

KEEP SAYING GAY: HOW NATIONWIDE “DON’T SAY GAY” BILLS VIOLATE THE FIRST AMENDMENT, CHILL PROTECTED SPEECH, AND HINDER PUBLIC HEALTH OUTCOMES

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I. INTRODUCTION

On June 12, 2016, a man walked into a popular gay dance club in Orlando, FL and opened fire.¹ At the time, the Pulse shooting was called the deadliest mass shooting in United States history, with at least forty-nine dead and dozens more injured.² This horrific hate crime targeted directly at the LGBTQ community during Pride festivities came after the Supreme Court handed down its landmark marriage equality decision in *Obergefell v. Hodges*,³ increasing queer visibility throughout the country.⁴ Large swaths of the country came together to support the victims of the Pulse nightclub shooting, with local and national government officials issuing statements, vigils across the country, and the President and Vice President of the United States meeting with survivors and victims’ families.⁵ This outpouring of support after Pulse was in stark contrast to the complete lack of response from government or public officials after the 1973 arson attack on the UpStairs Lounge in New Orleans, the previously most deadly incident targeting the LGBTQ community.⁶ After thirty-two people, among them pro-LGBTQ church-goers, were killed in the fire, local and state officials almost entirely ignored the event.⁷ Local churches even refused to host funerals for the victims of this arson.⁸ While both tragedies showcase clear targeting of the LGBTQ community, the government’s response after the Pulse shooting showed a shifting of the tides toward acceptance, understanding, and recognition. Federally, it appeared that the United States was making positive progress for the queer

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1. Bonnie J. Morris, *A Brief History of Lesbian, Gay, Bisexual and Transgender Social Movements*, AM. PSYCH. ASS’N. (Oct. 6, 2022), <https://www.apa.org/pi/lgbt/resources/history> [<https://perma.cc/SRA8-VGL5>].

2. *Id.*

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

4. Michael Ray, *Orlando Shooting of 2016*, BRITANNICA (Oct. 6, 2022), <https://www.britannica.com/event/Orlando-shooting-of-2016> [<https://perma.cc/YJ3W-823Y>].

5. Morris, *supra* note 1.

6. Ray, *supra* note 4.

7. *Id.*

8. *Id.*

community.⁹ However, at the state, local, and municipal levels, anti-LGBTQ sentiment continued to foment, spurred in large part by the religious right.¹⁰

This anti-LGBTQ sentiment continues to seep into violent acts, most recently with the mass shooting at Club Q in Colorado Springs on November 19, 2022.¹¹ The attacker at Club Q entered during a drag queen's birthday celebration, opening fire until he was wrestled to the ground by other patrons.¹² The attacker killed five people and injured seventeen others in a place meant to be a safe space for the LGBTQ community.¹³ The attacker claimed that his mother forced him to go to Club Q and that he was inspired to commit the attack by a neo-Nazi white supremacist training video.¹⁴ Prosecutors were able to show enough evidence to convict the attacker on murder and hate crime charges, pointing to evidence of a "distaste for LGBTQ."¹⁵ This distaste included an online message of a rifle scope over the pride flag and use of gay slurs to refer to others while online gaming.¹⁶ This violent attack is one of many against the LGBTQ community in recent years, and these acts coincide with an uptick in anti-LGBTQ legislation like the one at issue in this Note.¹⁷

In every documented culture throughout history, historians tend to agree that there is evidence of homosexual activity and same-sex love.¹⁸ However, there is also evidence of severe persecution of LGBTQ people by state, church, and medical authorities throughout history.¹⁹ This should come as no surprise to any reader of this Note, as homophobia, transphobia, and general "otherness" are entrenched in each of our institutions, churches, and governments. The two attacks described above come after centuries of persecution, and while marriage equality and more queer visibility show positive progress toward LGBTQ acceptance, institutions, churches, and governments are fighting to reduce visibility and reverse all positive progress made. These institutional and governmental attempts to restrict the rights and visibility of queer people, and

9. *Id.*

10. Sophie Bjork-James, *Christian Nationalism and LGBTQ Structural Violence in the United States*, 7 J. RELIGION & VIOLENCE 278, 279 (2019) (discussing how nationalist movements justify their own moral positions through framing privileged groups as victims).

11. Colleen Slevin, *Colorado Gay Club Shooting Suspect Charged with Hate Crimes*, AP NEWS (Dec. 6, 2022), <https://apnews.com/article/crime-shootings-colorado-hate-crimes-springs-b9be567920a55986c57af595335ac9f61> [<https://perma.cc/3WQB-2JBS>].

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Liz Elting, *In Dialogue: Sarah Kate Ellis, President And CEO Of GLAAD, On The Power Of Media And LGTBQ Representation, Part 2*, FORBES, (Feb. 23, 2023), <https://www.forbes.com/sites/lizelling/2023/02/23/in-dialogue-sarah-kate-ellis-president-and-ceo-of-glaad-on-the-power-of-media-and-lgtbq-representation-part-2/?sh=adda5fc52a19> [<https://perma.cc/CJL9-T6H6>].

18. Morris, *supra* note 1.

19. *Id.*

especially queer youth, across the country come to a head in Florida with what has been dubbed the “Don’t Say Gay” bill.²⁰

II. THE ISSUE & BACKGROUND INFORMATION

In early 2022, Florida Governor Ron DeSantis signed the “Parental Rights in Education” bill.²¹ The bill states,

“[c]lassroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.”²²

Opponents quickly labeled it the “Don’t Say Gay” bill.²³ In addition to preventing classroom instruction on LGBTQ topics, the bill allows for an extreme and likely chilling effect: the ability of parents to sue a school district if the policy is violated.²⁴ Florida’s law took effect on July 1, 2022²⁵, and at least twelve other states have considered new legislation that mimics Florida’s law, each generally seeking to prohibit any classroom mention or discussion of sexual orientation or gender identity.²⁶

Florida may be the first to pass a law like this in the past few years, but this is certainly not the first attempt to restrict discussions of LGBTQ topics in the classroom.²⁷ Similar laws, dubbed by LGBTQ activists as “no promo homo” laws, have been proposed and enacted in the past several decades in states wishing to forbid a school from saying positive things about queer people in classrooms.²⁸ Nine states passed “no promo homo” laws in the wake of the HIV/AIDS epidemic.²⁹ Three states repealed the laws, and South Carolina’s law was overturned in the U.S. Southern District of South Carolina after failing to meet even rational-basis review under the Equal Protection Clause.³⁰ Of the five

20. Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay'*, NPR (Mar. 28, 2022), <https://www.npr.org/2022/03/28/1089221657/don't-say-gay-florida-desantis> [<https://perma.cc/3J83-4YVT>].

