UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

EQUALITY FLORIDA, et al.,

Plaintiffs,

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

FLORIDA STATE BOARD OF EDUCATION, et al.,

Defendants.
_____/

STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiffs have not come close to making a constitutional case out of the Florida Legislature's efforts in H.B. 1557 to safeguard parents' rights to direct the upbringing of their young public-school children. Plaintiffs have no quarrel with, and indeed do not bother to mention, the bulk of the law—such as the parts of it that require schools to be transparent with parents about critical medical decisions and information affecting their children. *See* Fla. Stat. § 1001.42(8)(c)1.-2. Plaintiffs instead train their constitutional fire on a single provision—the one that delays "classroom instruction on sexual orientation and gender identity" until Florida's school children are at least fourth graders. Fla. Stat. § 1001.42(8)(c)3.

Even as to that requirement, Plaintiffs do not dispute that, if the classroom-instruction provision is—as the State contends—"a workaday law imposing modest,

neutral limits on formal curricular activities," ECF91 at 4, then it is perfectly constitutional. The reasons are clear. States must make decisions about what to teach. That requires drawing lines because not everything can or should be taught. And the Constitution leaves that line drawing to the politically accountable branches of state government, particularly when it comes to sensitive topics like, as Plaintiffs note (at 5), sexuality.

Plaintiffs can find constitutional infirmity in H.B. 1557 only by seeing bogeymen that are not there—though they are inconsistent about what, exactly, those bogeymen are. Sometimes, Plaintiffs paint the law as having crystalline clarity: Plaintiffs are sure, for instance, that the classroom-instruction provision is "aimed squarely at LGBT people." ECF91 at 1. They are certain that it sets up a "blanket ban on any discussion or acknowledgement of LGBT people." *Id.* at 45. But Plaintiffs make no serious attempt to reconcile those and similar assertions with the text of the statute, which applies without differentiation to all forms of "sexual orientation" and "gender identity," or with its evident purpose of protecting parental rights. Like the rest of the statute, the classroom-instruction provision simply safeguards the liberty of *all* parents to direct the upbringing of their children—and in particular to protect parents' right to introduce the sensitive topics of sexual orientation and gender identity to their youngest free of the State's interference.

At other times, Plaintiffs profess uncertainty about what the statute means. Plaintiffs tell us (at 36) that it would be "equally reasonabl[e]" to interpret the statute to be broader than the State reads it; they aver (at 37) that the statute is "ambigu[ous]"; and they complain (at 38) that the State's reading is not "the most obvious." Even if all of that were true—and it is not—those run-of-the-mill interpretive ambiguities would fall miles short of unconstitutional vagueness even in a criminal statute. *See United States v. Williams*, 553 U.S. 285, 305–06 (2008). And here, Plaintiffs' interpretive quibbles are with a statute that regulates classroom instruction in a public school—a context in which legislatures frequently use open-textured terms like "appropriate" in defining what may be taught. *E.g.*, Fla. Stat. § 1003.46(2)(d) (providing for "instruction and material" on sexuality that is "appropriate for the age and grade of the student").

Florida has acted well within its constitutional discretion in providing for parents, not teachers, to decide if and how to educate their children on the topics of sexual orientation and gender identity. The motion should be granted.

I. Plaintiffs misinterpret the statute.

Plaintiffs agree (at 4) that if the State Defendants are correct in how they interpret H.B. 1557—as a neutral limit on teaching "gender identity" or "sexual orientation" in class—then it is unobjectionable. But Plaintiffs bend over backwards to read the law in a broad, discriminatory fashion. They are wrong to do so.

Plaintiffs argue (at 4) that the law "targets LGBT people." But the statute says nothing about LGBT people: it limits "classroom instruction" on two topics—"gender identity" and "sexual orientation"—without respect to the identity or viewpoint of the speaker. Plaintiffs concede this as a textual matter, admitting (at 1) that H.B. 1557 uses "neutral language."

Nonetheless, citing (at 1) "statements by legislators and other public officials," Plaintiffs insist that discrimination is afoot. But when interpreting statutes, Florida courts "adhere to the supremacy-of-the-text principle," *Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021), and "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020). And even looking beyond the text, the law's context and history do not support Plaintiffs' narrative of discrimination, but rather an overriding purpose to protect parental rights, which supports reading the law to be neutral. *See* ECF68 at 4–11 (detailing the background leading up to the law's enactment).

Plaintiffs next argue (at 45) that H.B. 1557 is "a blanket ban on any discussion or acknowledgment of LGBT people." H.B. 1557 does no such thing; it limits instruction on two topics (sexual orientation and gender identity) for *all* people. Nor is H.B. 1557 a "ban." It simply delays instruction on those topics to fourth grade and beyond.

