Gay-Straight Alliances and Free Speech:
Are Parental Consent Laws Constitutional?

Keola R. Whittaker†

I. INTRODUCTION

Openly gay youth face intense harassment in school from fellow students, teachers, and school administrators. A recent New Jersey state court case describes the anti-gay harassment of student “L.W.”:

[H]e was standing with other students on the lunch line in the cafeteria. He was in front of a boy, who called L.W. “gay” and a “faggot.” According to L.W., the boy grabbed L.W.’s genitals, “humped” him and said, “Do you like it, do you like it like this.” L.W. said he walked away but the boy followed him and “humped” him again.1

† Associate, Wachtell, Lipton, Rosen & Katz; J.D., University of Pennsylvania Law School, 2007. Thank you to Professor Tobias Barrington Wolff and Stacey L. Sobel for their helpful comments on drafts of this article. All errors are my own.

When L.W. had earlier looked to the school’s guidance counselor for help, “[s]he advised him to ‘toughen up’ and ‘turn the other cheek.’” L.W.’s story is not unique. Lesbian, gay, bisexual, and transgender (“LGBT”) high school students face harassment, violence, and public humiliation. According to a recent study, two-thirds of teens were “verbally or physically harassed or assaulted during the past year because of their perceived or actual appearance, gender, sexual orientation, gender expression, race/ethnicity, disability or religion.”

Openly LGBT teens are especially at risk for harassment; they are three times as likely as straight teens to feel unsafe at school, and 90% (as compared to 62% of non-LGBT teens) have been harassed or assaulted in the last year. Rather than responding appropriately by disciplining harassers, school officials often ignore harassment, discipline the student being harassed, or actively interfere with the harassed student’s attempts to create gay-safe spaces.

Like many students faced with anti-gay harassment, Yasmin Gonzalez, a public high school student in Okeechobee, Florida, recently formed a gay-straight alliance (“GSA”) to provide a safe and supportive environment to discuss anti-gay harassment and to promote understanding and acceptance of gay students. School officials were not pleased. The group was denied official club status at the school, preventing it from meeting on school grounds.

The Okeechobee School District’s policy is just one of many attempts by school districts to ban GSAs. Politicians in several states have demanded outright bans against GSAs, comparing such clubs to organizations advocating illegal activity such as pedophilia and gambling.

School boards in Kentucky, Utah, California, Texas, Minnesota, and Indiana have forbidden or...
significantly curtailed the activities of GSAs in public schools. Most federal
courts that have considered the question have found that such bans can constitute
violations of the Equal Access Act ("EAA") and the First Amendment.\textsuperscript{15}

Despite the nearly unanimous rejection of GSA bans by courts, many state
legislators and school districts determined to prevent the formation of GSAs are
crafting creative ways to get around such legal barriers. Lawmakers in Utah, for
example, recently passed legislation that requires parental consent for students to
join non-curricular clubs.\textsuperscript{16} Georgia passed legislation that requires each local
school board to distribute a list of student organizations, their missions, and to
"provide an [opportunity] for a parent or legal guardian to decline permission for
his or her student to participate in a club or organization designated by him or
her."\textsuperscript{17} Similar laws have been or are being considered in Virginia,\textsuperscript{18} Florida,\textsuperscript{19}
Massachusetts,\textsuperscript{20} and Idaho.\textsuperscript{21}

While there has been much discourse regarding the legality of bans on
GSAs,\textsuperscript{22} the legality of parental consent laws is rarely addressed. In this article I
argue that parental consent laws, like those enacted in Utah and Georgia, violate
the First Amendment's protections on the freedom of association. Specifically, I
draw a comparison between parental consent laws and the \textit{NAACP v. Alabama}
line of cases, which holds that the compelled disclosure of an organization's
membership list can infringe on the right to privacy of association and belief.\textsuperscript{23}


\textsuperscript{15} See, e.g., Boyd, 258 F. Supp. 2d 667; E. High Sch., 95 F. Supp. 2d 1239. But see Caudillo,
311 F. Supp. 2d 550 (holding that the school district's abstinence-only policy justified the
ban against all student clubs discussing sex, including the GSA).

\textsuperscript{16} Student Clubs Act, UTAH CODE ANN. § 53A-1 1-1210 (Supp. 2008).

\textsuperscript{17} GA. CODE ANN. § 20-2-705 (Supp. 2008).

\textsuperscript{18} See Tommy Denton, Lawmakers Chose Politics Over Substance, THE ROANOKE TIMES, Feb.
27, 2007, B8.

\textsuperscript{19} Letitia Stein, Teachers Lash out at Board Meeting, ST. PETERSBURG TIMES, Feb. 14, 2007,
1B (reporting local school board considers parental consent rule).

\textsuperscript{20} Ethan Jacobs, Bill would require parental notification for school discussions of 'sexual

\textsuperscript{21} Editorial, House Ignores Big Issues to Meddle in School Clubs, THE IDAHO STATESMAN,
Apr. 4, 2006, 6.

