

Will Someone Please Think of the (non-LGBTQ+) Children?
Overbreadth in *Cousins et al. v. The School Board of Orange County*

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I. OVERVIEW

The protection of children is a noble goal that theoretically supersedes political affiliation or party line; however, the Florida legislature has attempted to use that goal as both sword and shield to justify discrimination against the LGBTQ+ community. Jennifer and Matthew Cousins, on behalf of themselves and their children N.C., S.C., M.C., and P.C. (“Plaintiffs”), sued members of the school board of Orange County (“Defendants”). Their children attended public school in Orange County and were in ninth, seventh, third, and first grades. The suit alleged that enforcement of Florida statute § 1001.42(8)(c)(3)—prohibiting classroom instruction on sexual orientation or gender identity for children in kindergarten through third grade, and providing that instruction for older children must be age and developmentally appropriate—violated the First and Fourteenth Amendments.

Plaintiffs filed their First Amended Complaint detailing claims of First and Fourteenth Amendment violations in the Orlando Division of the United States District Court in the Middle District of Florida.¹ The Court dismissed the complaint for failure to allege standing to pursue claims against the Defendants, though the Court did grant Plaintiffs leave to file an amended complaint because it was not clear that at least some of the pleading deficiencies could not be cured.² Plaintiffs filed their Second Amended Complaint, alleging chilled and prohibited speech in violation of the First Amendment (Count I); violation of the First

1. Cousins v. Sch. Bd. of Orange Cnty., 687 F. Supp. 3d 1251, 1265 (M.D. Fla. 2023).

2. *Id.*

Amendment right to receive information (Count II); overbreadth (Count III); deprivation of due process under the Fourteenth Amendment (Count IV); and deprivation of equal protection under the Fourteenth Amendment (Count V).³ Defendants moved to dismiss for lack of standing and failure to state a claim.⁴ The United States District Court for the Middle District of Florida held that Plaintiffs lacked standing to bring action against county school boards for violation of First and Fourteenth Amendment rights, including a lack of standing to bring claims of chilled and prohibited speech, overbreadth, and equal protection, and that Plaintiffs failed to state a *Monell* claim against the county school boards.⁵ While the Court held that Plaintiffs lacked standing to pursue First and Fourteenth Amendment claims against Defendants, and subsequently set aside all counts brought by Plaintiffs, this Note focuses on the doctrine of overbreadth alleged in Count III, specifically the substantive impact this doctrine has had and continues to have on the legal issues facing the LGBTQ+ community.

II. BACKGROUND

On July 1, 2022, the Florida legislature published Florida House Bill 1557.⁶ Otherwise known as the “Don’t Say Gay” law, this bill banned discussions of sexual orientation and gender identity in kindergarten through third grade classrooms. Rather than an isolated law, this bill is the latest example of Florida’s anti-LGBTQ+ efforts. From 1957 through 1963, the Florida Legislative Investigations Committee, led by state senator and former Florida governor Charley Johns, interrogated, intimidated, and outed LGBTQ+ students and faculty in Florida universities.⁷ The 1964 report “Homosexuality and Citizenship in Florida” stated that “a great many homosexuals . . . find special gratification in the recruitment to their ranks of youth.”⁸ This report, along

3. *Id.*

4. *Id.*

5. *Id.* at 1274-1281.

6. H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022).

7. Omar G. Encarnación, *Florida’s ‘Don’t Say Gay’ Bill Is Part of the State’s Long, Shameful History*, TIME (May 12, 2022, 3:51 PM), <https://time.com/6176224/florida-dont-say-gay-history-lgbtq-rights/>; Ian Gaffney, *Alternative UF: The Legacy of the Johns Committee*, GEORGE A. SMATHERS LIBRS., UNIV. OF FLA., <https://web.uflib.ufl.edu/spec/exhibits/altufjohns.htm> (last visited Nov. 15, 2024).

