

Challenging Florida’s Parental Rights in Education Act, AKA the “Don’t Say Gay” Law: Finding Equality Through Equal Protection Doctrine

Nelson Garcia

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Challenging Florida's Parental Rights in
Education Act, AKA the "Don't Say Gay"
Law: Finding Equality Through Equal
Protection Doctrine

Nelson Garcia

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I. INTRODUCTION

“This morning, the Supreme Court recognized that the Constitution guarantees marriage equality. In doing so, they have reaffirmed that all Americans are entitled to the equal protection of the law; that all people should be treated equally, regardless of who they are or who they love. This decision will end the patchwork system we currently have. It will end the uncertainty hundreds of thousands of same-sex couples face from not knowing whether they’re marriage, legitimate in the eyes of one state, will remain if they decide to move or even visit another. This ruling will strengthen all of our communities by offering to all loving same-sex couples the dignity of marriage across this great land.”¹

Those were the words of President Obama on June 26, 2015, the day same-sex marriage was legalized in America. On July 1, 2022, the dignity President Obama spoke of was stripped away from LGBTQ+ individuals all across the state of Florida.

On July 1, 2022, Florida’s Parental Rights in Education Act, also known as the “Don’t Say Gay” bill, went into effect.² The statute, signed by Florida’s Governor Ron DeSantis, builds on the Parents’ Bill of Rights, which was signed into law last year, and is part of Governor DeSantis’ “Year of the Parent”, focused on protecting parental rights in education.³

The law prohibits classroom instruction on sexual orientation or gender identity in kindergarten through third grade or “in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.”⁴ It also gives parents an option to sue a school district if the policy is violated.⁵

This Note details how Florida’s Parental Rights in Education Act is unconstitutional, as it violates the Equal Protection Clause of the

¹ *Read Obama’s Speech About Same-Sex Marriage Ruling*, TIME (Jun. 26, 2015, 12:40 PM) (quoting President Barack Obama), <https://time.com/3937925/obama-speech-same-sex-marriage/>.

² Jaclyn Diaz, *Florida’s governor signs controversial law opponents dubbed ‘Don’t Say Gay,’* NPR (Mar. 28, 2022, 12:33 PM), <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis>.

³ *Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education*, FL Gov (Mar. 28, 2022), <https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/>.

⁴ *Id.*; Fla. Stat. § 1001.42(8)(c)(3) (2023).

⁵ Fla. Stat. § 1001.42(8)(c)(7)(b) (2023).

Fourteenth Amendment. Part II explains the background of the law including why proponents advocate for the law and why the law has many critics. Part III states what the Equal Protection Clause is, what it says, and who it is intended to protect. Part IV posits why Florida's Parental Rights in Education Act should be analyzed under heightened scrutiny. Part V argues how the law violates the Equal Protection Clause. Part VI details why the law should be held to violate the Equal Protection Clause even if it currently does not.

II. BACKGROUND

Proponents of the Parental Rights In Education Act claim it allows parents, instead of school officials, to decide when and how to introduce LGBTQ+ topics and individuals to their children.⁶ Former Speaker of the Florida House of Representatives Chris Sprowls, endorsed the law and stated, "We're taking a firm stand in Florida for parents when we say instruction on gender identity and sexual orientation does not belong in the classroom where five and six-year-old children are learning. It should be up to the parent to decide if and when to introduce these sensitive topics."⁷

Former Republican Florida Representative Joe Harding,⁸ the drafter and most prominent proponent of the law,⁹ claims the purpose of the law is to "empower parents", "improve the quality of life for the state's children", and "create boundaries at an early age of what is appropriate in our schools."¹⁰ Harding further claims that the boundaries the law provides are fair to teachers and school districts because it outlines what Florida and the legislature expect from them.¹¹

⁶ Jay W. Richards & Jared Eckert, *Florida's Parental Rights in Education Bill Hits Target: Gender Ideology Harms Kids*, THE HERITAGE FOUND. (Feb. 14, 2022), <https://www.heritage.org/education/commentary/floridas-parental-rights-education-bill-hits-target-gender-ideology-harms-kids>.

⁷ *Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education*, FL GOV (Mar. 28, 2022), <https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/>.

⁸ Ja'han Jones, *'Don't Say Gay' Bill Sponsor Resigns After Charged With Fraud*, MSNBC (Dec. 9, 2022, 6:39 PM), <https://www.msnbc.com/the-reidout/reidout-blog/joe-harding-dont-say-gay-resign-rcna60955>.

⁹ Meredith Johnson, *The Dangerous Consequences of Florida's "Don't Say Gay" Bill on LGBTQ+ Youth in Florida*, 23 GEO. J. GENDER & L., no. 3, 2022, <https://www.law.georgetown.edu/gender-journal/online/volume-xxiii-online/the-dangerous-consequences-of-floridas-dont-say-gay-bill-on-lgbtq-youth-in-florida/>.

¹⁰ Matt Lavietes, *Florida House Passes 'Don't Say Gay' Bill*, NBC (Feb. 24, 2022), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/florida-house-passes-dont-say-gay-billrcna17532>.