That leaves Plaintiffs to quibble with what "classroom instruction" "on sexual orientation or gender identity" means. Citing dictionaries, Plaintiffs say (at 36) that "instruction," standing alone, could "equally reasonably" mean anything that "impart[s] knowledge." But "[s]tatutory language has meaning only in context." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415 (2005). And "instruction" does not stand alone; it is conjoined with "classroom instruction." The classroom is where the profession of teaching occurs. So the context is suggestive of a narrower meaning of "instruction": "the action, practice, or profession of teaching." *See* ECF68 at 17–18 (collecting dictionaries). When the statute mentions "classroom instruction," it describes the formal work that an instructor does in a classroom setting.

That reading is confirmed by the object of the statute. It regulates not instruction *simpliciter* but "instruction on" two specified topics. "On," in that construction, means the "subject of study." ECF68 at 18.

The limitation to "subjects of study" neatly resolves what Plaintiffs see (at 37) as "irresolvable uncertainty." Contrary to Plaintiffs' suggestions, a tangential reference to person's sexual orientation is not "classroom instruction" on it, just as a math problem asking students to add bushels of apples is not "instruction on" apple farming. Plaintiffs' questions (at 37) are thus easily answered: The statute does not prohibit stories where a prince and princess fall in love; it does not prohibit

instruction against bullying people with one mom or two; and it does not prohibit mere references to moms and dads (or any combination thereof). None of that is instruction "on" the relevant subjects.

Plaintiffs also tell us (at 36) that they do not know what "sexual orientation" and "gender identity" mean. But there is no mystery, let alone unconstitutional vagueness, about those terms, which are commonly used in the law without the fine-grained explication Plaintiffs demand. *E.g.*, *Bostock*, 140 S. Ct. at 1739, 1742, 1747, 1749; *id.* at 1755 (Alito, J., dissenting).

H.B. 1557 is thus clear and neutral in its prohibition. It regulates classroom lessons on gender identity and sexual orientation, regardless of viewpoint or identity. And that limited scope answers Plaintiffs' concerns (at 35) about the meaning of "school personnel or third parties"—the law applies to anyone who teaches "gender identity" and "sexual orientation" to a class as a teacher would.

Finally, Plaintiffs assert (at 19) that the State's interpretation conflicts with how "virtually every other interpreter" has read the law. Hardly. Then-Senator Diaz, who is now the Commissioner of Education, in explaining the bill on the Senate floor said that it was about "planned, lesson-planned effectuated instruction," which "does not prevent the other role of the teacher . . . of working and dealing with individual

students." Fla. S., recording of proceedings at 2:21–22 (March 8, 2022).[1] The State's interpretation has also been echoed by a leading First Amendment scholar on a podcast on which he debated the constitutionality of the law with one of Plaintiffs' lawyers. *See* We the People Podcast, The Constitutionality of Florida's Education Bill (Apr. 14, 2022).[2]

Plaintiffs rely as well (at 19) on certain "statements" by the Governor and his press secretary. In signing the bill, however, the Governor (in response to a question about the fears of some about "what is not on the page" and whether he could "assuage" those fears) stated that "what's very important" is that the basis for any fear is "not on the page"; that "we're talking about classroom curriculum"; and that "we are textualists" meaning "we follow the law." Signing of HB 1557—Parental Rights in Education 28–30 (March 28, 2022).[3] And the Governor's press secretary on her personal Twitter account—in a response to a Tweet of hers that Plaintiffs (at 51) trumpet—likewise made clear that the law is neutral because it "doesn't mention

[1] https://thefloridachannel.org/videos/3-8-22-senate-session/.

[2] https://constitutioncenter.org/interactive-constitution/podcast/the-constitutionality-of-floridas-education-bill.

[3] https://thefloridachannel.org/videos/3-28-22-signing-of-hb-1557-parental-rights-in-education/.

gay or straight." Christina Pushaw (@ChristinaPushaw), *Twitter* (Mar. 4, 2022 6:48 PM).[4]

II. Plaintiffs lack standing.

1. Plaintiffs lack standing to sue the State Defendants because they cannot establish traceability or redressability. Any order against the State Defendants would still permit parents to sue school districts. State courts, in turn, could still order school districts to comply with H.B. 1557. And thus, Plaintiffs would still suffer their alleged injuries even if the State Defendants were enjoined. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021).