\textsuperscript{22} See, e.g., Regina M. Grattan, It's Not Just for Religion Anymore: Expanding the Protections
of the Equal Access Act to Gay, Lesbian, and Bisexual High School Students, 67 GEO.
WASH. L. REV. 577 (1999); Carolyn Pratt, Protecting the Marketplace of Ideas in the
Classroom: Why the Equal Access Act and the First Amendment Require the Recognition of
Gay/Straight Alliances in America's Public Schools, 5 FIRST AMENDMENT L. REV. 370
(2007); Alice Riener, Pride and Prejudice: The First Amendment, The Equal Access Act, and
the Legal Fight for Gay Student Groups in High Schools, 14 AM. U.J. GENDER SOC. POL'Y

\textsuperscript{23} 357 U.S. 449 (1958). See Boorda v. Subversive Activities Control Bd., 421 F.2d 1142 (D.C.
Cir. 1969) (holding that the Subversive Activities Control Act's provisions, which require
disclosure of membership lists of any organization suspected of engaging in Communist
activities, violates the First Amendment); Gibson v. Florida Legislative Com., 372 U.S. 539
(1963) (holding that Florida could not mandate the release of the NAACP membership list);
Bates v. Little Rock, 361 U.S. 516 (1960) (holding that compelled disclosure of the NAACP
Just as the release of the NAACP membership list would have had a chilling effect on NAACP membership in the 1950s, requiring students to gain a parent’s consent to join a GSA will have a chilling effect on GSA membership. Both requirements violate the First Amendment. This article begins by providing an analysis of the EAA and cases that have overturned direct bans on GSAs. Next, I draw comparisons between recent efforts by schools to skirt the EAA by requiring parental consent to join student clubs and the compelled disclosure at issue in *NAACP v. Alabama*. Finally, I argue that the parental consent laws in Utah and Georgia violate the First Amendment.

II. THE EQUAL ACCESS ACT AND THE FIRST AMENDMENT

A. The Equal Access Act

Congress passed the EAA in 1984 in response to two federal court decisions upholding bans on religious student group meetings in public schools. While the drafters originally intended to allow for the formation of religious student groups, they extended the protections to groups espousing other political and philosophical speech. Under the EAA, if a public school permits one or more non-curricular clubs to meet at school, it may not deny equal access or fair opportunity to other student groups based on “religious, political, philosophical, or other content of the speech at such meetings.” The EAA received bipartisan support and was endorsed by Christian groups that now, ironically, seek to limit its protections.

The EAA can be read as codifying existing First Amendment protections rather than creating a new right for student groups. For example, *Windmar v. Vincent* held that the First Amendment protected religious expression in a public university. The University argued that the Establishment Clause prevented their recognition of religious student groups. The Court disagreed: “In this context we are unpersuaded [sic] that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.” A ban on religious groups is membership was an unconstitutional invasion of the freedoms guaranteed by the First Amendment).


30. *Id.* at 270-71.

31. *Id.* at 273.
an unconstitutional restriction on the right to associate for expressive purposes. In dicta, the Court hinted that these same rights may not apply to public high schools. The EAA "was passed to fit within the Constitutional limits that the Court ha[d] placed on school control over student speech," but extended the protections articulated in *Widmar* to high school students.

The EAA protects all groups, including GSAs, from prohibitions based on their political message. As Justice Kennedy noted, while the impetus of enacting the EAA was to guarantee religious student groups the right to meet on public school campuses, the statutory language is broad and, therefore, "one of the consequences of the statute . . . is that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind." If a court were to deny a GSA the same access granted to other non-curricular organizations, it "would be complicit in the discrimination against students who want to raise awareness about homophobia and discuss how to deal with harassment directed towards gay youth."

Despite the interpretation of the EAA to protect even controversial clubs, school boards have attempted to exploit several of the loopholes and exceptions in the EAA to justify discriminatory policies. First, school boards have argued that the GSA should not be defined as a non-curricular group because issues of sexuality are discussed in courses such as health classes. For example, defendants in *Colin ex rel. Colin v. Orange Unified School District* contended that the subject matter discussed in GSA meetings is covered in several courses including Health, Biology and Life Sciences, and Family Planning. Consequently, the defendants maintained, the GSA ought not to receive the same rights as non-curricular groups. Using the test for a curriculum-related group in *Board of Education of Westside County Schools v. Mergens*, the court found that there was "no overlap between the curriculum and the GSA's proposed discussions."

So long as the Board has a "limited open forum" at El Modena and allows any "noncurriculum related" student groups to meet, it can not prohibit the Gay-

---

32. See id. at 274 n.14. ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.").
36. See, e.g., id. at 1143-44. Analogously, school boards have also defended limitations on the communication avenues of non-curricular groups, even though such limitations did not apply to clubs such as cheerleading or synchronized swimming, on the grounds that the noted clubs whose communication avenues were not limited related to the physical education curriculum. *Straights & Gays*, 471 F.3d at 910-11.
37. 83 F. Supp. 2d at 1144.
38. See id.
39. Id. at 1145 (citing Mergens, 496 U.S. at 237).
Straight Alliance even if its meetings directly relate to the curriculum. Instead, the Board will have to show that meetings will “materially and substantially interfere with the orderly” instruction of students.\textsuperscript{40}

Despite concerns to the contrary,\textsuperscript{41} it is unlikely that the “non-curriculum-related” language of the EAA will justify exclusion of GSAs from the limited open forum.