¹¹ *Id.*

Opponents of the law disagree. Throughout Florida, teachers are unsure how to move forward. In Orange County, educators have voiced concerns that due to the vagueness of the statute, they are uncertain about how to navigate their classrooms and are unsure about what is and is not allowed.¹² Teachers are also concerned they will not be able to support their students and keep them both physically and mentally safe.¹³

Orange County Public Schools made a statement attempting to clarify what the statute allows making clear that the law will make classrooms less inclusive.¹⁴ The statement explicitly recommends that safe space stickers, intended to make people of all sexual orientations feel welcome,¹⁵ be removed from kindergarten to third grade classrooms, so that classroom instruction does not inadvertently occur on sexual orientation or gender identity.¹⁶

While teachers are not being prohibited from wearing clothing with rainbows on them, they are being cautioned not to, as such clothing may elicit classroom discussions deemed inappropriate.¹⁷ Critics of the law have said the broad language of the legislation could open districts to an influx of lawsuits from parents who believe any conversation about LGBTQ+ individuals or issues is inappropriate.¹⁸

Further, critics maintain that it undercuts the dignity of LGBTQ+ people and that it will have the effect of stigmatizing and silencing LGBTQ+ teachers and students.¹⁹ Representative Carlos Guillermo Smith, who opposed the bill, stated that the law goes beyond its text and sends a terrible message to Florida youth that there is something so wrong, so

¹² Kelsi Thorud, *Orange County Teachers Voice Concern Ahead of 'Don't Say Gay' Law Taking Effect*, WESH (June 28, 2022, 4:24 PM), <https://www.wesh.com/article/don-t-say-gay-law-takes-effect/40449397#>.

¹³ *Id.*

¹⁴ Anthony Talcott, *Orange County Schools Seeks to Clarify Interpretation of Parental Rights in Education Act*, CLICKORLANDO (Oct. 18, 2022, 11:29 PM), <https://www.clickorlando.com/news/local/2022/06/29/pushback-in-orange-county-schools-over-parental-rights-in-education-act/>.

¹⁵ *See Create a Safe Space*, TRUE COLORS UNITED, <https://truecolorsunited.org/safespace/> (“A safe space sign or sticker is a simple way to send a message to everyone who enters a space that **all** identities are welcome and supported.”).

¹⁶ Talcott, *supra* note 14.

¹⁷ Josh Sidorowicz, *No, Florida Teachers Are Not Being Told to Take Down Photos of Same-Sex Spouses*, WTSP (June 30, 2022, 6:40 PM), <https://www.wtsp.com/article/news/verify/florida-teachers-same-sex-spouse/67-0b3de16a-c0e2-46b8-9018-8692d290b551>

¹⁸ Lavietes, *supra* note 10.

¹⁹ Edward Swidriski, *Florida's "Don't Say Gay" Law Raises Serious Legal Questions*, A.B.A. (Nov. 22, 2022), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/fall-2022/florida-do-not-say-gay-law/.

inappropriate, so dangerous about LGBTQ+ people and issues that the topic has to be censored in classrooms.²⁰

Though the language of the law forbids school personnel and third parties from speaking about sexual orientation or gender identity in general, the legislative motivation behind the law's enactment and the persistence of anti-LGBTQ+ prejudice in parts of society, demonstrates the true legislative intent.²¹ In other words, the statute will punish people who discuss same-sex marriages and relationships but not people who discuss heterosexual marriages and relationships.

The law specifically forbids educators from speaking about LGBTQ+ individuals and issues. Because the law has both a discriminatory effect against a protected class and a discriminatory purpose, it violates the Equal Protection Clause of the Fourteenth Amendment.

III. THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause is found in the Fourteenth Amendment of the United States' Constitution.²² The clause states, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."²³

Although the Equal Protection Clause of the Fourteenth Amendment was designed to ensure legal equality for African Americans, Congress wrote it as a general guarantee of equality, and the courts have interpreted the Equal Protection Clause to prohibit discrimination on the basis of gender, religion, and disability.²⁴

A. LEVELS OF JUDICIAL REVIEW

There are multiples levels of scrutiny that the Court applies "when examining an equal protection claim."²⁵ More rigorous levels of judicial review increase the likelihood that "state action will be found unconstitutional."²⁶

The level of scrutiny applied to an equal protection claim is particularly important in cases regarding the rights of LGBTQ+

²⁰ Laviertes, *supra* note 10.

²¹ Swidriski, *supra* note 19.

²² U.S. CONST. amend. XIV, § 2.

²³ *Id.* (emphasis added). No state shall . . . nor deny to any person within its jurisdiction the equal protection of the laws."

²⁴ *The Rights of Lesbian, Gay, Bisexual, and Transgender People*, ACLU (Mar. 11, 2002), <https://www.aclu.org/other/rights-lesbian-gay-bisexual-and-transgender-people>.

²⁵ *Equal Protection*, 23 GEO. J. GENDER & L. 267, 270 (2022).

²⁶ *Id.*

individuals, as courts almost always invalidate anti-LGBTQ+ laws when heightened scrutiny is employed.²⁷

The Court applies strict scrutiny, the most rigorous level of judicial review, to laws that discriminate against a suspect class.²⁸ A suspect class is a group that has suffered historic discrimination and political disempowerment as a result of an immutable or distinguishing characteristic that defines them as a discrete group.²⁹ The Supreme Court considers classifications based on race, alienage, and national origin to be suspect classes that trigger strict scrutiny.

The Court applies intermediate scrutiny, a heightened level of scrutiny less rigorous than strict scrutiny, to evaluate classifications affecting members of quasi-suspect classes.³⁰ Gender is a quasi-suspect class and so classifications based on gender are subject to and must pass intermediate scrutiny.³¹

Under intermediate scrutiny, the Court must determine whether the proffered justification for the law offered by the state is “exceedingly persuasive.”³² The burden of justifying the law is demanding and rests entirely on the state.³³ The state must show, at a minimum, that the law serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.³⁴ The justification must be genuine, not hypothesized or invented post hoc in response to litigation.³⁵ Additionally, the justification must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.³⁶

B. LEVEL OF JUDICIAL REVIEW FOR DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

The Supreme Court and the Eleventh Circuit have indicated that discrimination based on sexual orientation and gender identity is discrimination based on sex, so laws that discriminate based on sexual orientation or gender identity are subject to intermediate scrutiny.