Plaintiffs answer (at 26) that an injunction against the State Defendants might "mitigate at least some of Plaintiffs' injuries." But the only connection Plaintiffs identify (at 31) between the State Defendants and H.B. 1557 is that the Commissioner of Education and the Board Members revise state standards and appoint magistrates to resolve disputes under H.B. 1557, and that the Board approves the recommendation of the magistrate. Plaintiffs never explain, however, how those acts contribute to their injuries or why enjoining them would provide Plaintiffs

[4] Citing a letter from the Florida Department of Education warning school districts that if they follow certain federal Title IX guidance, they risk "conflict with Florida law," ECF95, Plaintiffs argue that H.B. 1557 applies "anywhere on campus." But the potentially conflicting law referred to in the letter regulates sports teams designed for women, *id.* Ex. A at 2, and the letter does not mention H.B. 1557, which is additional evidence that it does not apply outside of classroom settings.

redress. The state standards, of course, do not injure Plaintiffs, as they have not been promulgated. And enjoining the appointment of a magistrate would exacerbate rather than redress Plaintiff's injuries: If the Department cannot appoint a magistrate, then parents will take their other statutory option and go to court. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (in assessing standing, courts can assume that "third parties" will act in "predictable ways"). Plaintiffs, however, object (at 25–26) to that type of private enforcement as causing their injuries. And the Board Members' adjudicatory role is wholly insufficient to establish standing. *See Whole Women's Health*, 142 S. Ct. at 532 ("[N]o case or controversy exists between a judge who adjudicates claims under a statute and a litigant who attacks the … statute").

Plaintiffs also cite (at 26) arguments advanced by some of the School Board Defendants that point the finger at the State Defendants for H.B. 1557's alleged harms. But even if the State Defendants were enjoined from "enforcing" H.B. 1557 (which they do not do anyway), the school boards would still be obliged to follow it, *see* Fla. Stat. §§ 1000.03(3), 1001.41(1), and would even be potentially subject to private-enforcement suits under H.B. 1557 if they established a "procedure or practice" of not doing so, Fla. Stat. § 1001.42(8)(c)7.b.(II). Those independent obligations make Plaintiffs' injuries neither traceable to the State Defendants nor

redressable by an injunction against them. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020).

2. Plaintiffs have also failed to allege an injury in fact.

a. The Individual Plaintiffs say (at 17) that they have suffered censorship. But every example they list occurred before H.B. 1557 took effect, and so even if that censorship occurred it is not traceable to the law or redressable by an injunction against it.

As to potential future injuries, Plaintiffs (at 18) concede that they must, at the very least, demonstrate that (1) they intend to engage in constitutionally protected conduct, (2) the conduct is arguably proscribed by statute, and (3) there is a credible, substantial threat of enforcement. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–64 (2014).

Most of Plaintiffs' claims fail at the second step. H.B. 1557 applies only to classroom instruction. Yet virtually all of Plaintiffs' "injuries" (at 18) are traceable to things that plainly are not "classroom-instruction" such as putting up a spouse's picture in a classroom, students choosing their own essay topics, or parents participating in school events—and are, therefore, not arguably proscribed by the statute.

Plaintiffs also argue that they will be deprived of information. But H.B. 1557 does not deny information—by providing that "instruction" on "gender identity" and

"sexual orientation" should begin only after third grade, the law merely regulates *when* that information can be conveyed. A ninth grader does not suffer constitutional injury when a school teaches physics in ninth grade and chemistry in tenth, even if the student would prefer the periodic table to Newton. *See Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980).

Regardless, Plaintiffs have not demonstrated that H.B. 1557 "objectively chills protected expression." *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120 (11th Cir. 2022). To start, there is no risk of direct enforcement against the Plaintiffs, as H.B. 1557 regulates school districts. *Id.* (recognizing that "threat of formal discipline or punishment is relevant to the inquiry"). Instead, Plaintiffs contend that they will self-censor to avoid an indirect reprisal, which would result only if a parent became concerned about Plaintiffs' conduct; the parent sought enforcement under H.B. 1557; the school district, a special magistrate, or a court found merit in the claim (because the school district had a "procedure or practice" that violated the statute, Fla. Stat. § 1001.42(8)(c)7.b.(II)); and the school district sought enforcement against Plaintiffs. That is far too speculative to be an objective threat of enforcement. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013).

b. The Organizational Plaintiffs argue (at 29) that they have associational standing because their members are injured. For the named individuals, that is wrong as explained above. Plaintiffs respond that even if their named members are not

injured, it is plausible that unnamed members are. That too is wrong because there is no reason to think that their unnamed members face injuries that their named members do not. *See Ga. Republican Party v. SEC*, 888 F.3d 1198, 1204 (11th Cir. 2018) (distinguishing Plaintiffs' main authority and explaining that speculation that an unnamed member will suffer injury is not enough).

Next, the Organizational Plaintiffs argue they suffered their own injury, asserting (at 27–28) that their "mission to combat discrimination" has been impeded. But an organization's general interest in a preferred result is not cognizable. *Jacobson*, 974 F.3d at 1250 (Democratic Party groups lacked a concrete interest in laws that helped elect Democrats). Harm to "abstract social interests" does not give rise to concrete injury. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

The organizations also maintain (at 28–29) that they have diverted resources to fight H.B. 1557. But "[a]n organization's abstract concern with a subject that could be affected by an adjudication does not substitute for . . . concrete injury." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976). For that reason, an organization cannot manufacture standing by expending resources to challenge a law absent a credible threat of enforcement. *See Clapper*, 568 U.S. at 415–16. If organizations cannot bootstrap standing by litigating, then surely, they cannot do so by lobbying. The same goes for any resources Plaintiffs have spent "counseling and educating members" (at 29). After all, even Plaintiffs admit (at 28) that diverting

resources to "general advocacy and policy work" does not create standing. Without grounding their spending in some injury, however, Plaintiffs' counseling and education is just that—general advocacy and policy.