8. Guild Book Serv., *Advertisement for the Report ‘Homosexuality and Citizenship in Florida,’ ca. 1964*, STATE LIBR. AND ARCHIVES OF FLA., FLA. MEMORY (Nov. 15, 2022, 6:28 PM), <https://www.floridamemory.com/items/show/326759> Fla. Legislative Investigation Comm.,

with the efforts of Charley Johns' committee, led to the prosecution of hundreds of Floridians based on their sexuality.⁹ In 1977, the Save Our Children crusade began, widely recognized as the first organized anti-gay movement.¹⁰ Save Our Children promulgated the idea that LGBTQ+ individuals should be feared and that parents needed to protect their children from being lured into a perverted lifestyle.¹¹ The legacy of the movement persisted well into the 1990s and 2000s; Florida was one of the last states to legalize homosexual sex, and several state referenda from 1998 to 2012 banned same-sex marriage.¹² Most recently, a spokeswoman for Florida governor Ron DeSantis described the "Don't Say Gay" bill as an "anti-grooming" bill.¹³ Governor DeSantis himself stated at the bill signing, "We will make sure that parents can send their kids to school to get an education, not an indoctrination."¹⁴

Led by Governor DeSantis, "Florida's shift to the right has turned the Sunshine State . . . into a model for other GOP-led states seeking to enact culturally conservative policies."¹⁵ While Florida was the first state to enact a "Don't Say Gay" bill, several states followed soon after and proposed similar laws, including Alabama, Arizona, Georgia, Iowa, Louisiana, Missouri, Oklahoma, Tennessee, and Ohio.¹⁶ Additionally, several states explicitly prohibited the positive portrayal of homosexuality in school through so-called "No Promo Homo" laws which mandate no positive promotion of homosexuality.¹⁷ These states included Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and

Homosexuality and Citizenship in Florida (1964), <https://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/Florida%20Report%201964.pdf>.

9. Encarnación, *supra* note 7.

10. *Id.*

11. *Id.*

12. *Id.*

13. Liam Edgar, *DeSantis Spokeswoman Christina Pushaw Ignites Controversy by Suggesting Critics of the Parental Rights in Education Bill Are "Groomers"*, TAMPA FREE PRESS (Mar. 7, 2022, 8:05 AM), <https://www.tampafp.com/desantis-spokeswoman-christina-pushaw-ignites-controversy-by-suggesting-critics-of-the-parental-rights-in-education-bill-are-groomers/>.

14. Dustin Jones & Jonathan Franklin, *Not Just Florida. More Than a Dozen States Propose So-Called 'Don't Say Gay' Bills*, NPR (Apr. 10, 2022, 7:01 AM), <https://www.npr.org/2022/04/10/1091543359/15-states-dont-say-gay-anti-transgender-bills>.

15. Julia Manchester, *Florida Becomes Conservative Model for Other GOP States*, THE HILL (May 18, 2023), <https://thehill.com/policy/healthcare/4001655-florida-becomes-conservative-model-for-other-gop-states/>.

16. Jones & Franklin, *supra* note 14.

17. *Laws Prohibiting "Promotion of Homosexuality" in Schools: Impacts and Implications*, GLSEN 2 (2018), https://www.glsen.org/sites/default/files/2019-12/No_Promo_Homo_2018.pdf.

Utah.¹⁸ Examples of “No Promo Homo” laws include emphasizing to students that homosexuality is not a lifestyle that is acceptable to the general public or discussing homosexual relationships only insofar as the discussion relates to the spread of sexually transmitted diseases.¹⁹ Although Florida was not among the states with “No Promo Homo” laws, the language of Florida House Bill 1557, the bill’s practical application in the Florida school system, and the intention of policymakers enacting the bill created an effect reminiscent of those laws.²⁰

Anti-gay legislation first began proliferating in the American school system during the HIV/AIDS epidemic of the 1980s.²¹ Similar to conservative policymakers and anti-LGBTQ+ advocates today, “proponents of these laws defend[ed] them as necessary to uphold ‘family values,’ asserting that discussion of diverse sexual or gender identities will ultimately ‘indoctrinate’ children to think such identities are acceptable.”²² Proponents of these laws, both then and now, made extensive use of “parental rights” when supporting anti-gay legislation, underscoring the priority of respecting parents’ values even at the cost of comprehensive education.²³ The HIV/AIDS epidemic created both the need for a more expansive sexual education curricula in schools as well as a wave of anti-LGBTQ+ sentiment.²⁴ As a result, a very real fear amongst conservatives took root: Schools would become centers for indoctrinating children into lifestyles and ways of thinking which went against the values held by their parents.²⁵ This fear expanded over the course of the twentieth century, and by the 2020s policymakers in Florida reacted with proposed laws such as the “Don’t Say Gay” bill and an “anti-woke agenda” bill (HB7).²⁶

While the decisions reached by the District Court in *Cousins* appear procedural and straightforward in nature, *Cousins* is a noteworthy case as it exemplifies how overbroad laws harm the LGBTQ+ community, as the

18. *Id.* at 1.

