IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GLBT YOUTH IN IOWA SCHOOLS TASK FORCE d/b/a/ IOWA SAFE SCHOOLS, et al., *Plaintiffs,* v. KIM REYNOLDS, in her official capacity as Governor of the State of Iowa, et al., *Defendants.*	Case No. 4:23-cv-00474-SHL-SBJ

REPLY TO DEFENDANTS' RESISTANCE TO MOTION FOR PRELIMINARY INJUNCTION

SF 496 ("the law") should be enjoined during the pendency of this action. It is unconstitutional on its face and violates Plaintiffs' First Amendment, equal protection, and Equal Access Rights. Chaos ensued as the school year began as school districts began implementing SF 496 in varying and inconsistent ways. The law has had an unprecedented and devastating impact on LGBTQ+ students. State Defendants mischaracterize the scope and effect of SF 496, claiming it is a routine curriculum measure. They are wrong. State Defendants also fail to acknowledge Plaintiffs' vagueness or overbreadth claims, let alone respond to the applicable tests. All Plaintiffs have standing to challenge the law and have satisfied every factor warranting a preliminary injunction.

I. State Defendants Mischaracterize the Scope and Impact of the Law.

State Defendants downplay the harm SF 496 has caused in numerous respects. First, they now seek to narrow the interpretation of the law so that the don't say gay or trans provisions do

not apply to libraries. But they did not so limit the law in their rulemaking,[1] and numerous school districts have interpreted it otherwise, demonstrating the vagueness of the law. Accepting a government defendant's narrower post-litigation interpretation is not how courts examine statutes for overbreadth. *See Am. Booksellers v. Webb*, 919 F.2d 1493, 1505–06 (11th Cir. 1990). "[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige" based on voluntary promises "to use a statute responsibly." *U.S. v. Stevens*, 559 U.S. 460, 480 (2010).

Second, State Defendants erroneously describe the law as "neutral" (Res. at 17, 21). The law is not neutral. On its face, the law targets the subjects of sexual orientation and gender identity, and its purpose and effect is to chill and restrict LGBTQ+ content and expression. If the law were intended to be applied neutrally, *all* books and curricular content containing *any* pronouns or mention of different-sex relationships would be excised from K-6 classrooms under the don't say gay or trans provision. The absurdity of that interpretation explains why schools and students have interpreted the law as suppressing solely messages of LGBTQ+ affirmation. State Defendants' own declarants belie their claim that the law is intended to apply neutrally to all sexual orientations and gender identities. They object specifically to materials that simply acknowledge the existence of all sexual orientations and gender identities without privileging anyone over any other. (Ex. A, Abram Aff. ¶¶ 2–12, ECF No. 53-1; Ex. C, Collier Aff. ¶¶ 3–6, 8–10, ECF No. 53-1.)[2]

[1] *See* ISBE proposed rules, available at https://educateiowa.gov/sites/default/files/2023-11/2023-11-15SBE-Rules-Chapter12.pdf (last visited Dec. 20, 2023).

[2] State Defendants' declarants, many of whom do not have students enrolled in any Iowa public school, offer excerpts of books they find offensive, and which they seek to remove from school libraries. However, State Defendants make no effort to demonstrate how any of these materials satisfy the test for obscenity. *See Miller v. California*, 413 U.S. 15, 24 (1973).

II. All Plaintiffs Have Standing.

All Plaintiffs have demonstrated standing for each of their claims.[3] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (Standing requires plaintiff to have (1) "an injury in fact[,]" (2) "fairly traceable to the challenged action of the defendant" and that (3) can "likely . . . be redressed by a favorable decision") (cleaned up). First, Plaintiff Students have standing to bring their chilled speech claims. A plaintiff "needs only to establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute. Self-censorship can itself institute injury in fact." *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (citing *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988)). All Plaintiff Students have alleged that they wish to engage in protected speech or expression, and that they reasonably have self-censored or been coerced to remain silent as a result of the law. (*See, e.g.*, B.F. Decl. ¶¶ 6, 8, ECF No. 2-2; B.F.S. Decl. ¶ 7, ECF No. 2-4; James Doe Decl. ¶ 8, ECF No. 2-6; P.B.-P. Decl. ¶¶ 7,8, 13, ECF No. 2-3; P.C. Decl. ¶ 7, ECF No. 2-5).