21. *Id.*

22. H.B. 1557, 2022 Leg., 124th Reg. Sess. (Fla. 2022) (enacted).

23. Diaz, *supra* note 20.

24. H.B. 1557, 2022 Leg., 124th Reg. Sess. (Fla. 2022) (enacted).

25. Diaz, *supra* note 20.

26. Dustin Jones & Jonathan Franklin, *Not Just Florida. More Than a Dozen States Propose So-called 'Don't Say Gay' Bills*, NPR (Apr. 10, 2022), <https://www.npr.org/2022/04/10/1091543359/15-states-don't-say-gay-anti-transgender-bills> [<https://perma.cc/S7MW-L5E9>].

27. *Id.*

28. *Id.*

29. “No Promo Homo” Laws: Harmful and Outdated, EQUALITY TEXAS, (Sept. 2, 2022), <https://www.equalitytexas.org/no-promo-homo-laws/> [<https://perma.cc/GTS8-ZLFH>].

30. *Id.*

states with these laws still in effect, four still limit discussion of LGBTQ issues to sex education courses.³¹ Florida's bill limits classroom "instruction or discussion" of gender identity and sexual orientation, which has led to some Florida teachers removing swaths of books containing even a passing mention of LGBTQ characters or ideas.³² Some of the books removed included "Twilight" and "Harry Potter",³³ which are common middle-early childhood reads.³⁴ These books were not removed from a classroom library in a K-3 classroom, as the original bill targeted, but rather a high school special education classroom.³⁵ These actions are massively consequential and reach expression and ideas far beyond the "Parental Rights in Education" bill's written purpose.³⁶

"Don't Say Gay" bills have been in the news for much of 2022 and 2023, with Florida taking the bulk of the spotlight due to a brazen leader keen on more than just being Governor of Florida. In the same state where a man opened fire in a gay night club in 2016 specifically targeting LGBTQ people, their state government seeks to limit speech about LGBTQ people entirely, as if our existence does not warrant a passing mention. DeSantis and others in his state government are speaking to a riled up, largely religious, national base, and he's chosen a culture war based on "protecting children" and "preserving parental rights." His sentiment is not new, but the passage of the bill and the effects we are seeing in the 2022-2023 school year are.

Indiana state legislators recently introduced House Bill 1608, a bill that censors conversation about LGBTQ people and issues in public schools.³⁷ The bill also targets transgender students by forcing teachers and administrators to "out"³⁸ students to their parents if a student changes their gender identity or pronouns.³⁹ The bill was amended to limit discussion of LGBTQ issues grades K-3 to sexual education courses, something that is uncommon in early education classes.⁴⁰ Indiana house committee members voted 9-4 to send the bill, sponsored by Republican Michelle Davis, to the full House for consideration.⁴¹ Supporters

31. *Id.*

32. Jo Yurcaba, *Florida Teachers Navigate Their First Year Under the 'Don't Say Gay' Law*, NBC NEWS, (Sept. 1, 2022), <https://www.nbcnews.com/nbc-out/florida-teachers-navigate-first-year-don-t-say-gay-law-rcna43817> [<https://perma.cc/AA9R-SJA6>].

33. Despite the Harry Potter series having no explicit reference to LGBTQ characters or ideas.

34. Yurcaba, *supra* note 32.

35. *Id.*

36. H.B. 1557, 2022 Leg., 124th Reg. Sess. (Fla. 2022) (enacted).

37. H.B. 1608, 123rd Gen. Assemb., First Reg. Sess. (Ind. 2023).

38. "Out" in this context means forcing someone to disclose their sexuality or gender without their consent.

39. H.B. 1608, 123rd Gen. Assemb., First Reg. Sess. (Ind. 2023).

40. Arleigh Rodgers, *Indiana 'Don't Say Gay' Bill Pivots to Kids' Gender Identity*, AP NEWS, (Feb. 25, 2022, 10:54 AM), <https://apnews.com/article/sex-education-teaching-indiana-gender-711a50c7b385dae68795889d07c2bcde> [<https://perma.cc/37AU-SUVG>].

41. *Id.*

of the bill argue that H.B. 1608 would “empower parents to choose how their children are raised.”⁴²

Indiana’s bill, as amended, provides:

“[T]hat a school, an employee or staff member of a school, or a third-party vendor used by a school to provide instruction may not provide any instruction to a student in kindergarten through grade 3 on human sexuality. Provides that a school employee or a school staff member is not prohibited from responding to a question from a student regarding certain topics. Provides that an employee or staff member of a school may only use a name, pronoun, title, or other word to identify a student that is inconsistent with the student's sex if the student, who is an adult or an emancipated minor, or the parent of an unemancipated minor requests in writing the use of a specific name, pronoun, title, or other word to identify the student.”⁴³

The Indiana House of Representatives passed H.B. 1608 on February 23, 2023 with little debate.⁴⁴ Indiana’s legislation is modeled off of Florida’s “Don’t Say Gay” bill,⁴⁵ and joins the over 250 anti-LGBTQ bills introduced in 2023 thus far.⁴⁶ These damaging bills stop speech, chill speech, and most importantly, negatively impact the lives and health of LGBTQ people, particularly LGBTQ youth.⁴⁷

Florida’s attempt to chill speech has been called “unconstitutionally vague” by opponents of the bill due to its implications on the First Amendment rights of both teachers and students alike.⁴⁸ Opponents to Indiana’s bill and other bills across the country echo the same sentiments.⁴⁹ A chilling effect on speech occurs when a regulation is so vague, overbroad, or uncertain that people are unsure if they can speak at all for fear of government sanctions.⁵⁰ Famously, teachers and students do not lose their constitutional right to free speech when they enter a school building or classroom.⁵¹

Florida’s “Don’t Say Gay” bill and others like it unconstitutionally restrict both teacher and student speech, and the statute maliciously violates the First

42. *Id.*

43. H.B. 1608, 123rd Gen. Assemb., First Reg. Sess. (Ind. 2023).

44. Emily Longnecker, *Indiana Gender Identity Bill Passes Indiana House*, WTHR, (Feb. 23, 2022), [https://www.wthr.com/article/news/politics/indiana-house-bill-1068-don't-say-gay-passes-house/531-9a747edf-a1f9-44f2-805d-1ae70ea60c5e](https://www.wthr.com/article/news/politics/indiana-house-bill-1068-don-t-say-gay-passes-house/531-9a747edf-a1f9-44f2-805d-1ae70ea60c5e) [<https://perma.cc/N887-H2KP>].

45. *Id.*

46. Elting, *supra* note 17.

47. *Id.*

48. Ian Millhiser, *The Constitutional Problem with Florida’s “Don’t Say Gay” Bill*, VOX (Mar. 15, 2022), [https://www.vox.com/2022/3/15/22976868/don't-say-gay-florida-unconstitutional-ron-desantis-supreme-court-first-amendment-schools-parents](https://www.vox.com/2022/3/15/22976868/don-t-say-gay-florida-unconstitutional-ron-desantis-supreme-court-first-amendment-schools-parents) [<https://perma.cc/7QTU-V4DQ>].