Second, school districts argue that GSAs are disruptive; bans on GSA activity are necessary to “maintain order and discipline on school premises, [and] to protect the well-being of students and faculty.”\textsuperscript{42} District courts are split on whether GSAs create a sufficient disturbance to justify their exclusion. In \textit{Boyd County High School Gay Straight Alliance v. Board of Education}, the court determined that § 4071(f) of the EAA, which allows schools to limit speech to ensure order and discipline, does not render it lawful for schools to suppress speech that is politically unpopular.\textsuperscript{43} The \textit{Boyd County} court reasoned that, under the facts of the case, any potential disruption would come from those opposed to gay-friendly groups, and a “heckler’s veto” does not justify violations of the First Amendment.\textsuperscript{44} Determining whether potential counter-speech would be disruptive ought to be “entirely divorced from actually or potentially disruptive conduct by those participating in it.”\textsuperscript{45} GSA meetings or GSA members themselves were not sufficiently disruptive to justify their exclusion.

Under slightly different facts, \textit{Caudillo v. Lubbock Independent School District}\textsuperscript{46} held that the school district’s interest in maintaining order outweighed the plaintiff’s rights under the EAA and the First Amendment. The court took a different view of the EAA, holding that the “potential for sexual-orientation harassment” could lead to disruptions that justify the exclusion of the GSA.\textsuperscript{47} Furthermore, the court held that protecting the students’ “physical, mental, and emotional well-being” also justified exclusion of the GSA from the limited public forum.\textsuperscript{48} Noting the discussion of “obscene and inappropriate material” on the GSA group’s website, the court found that the group violated the school district’s abstinence-only policy.\textsuperscript{49} According to \textit{Caudillo} the school district’s compelling interest in “protecting students from teen pregnancy, sexually

\textsuperscript{40.} \textit{Id.} at 1146 (quoting the EAA, 20 U.S.C § 4071 (2006)).
\textsuperscript{43.} \textit{See} 258 F. Supp. 2d 667, 688-91 (E.D. Ky. 2003).
\textsuperscript{44.} \textit{Id.}
\textsuperscript{45.} \textit{Id.} at 689 (emphasis in original) (quoting \textit{Tinker v. Des Moines Indep. Cmty. Sch. Dist.}, 393 U.S. 503, 505 (1969)).
\textsuperscript{46.} 311 F. Supp. 2d 550 (N.D. Tex. 2004).
\textsuperscript{47.} \textit{Id.} at 569-70.
\textsuperscript{48.} \textit{Id.} at 570.
\textsuperscript{49.} \textit{Id.} at 568, 570.
transmitted diseases, the harms associated with sexual activity and minors, and the harms associated with exposing minors to sexual subject matters” triggers the exceptions written into the EAA and outweights any free speech rights.50

The holding in Caudillo is unlikely to gain traction for several reasons. First, many courts, including a federal appellate court, have applied the Tinker rule, discussed in depth below, to EAA cases.51 Second, many GSAs have been explicit about the fact that their discussions do not involve sex.52 Finally, even if GSA discussions did involve sex, school districts without an abstinence-only policy would find it difficult to justify exclusion by virtue of the fact that the group discussed homosexual rather than heterosexual sexual relations.

B. The First Amendment

Courts have generally avoided the question of whether bans against GSAs violate the First Amendment, instead deciding cases on EAA grounds.53 An analysis of the case law relating to First Amendment rights of students in public schools, however, supports the contention that the activities of GSAs are constitutionally protected.

The seminal school speech case, Tinker v. Des Moines Independent Community School District, provided broad constitutional protections for public school students.54 The case addressed whether school officials could ban students from wearing armbands to protest the Vietnam War.55 After finding that the armbands posed no threat to the general order and discipline at the school, the Court held that the ban violated the First Amendment.56 Like other constitutional freedoms, the students do not leave “constitutional rights to freedom of speech or expression at the schoolhouse gate.”57 All students may express opinions, unless the speech “materially and substantially interferes”

50. Id. at 571.
51. See Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 870 (2d Cir. 1996) (“[T]he Equal Access Act strikes the same balance that the Supreme Court has struck between First Amendment free speech rights and a public school’s right to maintain order: the Act grants broad free speech rights under § 4071(a), and restricts those rights, under § 4071(c)(4), when club meetings ‘materially and substantially interfere with the orderly conduct of educational activities within the school.’”); see also Colin, 83 F. Supp. 2d at 1141 (“The ‘material disruption’ standard [in Tinker] is very similar to the one adopted by Congress in the Equal Access Act.”).
52. For example, the GSA at issue in Colin provides the following clarification in their mission statement: “This is not a sexual issue, it is about gaining support and promoting tolerance and respect for all students.” 83 F. Supp. 2d at 1138.
53. See Boyd, 258 F. Supp. 2d at 691 (“Since the Court has found that Defendants likely violated the Equal Access Act, the Court need not at this time address either Plaintiffs’ First Amendment claim or KERA claim for purposes of the pending motion.”); Colin, 83 F. Supp. 2d at 1149 (“In finding that the District has likely violated the Equal Access Act, the Court need not reach Plaintiffs’ First Amendment claim.”).
55. Id.
56. Id.
57. Id.
with the requirements of appropriate discipline in the operation of the school . . . [or] collid[es] with the rights of others."58