State Defendants argue that Plaintiff Students' self-censorship is unreasonable given that the enforcement provisions of the law apply directly only to school officials. (Res. at 11). This argument provides little comfort to Plaintiff A.C., a fourth-grader whose acknowledgement in class of her own identity could be construed as "promotion" under the don't say gay or trans provision, and who therefore conceals herself for fear of being singled out and shamed in front of her classmates. Students need not point to provisions mandating student discipline to show that they reasonably fear being stigmatized and labeled inappropriate. In the educational context, courts

[3] State Defendants do not expressly challenge Plaintiffs' standing to bring their vagueness, overbreadth, right to receive information, or equal access claims. With respect to the right to receive information claim in particular, Plaintiffs note that multiple Student Plaintiffs wish to check out books featuring LGBTQ+ characters and themes from their school libraries but are unable to do so because of SF 496 and its implementation. (*See* B.F. Decl. ¶ 12, ECF No. 2-2; B.F.S. Decl. ¶ 10, ECF No. 2-4; T.S. Decl. ¶ 8, ECF No. 2-7.)

have recognized enforcement mechanisms short of direct disciplinary action as creating an objectively reasonable chill for standing purposes. *See Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1117, 1122–24 (11th Cir. 2022) (objectively reasonable even absent threat of punishment for a student to self-censor to avoid being labeled offensive or stigmatized as engaging in inappropriate speech); *Gerlich v. Leath*, 152 F. Supp. 3d 1152, 1168–69 (S.D. Iowa 2016) (university officials had previously disapproved T-shirt designs and made denigrating comments about student organization's mission); *Int'l Ass'n of Firefighters v. City of Ferguson*, 283 F.3d 969, 971–73 (8th Cir. 2002) (fear of consequence to another person sufficient for chilled speech standing where plaintiff's interests are also affected). Vague as SF 496 is, Plaintiff Students reasonably fear that any discussion of gender identity or sexual orientation in a classroom setting could result in their being singled out and silenced, in addition to disciplinary action against their teachers. (*See* B.F. Decl. ¶¶ 6, 8; B.F.S. Decl. ¶ 7; James Doe Decl. ¶ 5; P.B.-P. Decl. ¶ 8.) Student Plaintiffs have an interest in a supportive environment, and disciplining teachers who facilitate such an environment injures that interest. *Cf. Price v. Denison Indep. Sch. Dist.*, 694 F.2d 334, 375 (5th Cir. 1982) (students and parents had standing to challenge school's discriminatory hiring because it injured students' interest in a diverse faculty).

State Defendants' perfunctory argument that ISS lacks standing fails for two reasons. First, ISS *does* allege an injury to its own interests; it has been forced to divert its resources to answering questions about SF 496's scope and implementation. (*See* Tayler Decl. ¶¶ 19–21, 32–33, ECF No. 2-8.) Second, ISS satisfies the test for associational standing through specific harms suffered by its members, in the form of administrative hurdles encountered by, and in some cases closures of, member GSAs. *See id.* ¶¶ 23–28; *Hunt v. Wash. State Apple Advert. Comm.*, 432 U.S. 333, 343 (1977) ("[A]n association has standing to bring suit on behalf of its members when: (a) its members

would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit"). SF 496 has hindered ISS's member GSAs' ability to operate; that interest is germane to ISS's purpose, which is "to provide safe, supportive, and nurturing learning environments and communities for LGBTQ+ youth and their allies," Tayler Decl. ¶ 3; and this case does not turn on any factual or legal dispute specific to any individual member GSA or member thereof. Furthermore, ISS has standing to assert the free-association rights of students who are not out to their parents because those students' very presence in this litigation would result in harmful consequences at home. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458–59 (1958).

State Defendants attack Plaintiffs' standing to challenge the law's forced outing provisions. However, because Plaintiffs mount a facial challenge to a content-based regulation of speech as substantially overbroad, Plaintiffs "are permitted to challenge [the Law] not because their own rights to free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Am. Booksellers Ass'n, Inc*., 484 U.S. at 392–93 (quotation omitted). In any event, Plaintiff students who are members of GSAs are themselves impacted by the forced outing provision's interference with their ability to associate with other students who fear being reported, and Plaintiff ISS represents the interests of its member GSAs, a number of which include students who fear being outed. (Tayler Decl. ¶¶ 22, 28; James Doe Decl. ¶¶ 5–7; Robert Smith Decl. ¶ 4, ECF No. 2-9; *see also* B.F. Decl. ¶ 13.)

III. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

All Plaintiffs have demonstrated a likelihood of success on their claims.[4] State Defendants argue the law is exempt from First Amendment scrutiny as government speech (Res. at 10, 13–19), ignoring a half century of precedent establishing that students enjoy free speech rights in school settings. *See, e.g.*, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021); *Rosenberger v. Rector & Visitors of Univ. Of Va.*, 515 U.S. 819, 828-30 (1995) (free-speech guarantee prohibits suppression of speech "because of its message," including in the public-school setting). State Defendants fail to acknowledge the law's breathtaking reach, which chills student speech, expression, and association, both inside and outside the classroom, even core political speech. *See Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist.*, 83 F.4th 658, 666–67 (8th Cir. 2023) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–62 (2014)) (constraints on student speech about gender identity in school can implicate core political speech and be subject to the most exacting scrutiny). Plaintiff Students also have demonstrated a likelihood of success on their claim that the law violates their right to receive information and ideas, see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976), a right that is nowhere more vital than in schools, *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972). State Defendants attempt to avoid this authority by focusing on the government's right to create a library inventory in the first place. But once a book has been placed in a library, a school may not remove it to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Bd. of Educ. v. Pico*, 457 U.S. 853, 854 (1982) (quoting *W. Virginia State Bd. of Educ.*

[4] State Defendants do not meaningfully address Plaintiffs' overbreadth and vagueness claims. Plaintiffs therefore refer the Court to their opening brief as to those claims. (*See* Mem. of Law in Support of Mot. for P.I. at 12–16, ECF No. 2-1.) To the extent a reply on those claims is warranted, Plaintiffs note that State Defendants' description of the statutory text focuses on the definition of "sex act" and ignores the vagueness of "description or visual depiction." For example, it is unclear whether a passage stating in passing that two characters "slept together" would qualify as a "description" of a sex act.

v. Barnette, 319 U.S. 624, 642 (1943)); *see also Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771, 776–79 (8th Cir. 1982). State Defendants contend that *Pico* lacks precedential value (Res. at 18). Even if that were true, State Defendants ignore *Pratt*, a binding Eighth Circuit decision that only the Eighth Circuit or Supreme Court can overrule. *See United States v. Smith*, 460 F. Supp. 3d 783, 792 (E.D. Ark. 2020) (Whether *Pratt* is still good law "is a decision for the Eighth Circuit, not the District Court," and "[t]he District Court's role here is to faithfully apply [*Pratt*] 'unless and until' it is 'reversed by the Supreme Court,' overruled by the Eighth Circuit sitting *en banc*, or becomes clearly irreconcilable with post-[*Pratt*] Supreme Court precedent." *Id.* (quoting *United States v. Robinson*, 697 F. App'x 486, 488 (8th Cir. 2017)). Regardless of the standard applied, it is beyond dispute that government may not censor materials based solely on disapproval of the message or to avoid political controversy. *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 190 (5th Cir. 1995).

The chilling effect of the law violates Plaintiffs' right to expressive association. GSAs are undeniably expressive associations under the law. *See Straights & Gays for Equal. v. Osseo Area Sch.-Dist. No. 279*, 540 F.3d 911, 913 (8th Cir. 2008) ("SAGE II")*; Gay Students Org. of Univ. of New Hampshire v. Bonner*, 509 F.2d 652, 660 (1st Cir. 1974). State Defendants contend that SF 496 does not reach non-curricular groups and deny that plaintiffs provided evidence of the closure of Iowa City's GSA notwithstanding testimony attesting to its closure. (R. Carlson Decl. ¶ 11, ECF No. 2-10.) The law, on its face and as applied, has caused school districts to either shutdown GSAs, or impose discriminatory restrictions leading to declining membership. (Tayler Decl. ¶¶ 23–30.)[5]

[5] The State further naively asserts that mere membership in the GSA would not trigger the forced outing provision. Indeed, Plaintiffs have not argued that. But full participation in the GSA involves frank and candid discussions about gender identity and sexual orientation, among other topics. *See* "What is a GSA?", The GSA Network, Iowa Safe Schools, available at: https://iowasafeschools.org/the-gsa-network (last visited Dec. 21, 2023) ("GSAs provide a place for students to meet, support and listen to each other about their experiences, talk about issues related to orientation and gender identity/expression, and work to end homophobia and transphobia in their school.").

Similarly, Plaintiffs are likely to succeed on their Equal Access Act claims. The State claims that the law does not touch noncurricular student groups because it does not mention them explicitly. However, Plaintiff GSA members and ISS member GSAs have experienced the same harm, and made the same showing as the students in the case cited by the State whose claims were adequate to invoke the protections of the EAA. *See SAGE II*, at 914 (limitations on group's access to communication avenues and meeting times and places sufficient to implicate EAA); *also* Res. at 22 (citing same). Plaintiffs here level parallel claims that their ability to access the same space for promotion of their GSAs has been limited in a way unique to them because of the viewpoint and content of their meetings, and which is not experienced by other non-curricular groups. The GSAs are non-curricular student groups operating in schools which have created a limited open forum, so their unequal treatment violates the EAA.

