

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

GSA Network, Students Engaged in
Advancing Texas, Texas AFT, Rebecca
Roe, by and through her next friend,
Ruth Roe, and Adrian Moore, by and
through his next friend, Julie Johnson,

Plaintiffs,

v.

Houston Independent School District,
Katy Independent School District, and
Plano Independent School District,

Defendants,

State of Texas,

Intervenor.

Civil Action No. 4:25-cv-4090

Judge Charles Eskridge

**PLAINTIFFS' RESPONSE TO INTERVENOR
STATE OF TEXAS'S MOTION TO DISMISS**

TABLE OF CONTENTS

INTRODUCTION	1
STANDARD OF REVIEW.....	5
ARGUMENT	6
I. Plaintiffs Have Standing	6
II. Plaintiffs State Viable Claims on the Merits	20
A. The GSA Ban Facially Violates the Equal Access Act	20
B. SB 12 Burdens Plaintiffs’ Speech Far Beyond Government Speech or the Speech of Government Employees	24
C. SB 12’s Challenged Provisions Are Viewpoint-Discriminatory and the State Does Not Attempt to Meet Strict, or Any Level of, Scrutiny.....	41
D. SB 12’s Challenged Provisions Are Vague	43
E. SB 12’s Provisions Are Properly Subject to a Facial Overbreadth Challenge.....	50
F. The GSA Ban Violates Plaintiffs’ Freedom of Association.....	54
G. SB 12 Also Operates as an Impermissible Prior Restraint.....	56
H. Severability Has No Bearing on the Motion	57
III. Plaintiffs’ Claims Against Plano ISD Are Not Moot.....	57
CONCLUSION.....	60

TABLE OF AUTHORITIES

Cases

<i>Arizona v. California</i> , 460 U.S. 605 (1983).....	7
<i>Arroyo Gonzalez v. Rossello Nevares</i> , 305 F. Supp. 3d 327 (D.P.R. 2018)	16
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	5
<i>Bd. of Educ. of Westside Cmty. Schs. v. Mergens</i> , 496 U.S. 226 (1990)	21, 23
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	5
<i>Book People, Inc. v. Wong</i> , 692 F. Supp. 3d 660 (W.D. Tex. 2023), <i>aff'd in part, vacated in</i> <i>part, remanded</i> , 91 F.4th 318 (5th Cir. 2024)	56
<i>Book People, Inc. v. Wong</i> , 91 F.4th 318 (5th Cir. 2024)	28
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	51
<i>Brown v. Entm't Merchs. Ass'n</i> , 564 U.S. 786 (2011)	35
<i>Chiles v. Salazar</i> , 607 U.S. 627 (2026)	35, 36
<i>Chiras v. Miller</i> , 432 F.3d 606 (5th Cir. 2005)	2, 32
<i>Chiu v. Plano Indep. Sch. Dist.</i> , 339 F.3d 273 (5th Cir. 2003)	56, 57
<i>Christian Legal Society v. Martinez</i> , 561 U.S. 661 (2010)	passim

<i>Cramp v. Bd. of Pub. Instruction of Orange Cnty., Fla.</i> , 368 U.S. 278 (1961).....	14
<i>Ferreira v. Borja</i> , 93 F.3d 671 (9th Cir. 1996), <i>cert. denied</i> , 519 U.S. 1122 (1997).....	7
<i>First Choice Women's Res. Centers, Inc. v. Davenport</i> , 146 S. Ct. 1114 (2026).....	55
<i>Food & Drug Admin. v. Alliance for Hippocratic Medicine</i> , 602 U.S. 367 (2024).....	12
<i>Free Speech Coal., Inc. v. Paxton</i> , 606 U.S. 461 (2025).....	35
<i>Frew ex rel. Frew v. Hawkins</i> , 540 U.S. 431 (2004).....	59
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006).....	29
<i>GSA Network v. Morath</i> , 821 F. Supp. 3d 753 (S.D. Tex. 2026).....	passim
<i>Hancock Cnty. Bd. of Sup'rs v. Ruhr</i> , 487 F. App'x 189 (5th Cir. 2012)	20
<i>Hazelwood School District v. Kuhlmeier</i> , 484 U.S. 260 (1988).....	24, 33, 34
<i>Healy v. James</i> , 408 U.S. 169 (1972).....	55
<i>Hunt v. Washington State Apple Advertising Commission</i> , 432 U.S. 333 (1977).....	14
<i>INS v. Chadha</i> , 462 U.S. 919 (1983).....	58
<i>Interstate Cir., Inc. v. City of Dallas</i> , 390 U.S. 676 (1968).....	44
<i>Jackson Fed'n of Tchrs. v. Fitch</i> , 799 F. Supp. 3d 571 (S.D. Miss. 2025).....	4, 25, 44

<i>Kennedy v. Bremerton Sch. Dist.</i> , 597 U.S. 507 (2022).....	passim
<i>Knox v. Service Emps. Int’l Union, Local 1000</i> , 567 U.S. 298 (2012).....	58
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983).....	48
<i>Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.</i> , 508 U.S. 384 (1993).....	11
<i>Lormand v. US Unwired, Inc.</i> , 565 F.3d 228 (5th Cir. 2009).....	5
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	5, 8
<i>Matal v. Tam</i> , 582 U.S. 218 (2017).....	26, 41, 42
<i>Merriott v. City of Bossier City</i> , 179 F.4th 393 (5th Cir. 2026)	53
<i>Minnesota Voters Alliance v. Mansky</i> , 585 U.S. 1 (2018).....	44
<i>Mirabelli v. Bonta</i> , 607 U.S. 492 (2026).....	39
<i>Moody v. NetChoice, LLC</i> , 603 U.S. 707 (2024).....	52, 53
<i>Morgan v. Swanson</i> , 659 F.3d 359 (5th Cir. 2011) (en banc)	33
<i>Nat’l Educ. Ass’n-New Hampshire v. NH Att’y Gen.</i> , 806 F. Supp. 3d 166 (D.N.H. 2025)	4
<i>O’Donnell v. Harris Cnty.</i> , 808 F. Supp. 3d 738 (S.D. Tex. 2025).....	7
<i>Paterson v. Weinberger</i> , 644 F.2d 521 (5th Cir. 1981).....	5

<i>Pernell v. Florida Board of Governors of the State University</i> , 181 F.4th 1135 (11th Cir. 2026)	passim
<i>Prince v. Jacoby</i> , 303 F.3d 1074 (9th Cir. 2002)	23
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992)	42
<i>Reed v. Town of Gilbert, Ariz.</i> , 576 U.S. 155 (2015)	34
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330 (1979)	13
<i>Roark & Hardee LP v. City of Austin</i> , 522 F.3d 533 (5th Cir. 2008)	43
<i>Rosenberger v. Rector & Visitors of Univ. of Va.</i> , 515 U.S. 819 (1995)	41, 42
<i>Rufo v. Inmates of Suffolk Cnty. Jail</i> , 502 U.S. 367 (1992)	59
<i>Shanley v. Ne. Indep. Sch. Dist., Bexar Cnty., Tex.</i> , 462 F.2d 960 (5th Cir. 1972)	56
<i>Shurtleff v. City of Boston</i> , 596 U.S. 243 (2022)	2, 26, 27, 28
<i>Sierra Club v. Espy</i> , 18 F.3d 1202 (5th Cir. 1994)	1
<i>Sorrell v. IMS Health Inc.</i> , 564 U.S. 552 (2011)	13
<i>Sossamon v. Lone Star State of Texas</i> , 560 F.3d 316 (5th Cir. 2009), <i>aff'd sub nom. Sossamon v.</i> <i>Texas</i> , 563 U.S. 277 (2011)	59
<i>Speech First, Inc. v. Fenves</i> , 979 F.3d 319 (5th Cir. 2020)	8

<i>Stanley v. Ga.</i> , 394 U.S. 557 (1969).....	40
<i>Students for Fair Admissions, Inc. v. President & Fellows of Harvard College</i> , 600 U.S. 181 (2023).....	37
<i>Texas v. Equal Emp. Opportunity Comm'n</i> , 933 F.3d 433 (5th Cir. 2019).....	15
<i>Texas v. United States</i> , 126 F.4th 392 (5th Cir. 2025)	7
<i>Tinker v. Des Moines Indep. Cmty. School Dist.</i> , 393 U.S. 503 (1969).....	3, 29, 36
<i>Turtle Island Foods, S.P.C. v. Strain</i> , 65 F.4th 211 (5th Cir. 2023)	8, 15
<i>United States v. Hansen</i> , 599 U.S. 762 (2023).....	51, 53
<i>United States v. O'Keefe</i> , 169 F.3d 281 (5th Cir. 1999).....	6
<i>United States v. Playboy Ent. Grp., Inc.</i> , 529 U.S. 803 (2000).....	2, 11, 26
<i>United States v. Skrmetti</i> , 605 U.S. 495 (2025).....	38
<i>United States v. Stevens</i> , 559 U.S. 460 (2010).....	52
<i>United States v. Williams</i> , 553 U.S. 285 (2008).....	47
<i>United States v. Windsor</i> , 570 U.S. 744 (2013).....	58
<i>Uzuegbunam v. Preczewski</i> , 592 U.S. 279 (2021).....	17

<i>Vill. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982).....	43
<i>Virginia v. Hicks</i> , 539 U.S. 113 (2003).....	51
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	5, 20
<i>Young Conservatives of Texas Found. v. Univ. of N. Texas</i> , 569 F. Supp. 3d 484 (E.D. Tex. 2021)	20

Statutes

20 U.S.C. § 4071(a)	21, 23
20 U.S.C. § 4071(c).....	23
Tex. Educ. Code § 1.007(b)	18
Tex Educ. Code § 11.005(c).....	18
Tex. Educ. Code § 11.005(b)(2).....	2, 9, 31
Tex. Educ. Code § 11.401.....	9
Tex. Educ. Code § 11.401(a)	39
Tex. Educ. Code § 11.401(c).....	47
Tex. Educ. Code § 26.011.....	18
Tex. Educ. Code § 26A.001	18
Tex. Educ. Code § 28.0043.....	9
Tex. Educ. Code § 28.0043(a)	31, 40, 49
Tex. Educ. Code § 28.0043(b)(3)	45
Tex. Educ. Code § 33.0815.....	9
Tex. Educ. Code § 33.0815(a)-(b).....	22
Tex. Educ. Code § 33.0815(b)	18, 35

Plaintiffs GSA Network, SEAT, Texas AFT, Rebecca Roe, and Adrian Moore (collectively, “Plaintiffs”)¹ submit this response in opposition to the Motion to Dismiss by Intervenor State of Texas (Dkt. 119) (hereinafter, “Motion”).