Bethel School District No. 403 v. Fraser59 narrows the Tinker "material disruption" rule.60 Matthew Fraser, a public high school student, was punished for using offensive language and a sexually explicit metaphor at a school assembly. Fraser sought review of the school's action in court, arguing that his speech was protected by the First Amendment. The Court recognized that while students in public school retain constitutional rights, including the freedom of expression, students do not have the same rights as adults.61 The state has an interest in protecting minors from exposure to vulgarities that often trump other free speech considerations. Thus, even if Fraser's speech did not create a "material disruption" so as to meet the Tinker standard, public school officials did not violate the First Amendment in censoring his lewd and offensive speech.62

Hazelwood School District v. Kuhlmeir establishes another exception to the broad Tinker rule. The Hazelwood court held that school officials may censor school newspaper articles about teen pregnancy and divorce.63 The school newspaper at issue was a school-sponsored publication and, while the students were allowed some editorial freedom in creating the publication, ultimate editorial authority was in the hands of school officials. Since the newspaper was published as part of a school journalism course, the Court concluded the publication was not an open public forum.64 Thus, the Court distinguished school-sponsored speech from other speech that occurs on the school grounds. While the latter is governed by the Tinker rule, the former may be censored for "legitimate pedagogical concerns."65

A recent Second Circuit decision distilled the rules embodied in this trilogy of school-speech cases:

(1) schools have wide discretion to prohibit speech that is less than obscene—to wit, vulgar, lewd, indecent or plainly offensive speech. [Fraser]

(2) if the speech at issue is "school-sponsored," educators may censor student speech so long as the censorship is "reasonably related to legitimate pedagogical concerns." [Hazelwood]

58. Id. at 513.
60. 393 U.S. 503 (1969).
61. 478 U.S. at 682.
62. Id. at 685.
64. Id. at 267.
65. Id. at 273.
(3) for all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under Fraser, nor school-sponsored under Hazelwood, the rule of Tinker applies. Schools may not regulate such student speech unless it would materially and substantially disrupt class work and discipline in the school. 66

The Supreme Court recently revisited the question of free speech rights in public schools in Morse v. Frederick, which examined whether a public school principal violated the First Amendment by punishing a student for displaying a banner reading “Bong Hits 4 Jesus” at a school-sponsored event. 67 While reaffirming Tinker, the Court provided further limits to free speech rights of public school students. First, the Court notes that the Fraser holding demonstrates that the “substantial disruption” test of Tinker does not aid courts in conclusively drawing a line between speech in public schools that is constitutionally-protected and speech that is not. 68 Instead, Fraser establishes that constitutional rights of students in public schools differ from those of adults. From that premise, the Court explained that despite the fact that “Bong Hits 4 Jesus” was not plainly offensive, the speech could reasonably be regarded as “promoting illegal drug use,” and such drug use “can cause severe and permanent damage to the health and well-being of young people.” 69 Preventing illegal drug use was an “important—indeed, perhaps compelling” interest. 70 Building on Fraser and Hazelwood, Morse adds to the list of Tinker exceptions by allowing for the suppression of speech that promotes illegal drug use.

These exceptions to the Tinker rule give rise to several potential legal arguments that would allow public schools to ban GSAs. First, as Caudillo v. Lubbock Independent School District holds, gay-friendly speech may arguably be banned under the Hazelwood rule. 71 Under Hazelwood, schools could suppress the speech for a legitimate pedagogical concern where the matter involves “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” 72 Caudillo wrongly applies the Hazelwood rule by suggesting that because the GSA in question “requested to use the school’s P.A. system and to post its fliers on school property” that the actions of the GSA could be imputed to the school itself. 73 In fact, the test in Hazelwood is more stringent than the Caudillo interpretation implies. The school may claim that speech is curricular, and thus

68. Id. at 2626-27.
69. Id. at 2628.
70. Id.
73. 311 F. Supp. 2d at 557 n.6; see also Boyd, 258 F. Supp. 2d at 690-91 (“The GSA’s message in the case sub judice is clearly not school sponsored. School-sponsored speech is governed by Hazelwood . . . rather than by Tinker.”).
not part of a limited public forum, if the speech "may fairly be characterized as part of the school curriculum," such as speech that is "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."74 Once school facilities or forums are opened to the public in such a way that they cannot reasonably be characterized as part of the school curriculum, as is the case with student organizations, the Tinker rule applies.75 Contrary to Caudillo, three other federal courts considering similar facts have held that activities of GSAs cannot reasonably be considered part of a school's curriculum.76

Second, the Fraser rule may arguably justify bans on gay-friendly speech for being vulgar and lewd. It has been argued, for example, that GSAs discuss offensive and lewd conduct through their association with and endorsement of same-sex sexual behavior.77 Fraser, however, addresses only the manner in which speech is made and does not justify censorship based on the political message. Such examples of speech that school officials may censor under Fraser include "speech containing vulgar language, graphic sexual innuendos, or speech that promotes suicide, drugs, alcohol, or murder."78 Pro-gay speech does not qualify for censorship under any of these categories. Courts have, for example, upheld the right of gay students to discuss and express their sexual orientation.79 Furthermore, political speech that makes people uncomfortable because it expresses an unpopular position may not be excluded.80