Plaintiffs also have demonstrated a likelihood of success on their overbreadth and vagueness claims. The confusion over this law is manifest, both in frank admissions by School Districts that they cannot understand what the law requires, and through organizations like ISS having to divert considerable time and resource to help teachers and students alike to understand the contours and prohibitions of SF 496. ISS Decl. ¶¶ 20, 21, 23, 28, 29, 30.

Plaintiffs are likely to succeed on their equal protection claims. State Defendants argue heightened scrutiny does not apply because SF 496 does not classify people based on sex nor impose differential treatment based on sex. (Res. 20). However, heightened scrutiny applies also to classifications based on sexual orientation and gender identity/transgender status both in of themselves and as forms of sex discrimination. *Baskin v. Bogan*, 766 F.3d 648, 654–657 (7th Cir. 2014) (sexual orientation); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (transgender status); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020) (discrimination on the bases of

sexual orientation and transgender status "necessarily entails discrimination based on sex"). Here, SF 496 was enacted with the purpose to discriminate and has the effect of discriminating against LGBTQ+ students, subjecting them to differential and adverse treatment on the basis of their sex, sexual orientation, gender identity, and transgender status.

Further, State Defendants fail to identify any legitimate purpose that SF 496 serves. SF 496 does not include a stated goal of ensuring "age-appropriate and research-based lessons"; that language is directed at the health class exception to the all-ages ban. Nor can SF 496 be justified as necessary to keep "inappropriate material away from children in school" or to keep "parents informed about their child's health, medical, and psychological information," when pre-existing Iowa law already protects more directly this professed government interest. *See 281 Care Comm.*, 766 F.3d at 789. And the State Defendants cannot justify SF 496 as allowing parents to decide whether they teach their children about gender identity and sexual orientation when the law endorses the hostility of certain parents to acknowledging in school that LGBTQ+ people exist. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("private biases" are not "permissible considerations for" governmental action); *see also Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (personal religious or philosophical objections to gay people may not constitutionally be given the imprimatur of the Government); *Romer v. Evans*, 517 U.S. 620, 635 (1996). At bottom, SF 496 does not serve any legitimate purpose, pedagogical or otherwise, let alone the exceedingly persuasive or compelling one required, and is instead rooted in animus toward and moral disapproval of LGBTQ+ people.[6]

[6] Indeed, the testimony of State Defendants' own declarant in support of the law betrays a level of vitriol that can only be described as animus. *See, e.g.,* https://twitter.com/Rushthewriter/status/1626324555596701698?s=20 (testimony of David Alexander comparing transgender people to "spayed and neutered" animals, and describing opponents of the law as "children-hating" and "slave-owners").

IV. The Remaining Factors Favor Issuance of a Preliminary Injunction.

Plaintiffs reiterate that likelihood of success on the merits of a First Amendment claim generally satisfies the other preliminary injunction requirements. *See Rodgers v. Bryant*, 942 F.3d 451, 456 (8th Cir. 2019). Even so, State Defendants' arguments regarding the other requirements are unpersuasive.

Plaintiffs have suffered and continue to suffer irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Powell v. Noble*, 798 F.3d 690, 702 (8th Cir. 2015) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). That students might purchase books elsewhere is no replacement for access to books in school libraries. *Little v. Llano Cnty.*, 2023 WL 2731089 at *12 (W.D. Tex. 2023).

The balance of the equities favors plaintiffs. "[I]t is always in the public interest to protect constitutional rights." *D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 1004 (8th Cir. 2019). And absent SF 496, the State continues to maintain the authority to prosecute the dissemination of obscene material to minors. *See* Iowa Code § 728.2. Parents may still request removal of materials from schools and school libraries, request their own child be prevented from checking out certain books, and request their own child be exempted from some curriculum request the removal of books or materials under procedures that pre-date the law. In contrast, right now, the rights of Plaintiffs and others like them are being eroded, and with each day that passes, they suffer further irreparable harm.

Conclusion

For the foregoing reasons, enforcement of SF 496 should be enjoined during the pendency of this action.

Date: December 21, 2023

Respectfully submitted

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**Application for admission pro hac vice granted.*
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