December 23, 2022

ATTORNEY GENERAL RAOUL FILES BRIEFS PROTECTING LGBTQ+ RIGHTS

Amicus Briefs Reject Attack on Federal Anti-Discrimination Protections, Oppose Florida's "Don't Say Gay" Law

Chicago — Attorney General Kwame Raoul filed two separate legal briefs this week rejecting an attack on federal LGBTQ+ anti-discrimination protections and opposing Florida's controversial "Don't Say Gay" law, which limits classroom discussions and has serious implications for LGBTQ+ students.

"Across the country, we are witnessing increased attacks on the rights of the LGBTQ+ community," Raoul said. "Discrimination has no place in our society, and I will continue to partner with fellow attorneys general from across the country to stand up against hate and discrimination in all its forms."

Raoul joined a coalition of 18 attorneys general in filing an amicus brief in Tennessee v. Department of Education supporting the rights of the more than 20 million lesbian, gay, bisexual and transgender Americans to live, work and pursue education free from discrimination. Under U.S. Supreme Court precedent, federal protections against sex-based discrimination guard against discrimination on the basis of sexual orientation and gender identity in both schools and the workplace. However, in a challenge to recent guidance issued by the U.S. Department of Education and the U.S. Equal Employment Opportunity Commission, a group of states led by Tennessee are asking the U.S. Court of Appeals for the Sixth Circuit to undermine the established interpretation of the law and its protections against LGBTQ+ discrimination.

In the friend-of-the-court brief, Raoul and the coalition highlight the pervasive harms of such discrimination and urge the appellate court to reject the current attack on LGBTQ+ rights should the court address the substantive challenge raised by the plaintiffs. In the amicus brief, the coalition asserts:

- LGBTQ+ students and employees face myriad concrete harms that the challenged guidance is meant to prevent and redress.
- The guidance issued by the U.S. Department of Education and Equal Employment Opportunity Commission reflects clear precedent interpreting Title VII and Title IX.
- If the appellate court reaches the plaintiff states' substantive challenge to the guidance, it should uphold that guidance.
- Amici states have enacted numerous laws similar to the challenged guidance, providing important societal benefits without compromising privacy or safety.

Joining Raoul in filing the brief are the attorneys general of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island and Washington.

Raoul also joined a separate coalition of 17 attorneys general opposing Florida's discriminatory "Don't Say Gay" law, which prevents classroom discussion of sexual orientation or gender identity, posing a serious threat to LGBTQ+ students who are particularly vulnerable to the harms caused by discrimination.

Raoul and the coalition argue Florida's new law is unconstitutional and causing significant harm to students, parents, teachers and other states. The coalition argues that non-inclusive educational environments have severe negative health impacts on LGBTQ+ students, resulting in increased rates of mental health disorders and suicide attempts not just in Florida, but throughout the country.

Joining Raoul in filing the brief are the attorneys general of California, Colorado, Connecticut, the District of Columbia, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island and Washington.

No. 22-5807

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STATE OF TENNESSEE, et al.,

Plaintiff-Appellees,

v.

DEPARTMENT OF EDUCATION, et al.,

Defendant-Appellants.

On Appeal from the United States District Court
for the Eastern District of Tennessee

No. 3:21-cv-00308
Charles E. Atchley, Jr., Judge

BRIEF OF AMICI CURIAE CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, AND WASHINGTON IN SUPPORT OF NEITHER PARTY

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INTERESTS OF AMICI CURIAE

Amici Curiae States of California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Washington, and the District of Columbia ("Amici States") submit this brief pursuant to Fed. R. App. P. 29(a)(2) in support of the rights of the more than 20 million lesbian, gay, bisexual, and transgender ("LGBT") Americans to live, work, and pursue education without being subjected to discrimination on the basis of their identity.[1] Amici States recognize that discrimination against LGBT individuals on the basis of sexual orientation and gender identity necessarily involves discrimination on the basis of sex—and that such discrimination causes significant, tangible, and legally-cognizable harms. These conclusions are borne out by the experience of Amici States and their residents.

Discrimination on the basis of sex against LGBT individuals is especially damaging in employment and education, the contexts addressed by the two guidance documents at issue in this appeal.[2] When employees do not have legal

[1] *See* Brooke Migdon, *US LGBTQ+ Population Hits 20 Million*, TheHill (Dec. 14, 2021). This resource is available on the internet. For authorities available online, citations indicate as much and full URLs appear in the table of authorities. All URLs were last visited on December 21, 2022.

[2] U.S. Equal Employment Opportunity Commission ("EEOC") Guidance on Protections Against Employment Discrimination Based on Sexual Orientation or

protection from anti-LGBT discrimination—including protected access to bathrooms, the ability to dress consistent with their gender identities, and protection against pronoun misuse contributing to a hostile work environment—these employees and the States in which they live and work incur significant harms. Such harms can be economic, physical, and psychological in nature, and are cognizable under well-established anti-discrimination case law.

Discrimination against LGBT individuals directly threatens the interests of States. Workers who lose their employment due to discrimination are often forced to seek public assistance, as are individuals unjustly deprived of educational opportunities. As a result, States expend greater sums to ensure that victims of discrimination are fed and housed, and lose tax revenues due to business inefficiencies. *See, e.g.*, Christy Mallory et al., Williams Inst., *Impact of Stigma and Discrimination (Michigan)* 56 (2019) (internet); Crosby Burns et al., Ctr. for Am. Progress & AFSCME, *Gay and Transgender Discrimination in the Public Sector: Why It's a Problem for State and Local Governments, Employees, and Taxpayers* 18 (2012) (internet).

Gender Identity (June 15, 2021) (internet) ("EEOC Guidance"); Department of Education, Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021) (internet) ("Education Guidance") (collectively, "Guidance Documents").

Amici States also have a strong interest in ensuring that federal laws intended to protect LGBT individuals from discrimination are recognized and enforced. Amici States rely on Title VII of the Civil Rights Act of 1964 ("Title VII"), and Title IX of the Education Amendments of 1972 ("Title IX"), to protect their residents, workers, and students from discrimination. *See, e.g.*, *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 742 (1983) (recognizing "the substantial State interest in protecting the health and well-being of its citizens") (quotation marks omitted). The Guidance Documents correctly effectuate these statutes' mandates, in turn making them more effective and of greater benefit to Amici States and vulnerable populations within them. The common experience of Amici States shows that protecting LGBT residents, workers, and students from discrimination on the basis of sex dramatically improves economic, psychological, health, employment, and educational outcomes for these individuals, yielding broad benefits, without compromising privacy or safety, or imposing significant costs.

ARGUMENT

I. IF THE COURT REACHES PLAINTIFF STATES' SUBSTANTIVE CHALLENGE TO THE GUIDANCE, IT SHOULD UPHOLD THAT GUIDANCE

Amici States take no position on the jurisdictional or procedural issues addressed by the district court. *See, e.g.*, *Tennessee v. United States Dep't of Educ.*, No. 3:21-CV-308, 2022 WL 2791450, at *5-*20 (E.D. Tenn. July 15, 2022) (addressing, *inter alia*, Plaintiff States' standing, ripeness, and "notice and

comment claim"). But if Plaintiff States renew their substantive challenge to the Guidance Documents on appeal, this Court should reject it. Not only are both Guidance Documents consistent with current case law interpreting Title VII and Title IX, they are also necessary to conform the respective agencies' administrative guidance to binding precedent.

A. The Education Department's Guidance Reflects Clear Precedent Interpreting Title VII and Title IX.

Just as Title VII reflects "a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment," *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal quotations and citations omitted), Title IX's prohibition on sex-based discrimination is broad and subject to few exceptions: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a); *see also* S. Rep. No. 100-64 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 3, 6, 1987 WL 61447 ("In enacting [Title IX], Congress intended that [it] be broadly interpreted to provide effective remedies against discrimination."); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("Congress gave the statute a broad reach."). The plain meaning of the phrase "on the basis of sex," along with the Supreme Court's long-standing and

consistent instructions to give full effect to Title IX's plain language, dictate that Title IX reaches discrimination against LGBT students.

In *Bostock v. Clayton County, Georgia*, the Court held that the question of whether LGBT individuals were protected from discrimination on the basis of sex under Title VII "involve[d] no more than the straightforward application of legal terms with plain and settled meanings," since an employer who discriminates against employees for being lesbian, gay, bisexual, or transgender necessarily "intentionally discriminate[s] against individual men and women in part because of sex." 140 S. Ct. 1731, 1743 (2020). That conclusion, the Court stated, "should be the end of the analysis," because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1741, 43; *see also id.* at 1745 ("an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules."). While "homosexuality and transgender status are distinct concepts from sex," distinguishing on the basis of sexual orientation or gender identity is necessarily on the basis of sex. *Id.* at 1746-47.[3]

The Court's plain-language interpretation of Title VII applies equally to Title IX, which has long been understood to focus on the individual ("no person") and

[3] As the Court observed, both sexual harassment and motherhood are also conceptually distinct from sex, but discrimination on either basis has long been recognized as sex discrimination. *Id.* at 1747.

incorporate similar standards. The Supreme Court has explicitly "looked to its Title VII interpretations of discrimination in illuminating Title IX." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617 (1999) (citing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992)). This Court has reached the same conclusion. *See*, *e.g.*, *Chisholm v. St. Mary's City Sch. Dist. Bd. Of Educ.*, 947 F.3d 342, 349–50 (6th Cir. 2020) ("In crafting our framework for analyzing Title IX claims, . . . we have drawn parallels between sex discrimination in the educational setting under Title IX and sex discrimination in the workplace under Title VII."). Indeed, while *Bostock* addresses Title VII, the Court uses both Title VII's phrase "because of sex" and Title IX's "on the basis of sex" interchangeably throughout. *See, e.g.*, 140 S. Ct. at 1737 ("[I]n Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin."); *id*. at 1753 ("[E]mployers are prohibited from firing employees *on the basis of* homosexuality or transgender status. . . .") (emphasis added).