III. Many State Defendants are immune.

Plaintiffs now understand (at 30 n.11) that (despite naming him as the lead defendant) the Governor is entitled to sovereign immunity because he has an insufficient connection to the enforcement of H.B. 1557. For most counts, they have reached the same conclusion (at 32) for the Florida State Board of Education and the Department of Education. But Plaintiffs continue to insist that they may bring official-capacity claims against individual members of the Board of Education and against the Commissioner of Education, invoking the exception to sovereign immunity under *Ex parte Young*, 209 U.S. 123 (1908). They are mistaken.

Plaintiffs point (at 31) to the fact that the Commissioner *appoints* the special magistrate who may enforce the law. That, however, is plainly insufficient to make the Commissioner a proper defendant, which is why Plaintiffs have dismissed the Governor even though he appoints members of the State Board of Education (who in turn appoint the Commissioner). *See* Fla. Const. Art. IX, § 2. Plaintiffs also invoke (at 31) the State Board of Education's adjudicative role in approving recommendations of the special magistrate to resolve private suits under H.B. 1557. But as Plaintiffs note (at 31 n.12), the special magistrate himself is not amenable to

suit because he is an adjudicator who merely "work[s] to resolve disputes between parties." *Whole Women's Health*, 142 S. Ct. at 532. The Board members' role in adjudicating the exact same disputes equally make them improper defendants.

After subtracting all that, Plaintiffs are left with (at 31) the fact that the Commissioner and the Board members are generally involved in developing state educational standards, *see* Fla. Stat. § 1003.41, which H.B. 1557 requires to be updated. But that generic role in administering the educational system does not mean that those officials "enforce" H.B. 1557, *Whole Women's Health*, 142 S. Ct. at 532, which, as Plaintiffs elsewhere note (at 32–33), is a role that is played by the school boards. The general education-related authority of the Commissioner and the Board members falls short of giving them the required authority over the "provision at issue." *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998). Still less does that authority mean that "the prospect of a state suit"—or indeed any action concerning Plaintiffs—at the hands of the Commissioner and the Board members is "imminent." *Whole Women's Health*, 142 S. Ct. at 542 (Thomas, J., concurring in part and dissenting in part) (quotation omitted).

One final point. If Plaintiffs cannot satisfy *Ex parte Young*, it follows *a fortiori* that Plaintiffs cannot meet the even more stringent Article III standard for suing those same defendants. *See Jacobson*, 974 F.3d at 1255–56.

IV. The statute is not vague.

1. The first step in a vagueness challenge is to construe the statute. *Williams*, 553 U.S. at 293. If necessary, a court must construe the law "to avoid constitutional concerns," *Pine v. City of W. Palm Beach*, 762 F.3d 1262, 1276 (11th Cir. 2014), and therefore, can adopt any "reasonable and readily apparent" constitutional interpretation, *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000). Judged by that standard—or indeed *any* standard—H.B. 1557 passes muster. H.B. 1557 is clear in its prohibition. It tells teachers that when they are formally doing their job—instructing in the classroom—they cannot teach two subjects in grades K–3 and must follow state standards for teaching them in later grades.

2. Plaintiffs respond by arguing (at 34) that a more stringent vagueness test applies because of their First Amendment concerns. Thus, they say, H.B. 1557 is unconstitutionally vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." (quoting *Wollschlaeger v. Governor*, 848 F.3d 1293, 1319 (11th Cir. 2017) (en banc)). But that argument has been rejected in cases involving classroom regulations. *E.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986); *Cal. Teachers Ass'n v. Davis*, 64 F. Supp. 2d 945, 956 (C.D. Cal. 1999). That is understandable because open-textured state regulation of school instruction is commonplace. *E.g.*, Fla. Stat.

§ 1003.46(2)(d) (providing for "instruction and material" on sexuality that is "appropriate for the grade and age").

Even under Plaintiffs' proposed test, H.B. 1557 passes muster. To see why, consider some civil laws that are not unconstitutionally vague: "[e]very . . . conspiracy[] in restraint of trade" is illegal, 15 U.S.C. § 1; operating a business as a "public nuisance" is unlawful, *Horvath v. City of Chi.*, 510 F.2d 594, 596 (7th Cir. 1975); and a person operating a limousine company must drive a car "recognized by the industry as [a] 'luxury' vehicle[]." *Leib v. Hillsborough Cnty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1304, 1310 (11th Cir. 2009).

