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Curriculum Censorship of LGBTQ+ Identity: Modern Adaptation of Vintage "Save Our Children" Rhetoric Is Still Just Discrimination

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Underpinning Florida's 2022 "Don't Say Gay or Trans" law is the same vintage, discriminatory rhetoric that has been invoked to harm LGBTQ+ people for decades: that LGBTQ+ people are deviant and fundamentally sexual, therefore even the most chaste acknowledgement of the existence of LGBTQ+ people is inherently inappropriate for children. LGBTQ+ students, students with LGBTQ+ family members, and LGBTQ+ school employees are protected by the constitution, including the First and Fourteenth amendments as well as federal civil rights law. Whether censorship of LGBTQ+ identities is effectuated directly, as in Florida, or indirectly through opt-outs, the dignitary harm is done. Curriculum censorship laws give veto power to the parent in the classroom most likely to object and harms the ability of all students to meet their academic goals—goals which often include the ability to navigate respectfully across difference in a civil society. Conflating the existence of LGBTQ+ people with inherently mature themes is animus and the government may not write that animus into law.

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INTRODUCTION

Public education holds a unique role in American society, and it is treated as a public good because, quite simply, it is one—having an educated American population is critically important for our society's well-being. *Brown v. Board* called it "the very foundation of good citizenship" and said, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[1] The United States Department of Education's mission is to prepare American students for "global competitiveness by fostering educational excellence and equal access."[2]

State constitutions echo these same purposes. Florida's constitution declares "[t]he education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders."[3] Minnesota's constitution declares that "[t]he stability of a

1. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954).

2. "[The U.S. Department of Education]'s mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access." *Overview and Mission Statement*, U.S. DEP'T OF EDUC. (last visited Sept. 9, 2022), https://www2.ed.gov/about/landing.jhtml [https://perma.cc/2YP7-Z5B5].

3. "The education of children is a fundamental value of the people of the State of Florida. It is,

republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools."[4] Every state provides for public education within its constitution.[5] Along with the importance of public education comes the necessity to ensure that every student has an equal opportunity to access these foundational services.[6] Note each of the statements of principle cited above stress not only the importance of education, but the importance of education for *every* child. *Brown* could not have been clearer: "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[7]

All, of course, includes LGBTQ+ students. It includes students of all faiths and no faith. It includes students who are immigrants and indigenous, with skin of every color and from every corner of our country. It includes students of all abilities, students of all socioeconomic backgrounds, students who are parents, and students being raised by grandparents, or by two parents of the same sex. In America, educating children is among our highest priorities because we know that thoughtful, educated Americans not only keep us competitive in the global economy but allow our democracy and community to flourish.[8]

The Supreme Court of the United States has reiterated this principle, not only in *Brown* but also in *Tinker v. Des Moines*:

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therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require." FLA. CONST. art. IX, § 1(a).

4. MINN. CONST. art. XIII, § 1.

5. Anusha Nath & Scott Dallman, *Education Clauses in State Constitutions across the United States,* FED. RSRV. BANK OF MINN. (Jan. 8, 2020), https://www.minneapolisfed.org/article/2020/education-clauses-in-state-constitutions-across-the-united-states [https://perma.cc/33P6-Y23W].

6. "As every child has a right to be educated, and as this should not be left to chance, to the whim, the penuriousness, the ignorance of the town or the district, there is no way but for the State to assume the entire work, or to *require* the towns to provide justly and equally for every child, and not to leave it, as is now done, to what is miscalled the *discretion* of the town or the district. The best schools should be every where [sic] provided, and the children should be compelled to attend them. . . . [T]he security of life, liberty and property depends upon general education . . . ." HORACE MANN, The COMMON SCHOOL JOURNAL & EDUCATIONAL REFORMER 214 (WM. B. Fowle ed., 1852).

7. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954).

8. *See* Sonia Sotomayor, *What We Owe Our Children*, 13 CARNEGIE REP. 41, 41 (2021) ("A healthy civil society requires peaceful engagement, respectful discussion, and thoughtful action, built on a foundation of knowledge and understanding. Achieving this requires investing in civil education.").

> "'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"[9]

America contains a multitude. The state has many important state interests and constitutional obligations to balance in its delivery of education to the marketplace of ideas. There are, as explained in *Tinker*[10] and *Board of Education v. Pico*,[11] important free speech rights. There are, as affirmed in *Christian Legal Society v. Martinez*, important free association rights.[12] There are, as explored in *Pierce v. Society of Sisters,*[13] and *Wisconsin v. Yoder*,[14] important rights to freedom of religious exercise. There are also important prohibitions of the establishment of religion, such as those at the heart of *Epperson v. Arkansas*[15] and *Edwards v. Aguillard*.[16] In addition, there are important non-discrimination obligations imposed by the Fourteenth Amendment to provide equal protection under the law.[17] Further, federal statutes and regulation impose additional non-discrimination requirements on the basis of race, color, and national origin, sex (including sexual orientation

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9. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (internal citations omitted) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)) (citing Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

10. *See id*. (holding that school officials could not censor student speech on "controversial subjects like the conflict in Vietnam" unless the statements "materially and substantially" disrupted the educational process).

11. Bd. of Educ. v. Pico, 457 U.S. 853, 870–71 (1982) (plurality opinion) (holding that First Amendment rights limit the power of school officials to remove books from school libraries because of their content).

12. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 696 (2010) (holding that a viewpoint-neutral policy on access to student organization forums did not infringe First Amendment limitations).

13. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that an Oregon law requiring children to attend public schools was unconstitutional as it interfered with the liberty of parents to choose schools for their children).

14. Wisconsin v. Yoder, 406 U.S. 205, 232–33 (1971) (holding that a state law requiring that children attend school past eighth grade violated the rights of Amish parents to direct the religious upbringing of their children).

15. Epperson v. Arkansas, 393 U.S. 97, 104–05, 109 (1968) (striking down a state law that criminalized teaching evolutionary theories in public school education because states must be "neutral" in religious matters and theories).

16. Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987) (holding that a Louisiana law mandating instruction in "creation science" whenever evolution was taught in public schools violated the Establishment Clause of the First Amendment).

17. *See, e.g.*, Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954) (holding that separating children in public schools on the basis of race was unconstitutional).

and gender identity), disability, and age.[18]

Unfortunately, LGBTQ+ youth—especially transgender and nonbinary youth—have been placed front and center of the newest wave of conservative attacks on what some perceive to be an alarming shift toward liberalism.[19] A record number of anti-LGBTQ+ bills have been filed in state legislatures in 2022, with a whopping 140+ specifically targeting transgender people, largely youth.[20] Florida's "Don't Say Gay or Trans" law was the tip of the spear on a new trend attempting to censor the curriculum at public schools to eliminate any acknowledgment of LGBTQ+ students, families, or identities.[21] This trend shares a basic contention of the argument Professor Alvaré makes in her article in this same publication: that is, first, that the fact of LGBTQ+ identity is something to which a person can have a moral or religious objection, and second, that the state, through public schools, should defer to that objection by protecting a student from exposure to the fact of LGBTQ+ identity.[22]

Neither of these approaches to curriculum censorship can be successful, and neither can be justified under the law. The Florida law has already been litigated on Equal Protection and First Amendment grounds.[23] As for Alvaré's argument—the freedom to exercise one's religion freely is a profoundly important constitutional right, one that is fundamental to the operation of our constitutional order, and that is embedded in our nation's very DNA.[24] The First Amendment's critical protections for religious freedom are two sides of the same coin: a robust Establishment Clause is among the most important protections for freedom of religious expression.[25] For this reason, public schools are

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18. *See generally Know Your Rights U.S.*, DEP'T OF EDUC. (Jan. 10, 2020), https://www2.ed.gov/about/offices/list/ocr/know.html [https://perma.cc/X2LU-PVFN]; U.S. DEP'T OF EDUC., SEX DISCRIMINATION: OVERVIEW OF THE LAW, (July 12, 2022), https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html [https://perma.cc/3E3B-NUQF].

19. The author does not encourage use of the phrase "culture war," despite its colloquial utility; a "war" implies there are two sides, able to engage in roughly similar ways. This "war" is simply a barrage of political attacks by powerful adults on defenseless children.

20. These numbers are Human Rights Campaign (HRC) internal data on file with the author.

21. *See generally* H.B. 1557, 2022 Leg., (Fla. 2022).

22. *See generally* Helen M. Alvaré, *Families, Schools, and Religious Fredom*, 54 LOY. U. CHI. L.J. 579 (2022).

23. *See infra* note 189 and accompanying text.

24. *See First Amendment and Religion*, U.S. CTS. (last visited Sept. 14, 2022), https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion [https://perma.cc/KJY7-3FCS] (describing the historical tradition of the First Amendment's Religion Clauses).

25. *See Freedom of Religion: The Establishment and Free Exercise Clauses*, LAWS. & JURISTS, https://www.lawyersnjurists.com/article/freedom-of-speechthe-establishment-and-free-exercise-clauses/ [https://perma.cc/UH5K-UEMF] (last visited Sept. 14, 2022) (explaining that the

given especially critical attention in Establishment Clause jurisprudence due to the influence of the state on the content of education, the importance of public education, and the impressionability of young students.[26] Indeed, the purpose of public schools is to ensure that the next generation of Americans are able to thoughtfully and critically engage with the issues of the day and to reach across difference to work together to form a more perfect union.[27] It is not, and cannot be, the goal of the public education system to lead students toward heterosexuality. Any method of curriculum censorship attempting to obfuscate the reality that LGBTQ+ people exist, whether via legislation, excessive opt-outs, or in any other way, prevents the respectful engagement across difference that is so vital to the welfare of our nation.[28]

Further, bound by the constitutional command that the government must afford to all equal protection of the law,[29] the government is not free to accept the discriminatory premise—no matter that some may hold religious beliefs that concur with that premise—that lesbian, gay, bisexual, transgender, or queer people do not exist, or that their existence

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Establishment Clause protects a negative right while the Free Exercise Clause protects a positive right).

26. *See , e.g.*, Engel v. Vitale, 370 U.S. 421, 424–25 (1962) (holding that school-sponsored prayer in public schools violated the Establishment Clause); Zorach v. Clauson, 343 U.S. 306, 314–15 (1952) (holding that New York's "released time" policy that permitted public-school children to leave campus during school hours to attend religious instruction and services did not violate the First Amendment because no public facilities were used for religious instruction and no student was forced a religious education); Edwards v. Aguillard, 482 U.S. 578, 583–84, 593 (1987) (holding that a Louisiana law mandating instruction in "creation science" whenever evolution was taught in public schools violated the Establishment Clause).

27. "I believe that education is a regulation of the process of coming to share in the social consciousness; and that the adjustment of individual activity on the basis of this social consciousness is the only sure method of social reconstruction. . . . I believe that the community's duty to education is, therefore, its paramount moral duty. . . . [T]hrough education society can formulate its own purposes, can organize its own means and resources, and thus shape itself with definitiveness and economy in the direction in which it wishes to move." John Dewey, *My Pedagogic Creed*, *in* TEACHER'S MANUAL NO. 25 3*,* 16–17 (1899).

28. Professor Alvaré argues that children exposed to heterosexual family units form an appropriate Christian faith, and that religion is disrupted when messaging and authority figures expose young people to particular beliefs and conduct. *See* Alvaré, *supra* note 22, at 597–601. This may be so; regardless, this is not an appropriate goal for the state, via public schools, to be pursuing—there is no secular purpose and its primary purpose, rather, is to indoctrinate young people with certain religious principles. It is also important to emphasize that not all religions—in fact, not all Christian religions—share the belief that family units led by different-sex parents are the only appropriate family units, nor that the intended purpose of marriage is to bear children. *See, e.g.*, David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RSCH. CTR. (Dec. 21, 2015), https://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/ [https://perma.cc/C79S-BYNL]. Rather, what is being suggested here is that the beliefs of one subset of Christian faith should be promoted, via the state's powers, at the expense of all others—including other Christian faiths, non-Christian faiths, and those of no faith at all.