Student organizations in public schools receive broad protections under both the EAA and the First Amendment. Once a school recognizes one or more non-curricular student organizations, it may not directly infringe on the rights of organizations to express unpopular viewpoints or the rights of students to form such organizations. Indirect infringements on freedom of speech present a more complex problem. Given the legal freedom school boards have to determine curriculum and school policies, it is difficult to argue that a school board policy that indirectly censors student speech is unlawful. As the next section discusses, however, the Tinker rule, along with the holdings of NAACP v. Alabama and its

74. Hazelwood, 484 U.S. at 271.
75. Id. at 273 ("[S]chool facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities . . . [to] some segment of the public, such as student organizations.").
77. See, e.g., Caudillo, 311 F. Supp. 2d at 561.
79. See, e.g., Henkle v. Gregory, 150 F. Supp. 2d 1067, 1075 (D. Nev. 2001) (holding that a gay high school student claiming that he was prevented from expressing his sexual orientation had stated a claim that his First Amendment rights were violated); Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980) (granting a preliminary injunction against a high school that attempted to prevent a male gay student from attending senior prom with another male student).
80. E. High Gay/Straight Alliance, 81 F. Supp. 2d at 1193.
progeny, supports the argument that recent parental consent laws designed to prevent the formation of GSAs violate the First Amendment.

III. PARENTAL CONSENT AS A FIRST AMENDMENT VIOLATION

A. NAACP v. Alabama and Its Progeny

In some circumstances, the mere release of the membership list of a controversial political organization will adversely affect the group. *NAACP v. Alabama* is the first in a line of cases to apply strict scrutiny to state action that forces such disclosure. At issue in *NAACP v. Alabama* was the validity of a court order for the production of the Association’s records including the “names and addresses of all Alabama ‘members’ and ‘agents’ of the Association.”*81* Alabama justified its demand as necessary for the “adequate preparation” of a lawsuit filed against the Association for alleged violations of Alabama corporate filing requirements. *82* The NAACP refused to comply, arguing that releasing the identity of all members would have a chilling effect on organizational membership. The NAACP showed that on previous occasions, when the identities of members were revealed, the members faced “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” *83* Thus, the Court found that compelled disclosure of petitioner’s Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure. *84*

Next, the Court set out to determine whether the State’s interest was compelling and therefore justified an infringement of the Association’s constitutional rights. Finding that a list of members was not necessary to prove the claims in the lawsuit, the court concluded “that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have.” *85* The strict scrutiny test used in *NAACP v. Alabama* has been applied to several subsequent actions to prevent the state from compelling disclosure of a membership in the NAACP. *86*

---

82. *Id.*
83. *Id.* at 462.
84. *Id.* at 462-63.
85. *Id.* at 466.
86. See, e.g., Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963); Bates v.
Membership lists of organizations like the NAACP are not, however, completely immune from disclosure. Following a series of decisions that approved of McCarthy-era anti-communist policies, the Court's contentious 1959 decision in *Barenblatt v. United States* upheld the conviction of a graduate student at the University of Michigan for refusing to answer questions about his membership in the Communist Party or related organizations. Writing for the Court, Justice Harlan noted that "Congress has wide power to legislate in the field of Communist activity in this Country." Thus "the provisions of the First Amendment [had] not been offended." In a vigorous dissent, Justice Black reaffirmed *NAACP's* strict test, noting that the only cases that have and should allow for intrusions on the freedom of speech are those in which "the effect on speech is minor in relation to the need for control of the conduct."

The Court returned to its more exacting review of policies that intrude on an organization's right to associate in its review of the 1976 federal campaign contributions law in *Buckley v. Valeo*. In reference to the amended Federal Election Campaign Act's disclosure requirements, the Court reiterated the necessity of the strict test in *NAACP v. Alabama,* reasoning that, "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." Despite the fact that disclosure requirements may deter some donors, the government had a compelling interest in providing the electorate with information and deterring corruption. Though portions of the law relating to campaign expenditures were struck down, those relating to contribution limits and disclosure requirements were upheld, as they were "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."

Six years later, in *Brown v. Socialist Workers '74 Campaign Committee,* the Court revisited *Buckley* to determine whether the campaign contribution disclosure requirements may be unconstitutional as applied to an unpopular political party. Here, an Ohio law requiring "every candidate for political office to file a statement identifying each contributor and each recipient of a disbursement of campaign funds" was held unconstitutional as applied to the Socialist Workers Party ("SWP"). Of particular importance for this

---

87. Id. at 127.
89. Id. at 134.
90. Id. at 141 (Black, J. dissenting).
92. Id. at 66.
93. Id. at 66-67.
94. Id. at 68.
96. Id. at 88-89.
determination was substantial evidence that members of the SWP faced “threats, harassment, and reprisals” different from those of other political parties.\footnote{Id. at 97.} Compelled disclosure would therefore “cripple [the SWP’s] ability to operate effectively and thereby reduce” the free exercise of ideas.\footnote{Id. at 93.} The Buckley test required looking carefully at the effect of campaign contribution disclosure requirements. The Court thus concluded that with regards to the SWP, “the diminished government interests furthered by compelling disclosures by minor parties does not justify the greater threat to First Amendment values.”\footnote{Id.}

