MEMORANDUM

TO: Rep. Jason Osborne, Majority Leader

FROM: Rep. Robert J. Lynn

DATE: March 15, 2021

RE: Constitutionality of HB544

HB544, which prohibits the propagation of "divisive concepts," essentially does four things: First, it prohibits the State and all its political subdivisions or instrumentalities, as well as educational institutions that receive state funds, from "teaching, instructing or training" any students or employees to "adopt or believe" any of the divisive concepts listed in section 10-C:1, II of the bill. See section 10-C:2, I(a). Second, it prohibits employees and students of any of the foregoing institutions from being disciplined or discriminated against because of their refusal to adopt, support, or act upon any such divisive concept. See Section 10-C:2, I(b). Third, it requires that all state contracts, subcontracts, and grants contain a provision that prohibits the contractors or subcontractors from utilizing workplace training programs that inculcate into its employees the proscribed divisive concepts. See section 10-C:2, II(a), (d); IV. Fourth, it requires all state agencies to ensure that its employees while in duty status and any contractors engaged to provide training do not "teach, advocate, act upon, or promote" divisive concepts. See section 10-C:2, V(a)(1).

Before considering the constitutionality of this bill, a threshold question for legislators to ask themselves is whether what the bill attempts to accomplish is a good idea – because if it is not, then we should not adopt it even if it would be constitutional to do so. To me, the answer to this threshold question is obvious: Yes, this bill is a good idea because the divisive concepts it seeks to prevent are concepts that are the antithesis of the fundamental values this country stands for – that all persons should be treated equally based on who they are as individuals, not based on their "group identity" and that no one should be discriminated against based on their race or sex or the actions of their ancestors. As this bill is debated, it might be worthwhile to try to pin down the opponents of the bill about whether they actually believe or support any of the divisive concepts that the bill seeks to prohibit. I suspect that some of them do support these pernicious concepts, but I doubt they will ever be willing to admit it. Still, forcing them to go on the record – or to duck the question – might prove to be a most interesting exercise!

Now to the issue of the bill's constitutionality. As I understand it, the primary argument offered against the bill is that it infringes upon the First Amendment right to freedom of speech and expression. Apparently, opponents claim that the bill violates free speech by compelling teachers and contractors not to engage in a kind of speech, i.e., teaching or advocating divisive concepts, that they may support and desire to communicate to others. In my view, this argument is not meritorious.

It is important to understand that, both as applied to governmental employees and to those performing under contract with the government, the speech that the bill regulates is speech of persons acting under the aegis of the government while engaged in their official

duties. The law is settled that when the government chooses to pursue policy objectives it may compel its employees to speak in support of those objectives as a condition of their employment. See Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); Evans-Marshall v. Board of Education, 624 F.3d 332, 340-44 (6th Cir. 2010) (Sutton, J.) (applying Garcetti to curricular and pedagogical speech of high school teacher); Brown v. Franks, 824 F.3d 713, 713 (7th Cir. 2016). See also Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"). Indeed, if the government lacked this power, it would effectively be precluded from governing. Garcetti, 547 U.S. at 418 ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."). Imagine if a high school teacher employed to teach math could decide that he wanted to lecture on history instead, yet the school board could do nothing about this without violating the teacher's First Amendment right to freedom of speech!

Nothing in this bill prohibits anyone, a teacher for example, from supporting or advocating "critical race theory" or any other divisive concept while off duty on his or her own time. The bill also does not prevent a teacher from holding views favorable to divisive concepts; it merely prohibits the teacher during the course of his duties from promoting or advocating to students that they should adopt or believe such divisive concepts.

It should be noted that there is a body of case law which supports the thesis that the government must act with enhanced circumspection when a law may infringe the "academic freedom" of those state-employed educators who teach at the college or university level. See Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sweezy v. State of New Hampshire, 354 U.S. 234 (1957); Demers v. Austin, 746 F.3d 402 (9th Cir. 2014). But unlike the broadly worded laws and regulations at issue in Keyishian and Sweezy, HB544 contains specific definitions of the "divisive concepts" it proscribes. Thus, I do not believe HB544 could successfully be challenged on vagueness grounds. See United States v. Williams, 553 U.S. 285, 304 (2008) (a statute or policy is impermissibly vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited"). And, as important, HB544 also contains a specific limitation which makes it clear that the bill does not prohibit teaching about the subject matter of divisive concepts, as long as this is done "in an objective manner and without endorsement." See section 10-C:3, II. Thus, unless the First Amendment means that a state college or university is flatly precluded from regulating the subject matters that its faculty may advocate or promote to its students while performing their duties – and I am aware of no decision holding as much – this statute should pass constitutional muster.