Plaintiff States argued below that the Education Department's guidance inappropriately expanded Title IX's substantive protections by relying on *Bostock*, which only addressed claims brought under Title VII. *See, e.g.*, Plaintiff's Mem. in Supp. of Plaintiff's Mot. for Prelim. Inj. (ECF No. 11) at 13-18 (hereinafter ECF No. 11). That argument is unfounded, because this Court and others "have drawn parallels between sex discrimination in the educational setting under Title IX and

sex discrimination in the workplace under Title VII." *Chisholm*, 947 F.3d at 349–50. In light of Title IX's plain text—and the Supreme Court's instruction to "look[] to its Title VII interpretations of discrimination in illuminating Title IX," *Olmstead*, 527 U.S. at 617 —the Education Department's interpretation of Title IX, updated to ensure that it conforms to *Bostock*, does not "'create new law, rights or duties.'" ECF No. at 11 (quoting *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018)). It recognizes existing ones. *See, e.g.*, *Soule v. Connecticut Ass'n of Sch., Inc.*, No. 21-1365-CV, 2022 WL 17724715, at *8 (2d Cir. Dec. 16, 2022) (reviewing multiple circuit court decisions and regulatory authority to determine "that discrimination based on transgender status is generally prohibited under federal law" in the Title IX context).

Because the language prohibiting sex-discrimination in Title VII and Title IX is synonymous, and the Court has looked to its interpretations of Title VII in illuminating Title IX, Plaintiff States' repeated reliance on *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318 (6th Cir. 2021), is also misplaced. *See*, *e.g.*, Reply in Supp. of Plaintiff's Mot. for Prelim. Inj. (ECF No. 57) at 13. This Court held in *Pelcha* that *Bostock*'s interpretation of Title VII did not apply to a claim of discrimination under the Age Discrimination in Employment Act because that statute requires age be the "determinative reason" for the plaintiff's firing for a claim to be cognizable. *Pelcha*, 988 F.3d at 324. Title IX, like Title VII, has no such requirement.

B. The EEOC's Guidance Reflects Established Precedent Interpreting Title VII

Title VII makes it unlawful "for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to *discriminate against* any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2 (emphasis added). "As used in Title VII, the term 'discriminate against' refers to 'distinctions or differences in treatment that injure protected individuals.'" *Bostock*, 140 S. Ct. at 1753 (quoting *Burlington N. & S.F.R.*, 548 U.S. 53, 59 (2006)). As the Supreme Court has repeatedly emphasized, "this language 'is not limited to "economic" or "tangible" discrimination.'" *Harris*, 510 U.S. at 21 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). Rather, "[t]he phrase terms, conditions, or privileges of employment evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." *Id.* at 21 (internal quotation marks and citation omitted); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) ("The prohibition of harassment on the basis of sex . . . forbids [] behavior so objectively offensive as to alter the 'conditions' of the victim's employment.").

The EEOC has long sought to implement the principle—consistently recognized by the Supreme Court—that "[w]hen the workplace is permeated with

'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Harris*, 510 U.S. at 21 (quoting *Meritor*, 477 U.S. at 65, 67). For example, in "Questions & Answers for Small Employers on Employer Liability for Harassment by Supervisors" (June 21, 1999) and "Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors" (Jun. 18, 1999), the EEOC provided updated guidance in response to two Supreme Court cases that had been issued the prior year addressing the standards for employer liability for sexual harassment: *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also, e.g.*, "Enforcement Guidance on *Harris v. Forklift Sys. Inc.*" (Mar. 8, 1994). By implementing guidance responsive to developments in Supreme Court interpretations of federal employment law, the EEOC helped ensure that the Court's holdings would be given full effect by those bound by the law and by those enforcing their rights under it.

The EEOC Guidance serves the same function. Using an accessible, question-and-answer format, the EEOC breaks down the *Bostock* holding, clarifies its applicability to both employees and employers, and explains how specific employment-related actions may be affected by *Bostock*, relying on existing case

law and guidance, the EEOC's reasoned decisions, and long-established principles of employment discrimination law. *See* EEOC Guidance.

That *Bostock* addresses only the question before the Court—namely, whether discriminatory termination is unlawful under Title VII—does not mean that it has no application to other forms of discrimination. *Cf. Tennessee*, 2022 WL 2791450, at *16 (noting the opinion's "limited reach"). The Court is obligated to rule only on the particular cases or controversies before it. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-60 (1992). But its reasoning readily extends further: the Court reaffirmed the scope of Title VII's anti-discrimination mandate to cover "'distinctions or differences in treatment that injure protected individuals.'" *Bostock*, 140 S. Ct. at 1753. That encompasses dress or bathroom-access rules that discriminate on the basis of sex by denying equal rights to LGBT individuals.

Title VII forbids the "entire spectrum of disparate treatment," *Harris*, 510 U.S. at 21, and the EEOC guidance clarifies that, after *Bostock*, sex-based discriminatory actions—like imposing dress or bathroom use requirements inconsistent with an employee's gender identity—are unlawful under established Supreme Court precedent governing hostile workplace discrimination. For example, the Supreme Court has long recognized that "severe or pervasive" instances of "discriminatory intimidation, ridicule, and insult," when based on sex, are actionable under Title VII, if a reasonable person would find such actions

harmful. *See id.* Being repeatedly forced to use a *sex-specific* restroom or to wear *sex-specific* clothes that do not match one's gender identity satisfies this standard. As discussed further in Section II, *infra*, ample research confirms concrete and substantial harm. The guidance appropriately recognizes, as Supreme Court precedent dictates, that when such behavior is "severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity," it can create a work environment that violates Title VII. EEOC Guidance at ¶ 7; *see also id.* (stating that "although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.").

II. THE CHALLENGED GUIDANCE SERVES IMPORTANT INTERESTS IN PROTECTING LGBT INDIVIDUALS

The anti-LGBT discrimination covered by the Guidance Documents causes concrete harms that are legally cognizable under settled standards for interpreting Title VII and Title IX, and the resulting injuries are amply documented.

A. Title VII and Title IX Recognize the Discriminatory Harms Identified in the Challenged Guidance

Both the plain text of Title VII and Title IX, as well as case law interpreting them, define the harms prevented by those statutes so as to include the behaviors addressed by the Guidance Documents.

As it is used in Title VII, the phrase "discriminated against" refers to "distinctions or differences in treatment that injure protected individuals." *Bostock*, 140 S. Ct. at 1753; *see also* 42 U.S.C. § 2000e–2(a)(1) (declaring that it is unlawful to discriminate against individuals with respect to, *inter alia*, "terms" or "conditions" of employment). Such differences in treatment are actionable under Title VII regardless of whether they constitute "'economic' or 'tangible' discrimination." *Harris*, 510 U.S. at 21 (citing *Meritor*, 477 U.S. 57). Moreover, even as to non-economic forms of discrimination, Title VII does not require a showing of "concrete psychological harm" for discriminatory conduct to be actionable. *Id.* at 22. Conduct violates Title VII whenever it is "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive." *Id.* at 21. The challenged EEOC Guidance applies these principles in a straightforward manner that is necessitated by Supreme Court authority. *See, e.g.*, EEOC Guidance at ¶ 11 (limiting application to "severe or pervasive" unwelcome conduct such as "intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee").

Similarly, the history of Title IX's application, both by courts and by the Education Department, encompasses the behaviors identified in the Education Guidance. In enacting Title IX, Congress "sought to accomplish two related, but

nevertheless somewhat different, objectives": "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979). Since at least the 1980s, the Education Department's Office for Civil Rights ("OCR") has interpreted Title IX to broadly protect against not only overt discrimination, but also differential treatment that adversely impacts education. *See, e.g.*, *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448-51, n.4 (Mar. 10, 1994) ("*Racial Incidents*") (Title IX sets similar legal standards). Consistent with Supreme Court precedent, OCR has long recognized that harassment "on the basis of sex" is prohibited by Title IX when it "denies, limits, provides different, or conditions the provision of aids, benefits, services, or treatment." U.S. Dep't of Educ., Office for Civil Rights, *Sexual Harassment: It's Not Academic* (Sept. 1988) 2 (quoting Antonio J. Califa, Director for Litigation Enforcement and Policy Services, U.S. Dep't of Educ., Office for Civil Rights, *Policy Memorandum* (Aug. 31, 1981)).

Such prohibited harassment "need not result in tangible injury or detriment" to its targets to be prohibited. *Racial Incidents*, 59 Fed. Reg. at 11,450; *see also* 34 C.F.R. § 106.30(a) (2) ("unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity"); *Nondiscrimination*

on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,170 (May 19, 2020) ("[N]either [Title VII nor Title IX] requires 'tangible adverse action or psychological harm' before the sexual harassment may be actionable").

For all of these reasons, the Guidance Documents protect against only long-recognized actionable harm—differences in treatment that can injure or create a hostile or abusive work or educational environment—on the basis of sex.

