CHAPMAN LAW REVIEW

Citation: Catherine Jean Archibald, *Still Problematic, Even Post-Settlement: Florida's "Don't Say Gay" Law and the Federal Constitution*, 28 CHAP. L. REV. 1 (2024).

Still Problematic, Even Post-Settlement: Florida's "Don't Say Gay" Law and the Federal Constitution

Catherine Jean Archibald

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Still Problematic, Even Post-Settlement: Florida's "Don't Say Gay" Law and the Federal Constitution

Catherine Jean Archibald[*]

Florida's "Don't Say Gay" Law, officially part of the Parental Rights in Education Act, came into force in 2022. As amended in 2023, this law prohibits classroom instruction on sexual orientation or gender identity for children in pre-kindergarten through the eighth grade, and forbids any instruction on sexual orientation or gender identity that is not "age-appropriate or developmentally appropriate" for children in any grade.

From the start, this law was controversial and was challenged in court as a violation of the U.S. Constitution. In March 2024, a settlement agreement was reached in a lawsuit challenging the law, providing clarification on various aspects, including what constitutes forbidden conduct under the law.

This Article argues that although the settlement agreement helps resolve many of the problematic aspects of the "Don't Say Gay" Law, the law still violates the Constitution. This Article contends that this law violated and still violates the First Amendment's protection of freedom of speech because of its chilling effect on protected speech and by promoting a particular religious viewpoint in schools. Additionally, it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment as it is an overbroad and vague law that was enacted with discriminatory animus against the LGBTQ+ community, and it discriminates based on sexual orientation and gender identity. This Article concludes that the courts should strike down this law and others like it as violative of the U.S. Constitution.

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I. INTRODUCTION

> *"Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8 . . . If such instruction is provided in grades 9 through 12, the instruction must be age-appropriate or developmentally appropriate for students in accordance with state standards."*
>
> — Florida's "Don't Say Gay" Law[1]

> *"Teachers are hereby banned from giving students any information that is not strictly related to the subjects they are paid to teach."*
>
> — Educational Decree Number Twenty-Six by Order of the High Inquisitor of Hogwarts[2]

In Florida, and increasingly in other states, limits are being placed on what teachers can talk about at school regarding sexual orientation and gender identity. But these limits mean that teacher and student speech is being chilled to the detriment of student learning and inquiry, and, as this Article will show, in violation of the First and Fourteenth Amendments of the U.S. Constitution. As one Supreme Court Justice wrote in 1952:

> Public opinion . . . can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.
>
> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and

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1 FLA. STAT. § 1001.42(8)(c)(3) (2024).

2 J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 509 (Bloomsbury ed., 2014) (2003).

> action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma.[3]

Florida's "Don't Say Gay" Law[4] prohibits classroom instruction on sexual orientation or gender identity for children in pre-kindergarten through the eighth grade and forbids any instruction on sexual orientation or gender identity that is not "age-appropriate or developmentally appropriate" for children in any grade.[5] Imagine a first-grade teacher who hesitates in answering a student who asks, "Why does Susan have two moms? That's impossible, right?" In the past, that teacher would have been free to answer, "Some women marry other women and have children together." But now, because of Florida's "Don't Say Gay" Law, that teacher knows they must not provide instruction on sexual orientation or gender identity, and may worry that such an answer, though true, might be interpreted as providing instruction on sexual orientation or gender identity. Instead, due to fear of violating the law, the teacher might say, "I can't answer that question." In effect, the teacher is muzzled. All children in the classroom lose. Susan loses by feeling like her family is invalidated. The student who asks the question loses because they miss out on learning about the diversity of family types in the United States. Other children in the classroom lose because they sense fear and uncertainty in their teacher when discussing certain subjects. Instead of existing within and fostering an atmosphere of "open-mindedness and critical inquiry," such a teacher exists within and fosters an atmosphere of fear, uncertainty, and lack of acceptance towards the diversity of family types in the United States.[6]

From the start, Florida's "Don't Say Gay" Law was controversial and was challenged in the courts as a violation of the U.S. Constitution. In March 2024, a settlement agreement (Settlement) was reached in one of these lawsuits, providing

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3 Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

4 This is not the law's official name, but a nickname given to the law by its critics. This Article uses this name for the law because, as this Article will show, it is an appropriate name for the law, and it is what the law is widely known as. *See* Wynne Davis, *Florida Senate Passes a Controversial Schools Bill Labeled 'Don't Say Gay' by Critics*, NPR (Mar. 8, 2022, 2:35 PM), https://www.npr.org/2022/03/08/1085190476/florida-senate-passes-a-controversial-schools-bill-labeled-dont-say-gay-by-criti [https://perma.cc/4GYK-QT8C].

5 § 1001.42(8)(c)(3).

6 *Wieman*, 344 U.S. at 196 (Frankfurter, J., concurring).

clarification on certain aspects of the law, including what constitutes forbidden conduct under the law.[7]

This Article argues that the Settlement, while immensely helpful and beneficial, does not solve all the problems of Florida's "Don't Say Gay" Law. Further, this Article contends that this law violates the Free Speech Clause and the Establishment Clause of the First Amendment because of its chilling effect on protected speech and by promoting a particular religious viewpoint in schools. Additionally, the "Don't Say Gay" Law violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it is overbroad, vague, was enacted with discriminatory animus against the LGBTQ+[8] community, and it discriminates based on sexual orientation and gender identity. This Article concludes that the law and others like it should be struck down by the courts as violative of the U.S. Constitution.

II. THE BACKGROUND AND CURRENT STATUS OF FLORIDA'S "DON'T SAY GAY" LAW

Initially, effective as of July 2022, Florida's "Don't Say Gay" Law prohibited classroom instruction on gender identity and sexual orientation in kindergarten through the third grade, with instruction only allowed in higher grades if it was "age-appropriate or developmentally appropriate."[9] However, in May 2023, the law was expanded to its current form to prohibit classroom instruction on gender identity and sexual orientation in pre-kindergarten through the eighth grade.[10] In March 2024, Florida reached a Settlement that clarified certain aspects of the law.[11] Although the Settlement changed how some of the "Don't Say Gay" Law may be applied,[12] it did not change the fact that the law is still on the books.

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7 Settlement Agreement, Armstrong *ex rel.* M.A. v. Fla. State Bd. of Educ., No. 23-10866 (11th Cir. Mar. 20, 2024), ECF No. 57-2 [hereinafter Settlement], https://aboutblaw.com/bc7W [https://perma.cc/C3TX-38DX].

8 LGBTQ+ stands for "lesbian," "gay," "bisexual," "transgender," "queer," and "questioning." The "+" refers to other "non-straight, non-cisgender identities." *Glossary of Terms: LGBTQ*, GLAAD, https://glaad.org/reference/terms/ [https://perma.cc/M69M-2KDT] (last visited Nov. 10, 2024).

9 Parental Rights in Education Act, ch. 22, 2022 Fla. Laws 248 (codified as amended at FLA. STAT. § 1001.42(8)(c)(3)), https://laws.flrules.org/2022/22 [https://perma.cc/U5M5-H8G3].

10 *See* § 1001.42(8)(c)(3).

11 *See* Settlement, *supra* note 7.

12 *See infra* Section II.E.

A. The Political and Societal Context of the Original Law

LGBTQ+ individuals have existed throughout time, across cultures, and throughout the animal kingdom.[13] Almost ten percent of youth ages thirteen to seventeen in the United States identify as lesbian, gay, bisexual, and/or transgender.[14]

Battles over the rights of LGBTQ+ individuals have long been contentious issues in U.S. politics and law. In the 1986 decision of *Bowers v. Hardwick*, the Supreme Court declared that states could criminalize adults engaged in consensual, same-sex sexual intimacy because there was no constitutional right to engage in that conduct.[15] Almost twenty years later, in the 2003 decision of *Lawrence v. Texas*, the Supreme Court reversed *Bowers* and found that adults do have a constitutional right to engage in consensual, same-sex sexual intimacy.[16] In 1981, gay and lesbian individuals were prohibited from serving in the military.[17] In 1993, the Clinton Administration allowed gay and lesbian individuals to serve in the military, so long as they did not reveal their sexual orientation to others, under the "Don't Ask, Don't Tell" policy.[18] In 2011, the "Don't Ask, Don't Tell" policy was repealed by the Obama Administration.[19] Massachusetts became the first state in the United States to legalize same-sex marriage, after the Massachusetts Supreme Judicial Court held in the 2003 decision of *Goodridge v. Department of Public Health* that the Massachusetts Constitution mandates a right to same-sex marriage.[20] Following that decision, other state supreme courts also found state and/or

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13 *See, e.g.*, BRUCE BAGEMIHL, BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY 1–2 (Stonewall Inn Editions ed., 2000) (1999) (documenting hundreds of examples of animal same-sex sexual behavior observed by scientists).

14 *See* KERITH J. CONRON, UCLA SCH. OF L., LGBT YOUTH POPULATION IN THE UNITED STATES: FACT SHEET 2 (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf [https://perma.cc/JB6X-RJVR].

15 Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

16 Lawrence v. Texas, 539 U.S. 558, 574, 578 (2003).

17 *See Don't Ask, Don't Tell Repeal Act of 2010*, NAT'L ARCHIVES FOUND., https://www.archivesfoundation.org/documents/dont-ask-dont-tell-repeal-act-2010/ [https://perma.cc/LCW2-WKU5] (last visited Nov. 10, 2024).

18 *See id.*

19 *See id.*; *see also* Gautam Raghavan, *10 Years Later: Looking Back at the Repeal of "Don't Ask, Don't Tell,"* THE WHITE HOUSE (Sept. 20, 2021), https://www.whitehouse.gov/ppo/briefing-room/2021/09/20/10-years-later-looking-back-at-the-repeal-of-dont-ask-dont-tell/ [https://perma.cc/BD5J-TFD7].

20 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

federal constitutional rights to same-sex marriage.[21] Recently, in the 2015 landmark decision of *Obergefell v. Hodges*, the U.S. Supreme Court found a federal constitutional right to same-sex marriage, legalizing it in all states.[22] Additionally, in 2020, in another landmark decision, *Bostock v. Clayton County*, the Supreme Court held that federal law prohibits employers from discriminating against employees based on their sexual orientation or gender identity.[23] In 2021, the U.S. Department of Education's Office for Civil Rights issued a notice of interpretation stating that students are protected from sexual orientation and gender identity discrimination at school.[24] In 2022, a federal court ordered that this interpretation not be implemented in twenty states.[25]

Other recent political and legal battles affecting the LGBTQ+ community involve questions on what bathrooms transgender individuals can use,[26] what sports teams transgender individuals can participate in,[27] bans on books containing LGBTQ+ content,[28] and bans on gender-affirming healthcare.[29] And of course, there is the subject of this Article,

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21 *See* Catherine Jean Archibald, *Two Wrongs Don't Make a Right: Implications of the Sex Discrimination Present in Same-Sex Marriage Exclusions for the Next Supreme Court Same-Sex Marriage Case*, 34 N. ILL. UNI. L. REV. 1, 11–12, 15–16 (2013).

22 Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

23 Bostock v. Clayton County, 590 U.S. 644, 651–52 (2020).

24 Enforcement of Title IX of the Education Amendments of 1972 in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637, 32638 (June 22, 2021), *vacated*, Tennessee v. U.S. Dep't of Educ., 615 F. Supp. 3d 807 (E.D. Tenn. 2022), *aff'd*, 104 F.4th 577 (6th Cir. 2024); *see also* Press Release, U.S. Dep't of Educ., U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity (June 16, 2021), https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity [https://perma.cc/W8M6-FN2X].