19. *Id.* at 2.

20. *See* Jones & Franklin, *supra* note 14.

21. Abbie E. Goldberg, *Perspectives of Florida Parents on HB 1557, the Parental Rights in Education Act*, Williams Inst., UCLA SCH. OF L. 5 (Aug. 8, 2023), <https://escholarship.org/uc/item/3p744028>.

22. *Id.*

23. *Id.*

24. *Id.*

25. *See id.*

26. <https://doi.org/10.1177/08959048241235405> *See generally* Eesha Pendharkar, *Here’s What Florida’s ‘Don’t Say Gay’ and Anti-‘Woke’ Bills Actually Say*, EDUC. WK. (Mar. 18, 2022), <https://www.edweek.org/policy-politics/heres-what-floridas-dont-say-gay-and-anti-woke-bills-actually-say/2022/03>

claims brought by Plaintiffs in *Cousins* are not isolated grievances. The overbreadth doctrine refers to laws that extend beyond unprotected or regulatable speech and sweep in a substantial amount of protected speech. A law that is overbroad does not have clear boundaries as to what is acceptable and what is not under its application, and therefore it can apply to speech that it was not intended to cover or speech that is constitutionally protected. The United States Supreme Court analyzed the overbreadth doctrine in *City of Houston v. Hill*, holding that a Texas ordinance criminalizing the interruption of a policeman while he is executing his duty was “substantially overbroad and therefore invalid on its face under the First Amendment.”²⁷ The Supreme Court explained that “[i]n a facial challenge to the overbreadth and vagueness of a law, a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.”²⁸ Furthermore, “[statutes] that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.”²⁹ Thusly, in conducting an analysis of a law’s potential overbreadth, a court must analyze the law with its practical application in mind; in other words, courts must consider what kind of speech is likely to be affected by the law in question, and whether that speech falls under constitutional protections.

Several plaintiffs have recently brought First Amendment overbreadth challenges to anti-LGBTQ+ laws.³⁰ Whether plaintiffs have challenged laws targeting drag shows, book bans, or pro-LGBTQ+ school curricula, the underlying theory in cases of this type is consistently one asserting that overbroad laws sweep in constitutionally-protected speech and expression at the expense of the LGBTQ+ community.³¹ Two

27. *City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987).

28. *Id.* at 458 (alteration in original) (quoting *Hoffman Ests. v. The Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494(1982)).

29. *Id.* at 459.

30. See Marisa Shearer, *Banning Books or Banning BIPOC?*, 117 NW. U. L. REV. ONLINE 24, 30 (2022-2023); Corey L. Gibbs, *The Right to Express Yourself: Trump-Appointed District Judge Declares Tennessee Adult Cabaret Law Targeting Drag Performances to Be Unconstitutional*, LGBT L. NOTES 20, 20 (2023) [hereinafter Gibbs, *The Right to Express Yourself*]; Corey L. Gibbs, *Where Does It Hurt?: Northern District of Florida Dismisses Challenge to “Don’t Say Gay”*, LGBT L. NOTES 8, 9 (2023) [hereinafter Gibbs, *Where Does It Hurt*].

31. See Gibbs, *The Right to Express Yourself*, *supra* note 30, at 22 (the court accepted the plaintiffs’ argument that an anti-drag statute was overbroad because a substantial number of its applications were unconstitutional, relying in part on drag performers’ fear of persecution under the statute); See Gibbs, *Where Does It Hurt*, *supra* note 30, at 9 (plaintiffs in the case relied on the overbreadth doctrine and asserted they had suffered a stigmatic injury).

recent cases out of Florida and Tennessee exemplify the difficulty of bringing overbreadth claims regarding LGBTQ+ issues to court. Firstly, in a case factually similar to *Cousins*, the plaintiffs in *Equality Florida et al. v. Florida Board of Education et al.* challenged Florida's "Don't Say Gay" bill on First and Fourteenth Amendment grounds.³² Like *Cousins*, the plaintiffs in *Equality Florida* also claimed the bill violated the overbreadth doctrine, as school policies aimed at including LGBTQ+ history and anti-LGBTQ+ discrimination had to be reworked or removed to comply with § 1001.42(8)(c)(3).³³ Ultimately, the District Court of the Northern District of Florida dismissed *Equality Florida* for lack of standing, holding that the plaintiffs failed to "trace the alleged harms to the application of the Law" and concluding that the harms alleged by the plaintiffs were merely speculative.³⁴ Secondly, and by contrast to *Cousins*, in *Friends of George's, Inc. v. Mulroy*, the District Court for the Western District of Tennessee not only found that plaintiffs challenging the Tennessee anti-drag "Adult Entertainment Act" had standing to bring an overbreadth claim, but also held that the Act was unconstitutional.³⁵ However, the Sixth Circuit reversed and remanded the district court's holding for lack of standing, asserting that the plaintiffs failed to show "pre-enforcement injury."³⁶ These two cases demonstrate the legal environment under which the *Cousins* court ruled: an environment hostile towards overbreadth claims against anti-LGBTQ+ laws, and one in which overbreadth claims rarely, if ever, succeed.