B. LGBT Students and Employees Face Myriad Concrete Harms the Challenged Guidance is Meant to Prevent and Redress

The Guidance Documents address real, ongoing harms suffered due to anti-LGBT discrimination in schools and workplaces. In the educational setting, these harms include overt harassment, lower academic participation and achievement, sexual assault, and mental and physical health issues. In the employment setting, LGBT workers similarly face overt harassment, lower pay, and mental and physical health issues as a result of discriminatory policies or workplace behaviors.

1. Harms Faced by LGBT Students

There are more than 2 million LGBT youth in America. *See* Kerith J. Conran, Williams Inst., *LGBT Youth Population in the United States* 1 (Sept. 2020) (internet); Jody L. Herman et al., Williams Institute, *How Many Adults and Youth Identify as Transgender in the United States?* 1 (2022) (internet). In a recent survey, an astonishing 81% of LGBT youth reported being verbally harassed

because of their sexual orientation, gender identity, or gender expression, and more than one in three (35.1%) report they were verbally harassed often or frequently. Joseph G. Kosciw et al., GLSEN, *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 28 (2020) (internet). LGBT students who had experienced discrimination in their schools based on their sexual orientation or gender identity were also almost three times as likely (44.1% versus 16.4%) to have missed school because they felt unsafe or uncomfortable. *Id.* at 49. And LGBT students who experienced discriminatory policies and practices also had lower grade point averages and educational achievement, and lower levels of educational aspiration than other students. *Id.* at 45, 48. They were also found to have lower self-esteem and higher levels of depression than students who had not encountered such discrimination. Joseph G. Kosciw et al., GLSEN, *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* xviii, 53-54 (2016) ("*2015 NSC Survey*").

Transgender students in particular suffer concrete harms—including greater risk of mental health issues and worse educational outcomes—as a result of severe and pervasive discrimination in schools. Of students known or perceived as transgender, 77% reported negative experiences at school, including harassment and assault. Sandy E. James et al., Nat'l Ctr. For Transgender Equal., *The Report*

of the 2015 U.S. Transgender Survey 132-34 (Dec. 2016). More than half (54%) reported verbal harassment, 24% reported suffering a physical attack, and 13% reported being sexually assaulted at school. *Id.* at 133-34. The Centers for Disease Control and Prevention ("CDC") has found that transgender students are, as a group, up to five times more likely to report feeling unsafe at or going to and from school, being bullied at school, being threatened or injured with a weapon at school, being forced to have sex, and experiencing physical and sexual dating violence. Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017*, 68 Morbidity & Mortality Wkly. Rep. 67, 69 (2019) (internet).

Transgender students who experienced discrimination, violence, and harassment due to their gender identity were three times more likely to have missed school in a given month than other students. Movement Advancement Project & GLSEN, *Separation and Stigma: Transgender Youth and School Facilities* 4 (2017) (internet). Nearly half of all transgender students responding to a national survey reported missing at least one day of school in the preceding month because they felt unsafe or uncomfortable there. Emily A. Greytak et al., GLSEN, *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* 14 (2009). They also reported feeling less connected to their schools than

other students. Kosciw et al., *2015 NSC Survey*, at xviii, 95. Nearly 20% of transgender students left a K-12 school because their mistreatment was so severe, and 40% of students who experienced frequent verbal harassment because of their gender expression did not plan to continue on to college. Greytak et al., *supra*, at 27. Discrimination at school also puts transgender students at risk of suicide and mental health issues; transgender people attempt suicide at approximately nine times the rate of the general population. James et al., *supra* at 114.

Transgender youth who are subjected to discriminatory school restroom and locker room policies also face concrete and cognizable harms, including increased risk of sexual assault compared to those without such restrictions. Gabriel R. Murchison et al., *School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, Pediatrics, June 2019, at 1 (internet); *see also* Kosciw et al., *2015 NSC Survey* at xviii, 86 (70% surveyed avoided school restrooms because they felt unsafe or uncomfortable). Transgender students also experience negative health effects from avoiding using the restroom, such as kidney-related medical issues and urinary tract infections, when they are forced by discriminatory policies to use a bathroom that does not match their gender identity. Human Rights Watch, *Shut Out: Restrictions on Bathroom and Locker Room Access for Transgender Youth in US Schools* 10 (2016) (internet); *see also* Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of*

Gender and Its Impact on Transgender People's Lives, J. of Pub. Mgmt. & Soc. Policy 65, 75 (2013) (54% reported negative health effects).

Removal of Title IX's protection for LGBT individuals would also cause serious ongoing harm. For example, transgender students who reported negative treatment based on sex in grades K-12 were more likely than other respondents to be under serious psychological distress, to have experienced homelessness, and to have attempted suicide. James et al., *2015 U.S. Transgender Survey*, *supra*, at 132.

2. Harms Faced by LGBT Employees

Denying LGBT employees the protections recognized by the EEOC Guidance–including access to bathrooms and protection from severe or pervasive harassment–would similarly cause serious harms to transgender individuals and the States in which they live. Close to half of LGBT workers in a recent survey reported having suffered adverse treatment at work because of their sexual orientation or gender identity, and nearly a third reported such treatment within the last five years. Brad Sears et al., Williams Institute, *LGBT People's Experiences of Workplace Discrimination and Harassment* 1 (Sept. 2021) (internet). LGBT workers are more likely to live in poverty, work in lower-paying service jobs, and rely on unemployment insurance, at least partially due to workplace exclusion and discrimination. *See*, *e.g.*, Caroline Medina et al., Center for American Progress, *Fact Sheet: LGBT Workers in the Labor Market* (June 1, 2022) (internet).

Transgender workers in particular report "[n]ear universal harassment on the job," including verbal harassment, intrusive questions about surgical status, denial of access to restrooms, and physical and sexual assault. Jaime M. Grant et al., Nat'l Ctr. for Transgender Equality and Nat'l Gay & Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 51, 56 (2011) (internet). Nearly half of transgender workers report "at least some" discriminatory behavior on a *daily* basis, such as "being the target of transphobic remarks, being ignored, or being pressured to act in 'traditionally gendered' ways." Christian N. Thoroughgood et al., *Creating a Trans-Inclusive Workplace*, Harv. Bus. Rev. Mag. (Mar.-Apr. 2020) (internet). Many report being compelled to act and dress in ways that do not match their gender identity. David Baboolall et al., *Being Transgender at Work*, McKinsey Q. (Nov. 10, 2021) (internet). Seventy-seven percent of employed transgender individuals took steps to avoid workplace mistreatment within the previous year, such as hiding their gender transition or quitting their job. And fifteen percent of transgender individuals report being verbally harassed, physically attacked, and/or sexually assaulted at work because of their gender identity or expression. James et al., *supra*, at 148.[4]

[4] The effects of this pervasive discrimination are reflected in the educational, economic, and health outcomes for transgender employees. Transgender employees are 2.4 times more likely to work in entry-level jobs lacking health benefits than cisgender employees. Baboolall et al., *supra*. Relatedly, the average

One study found that, even compared to the elevated risks of suicide already experienced by transgender individuals, transgender people who had been denied access to bathroom facilities were more likely to have attempted suicide than were other transgender people. Kristie L. Seelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. of Homosexuality 1378, 1388 (2016). Similarly, transgender employees who face discriminatory bathroom policies in the workplace experience concrete harms, including avoiding drinking or eating during the workday and urinary infections and kidney-related medical issues from avoiding restrooms inconsistent with their gender identities. Herman, *supra*, at 74-76.

III. AMICI STATES HAVE ENACTED LAWS SIMILAR TO THE CHALLENGED GUIDANCE, PROVIDING BENEFITS WITHOUT COMPROMISING PRIVACY OR SAFETY

Amici States have ample experience with laws and policies similar to the Guidance Documents. At least twenty states and the District of Columbia[5] have

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annual household income of a transgender adult is $17,000 less than the annual income for a cisgender adult, even when controlled for education level. *Id.*

[5] *See, e.g.*, California: Cal. Educ. Code §§ 220, 221.5(f) (education); Cal. Gov't Code §§ 12926(o), (r)(2), 12940(a), 12949 (employment). Colorado: Colo. Rev. Stat. § 24-34-402 (employment). Connecticut: Conn. Gen. Stat. § 10-15c (education); *id.* § 46a-60 (employment). Delaware: Del. Code tit. 19, § 711 (employment). Hawaii: Haw. Rev. Stat. § 489-3 (public accommodations). Illinois: 775 Ill. Comp. Stat. 5/1-102(A) (employment, public accommodations). Iowa: Iowa Code § 216.6 (employment); *id.* § 216.9 (education). Kansas: Kansas Hum. Rts. Comm'n, Kansas Human Rights Commission Concurs with the U.S. Supreme

laws parallel to the Guidance Documents regarding discrimination against LGBT students and employees. At least 225 local governments have also enacted similar laws.[6] That experience confirms that protecting LGBT people from discrimination yields broad benefits, without compromising privacy or safety, or imposing significant costs. Amici States enacted these protections because they recognized the need to protect against the serious and concrete harms caused by anti-LGBT

Court's *Bostock* Decision (Aug. 21, 2020) (internet) (advising that Kansas laws prohibiting discrimination based on "sex" in "employment, housing, and public accommodation" contexts "are inclusive of LGBTQ and all derivatives of 'sex'"). Maine: Me. Rev. Stat. tit. 5, § 4571 (employment); *id.* § 4601 (education). Maryland: Md. Code, State Gov't § 20-606 (employment). Massachusetts: Mass. Gen. Laws. ch. 76, § 5 (education); *id.* ch. 151B, § 4 (employment); *id.* ch. 272, § 92A (public accommodation). Minnesota: Minn. Stat. § 363A.08 (employment); *id.* § 363A.13 (education). Nevada: Nev. Rev. Stat. §§ 613.310(4), 613.330 (employment); *id.* § 651.050(2), 651.070 (public accommodation). New Hampshire: N.H. Rev. Stat. Ann. § 354-A:6. New Jersey: N.J. Stat. Ann. § 10:5-5 (definition); *id.* § 10:5-12 (employment and places of public accommodation including schools); *id.* § 18A:36-41 (directing state department of education to develop guidelines to ensure a supportive and nondiscriminatory environment for transgender students). New Mexico: N.M. Stat. Ann. § 28-1-2(Q) (definition); *id.* § 28-1-7 (employment); *id.* §§ 22-35-2-1 *et seq* (anti-bullying). New York: N.Y. Exec. Law § 291 (education, employment, public accommodations); N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13 (interpreting definition of "sex" to include gender identity). Oregon: Or. Rev. Stat. § 659.850 (education); *id.* § 659A.006 (employment, public accommodations). Rhode Island: R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment). Utah: Utah Code Ann. § 34a-5-106 (employment). Vermont: Vt. Stat. Ann. tit. 21, § 495 (employment). Washington: Wash. Rev. Code § 28A.642.010 (education); *id.* § 49.60.180 (employment). District of Columbia: D.C. Code § 2-1402.11 (employment); *id.* § 2-1402.41 (education).