H.B. 1557 is far clearer. *Supra* Part I. Indeed, if H.B. 1557 is vague, then schools could not control their curriculum: If a school cannot tell a kindergarten teacher not to teach "gender identity," then how can a school tell a math teacher not to teach English? In recognition of that concern, States have considerable leeway in formulating rules about classroom conduct. For example, it is not vague to tell a teacher not to engage in "conduct unbecoming of a teacher." *Fowler v. Bd. Of Educ. Of Lincoln Cnty.*, 819 F.2d 657, 665–66 (6th Cir. 1987).

Plaintiffs (at 35–37) also raise questions about H.B. 1557's operation, which they claim causes "irresolvable uncertainty." Those questions are resolved by construing H.B. 1557 in accordance with its language and design. *Supra* Part I. Even if some ambiguities remained, "run-of-the-mill statutory ambiguities" are not a

constitutional defect. *Sabetti v. Dipaolo*, 16 F.3d 16, 18 (1st Cir. 1994); *see also Williams*, 553 U.S. at 305–06. And regardless, the State's interpretation is at the very least defensible, so the Court must accept it as a readily apparent saving construction. *Pine*, 762 F.3d at 1275–76.

Plaintiffs next argue (at 38–41) that even under the State's interpretation, the law is vague because concerned parents may sue based on conduct that is not "classroom instruction." Yet parents cannot sue over any concern; they must point to a specific "school district procedure or practice." Fla. Stat. § 1001.42(8)(c)7.b.(II). And besides, the prospect that a parent might bring a losing claim does not make a law vague or somehow invite "discriminatory enforcement."

V. The statute accords with the First Amendment.

1. Under the government-speech doctrine, when the government speaks, it can choose what to say unconstrained by the Free Speech Clause of the First Amendment. *Dean v. Warren*, 12 F.4th 1248, 1264 (11th Cir. 2021). That doctrine applies here: when government-required classroom instruction occurs in Florida's public schools, the State is speaking. That is why a social studies teacher cannot teach "that Benedict Arnold wasn't really a traitor, when the approved program calls him one." *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). Plaintiffs' First Amendment claims thus must be rejected.

Plaintiffs deny that classroom instruction in public schools by public-school teachers is government speech. They object (at 41–42) that certain older Supreme Court and Eleventh Circuit cases did not employ the government-speech doctrine. But the Eleventh Circuit has explained that the cases on which Plaintiffs rely stand for the separate proposition that "school-sponsored expression" (like a student newspaper) is an "intermediate category" between "pure student expression and government expression." *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1213 (11th Cir. 2004); *see also Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2044–45 (2021) (*Hazelwood* involves a "categor[y]" of "student speech"). Plaintiffs' cases are thus perfectly consistent with the idea, also recognized by the Eleventh Circuit, that government speech is a different category. *Bannon*, 387 F.3d at 1213. It encompasses "expression delivered directly through the government or indirectly through private intermediaries." *Id.* In that area, "the government is free to make subject-matter-based choices." *Id.*; *Dean*, 12 F.4th at 1265–66 (relying on government-speech doctrine to hold that cheerleader had no First Amendment right to protest while cheering); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 877 (11th Cir. 2011) (relying on government-speech cases to conclude that university "was free to prohibit its students from engaging in counseling activities . . . outside the defined scope of the clinical practicum").

In any event, Plaintiffs recognize (at 43) that otherwise-binding precedent must yield to "changes" in "the law." As the Fifth Circuit has explained, however, the cases on which Plaintiffs rely occurred before "the Supreme Court's clarification of the government's authority over its own message." *Chiras v. Miller*, 432 F.3d 606, 617 (5th Cir. 2005). And the Supreme Court resolved any lingering doubts in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). There, the Supreme Court concluded that a coach praying at a football game was engaged in personal speech, not government speech. But the Court was clear that if the coach was "instructing players," it would be government speech. *See id.* at 2424. That resolves this case because H.B. 1557 regulates "classroom instruction."

Plaintiffs try to distinguish *Kennedy* (at 43) as dealing with teacher speech, not a student's right to receive information. But "[t]he listener's right to receive information is reciprocal to the speaker's right to speak." *Doe ex rel. Doe v. Governor of N.J.*, 783 F.3d 150, 155 (3d Cir. 2015); *accord Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality op.). Were it otherwise, "a student" could "assert a right to have the teacher control the classroom when the teacher herself does not have such a right." *Zykan*, 631 F.2d at 1307. Thus, when the government has the right to control the teacher's message, it has a reciprocal right to give that message to a student.

