

NATIONAL LGBT BAR ASSOCIATION  
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Litigation Primer Attacking State  
“No Promo Homo” Laws:  
Why “Don’t Say Gay” Is Not O.K.

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Our children have to deal with [the] complexity [of their sexuality] long before they’ve reached sufficient maturity . . . . Silence in the classroom only adds to the cloak of pain and shame, whereas open, age-appropriate

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\* © 2015 Jillian Lenson. J.D. 2014, Boston College Law School; B.A. 2010, University of Chicago. Thank you to my family and friends for their unconditional love and support. Thank you to the teachers and professors who pushed me to perfect the details without stifling my big ideas. Thank you to the legal department of Human Rights Campaign for giving me work that moved me and provided the inspiration for this piece; and to the National LGBT Bar for recognizing the potential in my Article and supporting its publication. Finally, thank you to the members and editorial board of the Tulane Journal of Law and Sexuality for their thoughtful work in editing and production. To the LGBT youth who continue to live in fear because of who they are, this is for you—we will keep fighting.

conversation may give [students] a chance and the courage to talk to an adult they trust.<sup>1</sup>

## I. INTRODUCTION

In a recent study by Human Rights Campaign (HRC), American youth were asked to identify the most important problems in their lives.<sup>2</sup> For non-LGBT students, the answers, in order of decreasing popularity, were (1) classes, exams, and grades; (2) college and career; (3) financial pressure related to college or job. These answers are typical of students growing up in the current generation; they are highly focused on both school and future successes.<sup>3</sup> The responses of LGBT youth to the same question, however, were markedly different.<sup>4</sup> LGBT students identified the following as their most important problems: (1) nonacceptance of families, (2) school and bullying problems, and (3) fear of being out or open.<sup>5</sup> This glaring contrast in responses is incredibly revealing: instead of worrying about the things students of their age are normally concerned with, LGBT students are almost exclusively stressed about being accepted, being harassed, and simply being themselves.

The concerns of this young population are grounded in troubling facts: LGBT students are twice as likely as non-LGBT students to be both verbally and physically harassed at school, as well as excluded by their peers because they are different.<sup>6</sup> An overwhelming 92% of LGBT students say that they hear negative messages about their sexuality, and one-third report that they are closeted at school.<sup>7</sup> Though some states offer bullying protection specifically enumerated to protect LGBT students and help address some of these realities, the majority do not.<sup>8</sup> Still further, in nine states, school officials are statutorily prohibited from

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1. Chas Sisk, *Tennessee Lawmakers Advance "Don't Say Gay" Bill*, USA TODAY (Feb. 16, 2012, 11:46 AM), <http://usatoday30.usatoday.com/news/nation/story/2012-02-16/tennessee-bill-homosexuality/53116470/1> (quoting Rev. Thomas Kleinert) (internal quotation mark omitted).

2. *Growing Up LGBT in America*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/youth#.UrDrfbQaeSo> (last visited Sept. 30, 2014).

3. *Id.*

4. The author recognizes that LGBT youth are just one minority youth group among, as well as encompassing, many others that also face additional important outside concerns that detract from their ability to focus primarily on school and educational futures.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Statewide School Anti-Bullying Laws and Policies*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/maps-of-state-laws-policies> (last visited Sept. 30, 2014).

providing LGBT students with the information, advice, or acknowledgment necessary to support this vulnerable student population.<sup>9</sup>

“No Promo Homo” or “Don’t Say Gay” laws are statutes that serve to limit or direct the discussion of LGBT issues in a way that is extremely detrimental for LGBT student populations. These laws exist in Alabama, Arizona, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, and Utah, and they are formatted in one of two general ways.<sup>10</sup> One format is considered “neutral,” meaning it does not explicitly instruct school officials to speak negatively against homosexuality; it just forbids discussion of the topic altogether.<sup>11</sup> The other format, however, mandates instruction that portrays homosexuality as sinful, unlawful, or unsafe.<sup>12</sup> Though most of these laws only explicitly limit this instruction in the context of sex education, this is the area of education where discussing sexuality is the most essential.<sup>13</sup> Further, the scope of these laws is not limited to the sex education classroom—the underlying message is clear for teachers acting in any of their professional capacities: talking about homosexuality at all could cost them their jobs.<sup>14,15</sup>

While it is manifestly detrimental for an LGBT student to be told by their teachers that their sexual orientation is wrong, laws that forbid any discussion of the subject, so called “neutral laws,” can have an equally harmful effect. These laws convey an unambiguous message that homosexuality is so immoral that even its very existence must be denied: “[T]he message schools and states send through these policies is clear: LGBTQ identities are wrong and should not be promoted, discussed, or even mentioned.”<sup>16</sup> Moreover, when school officials are statutorily prohibited from discussing homosexuality, they have extremely difficult choices to make when their professional or moral duties to protect the

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9. *9 States with Anti-Gay Laws That Aren’t That Different from Russia’s*, THINK PROGRESS (Feb. 4, 2014, 8:22 AM), <http://thinkprogress.org/lgbt/2014/02/03/3241421/9-state-gay-propaganda-laws/>.