[6] Human Rights Campaign, *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity* (Jan. 28, 2021) (cataloguing municipal and county protections across the country) (internet).

discrimination against their residents, students and employees. The experience of Amici States after enacting these protections has confirmed their benefit in prohibiting and redressing anti-LGBT discrimination in schools and workplaces.

A. Amici States' Efforts to Protect LGBT Persons in Education from the Concrete Harms of Discrimination Reap Substantial Benefits.

The laws enacted by Amici States have prevented and redressed concrete harms resulting from anti-LGBT discrimination. For example, California adopted protections against gender-identity discrimination in schools to address harms suffered by transgender students, including the practice discussed in Section 2.B., *supra*, of students avoiding drinking and eating during school and experiencing medical complications to avoid restroom use. Cal. Assemb. Comm. on Educ., Bill Analysis: Assemb. Bill No. 1266, at 5 (2013-2014 Reg. Sess.) (internet). The Legislature also recognized that many school districts were not in "compliance with their obligations to treat transgender students the same as all other students," and that some were excluding transgender students from sex-segregated programs, activities, and facilities. Cal. Senate Comm. on Educ., Bill Analysis: Assemb. Bill No. 1266, at 4 (2013-2014 Reg. Sess. Hearing Date June 12, 2013) (internet); *see also* Human Rights Watch, *supra*.

Similarly, in 2019 New Mexico adopted a comprehensive anti-bullying law for youth in schools in response to its determination that LGBT students

experienced bullying at nearly twice the rate of straight/cisgender youth. N.M. Stat. Ann. §§ 22-35-2-1 *et seq.* (2019); Legislative Education Study Committee Bill Analysis, N.M. SB 288 (Feb. 26, 2019) (discussing studies finding that LGBT youth "experience greater incidence of bullying at about twice the rate of their straight peers" creating a "hostile environment" in schools) (internet).

Inclusive polices like these have worked to address the harms LGBT students and employees in schools face by creating safer, more inclusive environments for everyone, without imposing any significant burdens. One federal study found that schools that adopted policies to make the school environment more inclusive for LGBT students created a safer and more inclusive environment for all students, not just those who identified as LGBT. CDC, *Inclusive Practices Help All Students Thrive* (June 27, 2022) (internet). Policies that protect transgender students' right to use bathrooms, other facilities, and activities consistent with their gender identity also help to create school climates that enhance all students' well-being and facilitate their ability to learn. Alberto Arenas et al., *7 Reasons for Accommodating Transgender Students at School*, Phi Delta Kappan, at 20-24 (Sept. 1, 2016) (internet). And when transgender students are permitted to live consistently with their gender identity, their mental health outcomes are comparable to their peers. Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, Pediatrics, Mar. 2016, at 5-7

(internet); Br. of Amici Curiae Sch. Adm'rs at 4, *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239, No. 16-273, 2017 WL 930055 (Mar. 6, 2017).

Moreover, although Plaintiff States argued below that "[c]ommon sense" dictates that inclusive bathroom policies will "harm" the "important interests" of "privacy [and] safety," ECF No. 57 at 23-24, none of the Amici States that have enacted inclusive policies have reported instances of misconduct, like harassment in restrooms or locker rooms, by transgender students. That experience is consistent with research demonstrating that no such increase results from adopting inclusive policies. *See, e.g.*, Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 Sexuality Rsch. & Soc. Pol'y 70–83, 77-78 (2019) (internet) (finding no increase in criminal behavior resulting from inclusive bathroom laws); David Crary, *Debate Over Transgender Bathroom Access Spreads Nationwide*, Salt Lake Trib. (May 10, 2016) (quoting former county sheriff stating that Washington State law protecting bathroom access led to "no increase in public safety incidents as a result," and "that indecent exposure, voyeurism, and sexual assault[] are already illegal, and police use those laws to keep people safe.").

Furthermore, contrary to the Plaintiff States' contentions, enacting these laws and policies does not require elimination of single-sex facilities, such as restrooms,

changing rooms, or living facilities at educational institutions. *See, e.g.*, Plaintiff's Mem. in Opp. to Defendant's Mot. to Dismiss at 31-32. That claim is unsupported. Neither guidance document challenged here requires elimination of single-sex facilities. Plaintiff States' suggestion to the contrary appears premised on the erroneous assumption that sex-segregated bathrooms are no longer sex-segregated if transgender persons can access the bathrooms that match their gender identity.

In sum, state policies similar to the Education Guidance protect LGBT students from discrimination and have been proven to create safer, more welcoming, and productive school environments, not just for LGBT students, but for all students. There is no demonstrable harm to Plaintiff States caused by them.

B. Amici States' Efforts to Protect LGBT Persons in Employment from the Concrete Harms of Discrimination Reap Substantial Benefits.

For many years, Amici States have had laws in place prohibiting employment discrimination based on gender identity and sexual orientation similar to the EEOC Guidance challenged here.[7] These laws, like the EEOC Guidance, prevent the demonstrable harms that result from allowing exclusionary workplace practices.

Laws and policies like these, and the EEOC Guidance, are needed to protect against discrimination that is, sadly, still pervasive in the workplace. *See* Section II.B.2, *supra*. Research has demonstrated that these protections "increase the

[7] *See supra* p. 21, n. 5.

likelihood of LGBT-friendly HR practices" that bring positive benefits and lessen the effects of anti-LGBT discrimination in the workplace. Lindsay Mahowald, *LGBTQI+ Nondiscrimination Laws Improve Economic, Physical, and Mental Well-Being*, Center for American Progress (March 24, 2022) (internet). And when transgender workers can safely transition and have their gender identities respected, they experience increased job performance and satisfaction, thereby increasing productivity and employee retention. Grant et al., *Injustice at Every Turn*, *supra*, at 3. These benefits further redound to both the states in which LGBT people work and society as a whole. Mahowald, *supra* (noting that anti-discrimination laws and regulations help LGBT workers "more fully bring their talents to existing businesses and solo ventures, leading to improved economic growth.").

Provisions like the EEOC Guidance, therefore, promote compelling interests in "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups." *Roberts v. Jaycees*, 468 U.S. 609, 626 (1984). These protections are needed to ensure that LGBT employees and students are fully protected from this type of pervasive discrimination and harassment no matter where they live.

CONCLUSION

Amici States submit that the challenged guidance at issue in this case is a straightforward—indeed, necessary—application of existing Title VII and Title IX principles and precedent. If the Court reaches Plaintiff States' substantive challenge to the guidance documents at issue, it should reject it.

Dated: December 22, 2022

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,571 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Brian Bilford

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2022, I electronically filed the foregoing document with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Counsel of record for all parties are registered as ECF Filers and will therefore be served by the CM/ECF system.

/s/ Sean Puttick

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

M.A., by and through his parent AMBER ARMSTRONG, et al.,

Plaintiffs,

v.

FLORIDA STATE BOARD OF EDUCATION, et al.,

Defendants.

Case No. 4:22-cv-134-AW-MJF

BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF NEW JERSEY, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW YORK, OREGON, RHODE ISLAND, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS

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INTRODUCTION AND INTEREST OF AMICI

The District of Columbia and the States of New Jersey, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New York, Oregon, Rhode Island, and Washington (collectively, "Amici States") file this brief as amici curiae in support of Plaintiffs in their opposition to the motions to dismiss.

The responsibility for public education lies with the states, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), and encompasses several "important" duties, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). One is to "prepare[] students for active and effective participation in [our] pluralistic . . . society." *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (plurality op.). Another is to "protect" students from harm. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2046 (2021). As the Supreme Court has explained, states must perform these educational duties "within the limits of" the Constitution. *Barnette*, 319 U.S. at 637.

In carrying out those duties, Amici States work to create an educational environment that is inclusive of everyone—including those who identify as LGBTQ. Indeed, Amici States strongly support the right of LGBTQ people to feel welcomed and to be treated equally in the school community. And our states have sought to make curricular decisions that embrace, rather than stifle, the free expression of

students and teachers. Thus, Amici States have an interest in the protection of LGBTQ students, parents, and teachers, and can offer expertise in education policy.