25 *See* Tennessee v. U.S. Dep't of Educ., 615 F. Supp. 3d 807, 825, 842 (E.D. Tenn. 2022), *aff'd*, 104 F.4th 577 (6th Cir. 2024).

26 *See, e.g.*, Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL'Y 1, 6–18 (2016) (describing battles over transgender bathroom rights); Catherine Jean Archibald, *Transgender Bathroom Rights in the Time of Trump*, 6 TENN. J. RACE, GENDER, & SOC. JUST. 241, 244–53 (2017) (same).

27 *See, e.g.*, Catherine Jean Archibald, *Transgender and Intersex Sports Rights*, 26 VA. J. SOC. POL'Y & L. 246, 251–56 (2019) (describing battles over rights of transgender individuals to play on certain sports teams).

28 *See, e.g.*, Alexandra Alter, *Book Bans Continue to Surge in Public Schools*, N.Y. TIMES (Apr. 16, 2024), https://www.nytimes.com/2024/04/16/books/book-bans-public-schools.html [https://perma.cc/TF2T-BASM] (describing bans on books containing LGBTQ+ characters and content in schools).

29 *See, e.g.*, Kimberly Kindy, *Historic Surge in Bills Targeting Transgender Rights Pass at Record Speed*, WASH. POST (Apr. 17, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/04/17/gop-state-legislatures-lgbtq-

Florida's "Don't Say Gay" Law, officially part of the Parental Rights in Education Act, which concerns what can be said and taught in schools.[30]

B. The Timeline of the "Don't Say Gay" Law, Including Regulations and Amendment

The Parental Rights in Education Act was signed by Florida Governor Ron DeSantis on March 28, 2022, and came into force on July 1, 2022.[31] It includes sections which allow parents to examine a school's "well-being" questionnaire, decide whether their child can complete the questionnaire, review school records concerning the child's well-being, and be informed of services provided by the school related to their child's well-being.[32]

As originally enacted in 2022, the "Don't Say Gay" section of the Parental Rights in Education Act provided as follows: "Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards."[33] In the build-up to the passage of the law, it became clear that key lawmakers who supported it did not want teachers to discuss, answer any student questions about, or even make incidental references to the LGBTQ+ community. For example, Senator Baxley, the Florida Senate sponsor of the "Don't Say Gay" Law, stated that teachers should not answer questions about students with two moms, and that math questions should not include questions involving kids with two moms or two dads.[34]

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rights/ [https://perma.cc/V55X-67HS]; *see also* Nicole Ezeh, *Supreme Court Hears Case on Youth Transgender Care*, NCSL (Dec. 6, 2024), https://www.ncsl.org/state-legislatures-news/details/supreme-court-hears-case-on-youth-transgender-care [https://perma.cc/8NL4-VMJL].

30 FLA. STAT. § 1001.42(8)(c) (2024).

31 Parental Rights in Education Act, ch. 22, 2022 Fla. Laws 248 (codified as amended at FLA. STAT. § 1001.42(8)(c)).

32 *Id.* sec. 1, § 1001.42(8)(c)(2), (5)–(6), at 250 ("A school district may not adopt procedures or student support forms that prohibit school district personnel from notifying a parent about his or her student's mental, emotional, or physical health or well-being, or a change in related services or monitoring, or that encourage or have the effect of encouraging a student to withhold from a parent such information.").

33 *Id.* § 1001.42(8)(c)(3), at 250.

34 *Senate Committee on Education – February 8, 2022*, MY FLA. HOUSE, at 32:10–32:30, 47:05–48:07, 55:24–55:50 (Feb. 8, 2022), https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=7863 [https://perma.cc/UTT8-ADRC]. Additionally, the preamble to the Parental Rights in Education Act states as one

The Parental Rights in Education Act provides procedures for parents to bring concerns to the school, school district, or a court of law if they believe any part of the law is violated.[35] The "Don't Say Gay" Law provides that a parent can bring a concern regarding the implementation of this law to the school district, and if the concern does not get resolved, the parent may request the Commissioner of Education to appoint a special magistrate, paid for by the school district, to investigate the matter and provide a recommendation to the State Board of Education.[36] Additionally, if the school district does not resolve the concern, a parent is also authorized to bring legal action against the school district for declaratory or injunctive relief.[37] If the parent obtains such relief from the court, they will also receive attorney fees and court costs from the school district, as well as a potential award of damages.[38]

Finally, the Parental Rights in Education Act provided that by June 30, 2023, the Florida Department of Education must have reviewed and updated any of its related rules or policies as necessary to comply with the law.[39]

Several months after the "Don't Say Gay" Law came into effect, the Florida Department of Education issued a rule pursuant to the law that forbade Florida teachers from "intentionally provid[ing] classroom instruction to students in prekindergarten through grade 3 on sexual orientation or gender identity" and "intentionally provid[ing] classroom instruction to students in grades 4 through 12 on sexual orientation or gender identity unless such instruction is either expressly required by state academic standards . . . or is part of a reproductive health course or health lesson for which a student's parent has the

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of its purposes: "prohibiting classroom discussion about sexual orientation or gender identity in certain grade levels or in a specified manner." Parental Rights in Education Act, 2022 Fla. Laws at 249 pmbl. Furthermore, when Governor DeSantis signed the "Don't Say Gay" Law, he explained that he did not want children at school to be read a book with a transgender main character. *See* PBS NewsHour, *WATCH: Governor Ron DeSantis Gives Remarks as He Signs into Law Florida's "Don't Say Gay" Bill*, YOUTUBE, at 03:55–04:20 (Mar. 28, 2022), https://www.youtube.com/watch?v=IVuniz7w1bQ [https://perma.cc/NW4E-MKP9].

35 Parental Rights in Education Act, sec. 1, § 1001.42(8)(c)(7), 2022 Fla. Laws at 250–51.

36 *Id.* § 1001.42(8)(c)(7)(b)(I), at 251.

37 *Id.* § 1001.42(8)(c)(7)(b)(II), at 251.

38 *Id.*

39 *Id.* sec. 2, at 251.

option to have his or her student not attend."[40] Any Florida teacher who violates this rule could have their educator's certificate revoked or suspended; in other words, they could lose their job.[41]

In May 2023, the "Don't Say Gay" Law was expanded to its current version, where classroom instruction on sexual orientation and gender identity is now prohibited from kindergarten through the eighth grade. The current version of the law provides, "Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8 . . . If such instruction is provided in grades 9 through 12, the instruction must be age-appropriate or developmentally appropriate for students in accordance with state standards."[42]

In August 2023, the Florida Department of Education updated its rules to comport with the updated law, forbidding

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40 FLA. ADMIN. CODE ANN. r. 6A-10.081(2)(a)(6)–(7) (2024). The Florida Department of Education is a state administrative agency empowered by the Parental Rights in Education Act to issue rules pursuant to and consistent with the Act. *See* Parental Rights in Education Act, sec. 1, § 1001.42, 2022 Fla. Laws at 249. By enacting this rule, the agency interpreted the "Don't Say Gay" Law's requirement that instruction on sexual orientation or gender identity be "age-appropriate or developmentally appropriate" for students in grades four through twelve to mean that the only age-appropriate or developmentally appropriate instruction on these subjects is when such instruction is required by state standards or is part of a reproductive or health lesson that parents are able to opt their children out of. *Id.* § 1001.42(8)(c)(3), at 250; *see also* 2 AM. JUR. 2D *Administrative Law* § 67 (2024) (stating that administrative agencies have the power to interpret statutes they are empowered by law to interpret). *See* Andrew Demillo, *Other States Are Copying Florida's "Don't Say Gay" Efforts*, ASSOCIATED PRESS (Mar. 23, 2023, 3:39 PM), https://apnews.com/article/huckabee-sanders-desantis-dont-say-gay-lgbtq-702fd5dc9633a7c93432f582de51a5fb [https://perma.cc/VN77-WCV2] (noting how the Florida Commissioner of Education stated that the Department of Education's rule and its interpretation of the "Don't Say Gay" Law was necessary to "clarify confusion around what is deemed age appropriate in later grades"); *see also* Hunter Foist, *Keep Saying Gay: How Nationwide "Don't Say Gay" Bills Violate the First Amendment, Chill Protected Speech, and Hinder Public Health Outcomes*, 21 IND. HEALTH L. REV. 177, 196 (2024) (explaining that, with this rule, "DeSantis and Florida Republicans are now suggesting that LGBTQ content is never acceptable in Florida classrooms and is never 'age-appropriate'"). To the author's knowledge at the time of publication, no challenges have been made to this administrative interpretation of the law.

41 *See* FLA. ADMIN. CODE ANN. r. 6A-10.81(2); *see also Educator Certification*, FLA. DEP'T OF EDUC., https://www.fldoe.org/teaching/certification/ [https://perma.cc/9MJ7-PLS9] (last visited Oct. 27, 2024) (stating that an educator certification is a requirement to teach in Florida schools).

42 FLA. STAT. § 1001.42(8)(c)(3) (2024). The law has exceptions that only apply to instruction on "awareness of the benefits of sexual abstinence as the expected standard and the consequences of teenage pregnancy." *Id.* § 1003.42(2)(o)(2); *see also id.* § 1003.46(2)(b).

teachers from "intentionally provid[ing] classroom instruction to students in prekindergarten through grade 8 on sexual orientation or gender identity."[43] Additionally, teachers are prohibited from:

> intentionally provid[ing] classroom instruction to students in grades 9 through 12 on sexual orientation or gender identity unless such instruction is either expressly required by state academic standards . . . or is part of a reproductive health course or health lesson for which a student's parent has the option to have his or her student not attend.[44]

Any teacher who violates this rule could have their educator's certificate revoked or suspended; thus, they could lose their job.[45]

C. The Impact of Florida's "Don't Say Gay" Law

Florida's "Don't Say Gay" Law has been devastating for LGBTQ+ children, families, and teachers. As a result of the law, LGBTQ+ books have been removed from schools, pride flags and safe space stickers have been taken down, and school administrators have removed lines from student plays, or cancelled plays altogether.[46] A gay high school valedictorian had to alter what he said in his graduation speech to remove the word "gay."[47] A teacher was investigated under the law for showing a PG-rated Disney movie with an LGBTQ+ character.[48] Teachers have had to scramble to change lesson plans for their students.[49] LGBTQ+ teachers have removed photos of their same-sex spouses, and student and teacher speech about LGBTQ+ family

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43 FLA. ADMIN. CODE ANN. r. 6A-10.081(2)(a)(6)–(7).

44 *Id.*; *see also* sources cited *supra* note 40.

45 *See* sources cited *supra* note 41.

46 Jo Yurcaba, *Florida Teachers Navigate Their First Year Under the 'Don't Say Gay' Law*, NBC NEWS (Aug. 19, 2022, 1:30 AM), https://www.nbcnews.com/nbc-out/florida-teachers-navigate-first-year-dont-say-gay-law-rcna43817 [https://perma.cc/2YT4-HJJD].

47 David Williams, *A Florida Class President Couldn't Discuss Being Gay in High School Graduation Speech – so He Talked About His Curly Hair*, CNN NEWS (May 25, 2022, 10:06 AM), https://edition.cnn.com/2022/05/25/us/florida-curly-hair-graduation-speech/index.html [https://perma.cc/8H9Z-ER92].

48 Jo Yurcaba, *DeSantis Signs 'Don't Say Gay' Expansion and Gender-Affirming Care Ban*, NBC NEWS (May 17, 2023, 9:30 AM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/desantis-signs-dont-say-gay-expansion-gender-affirming-care-ban-rcna84698 [https://perma.cc/R8G9-VF5U].