²⁷ Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1580 (2017).

²⁸ *Equal Protection*, 23 GEO. J. GENDER & L. at 271.

²⁹ *Id.* at 272.

³⁰ *Id.* at 274-75.

³¹ *United States v. Virginia*, 518 U.S. 515, 531 (1996).

³² *Id.* at 533.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

In *Bostock v. Clayton County*³⁷, the Supreme Court arguably extended the protections guaranteed by the Equal Protection Clause to discrimination based on sexual orientation. In *Bostock*, the Supreme Court consolidated three cases and decided whether Title VII prohibited employment discrimination based on sexual orientation or gender identity. Title VII makes it “unlawful . . . for an employer . . . to discriminate against any individual . . . because of such individual’s . . . sex.”³⁸

In all three cases, an employer allegedly fired a long-time employee simply for being homosexual or transgender.³⁹ In the first action, Gerald Bostock, a gay county employee, was fired for conduct “unbecoming” a county employee shortly after he began participating in a gay recreational softball league.⁴⁰ In the second action, Donald Zarda was fired by Altitude Express days after he mentioned being gay.⁴¹ In the third action, Aimee Stephens, who presented as male when she was hired, was fired by R.G. & G.R. Harris Funeral Homes after she informed the employer that she planned to “live and work full-time as a woman.”⁴²

The Court held that Title VII protects against discrimination based on sexual orientation and sexual identity, and an employer who fires an individual merely for being gay or transgender violates Title VII.⁴³ What this means is that discrimination based on sexual orientation or gender identity is ultimately discrimination based on sex, which is prohibited by Title VII.

In *Bostock*, the Court clarified that an employer who fires an individual for being homosexual or transgender, is doing so based on traits or actions it would not have questioned in members of a different sex.⁴⁴ The Court explicitly stated that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁴⁵

Further, the dissent in *Bostock* correctly cautions that by equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court’s decision will be cited as a ground for subjecting all three forms of discrimination to the same standard of review.⁴⁶

³⁷ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

³⁸ *Id.* at 1734; 42 U.S.C. § 2000e–2(a)(1)

³⁹ *See Bostock*, 140 S. Ct. at 1731.

⁴⁰ *Id.* at 1734.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1731.

⁴⁵ *Id.* at 1741.

⁴⁶ *Id.* at 1783.

Following *Bostock*, President Biden issued Executive Order No. 13988 stating that under *Bostock's* reasoning, laws that prohibit sex discrimination also prohibit discrimination on the basis of gender identity or sexual orientation.⁴⁷

Although the Supreme Court has not yet held that sex discrimination under the Equal Protection Clause, as opposed to Title VII, includes discrimination on the basis of sexual orientation and gender identity, the Eleventh Circuit has held that the protection the Equal Protection Clause provides against sex discrimination extends to discrimination based on sexual orientation and gender identity.

In *Glenn v. Brumby*,⁴⁸ the Eleventh Circuit held that all persons are protected from discrimination on the basis of gender stereotype.⁴⁹ Glenn, the plaintiff and a transgender woman, claimed that Brumby, her boss, fired her from her position as an editor in the Georgia General Assembly's Office of Legislative Counsel because of sex discrimination, thus violating the Equal Protection Clause.⁵⁰

Glenn showed up to work presenting as a woman and informed Brumby that she was transitioning.⁵¹ Brumby subsequently fired her stating that a man dressed as a woman and made up as a woman is inappropriate.⁵² Brumby stated that "it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing;" "that a male in women's clothing is "unnatural;" and that "Glenn's intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable."⁵³

Glenn sued, alleging discrimination under the Equal Protection Clause due to Brumby "discriminating against her because of her sex, including her female gender identity and her failure to conform to the sex stereotypes associated with the sex he perceived her to be."⁵⁴

The Eleventh Circuit Court sided with Glenn, holding that discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it is described as being on the basis of sex or gender, and so subject to intermediate scrutiny.⁵⁵

⁴⁷ Exec. Order No. 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021).

⁴⁸ *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011).

⁴⁹ *Id.* at 1318.

⁵⁰ *Id.* at 1313-14.

⁵¹ *Id.* at 1314.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1318.

⁵⁵ *Id.* at 1316-17.

The court explained that an individual cannot be punished because of his or her perceived gender-nonconformity and that ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes.⁵⁶

The Eleventh Circuit reaffirmed that an equal protection claim based on sexual identity and/or gender orientation discrimination is subject to intermediate scrutiny in *Adams v. School Board of St. Johns County*.⁵⁷ In *Adams*, the Eleventh Circuit determined whether a bathroom policy violated a transgender student's rights under the Equal Protection Clause. Although the court ultimately held that the bathroom policy did not violate the transgender student's equal protection rights, it evaluated the policy under intermediate scrutiny.

C. WHAT TRIGGERS HEIGHTENED SCRUTINY

While facially discriminatory legislation clearly triggers heightened scrutiny, it is much more difficult to determine whether a facially neutral law triggers heightened scrutiny.⁵⁸ In order for facially neutral legislation to raise suspicion under the Equal Protection Clause, the legislation must constitute "purposeful discrimination."⁵⁹ Purposeful discrimination requires that the legislation have both a disproportionate discriminatory impact on a group and be motivated by invidiousness.⁶⁰

Invidiousness, or discriminatory purpose, means that though the law may appear neutral, it was motivated by some bias or prejudice. In *Feeney*, the Supreme Court clarified what it meant by discriminatory purpose. "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."⁶¹ In other words, although in other areas of law people are presumed to intend the natural and foreseeable consequences of their voluntary actions, that is not to be the case for equal protection. Instead, discriminatory intent is present only if the discriminatory impact was the purpose of the state action.⁶²

⁵⁶ *Id.* at 1319.