INTRODUCTION

The Motion should be denied because Plaintiffs have standing to assert their claims against Defendants Houston ISD, Katy ISD, and Plano ISD (collectively, “School District Defendants”). When denying the previous motions to dismiss, this Court held that at least one Plaintiff has standing to challenge each aspect of SB 12 against each Defendant. *GSA Network v. Morath*, 821 F. Supp. 3d 753, 776 (S.D. Tex. 2026). The State of Texas (hereinafter, “Texas” or “State”) as an “intervenor has no right to relitigate issues already decided.” *Sierra Club v. Espy*, 18 F.3d 1202, 1206 n.3 (5th Cir. 1994). Plaintiffs thus retain standing and their claims are not moot against any Defendant, including Plano ISD.

The Motion should also be denied under Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs’ allegations in the First Amended Complaint (Dkt.

¹ Plaintiff Polly Poe filed a pending unopposed Motion to Dismiss (Dkt. 127) because she no longer works for Plano ISD or any School District Defendant, and her claims for prospective relief are therefore moot. As explained herein, Plaintiffs Texas AFT and GSA Network continue to assert claims against Plano ISD. *See infra* Section I.D.

32) (hereinafter, “Complaint”) state plausible violations of the Equal Access Act and First and Fourteenth Amendments. Texas intervenes for the limited purpose of “defend[ing] the constitutionality of Texas Senate Bill 12,” Dkt. 103 at 9, but its arguments do not meet the State’s “burden of proving the constitutionality of its actions” when “the Government restricts speech.” *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000).

Although the State claims that “SB12 only targets protected government speech,” Dkt. 119 at ii, it does not cite, much less satisfy, the test for establishing government speech from *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022). Even in the context of school activities, the government is subject to the requirements of the First Amendment when it creates “forum[s] for [] expression.” *See, e.g., Chiras v. Miller*, 432 F.3d 606, 616 (5th Cir. 2005). By its plain text, SB 12 applies in every type of forum that could occur at and surrounding Texas schools, including programs and trainings where students, teachers, or volunteers reference race or ethnicity, informal conversations between students and third parties about gender identity or sexual orientation both within and outside of school, and programs and activities of every Genders and Sexualities Alliance (“GSA”) in the state. SB 12’s challenged provisions suppress speech and association far beyond Texas classrooms and outside of school hours, since they apply to all programs and activities “at, for, or on behalf of” a school district or charter school, Tex. Educ. Code § 11.005(b)(2),

and they silence the speech of educators and third parties even in their private capacity far removed from any official job duties. The law therefore suppresses vast amounts of constitutionally protected private speech, well beyond what the Texas Legislature may permissibly restrict. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022) (“[T]he First Amendment’s protections extend to ‘teachers and students,’ neither of whom ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”) (quoting *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969)).

As this Court is aware, *see* Dkt. 125, the Eleventh Circuit recently confirmed in *Pernell v. Florida Board of Governors of the State University* that “the government speech doctrine may not be used ‘as a subterfuge for favoring certain private speakers over others based on viewpoint.’” 181 F.4th 1135, 1156 (11th Cir. 2026) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009)). As that court explained, “[t]he classic government speech cases . . . are [] about the government itself expressing certain ideas—not banning employees from endorsing others.” *Id.* The Eleventh Circuit also found the government employee speech test unable to salvage a law’s viewpoint discrimination because that doctrine’s rationale concerns “allowing proper performance of professors’ daily duties”—not establishing a “per se ban on speech the state disagrees with.” *Id.* at 1152 (citation omitted). Although *Pernell* focuses on public universities, its reasoning applies equally here and

demonstrates that the government bears the burden of establishing that it may restrict constitutionally protected speech while reinforcing that viewpoint discrimination is *per se* unconstitutional. *See also Jackson Fed’n of Tchrs. v. Fitch*, 799 F. Supp. 3d 571, 584 (S.D. Miss. 2025) (rejecting the argument that a Mississippi law is exempt from constitutional scrutiny because it “seeks to regulate only government speech, and the speech of public employees (such as educators) in their official capacity”).

Because the challenged restrictions of SB 12 are impermissibly vague, this provides an independent basis for finding the law’s restrictions unconstitutional. Regardless of curricular or government employee speech, “several courts . . . have struck down similar anti-DEI laws as void for vagueness.” *Nat’l Educ. Ass’n-New Hampshire v. NH Att’y Gen.*, 806 F. Supp. 3d 166, 197 (D.N.H. 2025) (collecting cases). SB 12 is also impermissibly overbroad and operates as a prior restraint, and its GSA Ban facially violates the Equal Access Act and Plaintiffs’ freedom of association.

In sum, Texas fails to establish grounds for dismissal of any of Plaintiffs’ claims and does not respond to many of the well-pleaded allegations in the Complaint. Because “federal courts . . . must decide cases based on the arguments presented by the parties,” *GSA Network*, 821 F. Supp. 3d at 777, the State’s failure to respond to many of Plaintiffs’ allegations waives its arguments at this stage of the case. For the reasons explained below, the

Motion should be denied so that the Parties can proceed with discovery and litigate the merits of SB 12's challenged provisions through summary judgment and trial.

STANDARD OF REVIEW

For a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss, the Court is required to examine “the sufficiency of the allegations in the complaint.” *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). The Court “must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Standing is assessed “with the manner and degree of evidence required at the successive stages of the litigation,” and at the pleading stage “general factual allegations of injury resulting from the defendant’s conduct may suffice.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Under Rule 12(b)(6), a complaint must merely “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court accepts all well-pleaded facts as true and views them in the light most favorable to Plaintiffs. *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009). Plausibility “is not akin to a ‘probability requirement,’” and a well-pleaded complaint proceeds “even if . . . actual proof of those facts is improbable.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

ARGUMENT

I. PLAINTIFFS HAVE STANDING

The State asks this Court to dismiss this case for want of standing, but the Court has already rejected its central arguments. Plaintiffs have alleged imminent and ongoing injuries caused by the implementation and enforcement of SB 12 by the School District Defendants, which is traceable to them and redressable through injunctive relief.

A. The State’s Intervention Supplies No Basis to Revisit the Court’s Standing Determinations

The Court’s previous ruling on multiple motions to dismiss rejected nearly identical standing arguments to those the State now raises, and there is no basis to reverse those findings. The Court expressly held that, although Commissioner Morath lacked the requisite connection to Plaintiffs’ injuries, the School District Defendants’ enforcement of SB 12 satisfied injury-in-fact, traceability, and redressability. The Court explained: “The ISDs have each implemented policies or are otherwise enforcing SB 12, and an injunction proscribing further enforcement would afford cognizable relief to Plaintiffs.” *GSA Network*, 821 F. Supp. 3d at 773. The Court further concluded that “at least one Plaintiff has standing with respect to each provision of SB 12.” *Id.* at 776. These holdings now constitute the law of the case. *See United States v. O’Keefe*, 169 F.3d 281, 283 (5th Cir. 1999) (“[T]he doctrine of the law of the case

posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.” (cleaned up)). “The law of the case doctrine applies to questions of jurisdiction such as standing,” *Texas v. United States*, 126 F.4th 392, 405 n.12 (5th Cir. 2025), and “a court that has decided that it has jurisdiction is not duty-bound to entertain thereafter a series of repetitive motions to dismiss for lack of jurisdiction,” *Ferreira v. Borja*, 93 F.3d 671, 674 (9th Cir. 1996), *cert. denied*, 519 U.S. 1122 (1997).

The Motion ignores the Court’s findings and seeks to relitigate Plaintiffs’ standing against the School District Defendants. But “permission to intervene does not carry with it the right to relitigate matters already determined in the case, unless those matters would otherwise be subject to reconsideration.” *Arizona v. California*, 460 U.S. 605, 615 (1983), *decision supplemented*, 466 U.S. 144 (1984); *see also O’Donnell v. Harris Cnty.*, 808 F. Supp. 3d 738, 754–56 (S.D. Tex. 2025) (Rosenthal, J.) (explaining that an intervenor “has no right to relitigate issues already decided” and “must accept the proceedings as he finds them”) (citations omitted).

B. Defendants’ Implementation of SB 12’s Challenged Provisions Has Already Burdened Plaintiffs’ Constitutionally Protected Speech

The Court’s prior rulings on standing remain correct because the allegations in the Complaint support each Plaintiff’s standing against the

School District Defendants. To establish Article III standing, a plaintiff “must (1) have suffered an injury in fact, (2) that is fairly traceable to the challenged action of the defendant, and (3) that will likely be redressed by a favorable decision.” *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020) (*citing Lujan*, 504 U.S. at 560–61). In pre-enforcement challenges, plaintiffs satisfy the injury-in-fact prong if they demonstrate (1) an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) that the course of action is arguably proscribed by statute, and (3) a credible threat of enforcement. *Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th 211, 215 (5th Cir. 2023). “In pre-enforcement free speech challenges, chilled speech or self-censorship is an injury sufficient to confer standing.” *Id.*

Applying these principles, the Court found it “certainly appears that Plaintiffs fairly demonstrate their intention to engage in conduct of a constitutional dimension that is arguably (and has actually been) proscribed by SB 12.” *GSA Network*, 821 F. Supp. 3d at 767. The State now disputes this by trying to reframe the “purported injury” of Plaintiffs GSA Network and SEAT as only “being able to disseminate their materials to students *specifically through teachers*.” Dkt. 119 at 8 (emphasis in original). But this misconstrues the allegations in the Complaint, which do not rely on the dissemination of materials through teachers and, instead, demonstrate a breadth of harm from not being able to speak and associate in and surrounding Texas schools.

The State’s argument that SB 12 “does not regulate what independent third parties may or may not do” because it only applies to “schools,” *id.*, is contradicted by the text of the statute. The Inclusivity Ban and Don’t Say LGBTQ+ Ban directly proscribe the speech of “volunteers” and “third parties,” thereby barring each of the organizational Plaintiffs from engaging in programs and activities relating to race, gender identity, and sexual orientation. Tex. Educ. Code § 11.005(b)(2); Tex. Educ. Code § 28.0043. The GSA Ban prohibits all clubs “based on sexual orientation or gender identity,” Tex. Educ. Code § 33.0815, which necessarily limits the speech of GSA Network’s chapter and student members, as well as GSA Network itself when its clubs are shut down. Likewise, Texas AFT members’ speech is directly restricted by the Social Transition Ban, which forbids school employees from “assisting” a student’s social transition or providing “any information” about this topic, even outside of educators’ official duties. Tex. Educ. Code § 11.401. Thus, each Plaintiff retains standing to challenge each provision against the Defendants they have sued, and Texas cannot avoid these injuries by rewriting the statute.