10. *Id.*

11. “No Promo Homo” Laws, GAY, LESBIAN & STRAIGHT EDUCATION NETWORK (Nov. 5, 2014), [glsen.org/learn/policy/issues/nopromohomo](http://glsen.org/learn/policy/issues/nopromohomo).

12. *Id.*

13. *Id.*

14. *Id.*

15. See Sabrina R. Erdely, *One Town’s War on Gay Teens*, ROLLING STONE (Feb. 2, 2012 10:55 AM), <http://www.rollingstone.com/politics/news/one-towns-war-on-gay-teens-20120202#ixzz2nkrUCLXV> (linking teachers’ failure to protect bullied students in the Anoka-Hennepin school district to their fear of being fired for violating the “No Homo Promo” policy).

16. Ashley E. McGovern, *When Schools Refuse To ‘Say Gay’: The Constitutionality of Anti-LGBTQ ‘No-Promo-Homo’ Public School Policies in the United States*, 22 CORNELL J.L. & PUB. POL’Y 465, 473 (2012).

well-being of their students conflict with this obligation to the state.<sup>17</sup> In light of these statutes, teachers have turned a blind eye to clear bullying and harassment situations instead of intervening as they otherwise would.<sup>18</sup> The effect on the students left defenseless in these circumstances is disastrous: “[I]t is well established that attacks on students on the basis of their sexual orientations are harmful not only to the students’ health and welfare, but also to their educational performance and their ultimate potential for success in life.”<sup>19</sup>

With recent victories for the rights of same-sex couples in *United States v. Windsor* and in several state legislatures, progress in the LGBT rights movement has been a matter of national attention.<sup>20</sup> These successes make it easy to feel like much of the gritty fighting is over and that advocates can rely on momentum to eventually achieve full equality for all LGBT citizens. The reality, however, is that for one of the most crucial and vulnerable facets of the LGBT community, equal protection is sorely lacking in almost a fifth of the country. These deplorable laws are not becoming irrelevant on their own; instead, they are still very much a part of the everyday lives of students in these states, and moreover, both Tennessee<sup>21</sup> and Missouri<sup>22</sup> have recently tried to enact

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17. Currently, all of these statutes punish a teacher’s violation with solely administrative discipline. Roxana Orellana, *Teacher’s Sex-Ed Talk Riles Parents*, SALT LAKE TRIB. (May 30, 2008, 12:58 AM), [http://www.sltrib.com/ci\\_9424130](http://www.sltrib.com/ci_9424130). While fear of a punishment that could get a teacher fired and deprive them of their entire livelihood is strong enough incentive to follow these laws, in 2008, a Utah legislator took it a step further and attempted to pass a law which would enforce criminal penalties on teachers who violated these mandates.

18. See Sabrina R. Erdely, *One Town’s War on Gay Teens*, ROLLING STONE (Feb. 2, 2012 10:55 AM), <http://www.rollingstone.com/politics/news/one-towns-war-on-gay-teens-20120202#ixzz2nkrUCLXV> (“‘LGBTQ students don’t feel safe at school,’ says Anoka Middle School for the Arts teacher Jefferson Fietek, using the acronym for Lesbian, Gay, Bisexual, Transgender and Questioning. ‘They’re made to feel ashamed of who they are. They’re bullied. And there’s no one to stand up for them, because teachers are afraid of being fired.’”).

19. Gillman *ex rel.* Gillman v. Sch. Bd. for Holmes Cnty., Fla., 567 F. Supp. 2d 1359, 1371 (N.D. Fla. 2008).

20. In 2013, six states (Rhode Island, Delaware, Minnesota, New Jersey, Hawaii and Illinois) legalized same-sex marriage and the Supreme Court held that section 3 of the Defense of Marriage Act, which federally defined marriage as between one man and one woman and, as such, denied legally married same-sex couples access to federal benefits, was unconstitutional. *United States v. Windsor*, 133 S. Ct. 2675 (2013); Morgan Little, *Gay Marriage Movement Wins Significant Victories in 2013*, L.A. TIMES (Dec. 9, 2013, 11:48 AM), <http://www.latimes.com/nation/nationnow/la-pn-gay-marriage-movement-gains-2013-20131206,0,1888807.story#axzz2nBz5GZd5>.

