, fill our hearts with thankfulness, and in the day of trouble, suffer not our trust in thee to fail; all which we ask through Jesus Christ our Lord. Amen.²⁶⁹

²⁶⁷ MARK A. BELILES & STEPHEN K. MCDOWELL, *AMERICA'S PROVIDENTIAL HISTORY* 95 (1989).

²⁶⁸ See William S. Lind, *Defending Western Culture*, 84 *FOREIGN POL'Y* 40, 40, 42 (1991) (arguing that traditional Western values such as freedom and education are essential to America's success).

²⁶⁹ *THE BOOK OF COMMON PRAYER* 820 (1979).