Plaintiffs next (at 44–45) parade horribles. They say that if the government can dictate the message students receive, then States might do all sorts of bad things, like teaching that "one race is superior to another." But Plaintiffs (at 44) do not cite any recent cases when that actually happened and that is probably because, under the government-speech doctrine, such a choice would be subject to democratic testing. Indeed, the Florida legislature recently enacted a law forbidding teaching that one race is superior to another in public schools. *See* Fla. Stat. § 1003.42(3)(b). Plaintiffs, on the other hand, seek to enlist the federal courts to compel Florida to accelerate the teaching of sexual orientation and gender identity to schoolchildren as young as kindergarten (rather than having the concepts taught in fourth grade and above in age-appropriate fashion). If that theory were right, however, the First Amendment would essentially disable States from regulating their curricula at all, which irreducibly requires making content- and viewpoint-based choices about what to teach. And without the ability to regulate curricula, schools could quickly be forced by a rogue student or teacher to teach the abhorrent ideas Plaintiffs fear. As between allowing public school curricular decisions to be decided through the people's representatives and delegating them to federal courts to decide which ideas must be taught in schools, the solution is clear. Democracy should reign. *See Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 341 (6th Cir. 2010) (Sutton, J.).

2. Even putting the government-speech doctrine aside, H.B. 1557 is constitutional.

To start, Plaintiffs' arguments suffer from a category error. Their cases concerning the "right to receive information and ideas" (at 42–43) involve the removal of information and ideas (typically books) from school. *E.g.*, *Pico*, 457 U.S. at 858–59 (plurality op.) (removal of library books). H.B. 1557 does not do that; it removes topics from early grades and allows them to be taught later. That is a big difference because the Constitution does not dictate the order in which schools present material. *See Zykan*, 631 F.2d at 1306. If there were any doubt on that score, the Court should err toward the State's view because it more closely tracks the Constitution's original meaning. The Constitution—properly understood—says nothing about these topics. *See Morse v. Frederick*, 551 U.S. 393, 414–16 (2007) (Thomas, J., concurring). Were the Court to face a choice between expanding the plurality opinion in *Pico*, and following the Constitution, it should do the latter. *Texas v. Rettig*, 993 F.3d 408, 417 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing).

Even indulging constitutional scrutiny, H.B. 1557 easily passes muster. Under *Hazelwood School District v. Kuhlmeier*, H.B. 1557 need only be "reasonably related to legitimate pedagogical concerns," 484 U.S. 260, 273 (1988), which can include avoiding sensitive topics. *Id.* at 271. Plaintiffs do not—and cannot—dispute

that "sexual orientation and gender identity" are "sensitive" topics. *Janus v. AFSCME*, 138 S. Ct. 2448, 2476 (2018). No more is required to uphold the statute.

Plaintiffs' disagreement (at 45–46) is premised on mischaracterizing the law as "a blanket ban on any discussion or acknowledgment of LGBT people." H.B. 1557 does not remotely do that. *Supra* Part I.

Plaintiffs next object (at 45) that the State must present "evidence" to "justify its choice" to instruct on sexual orientation and gender identity in later grades. Yet even under heightened scrutiny, the State does not need "evidence"; it can "rest solely on history, consensus, and simple common sense[.]" *Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1341 (11th Cir. 1998) (quotation omitted). It follows with even greater force that evidence is not required under *Hazelwood*'s more forgiving standard. That is why courts often dismiss *Hazelwood* claims on the pleadings. *E.g.*, *Johnson v. Pitt Cnty. Bd. of Educ.*, 4:16-cv-214, 2017 WL 2304211, at *7–8 (E.D.N.C. May 25, 2017); *Keeton v. Anderson-Wiley*, 110-cv-099, 2012 WL 13163578, at *21 (S.D. Ga. June 22, 2012); *Williams v. Vidmar*, 367 F. Supp. 2d 1265, 1273–74 (N.D. Cal. 2005); *see also Chiras*, 432 F.3d at 617 (*Pico* claim). At some point, a choice needs to be made about what to teach and "[t]he [State's] conclusions about course content must be allowed to hold sway over … individual [] judgments." *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991).

In urging this Court to police the State's curricular choices, Plaintiffs (at 45) invoke *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989). But that case is not to the contrary. It concerned limits on who could enter a school-created limited public forum, not choices about core curriculum. *Id.* at 1320; *Bannon*, 387 F.3d at 1218 (Black, J., concurring) (distinguishing *Searcey* on that ground). Even then, the court asked whether the school's policy was "intuitively obvious," indicating that some policies require no evidence. *Searcey*, 888 F.2d at 1321; *see Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1280 (11th Cir. 2003) (dismissing the idea that *Searcey* always requires evidence).

That leaves Plaintiffs to argue (at 46) that H.B. 1557 was motivated by animus. Because, on their telling, "H.B. 1557 was motivated by key lawmakers' hostility to LGBT people," Plaintiffs assert that the law does not serve a legitimate pedagogical interest. They are wrong both legally and factually.