29. *See* U.S. CONST. amend. XIV, § 1.

is inherently wrong or shameful.[30] By acknowledging the mere existence of LGBTQ+ youth, or by acknowledging that students may have same-sex parents or LGBTQ+ people in their lives, public schools are absolutely not engaging in instruction, promotion, or proselytization of LGBTQ+ identities. Rather, they are simply acknowledging the reality that not all children are the same, not all families are the same, and that learning to be respectful and kind across difference is a necessary component of coexistence in a civil society. This Article argues that when the state inflicts a harm on a specific class of person for no rational, legitimate reason, the mere fact that some people of faith have a religious belief that the outcome is desirable is not sufficient to save the state action from violating the constitution. This Article will show that "Don't Say Gay or Trans" laws, like the extreme curriculum opt-outs proposed by Professor Alvaré, are discrimination, plain and simple, and cannot be justified morally, pedagogically, or legally simply because they are consistent with the religious belief of some.

I. WHAT'S OLD IS NEW AGAIN: VINTAGE "SAVE OUR CHILDREN" HOMOPHOBIA IS BACK, ACCOMPANIED BY THE USUAL EFFORTS TO CENSOR CURRICULUM AND BAN BOOKS

The last several years have been an impossibly challenging time for public education: chronic underfunding, school shootings, pandemic disruptions, and confusion over mask mandates and vaccination requirements are only a few of the major challenges currently facing educators, administrators, students, and parents.[31] We are also

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30. *See* Romer v. Evans*,* 517 U.S. 620 (1996) (invalidating a statewide referendum (Amendment 2) which precluded legislative, executive, or judicial action to protect LGBTQ+ persons from discrimination).

> Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. . . . It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.

Id. at 633.

31. *See, e.g.*, *TCF Study Finds U.S. Schools Underfunded by Nearly $150 Billion Annually*, CENTURY FOUND. (July 22, 2020), https://tcf.org/content/about-tcf/tcf-study-finds-u-s-schools-underfunded-nearly-150-billion-annually/ [https://perma.cc/6B4S-PBCW] (describing the significant funding gaps in America's public schools); *New NCES Data Show Increases in School Shootings and Cyberbullying in K–12 Schools over the Last Decade,* NAT'L CTR. EDUC. STATS. (June 28, 2022), https://nces.ed.gov/whatsnew/press_releases/06_28_2022.asp [https://perma.cc/GH8Z-QA37] ("There were a total of 93 school shootings with casualties at

experiencing significant social and political change, with racial unrest over police violence, an insurrection, inflation, climate change, and challenges to our rule of law.[32] It is an overwhelming time to be responsible for raising the next generation of Americans.

Perhaps that is the reason why the moral panic made so famous by Anita Bryant[33] has roared back with such a vengeance: parents feel overwhelmed by the challenges their children need to be emotionally and intellectually prepared to face. "Wokeness" is being sold to them as the problem and preventing kids from learning across difference is being sold as the solution.[34] Of course, in a time where disinformation is so

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public and private elementary and secondary schools during the 2020-21 school year, more than any other year since data collection began . . . ."); Madeline Holcombe, *'Kids Very Rarely Do Better Than Their Parents Are Doing.' Here's What To Do*, CNN: HEALTH (Jan. 18, 2022, 3:06 PM), https://www.cnn.com/2022/01/18/health/children-impact-school-closing-coronavirus-wellness/index.html [https://perma.cc/E479-AV3C] (describing the mental health difficulties of children in recent years); Alison Durkee, *Nearly Every State Banning School Mask Mandates Now Faces Lawsuits, as Iowa Parent Sues,* FORBES (Aug. 26, 2021, 9:40 AM), https://www.forbes.com/sites/alisondurkee/2021/08/26/nearly-every-state-banning-school-mask-mandates-now-faces-lawsuits-as-iowa-parent-sues/?sh=394636a8d226 [https://perma.cc/R5EG-QYYN] (detailing the litigation that spawned from mask mandates across the United States); Angelo Fichera, *States, Not CDC, Set School Vaccination Requirements*, LA TIMES (Oct. 20, 2022, 1:40 PM), https://www.msn.com/en-us/health/other/states-not-cdc-set-school-vaccination-requirements/ar-AA13ctAe [https://perma.cc/5869-JV9D] ("[The CDC] 'only makes recommendations for use of vaccines, while school-entry vaccination requirements are determined by state or local jurisdictions.'").

32. *See 2020 Tied for Warmest Year on Record, NASA Analysis Shows*, NASA: GLOB. CLIMATE CHANGE (Jan. 14, 2021), https://climate.nasa.gov/news/3061/2020-tied-for-warmest-year-on-record-nasa-analysis-shows/ [https://perma.cc/FZH6-YL82] (noting the significant climate change the earth has experienced in the last seven years); Harry Enten, *How the GOP Lies about the US Capitol Insurrection and 2020 Election Are Related*, CNN: POL. (May 22, 2021, 10:04 AM), https://www.cnn.com/2021/05/22/politics/january-6-analysis/index.html [https://perma.cc/66MK-48PQ] ("The majority who have false thoughts about January 6 is similar to the percentage of Republicans who believe, falsely, that President Joe Biden didn't legitimately earn enough votes to beat Trump in the election."); Corey Williams, *Experts: Police Brutality, Racism Pushing Black Anxiety*, AP NEWS (Nov. 1, 2020), https://apnews.com/article/election-2020-race-and-ethnicity-virus-outbreak-police-police-brutality-ea845aacd10bf7babe371ce2ee86a5df [https://perma.cc/X335-AJNV] (discussing the anxiety Black Americans are experiencing in today's socio-political climate).

33. Anita Bryant famously said "homosexuals cannot reproduce, so they must recruit. And to freshen their ranks, they must recruit the youth of America." *See* Jillian Eugenios, *How 1970s Christian Crusader Anita Bryant Helped Spawn Florida's LGBTQ Culture War*, NBC NEWS (Apr. 14, 2022, 11:21 AM), https://www.nbcnews.com/nbc-out/out-news/1970s-christian-crusader-anita-bryant-helped-spawn-floridas-lgbtq-cult-rcna24215 [https://perma.cc/9SUH-VYDD] (describing the anti-LGBTQ campaign spearheaded by Anita Bryant in 1977).

34. *See* Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay,'* NPR (Mar. 28, 2022, 2:33 PM), https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis [https://perma.cc/3CCJ-F8TZ] ("Public school teachers in Florida are banned from holding classroom instruction about sexual orientation or gender identity after Florida's Gov. Ron DeSantis, a Republican, signed the controversial 'Parental Rights in Education' bill.").

prevalent,[35] and trust in the institutions that govern American society is so eroded,[36] the importance of public education teaching people how to be respectful across difference, think critically, and work together for our nation's common good are particularly important.

But Anita Bryant's "Save Our Children" slogan is just that—a catchphrase that, while effective in its time, came to be understood as discriminatory homophobic rhetoric.[37] That vintage homophobia is back in the spotlight—again, largely to serve the ambitions of one notable Floridian[38]—is disappointing, but the rhetoric is exactly as unfounded and discriminatory as it was nearly half a century ago.

The rhetoric is recycled, as are the efforts to write the rhetoric into law. In previous iterations of this conversation, the Supreme Court contemplated, and rejected, efforts to rewrite public school curriculum to teach creationism in place of evolution.[39] It has already contemplated questions about whether and how to shield students from literature that they may find challenging.[40] Public education is among the most vital and profoundly impactful government services in America. For public education to be successful, spaces for learning must be places where people can respectfully engage in nuanced and sometimes difficult

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35. *See generally* Jeffrey Gottfried et al., *Journalists Sense Turmoil in Their Industry amid Continued Passion for Their Work*, PEW RSCH. CTR. (June 14, 2022), https://www.pewresearch.org/topic/news-habits-media/media-society/misinformation/ [https://perma.cc/G9FX-BK77].

36. *See, e.g.* Gabriel R. Sanchez et al., *Misinformation Is Eroding the Public's Confidence in Democracy*, BROOKINGS: FIXGOV (July 26, 2022), https://www.brookings.edu/blog/fixgov/2022/07/26/misinformation-is-eroding-the-publics-confidence-in-democracy/ [https://perma.cc/HF4G-76H2] ("One of the drivers of decreased confidence in the political system has been the explosion of misinformation deliberately aimed at disrupting the democratic process."); Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/95RU-PVPV] ("Americans' confidence in the [Supreme C]ourt has dropped sharply over the past year and reached a new low in Gallup's nearly 50-year trend.").

37. Jillian Eugenios, *Anita Bryant's Decades-Old 'Save Our Children' Campaign Rings Familiar in Florida*, YAHOO NEWS (Apr. 14, 2022), https://news.yahoo.com/1970s-christian-crusader-anita-bryant-215612074.html [https://perma.cc/M2B4-LBX6] (noting that Bryant "spearheaded an anti-LGBTQ campaign" centered on parental rights to control their children's "moral atmosphere").

38. *See* Anthony Izaguirre, *Florida "Don't Say Gay Bill" Signed by Gov. Ron DeSantis*, PBS: NEWS HOUR (Mar. 28, 2022, 2:33 PM), https://www.pbs.org/newshour/politics/florida-dont-say-gay-bill-signed-by-gov-ron-desantis [https://perma.cc/MP7Y-JBGE] (discussing the bill Florida Governor Ron DeSantis signed that forbids instruction on sexual orientation and gender identity in kindergarten through third grade).

39. *See* Edwards v. Aguillard, 482 U.S. 578, 595 (1987) (holding that the Louisiana Creationism Act violated the Establishment Clause by seeking to employ the support of the government to achieve a religious purpose).

40. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982) (finding the actions of a school board in removing books characterized as "anti-American, anti-Christian, anti-Semitic, and just plain filthy" from public school libraries indicated a violation of the students' First Amendment rights).

questions. Further, spaces controlled by the government must be particularly careful not to chill or impede inquiry. Forbidding the acknowledgment that LGBTQ+ people exist, or allowing parents to excuse students from classes acknowledging that LGBTQ+ people exist, is not a robust new defense of the American family that deserves the state's deference; it is recycled rhetoric that serves only to elevate the religious beliefs of some over the dignity of others.

Beyond the legal arguments, however, there is a fundamentally problematic assertion being made by those who suggest that it is inherently inappropriate for children to be aware of the existence of LGBTQ+ people. This assertion is reflected in the label the Governor of Florida's office assigned to opponents of the "Don't Say Gay or Trans" legislation—"groomers"[41]—as well as in the assertion that it is reasonable or wise to excuse students from lessons that acknowledge that LGBTQ+ people exist, thrive, and can have happy lives and families. Conflating respectful conversations affirming the reality that LGBTQ+ people exist with the teaching of mature topics is an alarming and discriminatory logical sleight of hand that cannot be ignored. Consider this: Anita Bryant famously accused gay people of "recruiting" children, but she also said that she wouldn't argue for a closeted gay person to lose their job.[42] As a 1977 opinion piece in the *New York Times* responded, "[w]hat this means should be abundantly clear: Gay women and men in this country have been required to join a conspiracy to pretend we don't exist, so that other people can lie to children."[43] Curriculum censorship is, quite simply, forcing the state to perpetuate these lies. These new arguments are modern packaging of vintage homophobia. Children do not need to be lied to about the existence of LGBTQ+ people—and the state is prohibited from doing so.