49 Janelle Griffith, *Florida Teachers Are Worried New Policies Could Get Them Fired — or Even Criminally Charged*, NBC NEWS, https://www.nbcnews.com/news/us-news/florida-teachers-start-school-year-uncertainty-new-policies-take-effec-rcna99243 [https://perma.cc/CS2G-H6RL] (Aug. 16, 2023, 7:10 AM).

members has been chilled.[50] Although some of these harms have been ameliorated due to the Settlement, many of these harms, particularly the chilling of speech at school, remain. Under the "Don't Say Gay" Law and its implementing regulations, even post-Settlement, a teacher cannot provide instruction on the Supreme Court's landmark decision in *Obergefell v. Hodges*, granting same-sex couples the right to marry, in an eleventh-grade history or civics class without worrying that their teaching license will be revoked and they will lose their job.[51] As one LGBTQ+ advocate lamented, "This rule is by design a tool for curating fear, anxiety and the erasure of our LGBTQ community."[52]

LGBTQ+ students face discrimination and harassment at school based on their sexual orientation and/or gender identity.[53] Waning support for LGBTQ+ children in Florida schools harms their mental health, according to the Trevor Project.[54] Teachers in states, including Florida, that have LGBTQ+-related restrictions on speech are hesitant to expose their students to the reality of same-sex marriage and to different types of family structures, removing symbols that are supportive of the LGBTQ+ community, such as pride flags.[55] Teachers are also reporting "soften[ing]" their language in classroom discussions and even

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50 ABBIE E. GOLDBERG, UCLA SCH. OF L., IMPACT OF HB 1557 (FLORIDA'S DON'T SAY GAY BILL) ON LGBTQ+ PARENTS IN FLORIDA 9 (2023), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Dont-Say-Gay-Impact-Jan-2023.pdf [https://perma.cc/PWY6-W2EY] (noting that children in Florida have been afraid to talk about their LGBTQ+ families since the law's passage); *see also* Demillo, *supra* note 40.

51 Hannah Natanson, *Florida Bans Teaching About Gender Identity in All Public Schools*, WASH. POST, https://www.washingtonpost.com/education/2023/04/19/florida-bans-teaching-gender-identity-sexuality/ [https://perma.cc/PQ5D-236C] (Apr. 19, 2023, 6:32 PM); Carlos Suarez et al., *Florida Teachers Can Discuss Sexuality and Gender Identity in Some Classroom Settings, Legal Settlement Clarifies*, CNN, https://www.cnn.com/2024/03/12/us/florida-lgbtq-bill-schools-lawsuit-settlement/index.html [https://perma.cc/9NFD-MRNX] (Mar. 12, 2024, 8:54 AM) (explaining that the Settlement allows "students and teachers . . . to discuss sexual orientation and gender identity in classrooms, as long as it is not part of formal instruction").

52 *Id.*

53 GLSEN, THE 2021 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LGBTQ+ YOUTH IN OUR NATION'S SCHOOLS, at xv–xx (2022), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf [https://perma.cc/ZM53-GRQL].

54 *See* Devan Cole & Tina Burnside, *DeSantis Signs Controversial Bill Restricting Certain LGBTQ Topics in the Classroom*, CNN, https://www.cnn.com/2022/03/28/politics/dont-say-gay-bill-desantis-signs/index.html [https://perma.cc/9CPJ-7ULT] (Mar. 28, 2022, 4:41 PM).

55 ASHLEY WOO ET AL., RAND CORP., WALKING ON EGGSHELLS—TEACHERS' RESPONSES TO CLASSROOM LIMITATIONS ON RACE- OR GENDER-RELATED TOPICS 12 (2023), https://www.rand.org/content/dam/rand/pubs/research_reports/RRA100/RRA134-16/RAND_RRA134-16.pdf [https://perma.cc/N9DC-EHD9].

avoiding using the word "gender."[56] Additionally, teachers report not being able to engage their students in issues of critical public importance, or to present high interest materials to their students that help them to engage in the content and increase learning.[57] Teachers are forced to "[err] on the side of caution" and "walk[] on eggshells."[58] Approximately one fifth of teachers surveyed about recent limitations on teaching report feeling "more hesitant" to discuss controversial topics, or they avoid such topics altogether.[59]

D. Legal Challenges to the "Don't Say Gay" Law

Shortly after the "Don't Say Gay" Law was passed, a lawsuit challenging it as unconstitutional was filed.[60] The plaintiffs were parents, teachers, students, and organizations in Florida.[61] They originally sued the Florida Governor, Florida Department of Education, and others.[62] The U.S. District Court for the Northern District of Florida (District Court) found that the plaintiffs did not have standing to sue, as they had failed to allege any personalized and redressable injury traceable to the law.[63] The District Court also found that the statute was not vague as to the plaintiffs, despite some LGBTQ+ parents being unsure if they could volunteer in their kids' classrooms anymore.[64] The District Court dismissed the case with leave to amend.[65]

The plaintiffs then filed an amended complaint, and again the District Court dismissed the case, finding once more that the plaintiffs did not have standing.[66] The plaintiffs alleged that "safe space" stickers were removed from a Florida school district as a result of the "Don't Say Gay" Law, but the court found that the stickers were removed because of another section of the

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56 *Id.* (alteration in original).

57 *Id.* at 17–18.

58 *Id.* at 1, 20 (first alteration in original).

59 *Id.* at 21.

60 *See* Complaint & Jury Demand, Equality Fla. v. Fla. State Bd. of Educ., No. 4:22-cv-134 (N.D. Fla. Mar. 31, 2022), ECF No. 1.

61 Equal. Fla. v. Fla. State Bd. of Educ., No. 4:22-cv-134, 2022 WL 19263602, at *1 (N.D. Fla. Sept. 29, 2022), *appeal dismissed sub nom. per stipulation*, Armstrong *ex rel.* M.A. v. Fla. State Bd. of Educ., No. 23-10866, 2024 WL 1348273 (11th Cir. Mar. 22, 2024).

62 *Id.*

63 *Id.* at *2–3, *7.

64 *Id.* at *5.

65 *Id.* at *10.

66 M.A. v. Fla. State Bd. of Educ., No. 4:22-cv-134, 2023 WL 2631071, at *1 (N.D. Fla. Feb. 15, 2023), *appeal dismissed sub nom. per stipulation*, Armstrong *ex rel.* M.A. v. Fla. State Bd. of Educ., No. 23-10866, 2024 WL 1348273 (11th Cir. Mar. 22, 2024).

Parental Rights in Education Act: the provision that required school administrators to notify parents with any concerns about a child's well-being.[67] The plaintiffs alleged that teachers in one Florida school district had been advised not to talk about their same-sex partners or wear clothing that might lead to discussions on LGBTQ+ topics.[68] But the District Court found that none of the plaintiffs had standing to complain about this policy as they were either not attending that school district, or alternatively they failed to allege that their particular teachers would have talked about their same-sex partners or would have worn different clothing absent the school board policy.[69]

After the District Court dismissed the case for a second time, the plaintiffs appealed. The parties subsequently settled, and the appeal was dismissed.[70]

E. The Settlement of 2024

On March 11, 2024, almost two years after the law was enacted, a settlement was reached between the State of Florida and plaintiffs in the case of *M.A. v. Florida State Board of Education*.[71] Now, students and teachers in Florida can say "gay" or "transgender" in schools in certain delineated circumstances.[72]

The Settlement between the parties is the culmination of a lawsuit brought by plaintiffs Equality Florida, Family Equality, and a number of individuals against the State of Florida, specifically the Florida Department of Education, the Florida State Board of Education, and members of the Florida Board of Education in their official capacities.[73] It provides for the creation of a document that contains recitals about the history of the case and the limits of the law.[74] The Settlement requires the agencies

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67 *Id.* at *5.

68 *Id.* at *6.

69 *Id.*

70 *See Armstrong*, 2024 WL 1348273, at *1. A comparable case to *M.A. v. Florida State Board of Education* had a similar outcome. *See* Cousins v. Sch. Bd. of Orange Cnty., 636 F. Supp. 3d 1360, 1377 (M.D. Fla. 2022) (denying the preliminary injunction sought by individuals and non-profit organizations in their constitutional attack of the Parental Rights in Education Act), *case dismissed for lack of standing*, 687 F. Supp. 3d 1251 (M.D. Fla. 2023).

71 *See* Settlement, *supra* note 7, at 3–6, 8.

72 *See id.* at 4–5 (stating that the "Don't Say Gay" Law does not prohibit "incidental references in literature to a gay or transgender person or to a same-sex couple," and does not restrict "student-to-student speech").

73 *See id.* at 1.

74 *See id.* at 1–6.

to send the Settlement document to every school board in Florida and to encourage the school boards to send copies to every principal within their districts.[75]

In the Settlement, the State of Florida agrees to the following interpretations of the law:

(1) "Instruction" means the "action, practice, or profession of teaching," and only "instruction" on sexual orientation or gender identity is prohibited, not the "mere discussion of them."[76]

(2) Students can choose to address sexual orientation or gender identity in "class participation" and "schoolwork."[77]

(3) Teachers may respond if children talk about "their identities or family life." Teachers may also provide feedback if children choose to write an essay on LGBTQ+ identity. However, for "kindergarten through grade three," teachers may not respond to these situations "by teaching the subjects of sexual orientation or gender identity."[78]

(4) Incidental references to LGBTQ+ individuals and same-sex couples are allowed.[79]

(5) The statute does not prevent "stories where a prince and princess fall in love."[80]

(6) The statute restricts only books intended to instruct on gender identity or sexual orientation but does not prohibit incidental literary references to LGBTQ+ individuals.[81]

(7) The statute does not target or prefer particular sexual orientations or gender identities but instead is neutral. The statute prohibits teaching the "normalcy of opposite-

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75 *Id.* at 7.
76 *Id.* at 3.
77 *Id.*
78 *Id.*
79 *Id.* at 4.
80 *Id.*
81 *Id.*

> sex attraction" because that would be instruction on sexual orientation.[82]

Although the Settlement is a step in the right direction because it clarifies that certain things *are* allowed under the "Don't Say Gay" Law, it does not resolve all of the law's problems.

III. FLORIDA'S "DON'T SAY GAY" LAW VIOLATES THE FIRST AMENDMENT

The First Amendment provides that "Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech."[83] The "Don't Say Gay" Law violates both the Freedom of Speech Clause and the Establishment Clause of the First Amendment.

A. Freedom of Speech Exists Within Public Schools

Freedom of speech exists within public schools. It protects the rights of students and teachers to speak, as well as students' rights to receive information. The Supreme Court stated in 1960 that "[t]eachers and students must always remain free to inquire, to study and to evaluate."[84]

Nine years later, the Supreme Court famously stated in *Tinker v. Des Moines School District* that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[85] In *Tinker*, five students wore black armbands to school to protest the United States' involvement in the Vietnam War.[86] A school rule forbade wearing black armbands for this purpose, and the five students were suspended from school as a result.[87] The Court held that the school's rule violated the First Amendment, reasoning that "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" was insufficient to shut down speech in the school context.[88] Instead, the Court held that, for a school to limit speech, the

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82 *Id.* This seemingly contradicts section 1003.46 of the Florida Code, which allows teaching on AIDS—including sexuality—but then requires the instruction of the "benefits of monogamous heterosexual marriage." FLA. STAT. § 1003.46(1), (2)(b) (2024).