⁵⁷ *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 796 (11th Cir. 2022).

⁵⁸ *Equal Protection*, 23 GEO. J. GENDER & L., at 282-83.

⁵⁹ *Id.* at 282.

⁶⁰ *Id.* at 283.

⁶¹ *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279.

⁶² Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 303 (2015).

Determining the goal of the legislation and whether invidious discriminatory intent was a motivating factor demands a sensitive inquiry into as much circumstantial and direct evidence as may be available.⁶³ The Supreme Court will consider several factors including context (e.g., whether the timing of when the law was passed is suspicious); legislative history (e.g., whether there were hostile comments made by legislatures regarding the law); extreme disparate impact (e.g., whether one group is extremely and disproportionately impacted by the law); and bad fit between the means of the law, or the classification the law creates, and the end of the law, or what the government is trying to accomplish. (e.g., whether the law is egregiously overinclusive and/or underinclusive). Invidiousness may often be inferred from the totality of the relevant facts.⁶⁴

i. CONTEXT

Context refers to the timing of when the law was passed and whether this timing was suspicious. The Court has held that the historical background of the decision to pass the legislation is one evidentiary source when determining the goal of the legislation, particularly if it reveals a series of official actions taken for invidious purposes.⁶⁵ The specific sequence of events leading up to the challenged decision may also shed some light on the legislator's purposes.⁶⁶

For example, if a property was in an area always zoned under a certain code, and the code was suddenly changed when the town learned of plans to erect integrated housing, the sudden change would signify suspicious timing.⁶⁷

Departures from the normal procedural sequence also raise suspicion behind the real goal of legislation. Additionally, substantive departures can also be evidence that there are ulterior motives behind the legislation. For example, if factors usually considered important by the legislator strongly favor a legislation contrary to the one passed, this could signal that discriminatory intent exists.⁶⁸

ii. LEGISLATIVE HISTORY

The legislative or administrative history may be highly relevant to an inquiry of determining whether discriminatory intent exists, especially where there are contemporary statements by legislators, minutes of its

⁶³ *Vill. of Arlington Hts. v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

⁶⁴ *Davis*, 426 U.S. at 242.

⁶⁵ *Vill. of Arlington Hts.*, 429 U.S. at 267.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

meetings, or reports.⁶⁹ For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, members of the city council and other city officials made hostile comments condemning the Santeria religion, stating that Santeria was a sin, foolishness, and an abomination to the Lord.⁷⁰ The Court held these comments were evidence that an ordinance banning Santeria was passed with discriminatory intent.⁷¹

iii. EXTREME DISPARATE IMPACT

Extreme disparate impact refers to the fact that the law bears significantly more heavily on one group over another.⁷² The seriously disproportionate discriminatory impact on a group may demonstrate unconstitutionality because the discrimination is very difficult to explain on non-discriminatory grounds.⁷³ In *Washington v. Davis*, the Court explained that when African Americans are systemically excluded from jury selection, this systemic exclusion is such an “unequal application of the law . . . as to show intentional discrimination.”⁷⁴

iv. BAD FIT BETWEEN MEANS AND ENDS

Another factor the court will consider is whether a statute is extremely overinclusive or underinclusive.⁷⁵ The relevant inquiry when determining whether a law is underinclusive or overinclusive “is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the . . . legislature is within constitutional limitations.”⁷⁶

The Court has held that “underinclusive” refers to laws that do not include all who are similarly situated with respect to a rule, and thereby burden less than would be logical to achieve the intended government goal.⁷⁷ Conversely, laws that are “overinclusive” are impermissibly overbroad and burden more people than necessary to accomplish the government’s goal.

For example, in *Lukumi Babalu Aye*, the city’s ordinances were underinclusive because while one of the proffered goals was to eliminate animal cruelty, the ordinances only prohibited the slaughtering of animals

⁶⁹ *Id.* at 268.

⁷⁰ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 541 (1993). (Concerning equal protection of religion).

⁷¹ *Id.*

⁷² *Washington v. Davis*, 426 U.S. 229, 242 (1976).

⁷³ *Id.*

⁷⁴ *Id.* at 241 (quoting *Akins v. Texas*, 325 U.S. 398, 404 (1945)).

⁷⁵ *See Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 473-75 (1981).

⁷⁶ *Id.* at 473.

⁷⁷ *State v. Peters*, 534 So. 2d 760, 763 (Fla. 3d Dist. Ct. App. 1988).

for religious reasons; slaughtering animals for secular reasons was still allowed.⁷⁸

When determining legislative intent, the Court will also analyze whether the means the government chose to further its objective substantially relate to that end.⁷⁹

IV. THE PARENTAL RIGHTS IN EDUCATION LAW DISCRIMINATES BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

§ 1001.42(8)(c)(3) violates the Equal Protection Clause because it discriminates based on sexual orientation both on its face and in its effect, and so cannot pass the intermediate scrutiny that this sex-based discrimination triggers.

A. *THE PARENTAL RIGHTS IN EDUCATION LAW IS DISCRIMINATORY ON ITS FACE*

The language of § 1001.42(8)(c)(3) explicitly forbids discussions about LGBTQ+ identities. The statute states that “classroom instruction by school personnel or third parties on *sexual orientation or gender identity* may not occur in kindergarten through grade 3.”⁸⁰

While proponents of the law contend that it is not discriminatory because its terms also technically prohibit instruction pertaining to heteronormative family relationships and cisgender identities,⁸¹ the terms sexual orientation and gender identity are most commonly used to refer to individuals who are non-heterosexual and/or non-cisgender. Therefore, the law is discriminatory on its face.