A. Public Education Is Fundamental to American Democracy

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[44]

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41. Emily Brooks, *'Groomer' Debate Inflames GOP Fight over Florida Law*, HILL (Apr. 8, 2022), https://www.msn.com/en-us/news/politics/groomer-debate-inflames-gop-fight-over-florida-law/ar-AAW1msi [https://perma.cc/Q6SD-ZCUC] ("'Groomer' is the new favorite term being used by far-right commentators and activists to describe opponents of ['Don't Say Gay' legislation] . . . . 'It's not only infuriating, but alarming, that the right has chosen to score political points by misusing the term groomer. . . .").

42. Eugenios, *supra* note 33.

43. Jean O'Leary & Bruce Voeller, *Anita Bryant's Crusade*, N.Y. TIMES (June 7, 1977), https://www.nytimes.com/1977/06/07/archives/anita-bryants-crusade.html [https://perma.cc/4FHB-5GK7].

44. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1952).

Public education is one of the strongest tools of American democracy. While public education did not become widespread in the United States until the mid-nineteenth century,[45] our Founders advocated for the importance of education. Benjamin Franklin did so in a 1749 pamphlet, writing:

> The good Education of Youth has been esteemed by wise Men in all Ages, as the surest Foundation of the Happiness both of private Families and of Common-wealths. Almost all Governments have therefore made it a principal Object of their Attention, to establish and endow with proper Revenues, such Seminaries of Learning, as might supply the succeeding Age with Men qualified to serve the Publick with Honour to themselves, and to their Country.[46]

In a 1789 letter to James Madison discussing the future of America and the stability of its democracy, Thomas Jefferson wrote "[a]bove all things I hope the education of the common people will be attended to; convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty."[47]

The United States Supreme Court has expressed appreciation of the virtues of public education in one decision after another: in *Wisconsin v. Yoder,* "[p]roviding public schools ranks at the very apex of the function of a State";[48] in *Meyer v. Nebraska*, "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted";[49] and in *Brown v. Board of Education*,

> [E]ducation is perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[50]

The Supreme Court has emphasized repeatedly that constitutional rights continue to attach even within a school environment. *Tinker v. Des Moines* declares that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or

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45. CTR. ON EDUC. POLICY, WHY WE STILL NEED PUBLIC SCHOOLS: PUBLIC EDUCATION FOR THE COMMON GOOD 3 (2007).

46. BENJAMIN FRANKLIN, THE PAPERS OF BENJAMIN FRANKLIN, VOL. 3, JANUARY 1, 1745, THROUGH JUNE 30, 1750 397–421 (Leonard W. Labaree ed., 1961).

47. THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON, VOL. 12, 7 AUGUST 1787–31 MARCH 1788 438–443 (Julian P. Boyd ed., 1955).

48. Wisconsin v. Yoder, 406 U.S. 205, 213 (1971).

49. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

50. *Brown*, 347 U.S. at 493.

expression at the schoolhouse gate";[51] *West Virginia Board of Education v. Barnett* agrees, declaring "[t]hat they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[52] In *Meyer v. Nebraska*, the Court wrote "[t]hat the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected."[53] The constitutional rights that exist within the classroom include free speech rights,[54] rights to free association,[55] rights to religious liberty,[56] including prohibitions of the establishment of religion,[57] and equal protection under the law.[58]

These constitutional rights, like all constitutional rights, are circumscribed, in some cases because of their interactions with one another.[59] The compelling purpose of public education itself requires balance: it is because the state can wield such enormous influence over the minds of the next generation that the influence needs to be so carefully calibrated to meet the interests of the students being served and the nation that they will inherit. This rationale is exemplified in the *Meyer* decision, where the Nebraska legislature had, in response to post-war anti-German sentiment, forbidden the teaching of German in public schools.[60] The Court wrote:

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51. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
52. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
53. *Meyer*, 262 U.S. at 401.
54. *See id.* (holding that a law prohibiting the instruction of any language besides English in public schools is unconstitutional); *Tinker*, 393 U.S. at 511 ("In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."); Bd. of Educ. v. Pico, 457 U.S. 853, 868 (1982) (asserting that free speech allows students to actively participate in society).
55. *See* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 697 (2010).
56. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (holding that an Oregon law requiring children between the ages of eight and sixteen attend public school violated parents' fundamental right to direct the education of their children, particularly with respect to the ability to send their children to parochial schools where they would receive religious training); Wisconsin v. Yoder, 406 U.S. 205, 229–34 (1971) (holding that parents' constitutional rights to direct their children's religious upbringing outweighs a government interest in making education compulsory past the eighth grade).
57. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (holding that an Arkansas law forbidding the teaching of evolution in public schools is a violation of the Establishment Clause); Edwards v. Aguillard, 482 U.S. 578, 603–04 (1987) (holding that a Louisiana law mandating the teaching of "creation science" alongside the theory of evolution violated the Establishment Clause).
58. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1952).
59. *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).
60. *See generally* Meyer v. Nebraska, 262 U.S. 390 (1923).

> The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.[61]

To characterize the *Meyer* decision in modern terms, this is a case about anti-German animus, about the state legislature using its power inappropriately to suppress teachers and schools from teaching otherwise appropriate subjects because of bare dislike and disapproval of Germany, its language, and its people.[62] The Court characterizes the motivation as "easy to appreciate," but finds it nonetheless to have been a violation of the legislature's power.[63]

The reach of public education is vast, and when it is used to perpetuate discrimination, its ability to do so is unquestionably enormous. For this reason, Congress has acted to layer statutory non-discrimination protections over the constitutional protection afforded by the Fifth and Fourteenth Amendments. Examples of these protections include Title IX of the Education Amendments of 1972, which protect students from discrimination on the basis of sex—including pregnancy, sexual orientation, and gender identity in any education program or activity receiving federal financial assistance;[64] Title VI of the Civil Rights Act of 1964, which provides protections from discrimination on the basis of race and national origin in federally funded programs;[65] the Age Discrimination Act of 1975;[66] the Americans with Disabilities Act;[67] and Section 504 of the Rehabilitation Act of 1973.[68] States further have additional non-discrimination protections embedded in their state statutes and constitutions, including twenty states and the District of Columbia that have statutory prohibitions of discrimination in education on the basis of sexual orientation, and eighteen states and the District of

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61. *Id.* at 402.
62. *Id.* at 400.
63. *Id*. at 402–03.
64. *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC.: OFF. OF CIV. RTS. (Aug. 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [https://perma.cc/TX47-U6C4].
65. 34 C.F.R. § 100 (2021); *Know Your Rights,* U.S. DEP'T OF EDUC.: OFF. OF CIV. RTS. (Jan. 10, 2020), https://www2.ed.gov/about/offices/list/ocr/know.html [https://perma.cc/T9BR-VWBM]; *Sex Discrimination: Overview of the Law*, U.S. DEP'T OF EDUC. OFF. OF CIV. RTS. (July 12, 2022), https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html [https://perma.cc/2V5E-CBAM].
66. 34 C.F.R. § 110 (2022).
67. 28 C.F.R. § 35 (2022).
68. 34 C.F.R. § 104 (2022).

Columbia that prohibit discrimination in education on the basis of gender identity.[69] These protections are vital to ensuring that all students are able to receive a public education without discrimination.

B. Particular Vigilance for Compliance with the Establishment Clause in Elementary and Secondary Schools

To fulfill its solemn obligation to provide the next generation of Americans with the knowledge, critical thinking skills, and ability to engage across differences that they'll need to guide this nation's future, the state must create an educational environment that is respectful of all students and families. Honoring freedom of religion requires respect for the religious beliefs and traditions of all students—which is why the Supreme Court has "'been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."[70] As the *Pierce* Court wrote, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[71] Those additional obligations, however, are not the responsibility of the state to provide; in fact, the state is forbidden from doing so, and Establishment Clause jurisprudence explains why. The government cannot favor certain religious viewpoints, including by mandating that religious beliefs be included in public education curricula.[72] It bears repeating that no constitutional right, not even one as tightly woven into the fabric of the American psyche and law as the freedom to practice one's religion, is without limits.

Pierce protects the right of parents to ensure that their children receive a private education that includes instruction on matters of faith, if that is what they seek.[73] *Meyer* instructs us that suppressing certain topics from a school curriculum on the basis of dislike or moral disapproval, however justified it may seem at the time, exceeds the state's rightful authority.[74] *Brown* reminds us that all children—*all children*—have a right to receive a public education, and that too many times and in too many ways we fail

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69. *See* HUM. RTS. CAMPAIGN FOUND., 2021 STATE EQUALITY INDEX: A REVIEW OF STATE LEGISLATION AFFECTING THE LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER COMMUNITY AND A LOOK AHEAD IN 2022 (2022).

70. Van Orden v. Perry, 545 U.S. 677, 691 (2005) (citing Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987)).

71. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

72. *First Amendment and Religion*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion [https://perma.cc/64VB-4BX3] (last visited Sept. 19, 2022).

73. *Pierce*, 268 U.S. at 534–35.

74. Meyer v. Nebraska, 262 U.S. 390, 401–02 (1923).

to ensure that children truly receive one.[75] *Epperson v. Arkansas* and *Edwards v. Aguillard* demonstrate that attempting to preempt public school curriculum to teach about religious belief results in violations of the Establishment Clause.[76]

The *Epperson* case involved a statute in which, like the "Don't Say Gay or Trans" laws, the state legislature tried to prevent teachers from discussing a certain subject.[77] In *Epperson*, that legislature was Arkansas and the subject was evolution.[78] The law at issue made it unlawful "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals" or to use any textbook that did so, and Epperson, a biology teacher in Little Rock, adopted such a textbook with the intention of teaching from it.[79] The Supreme Court struck the law down in a 7-1 opinion, declaring that forbidding the teaching of evolution was not "an act of religious neutrality."[80] The Court said, "the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion. This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma."[81]

The Louisiana statute at issue in *Edwards v. Aguillard* was entitled the "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act, which the Court referred to as the "Creationism Act."[82] The statute linked the teaching of creationism and evolution, saying that if one was taught so must be the other; proponents of the law argued it was a boon for academic freedom.[83] The Court disagreed, saying that "the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint."[84] The Court refers to *Epperson* as it concludes that the Establishment Clause "forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma."[85]

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75. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493, 495 (1954).
76. *See* Epperson v. Arkansas, 393 U.S. 97, 103 (1968) ("[T]he law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting free exercise thereof."); Edwards v. Aguillard, 482 U.S. 578, 592–93 (1987) (finding the state statute mandating Creationist theory teaching violated the Establishment Clause because its "primary purpose" was to "advantage" a particular religion).
77. *Epperson*, 393 U.S. at 98–99.
78. *Id.*
79. *Id.* at 99 n. 3 (citation omitted).
80. *Id*. at 109.
81. *Id.* at 106–107 (citation omitted).
82. *See* Edwards v. Aguillard, 482 U.S. 578, 580 (1987).
83. *Id.* at 581.
84. *Id.* at 593.
85. *Id.* at 595(quoting *Epperson*, 393 U.S. at 106–07).

The Establishment Clause analysis in *Aguillard* and *Epperson* establishes an analogy that accomplishes three helpful things. First, it demonstrates the similarity between the creationism legislation and the "Don't Say Gay or Trans" laws and similar opt-outs; second, it demonstrates that schools are legally prohibited from censoring classroom discussion to further a particular religious viewpoint; third, it shows that simply because a viewpoint is religious, it is not entitled to deference or promotion by the state in school curriculum.

Justice Kennedy explored the idea of deference by the state to religious viewpoints in *Obergefell*, too. As a person of faith himself,[86] it seems that Justice Kennedy took very seriously the reality that some opponents of marriage equality had deeply, sincerely held religious beliefs that marriage ought to be between a man and a woman.[87] In his majority opinion, Kennedy said:

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.[88]

Taken together, these cases tell a compelling story: the state is not allowed to censor classroom instruction in order to promote a particular religious viewpoint; that parents who oppose same-sex marriage have a right to do so and may educate their children in a manner consistent with their beliefs if they so choose; and that the state may not put its imprimatur on discrimination against same-sex couples.