1. GSA Network Has Both Organizational and Associational Standing

The State incorrectly calls GSA Network a “stranger” to SB 12. Dkt. 119 at 11. But the Complaint alleges the opposite. GSA Network is a membership

organization whose members include registered GSA clubs and student leaders in Texas schools. Dkt. 32 ¶¶ 72-73. GSA Network engages “in constitutionally protected speech by communicating with students, parents, and teachers in GSA clubs, including by sharing resources and information with registered GSAs in Texas,” and it is “undisputed that actions and policies enacted by the ISDs pursuant to the Club Provision proscribe GSA Network member clubs and have caused such clubs to disband in Katy and Plano ISDs.” *GSA Network*, 821 F. Supp. 3d at 774.

Despite this finding, the State argues that GSA Network cannot show injury because “[t]here is no provision in SB12 that directly suppresses GSA Network’s speech.” Dkt. 119 at 9. This ignores the allegation that “[a]s a ‘third party’ itself, GSA Network is now directly prohibited from providing any ‘instruction, guidance, activities, or programming regarding sexual orientation or gender identity to students.’” Dkt. 32 ¶ 86 (quoting Tex. Educ. Code § 28.0043(a)). It also ignores the causal chain that once “GSAs are no longer permitted to be school clubs, meet on school campuses, use school resources, or have the support of faculty sponsors, GSA Network’s speech will be burdened, and its mission will be impeded.” *Id.* ¶ 81. For purposes of injury-in-fact, it does not matter whether SB 12 prohibits GSA Network’s speech directly or by closing off avenues where its speech occurs, since “[t]he distinction between laws burdening and laws banning speech is but a matter of degree.” *Playboy*,

529 U.S. at 812. Depriving an organization of access to a forum is often itself a constitutional injury. *See Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-95 (1993). Texas’s argument that GSA Network can simply move its clubs off campus falls flat, since no organization would have standing to sue when the government bans it from a forum based on viewpoint.

Texas never addresses the allegations that “GSA Network is a membership-based organization” and “brings claims in this lawsuit on behalf of itself ***and its members***.” Dkt. 32 ¶¶ 71-72 (emphasis added). Even though the Court expressly recognized GSA Network’s associational standing to sue on behalf of its members, *GSA Network*, 821 F. Supp. 3d at 774, the State ignores it and does not challenge that GSA Network sues on behalf of its members whose GSA has been shut down in Plano ISD, and whose speech is suppressed by each challenged aspect of SB 12. Dkt. 32 ¶¶ 83-86.

The State also fails to rebut GSA Network’s allegations that “its core operations have been perceptibly impaired by policies enacted pursuant to the Club Provision, requiring it to divert time and resources away from its ordinary programming to address the impact of SB 12—namely, the closure of its member clubs”—which is a “cognizable” injury. *GSA Network*, 821 F. Supp. 3d at 774. Texas quotes *United States v. Texas* for the proposition that “an organization cannot ‘spend its way into standing,’” Dkt. 119 at 10 (quoting 173 F.4th 659, 665 (5th Cir. 2026)), but it omits the full context of that quote from

Food & Drug Admin. v. Alliance for Hippocratic Medicine, where the Supreme Court explained that “an organization that ***has not suffered a concrete injury*** caused by a defendant’s action cannot spend its way into standing simply by expending money ***to gather information and advocate against*** the defendant’s action.” 602 U.S. 367, 394 (2024) (emphases added). GSA Network’s injury is not the expense of advocacy or gathering information but the suppression of its own speech: its member clubs have been disbanded, and the forums where it associated and communicated with students shut down. Dkt. 32 ¶¶ 78-79, 81, 86. An organization whose speech is silenced is not a “stranger” to the law, and GSA Network has standing.

2. SEAT Has Organizational and Associational Standing

The State largely repeats its arguments for GSA Network against SEAT and likewise ignores that “SEAT brings claims in this lawsuit on behalf of itself ***and its members.***” Dkt. 32 ¶ 91 (emphasis added). Texas thus does not challenge SEAT’s associational standing. And its arguments regarding organizational standing are misplaced because SEAT’s speech is directly proscribed by the Don’t Say LGBTQ+ Ban and Inclusivity Ban of SB 12, as both a “third party” and “volunteer.” *See* Dkt. 32 ¶¶ 109-115. Although the State seems to imply that these terms are synonymous with “employees,” *see* Dkt. 119 at 11-12 (“third parties, i.e., teachers”), the text of SB 12 treats them

disjunctively. Because “canons of construction suggest terms connected by a disjunctive [must] be given separate meanings, unless the context dictates otherwise,” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), “third party” and “volunteer” cannot mean the same thing as “employee” without rendering them superfluous.

The State’s argument that SEAT can continue speaking with its members and other students far away from K-12 schools is beside the point because burdening SEAT’s speech still constitutes injury-in-fact. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (“Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.”). And while the State avers that “SEAT’s alleged diversion of resources due to SB12 also fails,” Dkt. 119 at 12, it does not provide any legal or factual basis for this conclusion. The Motion therefore does not warrant dismissal of SEAT’s claims.

3. Texas AFT Has Standing

Texas AFT brings claims on behalf of its members in each School District Defendant. The State does not challenge that Texas AFT may challenge SB 12 on behalf of its members. Indeed, Texas AFT’s members would have standing in their own right, the interests at stake are germane to a teachers’ union’s purpose, and neither the claims asserted nor the relief sought requires individual members’ participation. *See Hunt v. Washington State Apple*

Advertising Commission, 432 U.S. 333, 343 (1977). As with GSA Network and SEAT, Texas misconstrues Texas AFT’s allegations and tries to limit their injuries solely to speech within school employees’ scope of employment. *See* Dkt. 119 at 13. This ignores Texas AFT’s vagueness claim, which subjects SB 12’s provisions to constitutional scrutiny even when it applies within government employees’ official duties, *see, e.g., Cramp v. Bd. of Pub. Instruction of Orange Cnty., Fla.*, 368 U.S. 278, 283 (1961), and it overlooks Texas AFT’s allegations that two provisions of SB 12 restrict “members’ private speech far removed from their official duties—such as when educators encounter students on the weekend or at a community event,” Dkt. 32 ¶¶ 134, 137. Thus, even Texas’s flawed reading of the government employee speech doctrine, *see infra* Section II.B.2, does not defeat Texas AFT’s membership standing to bring claims to vindicate its members’ constitutional rights.

4. Rebecca Roe Has Standing

Texas argues that Rebecca Roe’s injuries are “hypothetical” because she filed suit before Houston ISD implemented SB 12 against her. *See* Dkt. 119 at 14-15. But in a pre-enforcement challenge, plaintiffs must only allege an intent to engage in a course of conduct arguably affected with a constitutional interest, that the course of action is arguably proscribed, and a credible threat of enforcement. *Strain*, 65 F.4th at 215-16. As this Court noted, Rebecca has alleged that she previously participated in GSA clubs and seeks to do so again,

but the GSA Ban facially restricts her ability to do that. *GSA Network*, 821 F. Supp. 3d at 774. Moreover, Rebecca’s ability to speak about and engage in programs, activities, and discussions related to race, gender identity, and sexual orientation is arguably proscribed by SB 12’s Inclusivity Ban, Social Transition Ban, and Don’t Say LGBTQ+ Ban. *See* Dkt. 32 ¶ 149.

Without disputing these allegations, Texas contends that Rebecca has no constitutional right to engage in these programs, activities, and discussions while also invoking SB 12’s exceptions that purport not to limit students’ freedom of speech. *See* Dkt. 119 at 14-15. But “for purposes of the standing analysis,” courts “assume” that the plaintiff “is correct on the merits of its claim.” *Texas v. Equal Emp. Opportunity Comm’n*, 933 F.3d 433, 447 (5th Cir. 2019). Thus, Texas’s arguments as to the merits of SB 12 and the scope of its exceptions cannot be construed against Rebecca for standing purposes, and she meets every element required to establish injury from the law.

5. Adrian Moore Has Standing

Texas likewise contends that Adrian Moore’s injuries are speculative, but it fails to address the allegations in the Complaint that include concrete harm from each challenged aspect of SB 12. The GSA Ban caused Adrian’s Pride/Diversity Club to be shut down; the Social Transition Ban made his school life harmful and exclusionary; and the Inclusivity Ban and Don’t Say LGBTQ+ Ban strained his relationships with teachers and threatened to cut

off programs, activities, and discussions in which Adrian has participated in the past and sought to continue. Dkt. 32 ¶¶ 162-69.

Texas argues that Adrian does not “possess[] a constitutional right to be called any name other than that on the birth certificate,” Dkt. 119 at 16, but this statement is not accurate, nor does it undermine injury-in-fact. Courts have found that transgender people have a right to be called by their chosen name without undue government interference, *see, e.g., Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018), but Adrian does not bring a substantive due process or equal protection claim here. Instead, he challenges SB 12’s Social Transition Ban as vague, especially “since teachers and staff have continued using nicknames and shortened names for Adrian’s cisgender peers,” Dkt. 32 ¶ 165, and as violating his First Amendment right to speak with teachers about prohibited topics, including social transitioning, *id.* ¶ 160. Adrian has standing to assert these claims because SB 12’s implementation against him “ma[de] him feel nameless and dehumanized at school,” *id.* ¶ 162, and “create[d] a barrier not only between teachers and Adrian but also between Adrian and other students, which harm[ed] his educational inclusion and success,” *id.* ¶ 167. Because of these concrete injuries, Adrian has standing for the claims he brings. And even though he was a senior when he filed suit and has now graduated, *see id.* ¶ 14, Adrian’s request for nominal damages ensures that his claims are not moot, *id.* ¶ 316;

see Uzuegbunam v. Preczewski, 592 U.S. 279, 292 (2021) (holding that “a request for nominal damages satisfies the redressability element of standing”).

C. Plaintiffs’ Injuries Are Traceable and Redressable

This Court examined SB 12’s enforcement mechanisms at length in its recent decision and found that “the challenged provisions with SB 12 task school districts and not the Commissioner” with enforcement. *GSA Network*, 821 F. Supp. 3d at 768. As a result, this Court’s analysis “resolve[d] necessary considerations of *traceability* and *redressability*” since “the ISDs have each implemented policies or are otherwise enforcing SB 12, and an injunction proscribing further enforcement would afford cognizable relief to Plaintiffs.” *Id.* at 773. There is no reason to revisit these holdings now, despite the State’s argument to the contrary.