21. H.B. 229, 107th Gen. Assemb. (Tenn. 2012); see Sisk, *supra* note 1.

22. H.R. 2051, 96th Gen. Assemb. (Mo. 2012); Randy Turner, *Sponsor of “Don’t Say Gay” Bill To Head Missouri House Education Committee*, DAILY KOS (Jan. 10, 2013, 10:20 PM), <http://www.dailykos.com/story/2013/01/11/1178054/-Sponsor-of-Don-t-Say-Gay-bill-to-head-Missouri-House-Education-Committee#>.

these mandates, and at a broader level than ever before.<sup>23</sup> While both of these proposed bills eventually died, it is evident that proponents of this type of legislation have been reenergized as opposed to deflated by the LGBT rights movement’s recent progress. As such, litigating, and therefore invalidating, these laws is an essential step in ensuring that the next generation of LGBT youth can grow, learn, and live to their full potential. This Article was written in recognition of the immediacy and importance of combating these laws, and under the belief that they are indeed vulnerable to skilled and focused litigation.

Therefore, this Article is intended to serve as a guide of attack. It will first provide an overview of where “No Promo Homo” laws exist and relevant litigation that has already occurred. After laying the landscape, it will outline the constitutional and federal litigation theories that are the most damaging to the continuing existence of these laws, in order of decreasing breadth and effectiveness. Finally, it will address a potential federal individual claim for damages that could help chip away at these laws.

## II. OVERVIEW OF STATE “NO PROMO HOMO LAWS”

### A. *Nine States*

- Alabama requires that sex education courses and instruction include “an emphasis, via factual manner and from a public health perspective” that homosexuality is not an acceptable lifestyle and criminal under state law, despite *Lawrence v. Texas*.<sup>24</sup>
- Arizona does not have required sex education but if schools do decide to teach this subject they cannot promote or portray homosexuality in a positive way.<sup>25</sup>
- Louisiana’s sex education classes cannot show any sexually explicit homosexual material (can show sexually explicit heterosexual material).<sup>26</sup>
- Mississippi, which still has sodomy laws on the books despite *Lawrence v. Texas*,<sup>27</sup> promotes sex education classes that teach state

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23. Missouri’s proposed law would have prohibited any instruction, material, or extracurricular activity sponsored by a public school except in scientific instruction about reproduction. Tennessee’s proposed law would have prohibited teaching anything in public elementary and middle school that discusses sexual orientation other than heterosexuality. Both of these laws go well beyond specific sex-education prohibitions.

24. ALA. CODE § 16-40A-2 (1975); *Lawrence v. Texas*, 539 U.S. 558 (2003).

25. ARIZ. REV. STAT. § 15-716(C) (LexisNexis 2013).

26. LA. REV. STAT. ANN. § 17:281(A)(3) (2012).

27. 539 U.S. 558 (2003).

law as it relates to homosexuality and “that a mutually faithful, monogamous relationship in the context of marriage is the only appropriate setting for sexual intercourse.”<sup>28</sup>

- North Carolina’s sex education classes must teach that a “mutually faithful monogamous heterosexual relationship in the context of marriage” is the best way to avoid AIDS and other sexually transmitted diseases.<sup>29</sup>
- Oklahoma’s sex education classes must teach that engaging in homosexuality is primarily responsible for contact with the AIDS virus.<sup>30</sup>
- South Carolina’s sex education classes can only talk about homosexuality in the context of sexually transmitted diseases.<sup>31</sup>
- Texas mandates that all education for minors must teach that homosexual conduct is unacceptable and illegal under state law (despite the resulting conflict with *Lawrence*).<sup>32</sup>
- Utah’s health instruction prohibits the advocacy of homosexuality,<sup>33</sup> and schools must limit or deny authorization of, or school building use to, a club that involves “human sexuality,”<sup>34</sup> which is defined to include “advocating or engaging in sexual activity outside of [the] legally recognized marriage or forbidden by state law,” or “presenting information in violation of [the] laws governing sex education.”<sup>35</sup>

Last year, both Tennessee and Missouri attempted to introduce broader laws.

- Tennessee’s law, which passed the state house committee, would have prohibited teaching anything in public elementary and middle school that discusses sexual orientations other than heterosexuality.<sup>36</sup>
- Missouri’s law, which died in committee, would have prohibited “instruction, material, or extracurricular activity sponsored by a public school that discusses sexual orientation other than in scientific instruction concerning human reproduction.”<sup>37</sup>

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28. MISS. CODE ANN. § 37-13-171(2)(e) (2012).

29. N.C. GEN. STAT. § 115C-81(e1)(4)(e) (2013).

30. 70 OKLA. STAT. tit. 70, § 11-103.3(D)(1)-(2) (2013).

31. S.C. CODE ANN. § 59-32-30(A)(5) (2012).

32. TEX. HEALTH & SAFETY CODE ANN. § 85.007(b)(2) (West 2013).

33. UTAH CODE ANN. § 53A-13-101 (LexisNexis 2012).

34. *Id.* § 53A-11-1206(1)(b)(3).

35. *Id.* § 53A-11-1202(8)(a)-(b).