The *Cousins* opinion does not provide any significant overbreadth analysis; however, a March 11, 2024, settlement regarding Florida statute § 1001.42(8)(c)(3) offers more insight. This settlement concerns *Equality Florida et al. v. Florida Board of Education et al.*, discussed briefly above, in which plaintiffs asserted that the Florida statute was unclear as to what was permissible regarding discussion of gender and sexuality in the classroom.³⁷ The plaintiffs filed their First Amended Complaint on May 25, 2022, which the district court dismissed on September 29,

32. Kyla Tinsley, *Anti-LGBT Legislation in Florida: A Prime Example of States Mentally Harming LGBT Youth*, 44 N. ILL. U. L. REV. 135, 152 (2024).

33. *Id.* at 152, 155.

34. *Id.* at 152-53.

35. *Friends of George's, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 860, 879 (W.D. Tenn. 2023).

36. *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 440 (6th Cir. 2024).

37. Ileana Najarro, *What's Permissible Under Florida's 'Don't Say Gay' Law? A New Legal Settlement Clarifies*, EDUC. WK. (Mar. 12, 2024), <https://www.edweek.org/leadership/whats-permissible-under-floridas-dont-say-gay-law-a-new-legal-settlement-clarifies/2024/03>.

2022.³⁸ The plaintiffs filed their Second Amended Complaint on November 3, 2022, which the district court dismissed on February 15, 2023.³⁹ Although the plaintiffs filed a Notice of Appeal in the Eleventh Circuit on March 15, 2023, the settlement reached the following year resolved the need for further proceedings.⁴⁰ The settlement attempted to clarify the statute’s parameters with concrete examples of permissible behavior related to the LGBTQ+ community, as well as definitions of key terms of the statute such as “classroom instruction.”⁴¹ Some examples of behavior permitted by the settlement are enumerated below:

The Statute would also leave teachers free to “respond if students discuss . . . their identities or family life,” “provide grades and feedback” if a student chooses ‘LGBTQ identity’ as an essay topic, and answer “questions about their families.”

[T]he [S]tatute “would not prohibit[] incidental references in literature to a gay or transgender person or to a same-sex couple. Such references, without more, are not ‘instruction’ on these topics.”

The Statute “does not prohibit . . . mere classroom references to a person’s family – whether gay or straight, transgender or cisgender.”

The Statute does not restrict gay and transgender teachers from “put[ting] a family photo on their desk” or “refer[ing] to themselves and their spouse (and their children).”

The [S]tatute does not “prohibit participation in extracurricular activities (such as ‘Gay-Straight Alliances’ or book fairs) or ‘after-hours tutoring.’”

[T]he Statute does not restrict “lines referring to LGBTQ issues” in “musicals,” “dancing between persons of the same gender” at a school dance, or “wearing clothing inconsistent with students’ gender assigned at birth” . . . “None of that is ‘classroom instruction.’”⁴²

In addition, the terms of the settlement require that the plaintiffs “[r]elease and forever discharge the State of Florida and any officers thereof for any claims or causes of action that any Plaintiff raised or could

38. Settlement Agreement at 1, *M.A. v. Fla. State Bd. of Educ.*, No. 4:22-cv-134-AW-MJF (N.D. Fla. Feb. 15, 2023).

39. *Id.* at 2, 6.

40. *Id.* at 6.

41. *Id.* at 3.