83 U.S. CONST. amend. I.

84 Shelton v. Tucker, 364 U.S. 479, 487 (1960) (quoting Sweezy v. Wyman *ex rel.* New Hampshire, 354 U.S. 234, 250 (1957)).

85 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

86 *Id.* at 508.

87 *Id.* at 504, 508.

88 *Id.* at 509, 514.

speech would have to "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others," or the school would have to reasonably forecast a substantial disruption to the operation of the school.[89]

In a later case, the Supreme Court ruled that schools could restrict speech that is lewd or obscene.[90] In *Bethel School District No. 403 v. Fraser*, a student at a school-sponsored event gave a speech that the court characterized as being lewd and having sexual innuendo to an assembly of six hundred schoolchildren.[91] The school had a policy prohibiting speech that was disruptive, including "the use of obscene, profane language or gestures."[92] As a result of giving the speech, the student was suspended for two days and prohibited from speaking at his graduation ceremony.[93] The Court ruled that the school's actions were constitutional, reasoning that a school has the right to prohibit "vulgar and lewd speech" because such speech could undermine its basic educational mission.[94] Additionally, the Court reasoned that parents and schools have a valid interest in preventing children from being exposed to "sexually explicit, indecent, or lewd speech."[95]

Additionally, the Court held in *Hazelwood School District v. Kuhlmeier* that a school may censor student speech that appears to be endorsed by the school itself.[96] Students at Hazelwood East High School published a school newspaper as part of their journalism class.[97] The practice of the school was to submit the newspaper to the school principal prior to publication for his approval.[98] On the complained-of occasion, the principal objected to two of the articles, and the student paper was subsequently published without them.[99] One article discussed the experiences of pregnant students at the school; the principal was concerned that the identity of the pregnant students would be discoverable to readers of the paper, even though false names were used.[100] He was also concerned that discussion about birth

89 *Id.* at 513.
90 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
91 *Id.* at 676–79.
92 *Id.* at 678.
93 *Id.* at 678–79.
94 *Id.* at 685.
95 *Id.* at 684.
96 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
97 *Id.* at 262.
98 *Id.* at 263.
99 *Id.* at 263–64.
100 *Id.* at 263, 273.

control and sexual activity was inappropriate for younger readers of the paper.[101] The second article comprised a student's experience with the divorce of her parents and included negative statements about her father.[102] The principal was concerned that the father had not been given a chance to respond to the student's complaints.[103] The Court held that the school did not violate the First Amendment by removing the articles.[104] The Court reasoned that "[t]he question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[105] Schools may limit student speech in "school-sponsored expressive activities" so long as the limits are "reasonably related to legitimate pedagogical concerns."[106] The Court noted that when school censorship of student speech has "no valid educational purpose," then it is the job of the courts to intervene to protect First Amendment rights.[107]

The Supreme Court has held that the First Amendment includes the right to know and receive information.[108] Additionally, the Supreme Court has stated that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[109] Finally, the Supreme Court has held that "the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.'"[110] Thus, as established by the Supreme Court, the First Amendment protects teachers' rights to speak and children's rights to receive speech in schools, except in narrow circumstances involving speech that is

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101 *Id.* at 263.

102 *Id.*

103 *Id.*

104 *Id.* at 276.

105 *Id.* at 270–71.

106 *Id.* at 273.

107 *Id.*

108 *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (holding that the First Amendment protects the right to receive literature distributed by others); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); Thomas v. Collins, 323 U.S. 516, 534 (1945) (striking down a requirement of registering before making a public speech as violative of the speaker's right to speak and the listener's right to hear); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach.").

109 Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (alteration in original) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

110 *Id.* at 105 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

disruptive to classrooms, speech that is lewd or obscene, or speech that is limited for a valid educational purpose.[111] Speech that is limited by the "Don't Say Gay" Law, which is speech about the LGBTQ+ community, fits into none of these narrow categories. Therefore, as the next section shows, Florida's "Don't Say Gay" law violates the First Amendment rights of teachers and students.

B. The Law Violates the Free Speech Clause

Public school teachers have a First Amendment right to speak on matters of public importance in their classrooms, including on the existence of LGBTQ+ people.

In a series of three cases, the Supreme Court laid out a test to determine when a public employee may speak on matters of public concern at work.[112] The three-part test requires that: (1) the speech be on a matter of public importance; (2) the speech is not official speech of the employer; and (3) the speech does not hinder the employer from operating "efficiently and effectively."[113] Furthermore, speech on matters of public importance is protected if made at work as well as when made in the public sphere.[114]

In *Pickering*, the Supreme Court held that school teachers have the right to speak as citizens on matters of public importance, so long as they do not make recklessly false statements.[115] In *Pickering*, a school teacher criticized the school board in a letter that was published in a local newspaper.[116] The letter related to a proposed tax increase and criticized the way the school board had utilized funding,[117] specifically accusing it of

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111 *See* Tinker v. Des Moines Cmty. Sch. Dist., 393 U.S. 503, 506, 508 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682–83, 685 (1986); *Hazelwood*, 484 U.S. at 273; *see also* Thomas M. Cassaro, *A Student's First Amendment Right to Receive Information in the Age of Anti-CRT and "Don't Say Gay" Laws*, 99 N.Y.U. L. REV. 280, 296–97 (2024) (arguing that "Don't Say Gay" laws violate students' First Amendment rights to receive information).

112 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 157 (1983); Garcetti v. Ceballos, 547 U.S. 410, 445 (2006).

113 *See Garcetti*, 547 U.S. at 419; *see also* Stephen Elkind & Peter Kauffman, *Gay Talk: Protecting Free Speech for Public School Teachers*, 43 J.L. & EDUC. 147, 162–63 (2014) (discussing the three-part test that comes from *Garcetti*, *Connick*, and *Pickering*).

114 *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 413–15 (1979) (finding that a teacher's speech complaining of racial discrimination to her school principal in the privacy of his office was protected by the First Amendment).

115 *Pickering*, 391 U.S. at 574.

116 *Id.* at 564.

117 *Id.* at 569.

spending excessive funds on athletics.[118] As a result of the letter, the school board held a hearing, where it found that the letter was harmful to the "efficient operation and administration of the schools."[119] The school board then fired the teacher.[120] The teacher sued, and the Supreme Court held that the teacher's First Amendment free speech rights had been violated.[121] The Court reasoned that teachers have a right to speak on matters of public importance and that "the threat of dismissal from public employment is . . . a potent means of inhibiting speech."[122] The Court noted that teachers have informed opinions on matters of public interest that are important to share with the public.[123] Finally, the Court stated that the school district had not shown that the letter caused it any harm, "impeded the teacher's proper performance of his daily duties," or "interfered with the regular operation of the schools."[124] Additionally, the "teacher's public statements [were not] so without foundation as to call into question his fitness to perform his duties in the classroom."[125] Finally, the Court announced that in deciding these types of cases, what must be balanced is the right of the public employee to speak as a citizen on matters of public concern and the need for the government employer to run its office in an efficient manner.[126]

The Supreme Court has also held that employee speech is only protected if it addresses matters of public concern, which must be determined by looking at the full context of the speech.[127] In *Connick*, a public employee, a district attorney, was told by her supervisor that she would be transferred to work on a different caseload.[128] Unhappy with this development, the employee circulated a questionnaire to her coworkers that mainly asked about their satisfaction with the transfer policy, the office grievance process, office morale, and their confidence in their supervisors.[129] The employee was fired the next day due to her

118 *Id.* at 571.
119 *Id.* at 564.
120 *Id.*
121 *Id.* at 574.
122 *Id.*
123 *Id.* at 571–72.
124 *Id.* at 570–73.
125 *Id.* at 573 n.6.
126 *Id.* at 568.
127 Connick v. Myers, 461 U.S. 138, 146–48 (1983).
128 *Id.* at 140.
129 *Id.* at 141.

insubordination and refusal to accept the transfer.[130] The Supreme Court held that the employee's First Amendment rights had not been violated because the speech at issue only concerned "matters . . . of personal interest" and not matters of public concern.[131] The Court reasoned that government employers must be able to dismiss employees who impede the efficient operation of their offices.[132] Furthermore, the Court reasoned that the First Amendment is primarily concerned with speech on matters of public concern, and here, the questionnaire mainly concerned matters of personal interest.[133]

Finally, the Supreme Court held that employee speech is not protected by the First Amendment if it is made pursuant to the employee's official duties.[134] In *Garcetti*, a prosecutor wrote an internal memo analyzing a police warrant and, concluding that the warrant had several mistakes, recommended the case to be dismissed.[135] The prosecutor's office nevertheless decided to proceed.[136] The employee then claimed that he suffered retaliation, including a job transfer and a denial of a promotion.[137] Upon review, the Supreme Court found that the First Amendment did not protect the employee's speech because it represented the official speech of the employer, justifying the employer's disciplinary action against the employee.[138] The Court held that if an employee speaks as a private citizen on a matter of public concern, disciplinary action is only warranted if the speech impacts the employer's ability to work "efficiently and effectively."[139] Additionally, the Court held that the determination of what is in an employee's official job description must be a practical one and must consider what the public employee is actually expected to do as part of the job.[140] The Court noted that additional considerations may apply to "academic scholarship" or "classroom instruction," and it

130 *Id.*
131 *Id.* at 147.
132 *Id.* at 152.
133 *Id.* at 154.
134 Garcetti v. Ceballos, 547 U.S. 410, 426 (2006).
135 *Id.* at 414.
136 *Id.*
137 *Id.* at 415.
138 *Id.* at 424.
139 *Id.* at 419.
140 *Id.* at 424–25.

explicitly stated that it did not decide whether the rule from this case would apply to "speech related to scholarship or teaching."[141]

The "Don't Say Gay" Law violates the First Amendment because it prevents and chills public employees from speaking as citizens on matters of public concern at work. Furthermore, the speech it prevents and chills is speech that is not part of the public employees' official job duties. Finally, the speech it prevents and chills does not hinder the efficient and effective operation of the government service of running schools.

First, the speech at issue—instruction on sexual orientation or gender identity that is not part of the school curriculum—is speech on a matter of public concern, just as the speech in *Pickering* was speech on a matter of public concern.[142] The speech in *Pickering* involved a teacher speaking out about a school board's allocation of public funds, a clear example of a matter that concerns the public. Here, the speech being chilled and prevented by the "Don't Say Gay" Law—a teacher's speech explaining that LGBTQ+ people exist and are part of society—is also a clear example of a matter that concerns the public. At this point in history, many laws in the United States have recently been enacted, or are presently being considered, that harm and restrict the rights of the LGBTQ+ community.[143] People feel less fear and hatred towards the LGBTQ+ community if they know, or know of, an LGBTQ+ person they trust.[144] Lessening fear and

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141 *Id.* at 425.

142 Pickering v. Bd. of Educ., 391 U.S. 563, 571–72, 574 (1968); *see also, e.g.*, Snyder v. Phelps, 562 U.S. 443, 453–54 (2011) (finding that speech is on a matter of public concern when it pertains to the treatment of sexual minorities); Elkind & Kauffman, *supra* note 113, at 171–72 (noting that discussions on homosexuality in schools are necessarily a matter of public concern under *Pickering* and *Connick*).