36. H.R. 229, 107th Gen. Assemb. (Tenn. 2012).

37. H.R. 2051, 96th Gen. Assemb., 2d Sess. (Mo. 2012).

*B. Relevant Past Litigation*

The only notable state law challenge thus far is *National Gay Task Force v. Board of Education of Oklahoma City*.<sup>38</sup> In this case, the United States Court of Appeals for the Tenth Circuit struck down Oklahoma’s original “No Promo Homo” statute as unconstitutionally broad. The court found that the provision in the statute that prohibited teachers from advocating, encouraging, or promoting homosexual activity violated their First Amendment Free Speech rights.<sup>39</sup> While this case fell short of completely overturning Oklahoma’s “No Promo Homo” mandate, it represents persuasive precedent going forward for a potential First Amendment challenge to these laws.<sup>40</sup> It is also worth noting that Alabama, Mississippi, and Texas’ statutes mandate instruction that teaches that homosexual activity is illegal, even though the United States Supreme Court held in *Lawrence* that these intimate choices cannot be criminalized.<sup>41</sup>

There has also been litigation leading to settlements of these policies at the school district level. In 2011, the Southern Poverty Law Center and National Center for Lesbian Rights brought a lawsuit on behalf of five current and former students of the Anoka-Hennepin School District in Minnesota.<sup>42</sup> This school district had a “Sexual Orientation Curriculum Policy (SOCP)” that stated:

Teaching about sexual orientation is not a part of the District adopted curriculum; rather, such matters are best addressed within individual family homes, churches, or community organizations. Anoka-Hennepin staff, in the course of their professional duties, shall remain neutral on matters regarding sexual orientation including but not limited to student led discussions.<sup>43</sup>

The school district and plaintiffs entered a consent decree where the school district agreed to specifically repeal its SOCP, implement a program with significant protections for LGBT students (“with the aim of preventing bullying and creating a more accepting environment”), and

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38. 729 F.2d 1270, 1274 (10th Cir. 1984), *aff’d sub nom.* Bd. of Educ. of Okla. City, Okla. v. Nat’l Gay Task Force, 470 U.S. 903 (1985).

39. *Id.*

40. See OKLA. STAT. tit. 70 § 11-103.3(D)(1)–(2) (2013). Following the ruling in *National Gay Task Force*, the Oklahoma legislature passed a replacement statute that requires that sex education instruction explicitly connect homosexuality with AIDS, which is still current.

41. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

42. Madelyn Rodriguez, *See No Evil, Hear No Evil, Speak No Evil; Stemming the Tide of No Promo Homo Laws in American Schools*, SELECTEDWORKS 15-17 (Sept. 2012), [http://works.bepress.com/madelyn\\_rodriguez/1](http://works.bepress.com/madelyn_rodriguez/1).

43. *Id.* at 16.

assert that school officials could affirm the self-worth of their LGBT students.<sup>44</sup>

In late 2012, the American Civil Liberties Union (ACLU) and the ACLU of Utah sued the Davis School District in Utah after they instructed elementary schools to remove a children's book about a family with same-sex parents.<sup>45</sup> The school district defended the removal of the book under Utah's "No Promo Homo" law's prohibition of "advocacy of homosexuality."<sup>46</sup> In January 2013, this case settled and the Davis School District instructed its librarians to return the book to the shelves, never remove it again, and only restrict access to it if specifically instructed by a child's parents.<sup>47</sup>

These case examples expose the deep legal vulnerability of these laws, and they are truly ripe for removal with strategic litigation.

### III. LITIGATION STRATEGIES

#### A. *Constitutional Challenges*

##### 1. First Amendment Claims for Violation of a Teacher's Right to Free Speech

###### a. Teacher's Right to Free Speech

Teachers face a unique injury through these laws: their ability to speak freely about issues of sexuality is explicitly limited. As such, the strongest potential challenge to these statutes would be a teacher's First Amendment claim. The First Amendment of the United States Constitution prohibits the government from making any law "abridging the freedom of speech," and this mandate is a cornerstone of American culture and jurisprudence.<sup>48</sup> In *Tinker v. Des Moines Independent Community School District*, the Supreme Court established the existence of this fundamental right within the school context for both students and teachers.<sup>49</sup> Schools are limited public forums, and thus the right to free speech is subjected to greater limitation than it would be in a completely public forum. However, the Supreme Court has found that even within

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44. *Id.* at 17.

45. *A.W. and C.W. v. Davis Sch. Dist.*, AM. CIVIL LIBERTIES UNION (Jan. 31, 2013), <https://www.aclu.org/lgbt-rights/aw-and-cw-v-davis-school-district>.

46. *Id.*

47. *Utah School District Agrees Not To Remove Library Books Containing LGBT Content*, AM. CIVIL LIBERTIES UNION (Jan. 31, 2013), <http://www.aclu.org/free-speech-lgbt-rights-utah-school-district-agrees-not-remove-library-books-containing-lgbt-content>.