This translates directly onto the efforts to censor public school curricula to exclude any acknowledgment that LGBTQ+ people exist. If the state conceals the existence of LGBTQ+ people, obfuscates the legal reality that marriages between people of the same sex exist, or attempts to shame and silence children, or to penalize teachers for telling the truth about their same-sex spouse, these are all efforts "to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those

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86. *Anthony M. Kennedy*, OYEZ, https://www.oyez.org/justices/anthony_m_kennedy [https://perma.cc/HW7V-JF3E] (last visited Sept. 19, 2022).

87. *See* Obergefell v. Hodges, 576 U.S. 644, 679–80 (2015) ("Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.").

88. *Id.* at 672.

whose own liberty is then denied."[89]

Those who hold religious beliefs that condemn same-sex relationships or transgender identities are entitled to have, nurture, and teach those beliefs; but those beliefs are not entitled to a special public position of honor that demeans not only LGBTQ+ people and our families, but denies liberty to all of those whose religious beliefs are otherwise.

C. Beloved*,* King & King*, and* Gender Queer*: Renewed Efforts to Ban Black-Centered and LGBTQ+-Related Books*

Efforts to ban books are deeply intertwined with curriculum censorship, and as the *Epperson* case demonstrates, the two issues are often inseparable.[90] Banning books that discuss challenging topics like poverty, war, and racism from public libraries, including school libraries, has been a persistent tactic used to limit students' exposure to differing points of view. The books at issue in *Board of Education v. Pico*, for example, included classics like *A Modest Proposal*, *Slaughterhouse Five*, and *Black Boy,* [91] despite the fact that public libraries are supposed to be for "freewheeling inquiry."[92]

Unfortunately book banning is very much an issue of the present. Riding the wave of efforts to ban "critical race theory"[93] from being taught in classrooms around the country, Governor Glen Youngkin of

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89. *Id.*

90. *See generally Epperson*, 393 U.S.

91. Bd. of Educ. v. Pico, 457 U.S. 853, 858 n. 3 (1982).

92. *Id.* at 915 (Rehnquist, J., dissenting).

93. Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?* EDUC. WEEK (May 18, 2021), https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05 [https://perma.cc/L34E-UN57].

> Critical race theory is an academic concept that is more than 40 years old. The core idea is that race is a social construct, and that racism is not merely the product of individual bias or prejudice, but also something embedded in legal systems and policies. . . . This academic understanding of critical race theory differs from representation in recent popular books and, especially, from its portrayal by critics—often, though not exclusively, conservative Republicans. Critics charge that the theory leads to negative dynamics, such as a focus on group identity over universal, shared traits; divides people into 'oppressed' and 'oppressor' groups; and urges intolerance. . . . One conservative organization, the Heritage Foundation, recently attributed a whole host of issues to CRT, including the 2020 Black Lives Matter protests, LGBTQ clubs in schools, diversity training in federal agencies and organizations, California's recent ethnic studies model curriculum, the free-speech debate on college campuses, and alternatives to exclusionary discipline—such as the Promise program in Broward County, Fla., that some parents blame for the Parkland school shootings. "When followed to its logical conclusion, CRT is destructive and rejects the fundamental ideas on which our constitutional republic is based," the organization claimed.

Id.

Virginia campaigned on censoring books[94] like Toni Morrison's Pulitzer Prize-winning novel *Beloved*.[95] In *Pico*, the school board characterized the books it removed as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[96] Youngkin's ad echoed this rhetoric, describing *Beloved* as "some of the most explicit reading material you can imagine."[97] His opponent characterized the Youngkin attacks on *Beloved* as a "racist dog whistle."[98]

Youngkin is not alone: the American Library Association says that nearly 1,600 books were challenged or removed from libraries, schools, and universities last year, an unprecedented number.[99] Of these, "[m]ost targeted books were by or about Black or LGBTQIA+ persons."[100] Some school districts in Florida are questioning whether they need to restrict access to books about gender, sexuality, and racism as a result of the "Don't Say Gay or Trans" law.[101] A public library in Jamestown, Michigan—the only public library in the small town—was defunded because the library had a book called *Gender Queer* that included sexual themes and was initially shelved with other books that had sexual themes.[102] It was moved behind the librarian's desk, and two librarians were subjected to so much harassment and accusations of being "groomers" that they quit.[103] Ultimately the town voted to defund the

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94. Laura Vozzella & Gregory S. Schneider, *Fight Over Teaching 'Beloved' Book in Schools Becomes Hot Topic in Virginia Governor's Race*, WASH. POST, (Oct. 25, 2021, 8:18 PM), https://www.washingtonpost.com/local/virginia-politics/beloved-book-virginia-youngkin-mcauliffe/2021/10/25/e6157830-35d3-11ec-91dc-551d44733e2d_story.html [https://perma.cc/JU6M-77X5]; *see also* Glenn Youngkin (@GlennYoungkin), TWITTER (Oct. 25, 2021, 11:09 AM), https://twitter.com/GlennYoungkin/status/1452668527358402582?s=20 [https://perma.cc/35B3-XL4P] (describing an interview with the mother of a student in Fairfax County who expressed disappointment with Governor Terry McAuliffe's decision to veto a bill requiring schools to notify parents when sexually explicit reading material was assigned).

95. Dennis Hevesi, *Toni Morrison's Novel 'Beloved' Wins the Pulitzer Prize in Fiction*, N.Y. TIMES (Apr. 1, 1988), https://www.nytimes.com/1988/04/01/nyregion/toni-morrison-s-novel-beloved-wins-the-pulitzer-prize-in-fiction.html [https://perma.cc/JEB5-WQGH].

96. *Pico*, 457 U.S. at 857 (alteration in original).

97. Vozzella & Schneider, *supra* note 94.

98. *Id.*

99. *Surge in Book Challenges Press Kit*, AM. LIBR. ASS'N, http://www.ala.org/news/mediapresscenter/presskits/surge-book-challenges-press-kit [https://perma.cc/7W66-ETGF] (last visited Dec. 18, 2022).

100. *Id.*

101. Giuseppe Sabella, *Anne Frank, MLK among Authors Whose Books Schools Reviewed under New Florida Laws*, PALM BEACH POST (Sept. 2, 2022, 1:10 PM), https://www.palmbeachpost.com/story/news/2022/09/02/dont-say-gay-anti-woke-laws-affect-palm-beach-county-school-books/7938082001/ [https://perma.cc/HK77-75XE].

102. Danielle Paquette, *A Mich. Library Refused to Remove an LGBTQ Book. The Town Defunded It*, WASH. POST (Aug. 24, 2022, 6:00 AM), https://www.washingtonpost.com/nation/2022/08/24/michigan-library-defunded-gender-queer/ [https://perma.cc/SAD8-4XAV].

103. *Id.*

library entirely.[104]

It is worth probing further here to ask *what* about content related to LGBTQ+ people it is that is so inherently offensive. The book *Gender Queer* was shelved in the library in Jamestown where other books with similar themes were shelved.[105] There are, of course, children's books which discuss LGBTQ+ issues, including *King & King*, a picture book geared toward very early readers in which the prince falls in love not with a princess but instead another prince, whom he marries and together they live happily ever after.[106] This book was the focus of the 2008 lawsuit *Parker v. Hurley*, a case where two sets of parents in Massachusetts wanted to be able to opt their children out of having this book be read to them at school.[107] This case was dismissed by the district court as well as the First Circuit Court of Appeals, and the Supreme Court denied certiorari.[108] *King & King* is a picture book, a fairy tale, in which the only distinction from others in the genre is that the prince in question marries a man. It appears that the topic of princes marrying is only objectionable in fairy tales if the prince is LGBTQ+; it appears that a book for older students that includes sexual themes is objectionable solely because the characters are LGBTQ+. It is the existence of LGBTQ+ people that is the issue.

The simple truth is that there is nothing inherently offensive, mature, or inappropriate about a fairy tale in which the prince ultimately shares a chaste, storybook ending with another prince. There are more than half a million same-sex married households in the United States.[109] Adults may have more complex understandings of marital relations, but for children, there is nothing sexual about the fact that some families have two mommies and some families have two daddies. That's simply reality. It may also be their reality that one of the other kindergartener's

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104. *Id.*

105. *Id.*

106. King & King's blurb on Goodreads reads as follows:

> Once there lived a lovelorn prince whose mother decreed that he must marry by the end of the summer. So began the search to find the prince's perfect match and lo and behold . . . his name was Lee. You are cordially invited to join the merriest, most unexpected wedding of the year. *King & King* is a contemporary tale about finding true love and living happily ever after, sure to woo readers of any age.

King & King *by Linda De Haan & Stern Nijland*, GOODREADS, https://www.goodreads.com/book/show/446761.King_King [https://perma.cc/JTT4-FLH9] (last visited Nov. 15, 2022).

107. Parker v. Hurley, 514 F.3d 87, 90, 93 (1st Cir. 2008).

108. *See id.*; Parker v. Hurley, 474 F. Supp. 2d 261 (D. Mass., Feb. 23, 2007); Parker v. Hurley, 555 U.S. 815 (2008 (cert. denied).

109. *Census Bureau Releases Report on Same-Sex Couple Households*, U.S. CENSUS BUREAU (Feb. 24, 2021) https://www.census.gov/newsroom/press-releases/2021/same-sex-couple-households.html [https://perma.cc/358G-LGWU].

parents thought she was a boy when she was born but it turns out she's actually a girl. There are simple, age-appropriate, entirely chaste ways to discuss various family structures, and there are books that do exactly this.[110] If the state suppresses those books, refuses to discuss families that do not conform to the archetypical married two-parent heterosexual picket-fence nuclear family, or allows parents to opt their children out of classes that depict families with same-sex parents, the state is unlawfully picking certain religious beliefs to privilege and promote at the expense of the dignity of others.

This Article acknowledges, and Justice Kennedy has validated, that many Americans continue to hold religious or philosophical beliefs that are in opposition to marriage equality.[111] Those folks, and others, may be uncomfortable with the reality that it is now legal in every state in this country for LGBTQ+ people to marry a spouse of the same sex. Just as marriage equality is a reality, so too is the fact that opponents to marriage equality remain, and everyone has a right to their own opinion. However, as a matter of public policy, it is vital that we are extremely cautious to ensure that the religious objections that inform the sincere, personal oppositions to marriage equality are separated from the imprimatur of the state's enacted law and public policy. No constitutional right is unbounded—all must be balanced with the others.[112] We must insist on continuing to maintain and foster a deep appreciation for the necessity and value of freedom of religious belief while also continuing to find a balance that respects the dignity and equality of all.

As vintage homophobia rears back into to the spotlight, it is important to be clear-eyed and precise about the consequences of conflating LGBTQ+ identity with adult sexual behavior. It is both incorrect and deeply offensive to equate the reading of a picture book with two kings finding true love with themes that are truly mature and overtly sexual, like the distribution of condoms. It is even more outrageous and damaging to assert that reading a book like *King & King* in first grade is somehow the work of pedophiles grooming children for sexual abuse. It is outrageous to think that because one of the many books with mature themes, shelved with other books with mature themes, happens to be about a queer individual that the librarians are groomers too. And yet, the Governor of Florida embraced this rhetoric. A recent report by the Human Rights Campaign and the Center for Countering Digital Hate found that the average number of tweets per day using slurs such as

110. Some of the author's family's favorites include: *Everywhere Babies* by Susan Meyers, *Love Makes A Family* by Sophie Beer, and *The Family Book* by Todd Parr.

111. *See* Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

112. *See* Aleinikoff, *supra* note 59, at 94–95 (arguing that balancing of constitutional rights is uncontroversial today but still poses problems in "mechanics" of the balancing method).