49. Rodgers, *supra* note 40.

50. Note, *The Establishment Clause and the Chilling Effect*, 133 HARV. L. REV. 1338 (2020).

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

Amendment. Per settled Constitutional jurisprudence, this restriction on speech essentially amounts to a prior restraint, or restricting speech before it is uttered, and as such, is presumptively unconstitutional.⁵² As this Note will discuss and argue, by not allowing students to engage with and receive important ideas and knowledge about sexual orientation and gender identity, Florida is leading the charge in creating unsafe environments for LGBTQ students. Inevitably, Florida's "Don't Say Gay" bill and copycat bills across the country, including Indiana, will lead to worse public health outcomes for LGBTQ people across the country.

This Note will argue how Florida and other copycat "Don't Say Gay" bills are unconstitutionally vague, restrict protected speech and expression by students and teachers alike, unduly restrict access to protected ideas, and create hostile environments for LGBTQ students and teachers leading to poor public health outcomes for LGBTQ individuals across the country. It will also argue that discussion of sexuality and gender is not only appropriate for all students, but it should also be required in each grade level with varying degrees of depth and explanation.

III. ANALYSIS

A. *The First Amendment & Schools*

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."⁵³ Rather than promoting the free expression of ideas, Florida's "Don't Say Gay" bill expressly restricts classroom discussion of sexual orientation and gender identity in kindergarten through third grade classrooms—or "in a manner that is not age appropriate or developmentally appropriate for students in accordance with state standards."⁵⁴ Within months of being passed, this bill is having far reaching impacts on speech for students and teachers in every grade level in Florida, and the impact of Florida's discrimination of LGBTQ content in the classroom is being felt across the United States.⁵⁵

The First Amendment has drawn consistent scrutiny in educational settings. Every branch of government has grappled with its application for students, teachers, and books. Florida's "Don't Say Gay" bill calls for renewed scrutiny of how the First Amendment is applied in schools, what rights students and teachers have, and how far First Amendment rights should stretch in a school setting. The Constitution has served as a buoy for free expression and the free sharing of ideas, especially in our nation's schools.⁵⁶ The inability for students, teachers, and librarians to discuss LGBTQ content in or around the classroom violates the First Amendment and does not hold up against established First Amendment

52. *Neb. Press Ass'n. v. Stuart*, 427 U.S. 539, 559 (1976).

53. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

54. H.B. 1557, 2022 Leg., 124th Reg. Sess. (Fla. 2022) (enacted).

55. Millhiser, *supra* note 48.

56. *Shelton*, 364 U.S. at 487.

jurisprudence.

Before addressing the bulk of First Amendment jurisprudence, it is important to note that the First Amendment has been treated differently in schools than in other venues. Additionally, there are two conflicting interests regarding the First Amendment in schools: the need for open and free expression in schools and necessary bounds of that free expression.⁵⁷ States can and do restrict speech for both teachers and students alike.⁵⁸ The United States Supreme Court has recognized the “special characteristics of the school environment” and has given school districts limited ability to regulate student and teacher speech, with different standards applying to each subgroup.⁵⁹ However, students are afforded certain rights to expression under the First Amendment.⁶⁰

It is important to concede that Florida and other states’ “Don’t Say Gay” bills do *not* expressly limit student discussion of LGBTQ issues. However, student expression is implicated under the First Amendment by the chilling effect “Don’t Say Gay” bills have on student speech. In other words, even if the statute does not expressly limit student speech on LGBTQ issues, it impliedly restrains students in classroom settings from speaking about those issues and incentivizes teachers to shut down conversations about LGBTQ issues or risk liability for the school, the district, or themselves.

1. Student Expression

A student’s right to expression is not “automatically coextensive with the rights of adults in other settings,” and therefore some speech afforded to adults may not be protected for students in public schools.⁶¹ Students do not shed their constitutional rights upon entering a public school, and the Supreme Court recognized a standard for addressing when a school can constitutionally limit student speech.⁶² A school can limit speech if the speech constitutes, or the school can reasonably forecast, a “material and substantial interference” with school discipline and operation.⁶³ Additionally, schools and school districts can limit speech if it is lewd, vulgar, or plainly offensive.⁶⁴ Finally, a school or school district can restrict or censor speech that looks like school-sponsored speech, like a newspaper, if related to a legitimate pedagogical concern.⁶⁵ Finally, a school or school district can restrict or censor speech that looks like school-sponsored

57. SCOTT F. JOHNSON & SARAH E. REDFIELD, *EDUCATION LAW: A PROBLEM-BASED APPROACH*, 527 (6th ed. 2019).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986).

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

63. *Id.*

64. *Fraser*, 478 U.S. at 683.

65. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988).

speech, like a newspaper, if related to a legitimate pedagogical concern.⁶⁶

Florida's Don't Say Gay bill has already had a direct impact on protected student expression, even under the *Hazelwood* standard. In Osprey, Florida, Senior Class Class President Zander Moricz was restricted from even mentioning the word "gay" in a May 2022 commencement speech.⁶⁷ Importantly, this restriction of speech occurred roughly a month *before* the bill signed by Ron DeSantis even went into effect.⁶⁸ And while this speech technically would not be captured by the "Parental Rights in Education" bill, its impact and anticipated implementation in schools across Florida chilled student expression in a severely dehumanizing way. Moricz is an openly gay activist and student and was told by the principal that if Zander mentioned his activism or the word "gay" in his speech, his microphone would be cut off.⁶⁹ Moricz was able to subvert the restriction by talking about his "curly hair" as a metaphor, stating, "So while having curly hair in Florida is difficulty due to the humidity, I decided to be proud of who I was and started coming to school as my authentic self."⁷⁰

When it comes to gender expression, students in many school districts across Florida are now facing a similar chilling effect. For example, in Leon County, FL, the School Board unanimously approved its "LGBTQ Inclusive School Guide" for the 2022-2023 school year.⁷¹ The guide includes a provision that alerts *all* parents in a respective class if a child who is open about their gender identity, is in their child's physical education class, or on an overnight field trip with them.⁷² In other words, the school will forcibly "other"⁷³ a transgender, gender-fluid, or non-binary student to their peers and their peers' families, compelling "speech" that the LGBTQ student may not have wanted to speak.

Using the *Tinker*, *Fraser*, and *Hazelwood* standards, Florida's Don't Say Gay bill and its impacts thus far violate the First Amendment rights of students. Under *Tinker*, a school can censor student speech when the speech causes, or is likely to cause, a material disruption.⁷⁴

While Florida school officials may be able to show that some LGBTQ speech is likely to cause disruptions, it is wholly unconvincing that simply

66. *Id.*

67. Valerie Strauss, *Told Not To Say 'Gay' in Graduation Speech, He Made His Point Anyway*, WASH. POST (Oct. 8, 2022), <https://www.washingtonpost.com/education/2022/05/24/he-couldnt-say-gay-graduation-speech/> [<https://perma.cc/92MB-ZNCD>].