143 *See, e.g.*, Daniel Trotta, *Human Rights Campaign Declares LGBTQ State of Emergency in US*, REUTERS (June 6, 2023, 2:11 PM), https://www.reuters.com/world/us/human-rights-campaign-declares-lgbtq-state-emergency-us-2023-06-06/ [https://perma.cc/N6PG-U7SM] (noting that hundreds of anti-LGBTQ+ bills were introduced within a year); *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU, https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024 [https://perma.cc/M7KB-63CK] (Sept. 5, 2024); Ryan Thoreson, *UN Committee Criticizes US Record on LGBT Rights*, HUM. RTS. WATCH (Nov. 8, 2023, 3:33 PM), https://www.hrw.org/news/2023/11/08/un-committee-criticizes-us-record-lgbt-rights [https://perma.cc/396V-2RBK]; Annette Choi, *Record Number of Anti-LGBTQ Bills Were Introduced in 2023*, CNN, https://edition.cnn.com/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html [https://perma.cc/3D49-6X2T] (Jan. 22, 2024, 5:04 PM).

144 *See, e.g.*, Adrienne Spiegel, *Coming Out Still Matters*, ACLU (Oct. 11, 2013), https://www.aclu.org/news/lgbtq-rights/coming-out-still-matters [https://perma.cc/EY4M-W3YD]; *Why Come Out? Benefits and Risks*, SKIDMORE COLL., https://www.skidmore.edu/osdp/lgbtq/comingout3.php [https://perma.cc/9XSV-HFRC] (last

hatred of the LGBTQ+ community is clearly a public concern, as is increasing acceptance and tolerance of the LGBTQ+ community.[145]

Even if a teacher engaging in speech about gender identity or sexual orientation identifies as a member of the LGBTQ+ community, the speech still mainly involves a matter of public concern rather than a matter of private interest. Conversely, in *Connick*, the Supreme Court characterized a questionnaire written by a public employee unhappy about being transferred to a different caseload as mainly regarding a matter of private interest rather than public concern.[146] By contrast, when a teacher discusses the fact that LGBTQ+ people exist and are members of our society, that is speech about a matter of public concern, regardless of whether that teacher is LGBTQ+ or not. [147]

The language of the statute is: "Classroom instruction by school personnel . . . on sexual orientation or gender identity may not occur in prekindergarten through grade 8."[148] The dictionary definition of "instruction" is: "the act or practice of instructing or teaching; education."[149] Children learn and are taught through discussion and interaction with others, including their teachers.[150] Instruction includes teachers answering student

visited Sept. 29, 2024) (noting that coming out helps to "dispel myths and stereotypes by speaking about one's own experience and educating others").

145 *See, e.g.*, *LGBTI People*, U.N. HUM. RTS., https://www.ohchr.org/en/topic/lgbti-people [https://perma.cc/W44P-D635] (last visited Sept. 28, 2024) (describing widespread discrimination against and violence towards LGBTQ+ people throughout the world); Victor Madrigal-Borloz (Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity), *Visit to the United States of America*, U.N. Doc. A/HRC/56/49/Add.3 (Apr. 15, 2024).

146 *See supra* text accompanying notes 127–133.

147 *See, e.g.*, Rowland v. Mad River Loc. Sch. Dist., 470 U.S. 1009, 1012 (1985) (Brennan, J., dissenting) (finding that a teacher who was fired after coming out as bisexual spoke on a matter of public concern because there is a "public debate . . . currently ongoing regarding the rights of homosexuals"); Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1284 (D. Utah 1998) (stating that "a voluntary 'coming out' or an involuntary 'outing' of a gay, lesbian, or bisexual teacher would always be a matter of public concern").

148 FLA. STAT. § 1001.42 (2024).

149 *Instruction*, DICTIONARY.COM, https://www.dictionary.com/browse/instruction [https://perma.cc/JWH5-DW7E] (last visited Sept. 28, 2024).

150 *See, e.g.*, *Learning Through Discussion*, COLUM. UNIV. CTR. FOR TEACHING & LEARNING, https://ctl.columbia.edu/resources-and-technology/resources/learning-through-discussion/ [https://perma.cc/3D2V-RWRZ] (last visited Sep. 28, 2024) (noting that class discussion is an active learning technique that "can take many forms . . . [including] casual or informal conversations"); *Discussions*, IND. UNIV. BLOOMINGTON CTR. FOR INNOVATIVE TEACHING & LEARNING, https://citl.indiana.edu/teaching-resources/teaching-strategies/discussions/index.html [https://perma.cc/F6RZ-Y9A7] (last visited Sept. 28, 2024). *See generally* Wendy L. Ostroff, *Empowering Children Through Dialogue and*

questions, even on topics not related to the curriculum. Therefore, under the plain language of the statute, teachers are prevented and chilled from answering student questions on sexual orientation and gender identity.

The Settlement attempts to clarify that "instruction" only includes formal instruction as part of the curriculum. Explaining that "'[i]nstruction' is 'the action, practice, or profession of teaching,'" the Settlement states that only 'instruction' on sexual orientation or gender identity is restricted, "not 'mere discussion of them.'"[151] However, this is problematic and contradictory because, as outlined above, a discussion about sexual orientation or gender identity between a student and a teacher will necessarily involve instruction and teaching on sexual orientation or gender identity, especially when a student is relatively unfamiliar with these topics. The following are examples of discussion questions and answers between a student and teacher, illustrating the aforementioned point.

A student may ask a teacher a question such as, "Why does Susan have two moms?" A teacher responding to that question should be able to say, "Sometimes two women or two men love each other in a romantic way, get married, and have children." A student may ask a male teacher, "Why is there a photo of a man on your desk?" The teacher should be able to explain to the student, "The person in the photo is my husband. Sometimes men marry other men." A child may ask a teacher, "George says he's transgender, but what does that mean?" The teacher should be able to respond, "Sometimes children who are told they are a boy or girl at birth don't agree with that when they get older, and that is being transgender." However, under the "Don't Say Gay" Law as written and interpreted through the Settlement, teachers are prevented or chilled from providing these types of truthful, age-appropriate answers to student questions because they reasonably could be interpreted as providing instruction on sexual orientation or gender identity.

Discussion, 77 EDUC. LEADERSHIP 14 (2020) (noting that children ask valuable questions and learn from the discussions that follow). Indeed, the Socratic Method focuses solely on questions asked and answered to promote learning among the students. *See, e.g.*, Rick Reis, *The Socratic Method: What It Is and How to Use It in the Classroom*, QUADRAT ACADEMY, https://www.quadratacademy.com/single-post/the-socratic-method-what-it-is-and-how-to-use-it-in-the-classroom [https://perma.cc/J9TX-6N5B] (last visited Sept. 28, 2024).

151 Settlement, *supra* note 7, at 3.

Furthermore, the Settlement states that teachers may respond if children talk about "their identities or family life."[152] Teachers may also provide feedback if children choose to write an essay on LGBTQ+ identity.[153] However, for kindergarten classes through the third grade, teachers may not respond to these situations "by teaching the subjects of sexual orientation or gender identity."[154] This language seems contradictory because sometimes a mini-lesson is necessary in responding to a student question, as the above examples demonstrate. These mini-lessons, perhaps on the topics of sexual orientation or gender identity, are speech on a matter of public concern, which is then prevented or chilled by the "Don't Say Gay" Law and the Settlement.

Second, under the rule from *Garcetti*, Florida and other states may have the right to prevent and restrict the teaching of sexual orientation and gender identity topics as a formal part of the state curriculum.[155] Similar to *Garcetti*, where the prosecutor was engaging in his official duties when he wrote an internal memorandum pursuant to those duties, teachers engage in their official duties when teaching the state curriculum.[156] The Supreme Court stated that because the prosecutor was engaged in his official duties when he wrote the memorandum, his speech was not protected by the First Amendment.[157] Similarly, teachers may not be engaged in protected speech if they teach the topics of sexual orientation or gender identity as part of the curriculum when those topics are not part of the state curriculum.

However, when teachers answer student questions off-topic from the curriculum, they are not performing their official duties. After all, a teacher could respond to the student questions such as "Why does Susan have two moms?," "Why is there a photo of a man on your desk?," and "George says he's transgender, but what does that mean?" by stating simply, "I don't have time to answer that, we need to move on to the math lesson." Because they don't need to answer those types of questions, it is clear that

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152 *Id.*

153 *Id.*

154 *Id.*

155 *See, e.g.*, Epperson v. Ark., 393 U.S. 97, 107 (1968) (explaining that a state has an "undoubted right to prescribe the curriculum for its public schools"). For an explanation on why *Garcetti* may not apply in the public school context, see *supra* note 141 and accompanying text; *see also infra* notes 162–166 and accompanying text.

156 *See supra* text accompanying notes 134–141.

157 *See supra* text accompanying note 138.

answering them is not part of a teacher's official duties.[158] But, while a teacher does not need to answer these types of student questions, if the state *compels* them not to answer, then there is a First Amendment violation.[159] Compelling teachers not to answer particular questions is exactly the intention and effect of the "Don't Say Gay" Law, even after the settlement of 2024.[160]

Lastly, answering these types of questions honestly and age-appropriately does not hinder the state's delivery of an effective or efficient education system. After all, many states do not have "Don't Say Gay" laws, and their education systems are not hindered by students and teachers discussing the LGBTQ+ community in a school setting.[161] Therefore, the "Don't Say Gay" Law violates the First Amendment rights of teachers to speak on matters of public concern when they are not performing their official job duties.

Although the Supreme Court in *Garcetti* declined to decide whether its rule would apply to "speech related to scholarship or teaching,"[162] this statement was in response to the dissent of Justice Souter, whose main concern seemed to be academic freedom in the university setting.[163] However, Justice Souter's dissent did include a quotation from a case that concerned First Amendment protections in grade schools, not universities, so perhaps the dissent's concern and the majority's response to that concern would include speech in the grade school context.[164]

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158 *But see* Elkind & Kauffman, *supra* note 113, at 166 (arguing that anytime a teacher speaks to a student in school, they are performing their official job duties).

159 *See Epperson*, 393 U.S. at 107 (explaining that a state cannot restrict a teacher's speech for reasons which would violate the First Amendment).

160 Senator Baxley, the sponsor of the "Don't Say Gay" Law, explicitly stated that teachers should not answer these types of questions at school. *See Senate Committee on Education – February 8, 2022*, *supra* note 34, at 32:00–32:23, 46:58–48:07.

161 *See* Bobbi M. Bittker, *LGBTQ-Inclusive Curriculum as a Path to Better Public Health*, HUM. RTS., July 5, 2022, at 36–38; *see also* Jo Yurcaba, *Over 30 New LGTBQ Education Laws Are in Effect as Students Go Back to School*, NBC NEWS (Aug. 30, 2023, 12:04 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/30-new-lgbtq-education-laws-are-effect-students-go-back-school-rcna101897 [https://perma.cc/N96V-J6XW].

162 Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

163 *See id.* at 438–39 (Souter, J., dissenting) ("[I] have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities.").

164 *See id.* at 439.

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant

Regardless, even if the Supreme Court announces a different rule for the school setting in the future, it is likely to be more protective of free speech than the protection flowing from the *Pickering*, *Connick*, and *Garcetti* cases.[165] In stating that it was not deciding if its rule applied in the "scholarship or teaching" context, the *Garcetti* majority recognized that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for" by the Court's current decisions.[166] Therefore, teachers have the right to speak on matters of sexual orientation and gender identity at school outside of formal curriculum teaching, and would still have this right under any future, more protective rule that the Supreme Court might decide for the school setting. Thus, the "Don't Say Gay" Law, by preventing and chilling protected speech on sexual orientation and gender identity at schools, violates the First Amendment.[167]

C. The Law Violates the Establishment Clause

The "Don't Say Gay" Law was enacted to promote a particular religious worldview[168] and therefore violates the First Amendment's Establishment Clause. The First Amendment's Establishment Clause provides that "Congress shall make no law

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> protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Id. (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)); *see also* Clifford Rosky, *Don't Say Gay: The Government's Silence and the Equal Protection Clause*, U. ILL. L. REV. 1845, 1847 (2022) (noting that it is uncertain whether a teacher's curricular speech is government speech pursuant to the *Garcetti* rule).