"groomer" and "pedophile" in relation to LGBTQ+ people surged by 406% in the month after the Florida bill was passed and in a matter of mere days, just ten people "drove 66% of impressions for the 500 most viewed hateful 'grooming' tweets"—including Gov. Ron DeSantis's press secretary Christina Pushaw.[113] While politicians like DeSantis may not care about the deep harm they're causing, responsible policy makers and legal academics hopefully do. Before accepting the premise that *King & King* is objectionable, ask: is it permissible to object to a book simply because it acknowledges that same-sex marriages and LGBTQ+ people exist? If so, is accommodating that objection something that the state can do without inappropriately privileging one religious belief over others? Does accommodating that objection violate the dignity of others, and put the state's imprimatur on discrimination?

II. LGBTQ+ STUDENTS, TEACHERS, AND FAMILIES ARE DUE THE EQUAL PROTECTION OF THE LAW

Answering that question need not be done in a vacuum, and another quote from Justice Kennedy in another seminal LGBTQ+ rights case comes to mind: "[t]hey knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[114] With the clarity of hindsight, matters may be much more obvious than they were seen to be contemporaneously, and there is no more classic example of that phenomenon than *Brown v. Board of Education*.[115] The law, and many Americans, were blind to the truth that segregation imposed lasting dignitary harms on Black students. In retrospect the *Brown* decision is immensely popular with Americans, but it took decades to become so. The U.S. Constitution had to lead the way.

LGBTQ+ children, and the children of LGBTQ+ parents, experience dignitary harm from anti-LGBTQ+ discrimination. They also have constitutional protections against unequal treatment by the government. And they also experience the lasting consequences of that discrimination. "Don't Say Gay or Trans" is not segregation, of course, but it is a violation of equal protection of the laws. Objectors, including those who object to LGBTQ+ equality because of their religious beliefs, will likely always exist—but as with marriage equality, and with *Brown*, the U.S. Constitution can lead the way.

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113. CTR. FOR COUNTERING DIGIT. HATE & HUM. RTS. CAMPAIGN, DIGITAL HATE: SOCIAL MEDIA'S ROLE IN AMPLIFYING DANGEROUS LIES ABOUT LGBTQ+ PEOPLE 8 (2022).

114. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause).

115. Brown v. Bd. of Ed. of Topeka, 347 U.S. 483, 493 (1954).

A. Dignity of Children and Students

Brown v. Board famously declared that separate-but-equal was inherently not equal.[116] This Article will not delve deep into this case's storied place in American legal jurisprudence. However, some of its observations about the importance of education, including the lasting impacts of educational discrimination and the dignitary rights of students, are instructive here.[117]

First, the Court says that to assess whether the education being provided is truly equal, the Court "must consider public education in the light of its full development and its present place in American life throughout the Nation."[118] It goes on to say:

> Today, education . . . is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[119]

This was not idle dicta—this passage sets the stakes for why denial of equal education to Black students was so damaging to their ability to succeed in America. It was not only about what they would learn now, but how being separated from their peers created, and would continue to create, harm.

Second, the Court went on to explain that equality in education requires that students be afforded equal dignity, too. Quoting a case about graduate admissions, it said:

> [T]he [*McLaurin* Court] resorted to intangible considerations: "his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[120]

"A feeling of inferiority" does a lot of work here. The Court was

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116. *Id.* at 495.
117. *Id.* at 494.
118. *Id.* at 492–93.
119. *See Brown*, 347 U.S. at 493.
120. *Id.* at 493–94 (quoting McLaurin v. Okla. State Regents for Higher Ed., 339 U.S. 637, 641 (1950)).

concerned not only that the substance of the schooling provided might be unequal, but that the mere fact of separation created an ostracization that "may affect their hearts and minds in a way unlikely ever to be undone"; and, the Court was particularly concerned about the impact this would have on children in grade and high schools.[121] It cited the "Dolls Test" in which psychologists showed that racial discrimination shows up in children by the age of three, and is perpetuated by stereotypes and segregation.[122]

Children, *Brown* tells us, have dignity too.

Justice Kennedy explored the dignitary harms to children at length in *Windsor v. United States*, which struck down the federal law that defined marriage for federal purposes as exclusively between a man and a woman, when he wrote for the Court:

> The differentiation [of same-sex marriage] . . . humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.[123]

The *Windsor* decision again returns to the dignitary harms to children when it says the Defense of Marriage Act (DOMA) "instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others."[124] An amicus brief submitted in the *Windsor* case argued that "[i]n fact, the real effect of DOMA is to place the excluded class of children in a legal, economic and social underclass and to stigmatize all children with gay or lesbian parents."[125]

Justice Kennedy returned to the question of how marriage equality impacts the dignity of children in the opinion he wrote for the Court on the *Obergefell* decision:

> A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the

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121. *Id.*

122. *Id.* at 494 n.11; *see also* Leila McNeill, *How a Psychologist's Work on Race Identity Helped Overturn School Segregation in 1950s America*, SMITHSONIAN MAG. (Oct. 26, 2017), https://www.smithsonianmag.com/science-nature/psychologist-work-racial-identity-helped-overturn-school-segregation-180966934/ [https://perma.cc/SL2Q-XCWS] ("[The Doll Test] has had the most lasting impact on the field of psychology and on the Civil Rights Movement.").

123. United States v. Windsor, 570 U.S. 744, 771 (2013).

124. *Id.* at 775.

125. Brief for Scholars of the Const. Rts. of Children as Amici Curiae Supporting Respondents at 16–17, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 840028 (footnote omitted).

> significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples.[126]

In these decisions, the Supreme Court of the United States has delivered a message that the Fourteenth Amendment grants children and students important constitutional protections from dignitary harm imposed upon them by their government.[127] Children with same-sex parents have a dignitary right to have the marriage of their parents recognized equally by their government. Children with same-sex parents have a constitutional right to have their families treated with respect by their public schools.

B. Times Can Blind: Constitutional Rights Cannot Wait for Popular Consensus

While the outcome of *Brown* is widely heralded today, the decision provoked outrage at the time, including a campaign of "massive resistance"[128] that required the Court to rehear the case in order to determine remedies to force school districts to comply with their ruling.[129] A Gallup poll in 1954 found between 52–55 percent of Americans approved of the decision in *Brown v. Board.*[130] By the end of

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126. Obergefell v. Hodges, 576 U.S. 644, 646 (2015) (citation omitted).

127. *See* Brown v. Bd. of Ed. of Topeka, 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."); *Windsor*, 570 U.S. at 774 ("The power the Constitution grants it also restrains. . . . What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution"); *Obergefell*, 576 U.S. at 647 ("The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry.").

128. *See The Southern Manifesto and "Massive Resistance" to* Brown, NAACP: LEGAL DEF. FUND, https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/ [https://perma.cc/AW7J-423C] (last visited Sept. 14, 2022) ("[Virginia] Senator [Harry Flood] Byrd issued the call for 'Massive Resistance' . . . . 'If we can organize the Southern States for massive resistance to this order I think that, in time, the rest of the country will realize that racial integration is not going to be accepted in the South.'").

129. Brown v. Bd. of Ed. of Topeka, 349 U.S. 294, 298 (1955) [hereinafter *Brown II*] ("All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded."); *see also Brown*, 347 U.S. at 493.

130. Joseph Carroll, *Race and Education 50 Years after* Brown v. Board of Education, GALLUP

the decade, approval numbers were hovering in the 60 percent range.[131] Forty years after the ruling, in 1994, Gallup found 87 percent of Americans supported the ruling in *Brown*.[132] Today, 94 percent of Americans support interracial marriage; when *Loving v. Virginia* was decided in 1967,[133] only 20 percent approved.[134] Even then, progress was slow: it wasn't until 1997 that Gallup found more Americans approved of interracial marriage than disapproved.[135] Many Americans were deeply opposed to desegregation, and remained so for decades, just as many Americans were deeply opposed to interracial marriage. Today, 71 percent of Americans support same-sex marriage, up from 27 percent in 1996 and 60 percent in 2015 when *Obergefell* was decided.[136]

Public acceptance of LGBTQ+ equality and same-sex marriage is not required for LGBTQ+ people to be guaranteed equal protection of the laws. But it is important context to counterbalance the claim that somehow religious belief and support for LGBTQ+ equality are irreconcilably different. Indeed, data shows that many people of many different faiths and denominations actually support same-sex marriage. According to a 2019 study, "[a]bout two-thirds of white mainline Protestants (66%) now support same-sex marriage, as do a similar share of Catholics (61%)."[137] Catholics have consistently been more in favor of same-sex marriage than the general population, and since 2016 the majority of American Catholics have believed that same-sex marriage should be allowed.[138] Even Pope Francis is in favor of legal recognition for gay couples.[139] About 86 percent of American Hindus, 80 percent of Jewish Americans, 76 percent of mainline Protestants, 58 percent of Orthodox Christians, 55 percent of Black Protestants, 55 percent Muslims, and 52 percent of Hispanic Protestants support same-sex

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(May 14, 2004), https://news.gallup.com/poll/11686/race-education-years-after-brown-board-education.aspx [https://perma.cc/AGS4-WYP3].

131. *Id.*

132. *Id.*

133. Loving v. Virginia, 388 U.S. 1 (1967).

134. Justin McCarthy, *U.S. Approval of Interracial Marriage at New High of 94%*, GALLUP, (Sept. 10, 2021), https://news.gallup.com/poll/354638/approval-interracial-marriage-new-high.aspx [https://perma.cc/3S72-A676].

135. *Id.*

136. Justin McCarthy, *Same-Sex Marriage Support Inches Up to New High of 71%*, GALLUP (June 1, 2022), https://news.gallup.com/poll/393197/same-sex-marriage-support-inches-new-high.aspx [https://perma.cc/9A83-JEU2].

137. *Attitudes on Same-Sex Marriage*, PEW RSCH. CTR. (May 14, 2019), https://www.pewresearch.org/religion/fact-sheet/changing-attitudes-on-gay-marriage/ [https://perma.cc/H2M2-SZTY].

138. Kristjan Archer & Justin McCarthy, *U.S. Catholics Have Backed Same-Sex Marriage Since 2011*, GALLUP (Oct. 23, 2020), https://news.gallup.com/poll/322805/catholics-backed-sex-marriage-2011.aspx [https://perma.cc/XJE8-KT99].

139. *Id.*

marriage, too—more evidence that there is a diversity of religious belief on matters of marriage.[140]

Support for non-discrimination protections truly drives the point home: a recent Public Religion Research Institute (PRRI) report found that "nearly eight in ten Americans (79%) favor laws that would protect gay, lesbian, bisexual, and transgender people against discrimination in jobs, public accommodations, and housing, including 41% who *strongly* support them," as well as the "[v]ast majorities of most major religious groups."[141]

There is no doubt, however, that many people who disagree with same-sex marriage have religious reasons for doing so. Forty percent of Americans who attend church weekly believe same-sex marriage should be legal,[142] and about 30 percent of white evangelical Protestants support marriage equality.[143] While these numbers do not constitute a majority, they're substantial enough to contradict the narrative that LGBTQ+ equality is somehow innately at loggerheads with religious belief. Those who object to marriage equality on religious grounds are entitled to do so, but they do not speak for all religious people, all Christians, or even all folks in a denomination. While these voices are amplified, they are increasingly rare and do not speak for all people of faith in this country. Even if they did, the U.S. Constitution should lead the way.