Amici States' experiences make clear that Florida's recent actions are far outside the bounds of ordinary educational decision-making. The challenged Act, H.B. 1557, flatly bans "[c]lassroom instruction . . . on sexual orientation or gender identity" in kindergarten through third grade. Act of Mar. 28, 2022, § 1, 2022 Fla. Sess. Law Serv. Ch. 2022-22 (West) (codified at Fla. Stat. § 1001.42(8)(c)(3)). For all other students, the Act prohibits such instruction if not "in accordance with state standards." *Id.* These standards, however, may not exist for many more months, and there is no limit to how restrictive they might be. *See id.* § 2. The Act also subjects schools to liability for any violation by granting parents a cause of action for damages and attorney fees. *Id.* § 1.

All of those aspects of the law make it a radical outlier. No other state educational law sweeps as broadly as Florida's or targets the LGBTQ community in the same way. That undermines any genuine assertion that the Act furthers educational goals. Said another way, the Act's "unusual character" provides an additional indication that the Act is constitutionally suspect. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)); *accord United States v. Alvarez*, 567 U.S. 709, 722 (2012) ("[T]he sweeping, quite unprecedented reach of the statute puts it in conflict with the First

Amendment."). Moreover, Amici States' own evidence reveals the "immediate, continuing, and real injuries" the Act will inflict, and those harms "outrun and belie any legitimate justifications." *Romer*, 517 U.S. at 635. In light of the serious constitutional issues raised by Florida's extreme approach, Plaintiffs' allegations that Florida's law is unconstitutional are more than sufficient to survive a motion to dismiss.

SUMMARY OF ARGUMENT

1. Amici States' experiences reveal that the Act lacks a legitimate pedagogical purpose, rendering it constitutionally suspect. Amici States' policies allow educators to address LGBTQ issues, and these policies demonstrate that there is no legitimate reason to ban mentioning them. Amici States also ordinarily leave educational decisions to schools and teachers, rather than allowing schools to be haled into court over even minor instructional choices. Florida has chosen a starkly different path. It stands alone in its censorship of instruction related to LGBTQ issues and in its imposition of legal liability on school districts that do not censor LGBTQ issues. All the while, there are ways to address Florida's alleged concern in ensuring parental input in education without targeting a minority group. The experience of Amici States thus makes clear that Florida's approach is an unreasonable way to advance the state's professed interests. Indeed, the fact that the

Act so departs from other states' approaches provides further indication that it is not motivated by legitimate pedagogical goals.

2. The Act will stigmatize and harm LGBTQ youth in Florida and Amici States. Research shows that a failure to provide LGBTQ-inclusive classroom instruction adversely affects LGBTQ students' mental health and learning outcomes and results in increased anti-LGBTQ bias. Further, the harms stemming from Florida's law will extend beyond Florida's borders. The Act will harm children from Amici States who will be placed with families in Florida pursuant to the Interstate Compact for the Placement of Children ("ICPC"). And Amici States will need to devote resources to counteract the Act's harmful effects, including by increasing funding for programs that work to ensure the health and well-being of LGBTQ students in Amici States.

ARGUMENT

I. Amici States' Experiences Undermine Florida's Contention That Its Extreme Act Has A Legitimate Pedagogical Purpose.

Florida contends that the Legislature had "legitimate pedagogical concerns" when it enacted H.B. 1557. State Defs.' Second Mot. to Dismiss & Inc. Mem. of L. ("Fla. Br.") 3 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)). But Amici States' experiences undermine Florida's assertions that the Act has a legitimate pedagogical purpose and that it is reasonably related to any such purpose. *See* Fla. Br. 36-38. To pass constitutional muster, Florida must show—at

least under the First Amendment—that the Act is "reasonably related to legitimate pedagogical concerns." *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1213-14 (11th Cir. 2004) (per curiam); *see Searcey v. Harris*, 888 F.2d 1314, 1320 (11th Cir. 1989) (applying same test to a restriction by a school on non-student speech). That inquiry is fact-intensive and thus unsuitable for resolution at the motion-to-dismiss stage. Florida cannot justify its law with bare assertions; rather, factual development is necessary to determine whether the law is constitutional. *See Bishop v. Aronov*, 926 F.2d 1066, 1070-71 (11th Cir. 1991) ("[A] correct legal analysis must predicate proper explication of the constitutionally pivotal facts."); *Searcey*, 888 F.2d at 1322 ("We cannot *infer* the reasonableness of a regulation [restricting speech in school] from a vacant record.").[1]

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[1] Florida ignores much of this on-point Eleventh Circuit precedent directly addressing restrictions on speech in school, instead relying on out-of-circuit case law and claiming that subsequent Supreme Court decisions have abrogated Eleventh Circuit case law. *See* Fla. Br. 35 n.6. But this Court is "not at liberty to disregard binding case law that is so closely on point," unless it has been "directly overruled"—which none of the above cases have been. *Fla. League of Pro. Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996). Further, Florida points to no decision where a district court has dismissed a challenge to a speech regulation without any factual development. *See Bishop*, 926 F.2d at 1070-71 (stressing the importance of factual support for a defendant's restriction on speech in school); *Searcey*, 888 F.2d at 1321-22 (same); *Arce v. Douglas*, 793 F.3d 968, 976-77 (9th Cir. 2015) (holding that district court erred, in challenge under the Equal Protection Clause to curriculum law, by granting summary judgment on a limited record, thereby preventing plaintiffs from presenting evidence regarding legislative intent).

Moreover, Florida's attempt to justify the Act with bald assertions unsupported by facts is especially unpersuasive because the Act's plain terms are highly unusual and stand in stark contrast to other states' educational policies. As explained below, Amici States' education policies include and protect LGBTQ people, equip teachers to address LGBTQ topics (while accommodating parental choices), and leave educational decisions to school communities, not courts. Amici States' experiences thus show that states have an interest in including—rather than excluding—LGBTQ people. Further, when it comes to LGBTQ issues in schools, Amici States' policies show that Florida's resort to restricting speech and subjecting schools to litigation is extreme and unreasonable.

A. Unlike Florida's Act, Amici States' education policies serve the legitimate pedagogical purpose of including and protecting LGBTQ people.

Recognizing that LGBTQ Americans "cannot be treated as social outcasts or as inferior," *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018)), Amici States' policies foster an educational environment that is inclusive and respectful of LGBTQ people. As a general matter, most states do not single out LGBTQ people or issues for disfavored treatment, and many have inclusive or affirming education policies. Deborah Temkin et al., *Most State Policies That Address LGBTQ+ Students in Schools Are Affirming, Despite Recent Trends Toward*

Exclusion, Child Trends (Mar. 22, 2022), https://tinyurl.com/3atccep3. Amici States have advanced LGBTQ inclusivity and protections in schools in a few key ways.

Most fundamentally, Amici States protect LGBTQ students by statute, regulation, and agency action. Amici States prohibit discrimination in schools on the basis of sexual orientation or gender identity.[2] They also prohibit bullying on the basis of sexual orientation or gender identity, or require or urge schools to adopt policies to that effect.[3]

Amici States also recognize the indisputable fact that LGBTQ people are part of American life and therefore include LGBTQ experiences and contributions in history and social studies education. By statute, seven Amici States have

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[2] *See, e.g.*, Cal. Educ. Code §§ 200, 220; Conn. Gen. Stat. § 10-15c(a); D.C. Code § 2-1402.41(1); 775 Ill. Comp. Stat. §§ 5/1-103(O-1), 5/5-101(A)(11), 5/5-102(A); Mass. Gen. Law ch. 76, § 5; Md. Code Regs. §§ 13A.01.06.03(B)(5)(d), (j), 13A.01.06.04; Mich. C.R. Comm'n, *Interpretive Statement 2018-1* (May 21, 2018), https://tinyurl.com/yckmrn3z; Minn. Stat. §§ 363A.03(44), 363A.13(1); Nev. Rev. Stat. §§ 388.132(6)(a), 651.070; N.J. Stat. Ann. §§ 10:5-4, 10:5-5(*l*); N.Y. Exec. Law § 296(4); Or. Rev. Stat. § 659.850; Movement Advancement Project, *Equality Maps: Safe Schools Laws*, https://tinyurl.com/3hn9hh8r ("nondiscrimination" tab) (compiling laws of all states) (last visited Dec. 13, 2022).