42. *Id.* at 3, 4, 5, 6.

have raised in the Case, including any claim that Section 1001.42(8)(c)(3), Florida Statutes is facially unconstitutional.”⁴³

According to the settlement, classroom instruction is “the formal work of teaching that occurs in a classroom setting . . . Accordingly, the Statute restricts only teaching on the topics of sexual orientation and gender identity in a classroom setting.”⁴⁴ Furthermore, regarding non-discrimination, the settlement purports that “[t]he Statute does not target ‘sexual orientations and gender identities’ ‘To the contrary, instruction on the ‘normalcy of opposite-sex attraction’ would equally be ‘instruction on sexual orientation’ . . . The Statute ‘is neutral on the proscribed subjects.’”⁴⁵ While the settlement provides no legal precedent, it could be instructive to Florida school districts and educators in how to interpret the law.⁴⁶ Regardless, the struggle of teachers, parents, and students across Florida in the practical application of § 1001.42(8)(c)(3) remains an issue that will likely continue to find itself in front of Florida courts as it did in *Cousins*, although this recent settlement suggests an alternate route towards relief.

III. COURT’S DECISION

The “Don’t Say Gay” bill is codified in Florida Statute § 1001.42(8)(c)(3), which states in pertinent part:

Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8 If such instruction is provided in grades 9 through 12, the instruction must be age-appropriate or developmentally appropriate for students in accordance with state standards.⁴⁷

Plaintiffs asserted that enforcement of the statute violated the First and Fourteenth Amendments in both the First and Second Amended Complaints. As an initial matter, the Court determined whether the Second Amended Complaint failed on the grounds of being a shotgun pleading, looking to other Middle District of Florida District Court

43. *Id.* at 6.

44. *Id.* at 3 (emphasis omitted).

45. *Id.* at 4 (emphasis omitted).

46. Erica Meltzer, *Florida Settlement’s Limits on ‘Don’t Say Gay’ Law May Give Teachers and Students Breathing Room*, CHALKBEAT (Mar. 13, 2024, 3:50 PM), <https://www.chalkbeat.org/2024/03/13/florida-dont-say-gay-settlement-clarifies-law-protects-students-teachers/>.

47. Fla. Stat. § 1001.42(8)(c)(3)(2024).

decisions to guide its reasoning. In *Flores v. United States*, the court held that pleadings containing irrelevant factual allegations and legal conclusions constitute shotgun pleadings.⁴⁸ In *Whispering Pines Mobile Homeowners' Association, Inc. v. Wallach*, the court held that the plaintiffs' amended complaint constituted a shotgun pleading because the district court had to decipher how the defendant's conduct applied to each count by parsing all the irrelevant information the plaintiffs included.⁴⁹ The *Cousins* court used the prior analyses of *Flores* and *Whispering Pines* to determine whether Plaintiffs' Second Amended Complaint met federal pleading standards.⁵⁰

Despite the ultimate finding that the Second Amended Complaint failed to meet federal pleading standards, the Court continued to address the Defendants' arguments against Plaintiffs for lack of standing and failure to state a claim. In addressing the issue of standing, the Court looked to Eleventh Circuit case law precedent for guidance. Eleventh Circuit case law detailed the elements a plaintiff needed to have standing: "the plaintiff must have suffered an injury in fact, the defendant must have caused that injury, and a favorable decision must be likely to redress it."⁵¹ Furthermore, an injury in fact consists of "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."⁵² In addressing the issue of failure to state a claim, the Court looked at each count individually.

Regarding Count I, the Court again used Eleventh Circuit precedent. In *Speech First, Inc. v. Cartwright*, the court stated that in "determin[ing] whether a First Amendment plaintiff has standing, we simply ask whether the operation or enforcement of the government policy would cause a reasonable would-be speaker to self-censor[]—even where the policy fall[s] short of a direct prohibition against the exercise of First Amendment rights."⁵³ In *Koziara v. City of Casselberry*, the court held that plaintiffs seeking relief "must show a sufficient likelihood that [they] will be affected by the allegedly unlawful conduct in the future."⁵⁴ Regarding Count II, the Court dismissed the count without any relevant

48. *Flores v. United States*, No. 3:22-cv-70-MMH-PDB, 2022 WL 204247, at *3 (M.D. Fla. Jan. 24, 2022).

49. *Whispering Pines Mobile Homeowners' Ass'n, Inc. v. Wallach*, No. 6:19-cv-487-Orl-41EJK, 2020 WL 9455604, at *2–3 (M.D. Fla. Apr. 7, 2020).

50. *Cousins v. Sch. Bd. of Orange Cnty.*, 687 F. Supp. 3d 1251, 1267 (M.D. Fla. 2023).

51. *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020).

52. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1119 (11th Cir. 2022).

53. *Id.* at 1120 (internal citations omitted).