Additionally, the motivation behind the law confirms the suspicion that the terms “sexual orientation or gender identity” are meant to mean individuals who are non-heterosexual and/or non-cisgender. The original bill, which was later amended, required school faculty to “out” students to their parents within six weeks of them revealing their *gender identity or sexual orientation* at school.⁸² “Out” refers to revealing to parents that their

⁷⁸ Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993).

⁷⁹ Tuan Anh Nguyen v. INS, 533 U.S. 53, 68 (2001).

⁸⁰ FLA. STAT. ANN. § 1001.42(8)(c)(3) (2022).

⁸¹ Swidriski, *supra* note 19.

⁸² See Erin Brady, *Florida’s ‘Don’t Say Gay Bill’ Amendment That Would Out Kids Withdrawn*, NEWSWEEK (Feb. 22, 2022, 4:10 PM), <https://www.newsweek.com/floridas-dont-say-gay-bill-amendmentthat-would-out-kids-withdrawn-1681550>.

child is not heterosexual⁸³; heterosexual students do not need to be and are not “outed.”

Governor DeSantis has explicitly stated that the bill is aimed at removing discussions about “transgenderism” in the classroom.⁸⁴ When addressing the scope of the law he stated, “When you actually look at the bill and it says ‘no sexual instruction to kids pre-K through three,’ how many parents want their kids to have transgenderism or something injected into classroom instruction?”⁸⁵

B. THE PARENTAL RIGHTS IN EDUCATION LAW HAS A DISCRIMINATORY IMPACT AND A DISCRIMINATORY INTENT

The law has a discriminatory disparate impact as it disproportionately impacts LGBTQ+ individuals and was written with discriminatory intent. Under *Washington v. Davis*, that means the law triggers heightened equal protection scrutiny.

i. DISCRIMINATORY IMPACT

The discriminatory impact of the law is revealed by the steps Florida schools are taking to remove LGBTQ+ topics from the classroom but not their heteronormative counterparts.

Florida schools are removing books that discuss LGBTQ+ families and relationships but not books discussing heterosexual families and relationships, citing the Parental Rights in Education Act. Lake County Schools banned three books containing LGBTQ+ themes.⁸⁶ One of books is the award-winning 2005 children’s book, *And Tango Makes Three*, which tells the real-life story of a same-sex penguin couple that creates a family together.⁸⁷ The other banned books include “A Day in the Life of

⁸³ *What’s “Coming Out”?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/sexual-orientation/sexual-orientation/whats-coming-out> (last visited Nov. 3, 2023).

⁸⁴ Judd Legum, “Don’t Say Gay”: Florida Schools Purge Library Books with LGBTQ Characters, POPULAR INFORMATION (Jan. 5, 2023), <https://popular.info/p/dont-say-gay-florida-schools-purge>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Joshua Q. Nelson, *Florida School District Bans Book About Real-Life Gay Penguin Relationship, Citing Parental Rights Law*, FOX NEWS (Jan. 9, 2023, 9:40 PM), <https://www.foxnews.com/media/florida-school-district-bans-book-about-real-life-gay-penguin-relationship-citing-parental-rights-law>.

Marlon Bundo,” a book about a rabbit named Marlon Bundo that details the same-sex romance between him and another rabbit named Wesley.⁸⁸

In Seminole County, the school district has also pulled three books with LGBTQ+ themes.⁸⁹ These books involve books with gender non-conforming characters including “Jacob’s New Dress” which is a story about a little boy who likes to wear dresses.⁹⁰

LGBTQ+ families are disproportionately impacted by the law, as the law prevents Florida’s primary school students from talking about their LGBTQ+ family members and LGBTQ+ history.⁹¹ For example, if a student is asked to draw a picture of their family and a child draws their two dads and shares their drawing with the class, a parent could sue the school if they feel there was an inappropriate discussion of sexual orientation or gender identity.⁹² The resulting fear of impending lawsuits could encourage teachers to silence students who have LGBTQ+ family members and exclude them from exercises like this.

A recent survey found that fifty-six percent of LGBTQ+ parents are considering moving their families to another state over concerns that the law stigmatizes LGBTQ+ identities and creates a hostile learning environment for LGBTQ+ children or students with LGBTQ+ family members.⁹³

Their fears are confirmed in another study that found the law is already negatively impacting LGBTQ+ students and their parents.⁹⁴ Surveys show that eighty-eight percent of LGBTQ+ parents said they were very or somewhat worried about the effects of the bill on their children and families⁹⁵ and sixteen and a half percent have taken steps to move out of Florida.⁹⁶ Additionally, eleven percent of parents have considered moving their children to a school that is not bound by the “Don’t Say Gay” law, such as a private school.⁹⁷

⁸⁸ Christopher Rosen, *John Oliver comes after Mike Pence with surprise children’s book about gay bunny*, ENTERTAINMENT WEEKLY (Mar. 19, 2018), <https://ew.com/tv/2018/03/19/john-oliver-mike-pence-marlon-bundo/>.

⁸⁹ Legum, *supra* note 84.

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² *See id.*

⁹³ Brooke Migdon, *More Than Half of LGBTQ Parents in Florida Say They Are Considering Leaving the State*, THE HILL (Jan. 24, 2023, 1:58 PM), <https://thehill.com/homenews/state-watch/3828490-more-than-half-of-lgbtq-parents-in-florida-say-they-are-considering-leaving-the-state/>.

⁹⁴ Abbie E. Goldberg, *Impact of HB 1557 (Florida’s Don’t Say Gay Bill) on LGBTQ+ Parents in Florida*, WILLIAMS INST. 1 (Jan. 2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Dont-Say-Gay-Impact-Jan-2023.pdf>.

⁹⁵ *Id.* at 1.

⁹⁶ *Id.* at 2.