For one, in "free speech" cases, plaintiffs cannot use legislative purpose to challenge a facially constitutional law. *NetChoice, LLC v. Attorney Gen.*, 34 F.4th 1196, 1224 (11th Cir. 2022). Plaintiffs concede that general rule. But citing (at 47) a footnote in *Virgil v. School Board of Columbia County*, 862 F.2d 1517, 1523 n.6 (11th Cir. 1989), they contend that the rule is different when it comes to schools. But in *Virgil* the court did not look beyond the school board's stated basis for acting—the parties stipulated to motive. *Id*. at 1523 n.7. Nor is there a principled reason why

courts should treat the right to receive information differently from other First Amendment rights. If anything, courts should more rigorously probe motive when the State criminalizes conduct with the aim of suppressing speech than when the State chooses not to teach a topic, and yet courts do not. *See United States v. O'Brien*, 391 U.S. 367, 383 (1968).

Looking for speech-suppressing animus also makes little sense in this context. Schools can choose to delay teaching a topic because they deem it unsuitable. *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1227 (11th Cir. 2009). Thus, if a community finds communism unsuitable, it can choose not to teach Marx. But that is just another way of expressing "animus" towards Marxism. For that reason, "federal courts" cannot "substitute their own findings and opinions about educational suitability" just because the State's "motive for action is questioned." *Id*. Federal courts, in other words, should not play "ersatz dean[]." *Bishop*, 926 F.2d at 1075.

Regardless, Plaintiffs failed to plead a plausible inference of animus. *See infra* Part VI.

3. Plaintiffs also claim (at 47–48) that H.B. 1557 violates their rights to speak and share ideas. Like many of their arguments, this one is premised on their false assertion that H.B. 1557 regulates beyond "classroom instruction." *Supra* Part I. And

even if H.B. 1557 regulated student speech, it would still be constitutional under *Hazelwood* for the reasons noted above.

VI. Plaintiffs failed to plead an equal-protection claim.

1. Plaintiffs argue that H.B. 1557 is unconstitutional because in enacting it the Legislature was motivated by hostility toward LGBT people. But they do not dispute that only people who are personally denied equal treatment have standing to raise equal-protection claims. *Allen v. Wright*, 468 U.S. 737, 755 (1984). Instead, they argue (at 24) that they have pleaded differential treatment. But they never explain how—apart from stigma—they are treated differently. Nor could they; H.B. 1557 treats all students, teachers, and parents the same.

In that way, this case tracks *Moore v. Bryant*, 853 F.3d 245 (5th Cir. 2017). There, the plaintiff alleged that the Mississippi flag's design, featuring the Confederate flag, created a hostile environment. In Plaintiffs' words (at 24), it erected a barrier to his equal access to work. *Moore*, 853 F.3d at 251. But the Fifth Circuit held that plaintiff lacked standing because no one was denied equal treatment. *Id.*

2. Plaintiffs also have no real response to the argument that government speech is not subject to equal-protection analysis. They repeat (at 49 n.20) their theory that the government-speech doctrine does not bar their First Amendment claim. But that says nothing about whether government speech is subject to an equal-

protection challenge—and it is not. *E.g.*, *Fields v. Speaker of Penn. House of Representatives*, 936 F.3d 142, 161 (3d Cir. 2019); *Freedom from Religion Found., Inc. v. City of Warren*, 707 F.3d 686, 698 (6th Cir. 2013); *Bloomberg v. Blocker*, 3:21-cv-575, 2022 WL 485225, at *5 (M.D. Fla. Feb. 17, 2022).

3. Even putting that aside, Plaintiffs have not pleaded that the Legislature had a discriminatory intent. They say (at 49) that they can do that by pointing to just one of eight *Arlington Heights* factors. That is not so. The Eleventh Circuit has affirmed summary judgment on discriminatory intent even though the Plaintiffs had "evidence that supports several factors." *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1322 & n.33 (11th Cir. 2021). The Supreme Court has done much the same. *See Abbott v. Perez*, 138 S. Ct. 2305, 2329 (2018) (reversing discriminatory intent finding when Plaintiffs had some evidence). Instead, the ultimate benchmark is a plausible inference of animus. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020).

Plaintiffs fail on that score. For one, their narrative ignores the obvious indications that H.B. 1557 is not grounded in animus. Once again, Plaintiffs have no constitutional quarrel with the bulk of the law, which largely ensures that parents have transparency into the well-being of their children at school. Beyond that, Plaintiffs never answer why a legislature intent on discriminating against LGBT kids and their families would pass a scrupulously neutral law. And even crediting the

notion that LGBT students suffer when "gender identity" and "sexual orientation" are not taught, Plaintiffs never explain why a hateful legislature would permit instruction on those topics after third grade. That alone defeats their claim because "discrimination is not a plausible conclusion" when there are "obvious alternative explanation[s]." *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009).

At any rate, Plaintiffs' efforts to tick through the *Arlington Heights* factors fall short.