68. *Id.*

69. *Id.*

70. *Id.*

71. Matt Laviertes, *As Florida's 'Don't Say Gay' Law Takes Effect, Schools Roll Out LGBTQ Restrictions*, NBC NEWS (Oct. 8, 2022), <https://www.nbcnews.com/nbc-out/out-news/floridas-don-t-say-gay-law-takes-effect-schools-roll-lgbtq-restrictions-rcna36143> [<https://perma.cc/9PQ7-4LBF>].

72. *Id.*

73. "Other" in this context connotes ostracization from the norm or a deviation from heteronormative gender and sexuality standards.

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

acknowledging the existence of LGBTQ people in or around a school building or event could cause a material disruption as required under *Tinker*. Ironically, the statute itself caused a material disruption to the educational environment, with student walkouts occurring across the state.⁷⁵ One student in particular was suspended after he handed out pride flags at a walkout, with school administrators attempting to confiscate any flags that were distributed to other students.⁷⁶ *Tinker*'s armbands were clear political speech: a critique of American involvement in the Vietnam War.⁷⁷ In the same way, "saying gay" connotes clear political speech by students and should be afforded the strongest of constitutional protections.

Under *Fraser*, schools can censor speech that is lewd, vulgar, indecent, or plainly offensive.⁷⁸ Lewd, vulgar, and indecent expression has been found to be "speech that is something less than obscene" and typically connotes "sexual innuendo" or "profanity."⁷⁹ Additionally, student speech cannot be restricted simply because it is "inconsistent with an educator's sensibilities."⁸⁰ For example, students attempted to distribute an independent student publication featuring cartoon stick-figures in different sexual positions.⁸¹ The cartoon was found to be lewd and obscene based on its sexual content, and therefore eligible for public school censorship under the First Amendment.⁸² Perhaps most fitting, a commencement speech containing an elaborate and pervasive sexual innuendo was found to be plainly offensive and was able to be censored by a school.⁸³

One of Florida officials' main defenses of the Don't Say Gay bill is that it protects younger students from "sexual content."⁸⁴ This seems to put student speech captured by the Don't Say Gay bill, expressly or through a chilling effect, directly under *Fraser*. However, simply saying the word gay or having a classroom discussion about sexual orientation cannot reasonably be considered lewd, vulgar, indecent, or plainly offensive. And while LGBTQ lives and existence may be offensive to some, *student expression about LGBTQ issues does not connote pervasive sexual content*. A student speaking about growing up gay in Florida is not the same as a pervasive sexual innuendo, yet this bill treats them as such. Florida and other states with similar bills are suggesting that the mere mention of anything non-heteronormative is sexual in nature, and that is a

75. Meryl Phair, *Florida students are staging walkouts and getting suspended for handing out pride flags in protest*, SALON (Oct. 12, 2022), <https://www.salon.com/2022/03/09/florida-students-are-staging-walkouts-and-getting-suspended-for-handing-out-pride-flags-in/> [<https://perma.cc/2KFW-XGTY>].

76. *Id.*

77. *Tinker*, 393 U.S. at 506.

78. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986).

79. *Guiles ex rel. v. Marineau*, 461 F.3d 320, 327 (2d Cir. 2006).

80. *Doninger v. Niehoff*, 527 F.3d 41, 49 (2d Cir. 2008).

81. *Ochshorn ex rel. v. Ithaca City Sch. Dist.*, 645 F.3d 533, 536 (2d Cir. 2011).

82. *Id.*

83. *Fraser*, 478 U.S. at 682.

84. Millhisser, *supra* note 48.

dangerous and harmful idea.

Under *Hazelwood*, a school may censor speech if the speech looks like it is school-sponsored and is related to a pedagogical concern.⁸⁵ This is largely linked to school publications like newspapers and yearbooks.⁸⁶ In anticipation of the Don't Say Gay bill, a Florida school halted distribution of yearbooks until photographs of a student demonstration against the bill were "covered up."⁸⁷ The delay came as school officials, likely operating under the *Hazelwood* doctrine, wanted to avoid speculation that the school supported student walkouts.⁸⁸ It was reported that the photos in question showed students holding rainbow flags and signs stating, "Love is Love."⁸⁹

While censorship under *Hazelwood* is likely the most persuasive for the State of Florida, it still calls into question how censorship of the LGBTQ community is "legitimately related to a pedagogical concern." Using the example above, the State would likely claim that the pedagogical concern was the actual student walkout, not the content of the messages conveyed at the walkout. That in and of itself is likely enough under the *Hazelwood* standard to censor the school publication. Associating a school with "anything other than neutrality on matters of political controversy" is eligible for censorship under *Hazelwood*.⁹⁰ It is difficult to claim that this is not a matter of political controversy, and for that reason, student speech under school-sponsored publications is likely limited.

Supporters of the Don't Say Gay bill claim that the bill is only about classroom instruction and protecting the rights of parents.⁹¹ However, as illustrated by new Florida school district policies⁹² and explicit censorship of the word gay from a commencement speech,⁹³ it is abundantly clear that school districts are reaching beyond the traditional classroom setting and into the personal lives of LGBTQ students. Already, teachers across Florida have been asked to take down stickers showing support for LGBTQ students and to remove rainbow items from classroom decorations.⁹⁴

The public health impacts of limiting or restricting student speech about LGBTQ issues cannot be understated. According to the Trevor Project's 2021

85. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260 (1988).

86. *Id.*

87. Brooke Migdon, *Florida School Delays Yearbook Distribution Over Photos of 'Don't Say Gay' Protests*, (Oct. 12, 2022), <https://thehill.com/changing-america/respect/equality/3483803-florida-school-delays-yearbook-distribution-over-photos-of-don-t-say-gay-protests/> [<https://perma.cc/6N7P-3CRJ>].

88. *Id.*

89. *Id.*

90. *Hazelwood Sch. Dist.*, 484 U.S. at 260.

91. Millhiser, *supra* note 48.

92. Lavietes, *supra* note 71.

93. Strauss, *supra* note 67.

94. Sarah Mervosh, *Back to School in DeSantis's Florida, as Teachers Look Over Their Shoulders*, N.Y. TIMES (Oct. 8, 2022), <https://www.nytimes.com/2022/08/27/us/desantis-schools-don-t-say-gay.html> [<https://perma.cc/SFV7-TFU7>].