[3] *See, e.g.*, Cal. Educ. Code § 234.1(a)-(c); Conn. Gen. Stat. § 10-222d(a)(1), (b); D.C. Code §§ 2-1535.01(2)(A)(i), 2-1535.03; 105 Ill. Comp. Stat. § 5/27-23.7(a); Mass. Gen. Law ch. 71, § 37O(d)(1), (3); Md. Code Ann., Educ. §§ 7-424.1, 7-424(a)(2)(i)(1), (b)(1); Mich. State Bd. of Educ., *Model Anti-Bullying Policy* (Dec. 8, 2020), https://tinyurl.com/mttsrte3; Minn. Stat. § 121A.031(2)(g), (3); Nev. Rev. Stat. §§ 388.122(1)(c), 388.133; N.J. Stat. Ann. §§ 18A:37-14, 18A:37-15; N.Y. Educ. Law § 12(1); 8 N.Y.C.R.R. § 100.2(jj)(2), (3)(i); Or. Rev. Stat. §§ 339.351(3), 339.356; Movement Advancement Project, *supra* ("anti-bullying" tab) (compiling laws for all states).

promulgated history or social studies curricular requirements relating to LGBTQ Americans. Cal. Educ. Code § 51204.5; Colo. Rev. Stat. § 22-1-104(1)(a); Conn. Gen. Stat. § 10-25b(b); 105 Ill. Comp. Stat. § 5/27-21; Nev. Rev. Stat. § 389.061(1)(b); N.J. Stat. Ann. § 18A:35-4.35; Or. Rev. Stat. § 329.045(1)(b)(B)(vi) (effective 2026). Other Amici States have undertaken similar efforts to update curricular standards to include LGBTQ people. *E.g.*, D.C. State Bd. of Educ., Soc. Studies Standards Advisory Comm., *Social Studies Standards Guiding Principles* 8 (Dec. 16, 2020), https://tinyurl.com/3a6s68yh. Still others encourage and allow teachers to provide lessons that comprehensively cover the American experience, including that of LGBTQ people. *See, e.g.*, Me. Dep't of Educ., *LGBTQ+ Studies*, https://tinyurl.com/2p9793vf (last visited Dec. 13, 2022) (listing resources for teachers); Mass. Dep't of Elementary & Secondary Educ., *Defending Democracy at Home: Advancing Constitutional Rights, Obergefell v. Hodges (2015) Same-Sex Marriage* (Oct. 2018), https://tinyurl.com/2zh9p3ej (providing a model lesson plan on the history of *Obergefell v. Hodges*, 576 U.S. 644 (2015), to teach students about constitutional rights and the judiciary). At bottom, these efforts aim to "offer[] public school students a more accurate, complete, and equitable picture of American society," Ill. Inclusive Curriculum Advisory Council, *Inclusive Curriculum Implementation Guidance: Condensed Edition* 1, https://tinyurl.com/4pn8yt94 (last visited Dec. 13, 2022), and prepare them to live

in the contemporary United States, *Hearing on H.B. 6619 Before the Joint Comm. on Educ.*, 2021 Sess. 1 (Conn. 2021) (statement of Rep. Geoff Luxenberg), https://tinyurl.com/2rsxc7fs.

In addition to teaching academic subjects, states have an "interest in preparing children to lead responsible, healthy lives." *Leebaert ex rel. Leebaert v. Harrington*, 193 F. Supp. 2d 491, 497 (D. Conn. 2002), *aff'd*, 332 F.3d 134 (2d Cir. 2003). To that end, an increasing number of schools have established health instruction to ensure that all students, including LGBTQ students, have crucial health information at their disposal. *See* Heather Steed et al., *Only 17 States and DC Report LGBTQ-Inclusive Sex Ed Curricula in at Least Half of Schools, Despite Recent Increases*, Child Trends (Oct. 6, 2021), https://tinyurl.com/58zpj9kw ("From 2016 to 2018, 27 states and the District of Columbia reported increases . . . in the percentage of schools offering sex-ed materials that are inclusive of LGBTQ youth.").

Instead of including LGBTQ people in the school community, however, Florida's Act excludes them, thereby running counter to constitutional principles. States have a "legitimate . . . interest in seeking to eradicate bias against same-gender couples," and other LGBTQ people, "and to ensure the safety of all public school students." *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008). As Amici States' efforts reflect, LGBTQ people are part of American history and society, and "in the preparation of students for citizenship," it is "entirely rational" for schools to

include their experiences in an age-appropriate manner. *Id.* at 95. It is not a legitimate pedagogical interest, however, to exclude the entire class of LGBTQ people and their experiences from the education provided by public schools by censoring discussion about their identities.

B. Instead of censoring or restricting speech like Florida, Amici States equip educators to address LGBTQ topics.

While Florida's law sweeps broadly in its censorship or restriction of LGBTQ topics, Amici States approach these issues in more tailored and effective ways. The experience of other states reflects that Florida's severe approach to LGBTQ issues is unjustifiable and thus violates the First Amendment. *See Searcey*, 888 F.2d at 1322 ("It is the total banning of a group . . . that we find to be unreasonable."); *Virgil v. Sch. Bd. of Columbia Cnty.*, 862 F.2d 1517, 1525 (11th Cir. 1989) (considering, when upholding the removal of texts from a required reading list, that they "have not been banned from the school" and "[n]o student or teacher is prohibited from assigning or reading these works or discussing the themes contained therein in class or on school property").[4]

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[4] Although Florida tries to narrow the Act's reach to cover only, essentially, lessons given by teachers, *see* Fla. Br. 15-18, the Act uses broad terms lacking precise definitions. "[T]he many ambiguities concerning the scope of [the Act's] coverage render it problematic for purposes of the First Amendment." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Indeed, despite what Florida now claims, the Act's broad, vague prohibitions have already chilled expression. *E.g.*, Lori Rozsa, *Florida Teachers Race to Remake Lessons as DeSantis Laws Take Effect*, Wash.

At the outset, Amici States—and, in fact, all states aside from Florida—do not generally ban entire topics from discussion in schools. Until recently, "there [was] no state that actually [had] a 'don't say gay' law—one that explicitly prohibits teachers from discussing homosexuality at all." Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 Colum. L. Rev. 1461, 1469 (2017). Put simply, Florida's effort to censor LGBTQ topics is "sweeping, [and] quite unprecedented." *Alvarez*, 567 U.S. at 722.

Amici States, by contrast, have codified protections for the free exchange of ideas in schools. The District of Columbia, for instance, protects a student's "right to voice his or her opinions." 5-E DCMR § 2401.2. Likewise, Connecticut's Code of Professional Responsibility for Teachers states that teachers shall "[e]ngage students in the pursuit of truth, knowledge and wisdom and provide access to all points of view" and "[n]urture in students lifelong respect and compassion for themselves and other human beings regardless of . . . sexual orientation." Conn. Agencies Regs. § 10-145d-400a(b)(1)(B), (C).

Moreover, Amici States understand that the way to address LGBTQ-related topics that inevitably arise in schools is to equip teachers and schools to handle them directly and compassionately. For example, it is understandable that "questions arise

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Post (July 30, 2022), https://tinyurl.com/yu4ue5z5; Brooke Migdon, *Florida's 'Don't Say Gay' Law Takes Effect Today. Its Impact Is Already Being Felt*, Changing Am. (July 1, 2022), https://tinyurl.com/bs92arsc.

for . . . school staff when considering the best supports for transgender and gender nonconforming students." Vt. Agency of Educ., *Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students* 1 (Feb. 23, 2017), https://tinyurl.com/243yhrax. Thus, states have issued guidance to schools to address these questions rather than restrict what teachers can say.[5] Such guidance can helpfully identify example scenarios a teacher or administrator may encounter,

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[5] *E.g.*, Cal. Dep't of Educ., *Legal Advisory Regarding Application of California's Antidiscrimination Statutes to Transgender Youth in Schools* (Sept. 16, 2021), https://tinyurl.com/mr282sf9; Cal. Dep't of Educ., *Frequently Asked Questions - School Success and Opportunity Act (AB 1266)* (Sept. 16, 2021), https://tinyurl.com/2t4ncmsd; Conn. State Dep't of Educ., *Guidance on Civil Rights Protections and Supports for Transgender Students: Frequently Asked Questions* (Sept. 2017), https://tinyurl.com/24vuawfy; D.C. Pub. Schs., *Transgender and Gender-Nonconforming Policy Guidance* (June 2015), https://tinyurl.com/tatd3ncu; Ill. State Bd. of Educ., *Non-Regulatory Guidance: Supporting Transgender, Nonbinary, and Gender Nonconforming Students* (Mar. 1, 2020), https://tinyurl.com/2p8ehwz6; Md. State Dep't of Educ., *Providing Safe Spaces for Transgender and Gender Non-conforming Youth: Guidelines for Gender Identity Non-discrimination* (Oct. 2015), https://tinyurl.com/48by45jn; Mass. Dep't of Elementary & Secondary Educ., *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment* (Oct. 28, 2018), https://tinyurl.com/2p836nrh; Mich. State Bd. of Educ., *Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students* (Sept. 14, 2016), https://tinyurl.com/yetpukkh; Minn. Dep't of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* (Sept. 25, 2017), https://tinyurl.com/zr6r3j89; Nev. Dep't of Educ., *Supporting Sex/Gender Diverse Students*, https://tinyurl.com/3sv5tyrp (last visited Dec. 13, 2022); N.J. Dep't of Educ., *Transgender Student Guidance for School Districts*, https://tinyurl.com/2evmmuj6 (last visited Dec. 13, 2022); Or. Dep't of Educ., *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students* (May 5, 2016), https://tinyurl.com/36ecxvuf.

such as when a student begins to dress in a gender-nonconforming way, and explain best practices. *See, e.g.,* Haw. Dep't of Educ., *Guidance on Supports for Transgender Students* 6-11 (July 25, 2016), https://tinyurl.com/3bra5kjn; N.Y. State Educ. Dep't, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students* 5-10 (July 2015), https://tinyurl.com/2p8mk97k.

Amici States also invest in training for educators so they can meet the needs of LGBTQ students, parents, and teachers. California's recent budget allocated "$3 million for LGBTQ cultural competency training for public school teachers." Jo Yurcaba, *California Budget Includes $3 Million to Train Teachers on LGBTQ Issues*, NBC News (July 16, 2021), https://tinyurl.com/mrx84bnb. Nevada requires that teachers "receive annual training concerning the requirements and needs of persons with diverse gender identities or expressions." Nev. Admin. Code § 388.880(2)(a). And Michigan developed a workshop for educators on LGBTQ issues. Mich. Dep't of Educ., *Creating Safe Schools for Sexual Minority Youth*, https://tinyurl.com/4yesvp2e (last visited Dec. 13, 2022).

