

No. 22-13992

~~IN THE UNITED STATES COURT OF APPEALS~~

**FOR THE ELEVENTH CIRCUIT**

---

**LEROY BERNELL** *et al*

CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.12, Amicus, PEN AMERICA (PEN AMERICAN CENTER), hereby certifies that, in addition to those listed in Defendants-Appellants', Pernell Plaintiffs-Appellees', and Novoa Plaintiffs-Appellees' panel briefs the follo

## TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. Free and Open Classroom Discourse is Foundational to Academic Freedom, a Concept Deeply Rooted in First Amendment Doctrine	2
II. Educational Gag Orders are Chilling Speech across the Nation	3
III. The Act Constrains Freedom of Inquiry in Violation of the First Amendment	9
CONCLUSION	12
CERTIFICATE OF COMPLIANCE	13
CERTIFICATE OF SERVICE	13



Other Authorities:

Allen, Joseph, "Education and Freedom in a Democracy," *Bulletin of the American Association of University Professors* (1915-1955).....2

Fernando, Christine, "Critical race theory bans are adding more anxiety to stressed teachers: 'It's like walking a tightrope'" *USA Today* (Sept. 8, 2021).....7

Friedman, Jonathan, and Tager, James, *Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach* (2021).....4

Golden, Daniel "Muzzled by DeSantis, Critical Race Theory Professors Cancel Courses or Modify Their Teaching," *ProPublica* (Jan. 3, 2023).....8

Hixenbaugh, Mike and Hylton, Antonia, "Southlake school leader tells teachers to balance Holocaust books with 'opposing' views," *NBC News* (Oct 14, 2021)....6

Knowles, Hannah, "Critical race theory ban leads Oklahoma college to cancel class that taught 'white privilege'," *Wash. Post* (May 29, 2021).....6

Morrow, Brendan, "Anti-critical race theory parents reportedly object to teaching Ruby Bridges book," *The Week*, (Jul. 8, 2021).....6

PEN America, *Index of Educational Gag Orders* (last updated Jan. 6, 2023).....5

Pollock, Mica, et al., "Supported, Silenced, Subdued, or Speaking Up? K12 Educators' Experiences with the Conflict Campaign, 2021-22," *Journal of Leadership, Equity, and Research* (forthcoming, 2023).....8

2.1 (ond)8.2j 0 Tc 0h1.316 Td [x82

Woo, Ashley, et al., Walking on Eggshells: Teachers' Responses to Classroom  
Limitations on Race or Gender-Related Topics, RAND Corporation, at 12  
(2023).....7

Young, Jeremy C. and Friedman, Jonathan, America's Censored Classrooms  
(2022).....5

-policy organization

*Amicus* PEN America is a nonprofit, nonpartisan public-

erent in protecting free expression on the operation of a robust with on child in

... .. 66

action programs exist or that systemic forms of racism, sexism, or other forms of discrimination on the basis of membership in a protected class exist.

Government imposed curtailment of topics addressed in the classroom undermines the principle of free and open discourse in education, long a democratic bellwether. Viewpoint based restrictions are a particularly insidious form of this type of censorship and warrant even closer scrutiny. In this brief, Amicus outlines the free expression interests at stake, situates the Act in the context of a proliferation of similar viewpoint based legislation that has swept across the country, and demonstrates that the Act is unconstitutional.

## ARGUMENT

- I. Free and Open Classroom Discourse is Foundational to A

---



New Hampshire, 354 U.S. 234, 250 (1957). The exploration of new ideas and concepts is a foundational aspect of the classroom environment and the Supreme Court of the United States has repeatedly held that the First Amendment protects this process.

The First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom,” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) which is, in particular, the “marketplace of ideas.” (Internal quotations omitted). This protection is tied inextricably to democratic norms, furthered via “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.’” (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1948)) furtherance of democratic norms in the form of “vigilant protection of constitutional freedoms” is most vital in the classroom. *Shelton v. Twp. of Ellettsville*, 384 U.S. 479, 487 (1960) “No one should underestimate the vital role in a democracy that is played by those who guide and train our youth.” *Sweezy*, 354 U.S. at 26.