C. Lesser Than: The Cost of Censorship and Othering on LGBTQ+ Children

Justice Kennedy's caution against harm and humiliation of children could not be more salient in the context of "Don't Say Gay or Trans" laws and opt-outs, which effectively amount to the same. The children of same-sex couples and LGBTQ+ people will certainly be impacted by

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140. *Americans' Support for Key LGBTQ Rights Continues to Tick Upward*, PRRI (Mar. 17, 2022), https://www.prri.org/research/americans-support-for-key-lgbtq-rights-continues-to-tick-upward/ [https://perma.cc/6DKF-74C5]:

> Vast majorities of most major religious groups support same-sex marriage, including nearly all Unitarian Universalists (96%), about nine in ten religiously unaffiliated Americans (87%), and Hindus (86%). In addition, about eight in ten Jewish Americans (83%), Buddhists (81%), and other Catholics of color (80%) also support same-sex marriage, as do about three in four white mainline Protestants (76%), white Catholics (74%), and Hispanic Catholics (72%). Majorities of Orthodox Christians (58%), Black Protestants (55%), Muslims (55%), Hispanic Protestants (52%), and other Protestants of color (51%) support same-sex marriage. Less than half of Latter-Day Saints (46%) support same-sex marriage, and white evangelical Protestants (35%) and Jehovah's Witnesses (22%) are the least likely to support same-sex marriage.

Id. (footnotes omitted).

141. *Id.*

142. McCarthy, *supra* note 136.

143. PEW RSCH. CTR., *supra* note 137.

curriculum censorship of LGBTQ+ people, as will be students who themselves identify as LGBTQ+. This denial of equal protection of the law will cause lasting harms. As *Brown* foretold, policies like these "generat[e] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[144]

There may not be time to undo it: 45 percent of LGBTQ+ youth seriously considered suicide in the past year, including more than half of transgender and nonbinary youth (53 percent) and one in three cisgender youth (33 percent).[145] Eighteen percent—nearly one in five—LGBTQ+ youth ages thirteen to seventeen attempted suicide in the past year.[146] Note that the Trevor Project report sharing these statistics says, "LGBTQ youth are not inherently prone to suicide risk because of their sexual orientation or gender identity but rather placed at higher risk because of how they are mistreated and stigmatized in society."[147] They go on to say that "LGBTQ youth who found their school to be LGBTQ-affirming reported lower rates of attempting suicide."[148] In addition, according to a recent survey by the Human Rights Campaign, "31% of LGBTQ+ youth, 43% of transgender youth and 40% of questioning youth have been bullied at school, compared to 16 percent of their non-LGBTQ+ peers."[149]

That's why earlier this year, twenty-two groups, which collectively represent more than seven million youth-serving professionals and hundreds of child welfare organizations, penned an open letter to state legislators considering bills targeting LGBTQ+ youth, including Florida's "Don't Say Gay or Trans" law.[150] These organizations represent pediatricians, social workers, teachers, school nurses, school counselors, psychologists, psychiatrists, and school principals, among others, and they wrote in part:

> LGBTQ+ youth are already at a heightened risk for violence, bullying, and harassment. In addition, students who would be affected by these bills are among our most vulnerable to experiencing depression and engaging in self-harm, including suicide. These bills exacerbate those risks by creating an unwelcoming and hostile environment in places

144. Brown v. Bd. of Ed. of Topeka, 347 U.S. 483, 494 (1954).

145. TREVOR PROJECT, 2022 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 4 (2022).

146. *Id.*

147. *Id.* at 5.

148. *Id.* at 4.

149. HUM. RTS. CAMPAIGN FOUND., THE STATE OF MENTAL HEALTH IN THE LGBTQ COMMUNITY 3.

150. *See generally National Sign-On Letter*, HUM. RTS. CAMPAIGN (Feb. 15, 2022), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/National-Sign-On-Letter-Feb-24.pdf [https://perma.cc/3TDG-2V8K].

> where students should feel the safest and most supported. Research has shown that when transgender youth have access to gender-affirming services, competent care and affirmation, their risk of depression, anxiety and other negative mental health outcomes is greatly reduced.[151]

Many LGBTQ+ adults carry the results of this minority stress with them into adulthood. Mental health challenges including anxiety and depression disproportionately impact the LGBTQ+ community.[152] Sending the message to LGBTQ+ youth that their very existence is controversial can have harmful effects that last a lifetime. Allowing students to leave the classroom so as to avoid hearing about the fact that some families are headed by two parents of the same sex is no different. "Don't Say Gay or Trans" laws, or an opt-out scheme that has effectively the same result, will only exacerbate the existing stress that LGBTQ+ people already feel.

Times do change, but children will always be this nation's future. LGBTQ+ students already experience significant distress as a result of bullying and harassment that they experience. Youth-serving professionals call for affirmation of LGBTQ+ identity in school, not rejection or obfuscation of it. Censoring public school curriculum—overtly or implicitly—to prevent acknowledgment of LGBTQ+ people and same-sex families is a precisely the sort of imprimatur that Justice Kennedy warned so strongly against. [153] This censorship is a violation of the guarantee of equal protection of the laws: the government is treating a small, vulnerable group of people differently in a way that is causing real, enduring harm.

III. "DON'T SAY GAY OR TRANS" LAWS ARE MOTIVATED BY ANIMUS, ARE UNWORKABLE, AND ARE ILLEGAL

Both of these attempts to censor what schools may teach are unworkable, a result of anti-LGBTQ+ animus, and contrary to civil rights

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151. *Id.*

152. *See generally* Thom File & Matthew Marlay, *LGBT Adults Report Anxiety, Depression during Pandemic*, U.S. CENSUS BUREAU (June 16, 2022), https://www.census.gov/library/stories/2022/06/lgbt-adults-report-anxiety-depression-during-pandemic.html [https://perma.cc/QG4C-DEZ7]; *LGBTQI,* NAT'L ALLIANCE FOR MENTAL ILLNESS, https://www.nami.org/Your-Journey/Identity-and-Cultural-Dimensions/LGBTQI [https://perma.cc/5U7N-3P7X] (last visited Sept. 19, 2022).

153. Obergefell v. Hodges, 576 U.S. 644, 670–71 (2015) ("As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning. . . . With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.").

guarantees.

Florida's new "Don't Say Gay or Trans" curriculum censorship has only just gone into effect,[154] but already there is plenty of evidence to illustrate how damaging and discriminatory this law is. In actual operation, both the "Don't Say Gay or Trans" overt curriculum censorship approach and the opt-out implicit curriculum censorship approach will prove entirely unworkable, for two major reasons. First, both approaches require that the teacher calibrate a curriculum designed to accommodate the beliefs of the parents in the class most likely to complain or opt out; both functionally create a scenario in which the parent with the most objections determines what the entire class is able to learn. The impact of a standing ability to opt out of any classroom instruction or assignment that might have implications inconsistent with a parent's religious belief would be effectively the same: in operation the opt-outs would be incredibly burdensome, offensive, and contrary to the purposes of public education. The burden of administrating such opt-outs would be so overwhelming as to constitute an effective curriculum censorship ban. Second, this approach to designing a curriculum will prevent teachers from achieving the educational purposes they are employed to achieve—that is, to impart an education to their class that is consistent with educational standards set by the state—because the new law prohibits discussion of issues that are set forth in the state's required educational standards.[155]

These curriculum censorship efforts will also fail because, quite simply, they are motivated entirely by dislike and disapproval of LGBTQ+ people. There is no actual problem that this bill, or these opt-outs, are solving: they simply are trying to stifle recognition that LGBTQ+ people exist. Conflating any acknowledgment of LGBTQ+ people with inherently mature or inappropriate themes is discriminatory. Finally, LGBTQ+ people have their own constitutional rights that are violated by such a vague, offensive law.

A. Curriculum Censorship Gives Veto Power over Learning, Ability to Meet State Academic Standards, to the Parent Most Likely to Object

The Florida law it is entirely unworkable for several reasons, including that it is impossibly vague.[156] The law forbids any "instruction" of

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154. An Act Relating to Parental Rights in Education, H.B. 1557, 2022 Sess. (Fla. 2022), https://www.flsenate.gov/Session/Bill/2022/1557/Amendment/875175/PDF [https://perma.cc/N3WD-DJXK] (effective July 1, 2022).

155. *See* FLA. STAT. § 1003.41 (2022) (explaining the purpose of state academic standards and instructional support).

156. *See* FLA. STAT. § 1001.42 (8)(c)(3) (2022) ("Classroom instruction by school personnel or

"sexual orientation or gender identity" from kindergarten to third grade, and requires all "instruction" in fourth grade and above to be "age-appropriate or developmentally appropriate."[157] Neither "classroom instruction" nor "age-appropriate" is defined.[158]

This vague phrasing prompts a host of questions about what, precisely, this bill prevents.[159] Learning about families, talking about families, writing about what you did over the weekend with your family, and drawing pictures of your family are all standard curricular fare for early grades. And teachers are, after all, experts in how to present material effectively in a manner that is age-appropriate and developmentally appropriate—it is what they are professionally trained to do. It is the enforcement mechanism, though, that perhaps provides the most insight into the true operational reality of what the "Don't Say Gay or Trans" law would do: the private cause of action for a parent to sue the school district will coerce each teacher to adopt their curriculum so that the most

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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.").

157. *Id.*

158. *Id.*

159. A lawsuit filed shortly after the bill passed asks many of these. *See* Equality Florida v. DeSantis:

> To appreciate how this dynamic will unfold in practice, just consider how students, teachers, parents, guests, and school personnel might navigate these common questions: Can a student of two gay parents talk about their family during a class debate about civics? Can that student paint a family portrait in art class? Can a lesbian student refer to their own coming out experience while responding to a work of literature? Can a transgender student talk about their gender identity while studying civil rights in history class? What if that occurs in homeroom, or during an extracurricular activity with a faculty supervisor, or in an op-ed in the faculty-supervised school newspaper? Are teachers allowed to respond if students discuss these aspects of their identities or family life in class? If so, what can they say? Do those same limits apply if a teacher intervenes where a student is being bullied or beaten (or mistreated at home) based on their sexual orientation or gender identity? What if students address aspects of LGBTQ identity in essays for which teachers must provide grades and feedback? Speaking of which, can a history teacher educate their students about the history of LGBTQ rights? Can a government teacher discuss *Obergefell v. Hodges*, 576 U.S. 644 (2015)? Can an English teacher make note of queer themes or plots—and can they assign books in which one of the characters (or their families, or a side character) is LGBTQ? Does the librarian have to remove every book with LGBTQ characters or references? More simply, can a gay or transgender teacher put a family photo on their desk? Can they refer to themselves and their spouse (and their own children) by the proper pronouns? What do they do if a student's same-sex parents visit the class together on career day, or ask to join a field trip? Are those parents forbidden from speaking to the class, on the theory that their very presence somehow instructs students on "sexual orientation"?

Complaint at 5–6, Equality Florida v. DeSantis, No. 4:2022cv00134 (N.D. Fla. Mar. 31, 2022), https://www.nclrights.org/wp-content/uploads/2022/03/Equality-Florida-et-al.-v.-DeSantis-et-al.-Complaint.pdf [https://perma.cc/GW3Y-N8FF].

litigious parent with the most discriminatory views cannot object.[160] The vagueness of the operative language empowers the parent to have the "Don't Say Gay or Trans" law mean nearly whatever that parent wants it to mean, granting that parent an effective veto over class instruction for the entire classroom of children. Functionally, the "Don't Say Gay or Trans" law will, through the threat of parent lawsuits, chill any conversation at all acknowledging that some children in the class may have same-sex parents or may be LGBTQ+ themselves.

In fact, the "Don't Say Gay or Trans" law is going to create significant challenges for all Florida students, not just LGBTQ+ students or students with LGBTQ+ family members. Florida has state academic standards that lay out the educational benchmarks students are expected to reach each year.[161] As discussed further below, many of these will be significantly more difficult, if not impossible, for schools to meet under the "Don't Say Gay or Trans" law's curriculum censorship requirements, as several of the required topics enumerated in the standards could run afoul of the new censorship requirements.