National Survey of LGBTQ Youth Mental Health, queer and trans youth are four times more likely to consider or attempt suicide when compared to their heterosexual counterparts.⁹⁵ Additionally, two-thirds of LGBTQ youth said debates concerning state laws about the LGBTQ community in 2021 have had a negative impact on their mental health.⁹⁶ These trends continued into 2022 and will be elaborated on in the Public Health Impacts section of this Note.⁹⁷

When it comes to students in Florida and across the country, their expression and discussion of LGBTQ content must not be stifled. Yes, the school does have “special characteristics,”⁹⁸ but those characteristics do not allow for the pervasive intrusion into student expression as outlined in Florida’s Don’t Say Gay Bill. While there may be “legitimate pedagogical concern” for censoring “pervasive sexual innuendo,”⁹⁹ the existence and acknowledgement of LGBTQ people is no more sexual than the existence or acknowledgment of heterosexual people or relationships. Students should be permitted to speak about their identities freely without fear of retribution or punishment. And while supporters of this bill will say that it only restricts speech to a level that is “age-appropriate,” this bill and others like it go far beyond maturity and into ideology. For Ron DeSantis and his supporters, being queer will never be “age-appropriate.” We must reject this notion vigorously and protect the First Amendment rights of our students. After all, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”¹⁰⁰

2. Teacher Expression

Similar to students, public school teachers do not shed their constitutional right to free speech when they accept employment with a school.¹⁰¹ In *Pickering*, the Supreme Court held that an Illinois high school science teacher had a First Amendment right to send a letter to the editor of the local newspaper and affirmed that teacher’s right to comment on issues of public concern.¹⁰² Notably though, this speech occurred outside the classroom.¹⁰³

However, teachers now face an additional limitation on speech, as public employees no longer retain First Amendment protection for speech that occurs

95. *Issues Impacting LGBTQ Youth: Polling Analysis*, MORNING CONSULT: THE TREVOR PROJECT, (Jan. 2022), https://www.thetrevorproject.org/wp-content/uploads/2022/01/TrevorProject_Public1.pdf [<https://perma.cc/T4AS-GL9N>].

96. *Id.*

97. *2022 National Survey on LGBTQ Youth Mental Health*, THE TREVOR PROJECT, (last visited Feb. 27, 2023), <https://www.thetrevorproject.org/survey-2022/> [<https://perma.cc/5PX4-WAW3>].

98. Johnson & Redfield, *supra* note 57.

99. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986).

100. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

101. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 565 (1968).

102. *Id.*

103. *Id.* at 566.

in the course of their official job duties.¹⁰⁴ However, the majority in *Garcetti* stated that “there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”¹⁰⁵ And even though the Court refused to decide if *Garcetti* would apply in an academic context,¹⁰⁶ the Court’s analysis and reasoning have been applied to public school teachers as public employees.¹⁰⁷ When *Garcetti* is applied to teacher speech, the teachers generally lose.¹⁰⁸

Teachers in Florida are already seeing an impact on their ability to speak about LGBTQ issues.¹⁰⁹ One Florida middle school art teacher claims she was fired after answering student questions about her sexuality.¹¹⁰ After telling students that she was pansexual, and therefore attracted to all genders, several students asked to create art about their own genders and sexual orientation.¹¹¹ After school administrators asked her to take down the student artwork, the teacher was sent home and fired.¹¹²

Garcetti is a difficult standard for any teacher to overcome, particularly when that speech occurs directly in a classroom. However, there is something incredibly unique about the type of speech occurring in the example above. Most notably, the students were the ones leading the conversation, not the teacher.¹¹³ Reportedly, the extent of the conversation was the teacher being open and honest about her sexuality, giving it a dictionary definition, and allowing the students to make artwork reflecting *their own individual* sexuality or gender.¹¹⁴

Even under *Garcetti*, teachers do not lose all their free speech rights.¹¹⁵ And while *Garcetti* certainly maintains that a school can limit speech, it does not say that it can limit identity. *Garcetti* does not serve to make every public-school teacher a robot with no personality, characteristics, or personal history. Rather, it allows for schools to make choices about the kinds of speech teachers alike can use during instruction and in their capacity as a teacher.¹¹⁶ If a heterosexual teacher mentions his wife, should that speech be censored under *Garcetti*? Should

104. *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

105. *Id.* at 425.

106. *Id.* at 432.

107. Nathaniel Levy, *Garcetti’s Impact on Teachers*, ONLABOR (June 3, 2019), <https://onlabor.org/garcettis-impact-on-teachers/> [<https://perma.cc/C4PX-9V8V>].

108. *Id.*

109. Matt Lavietes, *Florida Teacher Allegedly Fired After Discussing Sexuality with Students*, NBCNEWS (May 6, 2022), <https://www.nbcnews.com/nbc-out/out-news/florida-teacher-allegedly-fired-discussing-sexuality-students-rcna27656> [<https://perma.cc/VQ9C-HDPW>].

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

116. Levy, *supra* note 107.

the government be able to censor his speech about his wife because that inherently implicates his sexuality or identity? Does this restriction on First Amendment rights only apply to queer teachers in the context of “Don’t Say Gay” bills being introduced and passed across the country?

Florida’s Don’t Say Gay bill uses *Garcetti* as a hammer and ignores precedent set in *Pickering*. Teachers in their official duties as public-school employees often field questions about their personal lives, like whether they have a pet, what television shows they’re watching, who their spouse is, if they have any kids, etc. Often, part of a district’s expectation for teachers is to get to know their class, establish boundaries, and garner respect from students.¹¹⁷ A male teacher referring to his wife likely gets no censorship from school administrators, like the question posed above. In other words, a teacher telling students that they are in a heterosexual relationship is acceptable. However, that same latitude seems to no longer be afforded to LGBTQ teachers or allies.

The standard *Garcetti* sets for public school employees is far too high and encompasses speech that should be protected. A teacher simply telling students their sexuality may very well be “acting in their official capacity,” but the difference in speech protection between heterosexual teachers and LGBTQ teachers is a clear violation of LGBTQ teacher rights.

This Note does not argue that *Garcetti* should be overruled, as there are important speech considerations for someone acting in their official role. Rather, it asserts that *Garcetti* should not apply to inherent characteristics about a teacher as a person, like their sexuality and gender. *Pickering* also allows teachers to speak on matters of public concern, but not in the classroom.¹¹⁸ Given the nation’s grappling with Don’t Say Gay bills and LGBTQ issues in education generally, it would be inappropriate jurisprudentially to prevent teachers from displaying pride flags or posting about LGBTQ issues on their personal social media accounts. This teacher expression should be afforded the highest First Amendment protection.

3. Book Bans

Queer storylines, even ones that include no mention or description of sexual content, “were found in more than half of the top [twenty] banned books of 2020.”¹¹⁹ This comes as a wave of school districts across the country seek to remove “controversial” content from libraries and curriculums alike.¹²⁰

Within the first few weeks of the 2022 school year, some teachers in Florida at all grade levels were told to review every single book on their classroom

117. Johnson & Redfield, *supra* note 57, at 527.

118. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 563 (1968).

119. Kaitlin Reilly, *Authors of LGBTQ Books For Youth Speak Out About Being Banned: 'Feels Like an Attack Against My Personhood, Because That Is What It Is'*, (Apr. 12, 2022), <https://www.yahoo.com/lifestyle/banned-books-ya-queer-authors-173156815.html> [<https://perma.cc/GF98-7BCC>].