## II. Educational Gag Orders are Chilling Speech across the Nation

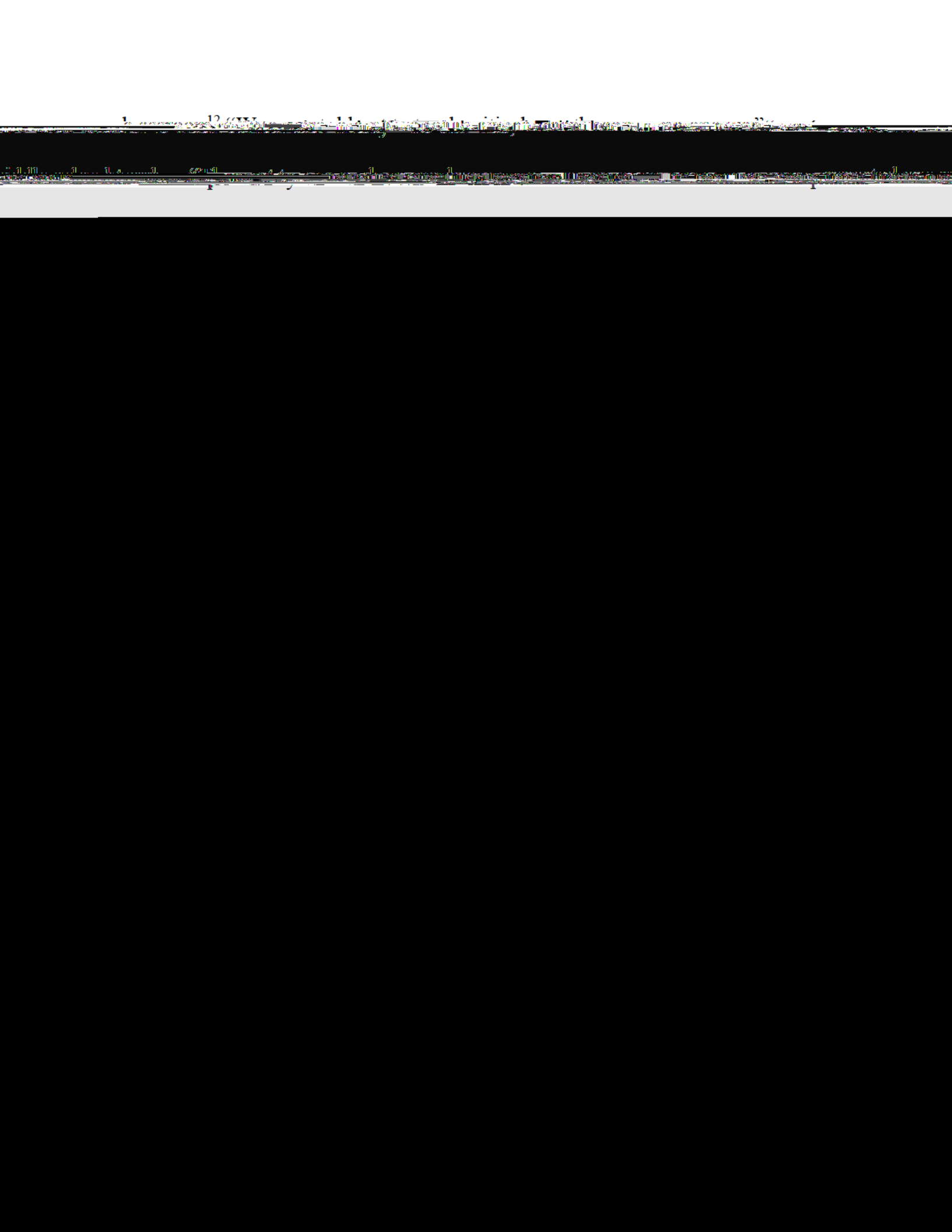
The Act is part of recent legislative efforts across the U.S. to restrict teaching and training of particular topics, in K-12 schools, higher education, state agencies and institutions, and workplace settings. As *Amicus* research catalogs, the majority of these bills target discussions of race, racism, gender, and American

history, banning a series of “prohibited” or “divisive” concepts.<sup>3</sup> These bills seek to use state power to exert ideological control over educational institutions, imposing government dictates on teaching and learning. Where enacted, they have chilled educational discussions of topics and viewpoints that the State disfavors.<sup>4</sup> The bills’ vague, sweeping language, particularly when coupled with potential

---

---

---



---

III. The Act Constrains Freedom of Inquiry in Violation of the First Amendment

The Supreme Court has held that neither students nor teachers exercised their First Amendment rights in the classroom. See *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 511 (1969); *Pickering v. Board of Ed.*, 391 U.S. 563 (1968). This

stated interest in enacting this law is “to fight back against woke indoctrination<sup>17</sup>” and to “put an end to wokeness that is permeating our schools and workforce,” illustrating the State’s focus on suppressing a particular set of viewpoints, which

---



(11th Cir. 1999) (“viewpoint discrimination [ ] is the most egregious form of content-based censorship”) see also *Searcey v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989) (“The prohibition against viewpoint discrimination is firmly embedded in First Amendment analysis”).

The Act’s viewpoint discrimination is plain and cannot survive any level of constitutional scrutiny, including the test set forth in *Bishop*. Under the Act, teachers in Florida are prohibited from sharing their insights and expertise with their students on the eight banned topics if they fail to do so.

To make matters worse, the Act also infringes on students' right to receive

information, in addition to ensuring the right to speak, also insures the right to receive information.

See *Students' Cases*, 204 U.S. 557, 564 (1907); *D. v. [redacted]*

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Federal Rule of Appellate Procedure 32(g)(1) that the attached brief is proportionally spaced, has a typeface of 14 points, and contains 2592 words.

Dated: June 23, 2023

/s/ James K. Green

CERTIFICATE OF SERVICE

I, James K. Green, counsel for Amicus Curiae and a member of the Bar of this Court, certify that on June 23, 2023, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ James K. Green  
James K. Green