⁹⁷ *Id.*

Parents have expressed concern over how the law would affect their children, including diminishing their children's sense of legitimacy and fostering a hostile school climate.⁹⁸ Additionally, parents reported that their children are being harassed and bullied at school because they had LGBTQ+ parents and are not able to talk about their parents or their own LGBTQ+ identities at school.⁹⁹

The law could severely impact the mental health of LGBTQ+ students. Amit Paley, CEO of the LGBTQ+ youth suicide prevention and crisis intervention group The Trevor Project, said that "when lawmakers treat LGBTQ+ topics as taboo and brand our community as unfit for the classroom, it only adds to the existing stigma and discrimination, which puts LGBTQ+ young people at greater risk for bullying, depression, and suicide."¹⁰⁰

A recent survey found that 42% of LGBTQ+ youth seriously considered suicide in 2021, demonstrating that young members of the LGBTQ+ communities are at a higher-than-average risk of suicide and self-harm.¹⁰¹ The Don't Say Gay Bill threatens the safety of LGBTQ+ students by transforming classrooms into unsafe spaces where such students feel unsafe to speak about their sexuality, which can worsen any mental health issues they are already facing. This law transforms "classrooms into unsafe spaces for LGBTQ+ students, where they must hide their sexuality, which can exacerbate the issues that these students are already facing."¹⁰²

Research has shown that anti-LGBTQ+ legislation has "direct and indirect effects on LGBTQ+ parents and their mental health."¹⁰³ When states with nondiscrimination policies have policies that do not include sexual orientation, it makes LGBTQ+ people feel more marginalization.¹⁰⁴ Further, favorable rulings on LGBTQ+ adoptive parenthood and adoption increases the mental health of these parents over those parents in states with less favorable rulings.¹⁰⁵

Similarly, LGBTQ+ members, regardless of age, report higher rates of victimization when they are living in communities that are perceived to be hostile to the LGBTQ+ community.¹⁰⁶

⁹⁸ *Id.* at 1.

⁹⁹ *Id.* at 2.

¹⁰⁰ Matt Lavietes, *Florida House Passes 'Don't Say Gay' Bill*, NBC (Feb. 24, 2022, 3:06 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/florida-house-passes-don-t-say-gay-bill-rcna17532>.

¹⁰¹ *Id.*

¹⁰² Johnson, *supra* note 9.

¹⁰³ Goldberg, *supra* note 94 at 4.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 4-5.

¹⁰⁶ *Id.* at 5.

Unlike in more progressive areas, LGBTQ+ members living in more conservative communities, which are likely to be perceived as more hostile to the LGBTQ+ community, report lower social inclusion, feelings of belongingness, and poorer health.¹⁰⁷ LGBTQ+ youth living in Southern and Midwestern states report higher levels of victimization in school due to their gender expression than youth living in Northeastern states.¹⁰⁸ Overall, the statistics highlight how schools can reflect the norms and attitudes of their state and region, as well as how those norms and attitudes can affect the LGBTQ+ members within each state.¹⁰⁹

The instant criticism the law received signals that it was intended to discriminate against LGBTQ+ individuals. President Joe Biden called the bill hateful and spoke directly to the LGBTQ+ community tweeting “I want every member of the LGBTQ+ community — especially the kids who will be impacted by this hateful bill — to know that you are loved and accepted just as you are. I have your back, and my Administration will continue to fight for the protections and safety you deserve.”¹¹⁰

Chasten Buttigieg, a former teacher and husband of the Secretary of Transportation, Pete Buttigieg, criticized the Bill, tweeting that it “will kill kids.”¹¹¹ Buttigieg also said the law is pushing kids back into the closet.¹¹²

Jon Harris Maurer, public policy director for Equality Florida, stated that proponents of the law “have made [it] clear they are willing to take a disgusting, unfettered attack on LGBTQ youth.”¹¹³ No one has criticized the bill for silencing heterosexual and cisgender identities.

ii. DISCRIMINATORY INTENT

The law was drafted with the intent to discriminate against LGBTQ+ individuals. While Florida law makers claim the goal of the law is “empowering parents,” “improving the quality of life for the state’s

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Brady, *supra* note 84.

¹¹¹ Johnson, *supra* note 9.

¹¹² John Wagner, *Chasten Buttigieg Speaks Out Against Florida’s ‘Don’t Say Gay Bill,’ Warning It Could Lead to More Suicides*, WASHINGTON POST (Jan. 25, 2022, 8:47 AM), <https://www.washingtonpost.com/politics/2022/01/25/chasten-buttigieg-criticizes-florida-bill/>

¹¹³ Ana Goñi-Lessan, *Harding Amendment Axed, But LGBTQ Advocates Say ‘Don’t Say Gay’ Bill Hurts Student Privacy*, TALLAHASSEE DEMOCRAT (Feb. 24, 2022, 2:52PM) <https://www.tallahassee.com/story/news/2022/02/22/dont-say-gay-bill-oversteps-student-privacy-lgbtq-advocates-say/6891967001/>.

children,” and “creating boundaries at an early age of what is appropriate in our schools,”¹¹⁴ this is pretextual.

The pretext is revealed when examining the context of the law’s inception, the legislative history regarding the legislation, and because the law is both overinclusive and underinclusive.

The context, or timing, of the law’s inception is particularly suspicious. Former Florida Representative Joe Harding, the drafter and most prominent proponent of the law,¹¹⁵ stated that he began exploring the need for the law after learning that Palm Beach County Schools were using a “genderbread person”, instead of a “gingerbread man” to teach gender identity.¹¹⁶ Governor DeSantis held up a copy of “The Genderbread Person” during a March 28 press conference explaining why he was signing the Parental Rights in Education Bill into law.¹¹⁷

The legislative history and hostile comments regarding LGBTQ+ individuals, further reveal the pretext associated with the law. Former Florida Representative Joe Harding stated the goal of the law is to prevent “teaching someone that they could have 100 different types of gender.”¹¹⁸ Therefore, he believes that teaching students that there are other genders aside from those that align with those assigned at birth is the real goal of the law.