165 *See, e.g.*, Elkind & Kauffman, *supra* note 113, at 170–71 (arguing that if the rule from *Garcetti* does not apply to public school teachers, then the two-part test from the *Connick* and *Pickering* cases will apply).

166 *Garcetti*, 547 U.S. at 425.

167 For other scholarship concluding that Florida's "Don't Say Gay" Law violates the First Amendment, see, for example, Zachary A. Kayal, *He/She/They "Say Gay": A First Amendment Framework for Regulating Classroom Speech on Gender and Sexuality*, 57 COLUM. J. L. & SOC. PROBS. 57, 96 (2023); Cassaro, *supra* note 111, at 318.

168 *See, e.g.*, Jillian Eugenios, *How 1970s Christian Crusader Anita Bryant Helped Spawn Florida's LGBTQ Culture War*, NBC NEWS, https://www.nbcnews.com/nbc-out/out-news/1970s-christian-crusader-anita-bryant-helped-spawn-floridas-lgbtq-cult-rcna24215 [https://perma.cc/6H7Z-UWN6] (Apr. 14, 2022, 9:21 AM) (describing the long history of anti-LGBTQ+ activism and its connection to certain religious groups in Florida); Omar G. Encarnación, *Florida's 'Don't Say Gay' Bill Is Part of the State's Long, Shameful History*, TIME (May 12, 2022, 3:51 PM), https://time.com/6176224/florida-dont-say-gay-history-lgbtq-rights/ [https://perma.cc/2EQ2-3YR7] (describing the connection between the Christian Right and the pursuit of laws that harm and marginalize the LGBTQ+ community).

respecting an establishment of religion."[169] The Establishment Clause does not permit a state to make a law "requir[ing] that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[170] Furthermore, if a law coerces public school students to participate in the exercise of religion, it violates the Establishment Clause.[171] By prohibiting discussions on sexual orientation and gender identity, Florida is indirectly coercing students into abiding by a particular set of beliefs: those aligned with certain religious doctrines opposing such discussions.

The Establishment Clause also forbids a state from directing the teaching and learning of students in order to promote or inhibit particular religious views.[172] In *Epperson*, Arkansas had a statute that forbade the teaching of evolution in schools.[173] The Supreme Court held that this law was unconstitutional and in violation of the Establishment Clause because a law "may not aid, foster, or promote one religion or religious theory."[174] The Court found that the law was made with the primary purpose of preventing the teaching of evolution because it conflicted with a particular religious doctrine.[175] The Court explained, "No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens."[176] It reasoned that the law was unconstitutional because "the state has no legitimate interest in protecting any or all religions from views distasteful to them."[177]

Here, the "Don't Say Gay" Law was enacted with the primary purpose and effect of preventing children from learning about people with minority gender identities and sexual

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169 U.S. CONST. amend. I.

170 Epperson v. Arkansas, 393 U.S. 97, 106–07 (1968) (holding invalid as a violation of the Establishment Clause a statute that forbade the teaching of evolution in schools); *see also* Edwards v. Aguillard, 482 U.S. 578, 581, 597 (1987) (citation omitted) (holding invalid as a violation of the Establishment Clause a statute that required the teaching of "creation science" whenever evolution was taught in schools).

171 *See* Lee v. Weisman, 505 U.S. 577, 586–87 (1992) (finding an Establishment Clause violation where school officials "direct[ed] the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools").

172 *Epperson*, 393 U.S. at 103.

173 *Id.* at 98–99.

174 *Id.* at 104.

175 *Id.* at 103.

176 *Id.* at 107.

177 *Id.* (citation omitted).

orientations.[178] This is because many religions traditionally oppose same-sex romantic and sexual relationships, as well as the existence of transgender individuals.[179] No credible suggestion has been made that the law exists for any other purpose. Therefore, the purpose and primary effect of the "Don't Say Gay" Law is to prevent children from learning about the LGBTQ+ community, simultaneously coercing students into compliance with certain religious views that discriminate against this group. The sponsor of the law, Senator Dennis Baxley, expressed in an interview about a different anti-LGBTQ+ bill, "I simply can't affirm homosexuality. My compass won't go there, knowing what I know biblically."[180] This sentiment demonstrates that, in sponsoring the "Don't Say Gay" Law, he was acting to further his religious convictions. In *Epperson*, the prohibition on teaching evolution was found to violate the Establishment Clause because its purpose and primary effect was to prevent certain religious views from being challenged at school.[181] In *Lee v. Weisman*, the Court rejected prayer at a public school graduation ceremony on Establishment Clause grounds due to its coercive nature.[182] Since the "Don't Say Gay" Law has the purpose and primary effect[183] of preventing certain religious

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178 *See Senate Committee on Education – February 8, 2022*, *supra* note 34, at 32:00–33:00, 47:00–48:00, 55:00–56:00.

179 *See, e.g.*, *Religious Groups' Official Positions on Same-Sex Marriage*, PEW RSCH. CTR. (Dec. 7, 2012), https://www.pewresearch.org/religion/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/ [https://perma.cc/T6PN-937K] (showing many religious groups have an official position against same-sex relationships); David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RSCH. CTR. (Dec. 21, 2015), https://www.pewresearch.org/shortreads/2015/12/21/where-christian-churches-stand-on-gay-marriage/ [https://perma.cc/3LEZ-6222] (revealing that many religious groups oppose same-sex marriage); *Personal and Family Issues: Sexual Relationships – CCEA*, BBC, https://www.bbc.co.uk/bitesize/guides/zfwp47h/revision/7 [https://perma.cc/ET83-PYSY] (last visited Oct. 27, 2024) (discussing Christian views on same-sex relationships); Allen H. Vigneron, *The Good News About God's Plan: A Pastoral Letter on the Challenges of Gender Identity*, ARCHDIOCESE OF DET. (Feb. 26, 2024), https://www.aod.org/the-good-news-about-gods-plan [https://perma.cc/7BJA-VMB7] (laying out the Catholic Church's opposition to being transgender).

180 Erin Sullivan, *Florida House Passes Its Anti-Gay Adoption Bill, but Saner Minds Prevail in the Senate*, ORLANDO WEEKLY (Apr. 9, 2015, 6:04 PM), https://www.orlandoweekly.com/news/florida-house-passes-its-anti-gay-adoption-bill-but-saner-minds-prevail-in-the-senate-2381083 [https://perma.cc/ZFA4-9YV6].

181 *Epperson*, 393 U.S. at 104.

182 Lee v. Weisman, 505 U.S. 577, 586–87 (1992).

183 Note that the purpose and effect test described and discussed above has been criticized by certain Supreme Court justices. *E.g.*, Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) ("[D]iscerning the subjective motivation of those enacting the statute is . . . almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite."). The *Lemon* test for

views from being challenged at school, and it coerces[184] students into abiding by particular religious beliefs that promote discrimination against the LGBTQ+ community, the law violates the Establishment Clause.

IV. FLORIDA'S "DON'T SAY GAY" LAW VIOLATES THE FOURTEENTH AMENDMENT

The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[185] The "Don't Say Gay" Law violates the Due Process Clause of the Fourteenth Amendment because it is overbroad and vague. Furthermore, it violates the Equal Protection Clause of the Fourteenth Amendment because it causes disproportionate harm to and discriminates against LGBTQ+ individuals, and it was enacted with animus against the LGBTQ+ community.

A. The Law Is Unconstitutionally Overbroad in Violation of the Due Process Clause

Establishment Clause cases (which includes this purpose and effect test) has recently been overruled in a case upholding a teacher's rights to pray at school-sponsored functions. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 532–34 (2022) (finding that a school football coach had a First Amendment right to pray publicly and lead students in prayer on the football field during school-sponsored games); *see* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (holding that in order to conform with the Establishment Clause, a law (1) should have a secular purpose, (2) should not have a primary purpose or effect of advancing or inhibiting religion, and (3) should not lead to excessive government entanglement with religion). It is fair to say that *Kennedy* has introduced uncertainty about the future of Establishment Clause jurisprudence. However, *Epperson* has not been overruled, and a policy that restricts the free speech and free exercise of a teacher's religion—such as the policy at issue in *Kennedy*—is quite different from a law that restricts certain non-disruptive teacher speech, which is the case with the "Don't Say Gay" Law. *Kennedy*, 597 U.S. at 534–35 (stating that "this Court long ago abandoned *Lemon*" and holding that instead courts should look to "historical practices and understandings" to interpret the Establishment Clause in line with the "understanding of the Founding Fathers").

184 The no-coercion test appears to be the preferred method of the Supreme Court as of late in adjudicating Establishment Clause claims. *See Kennedy*, 597 U.S. at 536–37 ("[C]oercion . . . was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."); *see also id.* at 537 ("Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause."). It remains mired in mystery how exactly the Court will handle Establishment Clause claims going forward, but to be sure, this Article contends that the "Don't Say Gay" Law should be struck down under any test.

185 U.S. CONST. amend. XIV, § 1.

The "Don't Say Gay" Law is unconstitutional because it is overbroad and punishes speech protected by the First Amendment. A statute is overbroad, and therefore an unconstitutional violation of the Due Process Clause, if it could be reasonably construed to prohibit speech protected by the First Amendment.[186] A law that could be construed to prohibit protected speech impinges on the "breathing space" that the First Amendment requires and may chill people from engaging in protected speech for fear of sanctions.[187]

Any person charged with violating a statute because of their speech can allege as a defense that the statute is overbroad, even if the speech at issue could be prohibited under a more narrowly-drawn statute.[188] Overly broad statutes that target speech are a threat to constitutionally protected speech.[189] In *Gooding v. Wilson*, the defendant was convicted of a crime due to stating these words to two police officers: "'White son of a bitch, I'll kill you,' 'You son of a bitch, I'll choke you to death,' and 'You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces.'"[190] The statute that the defendant was convicted under forbade "opprobrious words or abusive language, tending to cause a breach of the peace."[191] The Supreme Court affirmed the District Court in overturning the conviction, finding that the law was unconstitutionally overbroad.[192] The Court highlighted that although fighting words—words that would incite a reasonable person to immediate violence—can be constitutionally prohibited, "opprobrious" and "abusive" words encompassed more than fighting words.[193] The Court explained that "opprobrious" and "abusive" language includes language that is "conveying or intended to convey disgrace" and "harsh insulting language."[194] Additionally, the Court reasoned that "breach of the peace" includes situations where someone's words are merely offensive, which, again, punishes more than fighting words.[195]

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186 *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 522 (1972).
187 *Id.* at 521–22.
188 *Id.*
189 *Id.*
190 *Id.* at 520.
191 *Id.* at 519.
192 *Id.* at 520.
193 *Id.* at 525 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
194 *Id.* at 525.
195 *Id.* at 527 (citing Street v. New York, 394 U.S. 576, 592 (1969)).