Classroom instruction on matters of sexual orientation and gender identity is prohibited entirely in kindergarten through third grade.[162] A partial list of standards that relate to families and working together across difference includes:

- "Compare children and families of today with those in the past" (Kindergarten Social Studies),[163]
- "Demonstrate that conflicts among friends can be resolved in ways that are consistent with being a good citizen" (Kindergarten Social Studies),[164]
- "Use terms related to time to sequentially order events that have occurred in school, home, or community" (First grade Social Studies),[165]

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160. FLA. STAT. § 1001.42 (8)(c)(7)(II) (2022) ("Bring an action against the school district to obtain a declaratory judgment that the school district procedure or practice violates this paragraph and seek injunctive relief. A court may award damages and shall award reasonable attorney fees and court costs to a parent who receives declaratory or injunctive relief.").

161. *See generally Standards & Instructional Support,* FLA. DEP'T OF EDUC. https://www.fldoe.org/academics/standards/ [https://perma.cc/SD5F-69UH] (last visited Sept. 21, 2022).

162. FLA. STAT. § 1001.42 (8)(c)(3) (2022).

163. *See generally Kindergarten Standards*, FLA. EDUC. FOUND., https://www.floridaeducationfoundation.org/kindergarten-standards [https://perma.cc/HB97-K6TM] (follow "Social Studies" link and open "Social Studies Kindergarten" document) (last visited Sept. 14, 2022).

164. *Id.*

165. *First Grade Standards*, FLA. EDUC. FOUND., https://www.floridaeducationfoundation.org/first-grade-standards [https://perma.cc/8UU4-A7YB]

- "Make observations that plants and animals closely resemble their parents, but variations exist among individuals within a population" (First grade Life Science),[166] and
- "Identify group and individual actions of citizens that demonstrate civility, cooperation, volunteerism, and other civic virtues" (Third grade Social Studies).[167]

These are objectives, and do not include processes of learning such as free writing assignments in a daily journal, telling stories about weekend activities or what a student likes to do with their family, a child's favorite movie, game, or toy (which could be contrary to gender stereotypes), or making commemorations of Mother's Day or Father's Day.

The law allows "age-appropriate" discussion of sexual orientation and gender identity in fourth through twelfth grade.[168] However, all education should be age-appropriate; it is a teacher's talent, training, and responsibility to deliver education effectively to the students in their classrooms. Because the statute provides significant power to parents who disagree, and no meaningful direction to teachers or districts for how to comply, teachers and districts will be extremely wary of discussing sexual orientation or gender identity in any way, even in ways that they would otherwise have deemed to be uncontroversially age-appropriate. This may cause challenges in teaching to the Florida standards, including these examples from the high school history standards:

> Distinguish the freedoms guaranteed to African Americans and other groups with the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. . . .
>
> Compare how different nongovernmental organizations and progressives worked to shape public policy, restore economic opportunities, and correct injustices in American life.
>
> Examine key events and peoples in Florida history as they relate to United States history. . . .
>
> Analyze support for and resistance to civil rights for women, African Americans, Native Americans, and other minorities. . . .
>
> Analyze political, economic, and social concerns that emerged at the end of the 20th century and into the 21st century. . . . [and]

(follow "Social Studies" link and open "Social Studies First Grade" document) (last visited Sept. 14, 2022).

166. *SC.1.L.16.1*, CPALMS, https://www.cpalms.org/PreviewStandard/Preview/1594 [https://perma.cc/V2H8-WYU6] (last visited Nov. 5, 2022).

167. *Third Grade Standards*, FLA. EDUC. FOUND., https://www.floridaeducationfoundation.org/third-grade-standards [https://perma.cc/D5KU-FFQU] (follow "Social Studies" link and open "Social Studies Third Grade" document) (last visited Sept. 14, 2022).

168. FLA. STAT. § 1001.42 (8)(c)(3) (2022).

> Analyze significant Supreme Court decisions relating to integration, busing, affirmative action, the rights of the accused, and reproductive rights.[169]

Instituting an opt-out regime in which each parent is able to absent their child from any curriculum inconsistent with the family's religious belief would be unworkable as well. Would dedication to limiting family representation to a heterosexual two-parent married family extend to an objection to teaching to this second-grade social studies standard: "Recognize that Native Americans were the first inhabitants in North America. Compare the cultures of Native American tribes from various geographic regions of the United States"?[170] Many of these cultures were matrilineal, and at the time of colonization were non-Christian.[171] If this seems extreme, it is: the proposal being made elsewhere in this publication is to allow opt-outs from assemblies, literature class, history class, and any associated readings.[172] If there is no objection to teaching this second-grade social studies standard—and it would be horrifying if there was one—then in fact the concern is not about teaching traditional family structure at all.

As difficult as it is to square the "Don't Say Gay or Trans" law with the goals of public education, religious opt-outs to curricula depicting ideas at odds with a student or family's religious beliefs would be truly impossible. If administered with equal deference to all religious beliefs—which it would have to be—the burden of notification would be impossible to manage and defeat the purposes of public education just as soundly. Imagine if someone with religious objections to women working outside the home was able to opt out of every lesson about

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169. *High School US History*, FLA. EDUC. FOUND., https://www.floridaeducationfoundation.org/high-school-history [https://perma.cc/N3RL-CEHU] (follow "HS United States History" link and open "Florida Standards for High School United States History" document) (last visited Sept. 14, 2022).

170. *Second Grade Standards*, FLA. EDUC. FOUND., https://www.floridaeducationfoundation.org/second-grade-standards [https://perma.cc/X27X-GLRE] (follow "Social Studies" link and open "Social Studies Second Grade" document) (last visited Sept. 14, 2022).

171. *See, e.g.*, *Society*, CHICKASAW NATION, https://www.chickasaw.net/Our-Nation/Culture/Society.aspx [https://perma.cc/77LV-5G5H] (last visited Nov. 5, 2022) ("In earlier times, all Chickasaws belonged to a clan of his or her mother; this is known as a matrilineal system."); Nora Thompson Dean, *Some of the Ways of the Delaware Indian Women,* OFF. WEBSITE OF THE DEL. TRIBE OF INDIANS (Jan. 24, 1983), https://delawaretribe.org/blog/2016/08/07/some-of-the-ways-of-the-delaware-indian-women/ [https://perma.cc/5UM3-27JD] ("The Lenape are matrilineal which means that everything descends down from generation to generation through the female line."); *Explore the Centuries-Old History of the Hopi People*, HOPI CULTURAL CTR., https://hopiculturalcenter.com/about-the-hopi/ [https://perma.cc/7P53-Q6MH] (last visited Nov. 5, 2022) ("Today there are 34 living clans spread out among the 12 Hopi villages. Each Clan is made up of individuals who trace their ancestry matrilineally back to a common ancestor who in turn forms the corpus of that clan's particular history.").

172. *See generally* Alvaré, *supra* note 22, at 601–05.

female historical figures. Imagine if a polytheist (perhaps a Hindu) requested to opt out of any conversation related to monotheist religions—that would be an impossible challenge to accommodate in teaching American history, European history, and English literature, for example.

It is also important to note what the "Don't Say Gay or Trans" law isn't about: it isn't about sex education. In fact, Florida already has a procedure by which students may opt out of instruction about reproductive health or diseases like HIV or AIDS.[173] The ability of students to opt out of sexual education is already assured by an existing law, so "Don't Say Gay or Trans" is truly about censorship of non-sexual education curricula.

Florida's example demonstrates how curriculum censorship (overt or de facto through religious opt-outs) harms the ability of educators to meet the education system's stated goals. It will continue to have an impact on education overall, by pushing teachers out of the workforce, isolating LGBTQ+ students or students who have LGBTQ+ family members, and failing all of Florida in its paramount duty to educate Florida's children.[174] And when the objection is to whether or a not a particular student or student's family should be spoken of with respect, the school has an obligation under civil rights law and the United States Constitution to ensure that the family and the student are treated with dignity and respect.

B. Conflating LGBTQ+ Identity with Inherently Mature Themes Is Animus

Second, conflating LGBTQ+ identity with mature sexual themes is not only intellectually dishonest, it is also animus. Any argument that public schools should put forth only content that affirms a married, different-sex nuclear family is not one that can survive honest scrutiny. As discussed elsewhere in this Article, certainly there will be those who hold sincerely held religious beliefs that persuade them that curriculum censorship is a wise course of action. However, the long-lasting dignitary harms of discrimination in school are not overcome simply because some of those who desire a certain result have a religious justification for doing so.

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173. FLA. STAT. § 1003.42(3)(5) (2022).

174. *See* Matt Lavietes, *'I Cannot Teach in Florida': LGBTQ Educators Fear Fallout From New School Law*, NBC NEWS (Apr. 1, 2022, 9:17 AM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/-cannot-teach-florida-lgbtq-educators-fear-fallout-new-school-law-rcna22106 [https://perma.cc/2GHT-PBFC] (describing the experiences of LGBTQ Florida educators who left their positions as a result of this bill); *see also* Michael D. Langan, Commentary*, Why the Teacher Shortage in Florida?*, NBC2 NEWS (Aug. 22, 2022, 7:39 AM), https://nbc-2.com/features/commentary/2022/08/22/commentary-why-the-teacher-shortage-in-florida/ [https://perma.cc/XG7E-PGDJ] (noting many teachers are turned away by Governor Ron Desantis's recent laws, including the "Don't Say Gay or Trans" law).

Moral disapproval is not a legitimate government interest.[175]

This principle was demonstrated in yet another majority opinion by Justice Kennedy, this time from *Romer v. Evans*. Colorado's Amendment 2 would have preempted laws prohibiting discrimination on the basis of sexual orientation. Justice Kennedy wrote for the Court that the ballot measure's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests."[176]

That excerpt could easily have been written about the "Don't Say Gay or Trans" law—the interests served by these curriculum censorship efforts aren't practical or pedagogical, but purely political, and inexplicable by anything but animus. The sheer breadth of the law—prohibiting any discussion whatsoever about the existence of LGBTQ+ people—is so discontinuous with the reasons offered for it—for example, preventing "grooming"—that the law seems inexplicable by anything but animus toward the class that it affects.

The *Romer* opinion went on to say:

> A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.[177]

It is hard to identify legitimate justifications for censoring the fact that certain students, teachers, or families exist. In fact, even if one overlooks the glaring Establishment Clause issues and accepts the premise that only families headed by married, different-sex Christian couples ought to be depicted in school materials, then any discussion of any family that does not align with that approach—not just a family with LGBTQ+ members—would be similarly off-limits. That would include families

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175. *See* Romer v. Evans, 517 U.S. 620, 635 (1996) ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.").

176. *Id.* at 632.

177. *Id.* at 635 (alteration in original) (citation omitted) (citing Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).

with single parents, stepparents, interfaith parents, divorced parents, children in the foster care system, or multi-generational households. Further, it could impact schools' ability to instruct students about America's own indigenous matriarchal societies, major world religions, and other cultures across the globe. Yet, there are no requests for opt-outs regarding these elements of the required Florida curriculum—which prompts the question again, what is unique about families led by same-sex parents that poses a threat? Again, the objection and the proposed solution are inexplicably discontinuous. The curriculum censorship efforts inflict immediate, continuous, and real injury upon LGBTQ+ people while outrunning and belying any legitimate justification that may be claimed for them. The only explanation is dislike or moral disapproval of LGBTQ+ people specifically—and that is not a legitimate basis upon which to make a law.

It is discrimination to assert that LGBTQ+ people should be excluded from mention in public schools simply by virtue of them being LGBTQ+.