48. U.S. CONST. amend. I.

49. 393 U.S. 503 (1969).

this context, a teacher’s speech can only be limited when it results in a material or substantial interference or disruption of the normal activities of the school.<sup>50</sup> The Court made it abundantly clear that “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” is not sufficient to justify a limitation on expression.<sup>51</sup>

Given this standard, there is no precedent that LGBT advocacy, let alone mere discussion of the subject in order to support an LGBT student, would ever create a disruption sufficient to justify this limitation. In fact, speech that substantively addresses LGBT issues has been recognized as core political speech by the Tenth Circuit, which found that discussion of these issues constituted “statements aimed at legal and social change.”<sup>52</sup> Protection of such “core” speech is subjected to exacting constitutional protection in any context: “[T]he Court has frequently reaffirmed that speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”<sup>53</sup>

The Supreme Court has already addressed the issue of balancing core political speech from government employees against the state’s interest as an employer in promoting the efficiency of the public services it performs.<sup>54</sup> In *Pickering v. Board of Education of Township High School District 205, Will County*, the Court held that speech by public school teachers on matters of public concern enjoys the same protection as a “similar contribution by any member of the general public” unless that speech “either impeded the teacher’s proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally.”<sup>55</sup> Although the teacher’s speech at issue in *Pickering* occurred outside of the school and accordingly may be viewed as having some greater protection than a teacher’s speech to students within a school, that speech was also a disruptive and direct criticism of school policies and, therefore, more seriously hindered the state’s interest in school efficiency than factual or positive classroom discussion about LGBT issues would.<sup>56</sup> Further, in *Givhan v. Western Line Consolidated*

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50. *Id.* at 514.

51. *Id.* at 509.

52. Nat’l Gay Task Force v. Bd. of Educ. of Okla. City, Okla., 729 F.2d 1270, 1274 (10th Cir. 1984).

53. *Connick v. Myers*, 461 U.S. 138, 145 (1983).

54. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563 (1968).

55. *Id.* at 572-73.

56. *Id.* at 564.

*School District*, the Supreme Court explicitly affirmed a broad spectrum of First Amendment protection for public school teachers by holding that even private communication between a public school teacher and his or her supervisor should be protected.<sup>57</sup> As such, a public school defending a teacher's First Amendment challenge would need to show that communications as discreet as in a supervisor's office and as broad as a public statement, could only be regulated in so much as they impeded the teacher's performance or interfered with the school's operation.

A state may try and rebut a teacher's right by showing that, especially in a more conservative area, permitting positive LGBT discussion in class would be so repulsive to a large number of students that it would be sufficiently disruptive to warrant regulation. Courts have, however, largely invalidated claims such as these, appropriately heeding *Tinker's* warning that "[a]ny word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk."<sup>58</sup>

In *Fricke v. Lynch*, the United States District Court for the District of Rhode Island held that even an actual threat of violence was not enough of a disruption to deny a student of their First Amendment right of expression to bring a same-sex date to prom.<sup>59</sup> The court noted definitively that they refused to grant other students with a "'heckler's veto,' allowing them to decide—through prohibited and violent methods—what speech will be heard."<sup>60</sup> The first amendment does not tolerate mob rule by unruly school children.<sup>61</sup> A state would accordingly have a very high burden to show sufficient educational disruption to override the strong right of free speech at stake, especially given the fact that it is a general principle of our jurisprudence that "[t]he democratic response to speech that people disagree with is more speech: by allowing students to express both the popular and unpopular viewpoints society can foster 'enlightened opinion.'"<sup>62</sup>

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57. 439 U.S. 410, 415 (1979) ("[T]he First Amendment . . . require[s] the same sort of *Pickering* balancing for the private expression of a public employee as it does for public expression.").

58. See *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 508 (1969); see, e.g., *Butts v. Dall. Indep. Sch. Dist.*, 436 F.2d 728, 731-32 (5th Cir. 1971) (holding that a superintendent's mere expectation of disruption is not enough to establish a limitation of a student's First Amendment right to wear a black armband to protest the war).

59. 491 F. Supp. 381 (D.R.I. 1980).

60. 49a *Id.*

61. *Id.* at 387.

62. *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1141 (C.D. Cal. 2000) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)).