Texas seems to claim that Plaintiffs’ injuries are not redressable because “[a]ny action that could possibly be taken by the State would only occur after going through the entire grievance process as outlined in SB12 including investigations by the respective school and principal, the Board of Trustees, and then finally, if at all, by the Texas Education Administration.” Dkt. 119 at 7. While Texas limits this argument to “the State,” *id.*—which is only an Intervenor and not a Party against whom Plaintiffs allege standing—the grievance process in no way interferes with the traceability or redressability of Plaintiffs’ injuries that stem from school districts’ enforcement of SB 12.

The modifications to the grievance process that the State cites are entirely separate from the four challenged provisions of SB 12, and there is no textual support that the grievance process is the only—or even a primary—way to enforce the law’s challenged provisions. *See* Tex. Educ. Code § 26.011; § 26A.001. While grievances allow parents and students to complain about SB 12 or other issues, school districts “shall” implement SB 12’s requirements, Tex. Educ. Code § 1.007(b); the Inclusivity Ban requires districts to adopt policies imposing discipline “including termination,” Tex. Educ. Code § 11.005(c); and the GSA Ban provides that districts “may not authorize or sponsor” a covered club, *id.* § 33.0815(b). Every district must certify compliance with Texas Education Code Sections 11.005 and 28.0043 and post that certification publicly—which operates independently of any grievance. Thus, SB 12’s enforcement is not limited (or even related) to the grievance process, and a permanent order from this Court enjoining the School District Defendants from enforcing SB 12’s challenged provisions would provide Plaintiffs with the relief they seek, including being able to form and continue GSAs, being able to engage in programs and activities that reference race, gender identity, and sexual orientation, and not being subject to the law’s vague and unconstitutional provisions.

D. Polly Poe's Departure from Plano ISD Does Not Change the Standing Analysis for the Remaining Plaintiffs and Defendants

As explained in Plaintiff Polly Poe's Unopposed Motion to Dismiss (Dkt. 127), Poe is no longer employed as a teacher in Plano ISD and no longer asserts claims against any School District Defendant in this case. She therefore seeks to be dismissed as a Plaintiff in this case and no Defendant opposes this request.

Although Poe's claims are now moot because she only alleged prospective claims in the Complaint, Plaintiffs GSA Network and Texas AFT both have live claims against Plano ISD and continue to have standing against it. As discussed above, *see supra* Section I.B.1, GSA Network's own speech and association were curtailed in Plano ISD, and Texas does not contest that GSA Network also has associational standing on behalf of its student members and clubs in Plano ISD. *See* Dkt. 32 ¶¶ 72-73, 78.

Texas AFT also continues to assert claims on behalf of its members in the district. Texas AFT has over 66,000 members throughout Texas, including in each Defendant School District. *Id.* ¶¶ 123-24. At the time of filing suit, Texas AFT had 78 members in Plano ISD, and it currently has 91. *See* Supplemental Declaration of Zeph Capo (attached as Exhibit 1).² Because

² Courts may allow supplemental declarations when assessing jurisdiction at the motion to dismiss stage. *See Warth*, 422 U.S. at 501.

Texas AFT properly asserts claims on behalf of its members against Plano ISD, its claims against the district may proceed even though Polly Poe was the only member specifically named in the Complaint. *See Hancock Cnty. Bd. of Sup'rs v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012) (explaining that “at the pleading stage . . . [there is] no precedent holding that an association must set forth the name of a particular member in its complaint in order to survive a Rule 12(b)(1) motion to dismiss based on a lack of associational standing”); *Young Conservatives of Texas Found. v. Univ. of N. Texas*, 569 F. Supp. 3d 484, 490 (E.D. Tex. 2021) (“At later stages of litigation, the association may need to present evidence to support its allegations that specific members of its organization have been harmed. . . . But such proof is not required at the pleading stage.”).

II. PLAINTIFFS STATE VIABLE CLAIMS ON THE MERITS

A. The GSA Ban Facially Violates the Equal Access Act

Although most of Texas’s merits arguments were previously briefed and argued by the Commissioner, its Equal Access Act (“Act”) arguments are new.³ Dkt. 119 at 38. The State claims that “[t]here is not any provision of SB12 that,

³ During the preliminary injunction hearing, the Texas Education Agency Commissioner did not contest that the GSA Ban facially violates the Equal Access Act. *GSA Network*, 821 F. Supp. 3d at 779. The Christian Legal Society also submitted an amicus brief explaining why the GSA Ban violates the Equal Access Act. *See* Dkt. 82.

strictly based on the statutory text, could be considered to facially violate the Equal Access Act,” but this argument is refuted by the text of the GSA Ban, which facially prohibits non-curricular clubs based on content as well as viewpoint.

The Act makes it “unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.” 20 U.S.C. § 4071(a). “[E]ven if a public secondary school allows only one ‘noncurriculum related student group’ to meet, the Act’s obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time.” *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 236 (1990).

Texas does not contest that the basic elements of the Act are met here. Each School District Defendant receives federal funds, explicitly authorizes non-curricular student clubs to meet in limited public forums, and now facially prohibits certain clubs based on content. *See* Dkt. 32 ¶ 290. Thus, Plaintiffs have stated viable claims under the Act, and Texas does not dispute that GSAs

were actually shut down in both Plano ISD and Katy ISD due to SB 12. Dkt. 32 ¶¶ 78-79, 169.

Instead of defending SB 12’s facial violations of the Act, Texas tries to invoke an *as-applied* defense only as to Polly Poe because she occasionally “participated” in “meetings by answering student questions, pointing students towards resources and information, and gave presentations to students.” Dkt. 119 at 37 (quoting Dkt. 33, Ex. 5 ¶¶ 4, 6).⁴ This argument is irrelevant to how SB 12 facially violates the Act, since Poe did not bring a claim under the Act, there is no indication that her experience can be universalized, and the State concedes that “[t]he details of any existing or proposed clubs within Houston ISD or Katy ISD remain unknown at this time,” Dkt. 119 at 38 n.5—which renders the State’s argument inapplicable in those districts.

Moreover, SB 12 is not concerned about the level of teacher involvement in any club. It states that schools “*may* authorize *or sponsor* a student club” but “*may not* authorize or sponsor a student club based on sexual orientation or gender identity.” Tex. Educ. Code § 33.0815(a)-(b) (emphases added). SB 12 therefore allows teachers to be as active as they want in sponsoring certain clubs but completely bans GSAs regardless of their level of faculty involvement.

⁴ Poe clarified when making these statements that “the GSA is student-led” and she only “help[ed] give presentations.” Dkt. 33-5 ¶¶ 4-5.

The Act’s “fair opportunity criteria” set a floor for what schools must provide—not a ceiling. *See* 20 U.S.C. § 4071(c). These criteria describe when a school’s open-access policy suffices, and the operative provision of the Act makes it unlawful to “deny equal access . . . to any students who wish to conduct a meeting” based on the content of their speech. 20 U.S.C § 4071(a). This right belongs to students—not teachers—and teachers cannot take this right away by participating in a club too actively. *See Prince v. Jacoby*, 303 F.3d 1074, 1083 (9th Cir. 2002).

The Act’s language regarding “sponsorship” is aimed at ensuring that schools do not “impermissibly entangle government in the day-to-day surveillance or administration of religious activities” and clubs. *Mergens*, 496 U.S. at 253. While the Act’s provisions help ensure that school employees do not violate the Establishment Clause by actively leading religious meetings, they do not strip students and clubs of the Act’s protections if teachers like Poe occasionally participate in student-run clubs. And because SB 12 imposes a categorical ban on ***all*** clubs “based on sexual orientation or gender identity,” regardless of faculty involvement with clubs at specific schools, its facial prohibition plainly violates the Act.

B. SB 12 Burdens Plaintiffs’ Speech Far Beyond Government Speech or the Speech of Government Employees

Texas seeks to insulate *all* of SB 12’s challenged provisions from constitutional scrutiny by claiming that “SB12 only targets protected government speech.” Dkt. 119 at ii. But the text of SB 12’s challenged provisions suppresses speech far beyond what could possibly be categorized as government speech. The other doctrines that Texas invokes—including the government employee speech doctrine, the limited public forum analysis of *Christian Legal Society v. Martinez*, 561 U.S. 661, 686 (2010), and the school-sponsored speech doctrine of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 272 (1988)—similarly do not insulate SB 12’s challenged provisions from judicial review.

This Court correctly noted that “[t]o say that SB 12 is a complex law presenting complicated constitutional issues is a vast understatement,” Dkt. 89 at 36, which may be why Texas tries to “cobble[] together” various “doctrines . . . to support its suppression of disfavored viewpoints.” *Pernell*, 181 F.4th at 1150. But as the Eleventh Circuit held in *Pernell*, “the government speech doctrine may not be used ‘as a subterfuge for favoring certain private speakers over others based on viewpoint,’” and neither can the government employee speech doctrine. *Id.* at 1153, 1156. As in Florida, SB 12’s “speech restrictions are designed to ban disfavored speech on a broad scale before it happens” and

intended to cast a “pall of orthodoxy’ that the First Amendment will not tolerate.” *Id.* at 1149.

Another district court in this Circuit recently enjoined a Mississippi law prohibiting, among other things, “any [] policies or procedures that result in any formal or informal education, seminars, workshops or institutional program that focus on increasing awareness or understanding of issues related to race, sex, color, gender identity, sexual orientation or national origin” in all K-12 schools and universities in the state. *Fitch*, 799 F. Supp. 3d at 581. Just as Texas argues in this Motion, Mississippi contended that the law at issue “seeks to regulate only government speech, and the speech of public employees (such as educators) in their official capacity.” *Id.* at 584. But the court rejected that argument and held that the plaintiffs were still entitled to a preliminary injunction because the law at issue was “unconstitutionally vague, fails to treat speech in a viewpoint-neutral manner, and carries with it serious risks of terrible consequences with respect to the chilling of expression and academic freedom.” *Id.* at 585. This Court should likewise deny the Motion because Texas has not met its burden of showing that SB 12 suppresses only government speech or the speech of government employees.