54. *Koziara v. City of Casselberry*, 392 F.3d 1302, 1305 (11th Cir. 2004).

citations to case law or statutory law, though it did include a brief analysis of a potential redressability issue.

Regarding Count III, the Court relied on analysis from *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, in which the court noted that the “overbreadth doctrine does not relieve a plaintiff of the burden to prove constitutional standing.”⁵⁵ The Court did not engage in a discussion of Plaintiffs’ actual claim of overbreadth, and instead focused on Plaintiffs’ lack of standing. Regarding Count IV, the Court briefly cited *Pernell v. Florida Board of Governors of State University System*, which detailed the elements of a Fourteenth Amendment vagueness claim.⁵⁶ To establish a vagueness claim,

a plaintiff must show that (1) he seriously wishes to speak; (2) such speech would arguably be affected by the challenged prohibition, but the rules are at least arguably vague as they apply to him; and (3) there is at least a minimal probability that the rules will be enforced if they are violated.⁵⁷

The Court likened Count IV to Count I and dismissed Count IV for lack of standing.

Regarding Count V, the Court found that Plaintiffs failed to allege any specific injuries, stating that the alleged increase in bullying and removal of books do not meet the standard.⁵⁸ The Court used the explanation of an injury regarding gender inequality in *Heckler v. Mathews*, in which unequal treatment based on gender is recognized as a judicially cognizable issue.⁵⁹ The Court also addressed the issue of *Monell* liability, relying again on Eleventh Circuit precedent for its analysis. As per the Eleventh Circuit, “To state a *Monell* claim, a plaintiff must allege facts showing: ‘(1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation.’”⁶⁰ Plaintiffs in the noted case alleged that Orange County adopted “a procedural policy for parental notification but provided no clarification on the meaning of the vague terms,” though the

55. *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1270 (11th Cir. 2006).

56. *Cousins v. Sch. Bd. of Orange Cnty.*, 687 F. Supp. 3d 1251, 1278 (M.D. Fla. 2023) (citing *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218 (N.D. Fla. 2022)).

57. *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1266-67 (N.D. Fla. 2022).

58. *Cousins*, 687 F. Supp. 3d at 1279.

59. *Heckler v. Mathews*, 465 U.S. 728, 738 (1984).

60. *Cousins*, 687 F. Supp. 3d at 1280 (citing *Marantes v. Miami-Dade Cnty.*, 649 F. App’x 665, 672 (11th Cir. 2016)).

Court did not find that Plaintiffs had properly connected the supposed constitutional violation with the parental notification aspect of the Florida statute.⁶¹

The *Cousins* court declined to analyze the claims made against Defendants by Plaintiffs, specifically the claim of overbreadth, and in doing so perpetuated a law whose broadness contributes to the ongoing discrimination of the LGBTQ+ community in Florida. The Court dismissed Counts I-V of Plaintiffs' Second Amended complaint, and further declined to allow Plaintiffs leave to amend the complaint.⁶² As previously highlighted, the Court's reasoning for its decision was relatively straightforward: Plaintiffs' claims were dismissed due to lack of standing and failure to state a claim.⁶³ However, Footnote 4 of the *Cousins* opinion elaborated on the issue of overbreadth:

Even if Plaintiffs had properly addressed standing under Count III, "[t]he overbreadth doctrine does not . . . because it may not, waive the Article III requirement that the plaintiff have suffered a real injury in fact as to a challenged provision of an ordinance." *Maverick Media Grp., Inc. v. Hillsborough Cnty.*, 528 F.3d 817, 822 (11th Cir. 2008). As set forth above, only P.C. and M.C. have sufficiently alleged a First Amendment injury in this case and so, at the very least, they are the only Plaintiffs that can assert Count III.⁶⁴

Here, the Court addressed overbreadth outside of the issues of standing, consideration not afforded to the other First and Fourteenth Amendment claims. P.C. and M.C. P.C. and M.C. alleged several fears they had regarding the Florida statute, such as getting in trouble for discussing their nonbinary sibling's gender identity and pronouns and completing family tree assignment in class.⁶⁵ The Court recognized, at least briefly, that these concerns would allow a sufficient overbreadth claim, but offered no further analysis. The Court did recognize that "it is at least arguable that an explanation of a nonbinary sibling's identity and pronouns during instructional time in the classroom falls within the purview of the law," although this finding is limited to vagueness rather than overbreadth.⁶⁶

61. *Id.*

62. *Id.* at 1282.