The pretext of the law is further revealed because the law is both underinclusive and overinclusive. The law is underinclusive because it only promotes the rights of straight parents. Though the Florida legislator claims that the goal of the law is to “empower parents” and “improve the quality of life for the state’s children,”¹¹⁹ the law does not include all parents and all of the state’s children. The Parental Rights in Education Act leaves LGBTQ+ parents with no rights and diminishes the lives of the state’s children who are LGBTQ+.

The law is overinclusive because it does much more than what parents want. Parents want to be informed about what their children are being taught, but not at the expense of out casting LGBTQ+ children. Norma Schwartz, mother of a fifth grader and an eighth grader in Miami-Dade schools and a member of the Parent Teacher Association (PTA),¹²⁰ says

¹¹⁴ Lavietes, *supra* note 10.

¹¹⁵ Johnson, *supra* note 9.

¹¹⁶ Jennifer Hunt Murty, *FL State Rep. Joe Harding Discusses His Parental Rights Bill and Related Controversy*, Ocala Gazette (Apr. 13, 2022), <https://www.ocalagazette.com/fl-state-rep-joe-harding-discusses-his-parental-rights-bill-and-related-controversy/>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Lavietes, *supra* note 10.

¹²⁰ *About PTA*, NATIONAL PTA, <https://www.pta.org/home/About-National-Parent-Teacher-Association> (last visited Nov. 4, 2023). (“The PTA is a network of millions of

that while the organization wants parental engagement in schools and to empower parents, the law goes against their mission and vision to empower all children, not make them feel like they don't belong.¹²¹

Additionally, many Floridians disapprove of the Parental Rights in Education Act, as a survey found that fifty percent of respondents oppose the law.¹²²

V. THE PARENTAL RIGHTS IN EDUCATION LAW FAILS INTERMEDIATE SCRUTINY

The Parental Rights in Education law is unconstitutional because it violates the Equal Protection Clause as it fails intermediate scrutiny. As explained, *supra*, for sex-based legislation to pass intermediate scrutiny, the government must show that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.¹²³

A. IMPORTANT GOVERNMENTAL OBJECTIVE

The Supreme Court has held that important governmental objectives include traffic safety,¹²⁴ preventing illegitimate teenage pregnancies,¹²⁵ and assuring that a biological parent-child relationship exists.¹²⁶ The Eleventh Circuit has held that an important governmental objective includes protecting students' privacy in school bathrooms.¹²⁷

Governor Ron DeSantis claims the important governmental objective of the Parental Rights in Education Act is to reinforce parents' fundamental rights to make decisions regarding the upbringing of their

families, students, teachers, administrators, and business and community leaders devoted to the educational success of children and the promotion of family engagement in schools.”).

¹²¹ Anthony Izaguirre, ‘Don’t Say Gay’ Law Brings Worry, Confusion to Florida Schools, PBS, (Aug. 15, 2022, 2:59 PM), <https://www.pbs.org/newshour/education/dont-say-gay-law-brings-worry-confusion-to-florida-schools>.

¹²² A.G. Gancarski, *Poll: Majorities Oppose Ron DeSantis-Backed ‘Stop WOKE’ and Parental Rights Laws*, FLORIDA POLITICS, (Oct. 3, 2022), <https://floridapolitics.com/archives/561035-poll-majorities-oppose-ron-desantis-backed-stop-woke-and-parental-rights-laws/>.

¹²³ *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 801 (11th Cir. 2022).

¹²⁴ *Craig v. Boren*, 429 U.S. 190 (1976).

¹²⁵ *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 470 (1981).

¹²⁶ *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 54 (2001).

¹²⁷ *Adams*, 57 F.4th at 803.

children.¹²⁸ Comments by the Governor DeSantis and other legislators clarify that by “reinforce parents’ fundamental rights” they mean banning any discussion or beliefs that do not align with heteronormative ideology. Governor DeSantis stated the following: Parents’ rights have been increasingly under assault around the nation, but in Florida we stand up for the rights of parents and the fundamental role they play in the education of their children. Parents have every right to be informed about services offered to their child at school *and should be protected from schools using classroom instruction to sexualize their kids as young as five years old.*¹²⁹

House Speaker Chris Sprowls echoed Governor DeSantis adding that,

“The government should never take the place of a parent. We’re taking a firm stand in Florida for parents when we say instruction on gender identity and sexual orientation does not belong in the classroom where five and six-year-old children are learning. It should be up to the parent to decide if and when to introduce these sensitive topics.”¹³⁰

Their comments conflate teaching children about sexual orientation and gender identity with teaching children about sex. Teaching children that there are different sexual orientations, different genders, and that some children have parents of the same gender while others do not, does not sexualize children, it teaches them that diversity exists.

Though former Florida Representative Joe Harding concedes that teaching children the act of having sex and preventing sex is not the same as teaching children about sexual orientation and gender, he stands firm in his belief that banning discussions about sexual orientation and gender identity that do not align with the heteronormative sexual orientation and gender is crucial in Florida public schools.¹³¹

The comments by the legislators overwhelmingly reveal that the important governmental objective is not to reinforce parents’ fundamental rights to make decisions regarding the upbringing of their children, but to target and eradicate LGBTQ+ individuals from the classroom.

Further underscoring that the insidious governmental objective of the law is that sexual orientation and gender identity are not taught in grades

¹²⁸ Florida Gov., *supra* note 3.

¹²⁹ *Id.* (emphasis added).

¹³⁰ *Id.* (emphasis added).