Here, the "Don't Say Gay" Law is unconstitutionally overbroad because it prohibits, or could reasonably be construed to prohibit, speech protected under the First Amendment. As described in Section II.B, teachers have a constitutional right to speak outside of their official job duties on matters of public concern at their place of work so long as the speech does not disrupt the normal operation of the school.[196] However, the "Don't Say Gay" Law prohibits classroom instruction on sexual orientation and gender identity up to the eighth grade.[197] The Settlement clarifies that teachers can respond to student-initiated discussion of these topics, but teachers of kindergarten through the third grade may not respond to these situations "by teaching the subjects of sexual orientation or gender identity."[198] The law could reasonably be interpreted to prevent teachers from answering student questions about same-sex marriage or acknowledging that a person's gender identity differs from their assigned gender at birth. Pursuant to the law as written and interpreted under the Settlement, teachers are prevented or chilled from providing these types of truthful, age-appropriate, non-disruptive, non-curricular answers to student questions on matters of public importance. Similar to the *Gooding* statute that was declared unconstitutionally overbroad, the "Don't Say Gay" Law prohibits, or could reasonably be construed to prohibit, speech protected by the First Amendment and should be declared unconstitutionally overbroad.[199]

Therefore, the statute, as written and interpreted by the Settlement, violates the Due Process Clause of the Fourteenth Amendment.

B. The Law Is Unconstitutionally Vague in Violation of the Due Process Clause

The Florida Law violates the Due Process Clause of the Fourteenth Amendment because it is vague and does not draw clear lines between what speech is prohibited and what speech is permitted. This chills protected speech in violation of the Constitution. A law is vague in violation of the Due Process Clause of the Fourteenth Amendment when reasonable people

196 *See supra* Section II.B.

197 FLA. STAT. § 1001.42(8)(c)(3) (2024).

198 Settlement, *supra* note 7, at 3. For instance, teachers may provide academic feedback in response to a student's essay about their LGBTQ+ identity. *Id.*

199 *Gooding*, 405 U.S. at 520–21.

are so unsure about its meaning that they "must necessarily guess at its meaning and differ as to its application."[200]

In *Keyishian*, teachers at a state-run university challenged a New York law limiting their speech.[201] The law at issue provided that a teacher could be fired for uttering "any treasonable or seditious word."[202] Additionally, the law forbade the employment of any teacher who "'by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine of forceful' overthrow of government."[203] The Supreme Court found that the law was unconstitutionally vague because a teacher "cannot know the extent, if any, to which a 'seditious' utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine."[204] It continued, "The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts."[205] Additionally, the Court reasoned that it was unclear under the law whether the "statute prohibit[s] mere 'advising' of the existence of the doctrine, or advising another to support the doctrine."[206] The Court also noted that the law left open the question of whether a teacher who tells their class about "the precepts of Marxism or the Declaration of Independence," or a librarian who recommends that a student read a book about the "French, American, or Russian revolutions," violates the law.[207] The Court found that the law had the effect of intimidating teachers into "stay[ing] as far as possible from utterances or acts which might jeopardize" their jobs.[208] This, in turn, meant that the law stifled the "free play of the spirit which all teachers ought especially to cultivate and practice."[209]

The "Don't Say Gay" Law is unconstitutionally vague, similar to the law at issue in *Keyishian*. The "Don't Say Gay" Law's prohibition of "classroom instruction . . . on sexual

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200 Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926); *see also* Cramp v. Bd. of Pub. Instr. of Orange Cnty., 368 U.S. 278, 283 (1961); Epperson v. Arkansas, 393 U.S. 97, 112 (1968) (Black, J., concurring).

201 Keyishian v. Bd. of Regents, 385 U.S. 589, 591 (1967).

202 *Id.* at 597.

203 *Id.* at 599 (citation omitted).

204 *Id.*

205 *Id.*

206 *Id.* at 599–600.

207 *Id.* at 600–01.

208 *Id.* at 601.

209 *Id.* (quoting Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

orientation or gender identity" is vague because a reasonable teacher cannot decipher from the language of the statute what constitutes "classroom instruction" and what does not. Certainly, a lesson on what sexual orientation or gender identity are would count as "classroom instruction on sexual orientation or gender identity." But what about responding to a student's questions that touch on issues of sexual orientation or gender identity? What about a lesson on major Supreme Court decisions of the past ten years that includes mention of *Obergefell v. Hodges*, which legalized same-sex marriage throughout the United States, or *Bostock v. Clayton County*, where the Court found that discrimination against transgender and gay individuals in employment violates Title VII?[210] Here, the crucial consideration is that no teacher can decipher where the line is drawn between instruction and non-instruction on sexual orientation and gender identity. Therefore, the "Don't Say Gay" Law is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

Proponents of the "Don't Say Gay" Law may argue that the Settlement has cleared up any vagueness that existed in the law.[211] They may contend, that under the Settlement, it is now clear that incidental references to LGBTQ+ individuals in books, references to families that include LGBTQ+ individuals, and LGBTQ+ teachers displaying photos of their spouses or talking about their families at school do not violate the "Don't Say Gay" Law.[212] Furthermore, they may point out how the Settlement clarifies that "safe space" stickers, Gay-Straight Alliances, and library books containing LGBTQ+ characters are allowed at schools.[213]

While it is true that the Settlement does answer some of the uncertainties, the law remains vague, even post-Settlement. For example, because of the Settlement, LGBTQ+ teachers now know that they can put a photo of their spouse on their desk at school and refer to themselves and their spouse in class.[214] However, it is unclear how much they can say to a child who asks a question such as, "Why are you married to a man if you are a man?" If they respond with the truthful statement, "Sometimes men

210 Obergefell v. Hodges, 576 U.S. 644 (2015); Bostock v. Clayton Cnty., 590 U.S. 644 (2020).
211 *See* Settlement, *supra* note 7.
212 *See id.* at 4–5.
213 *Id.* at 5–6.
214 *See id.* at 5.

marry other men," this could be interpreted as instruction on sexual orientation.[215] If it is interpreted as instruction on sexual orientation, it would violate the Settlement, which states that teachers of kindergarten through the third grade must not answer student questions "by teaching the subjects of sexual orientation or gender identity."[216] Therefore, many teachers are likely to decide not to put a photo of their spouse on their desk, even post-Settlement, due to fear of violating the "Don't Say Gay" Law. Just as in *Keyishian*, the effect of the "Don't Say Gay" Law is that teachers are intimidated into "stay[ing] as far as possible from utterances or acts which might jeopardize" their jobs.[217] Thus, the "Don't Say Gay" Law, post-Settlement, is still unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

C. The Law Violates the Equal Protection Clause

Scholar Clifford Rosky has noted that "[a]gain and again, states have recognized that anti-gay curriculum laws violate the Equal Protection Clause."[218] He argues that when "government makes a deliberate choice, and takes affirmative steps, to prohibit officials from talking about a specific class of persons," the Equal Protection Clause is likely violated.[219] As discussed above, the "Don't Say Gay" Law chills teachers from speaking about the LGBTQ+ community in schools.[220] The "Don't Say Gay" Law also violates the Equal Protection Clause of the Fourteenth Amendment because it discriminates based on sex, sexual orientation, and gender identity, and because it was enacted to harm LGBTQ+ individuals.

The Fourteenth Amendment's Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[221] Under the Fourteenth Amendment, there are three different tiers of scrutiny, the application of which depends on what group the law

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215 *See supra* Section III.B.

216 Settlement, *supra* note 7, at 3.

217 Keyishian v. Bd. of Regents, 385 U.S. 589, 601 (1967).

218 Rosky, *supra* note 164, at 1848–49 (discussing challenges to "No Promo Homo" laws which predate Florida's "Don't Say Gay" Law and forbade teachers from the "advocacy of homosexuality" in schools).

219 *Id.* at 1851–52.

220 *See supra* Section II.C.

221 U.S. CONST. amend. XIV, § 1.

discriminates against.[222] Under the Fourteenth Amendment, a law that discriminates based on sex must pass the "intermediate scrutiny test."[223] According to this test, a law that discriminates based on sex is constitutional only if it serves an important governmental interest and is substantially related to that interest.[224] Additionally, laws that discriminate based on sex can only be upheld if the government shows an "exceedingly persuasive justification" for the law.[225] In addition, the Supreme Court has recently held that a law that discriminates against someone based on their sexual orientation or gender identity necessarily discriminates against that person because of their sex.[226]

Even under the lowest level of scrutiny—the "rational basis" level of scrutiny—a law that discriminates against a particular class of people must have, at the very least, a rational relationship to a legitimate governmental interest.[227] The Supreme Court has held that a law enacted simply to harm a group of people that the majority of the voters view unfavorably is not a law that bears a rational relationship to a legitimate governmental interest.[228]

Furthermore, a law that appears facially neutral violates the Constitution if it disproportionally harms a group and was enacted with invidious discriminatory intent against that group.[229] To determine whether a law was enacted with invidious discriminatory intent, otherwise known as "animus," it must be shown that an "invidious discriminatory purpose" was a motivating factor behind passing the law, which may be shown using any "circumstantial and direct evidence" available.[230]

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222 *See, e.g.*, Catherine Jean Archibald, *Transgender Student in Maine May Use Bathroom that Matches Gender Identity—Are Co-Ed Bathrooms Next?*, 83 UMKC L. REV. 57, 63–64 (2014) (explaining the three tiers of scrutiny under the Fourteenth Amendment).

223 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976); *see also* United States v. Virginia, 518 U.S. 515, 516 (1996).

224 *Craig*, 429 U.S. at 197.

225 *Virginia*, 518 U.S. at 524.

226 Bostock v. Clayton Cnty., 590 U.S. 644, 646 (2020) (finding that Title VII, a civil rights law that prohibits discrimination based on sex, necessarily also prohibits discrimination based on sexual orientation and gender identity).

227 *See* Romer v. Evans, 517 U.S. 620, 631 (1996) (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)).

228 *Id.* at 631, 634 (finding invalid a Colorado amendment that imposed a "special disability" solely upon lesbian, gay, and bisexual persons).

229 Pers. Adm'r v. Feeney, 442 U.S. 256, 272–73 (1979).

230 Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1976); *see also* William D. Araiza, *Cleansing Animus: The Path Through Arlington Heights*, 74 ALA. L.

Factors that can be considered to determine if animus was a motivating factor for a law include the "historical background" of the law, "particularly if it reveals a series of official actions taken for invidious purposes"; the impact of the law; and the legislative history of the law.[231] Once the plaintiff proves discriminatory intent and impact, the law can only be saved if the defendant can then show by a preponderance of the evidence that the law would have been enacted even without its discriminatory intent as a motivating factor.[232]

A facially neutral law that disproportionately harms a protected group, and which was made with intent to harm that group, violates the Equal Protection Clause of the Fourteenth Amendment.[233] In *Feeney*, the plaintiff alleged that a Massachusetts law giving lifetime favored status to veterans in civil service employment violated the Equal Protection Clause because it disproportionately harmed women.[234] The Court noted that at the time the litigation began, over 98% of veterans in Massachusetts were male and only 1.8% were female.[235] The Supreme Court found that although women were disproportionately harmed by the law as compared to men, there was no evidence that the law had been made intentionally to harm women.[236] Therefore, the Court found that the law did not violate the Equal Protection Clause.[237]

When a significant number of people vote in favor of a discriminatory law, that is an indication of animus as a motivating factor, and the fact that a majority voted in favor of it does not rid the law of its impermissible purpose.[238] Put plainly, a law enacted simply out of animus towards a disfavored group is invalid under the Fourteenth Amendment.[239] In *Romer v. Evans*,

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REV. 541, 554 (2023) (describing the durability and usefulness of the *Arlington Heights* animus test).

231 *Arlington Heights*, 429 U.S. at 266–68.

232 Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); *see also* Hunter v. Underwood, 471 U.S. 222, 228 (1985).

233 *See Feeney*, 442 U.S. at 272.

234 *Id.* at 259.

235 *Id.* at 270.

236 *Id.* at 279.