1. The State Bears the Burden of Establishing Government Speech, Which It Has Not Satisfied

Importantly, “[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *Playboy*, 529 U.S. at 816 (collecting cases). Because SB 12 takes aim at and suppresses speech, the State bears the burden of showing that its restrictions are constitutionally permissible. And far from insulating SB 12 from judicial review, the government speech doctrine cannot be “used as a cover for censorship.” *Shurtleff*, 596 U.S. at 263 (Alito, J., concurring). Instead, “[w]hen the government encourages diverse expression—say, by creating a forum for debate—the First Amendment prevents it from discriminating against speakers based on their viewpoint.” *Shurtleff*, 596 U.S. at 247 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-30 (1995)). “[W]hile the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.” *Matal v. Tam*, 582 U.S. 218, 235 (2017). For that reason, the Supreme Court “exercise[s] great caution before extending [its] government-speech precedents.” *Id.*

During the preliminary injunction hearing, the Commissioner’s counsel expressly acknowledged that the burden of establishing government speech falls on the State. *See* Prelim. Inj. Hr’g Tr. 136:12-14, Dkt. 87. Despite this acknowledgment, the State does not cite the test for government speech from *Shurtleff*, nor come close to meeting its requirements. This test instructs courts to examine (1) the history of the expression at issue, (2) the public’s likely perception of who is speaking, and (3) the extent to which the government has actively shaped or controlled the expression before. 596 U.S. at 252. The Court and Commissioner’s counsel—now counsel for the State—both discussed the government speech doctrine and *Shurtleff* at length during the preliminary injunction hearing, and the Commissioner conceded that there is not “any real record” that Texas has a history of exercising control over all school-related programs and activities similarly to SB 12. Prelim. Inj. Hr’g Tr. 136:17-21, Dkt. 87. The Commissioner also admitted that there is not “any evidence” that the public would perceive what SB 12 restricts as government speech. *Id.* at 137:21-22. Under the third *Shurtleff* prong, the Commissioner agreed with the statement that SB 12 is “trying to actively shape or control this expression in a way that’s different than has been of what’s happened in the past.” *Id.* at 138:9-15.

Despite this lengthy exchange, Texas’s Motion omits any mention of *Shurtleff* or its three factors. But the State cannot simply ignore this test, since

the burden for establishing government speech rests on the State. “Whether speech is government speech or private speech **requires** ‘a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression.’” *Book People, Inc. v. Wong*, 91 F.4th 318, 336–37 (5th Cir. 2024) (quoting *Shurtleff*, 596 U.S. at 252) (emphasis added). Even though their application “is not mechanical,” the three *Shurtleff* factors “guide the [government speech] analysis.” *Id.* Here, Texas cannot sweepingly say that SB 12 “simply regulates government speech,” Dkt. 119 at 17, when it does not address *Shurtleff* nor conduct the required analysis.

Critically, the government speech doctrine asks whether the government “**has** actively shaped or controlled the expression” at issue, not whether it **could**. *Shurtleff*, 596 U.S. at 252 (emphasis added). There is no record or allegation that the government has ever controlled all speech in and surrounding school-related activities as SB 12’s challenged provisions do here. *Cf. Kennedy*, 597 U.S. at 529-30 (holding that a coach’s prayer after football games on school property and in front of students “was private speech, not government speech”).

At this stage of the case, where Plaintiffs’ allegations must be accepted as true, SB 12 represents a profound shift in how Texas controls speech in and surrounding public schools, and the State’s mere invocation of the government speech doctrine cannot insulate the law from judicial review.

2. The Government Employee Speech Doctrine Similarly Fails to Immunize SB 12 from Constitutional Scrutiny

Instead of addressing the requisite test for government speech, Texas devotes much of its government speech section to the doctrine that applies to certain speech from government employees under *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). *See, e.g.*, Dkt. 119 at 18 (“*Garcetti* alone dooms Plaintiffs’ First Amendment claims”). The government employee speech doctrine developed as a way to ensure that the government—like private sector employers—is not required to allow employees’ speech to “disrupt the office, undermine [the manager’s] authority, and destroy close working relationships”—in short, . . . impeded[ing] ‘the administration of a government office.’” *Pernell*, 181 F.4th at 1151 (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1982)). In *Kennedy*, the Supreme Court considered *Garcetti* and reiterated the central command that “teachers and students” do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” 597 U.S. at 527 (quoting *Tinker*, 393 U.S. at 506). As *Kennedy* explained:

To account for the complexity associated with the interplay between free speech rights and government employment, this Court’s decisions . . . suggest proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech at issue. If a public employee speaks pursuant to his or her official duties, this Court has said the Free Speech Clause generally will not shield the individual from an employer’s control and discipline because that kind of speech is—for constitutional purposes at least—the government’s own speech. At the same time and at the

other end of the spectrum, when an employee speaks as a citizen addressing a matter of public concern, our cases indicate that the First Amendment may be implicated and courts should proceed to a second step. At this second step, our cases suggest that courts should attempt to engage in a delicate balancing of the competing interests surrounding the speech and its consequences.

Id. at 527-28 (cleaned up). Texas cites this test and argues that “it is difficult to surmise a situation in which a primary or secondary school teacher’s curricular choices are made other than ‘pursuant to [that [sic] educator’s official duties.’” Dkt. 119 at 18. But the plain text of SB 12 is not limited to the official curriculum, and the Complaint plainly alleges that each challenged aspect extends beyond it. *See, e.g.*, Dkt. 32 ¶ 220 (explaining that the Inclusivity Ban “is not limited to educators’ official duties and restricts Texas AFT members’ purely private speech on matters of public concern anytime that they are ‘at’ school property or attend conferences or events ‘for . . . the district’”); ¶ 134 (“On its face, the Social Transition Ban is not limited to only curricula, in-class discussions, or school employees’ official duties.”); ¶ 137 (“[T]he Don’t Say LGBTQ+ prohibition is not limited to the curriculum or educators’ official duties”).

A central problem with SB 12 is that it extends far beyond school employees’ official duties and restricts their speech even in their private capacity on matters of public concern. Although school employers—like private sector employers—must be able to control their workplaces, the challenged

restrictions here are fundamentally different from the facts behind each Supreme Court case involving government employee speech. As the Eleventh Circuit held in *Pernell*, “though the employee speech cases provide a useful framework for balancing interests, their primary rationale—managing government workplaces—does not apply here.” 181 F.4th at 1149. As in Florida, SB 12’s “speech restrictions are designed to ban disfavored speech on a broad scale before it happens, not respond to internal workplace issues on an individual level.” *Id.*

There is no suggestion here that the Texas Legislature was concerned about the internal management of government workplaces when enacting SB 12. The law instead imposes sweeping restrictions on the speech of public school employees while also facially restricting the speech of students, “volunteer[s],” and “third parties,” Tex. Educ. Code § 11.005(b)(2), Tex. Educ. Code § 28.0043(a). Because the plain text of each challenged provision applies beyond just government employees, the government employee speech doctrine does not insulate SB 12 from judicial review. And because the law imposes a “per se ban on speech the state disagrees with,” *Pernell*, 181 F.4th at 1152 (citation omitted), the proper remedy is to enjoin enforcement of the challenged provisions, even if their application may also sometimes implicate speech within the scope of government employees’ official duties.

3. Other Cases and Doctrines Cited by the State Do Not Insulate SB 12 from Constitutional Scrutiny

Texas cites several cases that emphasize “the wide authority regarding educational policy bestowed upon various Texas state entities,” including control over curriculum. Dkt. 119 at 19. But the State does not cite any case or doctrine that authorizes governmental viewpoint discrimination across all programs, activities, and clubs in and surrounding K-12 schools. Instead, Texas’s own cases stand for the proposition that once the government creates forums for private speech, the State cannot ban ideas or viewpoints.

For example, Texas cites *Chiras v. Miller* for the proposition that “when the relevant state entities—vested with the authority to do so—devise state curriculum, ‘it is the state speaking, and not the textbook author.’” Dkt. 119 at 20 (quoting 432 F.3d 606, 614 (5th Cir. 2005)). Unlike in *Chiras*, where the State Board of Education engaged in government speech by choosing a textbook, SB 12 is not aimed at in-class curriculum and extends far beyond it. *Chiras* held that when the government creates a “forum” for speech, it is still “subject to the viewpoint neutrality restriction,” 432 F.3d at 612 (citing *Rosenberger*, 515 U.S. at 833), which is what Plaintiffs allege here.

Texas also cites *Martinez* to argue that the government exercises significant control over “extracurricular programs,” Dkt. 119 at 22 (quoting 561 U.S. at 686), but it omits the central rule language from that case, which

clarifies that once a government entity creates a forum for speech, “[a]ny access barrier must be reasonable and viewpoint neutral.” 561 U.S. at 679 (citation omitted).

Likewise, the State relies on *Hazelwood* to assert that “[t]he determination of what manner of speech in the classroom [] is inappropriate properly rests with the school board, rather than the federal courts.” Dkt. 119 at 17 (quoting 484 U.S. at 272). This does not help the State’s argument because SB 12 does not grant decision-making authority to “school board[s]” but instead overrides their control and imposes viewpoint discrimination statewide.

Hazelwood held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” 484 U.S. at 273. The Fifth Circuit has explained that “the *Hazelwood* exception should be construed narrowly. It applies only where the speech is school-sponsored, a determination that turns on whether the views of the individual speaker might be erroneously attributed to the school.” *Morgan v. Swanson*, 659 F.3d 359, 408-09 (5th Cir. 2011) (en banc) (cleaned up). Here, SB 12’s challenged provisions are far too sweeping to be aimed only at school-sponsored speech. But even if *Hazelwood* could apply to certain applications of SB 12, Texas still does not allege any “legitimate

pedagogical concerns” to justify categorical censorship of references to race, gender identity, or sexual orientation. 484 U.S. at 273.

4. Each Challenged Section of SB 12 Burdens Constitutionally Protected Speech

i. GSA Ban

The Motion does not claim that the GSA Ban is limited to government speech but instead asserts that “the prohibition of clubs strictly based on gender identity or sexual orientation is a permissible content-neutral restriction.” Dkt. 119 at 22. Although a ban on these topics is viewpoint-discriminatory, *see infra* Section II.C, banning clubs “based on sexual orientation or gender identity” is also “obvious” content discrimination because the law “define[s] regulated speech by particular subject matter.” *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

The State never explains how this restriction could possibly be interpreted as content-neutral, nor does the State contest that each School District Defendant has established a limited public forum for noncurricular student groups in secondary schools, Dkt. 32 ¶ 214, both for purposes of the Equal Access Act and the First Amendment. Texas also does not dispute that “SB 12 itself establishes that student clubs, programs, and activities may continue—thereby creating limited public forums” for speech. Dkt. 32 ¶ 213. Because the GSA Ban facially denies Plaintiffs access to a limited public forum

still afforded to others, it is subject to constitutional scrutiny even under the cases cited by the State.

Texas quotes a lawmaker stating, “we shouldn’t have clubs based on sex,” Dkt. 119 at 21, but the GSA Ban does not target clubs “based on sex.”⁵ Instead, it bans clubs “based on sexual orientation or gender identity,” Tex. Educ. Code § 33.0815(b), and the law’s legislative history evinces an intent to target GSAs, Dkt. 32 ¶¶ 63-66, which have now been shuttered due to SB 12. The State does not assert that GSAs engage in any speech or conduct that is constitutionally unprotected; and, even if some lawmakers disapprove of the class of viewpoints expressed by GSAs, the government has no “free-floating power to restrict the ideas to which children may be exposed.” *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 794 (2011).