120. *Id.*

shelves for mention of “inappropriate” LGBTQ content.¹²¹ Ironically, many of the most challenged books of 2020 rose in the charts in spite of schools and parents challenging a book’s content or getting it removed from a school library or classroom curriculum.¹²² The Supreme Court has held that schools cannot remove books from its libraries to suppress ideas.¹²³ Importantly, the Supreme Court stated that “the Constitution protects the right to receive information and ideas.”¹²⁴ School officials may not remove books from a school library based on “narrowly partisan or political” grounds.¹²⁵ However, a school could remove books from a library for vulgarity or if it is not educationally suitable.¹²⁶ This is what the state of Florida is likely aiming at with the Don’t Say Gay bill. To “protect children,” Florida officials are arguing that LGBTQ content in schools is not “educationally suitable.”

When it comes to curriculum, schools likely have broader discretion to restrict books.¹²⁷ A school can restrict books for curriculum if related to a legitimate pedagogical concern, including related to student maturity, because it may look like the school is endorsing the book.¹²⁸

What Florida and other states are doing with their copycat bills is essentially placing LGBTQ content in a box. In fact, the statute expressly addresses that all LGBTQ content above grade 3 must be “developmentally appropriate” but fails to define what developmentally appropriate means.¹²⁹ By keeping the definition vague, Florida pushes school districts too far in their restriction on curriculum and libraries. Schools are more likely to err on the side of caution and remove a book from a library or curriculum due to its LGBTQ content to avoid liability under the Don’t Say Gay bill.¹³⁰

This problem was made worse by Governor Ron DeSantis and the Florida legislature when Governor DeSantis signed H.B. 1467, which requires school districts to review every book in their libraries and curriculums for “age-appropriateness.”¹³¹ This bill pushes books “under review” to see if they are restricted under the Don’t Say Gay bill and the recent “Stop WOKE Act,”¹³² aimed at restricting instruction on race relations or diversity.¹³³ H.B. 1467 calls

121. Mervosh, *supra* note 94.

122. Reilly, *supra* note 119.

123. Bd. of Educ., *Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 858 (1982).

124. *Id.* at 867.

125. *Id.* at 854.

126. *Id.* at 920.

127. *Virgil v. Sch. Bd. of Columbia Cnty.*, 862 F.2d 1517, 1522 (11th Cir. 1989).

128. *Id.* at 1521.

129. H.B. 1557, 2022 Leg., 124th Reg. Sess. (Fla. 2022) (enacted).

130. Kiara Alfonseca, *More Than 1 Million Books Subject To Review Based on State's New Laws*, ABC NEWS (Feb. 13, 2023), <https://abcnews.go.com/US/thousands-books-including-black-hispanic-historical-titles-review/story?id=97082518> [<https://perma.cc/4C47-9DGU>].

131. H.B. 1467, 2022 Leg., 124th Reg. Sess. (Fla. 2023) (enacted).

132. H.B. 7, 2022 Leg., 124th Reg. Sess. (Fla. 2023) (enacted).

133. Alfonseca, *supra* note 130.

for certified media specialists to review all books contained in classroom libraries or media centers across the state.¹³⁴ In Duval County, Florida alone, approximately 1.6 million titles must be reviewed by certified media specialists.¹³⁵ Under Florida's Don't Say Gay bill, any book that references LGBTQ content could be subject to removal from classroom or media center libraries.¹³⁶ Notably, H.B. 1467 covers all educational settings,¹³⁷ and schools have been encouraged by the Florida Department of Education to "err on the side of caution" in determining developmental appropriateness.¹³⁸

Some schools in Florida, like Manatee County schools, removed or covered all materials that have not been reviewed by media specialists.¹³⁹ This problem is no longer unique to Florida, as schools across the country are facing challenges to books written by or about LGBTQ people.¹⁴⁰ In fact, teachers and librarians who fail to follow the new guidelines set out by the Florida Department of Education and H.B. 1467 may be subject to criminal prosecution in the form of a felony.¹⁴¹

Under Florida's Don't Say Gay bill and copycat bills across the country, there is a concerted effort to place any content that covers, reaches, or is written by LGBTQ authors as not "educationally suitable" under *Pico*.¹⁴² However, the Supreme Court has made it clear that the removal of books from libraries cannot be done for the suppression of ideas.¹⁴³

Florida's Don't Say Gay bill, and its enforcement arm related to books, H.B. 1467, represents a government seeking to do just that: suppress ideas in educational settings. Proponents of these efforts in Florida claim that there are alarming amounts of "the most disturbing, pornographic books in...high school[s]."¹⁴⁴ One of the books banned by a Florida school district under the Don't Say Gay bill was *And Tango Makes Three*, an award-winning book about a real-life same-sex penguin couple raising a chick.¹⁴⁵ The School Board of Lake County School District said the book was "administratively removed due to

134. H.B. 1467, 2022 Leg., 124th Reg. Sess. (Fla. 2023) (enacted).

135. Alfonseca, *supra* note 130.

136. *Id.*

137. 2022 Fla. Sess. L. Serv. Ch. 2022-22 (C.S.C.S.H.B. 1467) (West).

138. Alfonseca, *supra* note 130.

139. *Id.*

140. *Id.*

141. Fabiola Cineas, *Ron DeSantis's War on "Woke" in Florida Schools, Explained*, VOX (Feb. 15, 2023), <https://www.vox.com/policy-and-politics/23593369/ron-desantis-florida-schools-higher-education-woke> [<https://perma.cc/ZXD7-7JBK>].

142. Alfonseca, *supra* note 130.

143. Board of Educ., *Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 871 (1982).

144. Press Release, Governor Ron DeSantis, Governor Ron DeSantis Signs Bill that Requires Curriculum Transparency (Mar. 25, 2022).

145. Donald Padgett, *Florida School District Bans Book on Gay Penguin Couple*, ADVOCATE (Jan. 10, 2023), <https://www.advocate.com/news/2023/1/10/florida-school-district-bans-book-penguin-couple-don-t-say-gay>. [<https://perma.cc/2BL2-G95E>].

content regarding sexual orientation/gender identification prohibited in HB 1557," otherwise known as Don't Say Gay bill.¹⁴⁶ The book does not include any sexual content or instruction on sexual activity.¹⁴⁷

If *And Tango Makes Three* does not contain sexual content, why is it being removed from classroom libraries and media centers? The short answer is simple: Florida is seeking to suppress the idea that queer people exist. Even though same-sex couples are not uncommon among penguins,¹⁴⁸ Florida's government sees their very existence as a threat. This book about real penguins is not sexual. It is not "pornographic." It is not "developmentally inappropriate." It is queer. And that is enough for Florida to decide that it cannot remain on classroom bookshelves.¹⁴⁹ Students retain and deserve the right to receive ideas.¹⁵⁰ Florida's attempt to restrict the ideas able to be received by students egregiously violates established precedent in *Pico* and cannot stand.