63. *Id.* at 1274-1281.

64. *Id.* at 1278 n.4 (emphasis omitted).

65. *Cousins*, 687 F. Supp. 3d at 1275.

66. *Id.*

The Court justified its quick dismissal of the overbreadth claim by finding that “Plaintiffs largely ignore Count III [in the Second Amended Complaint] and fail to specifically argue their standing to assert that claim.”⁶⁷ The Second Amended Complaint stated in pertinent part:

164. The First Amendment overbreadth doctrine is applied to the states through the Fourteenth Amendment and enforceable pursuant to 42 U.S.C. § 1983. A law may be invalidated as overbroad when a substantial number of its applications are unconstitutional, judged in relation to any permissible applications of the statute.

165. Because a substantial number of the applications of the Law are unconstitutional, judged in relation to its legitimate sweep, the Law is also overbroad, and its enforcement should be enjoined.

166. As a direct and proximate result of Defendants’ authority and conduct (including enforcement of the Law), Plaintiffs have suffered and will continue to suffer irreparable harm and damages.⁶⁸

Furthermore, the Complaint emphasized that “[t]he Law’s nebulous and overbroad terms achieve the intended, discriminatory goal of erasing all mention of LGBTQ+ people and families in schools.”⁶⁹ In its decision, the *Cousins* court did not consider how § 1001.42(8)(c)(3) potentially sweeps in constitutionally protected speech, nor did it consider how the application of such an overbroadly written law could cause LGBTQ+ individuals to suffer harm.⁷⁰ Despite acknowledging that Plaintiffs allege an increase in bullying directed at LGBTQ+ students as well as P.C. and M.C.’s potential First Amendment claims, the Court did not conduct an overbreadth analysis of § 1001.42(8)(c)(3).⁷¹

IV. ANALYSIS

As indicated above in the background section of this Note (Section II), *Cousins* is a noteworthy case as it exemplifies how overbroad laws harm the LGBTQ+ community. Furthermore, comparing the outcome in *Cousins* to the *Equality Florida* settlement demonstrates how LGBTQ+ plaintiffs seeking relief from harm caused by the “Don’t Say Gay” bill may need to rely on means beyond winning a court case. Roberta Kaplan, an attorney representing the plaintiffs in *Equality Florida*, commented on

67. *Id.* at 1278.

68. Second Amended Complaint at 56, *Cousins v. Sch. Bd. of Orange Cnty.*, 687 F. Supp. 3d 1251 (M.D. Fla. 2023), No. 6:22-cv-01312-WWB-LHP.

69. *Id.* at 21.

70. *Cousins*, 687 F. Supp. 3d 1251.

71. *Id.* at 1277.

the likely intention of the bill: “It had the impact that we think its drafters wanted . . . [a]nd that impact was to sow fear, confusion, and anxiety among kids, among parents, and among teachers.”⁷² Kaplan’s words reflect the inherent issue with laws like § 1001.42(8)(c)(3). While these laws are touted as broad protections for children, they further perpetuate the idea that even the concept of being LGBTQ+ is inherently dangerous, inappropriate, and unsuitable for young students. In addition, these laws play on the fears of conservative parents and validate fears of children being indoctrinated into a perverted lifestyle. The history of Florida’s anti-LGBTQ+ sentiments, as detailed in the Background section, makes clear that there is a sad tradition of assuming the worst of the LGBTQ+ community. Writing overbroad laws that harm the LGBTQ+ community is but another stepping stone in the well-trod path of ostracization and discrimination.

Although the Florida legislature insists that § 1001.42(8)(c)(3) was not intended to target the LGBTQ+ community specifically, the overbroad writing of the law nonetheless creates that outcome. It cannot be ignored that Ron DeSantis’ own spokeswoman identified the law as an “anti-grooming” bill, further highlighting the persistent stereotyping of LGBTQ+ issues as dangerous for children and marking LGBTQ+ individuals or allies as part of a scheme to harm their children.⁷³ Governor DeSantis himself promised to protect children from indoctrination at school when signing the bill, solidifying that the intent of the bill was to keep LGBTQ+ topics and issues away from Floridian children lest they be swayed into deviancy.⁷⁴ The decision in *Cousins* demonstrates that the children being harmed are not victims of a cabal of perverted homosexual deviants, but LGBTQ+-identifying children and their families. Children like P.C. and M.C. felt they could not discuss their nonbinary sibling at school, and families worry that there can be no remedy for any LGBTQ+ bullying.⁷⁵ The *Cousins* court confirmed as much by proclaiming “[t]his Court . . . cannot order students to be kind to each other or to cease bullying their peers.”⁷⁶ Perhaps not, though the Court was well within its power to grant relief based on laws whose broad application creates an

72. Meghan Bowman, *Equality Florida Lawyers ‘Thrilled’ with the Parental Rights Lawsuit Settlement*, WUSF NPR (Mar. 18, 2024, 5:00 AM), <https://www.wusf.org/courts-law/2024-03-18/equality-florida-lawyers-thrilled-parental-rights-lawsuit-settlement>.