Texas’s citation to Justice Kagan’s concurrence in *Chiles v. Salazar* undermines its claim that some laws “raise[] no real concern that the government is censoring disfavored ideas,” Dkt. 119 at 22, because in the sentence before, Justice Kagan explained that “[w]e apply our most demanding standard when there is any ‘realistic possibility that official suppression of ideas is afoot.’” 607 U.S. 627, 657 (2026) (quoting *Davenport v. Washington Ed.*

⁵ Even this would still be a “quintessential content-based law” unless limited to obscenity or obscenity for minors, which the State does not contend. See *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 492 (2025).

Assn., 551 U.S. 177 (2007)). *Chiles* thus reinforces that “viewpoint discrimination . . . represents an egregious form of content regulation, and governments in this country must nearly always abstain from it.” *Id.* at 641. Here, lawmakers specifically invoked GSAs by name before voting to banish them from Texas schools, Dkt. 32 ¶¶ 63-66, such that the GSA Ban is not only content-based but also viewpoint-discriminatory and subject to strict scrutiny.

ii. Inclusivity Ban

The State tries to insulate the Inclusivity Ban from First Amendment scrutiny by stating that it applies “only to activities ‘at, for, or on behalf of the district.’” Dkt. 119 at 24. This argument is unavailing because the Inclusivity Ban still reaches and suppresses enormous swaths of constitutionally protected speech. Just because a student organization meets “at” school, a parent chaperones a field trip “for” a school district, or a student attends a conference “on behalf of” their school, the government still bears the burden of establishing that private speakers’ speech during those activities is government speech, which Texas fails to do. The argument that speech is not constitutionally protected simply because it occurs “at” school has long been foreclosed since “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 506.

Plaintiffs also do not challenge the employment-related aspects of Texas Education Code Section 11.005 that the State cites, but instead only the provision that defines “diversity, equity, and inclusion duties” to include “developing or implementing policies, procedures, trainings, activities, or programs that *reference* race, color, ethnicity, gender identity, or sexual orientation.” Dkt. 32 ¶ 24. The Complaint therefore poses no conflict with the State’s contention that “[p]romoting differential treatment based on race, color or ethnicity is textbook discrimination,” Dkt. 119 at 23, but that is not what Plaintiffs challenge. Renaming the Inclusivity Ban a “Discrimination Ban” does not change its text. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023), concerned the use of race in admissions decisions; it says nothing about allowing the government to ban discussions of race entirely. As the Eleventh Circuit put it when rejecting the same conflation, “[p]reventing professors from positively discussing a viewpoint is not the same as regulating discrimination,” because “a difference of opinion is not discrimination.” *Pernell*, 181 F.4th at 1155. SB 12’s Inclusivity Ban proscribes any mention of race and other topics from every policy, procedure, training, activity, and program, which is viewpoint-discriminatory and drives these topics into the shadows. *See infra* Section II.C.

iii. Social Transition Ban

The State also fails to meet its burden of establishing that the Social Transition Ban can be considered government speech and instead launches into a stream of policy arguments to support this restriction. *See* Dkt. 119 at 24-26. These arguments have no bearing on the legal question of whether the Social Transition Ban reaches protected, rather than government, speech; and, indeed, further demonstrate that this section is viewpoint-discriminatory.

The State's reliance on *United States v. Skrmetti*, 605 U.S. 495 (2025), is misplaced because the Supreme Court there considered equal protection challenges to Tennessee's ban on certain medical procedures for minors, not First Amendment challenges to a student censorship law. Given the distinct legal and factual issues, it is misleading to rely on *Skrmetti* or characterize the practice of school employees using students' chosen names and pronouns as subject to "fierce scientific debate." *See* Dkt. 119 at 26. Reliance on the "Cass Review" is similarly inapposite and has no bearing on whether the open-ended nature of the Social Transition Ban, which is not limited to speech within school employees' official duties, could be considered government speech.

The State also quotes *Mirabelli v. Olson* for the proposition that "embarking upon a social transition based solely upon the self-attestation of the youth ***without consultation with parents*** and appropriate professionals is unwise." Dkt. 119 at 25 (quoting 691 F.Supp.3d 1197, 1208 (S.D. Cal. 2023))

(emphasis added)). This case diminishes the State’s argument because the Supreme Court in *Mirabelli* recognized the fundamental due process rights of parents that the school districts here have now usurped. *See Mirabelli v. Bonta*, 607 U.S. 492, 497 (2026). Instead of upholding parents’ rights, Katy ISD and Plano ISD have implemented the Social Transition Ban to interfere with the rights of parents who request that schools use their transgender students’ affirming names and pronouns—even with explicit written consent. *See* Dkt. 32 ¶¶ 161, 183-84.

The State’s argument that “[p]ublic schools are simply not the appropriate fora to provide instructions to students to enable a ‘transition from the person’s biological sex at birth to the opposite biological sex,’” Dkt. 119 at 26, both misdirects from the statute’s much broader language, *see infra* Sections II.D-E, and reinforces Plaintiffs’ argument that the Social Transition Ban is viewpoint-discriminatory. Ultimately, the State fails to show that the Social Transition Ban is aimed at or limited to government speech, and it is thus subject to constitutional scrutiny.

iv. Don’t Say LGBTQ+ Ban

Although the State claims that the Don’t Say LGBTQ+ Ban is “quintessential government speech as it is [sic] specifically defines curriculum boundaries,” Dkt. 119 at 27, the text of the statute defies that interpretation: “[a] school district, open-enrollment charter school, or district or charter school

employee may not provide *or allow a third party to provide* instruction, *guidance, activities, or programming* regarding sexual orientation or gender identity to students enrolled in prekindergarten through 12th grade.” Tex. Educ. Code § 28.0043(a) (emphases added). Texas does not dispute that Plaintiffs like the GSA Network and SEAT are themselves “third parties” directly subject to this restriction, or that they are no longer permitted to provide guidance, activities, or programming related to sexual orientation or gender identity to students in Texas schools. Dkt. 32 ¶¶ 86, 112, 122.

As with the Social Transition Ban, this prohibition is not limited in time or space. Instead, it facially restricts the speech of educators about matters of public concern even in their purely private capacity far beyond school property. *Id.* ¶ 137. The State’s claim that this section contains a savings clause for student speech, Dkt. 119 at 38, also does not render this section immune from constitutional scrutiny, since students have a right to receive information as well as speak, *see Stanley v. Ga.*, 394 U.S. 557, 564 (1969), and the State does not rebut the Complaint’s allegation that SB 12’s sweeping student speech exceptions are “so broad and vague as to be meaningless” because the more specific requirements of the law override a generalized exception under the interpretive canon of *lex specialis*, Dkt. 32 ¶ 253.

C. SB 12’s Challenged Provisions Are Viewpoint-Discriminatory and the State Does Not Attempt to Meet Strict, or Any Level of, Scrutiny

As illustrated above, each challenged provision of SB 12 discriminates based on viewpoint. Even though “the First Amendment prohibits government actors from ‘dictating what we see or read or speak or hear,’” Dkt. 32 ¶ 211 (quoting *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004)), SB 12 decrees what students, educators, and third parties see, read, speak, and hear in countless programs and activities that have long been established as forums of speech. *Id.* ¶ 212. And because SB 12’s provisions discriminate based on viewpoint in all types of forums, they are subject to strict scrutiny, which the State does not address nor attempt to meet.

The Supreme Court interprets “the term ‘viewpoint’ discrimination in a broad sense.” *Matal*, 582 U.S. at 243 (citations omitted). Just as prohibiting any discussion of religion in schools “discriminate[s] against an entire class of viewpoints,” *Rosenberger*, 515 U.S. at 831 (“If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one”), so too does SB 12 censor entire classes of viewpoints by proscribing topics of race, gender identity, and sexual orientation. Through the law’s text and legislative history, SB 12 suppresses the speech of students, parents, educators, and others who wish to speak about race, gender identity, or sexual orientation while

inherently privileging the perspective that these topics should not be discussed.

Texas does not contest Plaintiffs’ allegations that “SB 12 discriminate[s] based on viewpoint because they have the purpose and effect of suppressing non-majoritarian views regarding race, gender identity, and sexual orientation.” Dkt. 32 ¶ 225. By expressing a governmental preference for colorblindness and cisheteronormativity, *see id.* n.56, SB 12’s restrictions entrench majoritarian views and “drive [contrary] ideas or viewpoints from the marketplace.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (citations omitted).

Without addressing the substance of Plaintiffs’ viewpoint discrimination allegations, the State reiterates its argument that SB 12’s challenged provisions apply only to government speech while conceding that “[w]hen a student group asks to use school resources—including campus facilities—for its own purposes, the limited-public forum analysis would apply.” Dkt. 119 at 29. This concession dooms the Motion, because the cases Texas cites prohibit the government from discriminating based on viewpoint in a limited public forum without satisfying strict scrutiny. *See Matal*, 582 U.S. at 243; *accord Martinez*, 561 U.S. at 679. The State does not argue—and certainly does not establish—how SB 12’s challenged provisions are viewpoint-neutral, nor does it attempt to satisfy strict scrutiny or any level of scrutiny.

D. SB 12's Challenged Provisions Are Vague

Each challenged provision of SB 12 fails to tell educators, students, and third parties what it forbids, and each invites arbitrary and discriminatory enforcement. Texas does not rebut Plaintiffs' detailed allegations for why each challenged section is unconstitutionally vague. *See* Dkt. 32 ¶¶ 240-68.

A law is impermissibly vague when it (1) fails to provide a “person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,” or (2) fails to provide “explicit standards” for applying the law “to avoid arbitrary and discriminatory applications.” *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 551 (5th Cir. 2008) (citation omitted). A “more stringent vagueness test” applies where a statute “interferes with the right of free speech.” *Vill. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

Texas argues that the more stringent test does not apply since “any alleged speech at issue fails to implicate the First Amendment.” Dkt. 119 at 30. While this argument is incorrect, *see supra* Section II.B, it overlooks that this more stringent test applies even where a law merely “**ha[s] the capacity** to chill constitutionally protected conduct.” *Id.* (quoting *Roark*, 522 F.3d at 546) (emphasis added). Thus, the Court need not resolve the precise contours of constitutionally protected speech that SB 12's challenged provisions restrict before applying the heightened vagueness test, since SB 12 certainly has “the

capacity” of chilling Plaintiffs’ speech—and indeed already has. *See GSA Network*, 821 F. Supp. 3d at 775.