All these efforts comport with the constitutional principle of a "free exchange" of ideas. *Mahanoy*, 141 S. Ct. at 2046. Yet Florida's Act seeks to remove LGBTQ-related topics from schools entirely or otherwise restrict them because—purportedly—these are sensitive issues for some. Fla. Br. 36-37. As federal courts

in Florida have acknowledged, however, the way to approach such issues is not to censor them but to equip educators to address them. *See Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cnty.*, 567 F. Supp. 2d 1359, 1370 (N.D. Fla. 2008) ("If the schools are to perform their traditional function of inculcating the habits and manners of civility, . . . they must be allowed the space and discretion to deal with the nuances." (internal quotation marks omitted) (quoting *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1543 (7th Cir. 1996))). Although Florida's justifications may "sound in a desire to avoid the discomfort and unpleasantness of tolerating a minority of students whose sexual identity is distinct from the majority," "[e]nsuring that this minority of students are afforded meaningful expression secures the precept of freedom . . . exalted by the founders." *Gonzalez through Gonzalez v. Sch. Bd. of Okeechobee Cnty.*, 571 F. Supp. 2d 1257, 1269 (S.D. Fla. 2008); *see also Gay-Straight All. of Yulee High Sch. v. Sch. Bd. of Nassau Cnty.*, 602 F. Supp. 2d 1233, 1237 (M.D. Fla. 2009). Indeed, Florida's approach stands outside "a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431 (2022) (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

C. Florida stands apart from states by subjecting school communities to costly litigation for their legitimate instructional choices.

States typically set education policy at a general level and leave particular instructional decisions to districts, schools, and teachers, in collaboration with parents. *See, e.g.*, *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ."); *Ambach v. Norwick*, 441 U.S. 68, 78 (1979) ("[T]eachers by necessity have wide discretion over the way the course material is communicated to students."); Cal. Educ. Code § 60000(b) (recognizing that "specific choices about instructional materials need to be made at the local level"); Minn. Stat. § 120B.021(2)(b)(2) (providing that statewide academic standards must "not require a specific teaching methodology or curriculum"). Indeed, "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process." *Milliken*, 418 U.S. at 741-42. But Florida bucks this "tradition," *id*. at 741, by making such instructional decisions the subject of lawsuits—all purportedly in the name of parental rights, Fla. Stat. § 1001.42(8)(c)(7)(b)(II) (granting parents a cause of action). As Amici States' experience shows, however, parent perspectives and prerogatives can be reasonably accommodated by teachers and schools without courts being involved at every turn to enforce blanket statewide censorship requirements and speech restrictions.

To begin, Amici States largely place curricular and instructional choices with school boards and other bodies that seek public input, including that of parents. *See, e.g.*, Md. Code Ann., Educ. §§ 4-111 (vesting county school boards with the power to "[e]stablish curriculum guides and courses of study"), 4-112(a) (establishing "citizen advisory committee[s] to advise the [school] board[s]"). For example, Colorado instructs school boards to "convene a community forum on a periodic basis . . . to discuss adopted content standards." Colo. Rev. Stat. § 22-1-104(3)(a). Similarly, Oregon provides that the state board, in revising content standards, shall "[i]nvolve . . . parents." Or. Rev. Stat. § 329.045(1)(b)(C) (effective 2026). California, Connecticut, Illinois, Nevada, and New Jersey likewise leave most of the implementation of their inclusive curriculum requirements to local boards. *See* Cal. Dep't of Educ., *Frequently Asked Questions: Senate Bill 48* (Oct. 8, 2021), https://tinyurl.com/yc8yhnkh; Conn. Gen. Stat. § 10-25b(d); Ill. Inclusive Curriculum Advisory Council, *supra*; Nev. Rev. Stat. § 389.061(1); N.J. Stat. Ann. § 18A:35-4.36.

If parental concerns arise over instructional choices, Amici States have developed targeted, cooperative ways to accommodate them. Some Amici States have provided guidance to teachers on how to handle parental perspectives on LGBTQ topics, including sample letters. *See, e.g.*, D.C. Pub. Schs., *Transgender and Gender-Nonconforming Policy Guidance*, *supra*, at 31-36; Minn. Dep't of

Educ., *Toolkit*, *supra*, at 6-7. Other Amici States allow parents to review curriculum and instructional material. Cal. Educ. Code § 51101(a)(8); Mich. Comp. Laws Ann. § 380.1137(1)(a). Minnesota allows parents who object to certain instruction to "make reasonable arrangements with school personnel for alternative instruction." Minn. Stat. § 120B.20. Finally, when it comes to the most sensitive topics like health or sex education, 36 states and the District provide some type of parental opt-out option. Guttmacher Inst., *Sex and HIV Education* (Jul. 1, 2022), https://tinyurl.com/r259h2d2. Through these mechanisms, teachers and schools can accommodate parental choices.

Instead of these common, conciliatory approaches to parental choices, Florida's Act subjects schools to costly litigation by permitting parental lawsuits regarding curricular decisions. That approach breaks so significantly from reasonable alternatives that it undermines any claim that it is motivated by a legitimate effort to accommodate parents and their concerns about limiting inappropriate sexual content in schools. The Act subjects school districts to litigation, injunctions, damages, and attorney fees for any violation of its vague provisions banning certain speech. *See* Fla. Stat. § 1001.42(8)(c)(7)(b)(II). Such "[j]udicial interposition in the operation of the public school system," absent a compelling constitutional reason, is unprecedented. *Epperson*, 393 U.S. at 104; *see Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005) (Sutton,

J.) (collecting cases rejecting a parental right to direct classroom instruction); Todd A. DeMitchell & Joseph J. Onosko, *A Parent's Child and the State's Future Citizen: Judicial and Legislative Responses to the Tension Over the Right to Direct an Education*, 22 S. Cal. Interdisc. L.J. 591, 622 (2013) (explaining that states have near universally rejected legislative attempts to shift power over curricular decisions away from educators). It is also unneeded: as explained above, several options are available to involve parents in their child's education. Indeed, Florida already provides many of these procedures to parents. Fla. Stat. § 1014.04. Incentivizing litigation against schools is a punitive approach that chills the free exchange of ideas. The Act's drastic approach is thus unreasonable.

* * *

In short, Florida's extreme approach implies the absence of a legitimate pedagogical purpose, rendering its restrictions on speech and targeting of a minority highly suspect. And Amici States' experiences show that reasonable policies are available that include LGBTQ people, foster free speech, and accommodate parents. Florida's turn, instead, to restricting speech and targeting a minority supplies additional evidence of the Act's unconstitutionality. *See Romer*, 517 U.S. at 633. At a minimum, it plainly demonstrates that Florida cannot succeed on its motion to dismiss.

II. Florida's Act Stigmatizes LGBTQ Youth In Florida, And Its Stigmatic Harms Extend To Amici States.

The harm caused by the challenged Act extends well beyond Florida. By targeting the LGBTQ community, the Act harms children in Amici States, including those who will be placed in Florida pursuant to the ICPC, as well as students who attend school in Florida and then move to Amici States. And Amici States will need to devote resources to mitigate and counteract the harm that the Act is causing to LGBTQ students and others in their States.

A. The Act stigmatizes LGBTQ youth in Florida and Amici States.

The Act stigmatizes LGBTQ youth by prohibiting or limiting the discussion of LGBTQ people in schools. And in so doing, it threatens grave harm to the health and well-being of LGBTQ individuals, their families, and their communities. As study after study has shown, discriminatory social conditions have severe negative health impacts on LGBTQ people, resulting in increased rates of mental health disorders and suicide attempts, especially among LGBTQ youth. *See, e.g.*, What We Know Project, Cornell Univ., *What Does the Scholarly Research Say About the Effects of Discrimination on the Health of LGBT People?* (2019), https://tinyurl.com/2p84akjn (summarizing findings of 300 primary research studies, 82% of which "found robust evidence that discrimination on the basis of sexual orientation or gender identity is associated with harms to the health of LGBT

people"). Those harms extend to youth not just in Florida, but throughout the country.

1. Educational decisions that stigmatize LGBTQ youth directly harm mental health and educational outcomes.

As a vulnerable population, LGBTQ youth already face significant hardships. They are particularly likely to experience feelings of sadness and hopelessness, Laura Kann et al., Ctrs. for Disease Control & Prevention, *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors among Students in Grades 9–12 — United States and Selected Sites, 2015* 18 (2016), https://tinyurl.com/6cyefk2m, and to be victims of bullying, Madeleine Roberts, *New CDC Data Shows LGBTQ Youth Are More Likely to Be Bullied Than Straight Cisgender Youth*, Hum. Rts. Campaign (Aug. 26, 2020), https://tinyurl.com/2wu4ajuj. Increased victimization of LGBTQ students leads to health and suicide risks. Roberts, *supra*. These hardships are evident at the state level, too. For instance, LGBTQ students in Michigan are 2.9 times more likely to be threatened or injured with a weapon at school, 1.9 times more likely to be bullied at school or online, 2.7 times more likely to skip school because they feel unsafe, 1.5 times more likely to get Ds and Fs, and 3.2 times more likely to engage in self-harm behavior. Mich. Dep't of Educ., *Michigan Department of Education's Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ+) Students Project at a Glance* 1, https://tinyurl.com/4jxns374 (last visited Dec. 13, 2022). To take just one of the most troubling examples, 23% of Michigan's LGBTQ

high school students (13,500 students) attempted suicide in a recent 12-month period. *Id.* That rate is 4.6 times higher than their non-LGBTQ peers. *Id.*

An inclusive school climate, which permits teachers and students to discuss sexual orientation and gender identity, can help reduce the likelihood of these damaging outcomes. Inclusive school climates foster positive learning environments for LGBTQ youth, which are "an important factor in decreasing suicidality among LGBTQ adolescents." April J. Ancheta, Jean-Marie Bruzzese, & Tonya L. Hughes, *The Impact of Positive School Climate on Suicidality and Mental Health Among LGBTQ Adolescents: A Systematic Review* 10 (Apr. 2021), https://tinyurl.com/42hmsmdu. LGBTQ students in schools with inclusive climates are nearly 40% less likely to attempt suicide compared with LGBTQ students who attend schools with non-inclusive climates. Cady Stanton, *As 'Don't Say Gay' and Similar Bills Take Hold, LGBTQ Youths Feel They're 'Getting Crushed'*, USA Today (May 9, 2022), https://tinyurl.com/yckncebt. They are more likely to feel comfortable speaking to their teachers about LGBTQ-related issues, report less severe victimization based on sexual orientation and gender expression, and are less likely to feel unsafe at school because of their sexual orientation and gender expression. Joseph G. Kosciw et al., GLSEN, *The 2019 National School Climate Survey: The Experience of Lesbian, Gay, Bisexual, Transgender, and Queer Youth*

in Our Nation's Schools 73-74 (2020) ("Climate Survey"), https://tinyurl.com/5fmmzv9x.