¹³¹ Murty, *supra* note 119.

kindergarten through third grade.¹³² Moreover, the law is unnecessary as educators do not expect a major change in lesson plans for the exact reason that they do not cover such subjects in early grades.¹³³

B. SUBSTANTIALLY RELATED

Even if the governmental objective was sufficiently important, the law would not survive the substantially related requirement of intermediate scrutiny.

Banning classroom instruction on sexual orientation and gender identity is not substantially related to the law's proffered goal of reinforcing parents' fundamental rights to make decisions regarding the upbringing of their children.

Governor DeSantis stated that one of the reasons for the law is that parents have the right to be informed about what is happening in their children's schools.¹³⁴ The Commissioner of Education Richard Corcoran endorsed the Governor, adding that, "Greater parental involvement leads to a better quality of life for children and this important legislation helps ensure Florida's great educators collaborate with parents to ensure students are learning and flourishing."¹³⁵

Eliminating classroom instruction on sexual orientation and gender identity does not keep parents informed nor does it facilitate collaboration between educators and parents. Ironically, the law leads to a diminished quality of life for children and parents who are LGBTQ+ and parents of children who are LGBTQ+.

A law that would be substantially related to furthering the law's proffered goal of reinforcing parents' fundamental rights to make decisions regarding the upbringing of their children by keeping parents informed and fostering collaboration, would be a law that requires schools to be transparent and communicative with parents about the curriculum being taught. If the goal of the law is for parents to decide when to introduce LGBTQ+ topics to children, a law giving parents the ability to remove their children from a classroom where such topics are being taught would be substantially related to furthering that goal, not banning such discussions all together.

¹³² *Id.*

¹³³ Izaguirre, *supra* note 127.

¹³⁴ Florida Gov., *supra* note 3.

¹³⁵ *Id.*

VI. THE PARENTAL RIGHTS IN EDUCATION LAW DISCRIMINATES AGAINST LGBTQ+ INDIVIDUALS WITHOUT GOOD REASON

Even if the Parental Rights in Education Act does not currently violate the Equal Protection Clause, it causes the harms the Equal Protection Clause is designed to prevent.

The Equal Protection Clause promises that all persons in the United States shall enjoy the “equal protection of the laws.”¹³⁶ This means that they cannot be discriminated against without good reason.¹³⁷

Though the state’s proffered reason for the law is that it reinforces parents’ fundamental rights to make decisions regarding the upbringing of their children, comments and actions by Florida legislators prove that the reason is pretextual. The real reason for the law is to discriminate against individuals who do not fit within the heteronormative stereotype.

Further revealing the true reason behind the law is Governor DeSantis’ amorphous fear that transgender individuals are harmful and should be eradicated. DeSantis’ administration has led the effort to restrict transition-related care for people under eighteen.¹³⁸ In October of 2022, the Florida Board of Medicine voted to start drafting a rule that would bar all minors in the Florida from receiving treatment for gender dysphoria.¹³⁹

The effort to restrict such care began when DeSantis and Florida Surgeon General Joseph Ladapo issued nonbinding guidance through the Florida Health Department that sought to bar both “social gender transition” and gender-affirming medical care for minors.¹⁴⁰ The guidance contradicts accredited medical groups that have supported gender-affirming care for transgender youths, including the American Medical Association, the American Academy of Pediatrics, and the American Psychological Association.¹⁴¹

More recently, Governor DeSantis asked state universities for the number and ages of their students who sought gender dysphoria treatment,

¹³⁶ U.S. CONST. amend. XIV, § 2.

¹³⁷ Linda R. Monk, *Due Process Clause, Equal Protection Clause and Disenfranchising Felons*, PBS, <https://www.pbs.org/tpt/constitution-usa-peter-sagal/equality/due-process-equal-protection-and-disenfranchisement/> (last visited Nov. 3, 2023).

¹³⁸ Jo Yurcaba, *Florida Medical Board Votes to Ban Gender-Affirming Care for Transgender Minors*, (Oct. 29, 2022, 10:28 AM), <https://www.nbcnews.com/nbc-out/out-news/florida-medical-board-votes-ban-gender-affirming-care-transgender-mino-rcna54632>

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

including sex reassignment surgery and hormone prescriptions.¹⁴² While the reason he's conducting the survey wasn't completely clear, Florida House Democratic Leader Fentrice Driskell believes it could lead to cuts in funding for universities to treat students with this condition and an all-out elimination of services.¹⁴³

VI. CONCLUSION

The Equal Protection Clause of the Fourteenth Amendment guarantees that all people shall be treated equally under the law. The Parental Rights in Education Act ensures that LGBTQ+ individuals are second-class citizens and establishes that they are not entitled to the same rights and privileges as other Americans. Further, the law sends the message that elected officials only represent a particular group and reinforces the belief that individuals who do not fit within the heteronormative stereotype are less than.

Florida's Parental Rights in Education Act presumes that all parents have the same views, political beliefs, and agree on what is appropriate regarding sexual orientation and gender identity. This is exactly the type of stereotyping the Equal Protection Clause was designed to abolish.

Passing a law that the Florida legislature claims empowers parents and improves the quality of life for the state's children, but that has resulted in the erasure of LGBTQ+ individuals in our schools is pretextual, hypocritical, and discriminatory.

An Equal Protection challenge to the law would reveal that the law is both unconstitutional and that the Florida legislature is taking calculated measures to eradicate LGBTQ+ individuals from society.

¹⁴² Brendan Farrington, *DeSantis Seeks Details on Transgender University Students*, AP (Jan. 18, 2023, 7:13 PM), <https://apnews.com/article/ron-desantis-colleges-and-universities-race-ethnicity-florida-education-97d0b8aef2fc3a60733c8bd4080cc07b>.

¹⁴³ *Id.*