This Article has affirmed that religious beliefs about marriage being between one man and one woman are held by many Americans; it has acknowledged too that there are those whose sincerely held religious or philosophical beliefs strongly affirm single parenthood, divorce, multigenerational families, LGBTQ+ equality, or same-sex relationships, whose beliefs would become secondary to those of the objector in these efforts.[178] It has also explored the extent to which the state may or should adopt or defer to those beliefs in the construction of a public education curriculum meant to educate students of extremely diverse backgrounds, all of whom are entitled to an education that affords them dignity and respect.[179]

Moral disapproval of gay, lesbian, or bisexual people was not a legitimate reason to make LGBTQ+ people strangers from the law in Colorado.[180] A person's sincere, religious opposition to same-sex marriage, however fervently held, may not be given the effect of law.[181] Dislike of a certain type of person cannot be a legitimate government interest. The lifelong harms of discrimination in public schools are not

178. *See, e.g.*, *supra* text accompanying note 123 (describing how children of same-sex couples struggle to understand their family structure in the context of laws that only recognize marriage between heterosexual couples).

179. *See supra* text accompanying notes 125–127 (noting the negative impacts various bills that support the "traditional" heteronormative family structure have on children of LGBTQ+ couples).

180. *See Romer,* 517 U.S. at 635 (1996) (striking down the Colorado law at issue because "animus" toward a particular class lacked a rational relationship to a legitimate governmental purpose).

181. *See* Obergefell v. Hodges, 576 U.S. 644, 672 (2015) (finding that although religious principles may be based on honorable foundations, when those religious principles are the basis for laws and public policies that exclude and stigmatize others, those laws are unconstitutional).

overcome because an individual's religious belief and a discriminatory intention happen to accomplish the same outcome.

C. Teachers, Students, and Their Families Are Protected by the Constitution and Civil Rights Law

In addition to the constitutional claims that have been laid out elsewhere in this Article, there are federal statutory non-discrimination protections that protect students and staff from discrimination on the basis of sex, which includes sexual orientation and gender identity.[182] Curriculum censorship efforts such as Florida's "Don't Say Gay or Trans" law run afoul of these protections.

Justice Gorsuch, writing for the Court in *Bostock v. Clayton County*, affirmed that discrimination on the basis of sexual orientation and gender identity are inseparable from discrimination on the basis of sex, and therefore discrimination on the basis of sexual orientation and gender identity are forbidden by Title VII of the Civil Rights Act of 1964.[183] President Biden issued an Executive Order to his administrative agencies commanding them to assess the extent to which the *Bostock* decision impacted any prohibition of discrimination that these agencies were responsible for abiding by or implementing.[184] As a result, the U.S. Department of Education is engaged in rulemaking to further clarify the scope of Title IX's prohibition of discrimination on the basis of sex in regard to sexual orientation and gender identity.[185]

Florida's "Don't Say Gay or Trans" law has put the state's schools on a collision course with Title IX of the Education Amendments of 1972. Title IX forbids discrimination on the basis of sex in education, and schools risk their federal education funding should they be found to be in violation of the law. In response to Florida's law, the Secretary of the Department of Education released a statement reaffirming that Title IX protects students from discrimination in school based on their sexual orientation and gender identity and reminding all recipients of federal

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182. *See* Title VII of the Civil Rights Amendments of 1964, 42 U.S.C. § 2000e(k) (noting how "sex" is not limited on the basis of pregnancy or childbirth); Title IX of the Education Amendments Act of 1972, 20 U.S. Code § 1681(a) ("No person . . . shall, on the basis of sex . . . .").

183. Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1737 (2020) ("[W]hether employer[s] can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires [someone] for being homosexual or transgender fires that person for traits . . . it would not have questioned in . . . [the other] sex.").

184. Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 25, 2021).

185. *See generally* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390–91 (proposed July 12, 2022) (to be codified 34 CFR pt. 106).

education funding that they are bound to comply.[186] When the law went into effect the White House characterized the bill as "shameful", noting that "there have been reports that 'Safe Space' stickers are being taken down from classrooms. Teachers are being instructed not to wear rainbow clothing. LGBTQI+ teachers are being told to take down family photos . . . . This is discrimination, plain and simple."[187] The White House also noted that the Department of Education was monitoring the situation closely and was prepared to accept complaints from those who believed their federal civil rights had been violated.[188]

Unsurprisingly, litigation was filed immediately, although concerns about standing has resulted in dismissal with permission to replead in both cases.[189] The cases make a variety of claims, but they are largely constitutional. In *Equality Florida v. Florida State Board of Education*, a diverse group of plaintiffs that includes families, teachers, and LGBTQ+ organizations challenged the "Don't Say Gay or Trans" law on the constitutional grounds that the law violated the First and Fourteenth Amendments' principles of free speech and equal protection when it discriminatorily censored discussions of sexual orientation and gender identity.[190] Sixteen state attorneys general filed an amicus brief supporting the plaintiffs.[191] The plaintiffs in *Cousins v. The School Board of Orange County* include parents, students, and an LGBTQ+

186. U.S. Dep't of Educ., Statement from U.S. Secretary of Education Miguel Cardona on the Fla. State Legislature's Parental Rts. in Educ. Bill, Press Release (Mar. 8, 2022), https://www.ed.gov/news/press-releases/statement-us-secretary-education-miguel-cardona-florida-state-legislatures-parental-rights-education-bill [https://perma.cc/X9JC-8A5N].

187. White House, Statement by Press Sec'y Karine Jean-Pierre on Fla.'s "Don't Say Gay" Law Taking Effect (July 1, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/01/statement-by-press-secretary-karine-jean-pierre-on-floridas-dont-say-gay-law-taking-effect/ [https://perma.cc/E37K-ZPFQ].

188. *Id.*

189. *Equality Florida v. DeSantis* brought constitutional and federal statutory claims, but was dismissed for lack of standing in early October 2022, with leave to replead. *See generally* Equality Florida v. Fla. State Bd. of Educ., No. 4:22-cv-134-AW-MJF (N.D. Fla. Sept. 29, 2022), https://eqfl.org/sites/default/files/MTD%20Decision.pdf [https://perma.cc/DR7M-9D98]. *Cousins v. The School Board of Orange County* faced a similar outcome, again with leave to replead. *See generally* Tyleis Davidson, *Judge Refuses to Block Florida Law Known as "Don't Say Gay or Trans"*, LAMBDA LEGAL (Oct. 21, 2022), https://www.lambdalegal.org/news/cousins_fl_20221021_judge-refuses-to-block-florida-law-known-as-dont-say-gay-or-trans [https://perma.cc/Y2HZ-TE3D].

190. *See Equality Florida Joins Lawsuit to Challenge Don't Say Gay Law,* EQUAL. FLA. (Mar. 31, 2022), https://eqfl.org/eqfl-joins-lawsuit-against-dont-say-gay-bill [https://perma.cc/EAF8-F47E] (describing how anyone who mentions LGBTQ+ persons while in a school setting while fear legal repercussions).

191. *See generally* Brief for the District of Columbia and the States of New Jersey & California et al. as Amici Curiae in Support of Plaintiffs, Equality Florida v. DeSantis, No. 4:22-cv-134-AW-MJF, (N.D. Fla. Aug. 3, 2022), https://www.ag.state.mn.us/Office/Communications/2022/docs/EqualityFla_v_FlaStateBdEduc_AmicusBrief.pdf [https://perma.cc/86CT-XY43].

community center, again bringing constitutional complaints.[192]

As of this writing, no court or agency has yet made a public determination as to the statutory claims at issue, likely because the "Don't Say Gay or Trans" law and the school year are both so new. Both Title VII—which provides nondiscrimination protections to public school teachers[193]—and Title IX—which provides nondiscrimination protections to students[194]—prohibit discrimination on the basis of sexual orientation in employment and education, respectively. As implementation of "Don't Say Gay or Trans" rolls out across the state, with each district making its own risk calculations, complaints from teachers, students, and families will likely begin to manifest quite quickly. These will undoubtedly give rise to further litigation as well as administrative enforcement action. Given the clarity of federal law on this point, and the overtly discriminatory nature of the law, it seems unlikely that Florida's "Don't Say Gay or Trans" law will survive the coming scrutiny.

IV. CONCLUSION

LGBTQ+ people's existence is not political, sexual, inherently adult, or objectionable. It is simply a fact, and marriage equality is the law.[195] Efforts to erase either fact are immediate, continuing, and real injuries that outrun and belie any legitimate justification. LGBTQ+-led families exist, and LGBTQ+ youth exist. Teaching about LGBTQ+-led families and LGBTQ+ identities is not instruction in how to be LGBTQ+, but rather acknowledgment of a legal, practical, and social reality and supportive of the education of all children. Whether it is implementing a legislative curriculum censorship scheme like "Don't Say Gay or Trans"

192. *See generally* Complaint, Cousins v. Sch. Bd. of Orange Cnty., No. 6:22-1312, (M.D. Fla. July 25, 2022), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/cousins_fl_20220726_complaint.pdf [https://perma.cc/H9FW-UPV4].

193. *See* U.S. Equal Emp. Opportunity Comm'n, Opinion Letter on Protections against Employment Discrimination Based on Sexual Orientation or Gender Identity, https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender [https://perma.cc/75PU-R54Z] (last visited Nov. 3, 2022) ("Title VII applies to private-sector employers with 15 or more employees, to state and local government employers with 15 or more employees, and to the federal government as an employer. Title VII also applies to unions and employment agencies.").

194. *See generally* 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, Press Release (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/TN4J-VS48] ("Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of federal assistance.").

195. *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (finding that the Constitution grants LGBTQ+ persons the right to marry).

or an extensive opt-out program allowing students to avoid any mention of family structures that differ from their religious ideal, these attempts to censor curriculum are unworkable, illegal, and contrary to the purposes of public education. That very much includes the most important of civic duties: teaching the next generation of Americans how to operate civilly in a pluralistic society.

The fact that LGBTQ+ people exist is simply not something to which a person can have a moral or religious objection. Certainly, it is the right of families to raise their children in their own faith, which may involve a preference for heterosexuality, conformity with rigid gender rules, or a belief that a person's gender is only ever as assigned to them at birth. Those are precepts which families and religious communities have the right to instill. However, LGBTQ+ people have protections from discrimination under federal, state, and local laws; same-sex couples may legally marry in every state in the nation;[196] and children—even LGBTQ+ children, and the children of LGBTQ+ parents—have a right to equality and dignity under the law.[197] The state, including a public school, may not refuse to recognize that right to equality and dignity.[198] The state should not, and may not, defer to that objection by protecting the person from exposure to the fact of LGBTQ+ identity.

Neither of these approaches to curriculum censorship can be successful, and neither can be justified under the law. The fear and sense of overwhelm that parents have in modern America is understandable—the challenges facing our education system, and our young people, are immense. "Wokeness"—which in a sense can be understood as efforts to help see the world from the perspectives of those who are not like us—is not the problem, and erasing people and identities from curricula is not the answer. These are not novel legal arguments and they are not novel social arguments—they're recycled versions of the same old attempts to prevent young people from being exposed to ideas that may challenge the viewpoint from which they were raised.[199] Public education is about teaching kids what they need to be thoughtful, compassionate, knowledgeable, and engaged members of American society. That includes all kids—kids of many cultures, faiths, and religious traditions. Hiding ideas because grownups wish that LGBTQ+ people didn't exist is not only harmful and short sighted, but ineffective—for all her success, Anita Bryant's efforts to fear-monger about LGBTQ+ people didn't work

196. *Id.*

197. *See* U.S. CONST. amend. XIV, § 1 (guaranteeing equal protection under the law).

198. *See id.* (stating "No state shall . . .").

199. *See* discussion *supra* Part II (discussing how the denial of LGBTQ+ persons goes against constitutional principles given to other groups, while also having a direct effect on LGBTQ+ children and children of LGBTQ+ couples).

to drive us all back into the closet, and neither will these.