If no such showing was made, a teacher could properly assert a violation of their right to speak in almost any professional context. Therefore, this is likely a very strong constitutional challenge to “No Promo Homo” laws.

b. Impermissible Viewpoint Discrimination

Teachers have an equally strong claim in asserting that “No Promo Homo” laws constitute impermissible viewpoint discrimination of their speech. As previously mentioned, public schools are a limited public forum that, although not as stringently protected against speech regulations as a pure public forum, maintains considerable protections “even when the limited public forum is [the state’s] own creation.”<sup>63</sup> The “No Promo Homo” statutes at issue specifically prohibit a teacher from expressing positive viewpoints about homosexuality’s existence and legitimacy, while simultaneously allowing, and even mandating, the discussion of heterosexuality. Further, some statutes even require a distinctly negative viewpoint about homosexuality. These commands, which create a forum for an honest discussion of human sexuality yet deny a specific discussion “otherwise within the forum’s limitations,”<sup>64</sup> serve to attack “particular views taken by speakers on a subject,”<sup>65</sup> and reflect the exact type of “regulation of speech because of disagreement with the message it conveys” that the Court has deemed unacceptable in light of the First Amendment’s promise.<sup>66</sup>

Multiple district courts have found that school policies that deny positive LGBT expression or information create impermissible viewpoint discrimination: a policy that prohibited students from displaying pro-LGBT messages<sup>67</sup> and a policy that blocked student access to websites that provided positive LGBT information<sup>68</sup> were both invalidated under this First Amendment theory. Prohibition of viewpoint discrimination is at the heart of the protection necessary for the robust expression of ideas, so much so that courts have even found regulations that suppress the advocacy of illegal drug use to be impermissible under this doctrine.<sup>69</sup>

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63. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

64. *Id.* at 820.

65. *Id.* at 829.

66. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

67. *Gillman ex rel. Gillman v. Sch. Bd.*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008).

68. *Parents, Families & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888 (W.D. Mo. 2012).

69. *Rosenberger*, 515 U.S. at 829 (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the

This protection is deemed even more necessary within the classroom, where “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”<sup>70</sup>

In order to invalidate a teacher’s strong viewpoint discrimination claim, the state would need to put forth a justification that would survive strict scrutiny. It would have the burden of showing that the policy is narrowly tailored to further a “substantial” state interest in preventing a disruption.<sup>71</sup> Further, the state’s justification can never be legitimized when “the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”<sup>72</sup> This burden is extremely difficult to achieve, especially given that the only justification that a school could conceivably put forth other than animus would be a religious argument. The Court has definitively held, in light of the Establishment Clause, that “[t]here is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.”<sup>73</sup>

Thus, a teacher would have a very strong claim that a relevant “No Promo Homo” statute unconstitutionally regulated their ability to express their positive viewpoint on homosexuality, or even, simply, their viewpoint that it does indeed exist.

## 2. First Amendment Claim for Violation of a Student’s Right To Access Information and Ideas

The First Amendment offers another potential cause of action against “No Promo Homo” Laws, this time by a student. In *Board of Education v. Pico*, the Court, in denying a school’s ability to remove certain books from a library because they expressed ideas that the school disagreed with, discussed a student-specific “right to receive information and ideas,” which was established as “an inherent corollary of the rights of free speech and press” in the First Amendment.<sup>74</sup> The Court’s reasoning was twofold: (1) that the right to receive ideas follows

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more blatant . . . . Viewpoint discrimination is thus an egregious form of content discrimination.”); *Conant v. McCaffrey*, 172 F.R.D. 681, 694 (N.D. Cal. 1997).

70. *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

71. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 71 (1983).

72. *Rosenberger*, 515 U.S. at 829.

73. *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968).

74. 457 U.S. 853, 867 (1982) (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

naturally from a speaker’s First Amendment right to “send” ideas and (2) that this right was a “necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.”<sup>75</sup> The Court asserted that the school could not exercise its discretion of information dissemination “in a narrowly partisan or political manner,” because access to robust information “prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”<sup>76</sup>

Thus, a student in a state where these policies existed would have a strong, albeit more novel, argument that denial of the open discussion of homosexuality deprived them of their First Amendment right to receive information and ideas. At least one federal court, the United States District Court for the Western District of Missouri, has explicitly recognized this potential student’s First Amendment right in the LGBT context, stating that a school’s refusal to allow students to access websites with positive LGBT information would likely implicate this right.<sup>77</sup>

This claim could be asserted by either an LGBT or non-LGBT student, although an LGBT student would likely have an even stronger claim under this standard. LGBT students may have few, if any, other outlets to access crucial health and safety information about their sexuality, and most public school’s affirmatively assume responsibility to provide sex and health education for all of their students as exhibited by the broader context of the “No Promo Homo” statutes. Further, students may be able to gain some additional traction with this argument by asserting that the current social relevance of LGBT policy issues means that silencing this subject would deprive them of information and discussion necessary to help them prepare for success as citizens.<sup>78</sup>

### 3. Fourteenth Amendment Equal Protection Violation

LGBT students who disproportionately suffer due to “No Promo Homo” laws may also have Fourteenth Amendment Equal Protection claims by arguing that these laws, as applied, deny them equal protection of antibullying mandates. The Fourteenth Amendment provides in relevant part, “No state shall . . . deny to any person within its jurisdiction

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75. *Id.* at 867.

76. *Id.* at 868-70.