B. Public Health Impacts

While Don't Say Gay bills across the country seem squarely focused on policing speech in educational settings, it is important to realize how anti-LGBTQ rhetoric and chilled speech have direct and meaningful impacts on public health across the country and individual health outcomes for queer people. These outcomes are not hypothetical, and data shows severe risk to LGBTQ youth, especially in relation to suicide and mental health.¹⁵¹ Florida's Don't Say Gay bills comes among a nationwide wave of anti-LGBTQ legislation in state legislatures, with more bills than ever being proposed by legislators in 2022.¹⁵² According to The Armed Conflict Location & Event Data Project (ACLED)¹⁵³, nearly 200 anti-LGBTQ incidents were reported in 2022, representing three times the amount recorded in 2021 and twelve times the amount recorded in 2020.¹⁵⁴

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Board of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 853 (1982).

151. THE TREVOR PROJECT, *supra* note 97.

152. Kelsey Butler & Ella Ceron, *Colorado Club Shooting Follows Rise in Anti-LGBTQ Rhetoric, Violence*, BLOOMBERG (Nov. 21, 2022), <https://www.bloomberg.com/news/articles/2022-11-21/colorado-club-shooting-follows-rise-in-anti-lgbtq-rhetoric-violence> [<https://perma.cc/9BUH-JXKB>].

153. ACLED only collects data on physical activity; non-physical threats, harassment, or intimidation incidents that do not escalate into physical violence, or occur outside of physical demonstrations or propaganda events, are not captured. "Demonstrations" include peaceful and violent protests; "political violence" includes acts of sexual violence, non-sexual attacks, and mob violence; and "offline propaganda distribution" includes activities like flyering and banner drops.

154. Sam Jones & Roudabeh Kishi, *UPDATE | Fact Sheet: Anti-LGBT+ Mobilization on the Rise in the United States*, ACLED (Nov. 23, 2022), <https://acleddata.com/2022/11/23/update-fact-sheet-anti-lgbt-mobilization-in-the-united-states/> [<https://perma.cc/L2VA-U3GG>].

This rise in anti-LGBTQ sentiment and violence coincides with right-wing politicians, like Ron DeSantis in Florida, advancing legislation and using violent rhetoric specifically targeting the LGBTQ community.¹⁵⁵

The Trevor Project's 2022 National Survey on LGBTQ Youth Mental Health is one of the most diverse surveys of LGBTQ youth ever conducted.¹⁵⁶ It recorded and cataloged the experiences of nearly 34,000 LGBTQ youth ages thirteen through twenty-four in the United States in 2022.¹⁵⁷ One of the Survey's most disturbing findings was that rates of suicidal ideation and suicidal thoughts have trended upward among LGBTQ youth over the past three years, with 45% of LGBTQ youth seriously considering attempting suicide in 2022.¹⁵⁸ It is impossible to ignore the correlation between the rising amount of proposed and passed anti-LGBTQ legislation¹⁵⁹ and the rising suicide rates among LGBTQ youth.¹⁶⁰

This Note does not attempt to say Don't Say Gay bills across the country are the sole cause of rising suicide rates among LGBTQ youth, but rather that legislation like Florida's Don't Say Gay bill represent a capricious and violent subset of the population determined to erase the existence of LGBTQ people entirely. Proponents of Don't Say Gay bills will continue to say that their purpose is solely about parental control and removing "pornographic" or obscene material from schools.¹⁶¹ In reality, Don't Say Gay bills make LGBTQ youth feel less safe and accepted in their schools.¹⁶² LGBTQ youth who found their school to be LGBTQ-affirming reported lower rates of attempting suicide.¹⁶³ In schools where LGBTQ identity is accepted, embraced, and affirming, students reported better mental health outcomes related to suicide.¹⁶⁴

This is damning for Don't Say Gay bills and other anti-LGBTQ legislation related to education. A school should be a place where students go to learn, develop, and become better people. A school should be a place where robust discussion occurs and ideas are expressed freely.¹⁶⁵ A school should *not* be a place where a significant portion of the population feels ostracized and outcast for simply existing.

Discriminatory laws and policies, like Florida's Don't Day Gay bill and others like it, can contribute to feelings of rejection, stigma, and isolation, increasing the risk of mental health issues and suicide attempts among LGBTQ

155. Butler, *supra* note 152.

156. THE TREVOR PROJECT, *supra* note 97.

157. *Id.*

158. *Id.*

159. Elting, *supra* note 17.

160. THE TREVOR PROJECT, *supra* note 97.

161. Press Release, *supra* note 144.

162. THE TREVOR PROJECT, *supra* note 97.

163. *Id.*

164. *Id.*

165. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

individuals.¹⁶⁶ In fact, 73% of LGBTQ youth reported experiencing symptoms of anxiety in 2022, including more than three-quarters of transgender and nonbinary youth and nearly two-thirds of cisgender youth.¹⁶⁷ 58% of LGBTQ youth reported experiencing symptoms of depression in 2022.¹⁶⁸

Florida's Don't Say Gay bill prompted mental health organizations like the American Academy of Child and Adolescent Psychiatry (AACAP) to issue formal statements condemning the bill and decrying its potential impacts.¹⁶⁹ Dr. Warren Ng, AACAP president, wrote in this statement that:

[a]s child and adolescent psychiatrists, we are the physician experts and advocates for children's mental health, and we will continue to support our LGBTQ+ youth and condemn all harmful legislation and actions. Having a safe learning environment that supports healthy development is not a privilege, but a right for all youth . . . [t]his law grossly undermines the basic tenets of education policy by denying students access to and support from some of the most important and influential adults in their lives.¹⁷⁰

Others, like Michael Parent, PhD and associate professor in the Department of Educational Psychology at the University of Texas at Austin, worry that anti-LGBTQ legislation may "empower people to 'discriminate against, harass, and bully' LGBTQIA+ youth."¹⁷¹

Medical providers across the country have shared concerns about the potential detrimental impacts of anti-LGBTQ legislation, particularly regarding legislation targeting gender-affirming care.¹⁷² In 2021, researchers at the University of Michigan School of Public Health surveyed 103 providers of gender-affirming care from all fifty states.¹⁷³ Almost every provider indicated that laws restricting or banning gender-affirming care would negatively affect the mental health of transgender youth, noting that they would see increases in suicidal ideation, depression, anxiety, and addiction among their patients.¹⁷⁴

166. THE TREVOR PROJECT, *supra* note 97.

167. *Id.*

168. *Id.*

169. Florida's "Don't Say Gay or Trans" Law Stigmatizes LGBTQ+ Youth and Families, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, (Mar. 18, 2022), https://www.aacap.org/AACAP/zLatest_News/Floridas_Dont_Say_Gay_or_Trans_Law_Stigmatizes_LGBTQ_Youth_Families [<https://perma.cc/Q8NP-EKMW>].

170. *Id.*

171. Karen Pallarito, *How Anti-LGBTQIA+ Legislation Harms Youth Mental Health*, HEALTH, (June 15, 2022), <https://www.health.com/news/lgbtqia-laws-and-youth-mental-health> [<https://perma.cc/2FBE-BCCF>].

172. Landon D. Hughes et. al, "These Laws Will Be Devastating": Provider Perspectives on Legislation Banning Gender-Affirming Care for Transgender Adolescents. 69 J. ADOLESCENT HEALTH 976, 978 (2021).