LGBTQ-inclusive school climates are also associated with better educational outcomes. When LGBTQ students see themselves reflected in curricula, it creates an affirming learning environment that "may result in increased student engagement and may encourage students to strive academically which, in turn, may yield better educational outcomes." *Id.* at 74-75. Indeed, LGBTQ students in schools with inclusive curricula achieve a higher GPA than those in schools without inclusive curricula. *Id.* at 75. And LGBTQ students in schools with an LGBTQ-inclusive curriculum are more likely to say they plan to pursue post-secondary education. *Id.*

In light of the benefits of LGBTQ-inclusive curricula, it is no surprise that research also shows that non-inclusive schools—for example, ones that do not incorporate, or that expressly prohibit, discussion of LGBTQ issues within the classroom, as the Act requires—have damaging consequences for LGBTQ youth. As explained above, the absence of an LGBTQ-inclusive climate is strongly correlated with more suicidal ideation, worse educational outcomes, and decreased feelings of safety. LGBTQ students at schools with non-inclusive curricula are also less likely to feel supported by educators and less likely to have access to supportive school clubs, such as Gay-Straight Alliances. GLSEN, *GLSEN Research Brief: Laws Prohibiting "Promotion of Homosexuality" in Schools: Impacts and*

Implications 6-7 (2018), https://tinyurl.com/47r9yhzc ("GLSEN Research Brief"). And at non-inclusive schools, students are "more likely to face harassment and assault at school based on their sexual orientation and gender expression," *id.* at 3, and are less likely to have the benefit of supportive anti-bullying policies, *id.* at 7.

2. The Act will increase anti-LGBTQ bias.

Laws like the challenged Act that stigmatize LGBTQ people also increase the risk of anti-LGBTQ bias inside and outside the school environment.

For example, LGBTQ students attending schools with non-inclusive curricula are more likely to hear homophobic remarks at school. GLSEN Research Brief 3. By contrast, "attending a school that included positive representations of LGBTQ topics in the curriculum was related to less frequent use of anti-LGBTQ language." Climate Survey 73; *see also id.* (documenting less frequent usage of negative remarks about sexual orientation, gender identity, and gender expression).

Whether a school has LGBTQ-inclusive policies also correlates with the rate of peer acceptance of LGBTQ students. Non-inclusive schools are less likely to have students who are accepting of LGBTQ people than schools with inclusive climates (39.4% vs. 51.1%). GLSEN Research Brief 3. By contrast, "[t]he inclusion of positive portrayals of LGBTQ topics in the classroom may . . . help educate the general student body about LGBTQ issues and promote respect and understanding of LGBTQ people in general." Climate Survey 75. Indeed, LGBTQ students who

attend schools with LGBTQ-inclusive curricula are significantly more likely to report that their classmates are somewhat or very accepting of LGBTQ people (66.9% vs. 37.9%). *Id.*

Further, this increased understanding and respect "may lead students in general to speak up when they witness anti-LGBTQ behaviors." *Id.* Relative to students in schools with anti-LGBTQ curricula, LGBTQ youth in schools with inclusive curricula report that other students are more than twice as likely to intervene most or all of the time when hearing homophobic remarks and negative remarks about gender expression. *Id.*

Notably, the damaging effects of a law prohibiting instruction on LGBTQ issues in schools do not stop at a state's borders. When a law anywhere sends the message that some members of the community are disfavored, as the Act does, it compounds the stigma associated with being part of that community everywhere. Indeed, evidence suggests that, as with prior laws that victimize particular groups, the Act will adversely affect the mental health of LGBTQ youth in other states. For example, recent debates around laws that target the transgender community adversely affected the mental health of LGBTQ youth nationwide. The Trevor Project, *Issues Impacting LGBTQ Youth: Polling Analysis* 6 (Jan. 2022), https://tinyurl.com/2xnr9r5t. Two-thirds of LGBTQ youth reported that the recent debates about state laws restricting the rights of transgender people have negatively

affected their mental health. *Id.* And among transgender and non-binary youth, the effects were even more profound, with 85% reporting harm to their mental health. *Id.* These findings suggest that the Act stigmatizes and poses risk of harm to LGBTQ youth not just in Florida, but also elsewhere, including in Amici States.

B. The Act's harms extend beyond Florida and will require Amici States to expend additional funds.

In addition to the harms it inflicts on LGBTQ youth in Florida and in Amici States, the Act harms Amici States by requiring them to increase expenditures of state funds to combat bias and protect their most vulnerable residents.

For example, the Act directly implicates Amici States' interest in protecting at-risk youth who will be placed in Florida pursuant to the Interstate Compact for the Placement of Children. The ICPC—to which Florida and all Amici States are parties—provides for the movement and safe placement of children between states when children are in the state's custody, being placed for adoption, or being placed by a parent or guardian in a residential treatment facility. Am. Pub. Health Servs. Ass'n, *ICPC FAQ's*, https://tinyurl.com/342eej8h (last visited Dec. 13, 2022). This population includes children in foster care, and recent surveys of children in foster care have revealed a high percentage who identify as LGBTQ. *See, e.g.*, Marlene Matarese et al., *The Cuyahoga Youth Count: A Report on LGBTQ+ Youth Experience in Foster Care* 6 (2021), https://tinyurl.com/mp9bmunb (survey of an Ohio county identifying 32% of foster children to be LGBTQ); Theo G.M. Sandfort,

Experiences and Well-Being of Sexual and Gender Diverse Youth in Foster Care in New York City: Disproportionality and Disparities 5 (2020), https://tinyurl.com/5e6e59kj (survey of New York City identifying 34% of foster children to be LGBTQ). Amici States regularly place children in Florida pursuant to the ICPC, and those children who identify as LGBTQ will be stigmatized by Florida's new law. LGBTQ youth from Florida may also be placed in Amici States under the ICPC, leaving schools and social services agencies in Amici States to address the negative impacts of Florida's law.

State agencies will also need to expend additional resources to address the Act's negative effects on members of their own LGBTQ communities. For example, because the Act stigmatizes and harms LGBTQ people in Amici States, those individuals may require additional mental health services. In light of the "high prevalence of poverty in LGBT communities," state-run programs like Medicaid may bear a substantial share of the burden of addressing the significant mental health consequences stemming from the Act. Kellan Baker et al., Ctr. for Am. Progress, *The Medicaid Program and LGBT Communities: Overview and Policy Recommendations* (Aug. 9, 2016), https://tinyurl.com/ytp8apz3.

Furthermore, Amici States may need to ensure that the stigma caused by the Act does not spread to their own school environments. As explained, Amici States provide training and assistance to school staff to address bullying, understand

LGBTQ issues, and improve the educational climate for LGBTQ youth. The Act's adverse impact on LGBTQ students' mental health will increase the demand for such school-based services. And Amici States' education agencies will need to expand their efforts to address barriers to the well-being and educational success of LGBTQ students.

Finally, Amici States may need to increase funding for nonprofit organizations that provide social services to LGBTQ youth. Amici States recognize the vital role these organizations play in promoting LGBTQ individuals' health and well-being. Massachusetts, for example, funds organizations through its Safe Spaces for LGBTQ Youth program, whose goal is to "promote self-esteem, increase social connectedness and resilience, and decrease risk for suicidal behaviors (and self-harm)." Commonwealth of Mass., *The Safe Spaces for LGBTQIA+ Youth Program Engage Youth Who Are LGBTQIA+*, https://tinyurl.com/v25hcf86 (last visited Dec. 13, 2022). And New Jersey's Department of Children and Families provides funding and resources to organizations that serve LGBTQ youth, such as HiTops, which provides health services and group support to LGBTQ youth throughout New Jersey. HiTops, *About Us*, https://tinyurl.com/3bz9n622 (last visited Dec. 13, 2022). The stigmatic harms stemming from the Act will increase the demand for these organizations' services—and Amici States' funding for them.

CONCLUSION

The Court should deny the motions to dismiss.

Respectfully submitted,

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LOCAL RULE 7.1(F) CERTIFICATION

As required by Local Rule 7.1(F), the undersigned counsel certifies that this brief contains 6,398 words.

/s/ Adam J. Tuetken
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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2022, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

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