Even if the heightened test for free speech did not apply, SB 12’s challenged provisions are still unconstitutionally vague because they fail to provide adequate notice of what is proscribed and inherently lead to arbitrary and discriminatory enforcement. Vagueness is a due process doctrine that does not depend on the First Amendment. A statute must give fair notice of what it forbids regardless of whether the speech it reaches is protected. *See Interstate Cir., Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968) (“The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression.”).

The State’s invocation of *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1 (2018), is not to the contrary. Although Texas claims that “[p]erfect clarity” is not required, Dkt. 119 at 30, *Mansky* struck down a challenged law and explained that the government “must be able to articulate some sensible basis for distinguishing what may come in from what must stay out.” 585 U.S. at 16. As explained below, the State articulates no basis for how school districts may determine which clubs, programs, and activities are barred by SB 12, and which are not. This accords with other courts that have found similar laws to SB 12 be unconstitutionally vague, *see Fitch*, 799 F. Supp. 3d at 581, and the Eleventh Circuit in *Pernell* did not reach the issue of vagueness because it

found “the Act’s speech restrictions directly violate the First Amendment.” 181 F.4th at 1164 n.17.

1. The GSA Ban Is Vague

The GSA Ban is vague because it “does not provide guidance on how a school district or charter school can determine whether a club is ‘based on sexual orientation or gender identity,’” which necessarily leads to discriminatory and arbitrary enforcement. Dkt. 32 ¶ 242. The Complaint alleges that “[t]he term ‘based on’ is undefined and gives insufficient notice to school administrators about what types of clubs are prohibited, or how to make that determination.” *Id.* Without disputing this allegation, Texas implies that the GSA Ban is not vague only because “sexual orientation” and “gender identity” can be defined through dictionary definitions and a lawmaker stated: “[W]e shouldn’t have clubs based on sex.” Dkt. 119 at 31. This statement does not render the GSA Ban any less vague, and dictionary definitions cannot salvage the GSA Ban’s inherent vagueness, especially since the term “gender identity” is so broad that it “could reasonably be interpreted to bar any type of gender-based club.” Dkt. 32 ¶ 243. The Legislature amplified this section’s intrinsic vagueness by creating an exception to the Don’t Say LGBTQ+ Ban permitting organizations to exist “whose membership is restricted to one sex and whose mission does not advance a political or social agenda.” Tex. Educ. Code § 28.0043(b)(3). But “because this exception is neither incorporated into

nor referenced in the GSA Ban, the prohibition on all student organizations ‘based on . . . gender identity’ in this section remains unconstitutionally vague,” Dkt. 32 ¶ 243, and Texas does not respond to or rebut these allegations.

2. The Inclusivity Ban Is Vague

The Inclusivity Ban’s operative terms—including “develop,” “implement,” “policies,” “procedures,” “trainings,” “activities,” “program,” “reference,” and “volunteer”—“[i]ndividually and collectively . . . are so vague that they fail to provide the minimum guidance required by the First Amendment and Due Process Clause as to what kind of speech and activities are prohibited,” Dkt. 32 ¶¶ 245-50—and the State does not dispute these allegations. Texas also does not contest that the Inclusivity Ban’s exceptions do not mitigate its vagueness, *id.* ¶¶ 251-53, or that this section is “so ambiguous” that it “will lead to [] arbitrary and discriminatory enforcement,” *id.* ¶ 254.

The State only contends that the phrase “at, for, or on behalf of the district” is not vague because it “clearly and definitively indicate[s] th[at] SB12 prohibits discrimination by those performing duties on behalf of schools.” Dkt. 119 at 31. But the State’s reading ignores that the statute uses the disjunctive term “or” which sweeps in speech “at . . . the district,” “for . . . the district,” and “on behalf of the district.” The State’s reading impermissibly collapses this text to simply “on behalf of the district,” rendering the other parts of the statute

mere surplusage. Plaintiffs disagree that this phrase is “clear” or “definite” because it creates an uncertain scope of what speech is prohibited and sweeps in “many programs and activities where individuals or groups, including Plaintiffs, rent or access school facilities while engaging in private speech, or where students may represent their schools at non-school-sponsored events.” Dkt. 32 ¶ 249. Absent “statutory definitions, narrowing context, or settled legal meanings,” there is grave “indeterminacy” about what violates the Inclusivity Ban, which renders it impermissibly vague. *See United States v. Williams*, 553 U.S. 285, 306 (2008).

3. The Social Transition Ban Is Vague

Texas claims that it “strains credulity that public school employees do not understand the word ‘assist,’” Dkt. 119 at 31—the key term of the Social Transition Ban—but that is precisely what the Complaint establishes. Because this section requires school boards to investigate “any suspected violation” of this section and “immediately report the violation to the [C]ommissioner,” Tex. Educ. Code § 11.401(c), educators face immediate and severe consequences if they are accused of “assisting” a student’s social transition. Although the State claims that “assisting” is “specifically defined” in the dictionary, Dkt. 119 at 31-32, it somehow ignores the two competing dictionary definitions that Plaintiffs point to in the Complaint, *see* Dkt. 32 ¶ 260 (“While ‘assisting’ can mean ‘to give support or aid,’ it can also mean ‘to be present as a spectator.’

Under either definition, SB 12 gives school employees insufficient guidance as to what is prohibited.”) (citations omitted).

Texas does not dispute Plaintiffs’ allegation that “[t]he prohibition on ‘providing any information about social transitioning’ is particularly vague and open-ended,” *id.* ¶ 256, or that “the Social Transition Ban is not limited to curricula or speech within school employees’ official duties [which] further amplifies its vagueness,” *id.* ¶ 257. The State also does not address that “SB 12 gives no guidance as to how a student’s ‘biological sex’ may be determined, through what criteria, or by whom.” *Id.* ¶ 258.

The Complaint further alleges that the Social Transition ban “invites [] arbitrary and discriminatory enforcement,” such that, for example, “Katy ISD has [already] implemented this section arbitrarily by permitting cisgender, but not transgender students, to continue going by their chosen names and nicknames.” *Id.* ¶¶ 258-59; *see also Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (noting that the need to limit “arbitrary enforcement” is the “more important aspect of vagueness doctrine” compared to the “actual notice” prong). Texas has thus failed to rebut Plaintiffs’ well-pleaded allegations that the Social Transition Ban is vague by failing to provide adequate notice of what is proscribed and inviting arbitrary enforcement.

4. The Don't Say LGBTQ+ Ban Is Vague

Under this provision of SB 12, Texas argues only that “instruction, guidance, activities or programming . . . encompass the very essence of school employee duties” such that “the curricular safeguards are clearly intended for curriculum-based communications at schools.” Dkt. 119 at 32. This argument is contradicted by the text of the Don't Say LGBTQ+ Ban, which prohibits “school employee[s] . . . ***or . . . third part[ies]***” from “provid[ing] instruction, guidance, activities, or programming regarding sexual orientation or gender identity to students enrolled in prekindergarten through 12th grade.” Tex. Educ. Code § 28.0043(a) (emphasis added).

The State does not respond to Plaintiffs' allegation that “[a]s with the Inclusivity Ban, the terms ‘activities’ and ‘programming’ are so open-ended that they apply to the entire universe of anything that school employees or third parties do at or outside of schools,” Dkt. 32 ¶ 263; “the Legislature could have limited the term ‘instruction’ to classroom or extracurricular instruction, [but] declined to do so,” *id.* ¶ 264; and “‘guidance’ is not limited to formal guidance” but includes even informal advice, *id.* Texas also does not address Plaintiffs' allegation that the Don't Say LGBTQ+ Ban “fails to provide adequate notice as to what it means for any instruction, guidance, activities, and programming to be ‘regarding’ sexual orientation or gender identity,” *id.* ¶ 265, and the exception for certain single-sex clubs “amplifies, rather than

mitigates, this section’s vagueness, because it seems to acknowledge that many single-sex clubs and activities **are** impacted by SB 12’s prohibitions while also creating a vague and poorly worded exception,” *id.* ¶¶ 266-67. This “gives school and state officials arbitrary and unfettered discretion to determine which single-sex organizations might ‘advance a political or social agenda,’” *id.* ¶ 267—which Texas fails to address.

Because “courts shouldn’t consider arguments not presented by parties themselves,” *GSA Network*, 821 F. Supp. 3d at 777 (citation omitted)—and Plaintiffs’ allegations must be accepted as true at this stage of the case—there is no basis to determine that Plaintiffs have failed to state plausible claims that each challenged provision of SB 12 is impermissibly vague.

E. SB 12’s Provisions Are Properly Subject to a Facial Overbreadth Challenge

Each challenged provision of SB 12 sweeps in a substantial amount of protected speech relative to any legitimate sweep, and Texas does not dispute Plaintiffs’ specific and detailed overbreadth analysis. *See* Dkt. 32 ¶¶ 275-84. Instead, the State reiterates its position that these provisions only apply to government speech, while conceding that the statute affects “the speech and conduct of employees, ***volunteers and third parties*** at or on behalf of public schools.” Dkt. 119 at 33 (emphasis added). Because SB 12 facially suppresses constitutionally protected speech well beyond government speech—or other

speech that the government may permissibly restrict—Plaintiffs allege a viable overbreadth challenge.

“[T]he overbreadth doctrine instructs a court to hold a statute facially unconstitutional even though it has lawful applications” if it “prohibits a substantial amount of protected speech relative to its plainly legitimate sweep.” *United States v. Hansen*, 599 U.S. 762, 769 (2023) (cleaned up). The overbreadth doctrine ensures that the First Amendment has “breathing space.” *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). Overbroad laws harm “society as a whole, which is deprived of an uninhibited marketplace of ideas.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). To guard against the “chilling effect of an overbroad law,” courts will apply an “expansive remedy”: “suspending all enforcement of an overinclusive law.” *Id.* This remedy is “strong medicine.” *Broadrick*, 413 U.S. at 613. But courts have found this remedy appropriate where “the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.” *Id.* at 612.

The State implicitly concedes SB 12’s broad and problematic sweep by inviting the Court to “impose a limiting construction” where each provision could be rewritten to “only be applicable in the public school setting.” Dkt. 119 at 33-34. But the case Texas cites indicates:

[Courts] may impose a limiting construction on a statute only if it is ‘readily susceptible’ to such a construction.” We ‘will not rewrite a . . . law to conform it to constitutional requirements,’ for doing so would constitute a ‘serious invasion of the legislative domain,’ and sharply diminish Congress’s ‘incentive to draft a narrowly tailored law in the first place.’ To read [the law] as the Government desires requires rewriting, not just reinterpretation.