173. *Id.*

174. *Id.*

Anti-LGBTQ sentiment has been especially virulent regarding gender-affirming care.¹⁷⁵ Loud right-wing politicians like Representative Lauren Boebert of Colorado, have frequently accused transgender people and drag queens of “grooming” children without evidence.¹⁷⁶ Even with no evidence to back up claims of grooming, anti-transgender rhetoric bled into state legislatures, with bills taking aim at gender-affirming care for youth, bathroom usage, and sports bans for transgender individuals.¹⁷⁷

93% of transgender and nonbinary youth said that they have worried about transgender people being denied access to gender-affirming medical care due to state or local laws.¹⁷⁸ 91% said they were worried about being denied access to the bathroom due to state or local laws.¹⁷⁹ 83% said that they have worried about being denied the ability to play sports due to state or local laws.¹⁸⁰

Don’t Say Gay bills place LGBTQ youth in a negative spotlight, exacerbating already existing social pressures.¹⁸¹ Instead of providing representation and support, schools limited by anti-LGBTQ legislation like Don’t Say Gay bills actively harm health outcomes for LGBTQ individuals.¹⁸² Amit Paley, CEO & Executive Director of The Trevor Project, said, “The fact that very simple things—like support from family and friends, seeing LGBTQ representation in media, and having your gender expression and pronouns respected—can have such a positive impact on the mental health of an LGBTQ young person is inspiring, and it should command more attention in conversations around suicide prevention and public debates around LGBTQ inclusion.”¹⁸³

For many LGBTQ youth, the implementation and effects of Don’t Say Gay bills and other anti-LGBTQ legislation is quite literally *life or death*. 14% of LGBTQ youth attempted suicide in 2022, including 20% of transgender and nonbinary youth.¹⁸⁴ A shocking 50% of LGBTQ youth ages thirteen through seventeen considered suicide in 2022.¹⁸⁵

Our children are in crisis. While scrolling through TikTok, turning on the local news, or tuning into government press conferences, our LGBTQ youth are consistently being told they do not belong.¹⁸⁶ Our students are being told to stop

175. Butler, *supra* note 152.

176. *Id.*

177. Casey Parks, *Club Q Shooting Follows Years of Bomb Threats, Drag Protests, Anti-Trans Bills*, WASH. POST, (Nov. 20, 2022), <https://www.washingtonpost.com/dc-md-va/2022/11/20/club-q-shooting-lgbtq-harassment/> [<https://perma.cc/2EGC-MZQR>].

178. THE TREVOR PROJECT, *supra* note 97.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Florida’s “Don’t Say Gay or Trans” Law Stigmatizes LGBTQ+ Youth and Families*, *supra* note 169.

183. THE TREVOR PROJECT, *supra* note 97.

184. *Id.*

185. *Id.*

186. Press Release, *supra* note 144.

speaking and restrict their identities in school.¹⁸⁷ Our teachers are being directed to out transgender students,¹⁸⁸ remove books,¹⁸⁹ and keep quiet about the existence of LGBTQ people.¹⁹⁰

Our children deserve better. It is our duty to protect their right to free expression, their right to receive ideas, and most importantly, their right to live.

C. Recent Developments

In March of 2023, Ron DeSantis indicated that he would expand the impact of the Don't Say Gay bill¹⁹¹ by extending it to grades K-12.¹⁹² Notably, this expansion is being proposed by the Florida Board of Education, meaning that it does not require legislative approval.¹⁹³ The proposed rule states that schools “[s]hall not intentionally provide classroom instruction to students in grades 4 through 12 on sexual orientation or gender identity unless such instruction is either expressly required by state academic standards ... or is part of a reproductive health course or health lesson for which a student's parent has the option to have his or her student not attend.”¹⁹⁴

DeSantis and his supporters have defended the “Don't Say Gay” bill on grounds that sexual orientation and gender identity are not appropriate for young children in grades K-3.¹⁹⁵ With this recent proposal, DeSantis and Florida Republicans are now suggesting that LGBTQ content is *never* acceptable in Florida classrooms and is never “age-appropriate.”

D. How Indiana Should Move Forward: Proposed statutes to Enshrine LGBTQ Education into Indiana Law

Indiana should become a leader in the United States for LGBTQ education. Enshrining statutes to recognize LGBTQ youth in schools will serve multiple purposes: to protect our LGBTQ youth; to attract progressive and loving families to relocate; to attract the best LGBTQ workers and employers; to establish Indiana's place as a leader in public education. Passing these statutes will involve the amendment of several statutes, including Ind. Code 20-30-5-13¹⁹⁶ (instruction on human sexuality or sexually transmitted diseases) and Ind. Code 20-30-5-17¹⁹⁷

187. Strauss, *supra* note 67.

188. H.B. 1608, 123rd Gen. Assemb., First Reg. Sess. (Ind. 2023).

189. Alfonseca, *supra* note 130.

190. H.B. 1557, 2022 Leg., 124th Reg. Sess. (Fla. 2022) (enacted).

191. *Id.*

192. Anthony Izaguirre, *DeSantis to Expand 'Don't Say Gay' Law to All Grades*, AP NEWS (Mar. 22, 2023), <https://apnews.com/article/don't-say-gay-desantis-florida-gender-d3a9c91f4b5383a5bf6df6f7d8ff65b6> [<https://perma.cc/CL82-578A>].

193. *Id.*

194. Proposed Rule No. 6A-10.081, 49 Fla. Admin. Reg. 52, (Mar. 16, 2023).

195. Press Release, *supra* note 144.

196. IND. CODE § 20-30-5-13 (2021).

197. IND. CODE § 20-30-5-17 (2021).

(access to materials relating to instruction on human sexuality, personal analysis, evaluation, or survey of students; consent and procedure for participation).

Therefore, I propose the following statutes:

- 1) Beginning with students entering grade nine in the 2023–2024 school year, each school corporation, charter school, and state accredited nonpublic school shall require each student of the school corporation, charter school, or state accredited nonpublic school to successfully complete in grade nine, ten, eleven, or twelve one (1) semester of a LGBTQ education course.
- 2) School districts are required to provide library services including a collection involving various mediums and literacy to students and teachers. Students shall not be prohibited from accessing texts with LGBTQ content.

IV. CONCLUSION

Florida’s Don’t Say Gay bill is patently unconstitutional, as it restricts protected speech from teachers and students, restricts students from receiving important ideas, and chills further speech about LGBTQ issues. This unconstitutional restriction on speech will continue to have severe public health impacts until LGBTQ education and acceptance is enshrined into each of our institutions, and that change begins with public schools. Indiana should adopt mandatory LGBTQ education as a response to Florida’s Don’t Say Gay bill, setting Indiana apart from the rest of the country as a safe haven for queer students across the country. This Note unfortunately comes at a pivotal moment for LGBTQ people in the United States. As a nation, we can choose to let our students and queer people live authentically or we can choose to keep terrorizing our queer youth, putting their lives and health at risk.