237 *Id.* at 279–80.

238 Doe v. Ladapo, No. 4:23-cv-00114-RH-MAF, 2024 WL 2947123, at *15, *25, *39 (N.D. Fla. June 11, 2024) (finding that a transgender healthcare ban in Florida violated the Equal Protection Clause of the Fourteenth Amendment because the law harmed transgender individuals and was made with discriminatory animus).

239 *See* Romer v. Evans, 517 U.S. 620, 631 (1996).

the Supreme Court considered the constitutionality of a state constitutional amendment, voted into law by Coloradans, that invalided any state or municipal ordinance which would prevent discrimination against a person due to their "homosexual, lesbian or bisexual orientation."[240] The effect of this amendment was to repeal various city ordinances within Colorado that prohibited discrimination based on sexual orientation in housing, employment, public accommodations, and so on.[241] The Court found that this state constitutional amendment was invalid under the Equal Protection Clause of the Fourteenth Amendment.[242] Though Colorado stated that the purposes of the amendment were to preserve the liberties of people such as landlords or employers opposed to homosexuality who did not want to associate with lesbian, gay, or bisexual people, and to conserve state resources to fight other forms of discrimination, the Court found these reasons implausible given the far-reaching and broad impact of the amendment.[243] Instead, the Court determined that the underlying purpose of the amendment was to make lesbian, gay, and bisexual people "unequal to everyone else," which is an improper purpose.[244] Thus, because a "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," the Court held that there was no legitimate government interest that was rationally related to the law.[245]

Here, though arguably facially neutral, the "Don't Say Gay" Law has the foreseeable and actual effect of harming LGBTQ+ individuals within the state of Florida. The "Don't Say Gay" Law declares: "Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8."[246] This law is arguably neutral on its face as, presumably, it would prohibit instruction on heterosexual sexual orientation and cisgender gender identity as well as gay, lesbian, and bisexual sexual orientation and transgender gender identity. Indeed, the Settlement states as

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240 *Id.* at 624.

241 *Id.* at 623–24.

242 *Id.* at 635.

243 *Id.* at 632, 635.

244 *Id.* at 635.

245 *Id.* at 634–35 (alteration in original) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

246 FLA. STAT. § 1001.42(8)(c)(3) (2024).

much.[247] However, as Scholar Clifford Rosky argues, it is "implausible to think that the law [would] actually be applied in a neutral manner."[248] Indeed, the "Don't Say Gay" Law from the beginning has disproportionately harmed and is still disproportionately harming LGBTQ+ teachers, students, and families.[249] For example, from its inception, teachers have changed lesson plans to omit the fact that some prominent individuals are LGBTQ+.[250] Teachers have removed books with LGBTQ+ characters in them, decided not to form LGBTQ+ clubs with students, and have been caught up in stressful investigation procedures for showing movies that contain LGBTQ+ characters, all due to the "Don't Say Gay" Law.[251] Teachers have not similarly changed lesson plans to omit the fact that some prominent individuals are heterosexual or cisgender. They have not removed books that include heterosexual or cisgender characters. They have not been investigated for showing movies that contain heterosexual or cisgender characters. The "Don't Say Gay" Law disproportionately harms LGBTQ+ teachers and students in schools by not illustrating to everyone in the classroom that LGBTQ+ individuals are valuable and contributing members of society, and by stigmatizing LGBTQ+ identities. Although the Settlement states that the "Don't Say Gay" Law "does not restrict mere 'literary references to a gay or transgender person or to a same-sex couple,'" it also states that the law does "restrict[]. . . the use of books 'to instruct' 'students

247 Settlement, *supra* note 7, at 4.

248 Rosky, *supra* note 164, at 1854–55 (2022) (noting that a children's book discussing two male birds raising a baby bird together is one of the most banned books in the United States, while a similar book discussing a male and a female bird raising baby birds together has never been challenged or banned).

249 *See, e.g.*, Edward Swidriski, *Florida's "Don't Say Gay" Law Raises Serious Legal Questions*, LAB. & EMP. L. NEWSL. (ABA Lab. & Emp. L. Section, Chi., Ill.), Nov. 22, 2022, at 1 (noting that "[t]he legislative motivation behind the law's enactment and the persistence of anti-LGBTQ+ prejudice in parts of society, however, make it doubtful that the law will be applied evenhandedly, regardless of its formal wording"); Eric Berger, *How Florida's 'Don't Say Gay' Law Could Harm Children's Mental Health*, THE GUARDIAN (Apr. 4, 2022, 5:30 AM), https://www.theguardian.com/us-news/2022/apr/04/florida-dont-say-gay-bill-children-mental-health [https://perma.cc/68K6-6Q9H] (explaining how the "Don't Say Gay" Law can harm the mental health of children with LGBTQ+ parents by making it unacceptable for them to talk about their families at school).

250 *See, e.g.*, Lori Rozsa, *Florida Teachers Race to Remake Lessons as DeSantis Laws Take Effect*, WASH. POST (July 30, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/07/30/florida-schools-desantiswoke-indoctrination/ [https://perma.cc/ZB79-5VGW] (describing one Florida teacher who removed from her lesson plan the fact that the first American woman to fly in space was a lesbian).

251 *See, e.g.*, Yurcaba, *supra* note 48.

on the concepts of sexual orientation or gender identity.'"[252] Therefore, even after the Settlement, many teachers will err on the safe side by not reading books or showing movies to their students that contain LGBTQ+ characters in case a question might be asked by a student, which then leads to a conversation that could be construed as "instruction" on sexual orientation or gender identity.

Next, laws that discriminate against LGBTQ+ individuals necessarily discriminate based on sex.[253] In *Bostock v. Clayton County*, the plaintiffs were two men who were fired from their jobs because they were gay, and one woman who was fired from her job because she was transgender.[254] The Supreme Court found that the individual plaintiffs were fired based on sex in violation of Title VII's prohibition on sex discrimination.[255] The Court reasoned that, in firing an employee because of their sexual orientation or gender identity, the employer "fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[256] The Court explained that when an employer fires a man for being attracted to men, but would not fire a woman for being attracted to men, then the employer has discriminated based on sex.[257] Similarly, when an employer fires a transgender employee because she now identifies as female, and that employer would not fire a similarly situated female who was assigned female at birth and still identifies as female, that employer has discriminated based on sex.[258]

Similarly, because the "Don't Say Gay" Law disproportionately harms the LGBTQ+ community, it is a law that discriminates based on sex. When a gay teacher is afraid to talk about going on a trip with his husband because of the "Don't Say Gay" Law, but a similar heterosexual teacher is not afraid to talk about going on a trip with her husband, the law treats the two teachers differently because of their sex. Because the law discriminates based on sex, it violates the Equal Protection

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252 Settlement, *supra* note 7, at 4.
253 *See* Bostock v. Clayton Cnty., 590 U.S. 644, 660, 662 (2020).
254 *Id.* at 653–54.
255 *Id.* at 651–52, 680.
256 *Id.* at 652.
257 *Id.* at 660.
258 *Id.*

Clause unless it can pass intermediate scrutiny.[259] This test requires that the law be substantially related to an important government interest.[260] However, restricting teachers from discussing the LGBTQ+ community in classrooms is surely not substantially related to an important government interest as the law harms the LGBTQ+ community—a community that is already marginalized and facing discrimination in society.[261]

Next, the law was enacted due to animus against LGBTQ+ individuals and therefore cannot pass rational basis review, let alone intermediate scrutiny. In *Romer v. Evans*, the Supreme Court found that a law that singled out lesbians, bisexual, and gay individuals for unequal treatment was motivated by animus and could not survive even rational basis scrutiny under the Fourteenth Amendment's Equal Protection Clause.[262] Although the state in *Romer* argued that its law forbidding protections against discrimination for LGB individuals was to preserve the liberty of those not wanting to associate with LGB individuals, the Court found this to be an implausible purpose of the law, given its far-reaching and broad impact.[263] Instead, the Court determined that the purpose of the amendment was to make lesbian, gay, and bisexual people "unequal to everyone else," which is an improper purpose.[264] Similarly, the stated purpose of the "Don't Say Gay" Law, to preserve parental rights, is implausible, given the far-reaching nature of this law, which chills speech on LGBTQ+ issues throughout Florida's schools. Like the law in *Romer* that made LGB people "unequal to everyone else" by making sure they—and only they—remained unprotected by antidiscrimination laws, the "Don't Say Gay" Law makes LGBTQ+ students and teachers "unequal to everyone else" by chilling only their speech about their families and lives and by erasing any mention of LGBTQ+ families in the classroom, while not erasing heterosexual couples and families.[265]

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259 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

260 *Id.*

261 *See* Nelson Garcia, *Challenging Florida's Parental Rights in Education Act, AKA the "Don't Say Gay" Law: Finding Equality Through Equal Protection Doctrine*, 14 U. MIA. RACE & SOC. JUST. L. REV. 31, 49–51 (2023) (arguing that the "Don't Say Gay" Law should be judged with intermediate scrutiny and that it fails that test).

262 Romer v. Evans, 517 U.S. 620, 621, 632, 635 (1996).

263 *Id.* at 632, 635.

264 *Id.* at 635.

265 *See Senate Committee on Education – February 8, 2022*, *supra* note 34, at 32:00–33:00, 47:00–48:00, 55:00–56:00.

Therefore, because the "Don't Say Gay" Law (1) disproportionately harms and discriminates against LGBTQ+ individuals and (2) was passed with animus against the LGBTQ+ community, the law cannot pass rational basis review or intermediate scrutiny, and it violates the Equal Protection Clause.

V. THE LAW HAS INSPIRED OTHER STATES TO PASS SIMILAR LAWS

At the time of writing this Article, Florida's "Don't Say Gay" Law has influenced seven other states to pass similar legislation.[266] These restrictive laws are directly impacting almost twenty percent of children in the United States.[267] These other states have not, at the time of writing, reached settlements similar to Florida's Settlement. For the same reasons that this Article has shown that Florida's "Don't Say Gay" Law violates the Constitution and should be struck down, even post-Settlement, these similar laws in other states should also be found unconstitutional by the courts and likewise struck down.

VI. CONCLUSION

Florida's "Don't Say Gay" Law has caused and is causing great harm to the LGBTQ+ community in Florida and beyond. This law and others like it violate the First Amendment's Freedom of Speech and Establishment Clauses, as well as the Fourteenth Amendment's Equal Protection and Due Process Clauses, and should be struck down by the courts. Until that happens, LGBTQ+ individuals, students, and teachers will continue to suffer from the harmful and discriminatory impact of the law.

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266 States that either have similar laws or are considering similar laws include Alabama, Arkansas, Iowa, Indiana, North Carolina, Kentucky, and Louisiana. *See, e.g.*, Samantha LaFrance, *It's Not Just Florida: 4 New 'Don't Say Gay' Laws Passed in 2023*, PEN AM. (Aug. 31, 2023), https://pen.org/4-new-dont-say-gay-laws-passed-in-2023/ [https://perma.cc/V3Q5-GJAK] (noting that North Carolina, Arkansas, Iowa, and Indiana passed similar laws to Florida's "Don't Say Gay" Law in 2023); *see also LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws [https://perma.cc/79LE-5HAA] (last visited Sept. 18, 2024) (showing eight states with current "Don't Say Gay" Laws: Florida, Alabama, Arkansas, North Carolina, Louisiana, Kentucky, Indiana, and Iowa).

267 *LGBTQ Curricular Laws*, *supra* note 266 (revealing that seventeen percent of LGBTQ+ youth live in states which have a version of the "Don't Say Gay" Law).