77. *See* Parents, Families & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888, 899 (W.D. Mo. 2012).

78. *See Pico*, 457 U.S. at 868 (“[A]ccess [to ideas] prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members . . .”).

the equal protection of the laws.”<sup>79</sup> This fundamental guarantee assures that people are not denied the full protection of the laws simply because they are a member of an unpopular minority. All of the states with “No Promo Homo” statutes have at least general antibullying protection, and North Carolina has an enumerated bullying law that specifically protects LGBT students.<sup>80</sup> Therefore, students in each of these states have a clear right of protection from harassment and bullying. When their teachers are also forced to conform to “No Promo Homo” policies, however, they may not address bullying of LGBT students in the same way that they would for non-LGBT students for fear of professional discipline or even termination.<sup>81</sup> If this legal contradiction does indeed create a scenario where an LGBT student receives less protection under antibullying laws than their peers, which unfortunately has been an existing reality, the injured students may have an equal protection claim.<sup>82</sup>

Federal circuit courts that have dealt with this issue thus far in all contexts have held that student plaintiffs may establish a violation of Equal Protection by showing that the school district acted with “deliberate indifference” to their situation of peer harassment because of their membership in a protected class,<sup>83</sup> including the Seventh and Ninth Circuits, which have both addressed this issue specifically in the context of LGBT bullying.<sup>84</sup> Therefore, the strength of these claims would be highly fact-specific: if a student plaintiff could show that they had been harassed due to their actual or perceived sexual orientation, that the school had treated this student differently than students who were not bullied for being LGBT, and that school officials consciously failed to address this harassment because of the state’s “No Promo Homo” law, the student would likely have a strong case.

It is important to note that “deliberate indifference” is a notoriously high standard for a plaintiff to achieve.<sup>85</sup> The presence of a “No Promo

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79. U.S. CONST. amend. XIV, § 1.

80. See *Statewide School Anti-Bullying Laws and Policies*, *supra* note 8.

81. See *McGovern*, *supra* note 16.

82. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003) (“The guarantee of equal protection . . . requires the defendants to enforce District policies in cases of peer harassment of homosexual and bisexual students in the same way that they enforce those policies in cases of peer harassment of heterosexual students.”).

83. See *DiStiso v. Cook*, 691 F.3d 226 (2d Cir. 2012) (holding that this standard applied to peer harassment based on race); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1250 (10th Cir. 1999) (holding that this standard applied to peer harassment based on gender).

84. *Flores*, 324 F.3d at 1135; *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996).

85. *Adriana Alvarez & Adele Kimmel, Litigating Bullying Cases: Holding School Districts and Officials Accountable*, PUB. JUST. (2013), <http://publicjustice.net/blog/guilty-bystanders-why-school-officials-must-try-stop-bullying>. On pages 5 and 6, this Article addresses the difficulty of this standard in Title IX claims, but proving an equal protection violation for lack

Homo” statute, however, which regulates the way that teachers believe they can and cannot interact with victim students, is a powerful piece of evidence to help plaintiffs achieve this standard. If an accused teacher points to these statutes as reason for their neglect, as was the case in Anoka-Hennepin, then plaintiffs have a smoking gun to show that the teachers deliberately decided to not aid harassed students out of fear of repercussions.<sup>86</sup>

Assuming a case ripe for litigation on this issue would involve facts that were promising under this standard, the law would be evaluated under rational basis review, and the burden would be on the student to show that the state statute was not rationally related to any legitimate government interest. The best argument that a student could make would be that these laws were established because of pure animus against LGBT people: a singularly focused attempt to stigmatize and invalidate homosexuality. The Supreme Court has definitively held that animus alone can never suffice as a legitimate state interest.<sup>87</sup> The state would likely assert that their rationale for the law was not animus, and instead, served legitimate purposes in enforcing the morality, safety, and welfare of a vulnerable group of citizens. Given the current social climate, however, and the fact that the Supreme Court invalidated this sort of moral regulation in the LGBT context with *Lawrence*, this would be a difficult argument for a state to make.<sup>88</sup> Moreover, even if a state were to put forth an interest that could conceivably be legitimate under this standard, a student may be able to make a showing that the excessively strong and direct prohibitions in these laws prove that any reason a state may put forth is mere pretext for a solely discriminatory purpose. As one Tennessee student articulated in response to his state’s effort to enact such a law: “To me, they’re sending a message that in society gay people aren’t really equal.”<sup>89</sup>

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of protection under the bullying laws would require the same standard and thus a showing equally as hard to achieve.

86. See McGovern, *supra* note 16.

87. See *Romer v. Evans*, 517 U.S. 620, 632 (1996).

88. See *Lawrence*, 539 U.S. at 578.

89. See Sisk, *supra* note 1; *Romer*, 517 U.S. at 632 (reasoning that because the “sheer breadth [of the amendment against LGBT citizens] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests”).