The NAACP line of cases establishes two rules for evaluating the constitutionality of compelled disclosure requirements. First, compelled disclosures may only survive strict scrutiny if “(1) the statute as a whole . . . serve[s] a compelling governmental interest, and (2) a substantial nexus [exists] between the served interest and the information to be revealed.”\footnote{Vote Choice v. DiStefano, 4 F.3d 26, 32 (1st Cir. 1993) (citing Brown).} Second, a law compelling disclosure that is facially constitutional may be unconstitutional as applied to groups whose members face uniquely severe reprisals and harassment by virtue of their group’s unpopular political advocacy.\footnote{See supra notes 89-93 and accompanying text.}

**B. Parental Authority and the First Amendment**

The NAACP v. Alabama line of cases demonstrates that forcing the release of membership lists may violate the First Amendment. To be sure, the forced dissemination of membership lists will likely have a chilling effect on GSAs and as a result such action may violate the First Amendment. However as Fraser, Hazelwood, and Morse illustrate, public school students have limited First Amendment protections, and such rights are balanced against other considerations. The indirect bans on GSAs enacted in Utah and Georgia seek to expand these limits on free speech through an appeal to parental authority. Case law relating to parental authority clearly limits governmental intrusion into parental decision making. What remains unclear is whether the State may use parental authority to indirectly limit constitutional rights that the State may not limit directly.

Two cases, Meyer v. Nebraska and Pierce v. Society of Sisters, are often cited for the proposition that parents retain significant authority over their child’s education. The statute struck down in Meyer forbade the teaching of foreign languages before high school.\footnote{262 U.S. 390, 396-97 (1923).} In Pierce, the court held that a statute which prohibited students from attending parochial schools “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education
of children under their control." Meyer and Pierce stand for the proposition that the state may not prevent parents from choosing a particular educational program for their children. As one court noted, "the state does not have the power to 'standardize its children' or 'foster a homogenous people' by completely foreclosing the opportunity of individuals and groups to choose a different path of education." This does not, however, justify the conclusion that parents have the right to control school curricula. The coercive policies at issue in Meyer involve[d] the state proscribing parents from educating their children," while forcing schools to censor certain material parents find morally offensive "involves parents prescribing what the state shall teach their children." In general, school officials and teachers have the freedom to develop curricula despite parental objections so long as the material has a legitimate pedagogical purpose.

Many courts also draw a distinction between coercive and noncoercive burdens on parental authority. Information or material that is available to students on a voluntary basis and not part of a required school course does not have a coercive effect on the rights of parents and therefore passes constitutional muster. For example, constitutional challenges to the distribution of condoms and safe-sex information outside of the classroom failed because the materials were available on a voluntary basis and students were not compelled or otherwise pressured to receive them.

The extent of parental authority allowable under the law becomes more confusing and inconsistent when states use parental consent in an effort to reduce or forbid certain freedoms that minors would otherwise be able to exercise. For example, parental consent requirements for an abortion procedure are constitutional, so long as judges may override the general requirement. State laws that require parental consent for receiving contraceptives or safe-sex literature, on the other hand, were deemed unconstitutional. The lack of clear and consistent rules balancing parental authority against minor children's constitutional liberties complicates any analysis of these competing rights.

Despite the morass of jurisprudence on the subject of parental authority, courts are generally skeptical of states using parental authority as a means of enacting speech restrictions. Two case studies discussed below demonstrate how states have attempted to justify indirect violations of the First Amendment rights of minors by appealing to parental authority and how courts have responded. Both case studies provide some insight into whether courts will allow states to indirectly ban GSAs through parental consent laws.

105. Id. at 534.
106. See, e.g., Doe v. Irwin, 615 F.2d 1162, 1168 (6th 1980).
1. Restrictions on Violent Video Games

Several recent cases have considered the constitutionality of statutes forbidding the sale of violent and graphic video games to minors without parental consent.

The Eighth Circuit struck down such a statute in Interactive Digital Software Association v. St. Louis County.\textsuperscript{110} The ordinance at issue made it unlawful to knowingly make available or sell a graphically violent video game to minors without their parents' consent.\textsuperscript{111} Recognizing the parents' right to have primary responsibility to determine their child's well-being, the court reframed the question as one of state action.\textsuperscript{112} The question before the court was not whether parents could or could not determine what video games their children could purchase, but rather, whether "the County constitutionally may limit First Amendment rights as a means of aiding parental authority."\textsuperscript{113} The court answered in the negative; to allow the state to violate rights under the guise of parental authority without a more compelling governmental justification would set a precedent that would effectively strip minors of important constitutional rights.\textsuperscript{114} Equating government interest with parental control "would . . . invite legislatures to undermine the first amendment rights of minors willy-nilly under the guise of promoting parental authority."\textsuperscript{115}

Judge Posner, writing for the majority, found that a similar statute was likely unconstitutional in American Amusement Machines Association v. Kendrick.\textsuperscript{116} Upholding a preliminary injunction, the court drew a distinction between constitutional obscenity restrictions and unconstitutional censorship of information that is plausibly harmful.\textsuperscript{117} The government has an interest in regulating obscenities, not for the potential harms they cause, but because the material is offensive.\textsuperscript{118} Laws like the one at issue, which required parental accompaniment to play violent amusement park games, regulate only arguable harms. As in Interactive Digital Software, facilitating parental control did not rise to a compelling state interest.\textsuperscript{119} Posner's decision provides a strongly worded explanation for why the state, through parents, must not control information available to minors:

The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government

\textsuperscript{110} 329 F.3d 954 (8th Cir. 2003).
\textsuperscript{111} Id. at 956.
\textsuperscript{112} Id. at 959.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 960.
\textsuperscript{116} 244 F.3d 572 (7th Cir. 2001).
\textsuperscript{117} Id. at 575-76.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 576.
to control the access of children to information and opinion. . . . [S]ince an eighteen-year-old’s right to vote is a right personal to him rather than a right to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.120

Posner’s persuasive decision applies with even more weight to bans against GSAs. The implications of shielding teens from access to information about sexuality and from support for those experiencing harassment because of their perceived or actual sexuality not only affects the teen’s experiences in high school but as an adult. LGBT students that lack social support from peers are less able to cope with harassment, affecting their ability to pay attention in school and get homework done.121 Additionally, studies show that schools with gay-sensitive HIV instruction report lower sexual health risks and that school policies prohibiting harassment on the basis of actual or perceived sexual orientation or gender lowers suicide attempts among LGBT students.122 As Interactive Digital and American Amusement demonstrate, states may not justify limits on free speech by simply appealing to the governmental interest in aiding parental authority. A governmental interest in protecting minors from non-offensive materials must be “compelling” to justify intruding on First Amendment guarantees.

2. The Pledge of Allegiance

There is currently a split between the Third and Eleventh Circuits over whether the State may indirectly infringe on student’s free speech rights by requiring parental consent if the student wishes to refrain from reciting the pledge of allegiance. While the Third Circuit applies strict scrutiny to overturn the parental consent statute, the Eleventh Circuit does not address or discuss the strict scrutiny standard and instead upholds the statute without providing clear limits on the State’s use of parental consent to infringe on student rights.

The statute at issue in the Third Circuit’s Circle Schools v. Pappert decision required schools to notify the parents “of any student who declines to recite the Pledge of Allegiance or who refrains from saluting the flag.”123 The Third Circuit’s analysis focused on two aspects of the law: its intended purpose and effect on student speech. First, the law discriminated against “students based

120. Id. at 577.
122. Id. at 136-38.
123. 381 F.3d 172, 174 (3d Cir. 2004).
on the viewpoints they express" since it is "only triggered when a student exercises his or her First Amendment right not to speak." Since the purpose of the law was to support the recitation of the pledge, it was drafted to "chill speech by providing a disincentive to opting out of the Act." Furthermore, the Court concluded that Pennsylvania did not offer a compelling governmental interest; notifying parents of their child's education by informing parents of who declined to participate in the pledge was not compelling enough of an interest to justify the infringement of constitutional rights.

A similar statute was at issue in Frazier v. Winn. In their decision, the Eleventh Circuit overturned the lower court's holding that the statute was facially unconstitutional. The Eleventh Circuit, in contrast to Circle Schools, held that "the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students' freedom of speech." The Court carefully narrowed its holding to the Plaintiff's facial constitutional challenge and noted that the statute may indeed be unconstitutional as applied to a particular student or group of students, such middle school or high school students.

Winn is troubling precedent for First Amendment advocates as it gives the state seemingly unlimited authority to use parental consent laws to indirectly infringe on the constitutional rights of students. In doing so, Winn ignores analogous First Amendment case law and instead cites to parental consent laws relating to condom distribution in public schools and abortion rights. Neither case is applicable and neither case stands for the proposition that the state may use parental authority as the only justification for intruding on the constitutional rights of minors.

Several commentators have criticized the Eleventh Circuit's reasoning in Winn. Most notably, Judge Rosemary Barkett offered a vigorous dissent from

124. Id. at 180.
125. Id.
126. Id. at 181.
127. The statute at issue required students to recite the pledge of allegiance in elementary, middle, and high schools and: "Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge." Frazier v. Winn, 535 F.3d 1279, 1281 (11th Cir. 2008).
128. Id. at 1285-86.
129. Id. at 1285.
130. Id. at 1285 n.7.
131. Id.
132. For example, the Ayotte v. Planned Parenthood only requires parental notification of a proposed abortion. A minor may still have an abortion without their parent's consent after the notice period or through a judicial bypass procedure. 546 U.S. at 323-24.
the Eleventh Circuit's denial of rehearing *Frazier v. Winn* en banc.¹³⁴ Judge Barkett offers several insightful criticisms of *Winn* that speak directly to the state's use of parental authority as a justification for intrusions on the constitutional rights of students.

First, Judge Barkett notes that the *Winn* panel erred by not applying the strict scrutiny standard as courts have done in numerous cases addressing the state's right to curtail free speech.¹³⁵ Freedom of speech is a "sacred right" that "may be violated, if ever, only for the most compelling of state justifications."¹³⁶ By failing to apply strict scrutiny, the *Winn* panel ignores conflicting precedent and opens the door to further curtailments of constitutional rights.