Impact. To show that H.B. 1557 has a discriminatory impact, Plaintiffs must establish that the law, although neutral, will be applied unequally (*i.e.*, that the State will permit some instruction about, say, straight sexual orientations that it would not about LGBT orientations). But again, the law is neutral. *Supra* Part I. There is no plausible allegation that the law will nonetheless cause discrimination. That defeats their claim. *Greater Birmingham Ministries*, 992 F.3d at 1321 (plaintiffs must show both discriminatory purpose and effect).

Plaintiffs cite (at 51) their "lived experience." But that "experience" occurred before H.B. 1557 went into effect. And even crediting those accounts as related to H.B. 1557, the fact that third parties are badly misinterpreting the law does not show that the law is having a discriminatory impact, let alone one the Legislature could have foreseen.

Historical background and statements. Plaintiffs (at 51) continue to cherry-pick statements from the legislative record they say reflects animus. But they do not dispute the substantial evidence cited by the State that the legislative record as a whole reflects an overriding intent to empower parents to control the upbringing of their children. *See* ECF68 at 44–45. The statements Plaintiffs cite are best understood as based on the same motive of protecting and empowering parents. *See* ECF68 at 46–47.

Indeed, the statements must be read that way because of the presumption of legislative good faith. *See League of Women Voters of Fla. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022) (per curiam). Plaintiffs argue (at 52) that the presumption applies only in redistricting cases. That makes no sense: the presumption is a recognition of the sovereign status of state legislatures. Courts have therefore applied the presumption outside of redistricting. *E.g.*, *League of Women Voters*, 32 F.4th at 1373. That includes the Supreme Court which, when it sourced the presumption in *Miller v. Johnson*, cited an affirmative-action case. *See* 515 U.S. 900, 915 (1995).

That leaves Plaintiffs to rely (at 51) on their purportedly "most notabl[e]" evidence—a statement from the Governor's press secretary on her personal Twitter account. But statements by non-legislators (particularly made in a personal capacity) have little if any role to play in assessing legislative intent. *See Greater Birmingham*

Ministries, 992 F.3d at 1325. And a single statement by a non-legislator surely cannot carry more weight than the single statement of a legislator, which the Eleventh Circuit has made clear itself is not enough. *League of Women Voters*, 32 F.4th at 1373.

Without any statements, Plaintiffs (at 52) point to "decades" of supposed generalized "discrimination," most of which has nothing to do with Florida. The charges are false, and the Supreme Court has rejected that method of proving intent anyway. *Abbott*, 138 S. Ct. at 2324 (rejecting the argument that past discrimination infects current laws in the manner of "original sin").

Substantive departure. Plaintiffs claim (at 54) that H.B. 1557 represents a "substantive departure" from existing policy, which Plaintiffs think shows discrimination. There was no such "change"; ensuring a role for parents and promoting age-appropriate education have long been features of Florida law. *E.g.*, Fla. Stat. §§ 1002.20, 1003.41, 1003.42. Beyond that, Plaintiffs are left with the fact that the State enacted a new statute, which itself says nothing about discrimination.

Less discriminatory alternatives. Finally, Plaintiffs complain (at 54–55) that H.B. 1557 is "discriminatory" because legislators rejected certain amendments that Plaintiffs would have preferred to the enacted law. Yet the fact that "the legislature" failed to adopt "the alternative option that Plaintiffs would have preferred" is "unpersuasive" evidence of discriminatory intent. *Greater Birmingham Ministries*,

992 F.3d at 1327. And Plaintiffs never come to grips with the fact that the Legislature *did* adopt a "less discriminatory alternative." The original version of the bill restricted classroom "discussion." *See* ECF68 at 49. That language was amended to "classroom instruction" to make clear that the statute targeted the work of teaching, not ancillary conversations about identity. Again, Plaintiffs cannot explain why a legislature motivated by the sort of animus they describe would adopt such a limiting amendment.

VII. Plaintiffs failed to plead a Title IX claim.

Plaintiffs' brief argument (at 56–57) that they have stated a Title IX claim does little more than reprise their mistaken arguments that the law is discriminatory in other respects. As they recognize, however, their argument faces the additional hurdle that Title IX does not regulate "curricular materials." 34 C.F.R. § 106.42. Plaintiffs respond (at 57) that H.B. 1557 somehow does more than that—but the only portion of the law they challenge regulates "classroom instruction." *Supra* part I. Title IX fosters equality in education. 20 U.S.C. § 1681. The point is that, when all get access to the same classroom instruction, Title IX is not violated. Plaintiffs' understanding of the statute, by contrast, would represent an unprecedented intrusion into the State's traditional role in setting classroom agendas, which would require an unmistakably clear statement nowhere present in the statute. *E.g.*, *Bond v. United States*, 572 U.S. 844, 862 (2014).

CONCLUSION

The State Defendants' motion to dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Consistent with Local Rule 7.1(F) and the order of this Court, this motion contains 6,999 words.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2022, a true and correct copy of the foregoing was filed with the Court's CM/ECF system, which will provide service to all parties.

/s/ Henry C. Whitaker
Solicitor General