*B. Federal Challenge: Student's Title IX Claim*

Title IX, a federal statute that prohibits discrimination on the basis of sex in all schools that receive federal funding,<sup>90</sup> is another tool that students could invoke in similar form to an Equal Protection claim in order to help invalidate state “No Promo Homo” statutes. Though Title IX only explicitly covers claims for harassment “because of sex,” because LGBT identity is so closely linked to gender nonconformity, both the United States Department of Education<sup>91</sup> and many federal courts have held that the claims of LGBT students can be deemed to fit this “because of sex” standard.<sup>92</sup> The challenge in bringing this litigation, however, will be crafting the claim as to assert that these policies caused school officials to unequally address the bullying of LGBT students because of this identity. In *Davis v. Monroe County Board of Education*, the Supreme Court held that a successful peer harassment claim against a school required a two-part showing<sup>93</sup>: (1) that the harassment was “severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits” and (2) that the school was “deliberately indifferent to known acts of . . . harassment.”<sup>94</sup>

The first standard, which assesses the character of the harassment, is difficult to attain. Justice Kennedy makes clear in his dissenting opinion that students are held to lower standards of behavior than adults, and some inappropriate interaction between youth is deemed part and parcel of the school environment.<sup>95</sup> Further, this harassment must have the direct result of denying a student's educational opportunities.<sup>96</sup> The key to this argument would be a showing of school or class absence that was necessitated by an attempt to avoid this harmful treatment.<sup>97</sup>

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90. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

91. Jackie Downing, *U.S. Department of Education Instructs Schools to Stop Bullying*, GSA NETWORK (Oct. 27, 2010), <https://www.gsanetwork.org/news/us-department-education-instructs-schools-stop-bullying/102710>.

92. See *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135 (N.D.N.Y. 2011); *Martin v. Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967 (E.D. Mich. 2006); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952 (D. Kan. 2005); *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869 (N.D. Ohio 2003); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

93. 526 U.S. 629 (1999).

94. *Id.* at 646-47.

95. See *id.* at 675-80.

96. *Id.* at 652.

97. See *id.* at 10 (citing *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 257 (6th Cir. 2000), and *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 968 (D.

Assuming that a student could meet this threshold, they would then need to show that school officials were “deliberately indifferent to known . . . harassment.”<sup>98</sup> A school is only liable for its own conduct under Title IX and not the conduct of its students which it is justifiably unaware of.<sup>99</sup> As such, the threshold for culpability under this standard is especially high and requires both clear knowledge of an incident through observation or report and a completely inappropriate and disproportional response.<sup>100</sup> The presence of state “No Promo Homo” policies, however, may provide a relatively easy way to meet this standard in certain circumstances. As discussed in the Equal Protection argument, the existence of such a statute could provide clear evidence that a teacher both knew about peer harassment of an LGBT student, and made a conscience choice to ignore it out of fear of repercussion from defying their “No Promo Homo” obligations. If a teacher, attempting to justify their decisions to not act, pointed to these laws as a reason for their choice, a showing of both knowledge and deliberate indifference would be very possible.

Accordingly, a student plaintiff bringing a Title IX claim with the purpose of cutting against “No Promo Homo” statutes should look for a strong combination of facts that show a true hindrance of their educational opportunity, and a scenario where it is likely that but for these policies they would have received the assistance they both needed and deserved.

#### IV. CONCLUSION

The Supreme Court has long recognized the absolute necessity of ensuring that youth are provided with a fair and equal opportunity to an education: our society has intrinsically linked a good education to the capacity of an individual to be successful in life.<sup>101</sup> Yet, in spite of this clearly defined obligation to the next generation, nine states possess laws that both blatantly invalidate the identity of a class of students and also

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Kan. 2005), where both courts found that absences from the harassment effectively denied educational opportunities under this standard); 526 U.S. at 651-52.

98. *Davis*, 526 U.S. at 630.

99. *See Alvarez & Kimmel*, *supra* note 85.

100. *Id.* at 6.

101. *See, e.g., Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1175-76 (9th Cir. 2006), *cert. granted, judgment vacated sub nom. Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007) (“Public schools are places where impressionable young persons spend much of their time while growing up. They do so in order to receive what society hopes will be a fair and full education—an education without which they will almost certainly fail in later life, likely sooner rather than later. . . . The public school, with its free education, is the key to our democracy.”).

serve to leave this same group of children uniquely vulnerable to emotional, verbal, or even physical harassment. While schools are under no obligation to affirmatively make the lives of their LGBT students better, what they can absolutely no longer be allowed to do is make their already complicated lives worse. Though invalidating these statutes would not be nearly the end of ensuring that LGBT students are able to access education in a safe and positive way, given where our society is now, it is a glaring next step. These appalling statutes must be discarded as soon as possible, and hopefully this primer serves as a strong starting point to help guide effective litigation to achieve these ends.