Moreover, Judge Barkett argues that the parent's right of upbringing cannot be used as a justification for state involvement in infringement of First Amendment liberties. Rather, the parental right of upbringing is "a negative right that provides for protection of that right against the State."¹³⁷ Every prior case discussing the issue of parental upbringing, such as *Meyers* and *Pierce*, overturned statutory limits on parents' rights to determine the education of their children. These cases do not endorse a parent's right to enlist the aid of the State "to purposely trump the constitutional right of a minor."¹³⁸

Finally, Judge Barkett notes that *Winn* is not about "whether parents, on their own, can require their children to recite the Pledge of Allegiance, but whether the state can burden a clear First Amendment right" by requiring parental consent before students may exercise their constitutional rights.¹³⁹ As *Tinker* and its progeny hold, minors are persons under the Constitution and the state must respect their constitutional rights regardless of whether the parent agrees with the expression of those rights. By using parents as a means of overcoming constitutional obstacles, the state attempts to delegate an authority which it itself does not constitutionally possess.¹⁴⁰

Other circuits should not adopt *Winn*'s holding. *Winn* stands in contrast to decades of First Amendment jurisprudence and provides the state with almost limitless authority to violate constitutional rights of minors by appealing to parental authority. The state may not use parents to trump the rights of minors. Rather, the state must provide compelling justifications for intrusions on constitutional liberties independent from the rights of parents.

---

¹³⁵ *Id.* at *6-12.
¹³⁶ *Id.* at *11-12.
¹³⁷ *Id.* at *19-20.
¹³⁸ *Id.* at *22-23.
¹³⁹ *Id.* at *14-15.
¹⁴⁰ *Id.* at *15-17.
IV. PARENTAL CONSENT LAWS AS APPLIED TO GSAS VIOLATE THE FIRST AMENDMENT

The parental consent requirements enacted in Utah and Georgia should be subject to strict scrutiny as either a viewpoint-based restriction or a restriction on the freedom to associate. To determine if the law is subject to strict scrutiny, courts look to both its intended and actual effects.\(^\text{141}\) The Ohio and Georgia statutes are undoubtedly viewpoint-based restriction on free speech: the intended and actual effects will be to destroy or hamper the formation of GSAs.

LGBT students not only face harassment from classmates but may also have reason to fear rejection or violence from their parents.\(^\text{142}\) GSAs provide a forum for students to discuss and get information relating to sexual orientation and gender identity and provide support for students experiencing harassment due to their actual or perceived sexual orientation. Students join GSAs, in part, because they do not feel safe discussing their sexual orientation with family members. GSAs cannot function without privacy.

Forcing students to get their parent’s consent to join a GSA is akin to revealing a membership list. Utah’s law requires parental consent to join a student club;\(^\text{143}\) similarly Georgia’s statute gives parents a “veto” over what clubs their children may join.\(^\text{144}\) In either case, the student is forced to request permission to join a GSA. If a student violates the rule and is punished, parents may inquire about the reason for the punishment, requiring school officials to, at minimum, reveal that the student attended a club meeting they did not get approval to attend. Both scenarios present the possibility of students facing reprisal from parents for joining a GSA. It is clear that laws targeting GSAs should not be accorded the normal presumption of constitutionality. The burden should be placed on state governments to prove that the law is required to pursue a compelling state interest and that the law is narrowly tailored to promote the compelling state interest. Since lawmakers provided little support for the Utah and Georgia parental consent laws beyond extreme and overt animus towards

\(^{141}\) See supra Part III.B.

\(^{142}\) See Warren J. Blumenfeld & Laurie Lindop, Gay, Lesbian, Bisexual, and Transgender Suicide, OUTPROUD, at http://www.outproud.org/article_suicide.html (describing experiences of gay youth:

Lacking support from family and friends and being denied valid information in high school for his emerging sexual identity . . . Bobby [Griffith] did a back flip over a highway overpass in the path of a semi-truck and trailer, and was killed instantly. Bobby too kept a diary. At age 16 he wrote: “I can’t let anyone find out that I’m not straight. It would be so humiliating. My friends would hate me, I just know it. They might even want to beat me up. Any my family, I’ve overheard them lots of times talking about gay people. They’ve said they hate gays, and even God hates gays, too. It really scares me now, when I hear my family talk that way, because now, they are talking about me. . . . Sometimes I feel like disappearing from the face of the this earth.”) (last visited Mar. 20, 2008).

\(^{143}\) Student Clubs Act, UTAH CODE ANN. § 53A-11-1210 (Supp. 2008).

\(^{144}\) GA. CODE ANN. § 20-2-705 (Supp. 2008).
gay-friendly student groups, states will be hard pressed to provide justifications for the restrictions to overcome exacting scrutiny.

V. CONCLUSION

GSAs provide support to students dealing with harassment by virtue of their actual or perceived sexual orientation and help fight discrimination in public high schools. Unfortunately, states and school officials have enacted both direct and indirect prohibitions on their activities. Courts have nearly unanimously overturned direct restrictions as violations of both the EAA and the First Amendment. Indirect restrictions, such as those now in force in Utah and Georgia, will soon face similar legal challenges. While designed to avoid the constitutional problems of more direct action, the parental consent laws, as applied to GSAs, violate the First Amendment right to freely associate for expressive purposes. Courts must therefore overturn parental consent and notification statutes designed to remove the rights of high school students to form and participate in gay-friendly organizations.