73. Edgar, *supra* note 13.

74. Jones & Franklin, *supra* note 14.

75. *Cousins*, 687 F. Supp. 3d at 1275.

76. *Id.* at 1279.

environment in which LGBTQ+ bullying could potentially go unaddressed.

The idea of indoctrinating children into homosexuality is a definite undercurrent in discussions of the “Don’t Say Gay” bill; however, it may be worthwhile to consider the converse. There is a valid counterargument to be made alleging that the Florida legislature intends to indoctrinate children the opposite way, in other words teaching children from a young age that to be LGBTQ+ is to be so fundamentally different from normal society that laws are necessary to keep such a community in check. Children schooled in an environment where a deliberate curtailing of the LGBTQ+ community is the norm could internalize the message that the community is a topic best avoided. They may grow into adults unwilling to extend constitutional protections to a group of people they have only ever been told are deviant and dangerous. The fact that it took a settlement to outline the unclear language of § 1001.42(8)(c)(3) rather than a court like in *Cousins* points to the bill’s lack of functionality.⁷⁷ The fact that harm caused by the bill is squarely on the shoulders of the LGBTQ+ community points to the bill’s true intentions, despite the language of the settlement—and not the bill itself—proclaiming neutrality. The fact that the bill sweeps in constitutionally protected speech points to the Florida legislature’s attempt to use the guise of protecting children to further subjugate the LGBTQ+ community.

V. CONCLUSION

The protection of children is an issue most, if not all, people consider a worthwhile and important endeavor, necessary in creating a society where the most vulnerable are shielded from that which could harm them. Florida’s “Don’t Say Gay” bill, rather than fostering an environment of safety and security, achieves the opposite effect, allowing for the silencing, harassment, and discrimination of the LGBTQ+ community. In the name of protecting children, the Florida legislature has opened the door for some of the most vulnerable of society’s children to experience real harm in the institutions meant to guide them into adulthood. By refusing to engage with constitutional challenges such that citizens must seek relief through civil suits, Florida courts jam a stopper underneath that door, ensuring that the parents and children of Florida’s LGBTQ+ community have little hope for relief from justified discrimination. Overbroad laws hiding behind the noble goal of protecting children sweep in constitutionally protected rights the LGBTQ+ community deserves,

77. See Settlement Agreement, *supra* note 38.

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most significantly the freedom to speak about themselves. Laws like “Don’t Say Gay” bills turn back the clock on all the hard-fought progress made by the LGBTQ+ community to have their basic humanity recognized. These laws push the United States back to a time where the community was one to be questioned, feared, and excluded from society, where parents had to be vigilant in saving their children from perversion.

The *Cousins* decision demonstrates how the fight for LGBTQ+ rights is far from over, and its place among a long line of similar decisions makes clear the need for change, not just in Florida, but across the United States. A country whose legislatures and courts approve the use of overbroad laws like Florida’s “Don’t Say Gay” bill to oppress the LGBTQ+ community is not a country that can profess its constitution provides equal protection and treatment for all. Using the honorable goal of protecting children to enact policies that actively hurt the LGBTQ+ community is not only an insidious justification for discriminatory laws, but also an emotional excuse for legislators to use the judicial system to exert their own homophobia. *Cousins* was not the first decision of its kind, and likely will not be the last, as courts have consistently shown their reluctance to strike down laws like “Don’t Say Gay” on constitutional grounds. While settlements may offer another path for injured plaintiffs to seek relief, true relief will only come when overbroad laws targeting the LGBTQ+ community are declared unconstitutional. Rather than trying to carve out workable applications of anti-LGBTQ+ laws, courts should strike down these laws for their constitutional violations, including overbreadth. Doing so will achieve the goal that the Florida legislature, and other legislatures following Florida’s example, claim to care about above all else: the protection of America’s children.

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