United States v. Stevens, 559 U.S. 460, 481 (2010) (cleaned up). Here, the State’s request to require SB 12 to “only be applicable in the public school setting” would require a rewriting of the statute that is not “readily” apparent from the text itself. What is more, Texas’s proposed narrowing instruction does not cure the statute’s overbreadth. *See Kennedy*, 597 U.S. at 530-31 (rejecting the argument that “everything teachers and coaches say in the workplace [is] government speech subject to government control”). Because significant amounts of privately protected speech—by students, educators, volunteers, and third parties—occurs on school property and in school-related settings, the State’s proposed narrowing construction still renders the law substantially overbroad.

“[E]ven a law with ‘a plainly legitimate sweep’ may be struck down in its entirety . . . if its unconstitutional applications substantially outweigh its constitutional ones.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 723-24 (2024) (citation omitted). So too here. Although SB 12’s challenged provisions in some instances may apply to curricular speech or speech within government employees’ official duties, they sweepingly prohibit vast swaths of

constitutionally protected speech by students, student organizations, parents, volunteers, third parties, and government employees in their private capacity. Each challenged section of SB 12 is unconstitutionally overbroad and should be enjoined in its entirety to protect the First Amendment rights of students, parents, school employees, and third parties.

There is also no support to Texas’s argument that “any challenge to SB12 must be to the statute as it is applied.” Dkt. 119 at 34.⁶ The case the State cites for this proposition supports the continuing vitality of facial challenges, *United States v. Hansen*, 599 U.S. 762, 785 (2023), as does recent Fifth Circuit precedent, *Merriott v. City of Bossier City*, 179 F.4th 393, 403 (5th Cir. 2026). In *Merriott*, the Fifth Circuit conducted the two-step analysis required by *Moody*, 603 U.S. at 724, to first “construe the challenged statute” before “decid[ing] whether the Policy ‘encompasses a substantial number of unconstitutional applications judged in relation to [its] plainly legitimate sweep.’” 179 F.4th at 404. This mirrors the analysis that Plaintiffs submitted at the preliminary injunction stage, where Plaintiffs assessed the scope of each challenged provision and their overbroad application to constitutionally protected speech. *See* Dkt. 33 at 88-98.

⁶ This argument is also contradicted by the opening part of the Motion, which claims “Plaintiffs’ challenge must be considered as a facial challenge.” Dkt. 119 at 2.

At *Moody*'s first step, SB 12's challenged provisions reach every student club in every school in Texas whose subject a district deems "based on" sexual orientation or gender identity; every policy, procedure, training, activity, and program that "reference[s]" race, color, ethnicity, gender identity, or sexual orientation, undertaken by any employee, contractor, or volunteer, "at, for, or on behalf of" a district; every act of "assist[ance]" with social transitioning and the provision of "any information" on that subject, without limit as to time or place; and all "instruction, guidance, activities, or programming regarding" those subjects by employees or any "third party." At the second step, the protected applications are not marginal but central: student expression in forums the districts themselves opened, the speech of parents and volunteers, the speech of organizations like GSA Network and SEAT, and educators' private speech on matters of public concern. Measured against whatever legitimate sweep the provisions retain—which is likely none when the government discriminates based on viewpoint—the unconstitutional applications predominate. *See* Dkt. 33 at 88-98.

F. The GSA Ban Violates Plaintiffs' Freedom of Association

The GSA Ban facially violates Plaintiffs' First Amendment rights by "prohibit[ing] Plaintiffs' ability to create, participate in, and engage with GSAs." Dkt. 32 ¶ 298. Earlier this year, the Supreme Court reiterated the importance of protecting the freedom to associate, explaining that:

With the freedom to associate, minorities can ‘show their numerical strength,’ influence policy, and ‘stimulate competition’ in the marketplace of ideas. But take that freedom away and ‘dissident expression’ stands particularly vulnerable to marginalization or outright ‘suppression by the majority,’ leaving all of society poorer for it.

First Choice Women's Res. Centers, Inc. v. Davenport, 146 S. Ct. 1114, 1122 (2026) (cleaned up). Texas does not dispute Plaintiffs’ contention that the GSAs with which they seek to engage are facially banned by SB 12 from all public schools. See Dkt. 119 at 34-35. But the State tries to waive away this flagrant constitutional violation by stating that “[a]ny and all such clubs remain free to continue their activities at any location other than public and charter school campuses.” *Id.* at 35.

This argument is precluded by Supreme Court precedent, which recognizes that a student group’s “possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the [governmental] action.” *Healy v. James*, 408 U.S. 169, 183 (1972); accord *Martinez*, 561 U.S. at 690 (“If restrictions on access to a limited public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming.”). The State’s argument would deprive every group of its freedom of association if the government could freely ban organizations based on viewpoint simply by asserting that they can meet somewhere else.

G. SB 12 Also Operates as an Impermissible Prior Restraint

SB 12’s challenged provisions also prohibit speech before it occurs, and Texas fails to rebut Plaintiffs’ arguments that each challenged provision operates as a prior restraint. *See* Dkt. 32 ¶¶ 300-311. The State’s primary opposition to this claim is that “SB 12 does not prohibit constitutionally protected speech of any kind.” Dkt. 119 at 36. But as established *supra*, Section II.B, SB 12’s challenged provisions suppress constitutionally protected speech in every type of forum.

On its face, SB 12 does not merely “define[] the contours of the curriculum,” *contra* Dkt. 119 at 36-37, but plainly restricts constitutionally protected speech before it occurs. The prior restraint doctrine is not limited to “administrative and judicial orders,” *contra id.*, but applies to laws and policies in K-12 schools. *See, e.g., Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 282 (5th Cir. 2003) (“[E]ven in schools there exists a clearly established right to be free of prior restraints . . .”); *Shanley v. Ne. Indep. Sch. Dist., Bexar Cnty., Tex.*, 462 F.2d 960, 975 (5th Cir. 1972) (invalidating a prior restraint in the school context); *Book People, Inc. v. Wong*, 692 F. Supp. 3d 660, 701 (W.D. Tex. 2023), *aff’d in part, vacated in part, remanded*, 91 F.4th 318 (5th Cir. 2024) (holding that a law imposed an impermissible prior restraint on selling books to public schools).

Because each challenged provision of SB 12 impedes speech before it occurs, they are prior restraints that only pass constitutional muster if they have “narrow, objective, and definite standards.” *See Chiu*, 339 F.3d at 281 (citation omitted). Here, Texas does not dispute Plaintiffs’ allegation that SB 12 lacks any such procedural safeguards. Even under the test the State espouses—that a prior restraint need only be “reasonably related to legitimate pedagogical goals,” Dkt. 119 at 36-37—Texas does not state what SB 12’s pedagogical goals are, or how the text of the law reasonably relates to them. There is thus no reason to dismiss Plaintiffs’ claims of prior restraint.

H. Severability Has No Bearing on the Motion

Although the State includes a section on severability in the Motion, *see* Dkt. 119 at 40-41, the Complaint does not allege that S.B. 12 is not severable, and the requested relief is not to invalidate the entire law but only to enjoin Defendants from “enforcing four challenged aspects of S.B. 12 . . . and other provisions of the law requiring enforcement of these sections.” Dkt. 32 ¶ 313. Thus, severability provides no basis to dismiss any of Plaintiffs’ claims and need not be addressed at this stage of the case.

III. PLAINTIFFS’ CLAIMS AGAINST PLANO ISD ARE NOT MOOT

Texas argues that because Defendant Plano ISD sought entry of a proposed settlement with Plaintiffs prior to the State’s intervention, no live controversy exists between the parties, rendering Plaintiffs’ claims moot. Dkt.

119 at 38-9. But the willingness of a party to settle a dispute does not vitiate jurisdiction at the outset of the case nor render a claim moot.

In *United States v. Windsor*, 570 U.S. 744 (2013), and *INS v. Chadha*, 462 U.S. 919 (1983), the executive branch “determined that the statute [being challenged] was unconstitutional” and agreed with the plaintiffs that courts should enter judgment against it. *Windsor*, 570 U.S. at 758. In both cases, the Supreme Court held that “even where ‘the Government largely agree[s] with the opposing party on the merits of the controversy,’ there is [still] sufficient adverseness and an ‘adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.’” *Id.* at 759 (quoting *Chadha*, 462 U.S. at 940 n.12).

The State here seems to concede that *Windsor* “permits the exercise of federal jurisdiction” even if “prudential considerations” require “concrete adverseness which sharpens the presentation of issues.” Dkt. 119 at 39 (quoting *Windsor*, 570 U.S. at 760). Because party presentation is now satisfied by the State’s intervention, Plano ISD’s willingness to settle does not raise even prudential concerns.

A party’s willingness to settle does not render claims moot, since a case is moot “only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Knox v. Service Emps. Int’l Union, Local 1000*, 567 U.S. 298, 307 (2012) (citation and quotes omitted). Even if Plano ISD

avers that it will never again enforce SB 12, “[i]t is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice” and it must be “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009), *aff’d sub nom. Sossamon v. Texas*, 563 U.S. 277 (2011).

The only way that it would become “absolutely clear” that Plano ISD will never enforce SB 12’s challenged provisions would be to make the preliminary injunction permanent, either through an agreed or opposed final judgment. Governmental defendants often enter consent decrees to allow federal courts to enforce voluntary judgments against them. Consent decrees do not vitiate Article III jurisdiction but instead allow for resolution of claims where jurisdiction exists at the outset. *See Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). These settlements vindicate federal law and avoid “prolonged” litigation. *See, e.g., Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 379 (1992). If a willingness to settle could destroy jurisdiction, consent decrees could not exist and federal courts could not enforce them. Accepting Texas’s argument here would thus improperly bind the hands of independent school districts that seek to settle federal claims in the future.

Ultimately, however, Plaintiffs do not ask the Court to enter the parties’ agreed judgment now and have no objection to the Joint Motion remaining in

abeyance while this case proceeds. But holding a settlement in abeyance is not the same as losing jurisdiction. Plano ISD has not rescinded the challenged policies that harmed GSA Network and Texas AFT's members at the outset of this case, and Plaintiffs' temporary reprieve is only a result of the Court's preliminary injunction. A live controversy therefore persists, and Plaintiffs' claims against Plano ISD should not be dismissed.

CONCLUSION

The Court should deny the State's Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pending before the Court is Plaintiffs' Unopposed Motion to Exceed Word Count. Dkt. 126. The undersigned counsel certifies that the total number of words in this brief, exclusive of the matters designated for omission, is 13,929 words as counted by Microsoft Word software.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of August, 2026 a true and correct copy of the above document was served via the CM/ECF system to all counsel of record.

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